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**Philosophical Foundations of International Criminal Law:
Correlating Thinkers**

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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.*

Jeremy Bentham's Legacy: A Vision of an International Law for the Greatest Happiness of All Nations

Gunnar M. Ekeløve-Slydal*

Jeremy Bentham (1748–1832), English Enlightenment philosopher, political and legal reformist, coined pivotal English legal terms and created a vision of rationally reformed legislation at the national and international levels as primary instruments of human progress, civilisation, and peace.

This study outlines Bentham's positions on the main intellectual currents of his time, distancing himself from what he perceived as a backward-looking emphasis on religion and tradition as well as from protagonists of natural rights and natural law as a basis for reforming law, government and relations between nations. He argued in favour of carefully *codified* laws, based on what he perceived to be a rationally and empirically sound basis, namely, the 'utility principle' or the principle of maximisation of pleasure and minimisation of pain for the largest possible number of affected persons.

Bentham's texts on international law – including his influential *An Introduction to the Principles of Morals and Legislation* (1789), *Of Laws in General* (1782, rediscovered in 1939) and four articles dealing specifically with international law written between 1786 and 1789 – argue in favour of the law-like quality of international law. Admitted, the 'moral' or 'religious' sanctions, as he called them, for breaches of international law were seldom of great efficacy. But still there was enough to international law that was law-like to let one call it law.

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He defined international law as the law on inter-State relations, and proposed ways to strengthen its role in preventing wars and improving inter-State relations. His idea of codifying an international legal code also led him to see the need for an international court able to decide on disputes between States.

This study discusses foundational concepts, the role and the limits of international criminal law, considering Bentham's ideas and arguments about law. His vision of international law as a vehicle for peace, replacing wars with legal decisions, is part of his legacy. In situations where peace fails, however, Bentham's zeal for perfecting and codifying laws as well as subjecting judicial processes to the test of efficiency and the principle of utility may also be of lasting relevance. These ideas may have a bearing on contemporary discussions about effects and justification of international criminal law and the prosecution of international crimes.

Bentham was influenced by Enlightenment thinkers, as well as by his opposition to William Blackstone (1723–80), famous law professor and teacher of English common law. His ideas have been influential up to the present, including on important thinkers such as John Stuart Mill (1806–73), John Austin (1790–1859), and the pivotal twentieth century legal positivist H.L.A. Hart (1907–92).

While many took inspiration from Bentham's framing of legal concepts, his rejection of natural law and scepticism towards unwritten law, fewer followed him in his idealistic vision that a world guided by law would be a world without war. However, this may be his most important and lasting contribution.

12.1. Introduction

Jeremy Bentham coined terms like 'international law', 'codification' of unwritten laws, and 'maximisation' and 'minimisation' of happiness and pain, respectively. He developed a range of proposals for reform of the way England and other States at his time were governed, on how to improve the ways laws were drafted and enacted, on how to effectively fight corruption in government, and on how to improve penitentiaries, the care for poor people, and the overall functioning of the economy. He even spent time in Russia in 1786–87 to influence the reform-minded Empress Catherine II, though with little success.

Even though many of his ideas became influential at his time – in European countries like France, Spain, Portugal, and in several American

countries – Bentham remained frustrated by his lack of success in efforts to gather support for reform in his native England. The rejection of his proposal for a model prison, the ‘Panopticon’, by the English government in 1803 was a serious disappointment. After Parliament had adopted his plan in 1794, he had drafted thousands of pages of detailed plans for a prison that, in his view, would lead to less suffering among the inmates, rehabilitation of criminals, and more happiness for the society.

Bentham scholars maintain that his frustration with the government's rejection of his prison plan was pivotal in leading him to adopt ideas of representative democracy in the years after.¹ Long before this experience, however, Bentham as a young law student was initially reacting to what he perceived as lack of consistence and accessibility of England's legislation, which often existed only in the form of customary laws presented by lawyers, prosecutors and judges in unpredictable ways. He argued that for law to become a tool for improving society and preventing crime, it had to be codified based on sound principles, and foremost among them, the ‘principle of utility’.

