

# Shame, Memory, and the Unspeakable: The International Criminal Court as *Damnatio Memoriae*†

MICHAEL BLAKE\*

## TABLE OF CONTENTS

I.	INTERNATIONAL CRIMINAL LAW AND THE JUSTIFICATION OF PUNISHMENT .....	908
II.	MORAL CONSTITUTIONALISM AND THE REALM OF THE SPEAKABLE .....	916
III.	RADICAL EVIL AND POLITICAL SOCIETY .....	924

In 96 A.D., Emperor Domitian was assassinated by a group organized by his chamberlain Parthenius.<sup>1</sup> Although Domitian had numerous supporters in the army, Suetonius records that the political establishment of the time did not feel any great sympathy for the murdered Domitian:

The Senators on the contrary were so overjoyed, that they raced to fill the House, where they did not refrain from assailing the dead Emperor with the most insulting and stinging kind of outcries. They even had ladders brought and his shields and images torn down before their eyes and dashed upon the

---

† I am grateful to all participants at the University of San Diego School of Law's Conference on the Status of International Law and International Human Rights in May 2013 for their helpful comments. Particular thanks to Larry Alexander for his commentary and discussion of these ideas.

\* Professor of Philosophy and Public Policy, University of Washington, Box 353350, Seattle, WA 98195.

1. SUETONIUS, THE LIVES OF THE TWELVE CAESARS 358–59 (Joseph Gavorse ed., 1931).

ground. Finally they passed a decree that his inscriptions should everywhere be erased, and all record of him obliterated.<sup>2</sup>

These initial attacks upon the images and symbols of Domitian were the first stages of a legal *damnatio memoriae* against him.<sup>3</sup> The *damnatio* declared that the memory of Domitian would be stricken from the history of Rome. His edicts and words were not to be given legal force; his images and symbolic legacy were to be extirpated.<sup>4</sup> The *damnatio* was intended to erase Domitian, insofar as that was possible, from what was taken as a history of glory and rightful rule.<sup>5</sup> The extent to which this was possible, even in first century Rome, should not be overstated; the reality of Domitian's rule was not, and could not be, literally removed from memory. Suetonius, after all, *wrote down* both the fact of the *damnatio* and the reasons why it was appropriate.<sup>6</sup> The goal of the *damnatio*, instead, was to make that memory shameful—to invert the respect given to the deified rulers that had studded the past of Rome and that now formed the stock of rhetorical reference points that could be used in Rome's present governance.<sup>7</sup> The *damnatio*, in short, was intended as a political statement about the future of the Roman people and that this future should emphatically not include any reference to the aberrant acts and ideas of emperors such as Domitian.<sup>8</sup>

These ideas are not obviously relevant to the discussion of international criminal law. International criminal law is often understood as fulfilling the function of offering up a place for memory, rather than for forgetting and for shame.<sup>9</sup> Instead, I want to defend the idea that one powerful justifying explanation for some forms of international criminal law is as a sort of modern-day *damnatio memoriae*, in which the memory of the acts and ideas of those who have transgressed against basic moral norms is to be extirpated from political memory. Not, I should say again, literally; the function of criminal law here is not to hide the memory of evil or the

---

2. *Id.* at 361.

3. See ERIC R. VARNER, MUTILATION AND TRANSFORMATION: DAMNATIO MEMORIAE AND ROMAN IMPERIAL PORTRAITURE 111 (2004) (summarizing Domitian's reign and the senate's decision to "abolish his memory").

4. See Suetonius, *supra* note 1, at 361; VARNER, *supra* note 3, at 111.

5. Suetonius, *supra* note 1, at 361; VARNER, *supra* note 3, at 111.

6. See Suetonius, *supra* note 1, at 356–58, 360–61.

7. See VARNER, *supra* note 3, at 2 (discussing the practice of *damnatio memoriae* and its intended purpose); see also Sarah E. Bond, Op-Ed., *Erasing the Face of History*, N.Y. TIMES, May 15, 2011, at WK8 (discussing Egypt's removal of all images of ousted president Hosni Mubarak and the historical practice of erasure in Egypt and Rome).

8. See VARNER, *supra* note 3, at 111. For a discussion of the *damnatio* and its functions, see John Pollini, 88 ART BULL. 590 (2006) (reviewing VARNER, *supra* note 3).

9. See, e.g., LUDOVIC HENNEBEL & THOMAS HOCHMANN, GENOCIDE DENIALS AND THE LAW (2011).

corrupt rationales of those who committed it. The function is, instead, to remove certain ideas and persons from the stock of received reference points that can be cited in ordinary democratic politics in the future. The goal of international criminal condemnation, on this view, is democratic in nature, and it functions by limiting the space of those ideas and references that can be put forward in public without civic shame. There are, after all, ideas and persons, events and histories, that can be cited as justifying reasons within any democratic community, and those that cannot. Lawyers cite *Brown v. Board of Education*; they tend to avoid justifying their claims with reference to *Dred Scott*. Politicians—whether left or right—find homes for their ideas in the words of Winston Churchill; comparatively fewer look for antecedents in the ideas of Neville Chamberlain. The function of the modern *damnatio* is to limit forever the stock of persons and ideas that can be put forward in a political community, by making certain persons and certain ideas damned and damnable. When international criminal law condemns criminals on this account, it does so not because the persons involved deserve to be punished—although, on the account I give here, they certainly do not deserve to be free from that punishment. Nor does it punish because such punishment will directly incentivize future would-be war criminals into rethinking their plans. International criminal law, on my account, is justified with reference to the future democratic deliberations of the political community that is to be constituted in part by the legal deliberations of that criminal tribunal. We punish, on this account, because punishment here communicates a message to future democratic participants, and that message is one of shame—of what should never again be spoken of as anything other than shameful.

It follows, on this account, that the possible explanations for why international criminal law is justified—when it is justified—might go considerably further afield than conventional accounts of the justification of punishment. The function of international criminal law, on my account, is *constitutional*, in a way that most ordinary forms of legal punishment are not. The punishment we offer in the international case is one that involves the creation, in whole or in part, of a new legal community emerging out of violence and evil. The account of international criminal law I offer here involves a justification appropriate only to this context and makes the *punitive* aspect of international criminal law only indirectly relevant. What we are doing in international criminal law is creating a new constitution—if, by this term, we include both legal

norms and the public norms surrounding how we are to use and interpret those legal norms. As such, it is open to us to question whether punishment in the ordinary sense is even a necessary part of international criminal law at all.

I will not, however, follow up this last suggestion in the present Article. For simplicity's sake, I will assume that we are discussing in the present context only one particular form of international criminal institution, the International Criminal Court (ICC). I will further assume that we understand this court to have the nature, power, and jurisdiction—both personal and subject matter—that it currently does.<sup>10</sup> I would argue that the ICC might be justified as a sort of constitutional *damnatio* in three Parts. The first will discuss two ways of looking at the court and why the conventional justifications of punishment might not be adequate to justify what the court is doing. The second will examine the issue of the politically unspeakable and argue that the court's mandate might indeed be the responsibility of making certain ideas and persons politically shameful. The final Part will try to give some justification for the claim that this mandate might give rise to a justification for the court's existence. On the account I provide here, even if the court could not be justified with reference to the traditional notions of punishment, it might not be wronging those it punishes; those who commit radical evil might have no claim to be free from being used in the constitutional process of political reconstruction. If this argument is correct, then those who are damned by the court may be legitimately used as sites on which the constitutional history of the society in question is rebuilt; they are rendered shameful, and that shame may help build a new social world in which such shameful acts and actors will not recur.

