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Front cover: The cut stem of a fir tree in the forest around Vallombrosa Abbey in Reggello, in the Apennines east of Florence. The monastery was founded in 1038, and is surrounded by deep forests tended over several centuries. The concentric rings show the accumulating age of the tree, here symbolising how thought expands and accumulates over time, and how lines or schools of thought are interconnected and cut through periods.

Back cover: The forest floor covered by a deep blanket of leaves from past seasons, in the protected forests around Camaldoli Monastery in the Apennines east of Florence. Old leaves nourish new sprouts and growth: the new grows out of the old. We may see this as a metaphor for how thinkers of the past offer an attractive terrain to explore and may nourish contemporary foundational analysis.

Understanding the International *Ius Puniendi* under Durkheim's Collective Conscience: An Anachronism or a Viable Path?

**Carlos Augusto Canedo Gonçalves da Silva
and Aléxia Alvim Machado Faria***

14.1. Introduction

The States Parties to this Statute,

Conscious that all peoples are united by common bonds,
their cultures pieced together in a shared heritage, and concerned
that this delicate mosaic may be shattered at any time,

Mindful that during this century millions of children,
women and men have been victims of unimaginable atrocities
that deeply shock the conscience of humanity,

Recognizing that such grave crimes threaten the peace,
security and well-being of the world,

[...]

Determined to put an end to impunity for the perpetrators
of these crimes and thus to contribute to the deterrence
of such crimes,

[...]

Determined to these ends and for the sake of present
and future generations, to establish an independent permanent
International Criminal Court in relationship with the
United Nations system, with jurisdiction over the most serious
crimes of concern to the international community as a
whole, [...]

Resolved to guarantee lasting respect for and the enforcement
of international justice [...]¹

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The Preamble to the Rome Statute of the International Criminal Court provides fertile ground for understanding the basis, purpose and functions of international criminal law. The “delicate mosaic” of juridical cultures, united to fight the impunity of “unimaginable atrocities that deeply shock the conscience of humanity”, focuses on crimes of special gravity, the censure of which is supposedly a common shared value among national sovereignties.²

However, while the quest for the legitimacy of international punishment may seem relatively clear from these excerpts, the hypotheses elaborated upon in the scholarship face hurdles in at least two respects. To begin with, the foundation for punishment is commonly not distinguished from its purpose and function, possibly because the first outlines the legitimate boundaries for the latter two. Hence, theories of punishment that originally seek to describe valid functions or purposes are sometimes analysed as the very basis and grounds for the validity of punishment itself. Consequently, the discussion on the foundation and legitimacy of criminal sanctions becomes a debate over effectiveness of punishment – in repaying evil, preventing new crimes, maintaining social cohesion and so on. This may be caused by confusion among the theoretical, political and empirical methods of analysis and critique, as observed by Garland while studying Durkheim’s theory of punishment.³ It is therefore convenient to highlight that this research works only with the theoretical analysis of the international *ius puniendi* and of the Durkheimian collective conscience itself, leaving political and empirical methods for further studies.

Moreover, the scholarship on *ius puniendi* and the functions and purposes of international criminal law is so diverse that one chapter would not be sufficient to describe and analyse all of them. Assuming that it is necessary to narrow the scope of study, this chapter focuses on the con-

¹ From the Preamble of the Statute of the International Criminal Court (www.legal-tools.org/doc/7b9af9/). The text has been incorporated into Brazilian law, see Decreto n. 4,388, de 25 de setembro de 2002, Promulga o Estatuto de Roma do Tribunal Penal Internacional [Decree number 4,388, of 25 September 2002, Enacting the Rome Statute of the International Criminal Court].

² Kai Ambos, “Punishment without a Sovereign? The *Ius Puniendi* Issue of International Criminal Law: A First Contribution towards a Consistent Theory of International Criminal Law”, in *Oxford Journal of Legal Studies*, 2013, vol. 33, no. 2, p. 313.

³ David Garland, “Durkheim’s Theory of Punishment: A Critique”, in David Garland and Peter Young (eds.), *The Power to Punish: Contemporary Penalty and Social Analysis*, Heinemann Educational Books, 1983, p. 39.

cerns most frequently mentioned in international criminal legislation and jurisprudence, such as deterrence, retribution and protection of fundamental human rights. It concludes that only the last one can be considered a legitimate foundation or justification for international punishment, while the others remain as a fruitful ground for functions and purposes. This chapter further outlines the main shortcomings of this justification, such as the asymmetrical historical development of the idea of human rights, compared to the prerogative of the international community to punish (States, and later individuals), and the use of a necessarily universalising concept that encompasses elements far beyond the so-called core crimes.

We therefore introduce the Durkheimian 'collective conscience' notion as an alternative to the theories of international *ius puniendi*. It admits the legitimacy of punishment from the choice of certain practices that are especially burdensome for the international community, understood in its intercultural aspect, and is able to share a lowest common denominator of values to be protected. The chapter analyses the Durkheimian concept of crime and punishment as part of the process of collective morality, animated by universally shared feelings, in which crimes are violations of feelings intensively inserted into the collective consciousness. Thus, punishment, considered as an expression of these violations, is applied to maintain cohesion and reinforce collective beliefs and social solidarity.

However, the Durkheimian theory has its own shortcomings, partially due to the somewhat inconsistent descriptions of the different levels of societal development,⁴ partially because the use of the theory requires a cultural translation – after all, Durkheim never wrote about international criminal justice itself. The collective consciousness, defined by Durkheim as the totality of the beliefs and feelings common to the average membership of a society,⁵ was conceived based on specific societies, and not for such an open and multicultural collectivity as the international one. Hence, although the idea of a common collectivity has been developed in international criminal justice since the beginning of modern international law, the use of the Durkheimian concept does not dismiss a careful contextual analysis, in order to determine to what extent it can be applied without structural anachronism.

