1-1-2010

Working the System: A Comment on Andre Nollkaemper's System Criminality in International Law

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I. Introduction

André Nollkaemper’s impressive essay, System Criminality in International Law,¹ raises important questions about the role of—and the relationship between—principles of international criminal law and principles of the law of state responsibility in addressing conduct that violates some of our most deeply held values. He has made a substantial contribution to our thinking about the legal concepts that best apply in situations of mass atrocities or widespread human rights abuses. In this short Comment, I seek not so much to address specific claims Professor Nollkaemper has advanced, but rather to reflect on some of the general issues that his provocative essay raises.

II. Why (System) Criminality?

Professor Nollkaemper’s essay lays out, with great conceptual clarity, the phenomenon of “system criminality.” What I would like to consider in this Comment is whether there are any compelling justifications—in either conceptual, instrumental, or normative terms—for designating a system under which

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widespread crimes occur as “criminal,” as opposed to one subject to the normal rules of state responsibility. In other words, I want to explore whether the idea of system criminality does any useful work. In this regard, I make three claims about the idea of system criminality in the international context. First, I suggest that in the international system, there is no real conceptual justification for invoking the concept of “criminality,” as opposed to “responsibility,” at least in the context of the behavior of states. Second, I argue that the concept of system criminality is unlikely to provide many advantages—in either instrumental or norm expression terms—over the more traditional combination of individual criminal responsibility rules for persons operating in conjunction with state responsibility rules for states. In instrumental terms, the system criminality concept does not bring with it many additional tools that would help us halt the underlying criminal behavior. As an expressive matter, it may be doubtful whether the norms articulated by the international community can supplant the norms prevailing with a country characterized by system criminality. Third, I suggest that there may be affirmative drawbacks, from an instrumental perspective, in applying the concept of system criminality to entities such as states.

A. The conceptual basis?

Let me begin by asking why, as a conceptual matter, we would seek to designate violations of international humanitarian law or other universal norms by a state as “criminal,” rather than as “mere” breaches of state responsibility. The analogy between criminal and civil liability in the domestic context—at least in the United States—is an interesting point of departure for thinking about this in the international context. Under U.S. law, virtually any serious criminal act perpetrated against a victim will also constitute a breach of a civil law obligation. The crime of murder, for instance, is also the tort of wrongful death. The crime of rape is the tort of assault. The crime of theft is the tort of conversion. Although the notion of “crime”—as opposed to “tort”—traces its origins to the consolidation of the modern state and theological concerns, contemporary jurisprudence distinguishes crime and from tort essentially on the basis of whose interest the application of the

2. CHARLES W. THOMAS & DONNA M. BISHOP, CRIMINAL LAW: UNDERSTANDING BASIC PRINCIPLES 19 (1987) (describing the development of the state’s interest in crime, which supplanted a regime in which “[a]ll injuries seem to have been viewed as private, amenable wrongs”).

3. Id. at 41 (noting the historical connection “between the concepts of crime and sin” based largely on the role of ecclesiastical courts).
legal rule is meant to protect. In the case of a tort, the law serves to redress injury suffered by the particular victim of an illegal act. In the case of a crime, in contrast, the interests affirmed are not merely those of the victim, but more broadly the state, or the entire community. In particular, criminalizing conduct and punishing offenders serves a regulatory function and contributes instrumentally—at least in theory—to public order through deterrence and the incapacitation and rehabilitation of offenders. Criminalizing conduct also serves the important public function of expressing and affirming societal norms, in a way that the provision of traditional private tort remedies to a victim does not.

In international law, traditional notions of state responsibility serve largely the same function that civil law serves in the domestic context. To the extent traditional legal norms involve reciprocal exchanges between states, the purpose of the law of state responsibility is to provide redress for the “injured state” that has been harmed by a breach. If the United States, for example, imposes unlawful tariffs on Japanese steel products, the international law of state responsibility provides a mechanism by which Japan can demand cessation of the violation of its rights and can seek reparation for the harm it has suffered. There is no justification for applying the concept of criminality to such a breach—even though, of course, a breach of this kind is as much the product of collective or systemic decision-making and implementation by the government as would be the case with an ethnic cleansing campaign entailing the commission of crimes against humanity.