#### I. INTERNATIONAL CRIMINAL LAW AND THE JUSTIFICATION OF PUNISHMENT

There are at least two ways of justifying the practices and institutions of international criminal law. The first takes them as being continuous, in function and in justification, with domestic institutions of punishment. They may differ, of course, in their precise jurisdictional reach, or their powers, or their procedures. They are, on this view, akin in what makes them justifiable; the moral test for one applies with equal weight to the other. Call this the *continuity* view. The alternative, of course, is to think of

---

10. I will also be avoiding a discussion of the crime of aggression, which the ICC will eventually take up within its jurisdictional ambit. *See* Rome Statute of the International Criminal Court art. 5, § 2, July 17, 1998, 2187 U.N.T.S. 90 [hereinafter Rome Statute].

these institutions as radically discontinuous, in aim and in justifying rationale. What they are trying to do is sufficiently different, on this view, that we should not use theories developed to justify the one in the task of justifying the other. We can call this, naturally, the *discontinuity* view.

I will defend, of course, the discontinuity view. I want to examine the continuity view, though, and see if we can justify the ICC with reference to the same norms and ideas we use to justify domestic institutions of punishment. We should be careful here to distinguish between a conclusion that the ICC is unjustified on these norms and ideas and the conclusion that such norms and ideas are not the appropriate basis for the evaluation of the ICC. I want to remain open to the possibility that the ICC is best understood as a punishing institution much like a domestic court *and* that the ICC is right now not especially justifiable on the theories we use to justify domestic courts. Nevertheless, if we cannot justify the ICC on these theories, I believe we have at the very least some reason to look elsewhere and see if some other sorts of theories give us a better chance to show the ICC as justifiable.

So, what sorts of reasons do we generally give to justify domestic punishment? The canonical answer, of course, is to divide justifications into retributive and deterrence-based ones and then examine them both in turn.<sup>11</sup> I think this distinction is often harder to make than we tend to think; many people defend punishment with reference to future consequences for the protection of basic rights, a view that falls neither comfortably within the retributive line nor comfortably within the general description of utilitarianism and deterrence.<sup>12</sup> We can, though, use this distinction as it stands and see how able we might be to use these ideas to justify what it is that the ICC is trying to do. We can make these sorts of reasons more precise by making them describe what it is that makes the punishment rightful in each case. The retributive theory says, we punish you because you *deserve* to be punished; there exist basic rules that determine what individuals are entitled to have, and insofar as you have transgressed against those rules, so shall we rightly transgress against

---

11. See, e.g., Michele Cotton, *Back with a Vengeance: The Resilience of Retribution as an Articulated Purpose of Criminal Punishment*, 37 AM. CRIM. L. REV. 1313, 1315–17 (2000) (discussing the relationships between retribution and the utilitarian justifications of deterrence, incapacitation, and rehabilitation).

12. See, e.g., Markus Dirk Dubber, *Toward a Constitutional Law of Crime and Punishment*, 55 HASTINGS L.J. 509, 568 (2004) (discussing the “harm principle”).

those rules protecting you.<sup>13</sup> The deterrent theory, in contrast, says, we punish you for *our* protection; the future will be a better one if rules protecting our interests or rights are in place, and the existence of the pain of punishment is justified with reference to the greater protection those interests or rights shall receive.<sup>14</sup>

These thumbnail sketches are obviously subject to a great deal of interpretive detail, and different theorists will undoubtedly find much to disagree with in what I have just said. I want to avoid these discussions, though, and focus instead on whether or not we could use these broad outlines to justify international criminal law. Is it plausible to think that institutions such as the ICC are justified with reference to these ideas?

We can start by looking at retribution. The justification of the ICC would seem to be easily made with reference to retribution; those who commit radical evil, after all, have transgressed against the bodies and lives of others in a foundational way. Surely we can justify the imposition of harm against those persons with reference to the idea of some sort of reciprocity between the victim and aggressor, as retribution imagines.

There are worries, though, about the use of retributive reasoning as a justification for the ICC as an *institution*. Legal punishment, after all, is not just a matter of one individual deciding, rightly or not, to cause harm to another in the name of justice. It is, instead, done from within a *system* of rules that state collectively what may justly be done and what shall occur when these primary rules are violated. Thus, a justified retributive system must be one in which there is fairness not simply between the victim and aggressor in the process of legal punishment but between potential recipients of punishment in respect to allocation. This may prove to cause some problems before we can think of the ICC as justifiable as an instrument of retribution. In the first place, fairness between potential subjects of retribution would seem to require that like cases be treated alike. This is emphatically not the case in international criminal law. The United States, most notably, is functionally immune from international criminal procedure, both legally in virtue of its P-5 rights in the Security Council and functionally in virtue of its military supremacy.<sup>15</sup> What punishing actions the ICC has done have been uniformly directed against

---

13. See Cotton, *supra* note 11, at 1317.

14. See *id.* at 1316.

15. See Richard Dicker, *A Flawed Court in Need of Credibility*, N.Y. TIMES (May 21, 2012), <http://www.nytimes.com/2012/05/22/opinion/a-flawed-court-in-need-of-credibility.html> (discussing perceived flaws in the administration of international justice due to the dominance of some P-5 countries).

criminals from impoverished African nations.<sup>16</sup> This is not, I should emphasize, to impugn the court itself as unjustified; I do not want to say *that*. I want to say only that the court is unlikely to be easily justified with reference to the norms of fairness implicit within the idea of retribution. I would further add that the retributive ideal places the notion of systemic legal punishment within a wider framework of rights protection.<sup>17</sup> This might impugn some domestic institutions of punishment, but it outright damns the punitive practices of the international community, which exist against a backdrop of inefficient collective response to atrocity, widespread collaboration with exploitative and brutal regimes, and widespread refusal to accept any risk at all for the sake of foreign human rights protection.<sup>18</sup> On this view, we should be extremely hesitant before we seek to justify the ICC through the terms used to justify domestic legal institutions of punishment; these latter institutions tend to involve practices markedly absent from the former, and to reduce the one to the other is to risk making the ICC less justifiable than it might truly be.<sup>19</sup>

I do not want to overstate my conclusion here; it might be the case that the ICC is best viewed as an imperfect but hopeful development and that it might one day become truly justified as a retributive institution. I believe this optimism is mistaken—the advantages of the United States over the Central African Republic are unlikely to disappear any time soon—but do not want to insist on the point too strongly. I will, instead, take these difficulties as reasons to think that the ICC might be understood as doing something rather different from what domestic courts do. Before examining that, though, we might look at the issue of deterrence. Can we not justify the practices of the ICC with reference to the consequential calculus of pain and benefit? Pain is, after all, an unwelcome thing; if

---

16. Solomon Dersso, *The International Criminal Court's Africa Problem*, AL JAZEERA, <http://www.aljazeera.com/indepth/opinion/2013/06/201369851918549.html> (last modified June 11, 2013, 8:03 PM).