⁴ Bruce DiCristina, "Durkheim's Theory of Homicide and the Confusion of the Empirical Literature", in *Theoretical Criminology*, 2004, vol. 8, no. 1, p. 64.

⁵ Émile Durkheim, *Da divisão do trabalho social* (The Division of Labor in Society), Eduardo Brandão trans., Martins Fontes Press, 1995, p. 40.

The main purpose of this chapter is not to speculate on Durkheim's possible understandings of international punishment. He lived in a period of intense development of international law and humanitarian law but nevertheless refrained from positioning himself on the Treaty of Versailles, the League of Nations or any other element connected with the creation of international criminal law.⁶ But one can apply his thoughts about punishment to the context of international criminal law to see if the collective conscience can offer a better starting point for the international *ius puniendi* than more common theories that frequently transit between purpose, function and foundation, or are based on the broad concept of human rights.

14.2. Philosophy of Punishment Between Justification, Purpose and Function

Philosophy in criminal law concerns four main questions: why, for what, when and how to punish. Answering them homogeneously would entail intermingling the concepts of foundation, purpose, convenience and form of punishment – what would be reckless to do, even though the answers of each one of these questions intimately influence the others.

However, this is usually the case with the study of traditional theories. The insufficiency of the dichotomous classification of the purposes of the penalty between absolute theories – namely retribution – and the relative theories – in short, general and special deterrence – has long been recognised by the scholarship concerning national criminal law.

The first problem of theories for punishment is therefore also common in national criminal law: not all of them lend themselves to answering the same question. From the perspective of sociological functionalism, the concept of purpose refers to actions, while that of function, to a system of actions, communications or other elements. The purpose of the norm is derived from the acting purposes of the legislator – when they define what is prohibited and what is permitted – and of the applicator of

⁶ This is not to say, however, that Durkheim did not study international conflicts. On the contrary, in 1915 he published two essays on the First World War. In “‘L’Allemagne au-dessus de tout’: la mentalité allemande et la guerre”, he comes to the point of analysing the States’ sovereignty towards international treaties – that would not be binding, since “any superiority [to the national sovereignty] is intolerable”. See Émile Durkheim, “*L’Allemagne au-dessus de tout’: la mentalité allemande et la guerre*”, Armand Collins Press, Paris, 1991 (1915), pp. 19–21.

the norm – when they justify their decision with the norm, reinforcing, reinterpreting or rejecting the legislator's intends.

In the case of a function, on the other hand, the opposite occurs. A given social function can only be attributed to an action, either because this action is part of a social context of action or because it updates the structure in which the action itself is thought, leading to a specific function for this context of action.⁷

The categories 'purpose' and 'function' of punishment have something in common, namely they are descriptive rather than normative. The question of whether a purpose or function is legitimate and adequate must be distinguished from the question whether a purpose is sought. The *ius puniendi*, in turn, is intrinsically embedded in theories of legitimacy, not in empirically verifiable descriptive theories.

That is why one cannot place the grounds of the power of punishment on, for example, retribution. Retribution "asserts that the perpetrator should be punished for guilty acts",⁸ and is "the expression of social disapproval attached to a criminal act and its perpetrator, and demands punishment of the latter for what he did".⁹ Retribution is widely mentioned in the scholarship¹⁰ and in international criminal tribunals: a survey of the decisions of the International Criminal Tribunal for the former Yugoslavia ('ICTY'), the International Criminal Tribunal for Rwanda ('ICTR') and the Special Court for Sierra Leone ('SCSL') identified the mention of retribution in most sentences (82.4 percent in the ICTY, 72.1 percent in the ICTR and 88.9 percent in the SCSL, averaging 78.9 percent), with more than half (53.5 percent) concerning retribution being the most important or one of the main principles of sentencing.¹¹ In Kupreškić's sen-

⁷ Stephan Ast, "Überlegungen zum Verhältnis von Zweck und Funktion im Strafrecht", in *ZIS – Zeitschrift für Internationale Strafrechtsdogmatik*, 2018, vol. 4, p. 116.

⁸ Marcelo Almeida Ruivo, "O fundamento da pena criminal: Para além da classificação dicotômica das finalidades", in *Diritto Penale Contemporaneo*, 2014, vol. 1, p. 180.

⁹ International Criminal Tribunal for Rwanda, *The Prosecutor v. Vincent Rutaganira*, Trial Chamber III, Judgement and Sentence, ICTR-95-1C-T, 14 March 2005, para. 108 (www.legal-tools.org/doc/cd2a8f).

¹⁰ Gerhard Werle, *Principles of International Criminal Law*, 2nd ed., T.M.C. Asser Press, 2009, p. 34.

¹¹ Other sentencing principles are the restoration and maintenance of peace. See Shoshana Levy, "Retribution as a Sentencing Goal in International Criminal Justice", in *Research Project – When Justice Is Done: Life After Conviction*, Centre for International Criminal Justice, Vrije Universiteit of Amsterdam, April 2014, pp. 9–10.

tence, the importance of retribution was raised because of the special gravity of the crimes.¹²

This does not mean, however, that the international community should punish the criminal agent solely because they committed an illegal act. Retribution is one of the social functions of the sentence and may also appear as a ground since it is based on an idea of realisation of a universally shared justice. But it cannot be the basis for the legitimacy of punishment for it derives only in part from a thought that analyses why the community has the power to punish certain behaviours.

