

# INTERNATIONAL CRIMINAL COURTS: SOME DISSIDENT VIEWS ON THE CONTINUATION OF WAR BY PENAL MEANS

Carrie Gustafson<sup>†</sup>

## TABLE OF CONTENTS

I.	INTRODUCTION .....	52
II.	VIOLENCE, POWER, AND THE POLITICAL .....	54
	A. <i>Penal Justice and Power</i> .....	56
	B. <i>Penal Justice and the Political</i> .....	57
III.	THE BURDEN OF LEGITIMIZING LAWS' VIOLENCE .....	58
	A. <i>Deterrence Theory and The Man on Wall Street</i> .....	60
	B. <i>Retributive Theory: Punishment as Moral Engagement</i> .....	62
	C. <i>Reprobative Theory</i> .....	63
IV.	PUNISHMENT AS JUSTICE: A JURY TRIAL AS A LITMUS TEST.....	64
V.	DISINTERRING OF THE COMMUNITY AND DECENTERING THE MONSTROUS FEW .....	67
VI.	THE HEART OF NORMATIVE ORDER: PUNITIVE SANCTION OR SOCIAL EMBEDDEDNESS? .....	69
VII.	PUNISHING FOR PEACE: UNITY OF MEANS AND ENDS.....	71
VIII.	PRACTICAL DISCOURSE AND THE SEARCH FOR TRUTH .....	73
IX.	CAUSAL UNDERSTANDING, EXCULPATION, AND FORGIVENESS .....	75

---

<sup>†</sup> Ms. Gustafson is an Associate-in-Law and J.S.D./M.I.A. Candidate, Columbia University; J.D., University of Minnesota; B.S., University of Wisconsin, Madison. For George Skille, who shows the meaning of these Ithacas.

2005]	<i>INTERNATIONAL CRIMINAL COURTS</i>	52
X.	YIELDING TO LOCAL INITIATIVES: UNWILLING OR UNABLE.....	77
XI.	WORKING TO IDENTIFY AND SATISFY THE NEEDS OF VICTIMS OF SURVIVORS .....	79
XII.	AVOIDING BLUEPRINTS AND ACCOMMODATING INDIGENOUS VALUES AND NEEDS .....	81

*I cannot imagine a position where I should strive for an increase of man-inflicted pain on earth. Nor can I see any good reason to believe that the recent level of pain-infliction is just the right or natural one. And since the matter is important, and I feel compelled to make a choice, I see no other defensible position than to strive for pain-reduction.*

Nils Christie<sup>1</sup>

#### I. INTRODUCTION

The recent horror of civil war in the Balkans generated a particular urgency in the West to do something to mask the appearance of disorder and moral collapse on its periphery. With the United States as lead lobbyist and financier,<sup>2</sup> two ad hoc international criminal courts (ICCs) were established, ostensibly to restore order to the former Yugoslavia<sup>3</sup> and, as an afterthought, to Rwanda.<sup>4</sup> Hailed by U.N. leadership as

---

1. NILS CHRISTIE, LIMITS TO PAIN 11 (1981).  
2. See OFFICE OF THE PRESS SECRETARY, THE WHITE HOUSE, PUB. NO. 11769, U.S. EFFORTS TO PROMOTE HUMAN RIGHTS AND DEMOCRACY 2 (1997).  
3. See U.N. SCOR, 48th Sess., 3217th mtg. at 2, U.N. Doc. S/RES/827 (1993).  
4. See U.N. SCOR, 49th Sess., 3453d mtg. at 2, U.N. Doc. S/RES/955 (1994). For those unacquainted with the Nuremberg precedent for international criminal tribunals, the late professor Telford Taylor, a chief prosecutor at Nuremberg, has written a definitive account. See TELFORD TAYLOR, THE ANATOMY OF THE NUREMBERG TRIALS: A PERSONAL MEMOIR (1992). The mass of literature written on the legal issues surrounding the international court for the former Yugoslavia, Rwanda, and a permanent international criminal court dissuades me from rehashing the legal debate. For a sample of literature on the subject, see generally Payam Akhavan, *The International Criminal Tribunal for Rwanda: The Politics and Pragmatics of Punishment*, 90 AM. J. INT'L L. 501 (1996); Rupa Bhattacharyya, *Establishing a Rule-of-Law International Criminal Justice System*, 31 TEX. INT'L L.J. 57 (1996); Karl Arthur Hochkammer, *The Yugoslav War Crimes Tribunal: The Compatibility of Peace, Politics, and International Law*, 28 VAND. J. TRANSNAT'L L. 119 (1995); Paul D. Marquardt, *Law Without Borders: The Constitutionality of an International Criminal Court*, 33 COLUM. J.

moral progress,<sup>5</sup> these institutions were to merge our humanitarian instincts with a purported administrative capacity to control deviant behavior. Virtually overnight, the capacity of the international community to punish in a presumptively nondiscriminatory and salubrious manner grew exponentially, with scant philosophical reflection or historical depth.

Willem de Haan describes an “authoritarian consensus on issues of justice, discipline, control and the necessity of a ‘strong state’” concurrently emerging in the West.<sup>6</sup> Recorded by sociologists and criminologists, the cumulative effects of the drift to a law and order society are unmistakable in America’s cities.<sup>7</sup> The U.S. federal government mobilized a “war on crime,”<sup>8</sup> as politicians demonstrated the expediency of getting tough on deviants rather than engaging them and the members of their community in an effort to identify constructive solutions to social unrest.

In a similar haste to crack down on disorder, the ICC lobby may be overlooking a higher sensibility—a middle option between moral inertia and moral hysteria, indifference and punishment. Gandhi’s philosophy of *satyagraha* provides such an alternative. *Satyagraha* is the term Gandhi coined to describe his philosophy of active nonviolence.<sup>9</sup> Comprised of the words *satya* (truth) and *grapha* (grasping),<sup>10</sup> it literally means the firm grasping or “holding on to Truth.”<sup>11</sup> Its core

---

TRANSNAT’L L. 73 (1995); Timothy L. H. McCormack, *Selective Reaction to Atrocity War Crimes and the Development of International Criminal Law*, 60 ALB. L. REV. 681 (1997); Madeline H. Morris, *The Trials of Concurrent Jurisdiction: The Case of Rwanda*, 7 DUKE J. COMP. & INT’L L. 349 (1997); Lyal S. Sunga, *The Commission of Experts on Rwanda and the Creation of the International Criminal Tribunal for Rwanda*, 16 HUM. RTS. L.J. 121 (1995); Mariann Meier Wang, *The International Tribunal for Rwanda: Opportunities for Clarification, Opportunities for Impact*, 27 COLUM. HUM. RTS. L. REV. 177 (1995).

5. See Kofi Annan, *Advocating for an International Criminal Court*, 21 FORDHAM INT’L L.J. 363, 365 (1997) (“These tribunals have made significant progress and are setting an important precedent.”).

6. WILLEM DE HAAN, *THE POLITICS OF REDRESS: CRIME, PUNISHMENT AND PENAL ABOLITION* 20 (1990).

7. See STEVEN B. DUKE & ALBERT C. GROSS, *AMERICA’S LONGEST WAR: RETHINKING OUR TRAGIC CRUSADE AGAINST DRUGS* (1993) (assessing the “costs” related to the war on drugs including freedom, autonomy, health, and safety).

8. See ROBERT M. CIPES, *THE CRIME WAR* 3 (1968) (quoting U.S. President Lyndon Johnson in his speech to Congress on March 8, 1965, “We must arrest and reverse the trend towards lawlessness . . .”).

9. See M. K. GANDHI, *NON-VIOLENT RESISTANCE (SATYAGRAHA)*, at iii (Bharatan Kumarappa ed., Schocken Books 1961) (1951).

10. See WEBSTER’S NEW UNIVERSAL UNABRIDGED DICTIONARY 1611 (2d ed. 1983).

11. GANDHI, *supra* note 9, at 3.

elements are truth, expansively defined to encompass factual and moral or metaphysical truth, and *ahimsa*, meaning “non-violence”<sup>12</sup> and “love or charity.”<sup>13</sup>

Combined with modern social theory, *satyagraha* offers an ethical and practical response to disorder, suffering, and injustice that precludes inflicting or threatening to inflict violence on others. For ICC champions, it also yields several instructive and cautionary notes:

1. Violence and power are inherent features of any system of criminal justice.
2. An expanded power to punish is not a universal sign of moral progress or the achievement of justice.
3. Punishment is neither the inevitable nor the preeminent response to deviant behavior.
4. The subject and object of any humanitarian response to atrocity should be the community directly affected by and implicated in the underlying events.
5. Strategies to resolve conflict and strengthen social norms should reflect the inherent dignity and potential for moral responsibility in all persons and humanize, rather than degrade, the participants.

Although Gandhi wrote and said a great deal about religion, *satyagraha* cannot be ascribed to any particular orthodoxy.<sup>14</sup> Indeed, a great strength of *satyagraha* is its universality. As seen in the work of Bishop Dinis Singulane in Mozambique, Nelson Mandela in South Africa, Aung San Suu Kyi in Myanmar, and Martin Luther King in the United States, the central values of *satyagraha* have inspired atheists and nonatheists alike.

## II. VIOLENCE, POWER, AND THE POLITICAL

Gandhi appreciated that violence and power inhere in systems of criminal justice.<sup>15</sup> Criminal punishment as described by Harvard psychologist James Gilligan, “is that

---

12. *Id.* at vii.

13. *Id.* at 221.

14. *See id.* at iii (noting that Gandhi developed this doctrine from several different sources).

15. *See id.* at 351 (commenting that referring a crime to the police simply furthers their opportunity for corruption). *See, e.g., id.* at 262 for examples of “indecent assaults by the police at Viramgam.”

collective violence which any society defines as legal<sup>16</sup>; it must involve pain, suffering, deprivation, or other unpleasant consequences, or it ceases to be punishment.<sup>17</sup> Often veiled in the garb of nonviolence, the nature of criminal justice is unmistakable to those on the receiving end—whether a bystander gunned down by arresting authorities, a human-being imprisoned for life, or an abandoned spouse or child.