17. I have elsewhere defended the view that rightful punishment occurs only against a backdrop of effective police services. See Michael Blake, *International Criminal Adjudication and the Right To Punish*, 11 PUB. AFF. Q. 203, 206, 209 (1997).

18. See Michelle Kwon, *The Inefficiency of International Justice*, GEO. J. INT'L AFF. BLOG (Apr. 18, 2012), <http://journal.georgetown.edu/2012/04/18/the-inefficiency-of-international-justice-by-michelle-kwon/> (discussing the apparent lack of deterrence and rehabilitation provided through the international justice system).

19. These conclusions are echoed by Deirdre Golash, *The Justification of Punishment in the International Context*, in INTERNATIONAL CRIMINAL LAW AND PHILOSOPHY 201, 221–23 (Larry May & Zachary Hoskins eds., 2010).

threatened with pain, will the war criminals of the world not learn somewhat better behavior? If so, then the justification of the ICC might be continuous with the justification of domestic courts, at least when those courts are thought of as institutions of deterrence. Both the ICC and ordinary courts try to make the world a better place for potential victims, by making the world more uncomfortable for would-be abusers.

The difficulty with this calculation, of course, is the same thing that is difficult about any real-world calculation involving complex institutions and multiple actors: we simply do not know a great deal about the likely effects of institutions such as the ICC. This is a difference in degree, rather than in kind, from domestic law; we are also often ignorant about the effects of law, for example, the endless debates on the deterrent effects of the death penalty,<sup>20</sup> but more profoundly ignorant about the likely results of novel institutions such as the ICC. There are, moreover, reasons to think that the ability of the ICC to incentivize good behavior on the part of future war criminals is likely to be minimal at best. In the first instance, the simple fact of numbers is difficult to ignore. The ICC has, as I write this, only one conviction, and the result of that conviction has been a sentence of fourteen years.<sup>21</sup> Given the context in which many war criminals exist—a context of social and institutional breakdown, ongoing violence and atrocity, and bloody competition for power and security—it is safe to say that the worry factor of a possible indictment in The Hague may not be at the forefront of the criminal’s calculations. It is worthwhile to note that neither of the most high profile figures indicted by international tribunals—Slobodan Milošević and Muammar Gaddafi—was punished by the tribunal; Milošević died of natural causes, and Gaddafi died from violence in the street.<sup>22</sup> Potential war criminals are likely to see this trend and think—not unreasonably—that it is likely to continue.

---

20. Compare Richard B. Roper, *The Death Penalty at the Intersection of Reality and Justice*, 41 TEX. TECH L. REV. 15, 18–20, 31 (2008) (arguing that the death penalty serves as a valid deterrent), with Allan D. Johnson, Note, *The Illusory Death Penalty: Why America’s Death Penalty Process Fails To Support the Economic Theories of Criminal Sanctions and Deterrence*, 52 HASTINGS L.J. 1101, 1120–28 (2001) (arguing that the current death penalty appeals process eliminates any deterrent effect from capital punishment).

21. Thomas Escritt, *Insight: International Court’s Credibility in Dock over Failed Prosecutions*, REUTERS (Mar. 19, 2013, 9:14 AM), <http://www.reuters.com/article/2013/03/19/us-warcrimes-court-credibility-insight-idUSBRE92I0I120130319>.

22. See Prosecutor v. Muammar Mohammed Abu Minyar Gaddafi, Case No. ICC-01/11-01/11, Decision to Terminate the Case (Nov. 22, 2011), <http://www.icc-cpi.int/iccdocs/doc/doc1274559.pdf>; Kareem Fahim et al., *Qaddafi, Seized by Foes, Meets a Violent End*, N.Y. TIMES, Oct. 21, 2011, at A1; *Milosevic ‘Died of Natural Causes,’* CNN (Apr. 5, 2006), <http://www.cnn.com/2006/WORLD/europe/04/05/milosevic.death/>.



To the extent that the ICC does lead to a change in the calculation matrix of a given criminal, moreover, it is not clear that the change is one we have reason to value. Leslie Vinjamuri has argued that the threats of the ICC may make the criminal more resilient by heightening the costs of transitioning away from power.<sup>23</sup> It is not clear that such reasoning is true; Kathryn Sikkink has argued powerfully that those fears are overstated.<sup>24</sup> The main point here is that the justifiability of the ICC, on the deterrent picture discussed here, is at best undecided. We have reason to think that the precise consequences of the ICC are difficult, if not impossible, to gauge with any degree of accuracy. This means that the ultimate justification for the ICC is similarly indeterminate; we will not be able to rest easy with the institution's viability until we are aware of what changes it is actually likely to make.

All this, of course, presupposes that the deterrent function of the ICC is a function we are morally permitted to exercise. Deterrence in general, though, reflects consequentialist ideas that many—myself included—find difficult to wholeheartedly endorse.<sup>25</sup> It is one thing for us to say that the ICC actually does cause good results. It is quite another for us to think that we are permitted to achieve these results in this manner, by using violence against these persons. Imagine, for example, that the United States proposed using targeted drone strikes against suspected human rights abusers in Africa. Setting aside prudential worries about the likelihood of the drone program being done well, I suspect many of us would be worried about the legitimacy of the program's being undertaken at all. Even if it were effective, it might be impermissible as a violation of the rights of those it proposed to kill. I raise this not as a decisive objection to the deterrent theory of punishment—the theory has too much plausibility to be dispelled that easily—but because it demonstrates that efficiency in getting good results cannot be the only consideration in the justification of punishment. This means, in turn, that many of the concerns discussed above under the heading of retribution—the fairness of the system that imposes the punishment, most notably, given the disparity between the

---

23. Leslie Vinjamuri, *Peace May Require Forgoing Justice*, N.Y. TIMES, <http://www.nytimes.com/roomfordebate/2013/03/04/can-we-afford-to-forgive-atrocities/peace-may-require-forgoing-justice> (last updated Dec. 13, 2013, 11:39 AM).

24. KATHRYN SIKKINK, *THE JUSTICE CASCADE: HOW HUMAN RIGHTS PROSECUTIONS ARE CHANGING WORLD POLITICS* 26–27 (2011).

25. See, e.g., David Dolinko, “Using Persons” and the Justification of Punishment, 38 RUTGERS L. REC. 1 (2011).

United States and the Central African Republic—may recur under the heading of deterrence.

So, what to conclude? I suspect the first conclusion is that the ICC is not, right now, as easily justified as the institutions of domestic legal punishment. That may not be the most interesting of conclusions. I want to go beyond it, though, and suggest that this should not be the final word about the legitimacy of the ICC. On my view, the ICC is considerably more legitimate than the above picture might suggest. As a way of motivating this, I want to briefly examine the idea that punishment is not simply harsh treatment, given as a way of either causing good conduct or rewarding bad conduct. It does not simply *do* something. It does, instead, *say* something—it has propositional content. When we punish, we do not simply do a thing; we are, simultaneously, saying something as well.