A somewhat different situation occurs with general and special deterrence theories, because they do not come to operate in the plane of the purpose. In other words, deterrence theories do not reaffirm what was desired by the legislator, but instead update the structures in which the action is thought, from the perspective of the law enforcer. The so-called relative doctrines understand punishment as a “political-criminal instrument intended to act (psychically) on the generality of community members, away from the practice of crimes through criminal threat”.¹³ As Marcelo Ruivo rightly points out, “the basis and purpose of the penalty are synthetically confused in the interest of avoiding the dangerous consequences of crime for the community”.¹⁴

¹² International Criminal Tribunal for the former Yugoslavia, *Prosecutor v. Vlatko Kupreškić*, Trial Chamber, Judgement, IT-95-16-T, 14 January 2000, paras. 848 ff. (www.legal-tools.org/doc/5c6a53/): “The Trial Chamber is of the view that, in general, retribution and deterrence are the main purposes to be considered when imposing sentences in cases before the International Tribunal. As regards the former, despite the primitive ring that is sometimes associated with retribution, punishment for having violated international humanitarian law is, in light of the serious nature of the crimes committed, a relevant and important consideration. As to the latter, the purpose is to deter the specific accused as well as others, which means not only the citizens of Bosnia and Herzegovina but persons worldwide from committing crimes in similar circumstances against international humanitarian law. The Trial Chamber is further of the view that another relevant sentencing purpose is to show the people of not only the former Yugoslavia, but of the world in general, that there is no impunity for these types of crimes. This should be done in order to strengthen the resolve of all involved not to allow crimes against international humanitarian law to be committed as well as to create trust in and respect for the developing system of international criminal justice. [...] The Trial Chamber also supports the purpose of rehabilitation for persons convicted in the hope that in future, if faced with similar circumstances, they will uphold the rule of law”.

¹³ Ruivo, 2014, p. 181, see *supra* note 8.

¹⁴ *Ibid.*, p. 183.

General and special deterrence oscillates between the “why” and the “for what” questions – in the scholarship, there is an understanding that there is a duty on the State (or the international community) to change deviant behaviour – either by educating individuals, neutralising those who committed crimes, using punishment as a reinforcement of social cohesion or threatening, with exemplary punishment, effective repression of future crimes. This perspective is incompatible with the democratic State of law because it instrumentalises the criminal agent for the sake of improving social coexistence, and is even more fragile in the conception of an international community, whose prerogative to interfere in the lives of individuals and their freedoms is more limited.

In general terms, however, deterrence is also mentioned in international criminal law. The very Preamble to the Rome Statute quoted at the beginning of this chapter highlights the intention to “contribute to crime deterrence” by combating impunity. The reference to punishment deterrence is also present in international criminal scholarship both in order to prevent new crimes from occurring and to focus on the idea of creating and strengthening the ability of international criminal law to contribute to stabilising international norms.¹⁵

Notwithstanding the frequent allusion in international sentences, deterrence does not become a purpose in the international context. Under the spectre of re-socialisation, for example, to assume it as part of the purpose of international criminal law would imply giving the international community the duty to change the standard of conscience and action of an individual, bringing a paternalistic character that does not fit the very precepts of international law. And, even more, it would imply obliging the criminal agent to be re-socialised, violating the integrity of his psyche.¹⁶ Negative special deterrence also seems unacceptable as the purpose of punishment in international criminal law, for the same reasons that make it inappropriate for national criminal law: it is not a proportionate response to move the expensive punitive apparatus with the sole aim of neutralising the convicted person and preventing them from committing crimes temporarily while serving the imprisonment penalties imposed upon them.

¹⁵ Werle, 2009, p. 35, see *supra* note 10.

¹⁶ Ruivo, 2014, p. 184, see *supra* note 8.

Denying its role as a purpose, however, does not exclude the deterrence theory's capability of explaining nuances of the function of punishment reinforced in international criminal sentences. The issue seems to be, again, the constraints on the connection between social function, purpose, and foundation. Given that social functions are primarily descriptive elements that do not necessarily become legally relevant purposes (nor do they serve as grounds for legitimacy), the analysis of the effectiveness of these functions is also limited to this spectrum of social function. For positive special deterrence, the absence of re-socialisation cannot be a problem as long as this function of the penalty is not understood as the purpose of the rule – that is, the reason why the penalty was imposed in that way. As the function of deterrence is a part of the structure of action, not of the action itself – whose purpose has in its essence the protection of people against the crimes chosen in the Rome Statute – the bridge of this relative theory to the foundation of the penalty is impaired.

Therefore, although the analysis of the effectiveness of criminal deterrence in the context of international criminal law is important to point out their practical differences from national contexts, it does not interfere with the basis of punishment. This is the case with Deirdre Golash's argument that some characteristics of international crimes and the social context in which they are committed – such as those perpetrated for more irrational rather than strategic reasons¹⁷ – suggest that punishment must be less effective at achieving deterrence in the international forum than in the national.¹⁸ The discrepancy between theory and practice of deterrence, already recognised by scholarship,¹⁹ would then become even more evident in international law.

And if the precautions do not even reach the 'why' of the international criminal legislator awarding penalties for core crimes, neither can they be seen as the element that gives legitimacy to punishment.

¹⁷ Deirdre Golash, "The Justification of Punishment in the International Context", in Larry May and Zachary Hoskins (eds.), *International Criminal Law and Philosophy*, Cambridge University Press, Cambridge, 2009, pp. 204, 206.

¹⁸ *Ibid.*, pp. 202, 211.

¹⁹ Kai Ambos, "Sobre los fines de la pena al nivel nacional y supranacional", in *Revista de derecho penal y criminología*, 2003, vol. 2, no. 12, p. 202.