The conduct with which Professor Nollkaemper’s essay is concerned, however, differs from traditional breaches of international law. To the extent these offenses are erga omnes obligations, the international law of state responsibility already serves the “public” functions that criminal law does in the domestic context. The prohibitions on the perpetration of genocide, war crimes, or crimes against humanity are intended not only to protect the interests of the particular victims of

4. WAYNE R. LAFAYE, CRIMINAL LAW 15 (4th ed. 2003) (explaining that “[t]he aim of criminal law . . . is to protect the public against harm,” while the function of tort law is “to compensate someone who is injured for the harm he has suffered”).
5. Id. at 27-29 (discussing restraint, rehabilitation, and deterrence as theories underlying criminal punishment).
6. Id. at 29 (describing the theory under which “criminal punishment serves, by the publicity which attends the trial, conviction and punishment of criminals, to educated the public as to the proper distinctions between good conduct and bad conduct—distinctions which, when known, most of society will observe”).
those acts, but rather the interests of the international community as a whole.\footnote{Jonathan I. Charney, Progress in International Criminal Law?, 93 Am. J. Int'l L. 452, 459 (1999).} As is demonstrated by the kinds of collective measures Professor Nollkaemper identifies in his paper as potential tools the international community may use to suppress violations of these norms\footnote{Nollkaemper, supra note 1, at 335.}—e.g., sanctions such as those imposed against the apartheid regime in South Africa, the collective security responses of the kind that have been authorized in the Cote d'Ivoire and the Sudan, and perhaps even unilateral humanitarian intervention of the Kosovo variety—the international law of state responsibility already has the potential to serve the public order and governance functions that criminal law does in the domestic context. Additionally, \textit{erga omnes} norms prohibiting serious violations of international humanitarian law—like domestic criminal sanctions—express the norms or values of the international community.\footnote{In the words of the Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia, punishment for international crimes "should make plain the condemnation of the international community of the behaviour in question" and should be seen as "expressing the outrage of the international community at these crimes." Prosecutor v. Aleksovski, Case No. IT-95-14/1-A, Judgment, ¶ 185 (Mar. 24, 2000).} Under the circumstances, the conceptual justification for treating system criminality as criminal—and not "merely" a breach of state responsibility—is unclear.

\textbf{B. The instrumental benefits?}

Let me now turn from the conceptual to the instrumental realm. Here, I suggest that at least some of the regulatory tools aimed at suppressing illegal conduct that might flow from the designation of conduct as "criminal" may not function well in the context of system criminality. I again start by drawing some insights from the domestic context about the regulatory role that criminal law can play, and then highlight the limited utility of extending the concept of system criminality to the international realm.

\section*{1. The domestic context}

In the domestic law context—at least in the United States—addressing the breach of a legal norm through the criminal sanction, as opposed to civil liability, brings with it important instrumental advantages. The criminal sanction opens up a more expansive tool kit for state officials who seek to fundamentally alter the structure, or even the existence, of an entity that has committed "system"
violations. This can be seen most clearly in the context of the criminal prosecution of corporations for violations of the law. In recent years, the federal government has become more aggressive in pursuing criminal indictments against corporations for violations of the law. The use of the criminal justice mechanism unquestionably provides the government with a broader range of remedial tools than would ordinarily result through civil proceedings, where the normal remedy for the breach of a legal norm would be the payment of money damages.

First in this regard, a criminal indictment against a corporation may result in the dissolution of the firm in question. In 2002, for instance, Arthur Andersen, one of the “Big Five” American accounting firms, was criminally prosecuted for obstruction of justice in connection with the Enron scandal. After being convicted, Arthur Andersen surrendered its licenses to practice as certified public accountants, which was essentially the “death penalty” for the firm.