This idea is often associated with Joel Feinberg, who identifies it as the expressive function of punishment.<sup>26</sup> On Feinberg's analysis, the institution of legal punishment does not simply involve the giving of an unwelcome consequence; many legal results, from fines to judgments in civil suits, have that character. Legal punishment in the full-blooded sense, in contrast, brings with it both the unwelcome result and the sense of public disapprobation.<sup>27</sup> To simplify things somewhat, no one believes that a parking ticket is intended to express the antipathy of the community toward the tardy parker, and no one believes that the tardy parker ought to feel shame in virtue of some such judgment. The sentence of imprisonment, in contrast, does bring with it some notion that shame is appropriate and that a judgment legitimating such shame has emerged from the process of adjudication. Even a day's worth of imprisonment, said the Supreme Court in *Robinson v. California*, was cruel and unusual as punishment for the "crime" of being an addict;<sup>28</sup> Feinberg's theory explains this with reference to the fact that there, the stigmatization associated with legal incarceration was not legitimate. Punishment, again, is not simply an unwelcome consequence but an act of speech.<sup>29</sup>

Ideas like these seem to help explain what the ICC is trying to do and why it might be right to try to do it.<sup>30</sup> The ICC, I have said, is an institution

---

26. See Joel Feinberg, *The Expressive Function of Punishment*, 49 *MONIST* 397, 400–03 (1965).

27. *Id.* at 401–02.

28. 370 U.S. 660, 667 (1962).

29. Feinberg, *supra* note 26, at 402–03.

30. Robert Sloane and David Luban express similar ideas about the function of the ICC. Luban defends the idea that the ICC should be seen as norm generating, and Sloane discusses the idea that the sentencing function of the court should be judged with reference to the expressive function of the criminal law. See David Luban, *Fairness to Rightness: Jurisdiction, Legality, and the Legitimacy of International Criminal Law*, in

that is trying to damn the memory of wrongdoers. If punishment helps in this process, then perhaps that is enough of a good reason to engage in punishment. I believe these ideas are a good place to start, but I want to be careful. I do not think the expressive function of punishment is sufficient as a justification *of punishment*. Feinberg does not think it sufficient either—he identifies this as a function of an institutional practice that must receive its justification elsewhere.<sup>31</sup> If, in other words, we have this institution in place, and if it is conventionally associated with the communication of messages, then we are able to examine these messages and these conventions to see if they are morally appropriate. It is not enough for us to say that we are able to punish because that is how we send messages. Many violent things communicate messages—from an invasion to a hate crime—and we judge them in virtue of their violence and not solely in virtue of the rightness of their messages.

So, if we want to use the idea of an expressive function for punishment, and if we want to explore this idea as a way of justifying the ICC, we still have some questions to ask. The first, and most obvious, is why we are not doing wrong in choosing a punitive message for communicating our disapproving message. Feinberg, after all, imagines a nonviolent ceremony of disavowal as a replacement for some parts of punishment; we might imagine the same for our treatment of war criminals.<sup>32</sup> The second, and more vexing, is just what message it is that international legal process is trying to communicate. To whom is the message addressed? What is the message? What, in short, does the ICC actually *say*?

I will address the former question in Part III. For now, though, I want to examine the latter question and spend some time trying to figure out how to understand the ICC as a discursive institution. We can turn, then, to the idea that there is a certain pattern of speech in any democratic

---

THE PHILOSOPHY OF INTERNATIONAL LAW 569, 576–77 (Samantha Besson & John Tasioulas eds., 2010) (discussing the value of norm generating on the international landscape); Robert D. Sloane, *The Expressive Capacity of International Punishment: The Limits of the National Law Analogy and the Potential of International Criminal Law*, 43 STAN. J. INT'L L. 39, 88–91 (2007) (arguing that international sentencing should be undergone with criminal law's expressive function in mind). I do not want here to disagree with either Sloane or Luban; I want instead to get slightly clearer on what sorts of norms we are trying to create and what sort of proposition the court is actually trying to communicate.

31. See Feinberg, *supra* note 26, at 423.

32. *Id.* at 420.

political community that is properly understood as part of that community's constitutional structure.

## II. MORAL CONSTITUTIONALISM AND THE REALM OF THE SPEAKABLE

There are limits on speech in every community. The limits are legal, in the first instance; even the United States—a comparative outlier in free speech jurisprudence—brings legal force to bear against certain forms of speech, including libel, slander, obscenity, and the like. I am not primarily concerned with these limits, interesting though they are. I am more concerned with the fact that each community has a set of ideas and concepts that can be invoked in public in the justification of political practice and a corresponding set of ideas and concepts that are anathema. The former set might be understood, without too much abuse, as extending outward from John Rawls's concept of public reason, which he describes as involving the use of certain ideas that present in the "public political culture" of a well-ordered democratic society.<sup>33</sup> Rawls's ideas here are simultaneously descriptive and normative; they seek to guide the deliberations of a just democracy existing under circumstances of reasonable pluralism, and they depend for their plausibility upon the existence of a set of ideas that could be relied upon to recognize as politically appropriate.<sup>34</sup> I am not here directly concerned with Rawls's arguments so much as I want to emphasize what Rawls did not: the existence of ideas *within* the public political culture entails the existence of some ideas that are firmly and rightly regarded as *outside* that political culture. Rawls thought some of these ideas—nonpublic reasons stemming from comprehensive doctrines and sectarian views—had appropriate places within which they should be applied.<sup>35</sup> He did not concern himself too greatly with the emotional reaction we might think reasonable to find when we encounter those reasons elsewhere. Rawls was, famously, a theorist of the reasonable. But I think it is plausible to think that one way we have of supporting Rawls's vision is to think that some ideas are not simply private but *unspeakable*—unspeakable in public and in political life. We recognize some of these reasons as being so likely to lead to the violation of basic rights and norms that the use of these ideas is rightly regarded as shameful, rather than simply a violation of the norms of public reason.

Those of us who live within democratic cultures learn the limits of the speakable, even if we feel no particular desire to say the things that are

---

33. JOHN RAWLS, *POLITICAL LIBERALISM* 7–9, 212–13 (1993).

34. *See id.* at 212–13.

35. *See id.* at 220 & n.7.

politically unspeakable. We are all aware that there are reasons and arguments that can be presented without shame, and those that cannot. It is now, for instance, much less socially acceptable to be a simple gutter racist in public than it was in the 1960s. Those people who are, in fact, racists find themselves compelled to alter at least what they say in public so that they are able to insist upon their own antipathy toward racism. This was the source, famously, of Henry Louis Gates's rejection of hate speech laws: they punish only those racists lacking enough sophistication to hide their racism.<sup>36</sup> They punish, in other words, those who are *both* racist *and* badly educated.<sup>37</sup>

I do not want to celebrate this shift as a major accomplishment; the sophisticated racist is not morally superior to the gutter bigot. But it is, politically speaking, a step forward, when arguments that simply refer to the innate inferiority of a particular part of humanity no longer count as politically viable. We are, I think, in the middle of a similar change in the area of same-sex relationships. Even as recently as the 1990s, homophobic legislation could be grounded in a simple aversion to same-sex desire. The Supreme Court's recent decision in *United States v. Windsor*, in contrast, identified simple antipathy toward homosexuals as an inadequate ground for state action.<sup>38</sup> We are not there yet, but it may soon be the case that simple gutter homophobia is as unspeakable as simple gutter racism.