14.3. The *Ius Puniendi* in International Law

The point that gives legitimacy to international punishment is approached by scholars in distinct ways. Werle uses the classic Kantian justification that international law crimes substantially violate freedom in interpersonal relations, for which the validity of the general world law (*Weltrecht*) is denied. Consequently, international criminal law is legitimate because (and to the extent that) punishment compensates both the violation of freedom in interpersonal relationships and the denial of the general world law.²⁰

For Ambos, the purpose of international criminal law is to protect the fundamental legal rights of the individual and the international community, which is why only what is called “fundamental crimes” is criminalised.²¹ The author understands that the international community is where the nation-State was at the beginning of its existence: in the formation and consolidation of the monopoly of force, on which a *ius puniendi* is founded.²² This right to punish would also be based on a universally shared notion of what would be just or right. Further, despite the difficulty in analysing the purposes of punishment at the international level, national and international criminal law would have similarities in relation to their focus on the peaceful coexistence of persons – whether within a State, as in national criminal law, or across borders, in situations of serious human rights violations. According to Ambos, while national criminal law aims to have the same effect, for the individual and for society, international criminal law serves the purpose of creating a universal legal consciousness, towards a general positive and integrative deterrence that calls for reconciliation with the recognition that one does not give up the hope of achieving a negative general deterrence.²³

The protection of human rights is also recognised by Werle and Neubacher, the latter of whom regards the construction of human rights, from the 1940s, as the foundation for the existence of the International Criminal Court.²⁴ For Werle, international criminal law responds to mas-

²⁰ Werle, 2009, p. 33, see *supra* note 10.

²¹ Ambos, 2003, p. 195, see *supra* note 19.

²² *Ibid.*, pp. 197–98.

²³ *Ibid.*, p. 211.

²⁴ Frank Neubacher, “Kriminologische Grundlagen einer internationalen Strafgerichtsbarkheit”, in *Menschenrechte als Fundament einer internationalen Strafrechtsordnung*, Mohr Sibeck Verlag, 2005, p. 43.

sive violations of fundamental human rights and to the failure of traditional mechanisms. In fact, the protection of human rights is clear, especially in crimes against humanity, which held responsible individuals for systematic acts against fundamental human rights, such as the right to life and physical integrity, freedom of movement and dignity. But this does not mean that any violation of human rights, or even any serious violation of them, will be directly punishable by international criminal law. Only a small sample of human rights have guaranteed protection under international criminal law. Protection of human rights would then legitimise international criminal law while limiting its application.²⁵

Golash, on the other hand, sees the justification for the punishment of international crimes, above all in the seriousness of the crimes and their power to directly affect more individuals.²⁶ International punishment would then be important to show the condemned that the whole world (and not just their local enemies) condemns their criminal attitudes and recognises the grave damage caused by the crime. Judgments are essential to the narrative of these crimes.²⁷

This point of view has non-judicial aspects that may be compared with other justifications commonly associated with international criminal law, such as promoting social reconciliation, giving response to the victims, and establishing historical records, in order to avoid denialism in the future. Analysing these type of arguments, Luban comes to the interesting conclusion that they are recurring in international criminal law discussions mainly because the international courts are focused more in the judgements themselves than in the punishment. But since they tend to insert the political character of the international judgements into the purpose of punishment itself, they would not be adequate. Because of that, Luban offers the alternative of justifying the international punishment from the norm projection. The international criminal judgements would be, then, expressive acts to spread the news that mass atrocities are not only political conflicts, but mainly hideous crimes. In other words, only judgements would be able to express that the political violence committed

²⁵ Werle, 2009, pp. 45–46, see *supra* note 10.

²⁶ Golash, 2009, pp. 201–23, see *supra* note 17.

²⁷ *Ibid.*, pp. 218–19.

against innocents is essentially criminal, even when one side hates the innocent as its enemy.²⁸

What all these theories have in common is the assumption that the international community has universally shared values, irrespective of culture, whose grave violations may be guarded beyond the sovereignty of each country. “[P]articularly serious crimes affecting the international community as a whole”, as referred to in the Preamble and Article 5 of the Rome Statute, constitute the key element that reflects not only on the legitimacy of punishment by the international community, but also on its justification from the perspective of the legislator; that is, how to choose core crimes that will have universal validity required by the norms of international law.²⁹ It is in this respect that Durkheim's idea of collective consciousness may help the understanding of legitimation without as many caveats as the justification that surrounds the concept of human rights.

14.4. Émile Durkheim and Functionalist Criminology

For this part of the analysis, let us begin by recalling some basic points of functionalism: society can be perceived as a system whose parts cannot be examined in isolation, but in an interrelated way and from the contribution of each person to the society in general. In this way, human relationships, beliefs and convictions, production institutions and the family can only be understood from how they relate to each other – since the change in one of them will certainly have reflexes in others – and what they mean for the functioning of the whole society. The methodologies chosen by leading functionalist authors (Durkheim, Talcott Parsons, Malinowski, and so on) have often been far apart and the same can be said of the central theoretical problems of each one of them. But all tended to regard society as a ‘whole’.

Durkheim's work emerges in the context of nineteenth century French society, and must be understood in this perspective. This means that the French sociologist sought answers to the disturbing effects of the collapse of France in the Franco-Prussian War of 1870–1871, as well as the vertiginous industrialisation process experienced by his country at that

²⁸ David Luban, “Fairness to Rightness: Jurisdiction, Legality, and the Legitimacy of International Criminal Law”, in Samantha Besson and John Tasioulas (eds.), *The Philosophy of International Law*, Oxford University Press, Oxford, 2010, pp. 575–77.

²⁹ Werle, 2009, p. 30, see *supra* note 10.

time. It was a question of examining the possible elements of social cohesion from this framework of rapid and profound social changes.