Second, the presence or threat of criminal indictment of a corporation is often used as leverage by the government to compel cooperation that will make it easier to criminally prosecute the most culpable individual employees of the corporation.

Third, the federal sentencing guidelines authorize a court to impose expansive remedies against a corporation convicted of a crime. The court may, as part of the sentencing process, require the corporation to create a detailed “compliance and ethics program” that “will be “effective in preventing and detecting criminal conduct.” Sentencing courts can subject a convicted corporation to a probationary period to monitor its progress in setting up a suitable compliance program. In addition, the court can require the corporation to create a trust fund sufficient to address expected future harm, or to impose on the corporation “community

14. Erik Paulsen, Imposing Limits on Prosecutorial Discretion in Corporate Prosecution Agreements, 82 N.Y.U. L. REV. 1434, 1457-1458 (2007) (explaining that corporate cooperation generated by deferred prosecution agreements—in the form of admitting liability, identifying perpetrators of criminal conduct, and occasionally waiving privileges to internal documents and investigations—can be invaluable in prosecuting cases against individuals).
16. Id. § 8D1.4(c).
17. Id. § 8B1.2(b).
service” that is “reasonably designed to repair the harm caused by the offense.”

Perhaps my favorite authority in this regard is the ability of the court to “order the
organization, at its expense and in the format and media specified by the court, to
publicize the nature of the offense committed, the fact of conviction, the nature of
the punishment imposed, and the steps that will be taken to prevent the recurrence
of similar offenses.”

2. The international context

But when we shift to the international context, it is doubtful that conceiving of
collective conduct as “criminal” similarly expands the set of remedies available to
halt and prevent recurrence of the offending conduct. With respect to the first
enhanced benefit of using the criminal law paradigm in the domestic context, there
is no international analogue to ordering the dissolution of a criminal corporation. It
is simply not possible to dissolve or negate the existence of a state, even if it
exhibits system criminality.

Second, there seems to be little hope that identifying the systemic criminality in
a state can be utilized as a tool to facilitate the conviction of individual criminals.
The variety of interested stakeholders and actors with a voice in the governance of
a corporation (including directors, shareholders, and employees) is often more
diverse than is the case for a state, especially a state that exhibits the characteristics
of system criminality. Indeed, I suspect that the designation of a state as criminal,
rather than encouraging the state to aid in securing the conviction of individual
actors in that state, is more likely to foster resistance to criminal prosecution of
individual perpetrators.

Third, might the enhanced remedies that flow from the use of the criminal
paradigm in the domestic context justify applying the notion of criminality to
systems in the international realm? Professor Nollkaemper has identified
instructive examples of the kinds of structural remedies that can be imagined in
response to the commission of international crimes; this is a real contribution of
his essay. But I question whether it is necessary to think in terms of criminality in
order to avail ourselves of this expanded set of remedies. We have seen the
international system employ remedies going well beyond the traditional forms of
restitution and compensation to address violations of rules of state responsibility

18. Id. § 8B1.3.
19. Id. § 8D1.4(a).
20. I explore this notion further in Section III, see infra pp. 361-63.
that do not constitute international crimes. In the case of the Iranian nuclear crisis, for instance, the Security Council has demanded that Iran halt its uranium enrichment program and accept International Atomic Energy Agency inspections in accordance with the terms of an Additional Protocol to which Iran is not a party, even though no international crimes have been committed. In the case of North Korea, the Council has gone perhaps further, obligating North Korea to “retract its announcement of withdrawal” from the Nuclear Nonproliferation Treaty. Security Council Resolution 1540 further demonstrates the broad capacity of the international system to assert extensive remedial—and even preventive—powers. It obligates states to “adopt and enforce appropriate effective laws which prohibit any non-State actor” from acquiring or using weapons of mass destruction.