The ICC lobby has been remarkably candid about the violence inherent in international penal justice. It is not uncommon to hear casual talk of the number of lives worth sacrificing for a criminal prosecution,<sup>18</sup> of the need to hunt down suspected criminals,<sup>19</sup> to remove military leaders “from the scene, one way or another,”<sup>20</sup> and to undertake “‘snatch’ operation[s] which carr[y] a high risk of casualties.”<sup>21</sup> Many Western military leaders find the risk of sniping or hostage taking directed against international workers and troops to be “both containable and necessary.”<sup>22</sup> In the words of a European officer involved with the hunt for Radovan Karadzic, “We can take him, but it will not be a walk in the park. It must be well planned. We don’t want a large shootout with civilians caught in the crossfire.”<sup>23</sup>

To the predictable civilian deaths resulting from commando arrest operations must be added the foreseeable murder of prosecution and defense witnesses and their families, so tragically familiar in Rwanda. In January 1997, a

---

16. JAMES GILLIGAN, *VIOLENCE: OUR DEADLY EPIDEMIC AND ITS CAUSES* 141 (1996).

17. See MICHAEL IGNATIEFF, *A JUST MEASURE OF PAIN: THE PENITENTIARY IN THE INDUSTRIAL REVOLUTION: 1750–1850*, at 75–76 (1978) (explaining Jeremy Bentham’s concept of punishment as an “objective use of pain by the state.”).

18. Responding to a question by the author regarding the amount of blood worth sacrificing in the interest of prosecuting indicted war criminals in the former Yugoslavia, panelist Paul Williams of the Carnegie Endowment for International Peace declared, “As much blood as needs to be spilt, may be spilt.” N.Y. City Bar Ass’n Conf. on Int’l L. (1996) (tape on file with the *Houston Journal of International Law*).

19. See Joseph Fitchett, *No Problem From French in Bosnia, Americans Say Paris is Said to Back Raids on War Criminals*, INT’L HERALD TRIB., July 17, 1997, at 5; see also Kenneth Roth, *Why Justice Needs NATO*, NATION, Sept. 22, 1997, at 21.

20. Peter Maass, *Righteous Wrath*, N.Y. TIMES, July 14, 1997, at A15.

21. Charles Trueheart, *Croat (and UN Tribunal) Go on Trial: Lack of Cooperation Hinders Prosecution*, INT’L HERALD TRIB., June 25, 1997, at 1.

22. Kenneth Roth, *Two Years After Srebrenica, Killers Remain Free*, INT’L HERALD TRIB., July 11, 1997, at 8.

23. Chris Hedges, *Fallen Serb on the Run, Hotly Pursued by NATO*, N.Y. TIMES, May 31, 1998, at A6 (noting that Karadzic “follows Saddam Hussein’s tactic of staying in areas that mean we risk civilian deaths in an attempt to get him.”).

witness, her husband, and seven of their children were murdered after she testified before the Rwandan Tribunal and had been promised protection.<sup>24</sup> Another prosecution witness was killed with his daughter, brother, nephew, and seven others after being advised by his UN protectors “to call them if he was attacked,” although the nearest telephone was twenty miles away.<sup>25</sup> As “roaming gangs of Hutu extremists” continue to murder witnesses, it is little surprise that the prosecutor’s greatest challenge is finding survivors willing to testify.<sup>26</sup>

#### A. *Penal Justice and Power*

For those who would cite as a virtue of ICCs a splendid isolation from power politics, Gandhian thought and ongoing crises in Bosnia offer the reminder that systems of criminal justice are inextricably linked to strategies of power and are inoperable without a power-wielding accessory like U.S. and British special forces. The power to punish has been variously described as “an instrument and vector of power,”<sup>27</sup> “the unspeakable Other of all political power,”<sup>28</sup> and in specific reference to an ICC, “authoritarian in its mode of operation.”<sup>29</sup>

According to Human Rights Watch, the only realistic prospect for delivering those indicted by the Yugoslav is military involvement by NATO, with its “superior firepower.”<sup>30</sup> As a U.S. official similarly concluded, “[T]hese things work when governments such as the United States use their clout to make it work.”<sup>31</sup> This is apparent from events in the former Yugoslavia. In the most notorious arrest operation to date,

---

24. See Nasser Ega-Musa, *Another Failure of Justice in Africa*, WASH. POST, Mar. 6, 1997, at A21.

25. *Id.*

26. *Troubled Tribunal*, ECONOMIST, Feb. 22, 1997, at 53, 54; see also Lara Santoro, *Looking for a Few Good Legal Eagles*, CHRISTIAN SCI. MONITOR, Aug. 14, 1997, at 1.

27. ADRIAN HOWE, PUNISH AND CRITIQUE: TOWARDS A FEMINIST ANALYSIS OF PENALTY 86 (1994) (quoting MICHEL FOUCAULT, DISCIPLINE AND PUNISH: THE BIRTH OF THE PRISON (Alan Sheridan trans., Vintage Books 1979) (1977)).

28. Pat Carlen, *On Rights and Powers: Some Notes on Penal Politics*, in THE POWER TO PUNISH: CONTEMPORARY PENALTY AND SOCIAL ANALYSIS 203, 208 (David Garland & Peter Young eds., 1983).

29. Michael Stewart, *Atone and Move Forward*, LONDON REVIEW OF BOOKS, December 11, 1997, at 12, 16.

30. Roth, *supra* note 22, at 8 (the author is the executive director of Human Rights Watch).

31. Alessandra Stanley, *Conference Opens on Creating Court To Try War Crimes*, N.Y. TIMES, June 15, 1998, at A1.

elite British soldiers backed by U.S. logistical and intelligence support shot one suspect to death.<sup>32</sup>

It is often said that a standing ICC holds “the promise of universal justice,”<sup>33</sup> the implication being that permanence will take power politics out of the equation. For the foreseeable future, this is a myth. Whether an ICC is established by treaty, by the Security Council, or by the U.N. General Assembly, without the enforcement powers of the Security Council and its members, any such tribunal would be impotent. Whether an ICC acquires permanence or not, the gatekeeper and lead role played by the permanent members of the Security Council will remain secure. Abroad, as at home, these gut-satisfying forays will remain the providence of the “ruling class.” Rather than new moral sensibilities, a new rationale for exercising power explains the dramatic appearance of the ICCs as the twentieth century draws to a close.

#### B. *Penal Justice and the Political*

In classic liberal style, ICC proponents often portray their endeavor as purely juristic,<sup>34</sup> and hence nonpolitical and superior. In Carl Schmitt’s definitive work, *The Concept of the Political*, he challenges such a claim. According to Schmitt, an entity that possesses the right and power to affirm the enemy quality of an individual or group bears the ultimate distinction of the political.<sup>35</sup> This “enemy” is one “who no longer must be compelled to retreat into his borders only,” but must be pursued and destroyed.<sup>36</sup>

Based on Schmitt’s conception of the political, the mechanism ICC proponents champion—one endowed with the authority and power to define the enemy—*epitomizes* the political.<sup>37</sup> Ultimately, ICC lobbyists aim to establish a body of international legal norms and institutions that will operate to preclude parties engaged in armed conflict from suing for peace under certain conditions—namely, amnesty for specific

---

32. See Roth, *supra* note 19, at 21, 22.

33. Annan, *supra* note 5, at 366 (explaining that one universal law applies to all nations).

34. See *id.* at 364.

35. See CARL SCHMITT, *THE CONCEPT OF THE POLITICAL* 37 (George Schwab trans., Univ. of Chi. Press 1996) (1932).

36. *Id.* at 36.

37. See *id.* at 79. Referring to the League of Nations, which was performing functions similar to an ICC, Schmitt stated, “This allegedly non-political and apparently even antipolitical system serves existing or newly emerging friend-and-enemy groupings and cannot escape the logic of the political.” *Id.*

acts.<sup>38</sup> Such a system that is sufficiently powerful to prevent a war from terminating contrary to its interests or principles clearly serves emerging “enemy” distinctions. It cannot, therefore, “escape the logic of the political.”<sup>39</sup>

Of equal importance is the response Schmitt offers to those who would purport to act in the name of universal humanity. Quixotic, perhaps, his words are strongly reminiscent of Gandhi’s:

The concept of humanity excludes the concept of the enemy, because the enemy does not cease to be a human being . . . .

. . . .

To confiscate the word humanity, to invoke and monopolize such a term probably has certain incalculable effects, such as denying the enemy the quality of being human and declaring him to be an outlaw of humanity.<sup>40</sup>

Humanity as such and as a whole has no enemies. Everyone belongs to humanity. . . . If one discriminates within humanity and thereby denies the quality of being human to a disturber or destroyer, then the negatively-valued person becomes an unperson, and his life is no longer the highest value: it becomes worthless and must be destroyed.<sup>41</sup>

The determination of ICC advocates to abolish certain human rights violations is so strong that they no longer shun killing. Such an agenda is nothing, if not political.

### III. THE BURDEN OF LEGITIMIZING LAWS’ VIOLENCE

Precisely because an expanded power to punish involves certain suffering and violence, the architects of ICCs are morally obliged to identify the specific aims they expect to achieve and how they will assess their progress.<sup>42</sup> It is

---

38. See Annan, *supra* note 5, at 364–65 (discussing the fact that all lawbreakers will have to pay for their acts, regardless of who they are).

39. SCHMITT, *supra* note 35, at 79.

40. *Id.* at 54.