His thinking incorporates significant elements bequeathed by the great Revolution of 1789, which would prepare ground for some problems that would be faced by France in the following century.³⁰

Within this new structural framework imposed by the process of industrialisation, followed by profound social changes, Durkheim sought to identify the paths to be travelled towards a functionally integrated society. He aimed also at understanding the origins of solidarity in modern society, seemingly devoid of shared categories, due to increasing individualism, the specialisation of functions and the gradual loss of religion as a moral reference.³¹

The question of authority within the framework of the modern industrial State would become the principal focus of analysis of all of his social theory. Durkheim confronted this question by taking into account that, in France, the problem of authority postulated its study in the perspective of the revolutionary legacy that enshrined “individualism” as an unconquerable and permanent conquest, but still faced with the moral traditions of autocratic, catholic and petrifying conservatism.

These concerns are very much present in his *The Social Division of Labor*, in which the concept of anomia would make its appearance.³² Identifying the processes of social change in the light of the various historical forms of social organisation and division of labour, Durkheim pointed to two forms of society: that which generates a kind of mechanical solidarity, characterised by its self-sufficiency, uniformity and monolithism, located in the most primitive stages of social organisation; and that which gives rise to the type of organic solidarity that will manifest itself in modern society, characterised by its dynamism, high complexity and with a high division of labour.³³

³⁰ Anthony Giddens, *Política, sociologia e teoria social. Encontros com o pensamento social clássico e contemporâneo* [Politics, Sociology and Social Theory: Encounters with Classical and Contemporary Social Thought], Edusp, 1997, pp. 105 ff.

³¹ David Garland, *Castigo y sociedad moderna*, Siglo Veintiuno Editores, 1999, pp. 41 ff.

³² Durkheim, 1995, see *supra* note 5.

³³ Bernard Snipes Vold, *Theoretical Criminology*, Oxford University Press, Oxford/New York, 1998, p. 125: “Durkheim’s analysis of the processes social change involved in industrialization is presented in his first major work, *De la division du travail social*, written as his doctoral thesis and published in 1893. In it he describes these processes as part of the

Criminality, in this perspective, plays an important role in maintaining social solidarity and as a normal manifestation of diversity, being part of a healthy society rather than a pathological manifestation of it, changing due to the transformations of society itself.³⁴

Every society must co-exist with a certain amount of crime, as a necessary and indispensable condition for its progress and even social change, since criminality itself can constitute forms of actions capable of anticipating a certain moral that later would be countersigned by the society itself.³⁵ In this context, the criminal, far from being a parasitic agent or a foreign body to society, becomes a regular agent of social life, and crime, in this way, appears as a normal phenomenon or social fact and with a tendency to grow in a differentiated and increasingly individualistic socie-

development from the more primitive mechanical form of society into the more advanced organic form. In the mechanical form each social group in society is relatively isolated from all other social groups and is basically self-sufficient. Within these social groups individuals live largely under identical circumstances, do identical work, and hold identical values. There is little division of labor, with only a few persons in the clan or village having specialized functions. Thus, there is little need for individual talents and the solidarity of the society is based on the uniformity of its members. Contrasted with this is the organic society, in which the different segments of society depend on each other in a highly organized division of labor. Social solidarity is no longer based on the uniformity of the individuals, but on the diversity of the functions of the parts of the society”.

³⁴ Durkheim employs the word ‘function’ to designate the system of vital movements, abstracting itself from its consequences and, in a different way, as an expression of the correspondence that exists between these movements and some needs of the body. Thus, one can speak in terms of digestion, breathing, and so on. In this line of reasoning, according to Durkheim, punishment has little use as a means of correcting the guilty or of general intimidation. Its function is to keep intact the social cohesion and validity of the common consciousness. In this sense, it acts in the sphere of collective feelings, reaffirming them and showing their vitality (see Durkheim, 1995, p. 13, see *supra* note 5). Needless to say, the influence of this view in the contemporary functionalist debate on the function of punishment is clear from reading the work of Günther Jakobs, although there are important differences between Durkheim’s thought and that of Jakobs, which incorporates Luhmann’s theory of systems. For an analysis of the integrative-preventive conception of the penalty, see Alessandro Baratta, “Viejas y nuevas estrategias en la legitimación del Derecho Penal”, in *Poder y Control*, PPU, Barcelona, 1986, pp. 77–92, where the author points to the Durkheimian resonances of Jakobs’s proposal, although reworked in the light of N. Luhmann’s systems theory.

³⁵ The classic example would be political crime, whose author, appointed and condemned as a social and subversive reprobate of the constituted order, will often be the same person who will later occupy a prominent place or leadership within the new order. Néelson Mandela, becoming Head of State in South Africa, represents one of the most emblematic examples of this.

ty. Thus, one of the conclusions to be drawn from a reading of *The Social Division of Labor* is that criminal law and punishment reinforce the so-called collective conscience³⁶—demeaned by the practice of crime—and play a fundamental role in the process of cohesion in societies organised on the basis of mechanical solidarity, losing some of this predominant role but still maintaining its importance, in those founded on organic solidarity (modern societies).³⁷

Although there are:

crimes of different species, there is, in all these species, something in common. What proves it is that the reaction that they determine on the part of society, namely, the penalty, is, apart from differences of degrees, always and everywhere the same. The unity of effect reveals the unity of the cause. Not only among all the crimes foreseen by the legislation of one and the same society, but among all those who have been or are recognized and punished in the different social types, there are surely essential similarities. [...] Because, everywhere, they affect in the same way the moral conscience of the nations and produce the same consequence.³⁸

In this way, this social solidarity, coming from common states of consciousness, represents and embodies the process of general integration of society, to a greater or lesser extent depending on the different relationships in which it is felt. If these relationships are in greater numbers, they will create more bonds between the individual and the group and reinforce, increasing the degree of social cohesion. The number of these relations

³⁶ Durkheim, 1995, pp. 50–52, see *supra* note 5.