Different societies, of course, have different sorts of things that are politically unspeakable, and these differences may reflect very good reasons—reasons stemming, notably, from the particular pasts that have given rise to existing wounds within those societies. We have good reason to think that what is speakable within one society—what might not be reasonable, on Rawls's tests, but what should perhaps be regarded as not worthy of scorn and marginalization—should be utter anathema within another. It is one thing for a talk radio host in New Jersey to refer to a disfavored group as human vermin; it is quite another for Valerie

---

36. Henry Louis Gates Jr., *Let Them Talk*, NEW REPUBLIC, Sept. 20 & 27, 1993, at 37, 45–46.

37. *Id.*

38. 133 S. Ct. 2675 (2013). Indeed, there were “audible gasp[s]” in the courtroom when Justice Kagan read some of the purported rational bases offered for the Defense of Marriage Act upon its passage in 1996. See Maura Dolan, *Supreme Court Likely To Strike Down DOMA, Experts Say*, L.A. TIMES (Mar. 27, 2013), <http://articles.latimes.com/2013/mar/27/local/la-me-lanow-doma-react-gay-20130327> (describing the “intake of breath” when Justice Alito described same-sex couples as “loving and committed”).

Bemeriki to do it in Rwanda.<sup>39</sup> It is, similarly, one thing for a British man to sing the praises of his nation's heroes and quite another for a man in Germany to sing the *Horst Wessel Lied*. The difference between the cases is not simply the legal effects—in the latter disjunct, in both cases, legal consequences did or would follow from the acts of speech.<sup>40</sup> The difference is, instead, that the context and history of the words make speaking them a very different thing, politically speaking. Where there is a situation in which widespread human rights abuses are possible—where, notably, it is possible because it has already happened—we have a stronger reason to use the forces of repression to anathematize and marginalize certain forms of speech. Germany after the Holocaust has made Nazi symbolism and speech criminally prohibited, but it has also created a form of social universe in which ideas redolent of Nazism are to be recognized and condemned simply in virtue of that fact. Nazi ideas are not literally unspeakable, of course—they continue to be spoken, all too often—but they are politically unspeakable, in that they cannot and will not be taken seriously as part of the ongoing process of political discourse. They are unspeakable by virtue of this fact: they will not be given the basic respect owed to the political speech acts of a fellow citizen.

With these ideas in mind, we might return to the issue of the ICC. What exactly is it that the ICC is trying to do, if it is viewed as a discursive institution? If it is trying to anathematize, to make shameful, how exactly is that to be accomplished? To answer these questions, we might return briefly to the world of Domitian. Domitian's *damnatio* was intended to remove Domitian from the world of political justification.<sup>41</sup> This was a world in which most dead Caesars could expect to dwell; former rulers became part of the set of institutions to which current rulers could appeal, both in justifying their acts to the public and in the process of political negotiation.<sup>42</sup> It is worth noting in this context that the army, which rather liked Domitian, tried unsuccessfully to have him made a god after his death; being a god was, rhetorically speaking, a way of emphasizing that Domitian's relevance should continue after his death.<sup>43</sup> The *damnatio*, I think, might be viewed as having three related elements, none of them especially sharply distinguished from each other. The first is that it seeks to remove the idea that the person damned is an

---

39. For more about Valerie Bemeriki, see Dele Olojede, *When Words Could Kill*, NEWSDAY (Long Island, N.Y.), May 4, 2004, at A37, available at 2004 WLNR 1088687.

40. See Ben Camm-Jones, *Apple Removes Nazi Anthem from German iTunes*, TECHWORLD (Jan. 28, 2011, 1:06 PM), <http://news.techworld.com/sme/3258503/apple-removes-nazi-anthem-from-german-itunes/>.

41. See VARNER, *supra* note 3, at 111.

42. *Id.*

43. See SÜETONIUS, *supra* note 1, at 361.

*authority*—someone whose ideas are worth taking seriously because that person is the one who produced them. After the *damnatio*, Domitian was not someone who could be raised within the senate as a way of giving extra weight to a particular view or policy.<sup>44</sup>

The second is that it sought to remove the idea that the damned could properly be understood as a *hero*. Roman emperors, naturally, had a lengthy afterlife as exemplars of virtue; the ones who were beloved received the same glow of approbation as is currently assigned to modern celebrities.<sup>45</sup> On this view, the *damnatio* was intended to dispel the tendency we have to think that the politically great are morally good. To say that someone was showing the political judgment of a Domitian, after the *damnatio*, meant something quite different from what it might have meant to say that someone was acting like a Caesar or a Solon.

The final thing I want to note is that the *damnatio* is intended to permanently cast a pall of disreputability over certain forms of political argument—those employed by the damned. Strictly speaking, of course, we should not engage in ad hominem evaluation of arguments; each argument should stand or fall on its merits. In practice, naturally, people are not that rational, and the fact that the despised once made an argument counts as a reason to regard that argument as presumptively worthy of being despised—think, in this connection, of Godwin’s Law, the theory that every Internet argument eventually involves comparing one’s opponent to Hitler.<sup>46</sup> After all, Domitian was not merely a doer but a figure who gave reasons for his actions, often rather complex ones involving the nature of religion and the infelicities of the Christian faith.<sup>47</sup> Eusebius records that the Christians exiled from Rome by Domitian were urged to return after his death; this was done, we might think, not because the Christians were beloved but in part because Domitian himself was so hated that his patterns of reasoning should be regarded as presumptively erroneous.<sup>48</sup>

44. See VARNER, *supra* note 3, at 2.

45. See WILLIAM E. DUNSTAN, ANCIENT ROME 317 (2011) (“[Trajan’s] reputation as the model ruler lived on down the centuries and eventually reached legendary proportions—Dante singled him out from all other non-Christian emperors for a place in Paradise . . .”).

46. *Godwin’s Law Definition*, OXFORD ENGLISH DICTIONARY, <http://www.oed.com/view/Entry/340583> (last visited Feb. 18, 2014).

47. See DUNSTAN, *supra* note 45, at 306–07.

48. See EUSEBIUS, THE HISTORY OF THE CHURCH FROM CHRIST TO CONSTANTINE 82 (Andrew Louth ed., G. A. Williamson trans., Penguin Books rev. ed. 1989) (1965).

We may leap forward now from Domitian to Thomas Lubanga Dyilo. I believe the ICC's condemnation of Lubanga has a strong similarity to these three forms of authoritative condemnation. In the first instance, the idea that Lubanga is the antithesis of a hero is rather obviously the focus of the judgment against him. In its sentencing decision, the court emphasized the gruesome nature of his crime and the innocence of the children he sent to their deaths.<sup>49</sup> This should not be a surprise; the moral depravity of a criminal is relevant to sentencing, both within domestic jurisprudence and within the ICC. What I want to suggest, though, is that the justifying purpose of the ICC here is found in precisely this communication of moral disapprobation. In domestic jurisprudence, we might think that whether or not someone watching the trial regards the defendant as heroic is largely a matter of irrelevance. Many people, for example, still write to Charles Manson; the civil society of America persists.<sup>50</sup> In the ICC, though, the communication that these acts were *not heroic*—that Lubanga sought out the most vulnerable members of his society and destroyed them for selfish gain—seems to be the best way of justifying the enterprise itself. The ICC is trying, through what it says and the meaning of what it does, to send the message that Lubanga is not just worthy of being punished by the court but worthy of being seen as contemptible by his own society.