41. Carl Schmitt, *The Legal World Revolution*, TELOS, Summer 1987, at 73, 88.

42. See JOHN BRAITHWAITE & PHILIP PETTIT, NOT JUST DESERTS: A REPUBLICAN THEORY OF CRIMINAL JUSTICE 78–80 (1990) (discussing different theories of justifying punishment).

imperative to clarify goals lest, in the words of Michael Reisman, “we fall victim to a judicial romanticism in which we imagine that merely by creating entities we call ‘courts’ we have solved major problems.”<sup>43</sup> Of course, the aim of achieving justice, which has no empirical referent, is clearly not an adequate response. In discharging their burden, ICC proponents should keep in mind Holmes’s admonition against blind guesses.<sup>44</sup> Likewise, they should be mindful of H. L. A. Hart’s repudiation of the simple admission that instead of a single value or aim, they seek a plurality.<sup>45</sup>

This burden of inquiry and analysis is of practical and ethical consequence. Without a clear conception of appropriate and achievable aims, a firm basis in relevant research and theory, and a critical understanding of their endeavor, ICC proponents risk costly failure. For Gandhi, who viewed ethics and politics as equally and fundamentally concerned with the pragmatic,<sup>46</sup> the delict is double. However, their task is not an easy one. If philosophical and empirical questions about punishment were ever more or less settled, they are not today.

Virtually all theories of criminal justice can be characterized as either retributive or utilitarian.<sup>47</sup> For utilitarians punishment is justified to the extent it produces a socially desirable consequence, ordinarily general deterrence.<sup>48</sup> In contrast, consequences are irrelevant for retributionists. Rather they consider it simply morally fitting that criminal offenders are punished.<sup>49</sup> Described by Robert Solomon, “[T]he desire for retribution is the desire for

---

43. W. Michael Reisman, *Institutions and Practices for Restoring and Maintaining Public Order*, 6 DUKE J. COMP. & INT’L L., 175 (1995).

44. See Oliver Wendell Holmes, *The Path of the Law After One Hundred Years*, 110 HARV. L. REV. 989, 1002 (1997) (republishing Holmes’s March 25, 1897 speech on its centennial). “What have we better than a blind guess to show that the criminal law in its present form does more good than harm?” *Id.*

45. See H. L. A. Hart, *Prolegomenon to the Principles of Punishment*, in PHILOSOPHY OF PUNISHMENT 15, 16 (Robert M. Baird & Stuart E. Rosenbaum eds., 1988).

46. See GANDHI, *supra* note 9, at 82 (stating the essence of political power is results). For example, he expected the ethical concepts of *ahimsa* and *satyagraha* to eventually win independence for India. See *id.* at 385.

47. See John Rawls, *Two Concepts of Rules*, in PHILOSOPHY OF PUNISHMENT, *supra* note 45, at 38; DE HAAN, *supra* note 6, at 103 (noting that all theories of punishment are based on retribution and deterrence).

48. See J.B. Cederblom, *Introduction*, in JUSTICE AND PUNISHMENT 3 (J.B. Cederblom & William L. Blizek eds., 1977).

49. See Walter Berns, *The Morality of Anger*, in PHILOSOPHY OF PUNISHMENT, *supra* note 45, at 85 (stating that we punish criminals principally to pay them back).

vengeance[,] . . . getting even, putting the world back in balance.”<sup>50</sup>

A. *Deterrence Theory and The Man on Wall Street*

Among utilitarian schemes, ICC advocates rely on deterrence theory with a level of confidence matched only by theorists’ disaffection.<sup>51</sup> Positive criminology has accumulated masses of evidence testifying to the failures of deterrence theory.<sup>52</sup> Described by Karl Menninger, the U.S. deterrence-based system is “antiquated, expensive, and disappointing, . . . [and uses] primitive methods of dealing with those who transgress the law.”<sup>53</sup> For Jerome Miller, it is a system “distinguished mostly by its failure to make communities safer and its alienation of large segments of our population.”<sup>54</sup>

Whether the offense is tax evasion or genocide, deterrence theory presupposes a rational, utility-maximizing actor who graces Wall Street and the texts of supply-side economists. Persons commit crimes, so the theory goes, when the expected value of doing so exceeds the cost of punishment. To reduce crime, society need only raise the price by imposing harsh penalties. In the real world, James

---

50. ROBERT C. SOLOMON, *A PASSION FOR JUSTICE: EMOTIONS AND THE ORIGINS OF THE SOCIAL CONTRACT* 41 (1990).

51. See William Pfaff, *Why Expand a NATO that Fails to Enforce Peace in Bosnia?*, INT’L HERALD TRIB., July 17, 1997, at 8 (discussing the opportunity to “deter some future war crimes by demonstrating that criminals are accountable to an impartial authority.”); Roth, *supra* note 22, at 8 (emphasizing NATO’s failure in deterring international war crimes); Wang, *supra* note 4, at 225 (citing President of the Rwandan Tribunal Antonio Cassese’s description of the purpose of the Rwandan Tribunal as punishment, deterrence, and reconciliation). For a scholarly critique of deterrence theory, see WESLEY CRAGG, *THE PRACTICE OF PUNISHMENT: TOWARDS A THEORY OF RESTORATIVE JUSTICE* 196 (1992) (discussing the difficulties with the use of deterrence to obtain compliance with the law); DE HAAN, *supra* note 6, at 102–03 (analyzing whether punishment is justifiable); BARBARA HUDSON, *JUSTICE THROUGH PUNISHMENT: A CRITIQUE OF THE ‘JUSTICE’ MODEL OF CORRECTIONS* 63 (1987) (contrasting utilitarian views with theorist’s belief that there is a great injustice to the individual criminal in pursuing punishment on grounds of general deterrence); ANDREW RUTHERFORD, *CRIMINAL JUSTICE AND THE PURSUIT OF DECENCY* 26 (1993) (noting the “philosophical void that followed [rehabilitation’s] decline”).

52. See BRAITHWAITE & PETTIT, *supra* note 42, at 3 (stating that deterrence theory failed to produce the expected evidence that more police, more prisons, and more certain and severe punishment made a significant difference in the crime rate).

53. Karl Menninger, *Therapy, Not Punishment, in PHILOSOPHY OF PUNISHMENT*, *supra* note 45, at 49.

54. JEROME G. MILLER, *SEARCH AND DESTROY: AFRICAN-AMERICAN MALES IN THE CRIMINAL JUSTICE SYSTEM* 136 (1996).

Gilligan identifies “only” four problems with this model: “It is totally incorrect, hopelessly naive, dangerously misleading, and based on complete and utter ignorance of what violent people are actually like.”<sup>55</sup>

The volumes written on what Andrew Rutherford calls the “‘fiasco’ of imprisonment”<sup>56</sup> indicate the assumptions behind incarceration have serious flaws. Whether and how these findings translate to humanitarian crises remains wholly unexamined. The literature that does exist on the subject is aptly characterized by Michael Howard as “utter balderdash.”<sup>57</sup> Events of the late twentieth century indicate that for the near future, atrocities will most likely occur in civil war.<sup>58</sup> Here, as in Rwanda and the former Yugoslavia, threats that fail to deter individuals with reason enough to value their lives and freedom can only be regarded as meaningless.<sup>59</sup>

Noted by military historian Martin van Creveld, combatants do not go to war because of rational self interest for the reason, “to put it bluntly[,] that dead men have no interests.”<sup>60</sup> Moreover, the more immediate pressures and incentives a military setting provides, including the approval and support of comrades and superiors, neutralize whatever compliance pull a remote entity like an ICC might exert. Discussed further below, normative compliance depends vitally on people’s perceptions of the values, beliefs, and intentions of immediate others, rather than the threat of formal sanction by a remote institution.

To expect otherwise, Gandhi considered foolish, and post-World War II behavior lamentably confirms his skepticism. The failure of death sentences meted out at Nuremberg and Jerusalem to deter is manifest in the acts of

---

55. GILLIGAN, *supra* note 16, at 94–95.

56. RUTHERFORD, *supra* note 51, at 80 (discussing Thomas Mathiesen’s argument that “we have prisons . . . because there exists a pervasive and persistent ideology of prison in our society [that renders the prison] as meaningful and legitimate, [and] is supported by an ‘inner circle’ of criminal justice personnel, who pretend that the prison is a success though, though in fact they more or less know that it is not . . .”).

57. Michael Howard, *The Uses of Militancy: The Sacral Role of the Warrior-Leader—Fear God. Honour the King*, *TIMES LITERARY SUPPLEMENT*, Apr. 10, 1998, at 3, 3.

58. See Adam Roberts, *The Crisis in UN Peacekeeping*, *SURVIVAL*, Autumn 1994, at 93, 106.

59. See Menninger, *supra* note 53, at 47–49 (explaining that “our official, prison-threat theory of crime control is an utter failure.”).

60. MARTIN VAN CREVELD, *THE TRANSFORMATION OF WAR* 158 (1991). Thus, they are unlikely to be deterred from conduct by possible future penalties.

Pol Pot, Lieutenant Calley, and Idi Amin. Similarly, events in Srebrenica and Rwanda quickly disabused the deterrent capacity of the Yugoslav Tribunal.

Yet, more troubling than the questionable deterrent value of ICCs, numerous theorists and practitioners have expressed concern that they may actually undermine stability and respect for the law.<sup>61</sup> Described by Fen Osler Hampson, “Peace and justice do not always work in tandem. The need to establish power sharing structures that accommodate rival factions and interests may well clash with the desire to punish perpetrators of human rights abuses.”<sup>62</sup> The demonstrated commitment and integrity of these skeptics counsel against the ready dismissal of their disquiet. A sense of history and humility should also temper demands to proceed, come what may, on the basis of some intuitive moral certainty.

#### *B. Retributive Theory: Punishment as Moral Engagement*

The liberal vision of reducing crime by attacking its social causes was essentially supplanted in the late 1970s by retributive schemes requiring that criminals get their “just desserts.”<sup>63</sup> These retributive schemes reflect the belief that it is morally fitting that offenders be made to suffer.<sup>64</sup> ICC discourse is imbued with like sentiment and the characteristic self-righteous tenor of those striving to secure the “deserved” punishment of others.