³⁷ *Ibid.*, pp. 81–83: “The penalty does not serve, or only serves very secondary, to correct the guilty or intimidate their possible imitators; from this dual point of view, its efficacy is fairly dubious and, in any case, mediocre. Its true function is to keep social cohesion intact, maintaining all the vitality of the common consciousness. Denied in such a categorical way, it would necessarily lose part of its energy if an emotional reaction from the community did not compensate for that loss, and this would result in a relaxation of social solidarity. [...] In a word, in order to have an exact idea of the penalty, it is necessary to reconcile the two opposing theories that were offered to it: the one that sees in it an atonement and that makes of it a weapon of social defense. Indeed, it is true that the purpose of the sentence is to protect society, but this is because it is atonement; and, on the other hand, if it is to be expiatory, it is not because, in convergence of I do not know what mystical virtue, pain redeems the lack, but because the penalty can only produce its socially useful effect under this necessary condition”

³⁸ *Ibid.*, pp. 39–40.

will be proportional to that of the repressive rules, so that by determining which fraction of the repressive legal apparatus represents criminal law, we can know the extent and importance of this solidarity.³⁹

As Garland points out, for Durkheim, though the pen possesses some content of instrumental control and rationality, its essence will be – and this holds true for mechanical as well as organic societies⁴⁰ (although much more for the first) – that of an unthinking and irrational emotion. Emotion presides, rather than anything else, over the punitive moment directed at the profanatory action of the sacred, that is, crime.

And while the institutional routines modify these rage accesses and strive to use them productively, the dynamic and motivational force of punishment, and its general direction arise from sentimental roots, from the psychological reactions commonly felt by individuals when the sacred collective values are violated. For this reason, although the modern state has practically the monopoly of criminal violence and the control and administration of punishment, a much larger population feels involved in the process and provides the context of support and social assessment within which the State execute the punishment.⁴¹

In Durkheim's subsequent work *Suicide*, the concept of anomie appears more explicitly,⁴² although it is recognised that he never developed it in detail.

If, in *The Social Division of Labor*, the notion of anomie is related to the failures of the system of social division of labour that characterise modern societies, in Durkheim's *Suicide*, he uses the selfishness-altruism typology to support the argument that the complexification of social sys-

³⁹ *Ibid.*, p. 83.

⁴⁰ Durkheim argues that retributive justice measures lose strength as 'mechanical societies' give way to 'organic societies'. The recent growth of restorative justice models may well support Durkheim's thesis.

⁴¹ Garland, 1999, p. 49, see *supra* note 29. Durkheim states that these instinctive and irresistible feelings even reach the innocent (relatives of the guilty, for example). Accompanying the work of a court provides, according to him, a vision of these passions insofar as the lawyer seeks to arouse sympathy for the accused and the prosecutor to arouse the social feelings that the criminal act offended. Thus, he concludes, "the nature of the pen has not essentially changed. All that can be said is that the need for revenge is better addressed today than it was yesterday". See Durkheim, 1995, p. 61, *supra* note 5.

⁴² Émile Durkheim, *O suicidio [The Suicide]*, Martins Fontes Press, 2000.

tems is responsible for the growing process of individualisation of society.⁴³

In this work, Durkheim notes that suicide rates increase significantly both during peak periods and moments of economic depression, both characterised as periods of collective disorganisation, marked by the absence of regulatory mechanisms (anomic suicide). Relating suicide to some variables such as levels of education or family nucleus, he concludes that there will be a higher incidence of attacks on one's own life when it comes to individuals belonging to societies that profess predominantly Protestant religions, where the levels of education are higher and the ties of family assertion fainter. The result of such a situation of maladjustment may be, in addition to crime, suicide, individual response to the social structure maladjusted (selfish suicide). Thus, in more markedly individualistic societies, the possibility of suicidal responses would be greater. It is important to note here that, for Durkheim, the situation of anomie refers to social and cultural structures and their own characteristics rather than to a psychological state of reaction of the individual when confronted with them.⁴⁴

Crisis is often the result of this anomie, which impedes the efficient functioning of the regulatory mechanisms for the good functioning of society. The crime carried out under anomalous conditions, that is, outside reasonable control parameters, will be the product of the non-functioning or dysfunctional institutional instruments capable of providing satisfactory degrees of social cohesion.

As well noted by Hassemer and Muñoz Conde:

⁴³ The more objective concept of anomie in Ralf Dahrendorf seems to approach that of Durkheim, see Ralf Dahrendorf, *A Lei e a ordem [Law and Order]*, Tamara D. Barile trans., Instituto Liberal Press, 1997, p. 28: "a social condition where the norms regulating people's behavior have lost their validity. A guarantee of this validity is the present and clear force of sanctions. Where impunity prevails, the effectiveness of standards is in jeopardy. In this sense, anomie describes a state of affairs where violations of norms are not punished. This is a state of extreme uncertainty, in which no one knows what behavior to expect from the other in certain situations [...] Anomie would then be a condition in which both social effectiveness and the cultural morality of norms tends to zero".

⁴⁴ However, it is undeniable that the concept of anomie can be understood from the perspective of a psychological reaction of the individual before the social and cultural structures. See, for example, David Riesman, Reuel Denny and Nathan Glazer, *The Lonely Crowd*, Yale University Press, New Haven, 1950, pp. 287 ff.