I think similar things might be said about the other two aspects of the *damnatio* I have identified. The ICC's decisions emphasized that Lubanga was, in fact, a reasonable being.<sup>51</sup> In the ICC's conviction, the court depicted Lubanga as a political leader who built a thriving party with a platform he personally helped create.<sup>52</sup> This emphasis is not simply to make the case that Lubanga was no victim of circumstance. Instead, it is to emphasize that Lubanga himself was a figure who used reason, and who used it badly. As such, we have reason to think that the specific ways in which he argued—the justifications he offered for warfare and for his decisions within warfare—are arguments we ought to regard as shameful, presumptively not just wrong but evil. Indeed, the ICC does try to delegitimize Lubanga as both a model for political agency and a provider of political reasons. He is neither hero nor authority; instead, reasons he

---

49. See Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06, Decision on Sentence, ¶¶ 36–50, 57–78 (July 10, 2012), <http://www.icc-cpi.int/iccdocs/doc/doc1438370.pdf>.

50. David Macaray, *Charles Manson and Me*, HUFFINGTON POST CRIME BLOG (Oct. 4, 2011, 5:55 PM), [http://www.huffingtonpost.com/david-macaray/charles-manson-and-me\\_b\\_994638.html](http://www.huffingtonpost.com/david-macaray/charles-manson-and-me_b_994638.html).

51. See *Lubanga*, Case No. ICC-01/04-01/06, ¶¶ 54–56.

52. Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06, Judgment, ¶ 1356 (Mar. 14, 2012), <http://www.icc-cpi.int/iccdocs/doc/doc1379838.pdf>.



provided for political action should be removed from the world of respectable political speech.

That, I think, is the message that the court is trying to send. Of course, it is true that domestic courts say similar things. I believe, however, that the difference is that domestic courts rightly regard this sort of discursive practice as an element added to an independently justified practice of legitimate punishment. We punish, that is, because it is right to do so, and if that punishment communicates what ought to be communicated to others, then so much the better. If not—if no message can be communicated, for example, because a desert island society is about to dissolve—then we should not worry. The expressive function of punishment is a means by which domestic societies might make themselves better off, by using an already-justified practice for purposes of social reprobation. Internationally, in contrast, I think this is in fact the best story we have about why these institutions ought to be set up. This is, again, a theory of *discontinuity*; despite the similar appearance of the two forms of practice, they are justified in rather different ways. The purpose of the punishment of Lubanga, on this view, is not to give Lubanga what he deserves; to be blunt, no human institution could do that. Nor is the purpose to directly incentivize good behavior by imposing a sort of tax on future wrongdoers. Lubanga was not effectively deterred by the existence of the ICC, and it seems to be quite unlikely that future Lubangas will face a different set of incentives. The ICC is speaking neither to Lubanga nor to those who might choose to emulate him. Instead, it is seeking to create a new form of constitutional community—a constitution, again, that is as much a matter of shared political will as of legal institutions. This community is defined, as all are, by a set of heroes and reasons and arguments that can be appealed to in public political discourse. The ICC is best justified, on this view, as a way of setting limits to this discourse after the radical failure of that community to follow the dictates of morality. The ICC is, again, a thoroughly political institution, not political in the discreditable sense—despite the criticisms I offer above; the ICC is not to be dismissed as parochial—but political in that its proper target is the creation of a new political community.<sup>53</sup>

---

53. Scott Shapiro and Michael Ramsey have both pressed upon me the idea that the ICC might be justified as a sort of precommitment strategy: the ICC forces signatory states to commit to the punishment of those who violate human rights, and the ICC's most basic threat is to take over that punishing function if the state drags its feet. This is undoubtedly true, but I believe the best explanation of the ICC must make reference to

Is this analysis plausible when deployed as a justification for the ICC? Whether it is depends upon factual arguments I have no way of making; I am not an empirical scholar, and I try to avoid pretending to be one. I do have to say that I find it not obviously implausible and believe there is some minimal amount of evidence from history that might give us reason to accept it. Compare, for instance, the reaction of Germany and Japan to the recognition of atrocity following the Second World War. The denazification process was wide ranging within Germany and included both legal trials against individual Germans and the extirpation of Nazi symbols and ideas from German social life.<sup>54</sup> Germany has made Holocaust denial unspeakable, both legally and morally; the legal concept of *volksverhetzung* has made Nazi ideas legally condemnable under some circumstances,<sup>55</sup> but the trials at Nuremberg began a more broad social process making such ideas socially monstrous as well.<sup>56</sup> To diminish the moral depravity of the Holocaust in modern Germany is to make oneself unworthy of engagement as a political agent.

Japan, in contrast, has proven to be more resistant to the recognition of the atrocities occurring during the occupation of Manchuria. Social attitudes toward past atrocities are complex, but the idea that such atrocities are potentially defensible is a live one within Japanese political culture. A Japanese mayor made headlines in May 2013 for defending the sexual slavery of Korean women during the Second World War; such practices, he said, were necessary for military discipline.<sup>57</sup> To be fair, there was some outrage at this statement, both at home and abroad, and we may be heartened by this fact.<sup>58</sup> We should, however, be equally dismayed that the statement was made at all.

---

what it is that the court *does*; why is the court allowed to punish individual people? What does it hope to gain by doing so? If the ICC were simply a treaty that authorized harsh treatment against states that were unable or unwilling to punish their own, we might have been satisfied with any number of ways in which this harsh treatment might be doled out. The use of criminal procedure against individual lawbreakers would be one of any number of possible ways of prompting states to do their jobs. I believe, even if we conceive of the ICC as a precommitment strategy, we ought to conceive of the court as a body that uses legal norms against individual persons and see what reason that court might have for doing so.

54. See, e.g., FREDERICK TAYLOR, *EXORCISING HITLER: THE OCCUPATION AND DENAZIFICATION OF GERMANY* (2011).

55. See STRAFGESETZBUCH [STGB] [PENAL CODE], Nov. 13, 1998, Bundesgesetzblatt [BGBL.] 3322, as amended, § 130(4) (Ger.).

56. See generally TAYLOR, *supra* note 54 (chronicling the postwar occupation and denazification of Germany).

57. See Hiroko Tabuchi, *Women Sent to Brothels Aided Japan, Mayor Says*, N.Y. TIMES, May 14, 2013, at A7.

58. *Id.*

It is difficult, if not impossible, to say why this difference between Japan and Germany should have emerged. One factor might be the comparative weight placed by the Allies upon the Nuremberg tribunal, rather than upon the International Military Tribunal for the Far East.<sup>59</sup> These latter trials also included a comparatively greater grant of sovereign immunity; notably, the emperor and his family were entirely free from any threat of prosecution.<sup>60</sup> There was, perhaps, more cynicism in the conduct of these trials, as well; Shiro Ishii, responsible for vivisection and other human experimentation at the covert Japanese military biowarfare research program Unit 731, was allowed to go free in exchange for the medical data his torture had produced.<sup>61</sup> I think it at least plausible that an international trial, properly conducted, may have the effect of producing the right sort of shame following evil by marginalizing and shaming those who perpetrated the worst of it. I also believe, though I acknowledge I am not able to adequately ground my contention, that Nuremberg had some part to play in setting the framework for what can and cannot be said in modern Germany. As a final point, I am convinced that if we want to justify the ICC, we have reason to look to this sort of function, rather than to more traditional conceptions of punishment.<sup>62</sup>

All of this is to say only that the ICC might have a role to play in setting the stage for modern democratic states to emerge after atrocity. We might worry that this ignores the central concern about punitive institutions: whether they have the right to punish at all. What I propose here is that the ICC is properly understood as a sort of discursive institution, justified with reference to its ability to create a democratic community. What this might seem to obscure is the fact that this discourse involves

---

59. See MADOKA FUTAMURA, WAR CRIMES TRIBUNALS AND TRANSITIONAL JUSTICE: THE TOKYO TRIAL AND THE NUREMBERG LEGACY 8–11 (2008).