Before its renaissance, retribution was widely considered a dead letter, particularly among liberal theorists like H. L. A. Hart.<sup>65</sup> In the words of Hannah Arendt, “We refuse, and

---

61. See Anonymous, *Human Rights in Peace Negotiations*, 18 HUM. RTS. Q. 249, 250 (1996) (discussing the possibility of a quest for justice “prolonging a war and increasing the number of deaths, the amount of destruction, and the extent of human suffering.”); Adam Roberts, *The Laws of War: Problems of Implementation in Contemporary Conflicts*, 6 DUKE J. COMP. & INT’L L. 11, 12–13 (1995); Jose Zalaquett, *Balancing Ethical Imperatives and Political Constraints: The Dilemma of New Democracies Confronting Past Human Rights Violations*, 43 HASTINGS L.J. 1425, 1427–28 (1992); Fen Osler Hampson, *Can Peacebuilding Work?*, 30 CORNELL INT’L. L.J. 701, 701 (1997) (finding that the recent outbreaks of violence across the globe “raise doubts about the viability of international interventions.”).

62. Hampson, *supra* note 61, at 712.

63. See RUTHERFORD, *supra* note 51, at 15–16.

64. See John Rawls, *Two Concepts of Rules*, in PHILOSOPHY OF PUNISHMENT, *supra* note 45, at 37–38.

65. See Hart, *supra* note 45, at 15 (stating that “a cloud of doubt has settled over the keystone of ‘retributive’ theory”). See also BRAITHWAITE & PETTIT, *supra* note 42, at 2; IGOR PRIMORATZ, JUSTIFYING LEGAL PUNISHMENT 71 (1989).

consider as barbaric, the propositions ‘that a great crime offends nature, so that the very earth cries out for vengeance; that evil violates a natural harmony which only retribution can restore; that a wronged collectivity owes a duty to the moral order to punish the criminal.’<sup>66</sup> It is easy to become angry as a result of recent tragic events in Rwanda, Sudan, and the former Yugoslavia. Yet Gandhi and others have questioned whether such anger is beneficial in the long run for victims, perpetrators, or the larger community.<sup>67</sup> The Dalai Lama, for one, retells the story of an “extraordinary and inspiring” answer given to him by a young Tibetan monk who believed the greatest danger from atrocities perpetrated by the Chinese in Tibet may be a loss of compassion for the Chinese.<sup>68</sup>

The pendulum is again swinging slowly away from politically expedient appeals to vengeance. It is startling, therefore, that historically progressive human rights advocates are now moving contrariwise. If our true aim is to restore order and human dignity, *satyagraha* offers an approach vastly superior to the proverbial “pound of flesh,” as evidenced daily in transitional South Africa.

### C. *Reprobative Theory*

What ICC proponents ultimately seek through pain infliction is an authoritative expression of moral condemnation. Suffering is to be inflicted on others so that we can demonstrate our abhorrence of the destruction of life. H. L. A. Hart, among others, assailed such expressive justice, describing it as “uncomfortably close to human sacrifice as an expression of religious worship.”<sup>69</sup> Reprobation and denunciation are important aspects of social ordering, but remote, atomized penal institutions are a dubious means to this end.

Gandhi, like Primo Levi and others, observed that evil in the world results largely from humanity’s tendency to deny

---

66. HANNAH ARENDT, *EICHMANN IN JERUSALEM: A REPORT ON THE BANALITY OF EVIL* 254 (1963).

67. See, e.g., Tina Rosenberg, *Recovering from Apartheid*, *NEW YORKER*, Nov. 18, 1996, at 86, 92, to observe that a majority of African National Congress officials rejected the idea of prosecutions as smacking of “vengeance” and “retribution.”

68. SIMON WIESENTHAL, *THE SUNFLOWER: ON THE POSSIBILITIES AND LIMITS OF FORGIVENESS* 130 (H. A. Pichler trans., Schocken Books 2d ed. 1997) (1969).

69. Dan M. Kahan, *What Do Alternative Sanctions Mean?* 63 *U. CHI. L. REV.* 591, 596 (1996) (quoting H. L. A. HART, *LAW, LIBERTY, AND MORALITY* 65–66 (1963)).

and disregard injustice and suffering *in toto*.<sup>70</sup> Silence is the real crime against humanity. Using Hitler's reputed quip—"After all, who today speaks of the annihilation of the Armenians"<sup>71</sup>—to legitimate prosecutions is thus inapt. Far from a failure to initiate criminal prosecutions, the world largely ignored the Armenians' plight.<sup>72</sup> Ongoing revelations about World War II indicate how tragically unexceptional such indifference was. Then and now, the absence of *any* response to human suffering, not simply a punitive one, demands our attention.

#### IV. PUNISHMENT AS JUSTICE: A JURY TRIAL AS A LITMUS TEST

A particularly questionable claim of ICC lobbyists is their equation of punishment and justice. Gandhi recognized that criminal punishment signifies the antithesis of justice.<sup>73</sup> He disdained peace attained through punitive measures, and dismissed an international police force as "a concession to human weakness, not by any means an emblem of peace."<sup>74</sup> Gandhi recognized that institutionally inflicted punishment constitutes violence that no amount of justification can make intrinsically good or indicative of virtue.

To equate prosecutions with justice is not only illiberal, it is pinched. Like the god of Sophocles, the ICC lobby apparently "knows neither equity nor grace[,] . . . but only cares for strict and simple justice."<sup>75</sup> With the ancient proverb *summum ius summa iniuria*—strict justice is the greatest injustice—an ageless debate begins anew. No group is apt to argue for injustice, yet few are likely to agree on a unitary meaning for justice. The idea of justice is infinitely irreducible: for a utilitarian, it may be the greatest good for the greatest number; for a Greek Stoic, the rendering to each his due; for a Quaker, the restoration of right relationships; for a Christian, to forgive seventy times seven; for a South

---

70. See 2 THE MORAL AND POLITICAL WRITINGS OF MAHATMA GANDHI 624 (Raghavan Iyer ed., 1986) [hereinafter WRITINGS].

71. Stewart, *supra* note 29, at 12.

72. Often overlooked, the story of the genocide "all but disappeared from the historic record," despite the public trial in Berlin of the most prominent member of the "Justice Commandos of the Armenian Genocide." *Id.*

73. See WRITINGS, *supra* note 70, at 498 ("Peace must be just. In order to be that, it must be neither punitive nor vindictive.").

74. *Id.*

75. Martha C. Nussbaum, *Equity and Mercy*, in PUNISHMENT: A PHILOSOPHY & PUBLIC AFFAIRS READER 145, 153 (John Simmons et al. eds., 1995) (quoting Sophocles).

African, to offer redress and restore balance; and so on, ad infinitum.<sup>76</sup>

Different societies and their members have distinct notions of what is fair and right.<sup>77</sup> Western institutions tend to reflect simply one conception of justice—retribution. The meaning ascribed to justice varies widely because the concept is inextricably contextual and presupposes various sets of conditions and considerations.<sup>78</sup> Hence, a verdict in a criminal trial can ameliorate one group's sense of injustice while provoking that of another. This phenomenon is exemplified in the varied responses given by Hutu and Tutsi to the question of whether justice was served asked hours after a Rwandan court sentenced a Hutu to death last year.<sup>79</sup>

Above all, a puritanical equation of justice and punishment is conducive to violence. The wisdom of *satyagraha* rests in its recognition that when ideals pertaining to ends such as justice gain ascendancy, violence is more probable. Based on twenty-five years' work with the most violent individuals in U.S. penal institutions, James Gilligan similarly concludes that attempts by individuals and groups to achieve justice or to undo injustice constitute "*the one and only universal cause of violence*."<sup>80</sup> Whether we label it crime or punishment, the purpose of both forms of violence is the same:

[T]o restore justice to the world by replacing shame with pride. And the means by which that is accomplished is the same. The very same acts of violence and mutilation (by which one prevents one's victim from shaming oneself further) serve to shame one's victim. . . . [F]or it is shameful to suffer violence (regardless of whether it is called crime or punishment), just as it is a source of pride and honor to be the one who dispenses violence to others.<sup>81</sup>

---

76. In the very name of justice, deconstructionists like Jacques Derrida question the claim of *any* institution to embody absolute justice. See Mark Lilla, *The Politics of Jacques Derrida*, N.Y. REV. OF BOOKS, June 25, 1998, at 36, 39–40.

77. See JUDITH N. SHKLAR, *THE FACES OF INJUSTICE* 38 (1990). "People simply differ enormously about what they feel personally to be unjust." *Id.*

78. See SOLOMON, *supra* note 50, at 18.

79. See Alan Zarembo, *Judgment Day: In Rwanda, 92,392 Genocide Suspects Await Trial*, HARPER'S, Apr. 1997, at 68, 78. Although many Hutus felt that many of those executed were innocent, they were afraid to say so in fear of retaliation. See *id.*

80. GILLIGAN, *supra* note 16, at 12.

81. *Id.* at 185.

Once associated with movements for *social* justice, ICC proponents have converted the slogan “no peace without justice” overnight into what Diane Johnstone describes as “a recipe for perpetual war.”<sup>82</sup>

Should there be a question in the reader’s mind whether warring parties are likely to consider an ICC productive of justice, a simple thought experiment should resolve any lingering doubt. Imagine that defendants before ICCs are entitled to have their guilt determined by a jury of peers representative of their community, whether Bosnian, Canadian, Irish, Chechen, or Nicaraguan. At present, and contrary to U.S. jurisprudence, they have no right to a jury trial. Were this not the case, we might get a clear if discomfiting glimpse at the underlying reality not unlike that bared in the O.J. Simpson proceeding which produced what some called a “white” civil verdict and a “black” criminal acquittal.<sup>83</sup> Due partly to the ubiquity of situationally-rooted expectations and norms during serious social unrest, “ordinary” members of an offender’s community are best suited to understand and, therefore, to judge his or her alleged conduct.<sup>84</sup> Given this, it is hardly surprising that the British government makes no provision for jury trials in cases involving “political” crime in Northern Ireland.<sup>85</sup>

In a deeply divided society, arguably the only type of society likely to produce the types of crimes for which ICCs are intended, criminal prosecutions do not have a conciliatory effect. Rather, they manifest and exacerbate division as recently witnessed daily in Chile.<sup>86</sup> This follows in

---

82. Diana Johnstone, *Selective Justice in the Hague*, NATION, Sept. 22, 1997, at 16, 16.

83. See Maureen Dowd, *State of Union Not Yet Black, White*, SAN ANTONIO EXPRESS-NEWS, Feb. 10, 1997, at A11.

84. To this day some Japanese politicians claim to be the victims of World War II rather than the aggressors. See James Dao, *Parents’ Nightmare, Children’s Quest*, N.Y. TIMES, May 16, 1998, at B3.