[N]aturally, neither Durkheim nor his followers attribute all the causes of suicide, nor all the problems that lead to deviant behavior or criminality to anomie, but, of course, there is no doubt that an explanation in these terms of criminality is suggestive, at least worthy of being taken into account, especially if it is observed that it no longer locates its origin in the deficient individual or in the deficient socialization, but in the social structure itself that conditions this type of attitude. The theory of anomie is also attractive because it does not refer, as was characteristic of other sociological theories, to social groups of marginal young people or adults, members of subcultures that in some way predetermined their criminal careers, but to the average man, even of good cultural level, that accepts, in principle, the social and legal norms and wants to make his life within them.⁴⁵

Durkheim's more detailed analysis of punishment is found in a perhaps less well-known work, *Moral Education*. In this book, Durkheim emphasises that we should think of punishment less as a utilitarian instrument and more as an expression of moral action. Its role is to enhance the reality of moral commandments. After all, Durkheim regards the State as a kind of public awareness of society. Or, in the words of Melossi, the moral leader who must educate and guide citizens.⁴⁶ Both in the classroom and in the courts, punishment will be the testimony that the violated law maintains its authority and its validity. It is less a question of dissuading other members of society from committing actions similar to those of the punished than of encouraging consciences to persevere in their faith in the 'system', or, to use a more adequate expression in Durkheim, the functioning of society.⁴⁷ Punishment is a demonstration of the inviolability of the rule infringed by the offender. As a moral phenomenon, the penalty must communicate to the transgressor – but, above all, and especially, to society – that content, through ways that can sensitise a specific social audience. This explains, for example, why our modern societies repudiate corporal punishments such as scourges or amputations – penalties that, if

⁴⁵ Winfried Hassemer and Francisco Muñoz Conde, *Introducción a la criminología*, Tirant Lo Blanch, 2001, p. 109.

⁴⁶ Mario Melossi, *El Estado del control social*, Siglo Veintuno editores, 1992, p. 80.

⁴⁷ Durkheim *apud*: Garland, 1999, p. 63, see *supra* note 29: "Punishment is only the palpable symbol through which an inner state is represented; it is an observation, a language through which the social conscience or that of the teacher expresses the feeling inspired by the disapproved behavior".

applied, would weaken their trust and moral message, weakening their character of communication – unlike ancient societies.

In conclusion, Durkheim, despite leaving aside other important dimensions of punishment and criminal law, knew how to exploit like no one else this symbolic resonance as an instrument for understanding the moral life of society.⁴⁸

14.5. A Potential Cultural Translation

Analysing the philosophical grounds of international criminal law from Durkheim's perspective is not a new idea. Marina Aksenova, for example, uses criminological functionalism to understand the choice of crimes that are considered international, especially crimes against humanity. Like Tallgren, Aksenova considers the work of the sociologist as important in building the legal basis on which international criminal law is based. And disregarding deterrence as the basis of the right to punish in international criminal law, she finds the legitimization of the international response to crimes against humanity in the symbolic recognition of suffering and outrage caused by collective criminality.⁴⁹

The main Durkheimian argument used is the moral legitimacy of feelings shared collectively – in this case, beyond the boundaries of State sovereignty. To explain why the Durkheimian theory should be used in this matter, Aksenova argues that there is fluidity and adaptability in his ideas to explain the “moral glue” that binds all communities. If one analyses this statement from Durkheim's relationship with his position on the collective consciousness as a platform for shared feelings, one will see that his last works indicate some fluidity. While in *The Elementary Forms of Religious Life*, he identified the scope of the collective consciousness as a platform for shared feelings that becomes smaller as society progresses and differentiates, Durkheim later recognised the role of that consciousness even in advanced societies, claiming that morality transcends time and social organisation.⁵⁰

However, although Durkheim lived in a period of intense development of international and humanitarian law and his own personal life was

⁴⁸ *Ibid.*, p. 65.

⁴⁹ Marina Aksenova, “Solidarity as a Moral and Legal Basis for Crimes against Humanity: A Durkheimian Perspective”, in *iCourts Working Paper Series*, 2016, no. 52.

⁵⁰ *Ibid.*, pp. 5–6.

especially affected by the First World War, his texts do not address international criminal law. Crime, punishment and anomie were all thought of in a context that presupposes State sovereignty.

But this does not prevent the analysis of his ideas – provided in a contextualised manner – in the study of the philosophy of international punishment. Tallgren argues that Durkheim's texts did not have this original function but were used in the very elaboration of what is now understood as international criminal law – not only in relation to the International Criminal Court, but also in the *ad hoc* and hybrid courts that preceded.⁵¹

Durkheim rejected the common conception that the criminal repression of certain acts could be validly explained from the mere reference to their danger to society. For him, some acts that pose no danger to society are repressed, such as violations of etiquette or religious practices. In a provocative way, he argues that “even if the injury occurs, there is no proportionality between the injury caused by the criminal act and the repression that it entails”.⁵² An economic crisis may therefore disrupt society more than an isolated homicide, and yet the latter is considered the most severe of crimes.

The rapprochement of these observations to the context of international criminal law would lead to questions about whether the crimes described there are in fact more serious than other problems in the international community, such as hunger and destruction of the environment by their exploitation. These questions may seem absurd, for criminality is not an inherent quality of a particular class of actions, but rather the result of a process of social definition. In this regard, the protection of society is dismissed as an argument to legitimise criminalisation – also because both crime and its punishment are considered important for social integration – which shifts the very reaction of society to the central point. The function of the sentence, then, would be to maintain inviolable social cohesion, to reinforce collective beliefs and feelings and, consequently, social solidarity.

If the repressive law is a partial reflection of the collective consciousness of a particular society, the choice of criminalisation does not

⁵¹ Immi Tallgren, “The Durkheimian Spell of International Criminal Law?”, in *Revue interdisciplinaire d'études juridiques*, 2013/2, vol. 71, pp. 137–69.

⁵² *Ibid.*, pp. 144–45.

necessarily represent the fruit of a categorical analysis of the most dangerous behaviours, but rather what the feelings of society indicate as more important.