60. See *id.* at 63, 121.

61. See DANIEL BARENBLATT, A PLAGUE UPON HUMANITY: THE SECRET GENOCIDE OF AXIS JAPAN'S GERM WARFARE OPERATION 207, 210–11, 223 (2004); Nicholas D. Kristof, *Japan Confronting Gruesome War Atrocity*, N.Y. TIMES, Mar. 17, 1995, at A1.

62. I would also be cautious before asserting that the approach I offer here is the only way in which these institutions might be justified; it is always possible that some other sorts of considerations—perhaps, the need to acknowledge the drive for vengeance while minimizing the damage that drive creates—might also be invoked in justification of the ICC. I am skeptical about the ability of such ideas to ground the court as it exists, but I do not here try to argue that these ideas could not do the job. I am grateful to Don Dripps for discussion of this point.

putting people like Lubanga in jail—in his case, for fourteen years.<sup>63</sup> What right do we have to do that? Is this not simply another case of using people for the benefits of others? It is to these worries that I will now turn.

### III. RADICAL EVIL AND POLITICAL SOCIETY

The worry I have identified above is a powerful one. Those of us who are deontic thinkers tend to worry about deterrence-based theories of punishment precisely because they tend to justify causing harm to some with reference to the benefits given to others. Rawls's criticism of utilitarianism began with just this fact: utilitarians cannot take seriously the separateness of persons and therefore cannot accept the moral inviolability of the individual.<sup>64</sup> I do not mean to contravene this fact. Indeed, in the area of domestic punishment, I accept that we cannot justify causing harm to one simply with reference to the greater well-being of another. What can we say, then, about the legitimacy of using Lubanga's person as a way of making a constitutional point?

There are two things I want to emphasize here about why this might not be as morally problematic as it might at first seem. The first is the transitional context in which this punishment is occurring; the second is the notion that radical evil might give rise, in this context, to legitimate forms of rights forfeiture. These two ideas are deeply related, but I will try to discuss them separately.

We can begin with the idea that the punishment of Lubanga is occurring within a context of transitional justice—transitional between the absence of legitimate government institutions and their presence. This is an inevitable part of the ICC's mandate; it has no role to play when government institutions are able and willing to do their job. It is not allowed, for example, to simply take over an existing set of legitimate institutions because it might do the job they do better.<sup>65</sup> This fact is hardly news; we are aware that the place within which the ICC acts must necessarily be one in which the institutions of government have been absent. What I want to emphasize, though, is that the idea of transition has two sides. The first is that we are transitioning toward just governance. The second is that we are transitioning away from anarchy and lawlessness and importantly, that we have not yet in fact entirely escaped from those circumstances. I do not want to oversell the claim; I

---

63. See Marlise Simons, *Congolese Warlord Draws First Sentence from International Criminal Court*, N.Y. TIMES, July 11, 2012, at A4.

64. JOHN RAWLS, *A THEORY OF JUSTICE* 27–29 (1971).

65. See Rome Statute, *supra* note 10, art. 5, § 1.

do not think that the ICC always acts against a backdrop of pure anarchy. Very few places, however badly run, have ever had that character. But, insofar as it is acting after atrocity and in place of weak institutions that are insufficient to defend the domestic rule of law, the ICC is involved in acting against a backdrop in which those domestic institutions are anemic and ineffectual at best. I think it is important to recognize that where there is the absence of such governing institutions, we may have the right to do to people's bodies what we would not ordinarily be able to consider doing. After all, just war theory presupposes that there is a difference in what we can do to people during warfare and what we can do to them while in a state of civil society.<sup>66</sup> Indeed, although this is somewhat controversial, it seems true that those who are war criminals might in fact be justly subject to forms of violence we could not even conceive of accepting as part of civil society—including the imposition of a violent death without due process. Secretary of the Treasury Henry Morgenthau believed that the appropriate response to the Nazi hierarchy was summary execution.<sup>67</sup> Although I believe we have all benefitted from the existence of the Nuremberg tribunals, I do not think Morgenthau was mistaken in his belief that such execution would have been no moral wrong against those executed.<sup>68</sup> The simple fact is that warfare is different and that the ways in which people must treat each other may be different as well. When it acts to transition away from war, the ICC still acts with one foot in the rules and practices of modern warfare. It is setting up a constitutional system, not acting within one. As such, it is possibly true that those who—like Lubanga—are to be used to make a political point have no particular right to be free from such treatment.

To be clear, I do not want to make the case that people like Lubanga have no rights. They have the same moral rights as all persons. But I do want to emphasize that there is a difference between the rights we are morally entitled to expect within a domestic political system and the

---

66. See generally ROBERT W. TUCKER, *THE JUST WAR: A STUDY IN CONTEMPORARY AMERICAN DOCTRINE* (1960) (discussing justifications for the use of force).

67. The "Morgenthau plan" went beyond simply the summary execution of the Nazi leadership and entailed the permanent destruction of Germany as a military or industrial power. GARY JONATHAN BASS, *STAY THE HAND OF VENGEANCE: THE POLITICS OF WAR CRIMES TRIBUNALS* 151, 157 (2000).

68. See *id.* at 152 ("Morgenthau spent much of 1944 bombarding the White House with proposals for harsh treatment of Germany after the war—part and parcel of which was the summary execution of many Nazi war criminals. He had no patience for plodding legalism. His justice was to be swift and terrible.").

comparatively thin rights we have under international human rights law. Those who transgress against domestic law may have a right, by virtue of their status as objects of that complex system of laws, to be treated as equal in comparison to other persons coerced by that law; they may have a strong moral right to be treated in ways that do not depend upon a showing of benefits to others. Those who transgress against international law, in contrast, violate those norms that are themselves definitive of what can count as a legitimate system of domestic law.<sup>69</sup> They do, insofar as it is within their power, act to bring us back to a system of war. We may be allowed to use tools and ideas within war that would not be acceptable within a system of domestic law. We should not pretend, in other words, that the ICC is acting against a backdrop akin to that of the domestic legal system; the ICC acts only when that most basic set of moral guarantees has ceased to exist and thus acts only when the world has returned to war.<sup>70</sup> We should not think that those who act to bring us out of war are obligated to act as if they have already done so; we cannot confuse the moment of founding with the rules that hold sway after that founding. To use Arthur Applbaum's pithy saying, "All foundings are forced."<sup>71</sup> This fact may permit us to use Lubanga in a manner that we could not imagine for even the most heinous domestic criminal.