85. See Warren Hoge, *Knotty Issue for Belfast: Fate of Royal Ulster Police*, N.Y. TIMES, May 17, 1998, at A3.

86. See, e.g., *Threats Over Pinochet Case Inflaming Tensions in Chile*, N.Y. TIMES, Oct. 24, 1998, at A (“A growing number of political leaders and analysts are expressing fears that a prolonged international legal struggle over General Pinochet will expose the country to renewed splintering and violence.”); Tim Golden, *Arresting a Dictator Is One Thing. Then It Gets Tough*, N.Y. TIMES WEEK IN REV., Nov. 1, 1998, at 8 (noting Chilean view that “the success of human-rights lawyers targeting General Pinochet will almost certainly come at the expense of the uneasy political compromise by which Chile achieved a measure of reconciliation and peace.”); cf. James C. McKinley, Jr., *6 Are Hanged by Burundi for Massacres*, N.Y. TIMES, Aug. 1, 1997, at A3 (stating that the executions “are likely to polarize the two sides of the debate” in Burundi).

part because those who would occupy the dock *are inevitably and widely seen as symbolic representatives of their group*.<sup>87</sup> The association is even greater in cases involving “big fish” like Maurice Papon, P. W. Botha, General Pinochet, and Winnie Mandela. As the prosecution declared at the opening of the Adolf Eichmann trial, “It is not an individual that is in the dock[,] . . . but anti-Semitism throughout history.”<sup>88</sup> Given their metaphorical significance, one can hardly expect ICCs to ameliorate collective guilt. On the contrary, they may actually revive and inflame antagonistic sentiment.<sup>89</sup>

#### V. DISINTERRING OF THE COMMUNITY AND DECENTERING THE MONSTROUS FEW

Despite a veritable cottage industry of ICC literature and conferences,<sup>90</sup> there is scant evidence of analysis devoted to identifying the intended beneficiary and target audience of international prosecutions. The omission bolsters suspicions voiced by a Rwandan delegate to the United Nations that ICCs exist to appease the conscience of the international community, not to provide enduring value to a ravaged community.<sup>91</sup> For reasons given below, the subject and object of humanitarian efforts in the wake of human rights disasters must be the community directly affected by and implicated in the events.

If the intended beneficiary of international prosecutions is the amorphous “international community,” ICC advocates have yet to identify, let alone examine, the myriad questions that follow from this premise. If, for instance, a government’s prerogative to punish rests on the reciprocal benefits and burdens comprising the social contract, on what does the international community base its prerogative? Individual Palestinians, Sudanians, Serbs, or Tutsis would likely be

---

87. See Charles Simic, *Unfashionable Victims*, LONDON REV. OF BOOKS, July 31, 1997, at 12 (stating that Radovan Karadzic and Ratko Mladic “are taken as embodiments of the soul of their people.”).

88. ARENDT, *supra* note 66, at 16.

89. See Hoge, *supra* note 85, at A3 (stating that, according to a poll conducted by Ireland’s largest newspaper, the release of prisoners and police reform top the list of issues that most preoccupy the warring communities of Northern Ireland); Tina Rosenberg, *Defending the Indefensible*, N.Y. TIMES MAG., Apr. 19, 1998, at 46, 56 (remarking on the “near-universal belief among Serbs that the tribunal is an anti-Serb instrument.”).

90. See *supra* note 4 for a short list of articles.

91. See *U.N. Establishes Rwanda Genocide Tribunal*, Reuters North American Wire, Nov. 8, 1994, available in LEXIS, Nexis Library, World News File.

hard pressed to name the security benefits they receive from the international community. Indeed, the mere occurrence of serious human rights violations is itself indicative of the inadequacy of international recourse and remedies to ameliorate the security dilemma so prevalent in post-modern civil war.

ICC proponents have also overlooked the central question of what units, individuals or groups, should be the target of efforts to restore order to a badly fractured society. Backing a remedy designed to socialize individuals, they envision a society disintegrated into an amoral Hobbesian war of all against all, rather than into rival moral communities. Deftly noted by Dennis Wrong, for group-level conflict to occur, the individual group members must already “have been socialized to . . . correctly gauge the expectations of others, internalize at least some norms, and possess selves sensitive to the appraisal of others.”<sup>92</sup> The familiar lack of remorse shown for acts that if committed against a member of one’s own group would draw heavy censure, signals a disjunction between groups’ values and norms.

The target unit of efforts to restore order in the aftermath of human rights atrocities should be groups, not individuals. Like justice, crime is embedded in community and is the ultimate concern of community. Gandhi well-appreciated this and other commonplaces of modern criminology like the need to focus on the character of society that engenders depraved acts, rather than fixating on a supposed depraved few.<sup>93</sup> Repudiating the fashion of ascribing crime to isolated individuals, Gandhi declared:

It hardly becomes us to take refuge in that moral alibi. Who are the hooligans after all? They are our own countrymen and, so long as any countryman of ours indulges in such acts, we cannot disown responsibility for them.<sup>94</sup>

Familiar to students of Nazi Germany, a Hitler—like a Stalin, a Karadzic, a Tudjman, a Mao—is only as strong as the power

---

92. DENNIS H. WRONG, *THE PROBLEM OF ORDER: WHAT UNITES AND DIVIDES SOCIETY* 182 (1994). For instance, in both Nazi Germany and Rwanda in the 1990s, a strong tradition of obedience to authority prevailed. See Gail M. Gerhart, *Recent Books on International Relations: Africa*, FOREIGN AFF., May–June 1996, at 156; Michael Thompson-Noel, *Home Truths About Genocide—Murderous Disputes in Faraway Places Bring Out the Honest Pessimist in Michael Thompson-Noel*, FIN. TIMES (London), Jan 13, 1996, at xvi.

93. See WRITINGS, *supra* note 70, at 624.

94. *Id.* at 252.

of mass obedience and support. However, to confuse the notion of corporate responsibility with collective guilt or excusable impulses is a mistake. As Gandhi stressed, life circumstances do not remove individual responsibility.<sup>95</sup> To hold otherwise is tantamount to denying the very foundation of human dignity. If we are serious about controlling war crimes during internal conflicts, our first priority should be to create a culture in which it is not tolerated.

#### VI. THE HEART OF NORMATIVE ORDER: PUNITIVE SANCTION OR SOCIAL EMBEDDEDNESS?

A presupposition of the ICC endeavor is that formal mechanisms are integral to uphold group life and to stem deviant behavior.<sup>96</sup> Reminiscent of presociological thought, this view overlooks the “complex network of social ties which spontaneously creates a normative order that exists independently of [legal institutions].”<sup>97</sup> *Satyagraha* presupposes otherwise. Cooperation and consent of the governed is a *sine qua non* of long term crime control and good government; although soldiers or police may be able to retake a community, they cannot hold it without the assent of its members.<sup>98</sup> For lasting peace, Nelson Mandela proclaimed, “[W]e do not rely on laws, we rely purely on persuasion.”<sup>99</sup> Where society depends instead on law, Gandhi concluded that “law ceases to be law, and society ceases to be society.”<sup>100</sup>

To understand why people commit heinous acts, it helps to appreciate what motivates combatants to face the threat of

---

95. See WRITINGS *supra* note 70, at 67–69; 1 THE MORAL AND POLITICAL WRITINGS OF MAHATMA GANDHI 120–121 (Raghavan Iyer ed., 1986).

96. Kofi Annan, Secretary General of the United Nations, stated that all peoples of the world should have basic human rights and that the basis of law ensures those rights. Annan, *supra* note 5, at 363. He thus advocates a formal court to administer that law. See *id.* at 365.

97. WRONG, *supra* note 92, at 170. “It is the social process in group life that creates and upholds the rules, not the rules that create and uphold group life.” *Id.* at 49; see generally Robert J. Sampson et al., *Neighborhoods and Violent Crime: A Multilevel Study of Collective Efficacy*, SCIENCE, Aug. 15, 1997, at 918–19, 923 (finding that “collective efficacy,” meaning informal social control, cohesion, and trust, remains a significant predictor of violent crime).

98. See IGNATIUS JESUDASAN, S. J., A GANDHIAN THEOLOGY OF LIBERATION 287 (1987) (referring to Gandhi’s insight into the need for any long-term government to have the consent of the governed).

99. PATTI WALDMEIR, ANATOMY OF A MIRACLE: THE END OF APARTHEID AND THE BIRTH OF THE NEW SOUTH AFRICA 261 (1997).

100. V.S. Hegde, *The Practice of Law and Gandhi*, in NEW DIMENSIONS AND PERSPECTIVES IN GANDHISM 424 (V. T. Patil ed., 1989).

death and mutilation in battle. Time and again, military historians and professionals dwell not on the coercive power of the army or state, but on what Dennis Wrong calls the “‘merely’ mental stuff . . . [that] binds like chains of steel.”<sup>101</sup> The decisive restraint on inhuman practices in war rests within the soldier, not on formal sanctions.

Like heroic deeds, deviant behavior stems from expectations of what is acceptable, *even laudable* behavior, which is borne out because others are aware of and live up to those expectations.<sup>102</sup> This principle is particularly salient in armed conflict, one of the most imitative of human activities.<sup>103</sup> Napoleon demonstrated an early appreciation of the potency of peer pressure, declaring “the greatest punishment in a French army for not having participated in the dangers and the victories is the reproach that is directed to [soldiers] by their comrades.”<sup>104</sup> Two hundred years later, Israeli soldiers attest that what worries them most in combat is “what others would think of them, or what their families or friends would feel about them when they came home.”<sup>105</sup>

In conflict or cooperation, the major spring of human action is the desire to win the good opinion of family, friends, and close associates.<sup>106</sup> Indeed, the priority human beings place on honor and self-respect (our own and that of our group) over survival may be our most unique and dangerous attribute. Conversely, as mentioned above, the fear of shame or ridicule is the most common reason human beings engage in violent behavior.<sup>107</sup> If we understand this, the advantages of *satyagraha* over penal threats as a means to elicit right-conduct become even more apparent.