Additionally, the Security Council has conferred extensive regulatory, governance, and state-building authorities on the many transitional administrative authorities it has established, beginning with the U.N. Transitional Authority in Cambodia (UNTAC), the mandate of which included authorities relating to human rights, the organization and conduct of free and fair general elections, military structures, civil administration, the maintenance of law and order, the repatriation and resettlement of Cambodian refugees and displaced persons, and the rehabilitation of essential Cambodian infrastructure during the transitional period.

Two important caveats are important here, at least with respect to the remedies that can be imposed by the Security Council. First, as Professor Nollkaemper rightly points out, this broad range of remedial or regulatory capacities is not available to states acting unilaterally, but depends upon the exercise of the Security Council’s Chapter VII powers. Second, the Council’s powers are not available in all cases, but only where the Council determines that there has been an act of aggression, a breach of the peace, or a threat to international peace and security. The key point for my purposes, however, is that the availability of such broad remedies is not necessarily contingent upon the identification of system criminality in the target state.

C. Normative benefits?

Instrumental considerations may not be the only justifications for utilizing the criminal paradigm to address situations of systemic crimes. As noted above, the use of the criminal justice sanction, apart from unleashing an expanded prosecutorial tool kit, is also said to serve the powerful goal of reinforcing societal norms against the proscribed conduct.

But here, too, I think the value of the criminal paradigm is limited. As Professor Nollkaemper’s essay notes, a feature of system criminality—where the commission of crimes is pervasive in the system—is that individual crimes are not seen as violating the norms prevailing in that community; the commission of crimes is rather seen as being in conformity with the prevailing norms. The notion of system criminality, however, seems no more likely to alter this situation than does the state responsibility regime. That is because the relevant normative discourses—the one taking place within the society in question and the one taking place in the international community—are being held within different communities. The affirmation of norms against atrocities through the use of the criminal sanction is unlikely to change the prevailing normative culture within the society in question. If it could, what we might characterize as systemic deviance from global norms would presumably never have emerged in the affected society in the first place.

Research by the social psychologist Robert Cialdini and others on the role of social influence on behavior demonstrates not only that individual behavior is susceptible to outside influence, as Professor Nollkaemper observes, but also that “an individual occupying a given social space will be more likely to conform to the attitudes, beliefs, and behavioral propensities exhibited by the local numerical majority than by either the local numerical minority or less proximate persons.” Because members of more proximate “clusters” reinforce one another’s norms, it is unlikely that a social outgroup—like the international community—can serve to change the beliefs shared by a the local community in a state that exhibits system criminality.

27. Robert B. Cialdini & Noah J. Goldstein, Social Influence: Compliance and Conformity, 55 ANN. REV. PSYCHOL. 591, 608 (2004) (citation omitted) (emphasis added); see also id. at 613 (noting that individuals subjected to deindividuation procedures “instead conformed their behaviors to the local, situation-specific norms defined by the group identity”).
28. Id. at 608 (“The self-reinforcing nature of clusters tends to perpetuate their existence once they are formed.”).
So it may be that the only benefit of system criminality is to permit the international community, for its own benefit, to express its judgment or condemnation of conduct taking place in mass atrocity situations. But the international community is already able, as a normative matter, to condemn the underlying conduct of both individuals (through traditional forms of international criminal law) and of states (through traditional state responsibility principles). As such, it is not clear that there is much additional normative benefit associated with the concept of system criminality.29

III. Why Not System Criminality? Potential Instrumental Costs

Finally, it may be that not only do we not gain much—either in instrumental or normative terms—by employing the concept of system criminality; we may actually produce outcomes that are counterproductive to the goals of halting crimes and producing changes in local behavior in mass atrocity situations. This is because of the problematic impact that the international designation of conduct by a state’s actors as “criminal” may have on the societies or groups from which the perpetrators come—at least if the prevailing domestic reaction to indictments and prosecutions by international criminal tribunals serves as a guide.