This brings us to the second aspect of international criminal law worth examining. Those who are punished under the ICC have committed acts that are best described as morally shocking—not simply illegal or worthy of condemnation, but radically evil. It is possible for us to think that such people—who have systematically rejected and ignored the human dignity of others—no longer have the right to morally reject the sorts of treatment I imagine here. They would be, at the very least, caught in a sort of performative contradiction; in protesting their treatment, they insist upon a principle—the moral relevance of humanity—that they themselves have consistently refused to uphold. I want to be very careful here; I do not think that ideas like this license us in treating those we punish in domestic law as having forfeited their right to treatment as a moral equal. This is the case domestically because the institutions are trying to *punish*, which involves the attempt to do something that—on the retributive view at least—involves treating the criminal as a moral agent entitled to

---

69. For a justification of this way of looking at international law, see ANNA STILZ, *LIBERAL LOYALTY: FREEDOM, OBLIGATION, AND THE STATE* (2011).

70. See *supra* note 65 and accompanying text.

71. Arthur Isak Applbaum, *Forcing a People To Be Free*, 35 PHIL. & PUB. AFF. 359, 400 (2007).

equality.<sup>72</sup> It is also worth noting, I think, that domestic legal institutions—in a stable democratic state—can *survive* treating even the worst persons with respect. Internationally, though, we might think that the ICC is doing something that necessarily involves justifying harsh treatment with reference toward the good of some future political community, in which the criminal may not indeed have any part. If this is permissible, it might be because the criminal in question has committed acts of a character sufficient to thoroughly lose the right to be free from being so used. Christopher Heath Wellman has recently proposed this as a picture of punishment more generally; on this analysis, punishment is permissible in virtue of the rights the criminal has forfeited by his choice to act within crime.<sup>73</sup> I am not confident that I accept this as a picture of domestic punishment—I am also not confident I do not—but I do think that it seems a plausible picture of how we might understand why we are morally permitted to put Lubanga in jail. Lubanga, after all, is not being punished as part of an ongoing system of legal punishment, defended by a domestic state as part of its process of self-rule. He is, instead, engaging in an illegitimate act of war. When Lubanga acts against the most basic norms of international law and undermines the rights that individuals have under those norms, he removes from himself the right to complain when we use force against him. If we use that force as part of the process of building a new society, in which Lubanga and those who would follow him have no part, he has no complaint against us.<sup>74</sup>

These ideas are jarring. Most of us recoil from the idea that we might punish some with a view toward the edification of others. I would note, however, that nothing in what I have said here allows us to go further than what the ICC is currently doing in seeking to impose punishment upon individuals only after a fair trial. Nothing in these ideas allows us to engage in punishment against the innocent; only in actually committing a crime against the basic rights of others does an individual become a legitimate subject of punishment, and the criminal trial is required for us

---

72. E.g., Dan Markel, *Executing Retributivism: Panetti and the Future of the Eighth Amendment*, 103 NW. U. L. REV. 1163, 1184 (2009).

73. See Christopher Heath Wellman, *The Rights Forfeiture Theory of Punishment*, 122 ETHICS 371, 371–76 (2012).

74. Lori Watson pointed out that part of the process might involve the testimony of the victims of such abusers as part of the process of extirpation; I have focused on the role of the accused and of the institution of the court itself, but I agree with Watson that the voice of the victim might be a valuable part of the process of rebuilding a social world in which such victimization does not occur.

to be confident in our belief that this individual is legally and factually guilty. Moreover, the ICC is duty bound to demonstrate what the rule of law looks like so as to create a model by which the rule of law might be created. I have said here that the ICC is justified, in part, because it acts within a context in which law has ceased to hold.<sup>75</sup> However, nothing in that context permits the court to act contrary to the morality of individual rights that animates law itself. The court may not be justified with reference to the same ideas that justify domestic courts. It should, however, hold itself to similar standards of procedural and substantive fairness.

All of this is necessarily a rough sketch, but I hope it might suffice to give some plausibility to the idea that the ICC's best justification might have very little to do with punishment as ordinarily understood. If punishment is justified in the ways we ordinarily try to justify it, the ICC may not have much to recommend it. If we think of the ICC instead as a form of constitutional act—as the use of the language and procedure of modern legal punishment in service of the constitutional project—then the ICC may be better equipped to present itself as justifiable. The ICC, on this analysis, sets out the future of a society after atrocity by seeking to invoke the shame that is conventionally associated with punishment in service of the constitutional project. For domestic courts, it is the sentence and harsh treatment that make punishment what it is. For the ICC, I suggest, the most important part of the process is the verdict itself. What matters most, morally speaking, is not that bad people have a bad time but that such bad people are forever damned as unworthy of admiration and emulation.

What could we take away from these ideas? I will conclude with only two ideas that might emerge from this Article. The first is that the ICC is justified, if it is, with reference to what is likely to emerge from it. The justification I offer here is sufficient to justify the ICC only if the ICC and institutions like it actually are able to marginalize and stigmatize those who are evil. What evidence there is about this proposition is sketchy. It is disheartening to see that William Ruto, recently elected as Kenya's Deputy President, was able to use his ICC indictment as a form of credentialing.<sup>76</sup> This suggests, I think, that the ICC should be extremely careful in how it presents itself. If we are seeking to engage in punishment as we ordinarily understand it, we have some prudential reason to avoid triumphalism, be modest in our claims, and so on. If our goal is instead the creation of a constitutional project, we have a much stronger moral reason to be careful about how much we think we can do. Those who

---

75. See *supra* note 65 and accompanying text.

76. See Ngugi wa Thiong'o, *A Dictator's Last Laugh*, N.Y. TIMES, Mar. 15, 2013, at A25.



are punished by an international body will be stigmatized only if those within their society accept that body's right to stigmatize. This suggests that the ICC should be careful about overreaching. Even if it were not already jurisdictionally limited in its ability to replace the deliberations of domestic political societies, it would have a strong moral reason to avoid replacing such deliberations. A principle of subsidiarity, in other words, seems defensible not just legally but morally.

This leads me to my final point: we should resist the idea that the ICC is a court like any other court. Indeed, this has been what I have been trying to establish all along. What I want to say here is that the discontinuity between the ICC and other courts should be sufficient to make us think that the ICC is best understood as something genuinely extraordinary. We should not be misled by the superficial similarity between the ICC and other forms of legal institutions. The ICC is, on my analysis, something that exists only when domestic law fails. In other words, it is best understood as having relevance only under circumstances of moral catastrophe. There is some controversy between different scholars as to the ambitions that the ICC should eventually have; should it limit itself to the core human abuses, or should it try to become something grander?<sup>77</sup> I believe we are right to regard the ICC as something much more like an emergency response to an emergency situation; it is not a domestic court writ large but something more like a standing army—an institution ready and waiting for the tragic circumstances in which its powers become relevant. I cannot defend this conclusion here. I think what I have said, though, may give us reason to think that the ICC involves doing things—and saying things through that doing—that are genuinely extraordinary and that should not be regarded as the simple international extension of domestic law. Once again, though, I cannot defend such conclusions; I will close simply by reasserting them. The ICC, as I understand it, may be best justified with reference to the ways in which it reshapes the future of a domestic society. An international criminal court understood in such a manner might be more modest in how much it thinks it can accomplish; it might also, however, be more justifiable than it would be if read as a simple institution of legal punishment.

---

77. I am grateful to Jamie Mayerfeld for discussion of these issues, even though he would not likely agree with the conclusions.