---

101. WRONG, *supra* note 92, at 45.

102. See JOHN BRAITHWAITE, *CRIME, SHAME, AND REINTEGRATION* 21 (1989).

103. See VAN CREVELD, *supra* note 60, at 174.

104. HANS DELBRUCK, *THE DAWN OF MODERN WARFARE* 414 (Walter J. Renfro, Jr., trans., Bison Press 1990) (1985).

105. RICHARD HOLMES, *ACTS OF WAR: THE BEHAVIOR OF MEN IN BATTLE* 283 (1985) (quoting Samuel Rolbant on the combat motivation of Israeli soldiers). In the case of “mob” behavior, often the handmaiden of human rights abuses, the contribution of social influence is even more pronounced. See Dan M. Kahan, *Social Influence, Social Meaning, and Deterrence*, 83 VA. L. REV. 349, 353 (1997) [hereinafter Kahan, *Social Influence*].

106. See BRAITHWAITE, *supra* note 102, at 21.

107. See GILLIGAN, *supra* note 16, at 77, 197.

## VII. PUNISHING FOR PEACE: UNITY OF MEANS AND ENDS

A signal challenge to the ICC enterprise is the core precept of *satyagraha* that the ends preexist in the means. In Gandhi's words,

[T]he belief that there is no connection between the means and the end is a great mistake. . . . The means may be likened to a seed, the end to a tree; and there is just the same inviolable connection between the means and the end as there is between the seed and the tree.<sup>108</sup>

For long term peaceful human relations, punitive threats are simply not in the spirit of the end.

Gandhi's insistence on the inviolability of means was derived partly from man's ability to exercise control over means, but to never command results.<sup>109</sup> For transitional societies in particular, this author believes an ethically responsible policy is one that reflects a world where unintended consequences are the norm. An ends-oriented strategy like penal justice, however well-intended, falls short of the mark.

The indivisibility of means and ends follows also from the axiom that violence, even where seemingly justified, only leads to more violence.<sup>110</sup> Noted by criminologists, the destructive strategies and war mentality integral to the pursuit of criminal justice fuel revolt and harden resistance in the defeated "enemy."<sup>111</sup> Confirmed by events in Somalia and Bosnia, they also provide the target with needed moral support and engender martyrs.<sup>112</sup> In contrast, by choosing not to retaliate, *satyagrahis* undermine the target and throws him or her off balance.

---

108. DENNIS DALTON, MAHATMA GANDHI: NONVIOLENT POWER IN ACTION 9 (1993).

109. See HOWARD HORSBURGH, QUENCHING WRATH: COLLECTIVE SECURITY AND NONVIOLENCE 42 (1968).

110. See JOHAN GALTUNG, PEACE BY PEACEFUL MEANS: PEACE AND CONFLICT, DEVELOPMENT AND CIVILIZATION 7 (1996) (discussing violence and religion).

111. See BRAITHWAITE, *supra* note 102, at 80 (stating that evidence shows aggression and delinquency are the reaction to excessive use of punishment and power assertion); HORSBURGH, *supra* note 109, at 98 (stating that enforcement and punishment often give rise to enmity and hatred).

112. See Kahan, *Social Influence*, *supra* note 105, at 357 (stating that in certain inner-city neighborhoods, a similar phenomenon occurs where criminal convictions, "far from being a mark of disgrace, are for some 'a badge of honor.'").

Above all, means are expressive and fused with values such as human dignity and respect. The means a society adopts signal the type of society its members envision, and presage the outcome.<sup>113</sup> Here, the ICC enterprise is inapposite. Profoundly undemocratic, it is antithetical to responsible, local self government. It communicates that threats are considered constructive of social order, that the dominant party is willing to use force to achieve its end, and the “imbalance of power which allows him to do so.”<sup>114</sup> Like the Hegelian man who lifts a stick to his dog, to “civilize” others by force is to treat human beings as innately antisocial, amoral calculators, and to deny the spiritual unity of humankind, envisioned by Gandhi.<sup>115</sup>

A great strength of *satyagraha* is its inherent appeal to the other as a moral agent, endowed with reflective consciousness and concern for justice and other people’s needs. No matter how depraved a person might appear to be, *satyagraha* reflects the dignity and potential for good in him or her.<sup>116</sup> In the words of Gandhi, “Who can dare say that it is not in their nature to respond to the higher and finer forces? They have the same soul that I have.”<sup>117</sup> The unparalleled success of Nelson Mandela, who “pinned the label ‘man of integrity’ to F. W. de Klerk’s breast,”<sup>118</sup> demonstrates the efficacy of treating an adversary as a morally responsible agent capable of responding to reasoned normative appeals.

Lasting stability is possible only when both sides to a conflict recognize that they cannot force the other to submit, whether on the battlefield or in the courtroom. For this reason, hope rests with those situated in the middle. Unlike a threat-based strategy, which dissipates the will of otherwise indispensable, well-intended persons, *satyagraha* is practiced with the opponent and avoids methods likely to humiliate, harass, or engender opposition. *Satyagrahis* ensure that the case is set out as clearly as possible and that “ordinary”

---

113. See H. J. N. HORSBURGH, *NON-VIOLENCE AND AGGRESSION: A STUDY OF GANDHI’S MORAL EQUIVALENT OF WAR* 44 (1968).

114. CRAGG, *supra* note 51, at 196.

115. See Madan Gandhi, *Metaphysical Basis of Gandhian Thought*, in *NEW DIMENSIONS AND PERSPECTIVES IN GANDHISM*, *supra* note 100, at 211 (“[T]o use violence against the evil-doer was to deny spiritual unity with him and to fight evil with its own weapons was like casting out Satan by Satan.”).

116. See WRITINGS, *supra* note 70, at 482 (“Such courage comes from the belief that God sits in the hearts of all and that there should be no fear in the presence of God. The knowledge of the omnipresence of God also means respect for the lives of even those who may be called opponents or *goondas*.”).

117. *Id.* at 488.

118. WALDMEIR, *supra* note 99, at 158.

persons are given every chance to reflect and to offer a decent response. Here again, a punitive approach is inapt.

#### VIII. PRACTICAL DISCOURSE AND THE SEARCH FOR TRUTH

For Gandhi truth was but another name for God, envisaged by everyone in fragments and from different angles.<sup>119</sup> Gandhi's insistence on nonviolence and on man's incompetence to punish derived from his belief that no human being is capable of knowing absolute truth.<sup>120</sup> Conflict, he observed, is the result of misperceptions and competing relative truths, and its resolution requires a willingness to hear and consider the opponent's position and to communicate one's own.<sup>121</sup> It follows that those on the margins of society—criminal and otherwise—are to be given an opportunity to be heard.

A core strength of *satyagraha* rests in the harmonizing and educative power of dialogue, increasingly recognized by contemporary political and social theorists. Like the Navajo strategy of "talking things out," *satyagraha* treats crime and conflict as a starting point for dialogue wherein all concerned individuals are given an opportunity to express the truth as they see it and to offer solutions.<sup>122</sup> Like Willem de Haan's concept of practical discourse, it is an open elaborative process that begins with the admission that there are no simple or categorical answers.<sup>123</sup> In stark contrast, administering "justice" by judicial fiat from above is anathema to the republican sense of a shared, participatory life—hardly a civilizing agent.

A particularly misguided claim of ICC proponents is that criminal prosecutions are productive of "the truth." As Madeleine Albright declared during the U.N. Security Council meeting to establish the Yugoslav Tribunal, "The only victor

---

119. See WRITINGS, *supra* note 70, at 252; GANDHI, *supra* note 9, at 39; DALTON, *supra* note 108, at 10.

120. See DALTON, *supra* note 108, at 10 (discussing the imperfections of human understanding). Truth was Gandhi's "religion," and he believed that nonviolence, or *ahimsa*, was the only way to realize it. See WRITINGS, *supra* note 70, at 230–31.

121. See Gandhi, *supra* note 115, at 197, 206. Improving communication is perhaps the most efficacious third-party function, since it is required to clear up initial misunderstanding, to make accurate diagnosis possible, and to explore alternative means, goals, and common interests.

122. Robert Yazzie, 'Life Comes from It': Navajo Justice Concepts, 24 N.M. L. REV. 175, 182–83 (1994).

123. See DE HAAN, *supra* note 6, at 158–61, 168, for a discussion of practical discourse.

that will prevail in this endeavor will be the truth.”<sup>124</sup> Nothing so belies this as the paucity of information about the 1994 genocide in Rwanda, generated by hundreds of criminal prosecutions, relative to the wealth of information about apartheid South Africa, compiled through nonprosecutorial means.<sup>125</sup> Manifest in the trial of O.J. Simpson, criminal trials are anything but a search for the truth. On the contrary, their reductionist, bipolar logic and inherent barriers to the truth conceal and distort history. As noted by Hannah Arendt:

[J]ustice demands that the accused be prosecuted, . . . and that all the other questions of seemingly greater import—of “How could it happen?” and “Why did it happen?,” of “Why the Jews?” and “Why the Germans?,” of “What was the role of other nations?” . . . —be left in abeyance.<sup>126</sup>

Based on extensive scholarly research, Mark Osiel has analyzed the efficacy of criminal trials to illumine events in the aftermath of human rights disasters.<sup>127</sup> In post-World War II Germany, Japan, and France, for instance, he finds that judicial processes effectively absolved the general populace and overlooked the mass collaboration and institutional support by unavoidably ascribing responsibility to a few select individuals.<sup>128</sup> Instead of stimulating serious moral deliberation and self-scrutiny, the trials hindered an open debate on the far more complex reality.<sup>129</sup> In the case of Austria, the international furor surrounding Kurt Waldheim’s 1986 election touched off the first real debate among its citizenry about Austria’s complex and long-repressed Nazi history.<sup>130</sup> Similarly, *despite* years of prosecutions by the

---

124. Stewart, *supra* note 29, at 12.

125. See Zarembo, *supra* note 79, at 70–71 (noting that imprisoned Tutsi rebels in Rwanda “dispute their crimes” and “deny that the genocide ever happened.”).