One of the fundamental goals ascribed to criminal prosecutions in the transitional justice literature is the idea of individualization of guilt.30 Whatever may be said for the claim that criminalization enables victim groups to distinguish between the guilty and the innocent among a perpetrator group (or at least between the very guilty and the less guilty), we observe a quite different dynamic when we examine the flip side of the individualization of guilt coin. Anecdotal evidence suggests that frequently in war crimes situations, members of the groups from which perpetrators come do not see criminal indictments by international institutions as a means of identifying the few “bad apples” who happen to come

29. Expression is not the only normative function served by the criminal justice system. It also addresses a moral and psychological demand for retribution—i.e., for punishment. See LAFAVE, supra note 4, at 29-30. Even if the psychological demand for retribution can be satisfied through the punishment of collective enemies—the post-World War I reparations regime was motivated largely by such a demand for punishment of the German state—I do not take Professor Nollkaemper’s essay to argue for collective punishment. The collective punishment of states in any event scarcely seems defensible on moral grounds.

from their community. Rather, the application of the criminal sanction—even when directed only against individuals—is seen rather as condemnations of their entire community. For example, Serbs did not see the indictment of Serbian leaders by the International Criminal Tribunal for the Former Yugoslavia (ICTY) as justifiable charges brought against a few thugs who happened to be Serbs, but rather as condemnations of the Serb people. By the time he was transferred to The Hague in 2001, Slobodan Milosevic was no hero to the Serbian people. But even though the Serbs were themselves eager to prosecute Milosevic for crimes committed in Serbia, the ICTY’s prosecution of him was seen as an indictment of Serbia itself.

My anecdotal observations of the hostile responses of societies whose nationals are indicted by international tribunals are consistent with the findings of social psychology. We may in this regard think of a domestic social order, with its particular local norms, as an “ingroup,” and the international community, with its universal norms, as an “outgroup.” Psychological research shows that when subjects are exposed to outgroup influences, they “tend to engage in no attitude change or to move their opinions in the direction opposite of the advocated position.” Given these psychological dynamics, the highly judgmental notion of system criminality—if it is employed as a tool to devise legal responses in mass atrocity situations—may increase the extent to which members of a society whose agents have committed international crimes identify with the perpetrators. Admittedly, Professor Nollkaemper is careful to note that in his view of system criminality, “responses targeted at the level of the system . . . need not carry the connotation of collective guilt. They can be of a fundamentally different nature than individual criminal responsibility to which the idea of guilt is inherent.”

32. Steven Erlanger, Serb Authorities Arrest Milosevic to End Standoff, N.Y. Times, Apr. 1, 2001, §1, at 1 (describing Milosevic’s arrest by Serbian authorities to answer “various charges of financial irregularities, misusing customs duties, abusing his powers and causing ‘damage to the Serbian economy,’ including colluding in hyperinflation in the early 1990’s that cost the nation more than $600 million.”).
33. Jelena Tosic, Transparent Broadcast? The Reception of Milosovic’s Trial in Serbia, in Paths to International Justice: Social and Legal Perspectives 83, 93 (Marie-Bénédicte Dembour & Tobias Kelly eds., 2007) (noting a sense of “solidarity or even identification with” Milosevic during his trial before the ICTY, even on the part of his former opponents, and a concomitant “counterproductive rise in the popularity of the former president.”).
34. Cialdini & Goldstein, supra note 27, at 612 (citation omitted).
35. Nollkaemper, supra note 1, at 325.
Nevertheless, his project is one that focuses fundamentally on a form of "collective responsibility,"\textsuperscript{36} and one that entails stark moral condemnation of social systems and even entire states. If our ultimate goal is to transform the societies in which international crimes occur, I fear that the potential backlash of those who are designated as citizens of states pervaded by systemic criminality will prove far more harmful than any of the advantages we may realize by highlighting the systemic nature of international crime.

\textsuperscript{36} Nollkaemper, \textit{supra} note 1, at 323, 352.