The problem, however, is to see to what extent the use of the Durkheimian idea of collective consciousness for the international community leads to distortions of the theory. As Tallgren notes, the notion of an international common sense or consciousness has been present since the beginning of modern studies on this branch of law and extends throughout its development in the twentieth century, although the idea of “legal consciousness of the civilized world” have been widely questioned since the 1960s⁵³ as inappropriate or insignificant.

On the other hand, Durkheim’s sociological approach to law analysed it not only at a specific time and place, but also from factual historical developments. International criminal law deals with a much more abstract collectivity, what implies the union of heterogeneous and totally diverse collectivities in terms of cultural development.

The claim to universality of international criminal law is one of the greatest obstacles to the identification of a foundation for international punishment through approaches to Durkheim’s collective conscience. For Durkheim, crime is what disturbs the feelings that will be found in any healthy person of any society.⁵⁴

The way Durkheim views criminal law is the direct expression of an unambiguous collective consciousness, which gives no room for conflict of values.⁵⁵ International criminal law continues its relentless effort to distinguish itself from political affairs.⁵⁶ Moreover, Durkheim’s thinking about punishment was not a monolithic part of his work, but continued to develop during his career. First, in the *Division of Labor*, he regarded punishment as essential to maintaining the cohesion of society inviolable in upholding common consciousness in all its vigour; in *Moral Education*, Durkheim comes to understand punishment as performative and demonstrative; and in his last great work, *Elementary Forms*, arbitrary religious codes emerge as the centre of primitive taboos, to the detriment of the

⁵³ Martti Koskenniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870–1960*, Cambridge University Press, Cambridge, 2001, pp. 11–97.

⁵⁴ Durkheim, 1995, p. 34, see *supra* note 5.

⁵⁵ Tallgren, 2013, p. 152, see *supra* note 51.

⁵⁶ *Ibid.*, p. 153.

social need for solidarity.⁵⁷ What does not change is that, for Durkheim, punishment was never an instrument to rationally control deviant conduct – it would never serve, therefore, for special deterrence. It is, instead, the result of emotional reactions caused by the offence to the feelings shared by all of society.

Durkheim insists that even in modern times, punishment remains a passionate and vengeful reaction motivated by irrational and moral feelings. International criminal law is also a diverse collectivity of nationals insofar as it refers to a world in which destruction, injury and suffering far exceed the routine of national criminal law. In this sense, although it is difficult to define an international 'collective conscience' due to the social plurality that it covers, international criminal law works only with crimes whose moral feelings of aversion are more easily identified than those of various crimes national authorities. In Tallgren's words, moral feelings are more likely to be touched by genocide than by evasion.⁵⁸

14.6. Conclusion

With the difference between the foundation, purpose and social functions of punishment, from the perspective of sociological functionalism, some elements of international criminal punishment become clearer. First, perhaps also found in national criminal law can be overcome by identifying that retribution can be understood as one of the 'whys' of punishment insofar as it is founded on the realisation of justice and, thus, legitimises the choice of the legislator; that there is a difference between the purpose of the norm and its social function; and that theories of general and special deterrence through punishment are limited to the confirmation of the structure in which the action is committed. Thus, although they may even be considered as legislative purposes – as in the preamble to the Rome Statute – they suffice to justify the choice of core crimes (that is, the purpose of punishing such crimes specifically) or the punitive prerogative of the international community. In this sense, the recognised difficulty of transposing national theories on the purpose of punishment, or of creating totally new elements for international criminal law,⁵⁹ does not interfere with the legitimacy of the right to punish that already surrounds it.

⁵⁷ *Ibid.*, p. 156.

⁵⁸ *Ibid.*, p. 159.

⁵⁹ Ambos, 2003, p. 210, see *supra* note 19.

In addition, *ius puniendi* is understood in a less restrictive way when collective consciousness is used to explain why the international community can break through the borders of State sovereignty and punish, when this is not enough, violations of values that unite the international community as a whole, despite its inter-culturality. This seems to be an alternative adequate to the specificities of the philosophy of punishment in international criminal law since it is not as comprehensive or universalising as human rights, not so localised in a specific criminal legal culture as the idea of protection of particularly serious legal assets.

However, to assume the applicability of Durkheim's thinking in the philosophy of international criminal justice also implies recognising the limitations that the author's contextualisation and his own work do not allow us to transpose. One might argue, for example, that Durkheim does not explore the processes by which some rule-breakers rather than others are considered criminals. This issue, as a touchstone of international criminal law, remains challenging to the legitimation of a punitive system that is unable to investigate and hold responsible everyone involved in an international crime – nor does it intend to do so.

This chapter does not purport to address this limitation. After all, considering that sample punishment is more an effect of the eminently political character of international criminal tribunals than a philosophical assumption to legitimise punishment, its theorising is much closer to questioning of 'when' and 'how' to punish than 'why'. And for these questions, it may be necessary to admit the inapplicability of Durkheimian thought.

The limits of contextualisation and content that encompasses the scope of this chapter are mainly those already discussed concerning the sovereignty and cultural translation of a text that was not thought to deal with an international society that is not only complex or advanced in the sense meant by Durkheim but involves legal cultures with totally different forms and levels of criminalisation.

Furthermore, understanding the *ius puniendi* of international criminal law by utilising the Durkheimian collective conscience leads to different conclusions about the basis and purpose of the sentence, but does not summarily reject all other theories. If in national criminal law it is possible to recognise, for example, the importance of retributive thinking for the development of ideas about guilt and proportionality of punishment, even if one insists on conceiving some of the forms of deterrence as its

most adequate foundation, to incorporate what the relative and absolute theories of punishment have to say about the limits and circumstances of the right to punish seems the natural way also to international criminal law.

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