126. ARENDT, *supra* note 66, at 3.

127. See Mark J. Osiel, *Ever Again: Legal Remembrance of Administrative Massacre*, 144 U. PA. L. REV. 463, 466 (1995) (examining “recurring problems that have arisen from efforts to employ criminal prosecution to influence a nation’s collective memory of state-sponsored mass murder.”).

128. See *id.* at 537, 581; Madeline H. Morris, *Justice in the Wake of Genocide: The Case of Rwanda*, 3 ILSA J. INT’L & COMP. L. 689, 690 (1997) (stating that the International Rwandan Tribunal will by no means address the bulk of Rwanda’s genocide-related criminal cases, estimated in excess of 80,000).

129. See Osiel, *supra* note 127, at 595–96.

130. See *Austrians Consecrate a Day to Victims of the Holocaust*, N.Y. TIMES, May 6, 1998, at A5.

Tokyo Tribunal, Japan's "excesses" during World War II "disappeared off the world's agenda," overlooked in popular culture and academic histories, for almost fifty years.<sup>131</sup> It was not until the trial of Adolf Eichmann—for the privilege of which Israel was forced to disobey international law—that the suffering of Jews was finally recognized.<sup>132</sup> Today, a revitalized popular and academic debate suggests that we are not yet finished with a Holocaust "sanitized," in the words of José Alvarez, by the Nuremberg trials.<sup>133</sup>

#### IX. CAUSAL UNDERSTANDING, EXCULPATION, AND FORGIVENESS

Once a hallmark of conservative thinking, the degree of disinterest ICC proponents show in causal theory is striking. Related efforts to steer thinking about complex conflicts into criminal stereotypes, exemplified by a recent American journalist's appeal to portray events in Africa in criminal terms, is equally troubling.<sup>134</sup> Declining this invitation, BBC correspondent Lindsey Hilsum observed: "We refuse to allow conflicts in Africa to have any politics. We always report them as 'crimes.' They are not crimes. It's politics. We have to understand that, and if we don't, we're nowhere."<sup>135</sup>

Not unlike the religious dogma Gandhi scorned, the popular appeal of criminal stereotypes emanates from the security of binaries—good and evil, guilt and innocence, right and wrong, Us and Them—that shield us from the uncomfortable and complicated realities that yield atrocities. Humankind's proclivity to simplify and schematize is heightened when confronted with horror.<sup>136</sup> To this, Nils Christie adds distance.<sup>137</sup> All told, the bigger the social problems, the more remote *They* are, the greater the need for a "crime" myth. Whether at home or abroad, the ensuing

---

131. Dao, *supra* note 84, at B9.

132. See NINA SUTTON, BETTELHEIM: A LIFE AND A LEGACY 345 (David Sharp trans., Basic Books 1996) (1995).

133. José E. Alvarez, *The Likely Legacies of Tadic*, 3 ILSA J. INT'L & COMP. L. 613, 619 (1997).

134. See Roy Guttman, *Reporting from the Killing Fields*, audio tape of Conference, held by the University of California at Berkeley, May 1997 (on file with the *Houston Journal of International Law*).

135. See Lindsey Hilsum, *Reporting from the Killing Fields*, audio tape of Conference, held by the University of California at Berkeley, May 1997 (on file with the *Houston Journal of International Law*).

136. See TZVETAN TODOROV, FACING THE EXTREME: MORAL LIFE IN THE CONCENTRATION CAMPS 266 (Arthur Denner & Abigail Pollak trans., Metropolitan Books 1996) (1991) (discussing how former Nazi camp inmates reconstruct the past).

137. See NILS CHRISTIE, CRIME CONTROL AS INDUSTRY 23 (1993).

“maudlin spectacles . . . further dull the capacity for civic responsibility.”<sup>138</sup>

The wisdom of *satyagraha* is its commitment to understand what motivates people to commit heinous acts. Criminal prosecutions, in contrast, serve as a substitute for understanding. They are a way of labeling, thinking, and talking about the adversary, rather than listening to him or her.<sup>139</sup> If our aim is prevention, then “nothing is more important than to learn everything we can about why people become violent.”<sup>140</sup> A lack of empathy, moreover, sets anyone on the path to violence. Through understanding the adversary becomes no longer an incomprehensible monster with no discernable connection to Us.

The popular notion *tout comprendre c'est tout pardonner*—to understand all is to forgive all—is a moral fallacy and “the bogeyman of every effort to understand violence.”<sup>141</sup> Primo Levi, occasionally cited as one of its key proponents, repeatedly acknowledged the importance of understanding on the basis that “what could be perpetrated yesterday could be attempted again tomorrow.”<sup>142</sup> The aim of causal understanding is not to obliterate, pardon, or justify the past, but to prevent its reoccurrence. As a witness to genocide in Rwanda avowed, “you have to try to understand, because if you don't try to understand, you get nowhere.”<sup>143</sup>

Those who counsel understanding are often labeled “forgivers.” Evident in the work of Gandhi, retaliation and forgiveness are not mirror-opposites, nor do they exhaust the world of possible responses to injustice. One may forswear retaliation, but still withhold forgiveness.<sup>144</sup> Forgiveness, on the other hand, presupposes that any plans to punish or otherwise retaliate have been forsworn, for once one has retaliated, what remains to forgive? It is thus nonsensical to assert that “[u]nless justice is done it's difficult for any

---

138. MILLER, *supra* note 54, at 161.

139. See GILLIGAN, *supra* note 16, at 183, 258 (stating some people believe trying to understand criminals is futile and that we should simply “lock them up and throw away the key.”).

140. *Id.* at 267.

141. *Id.* at 24.

142. PRIMO LEVI, *THE DROWNED AND THE SAVED* 53 (Raymond Rosenthal trans., Summit Books 1988) (1986).

143. Hilsum, *supra* note 135.

144. See WRITINGS, *supra* note 70, at 293 (stating that without an *act* of forgiveness, there is no forgiveness).

person to think of forgiving,”<sup>145</sup> if by “justice” one intends punishment.

For policymakers concerned with prevention and restoring order, the essentially theological question of forgiveness may simply be beside the point, with one caveat: political leaders may not wish to foreclose individual acts of pardon.<sup>146</sup> Above all, forgiveness is a matter of individual conscience that no institution or authority can demand or effect in another’s name. If Desmond Tutu offers forgiveness on behalf of all South Africans, expressions of discontent are thus to be expected.

#### X. YIELDING TO LOCAL INITIATIVES: UNWILLING OR UNABLE

Because the determinative response to deviancy occurs locally, communities that treat crime as something best left to institutions and professionals at far remove, act in a malfeasant way. Recent requests by Cambodian and Burundi officials for an international tribunal to try certain of their nationals<sup>147</sup> exemplify a dangerous abdication of responsibility that international mechanisms ought not to condone, let alone encourage. In the spirit of *satyagraha*, international tribunals should be rejected in favor of local, constructive action. When, for instance, a state’s judiciary is in such disarray that fair and impartial trials are not

---

145. Rosenberg, *supra* note 67, at 88.

146. THE SUNFLOWER contains several remarkable statements on the value of forgiving *by the individual*, given in response to the following question posed by Simon Wiesenthal: “You are a prisoner in a concentration camp. A dying Nazi soldier asks for your forgiveness. What would you do?” WIESENTHAL, *supra* note 68, at front cover. Notable among the essays are those by the Dalai Lama, Robert Coles, Rabbi Laureate Harold Kushner, Martin Marty, and Matthew Fox. See *id.* at v–vii. The most poetic response is given by Jose Hobday, a Franciscan nun of Seneca, Iroquois, and Seminole descent:

[T]he words of my Seneca mother to me when I was badly wronged and wanted revenge and retaliation stay with me: “Do not be so ignorant and stupid and inhuman as they are. Go to an elder and ask for the medicine that will turn your heart from bitterness to sweetness. You must learn the wisdom of how to let go of poison.” . . . Forgiveness is of the heart. I would have forgiven, as much for my own peace as for [the Nazi’s]. . . . No one, no memory, should have the power to hold us down, to deny us peace. Forgiving is the real power. I offer [Mr. Wiesenthal] the sturdy sunflower of our great West—it is small enough to dance. Ho!

*Id.* at 174–75.

147. See U.S. Dept. of State: *Daily Press Briefing*, M2 Presswire, May 4, 1998, available in 1998 WL 11309996; UN Security Council *Rejects Genocide Tribunal* . . ., Agence France-Presse, July 18, 1997, available in 1997 WL 2154941.

possible, rather than spending scarce resources on a stop-gap measure of dubious efficacy, the overriding aim should be to assist and encourage local efforts to remedy the situation as expeditiously as possible.

All but ignored in Cambodia, Bosnia, and Rwanda, the development of an effective and impartial judiciary is vital to stabilize society. In the case of Cambodia, an inept and corrupt judiciary remains after unprecedented sums were spent presumptively elsewhere.<sup>148</sup> In the case of Rwanda, devastated by genocide and overwhelmed with more than 80,000 individuals awaiting trial in squalid prison conditions,<sup>149</sup> the limited capital expended on a comparatively opulent and ineffectual ICC should have been invested in the local judiciary.<sup>150</sup>

When local officials are *unwilling* to pursue a national remedy, and the international community is unwilling to spend the needed blood and treasure to assume de facto control, the best that can be done by lawyers is to help systematically collect and catalogue evidence. For this, the Cambodian Genocide Project at Yale University, and ongoing nongovernmental efforts to interview survivors of Guatemala's civil war,<sup>151</sup> offer possible models. Whether justice comes quickly or not at all in these cases, events in South Korea, France, Switzerland, Spain, the United States, and Japan indicate that changes in government, venue, and popular opinion can revive demands for an accounting and reveal alternative avenues for redress.