After the government rejected the Panopticon and other reform proposals, Bentham realised that legislators did not always care for the well-being of society, but rather for their own interests and the interests of a group of benefactors. His democratic breakthrough seems to have come from his realisation that those in power were informed by ‘sinister interests’, rather than by the utility principle. He first applied the concept of sinister interest to the legal profession and then to the political establishment to explain their interest-based resistance to legal and political reform.

Even though Bentham found the task of legislating too complex for ordinary people, he considered that they (including women) should have a final say over who would represent them in drafting laws that benefitted society. It would also follow that people had to be given the option to scrutinise the way the government and the Parliament operated to make informed choices among candidates.

¹ There exists, though, different views on what led Bentham to become a political radical, campaigning for abolition of the British monarchy and the House of Lords, the replacement of the Common Law with a codified system of law, the ‘euthanasia’ of the Anglican Church, and for universal franchise. The influence of James Mill (1773–1836), John Stuart Mill's father, and other liberals may also have played an important role. For a detailed account, see Phillip Schofield, *Utility and Democracy: The Political Thought of Jeremy Bentham*, Oxford University Press, Oxford, 2006, chaps. 5–6.

This is how Bentham the ‘legal reformer’ (the ‘Enlightenment Bentham’ of the eighteenth century) and Bentham the ‘democrat’ (the ‘radical Bentham’ of the nineteenth century) are connected. To legislate well is for expert legislators to accomplish; often based on proposals from external experts like himself. However, if legislators did not have the well-being of the people in mind, the people should have the power to replace them.²

As important as his utilitarian-based legal and political reform proposals were, Bentham had much more to offer. He was not only a legal and political reformist, but contributed to defining new foundations of ethical and legal philosophy (‘jurisprudence’), as well as presenting influential ideas in political science, philosophy of language and logic.

Much inspired by progress in the natural sciences at his time, Bentham considered his own efforts of developing and applying foundational principles of legislation and morals as parallel to developments in physics and medicine. His main contribution would be to lay out the details of the ‘principle of utility’ in law and politics, as he outlined in his most known work, *An Introduction to the Principles of Morals and Legislation* (1789).³

It could be said that Bentham devoted the first part of his long career as philosopher and publicist to developing proposals for reform of legislation, detecting obstacles for sound reforms to be implemented, and devising strategies to overcome them. From the second decade of the nineteenth century, he devoted much of his attention to proposals for democratic reform in England. During the same period, he also developed extensive contacts with legislative authorities in a range of countries to promote a rationalised code of law which could serve as a model for all nations with liberal opinions.

The present chapter outlines some of Bentham’s main ideas, and applies them to contemporary debates about the foundations of international criminal law. Benthamite concerns may – even though international law of his time was lacking important characteristics of current international criminal law – still have some bearing on current debates and ef-

² Cf. *ibid.*, p. v.

³ The first edition of the book was printed in 1780, but published only in 1789. A new version, corrected by the author, was published in 1823: Jeremy Bentham, *An Introduction to the Principles of Morals and Legislation*, new edition, printed for W. Pickering and E. Wilson, London, 1823..

forts to develop sound foundations of this branch of international law, and strengthening consensus on both the legal norms and the institutions established to uphold them, such as the International Criminal Court ('ICC').

12.1.1. The Principle of Utility

Bentham formulated the 'principle of utility' in 1769 while he was still a young man. Among those he took inspiration from were contemporary philosophers such as Claude-Arien Helvétius (1715–71), David Hume (1711–76) and Joseph Priestley (1733–1804). According to the principle, *the greatest happiness of the greatest number* is the only proper measure of right and wrong and the only proper end of government. In Bentham's mind, however, even if the fundamental goal for the science of legislation and politics was fixed, the science itself was complex. To succeed, one must constantly consider information and ideas as to how the defined end might best be achieved.⁴

Until his death, Bentham remained convinced that the principle of utility, along with supporting principles, constituted sufficient foundation for a scientific approach to morals, legislation and politics.