---

148. See Colleen McGinn, *Will Cambodia's Elections be Free and Fair?*, WASH. TIMES, July 26, 1998, at B2.

149. See Stephen Buckley, *U.N.-Run Rwanda Genocide Trials Seen as Kangaroo Court*, HOUS. CHRON., Feb. 2, 1997, at A30.

150. See Suchada Kulawat, *International Criminal Court: Trying Our Worst Criminals*, BANGKOK POST, Aug. 14, 1997, available in 1997 WL 13373251 (stating that the Rwanda tribunal cost \$367 million from 1995–1996 and \$25 million for 1997); Neil J. Kritz, *Coming to Terms with Atrocities: A Review of Accountability Mechanisms For Mass Violations of Human Rights*, 59 DUKE J. LAW & CONTEMP. PROBS. 127, 149 (1996) (discussing the preference for national efforts rather than international efforts).

151. See *Madness Cambodian Quandary*, CHARLESTON GAZETTE, Sept. 10, 1996, at A6 (describing efforts of the Cambodian Genocide Project in collecting evidence of the Khmer Rouge's atrocities); Tracey Wilkinson, *Guatemalans Bury the Dead, But Not the Fear*, GUARDIAN (London), Jan. 6, 1995, at 15 (describing efforts of human rights groups to interview survivors of the massacres).

## XI. WORKING TO IDENTIFY AND SATISFY THE NEEDS OF VICTIMS OF SURVIVORS

Any serious effort to deal with a legacy of human rights violations must include a commitment to confront and constructively respond to victims' suffering and sense of injustice. The extent of modern society's failure in this regard has been observed by Gandhi and innumerable others. Given the profound and varied experiences of victims, as well as the disparate coping mechanisms within and across cultures,<sup>152</sup> any singular right approach is untenable. International law and *satyagraha* appropriately demand constructive remedial action, but neither impose a one-size-fits-all managerial solution.<sup>153</sup> An effective remedy may include compensation and the investigation, dissemination, and acknowledgement of events, but customary international law imposes no duty to effect punitive justice.

To the extent that it is humanly possible to mitigate the suffering of survivors of atrocities, this can be accomplished as effectively, if not more so, without inflicting or threatening to inflict suffering on human beings, with one possible exception. To the extent persons derive solace from seeing an enemy-oppressor "get what they deserve"—defeated or humiliated in the courtroom, if not on the battlefield—it is a satisfaction international humanitarian law ought not pursue. The antiquated "punishment as therapy" models, individual and collective, are without support in credible, modern social science.

The notion that penal institutions provide an essential outlet for innately violent and vengeful human beings has been thoroughly debunked as dangerously unhelpful, pseudo biology.<sup>154</sup> Similarly, the belief that peaceful coexistence requires a clean slate that only punishment can deliver is based on an exaggerated and misguided fear of vigilantism.<sup>155</sup> Despite outrageous acts and levels of crime throughout history, "vigilantism remains extremely rare."<sup>156</sup> In present

---

152. See Lynne N. Henderson, *The Wrongs of Victim's Rights*, 37 STAN. L. REV. 937, 996–98 (1985) (describing the various ways victims cope with harm).

153. Although genocide is prohibited under customary international law, there are no fixed penalties for violations of peremptory norms, including genocide. See JORDAN PAUST, *INTERNATIONAL LAW AS LAW OF THE UNITED STATES* 293 (1996).

154. See GILLIGAN, *supra* note 16, at 212 (stating that outlets to violence only reinforce violent behavior).

155. See GEORGE L. KELLING & CATHERINE M. COLES, *FIXING BROKEN WINDOWS: RESTORING ORDER AND REDUCING CRIME IN OUR COMMUNITIES* 254 (1996).

156. *Id.* at 256.

day Cambodia, El Salvador, and Rwanda, victims and victimizers coexist in relative peace.<sup>157</sup>

There is perhaps no greater canard than the idea that punitive justice provides needed therapy for individuals; that nothing can assuage anger or restore dignity like punishment. Accounts of scholars who have worked extensively with survivors reveal that the urge for vengeance is far from universal.<sup>158</sup> Empirical studies further indicate that the emphasis on victimhood, blame, and powerlessness may actually undermine recovery from violent crime.<sup>159</sup> In Gandhi's experience, individuals who neither submit passively nor retaliate in response to violence find in themselves a new sense of strength, dignity, and courage.<sup>160</sup> Viktor Frankl and Tzvetan Todorov reached similar conclusions regarding victims of the Holocaust.<sup>161</sup>

Judith Shklar's conclusion that indifference, insensitivity, fear, and inequality give injustice its power is reflected in the prevailing demands of victims and survivors.<sup>162</sup> Typically, they seek the restoration of order, meaningful restitution and rehabilitative services, a thorough inquiry into the events that are recorded and publicly acknowledged, an opportunity to participate in decision-

---

157. See Seth Mydans, *Cambodian Aesop Tells a Fable of Forgiveness*, N.Y. TIMES, June 28, 1997, at A4 (describing how some Cambodians would rather achieve national reconciliation than criminal justice); Zarembo, *supra* note 79, at 68-69 (describing how some Rwandans would rather forget about the genocide than seek criminal justice); Thomas Buergenthal, *The United Nations Truth Commission for El Salvador*, 27 VAND. J. TRANSNAT'L L. 497, 513 (1994) (commenting that El Salvadorans never spoke out or sought vengeance because they feared reprisal).

158. See Buergenthal, *supra* note 157, at 539 (describing how retribution was not a goal for the Salvadorean people who testified before the U.N. Truth Commission); Rosenberg, *supra* note 67, at 92 (observing that most victims testifying before the South African Truth Commission do not ask for penal justice). In the words of Archbishop Desmond Tutu, "Retributive justice is largely Western." *Id.* at 90.

159. See Henderson, *supra* note 152, at 976 (arguing that the criminal process may not psychologically heal victims).

160. This sums up Gandhi's theory of *ahimsa*. See GANDHI, *supra* note 9, at 41 (defining the duty of nonviolence and the active efforts to win violent people over to the truth). In this way, *satyagraha* bears a striking resemblance to Hannah Arendt's renowned characterization of forgiveness, as "the only reaction which does not merely re-act, but acts anew and unexpectedly, unconditioned by the act which provoked it and therefore freeing from its consequences both [forgiver and forgiven]." HANNA ARENDT, *THE HUMAN CONDITION* 216 (1959).

161. See VIKTOR E. FRANKL, *MAN'S SEARCH FOR MEANING: AN INTRODUCTION TO LOGOTHERAPY* 76 (Ilse Lasch trans., Simon & Schuster, Inc. 1984) (1946); TODOROV, *supra* note 136, at 15-16.

162. See SHKLAR, *supra* note 77, at 49-50.

making, and an opportunity to recount their experiences. Above all, meeting the day-to-day emotional challenges that result from the sheer terror of being victimized may be the greatest need and the most daunting task facing society. Faced with these pressing needs, the expenditure of untold sums to prosecute a handful of culpable elites *at best* perilously approaches malfeasance.<sup>163</sup> ICCs represent a classic example of false philanthropy. Incalculable sums are being spent in an attempt to do what cannot be done, rather than investing in small but achievable projects.

## XII. AVOIDING BLUEPRINTS AND ACCOMMODATING INDIGENOUS VALUES AND NEEDS

For the sake of appearing resolute, we risk putting an iron grip on complex problems that demand local solutions. International criminal prosecutions exclude myriad values like mercy, shaming, recompense, forgiveness, compassion, and repentance that may be regarded locally as valuable, even imperative, to alleviate suffering and to restore order. By assuming that a serious disturbance of social order is first and foremost a criminal matter that demands a legal solution, we overlook and underrate indigenous values and practices like *satyagraha* and the African concept of *ubuntu*.<sup>164</sup> The cautionary words of Justice Richard Goldstone, spoken at a time when the fate of his native South Africa was at stake, are instructive:

A solution successful in one country may fail in another. The correct approach to the past will depend upon a myriad of political, economic, and cultural forces. . . .

. . . .

---

163. See Trueheart, *supra* note 21, at 1 (noting a statement by Cherif Bassiouni who said “Four years and \$100 million, and what has it produced?”).

164. *Ubuntu* is a term common to several African languages, meaning “humanity” in Xhosa and “human nature” in Zulu. As practiced in South Africa, *ubuntu* contemplates,

[A] culture which places some emphasis on communality and on the interdependence of the members of a community. It recognizes a person’s status as a human being, entitled to unconditional respect, dignity, value and acceptance from the members of the community such person happens to be part of. It also entails the converse, however. The person has a corresponding duty to give the same respect, dignity, value and acceptance to each member of that community.

S. v. Makwanyane and Another, 1995 (6) BCLR 665 (CC) (Langa, J.).

The manner in which violations are handled, whether perpetrators are punished, lose office, or are granted indemnities are issues which will depend on political considerations which will differ from country to country.<sup>165</sup>

In the fashion of economic developmental assistance, will decades of costly error pass before the international community reawakens to the value of decentralization, discretion, and local initiative? Instead of indulging the notion that we have a corner on the universal meaning of justice, we should seek out and support local initiatives to restore human dignity and a semblance of order in the wake of human rights disasters. In striking contrast with events in Latin America and South Africa, those in the Balkans and the Great Lakes region of Africa suggest that a fixation on formal justice may be irrelevant, at best, to these ends.

---

165. Richard Goldstone, *Exposing Human Rights Abuses—A Help or Hindrance to Reconciliation?*, 22 HASTINGS CONST. L.Q. 607, 615, 620 (1995) (contemplating the establishment of international courts to try human rights violators, while at the same time understanding the socio-political differences between nations).