His faithfulness to moral reasoning based on this principle is well illustrated by his acting in the last hours of his life. On 6 June 1832, he said to a friend that was with him, "I now feel that I am dying; our care must be to minimise the pain. Do not let any of the servants come into the room, and keep away the youths; it will be distressing to them and they can be of no service. Yet I must not be alone; you will remain with me and you only; and then we shall have reduced the pain to the least possible amount."⁵ Not much happiness was achievable at such a moment; however, making efforts to minimise the pain was still within Bentham's power.

Bentham introduced the 'principle of utility' in the form of a metaphor:

Nature has placed mankind under the governance of two sovereign masters, *pain* and *pleasure*. It is for them alone to point out what we ought to do, as well as to determine what we shall do. On the one hand the standard of right and wrong, on the other the chain of causes and effects, are fastened to

⁴ Cf. James Steintrager, "Bentham", in Geraint Parry (general ed.), *Political Thinkers*, vol. V, Routledge, London, 2004, p. 110.

⁵ Quoted from Francis Charles Montague, "Introduction", in Jeremy Bentham, *A Fragment of Government*, The Lawbook Exchange, Ltd., Clark, 2001, p. 14.

their throne. They govern us in all we do, in all we say, in all we think: every effort we can make to throw off our subjection, will serve but to demonstrate and confirm it. In words, a man may pretend to abjure their empire: but in reality, he will remain, subject to it all the while. The *principle of utility* recognises this subjection, and assumes it for the foundation of that system, the object of which is to rear the fabric of felicity by the hands of reason and of law. Systems which attempt to question it, deal in sounds instead of sense, in caprice instead of reason, in darkness instead of light.⁶

A few comments will have to suffice to put this introduction of one of the most important principles ever proposed in moral and legal philosophy into context. *Firstly*, it should be noted, as is not always done, that Bentham explicitly States, immediately after this introduction, that “enough of metaphor and declamation: it is not by such means that moral science is to be improved”.⁷ Even though the introduction is illustrative and pictures the principle of utility well, it may also be misleading if taken as a precise account of the new science Bentham aimed to develop.

Among Bentham’s vast body of work, such metaphoric texts are rare. He sometimes admits that his writings are too detailed, dry and long to attain a large readership. However, sciences of morals and legislation deal with highly complex subject matters and must necessarily be detailed and complex themselves.⁸

Secondly, in a note in the 1823 edition of *An Introduction to Principles of Morals and Legislation*, in which the introduction appears, Bentham indicates that the terminology might be improved. The ‘principle of utility’ should instead be named ‘*greatest happiness* or *greatest felicity*’

⁶ Jeremy Bentham, *An Introduction to the Principles of Morals and Legislation*, reprint of 1823 new edition, Clarendon Press, Oxford, 1876, pp. 1–2.

⁷ *Ibid.*, p. 2.

⁸ According to Bentham scholars, this might be one of the reasons for a seeming paradox: although Bentham became influential in his time and continues to be so, most of his texts remain unread. That may be because they often discuss, in much detail, the application of the principle of utility in different realms, and many of the controversies he engaged in are long forgotten. Many of his texts also went unpublished, or were published long after they were written. However, new and improved editions of some of his lesser known, but high-quality texts in the Collected Works of Jeremy Bentham may improve this situation. For more information on the Collected Works of Jeremy Bentham and the Bentham Project, see the web sites of Oxford University Press and the Bentham Project, University College of London, respectively.

principle'. The principle states that "the greatest happiness of all those whose interest is in question" is "the right and proper, and only right and proper and universally desirable, end of human action: of human action in every situation, and in particular in that of a functionary or set of functionaries exercising the powers of Government. The word *utility* does not clearly point to the ideas of *pleasure* and *pain* as the words *happiness* and *felicity* do".⁹ For some, Bentham contends, the use of the word utility had therefore made acceptance of the principle harder.

It then follows that Bentham would, for pedagogical reasons, prefer to refer to his main principle as the 'principle of happiness or felicity'. However, since in the history of philosophy, Bentham is perceived as a chief proponent of *utilitarianism* – which is derived from the word utility – I will nevertheless stick to the terminology of the original version of the book.¹⁰

Thirdly, it should be noted that Bentham claims that the sovereign masters, pain and pleasure, both as a matter of fact, govern us in all we do, and as an ethical and legal foundational principle, *ought* to or *should* govern us in all we do. The principle both functions as a description of human nature – humans are creatures that minimise pain and maximise pleasure by their actions – and as a *prescription tool* on how each human being should act. Some have argued that Bentham in this way departs from David Hume, who in the third part of his *Treatise of Human Nature* (1739–40) argues against moral rationalism by showing that transition from premises whose parts are linked only by "is" to conclusions whose parts are linked by "ought" are "altogether inconceivable".¹¹

In explaining Bentham's position, the above-mentioned metaphorical character of the text should be kept in mind.¹² More important, however, is Bentham's clarification of the epistemological status of the principle in his further explication. The principle is *not* susceptible to "any direct proof", he maintains, because any such proof must start somewhere. That which "is used to prove everything else, cannot itself be proved: a

⁹ Bentham, 1823, p. 1, see *supra* note 3.

¹⁰ It should also be noted that Bentham kept the original terminology in the revised version of the book, despite the difficulty in comprehension.

¹¹ David Hume, *A Treatise of Human Nature*, book III, part I, Lewis Amherst Selby-Bigge (ed.), Clarendon Press, Oxford, 1888, p. 469.

¹² Cf. Steintrager, 2004, p. 17, see *supra* note 4.

chain of proofs must have their commencement somewhere. To give such proof is as impossible as it is needles”.¹³

Bentham holds that the principle nevertheless can be shown to “be a right principle to be governed by, and that in all cases, it follows from what has been just observed, that whatever principle differs from it in any case must necessarily be a wrong one”.¹⁴ One of the principles opposed to the principle of utility is the ‘principle of asceticism’. Bentham’s strategy is to show that this principle, as well as another opposing principle, the ‘principle of sympathy and antipathy’, is either impossible to apply consistently or “at bottom but the principle of utility misapplied”. In contrast, the “principle of utility is capable of being consistently pursued; and it is but tautology to say, that the more consistently it is pursued, the better it must ever be for human-kind”.¹⁵

The ‘principle of sympathy and antipathy’ is, according to Bentham, hardly a principle at all. It is rather “a term employed to signify the negation of all principle”. It means approving or disapproving of “certain actions, not on account of their tending to augment the happiness, nor yet on account of their tending to diminish the happiness of the party whose interest is in question, but merely because a man finds himself disposed to approve or disapprove of them”.¹⁶ In criminal proceedings, this principle boils down to approval or disapproval by way of your feelings: “If you hate much, punish much: if you hate little, punish little: punish as you hate. If you hate not at all, punish not at all”.¹⁷

Bentham admits, though, that sympathy or antipathy may be a motive or cause of an act. This must, however, be distinguished from the evaluation of the moral character of the act. Some acts which were motivated by sympathy may have bad effects, while acts committed based on antipathy may have good effects. Such sentiments can therefore never be a right ground of action.

Arguing thus, Bentham attempts to show that the “only right ground of action, that can possibly subsist, is, after all, the consideration of utility

¹³ Bentham, 1876, p. 4, see *supra* note 6.

¹⁴ *Ibid.*, p. 8.

¹⁵ *Ibid.*, p. 13.

¹⁶ *Ibid.*, p. 16.

¹⁷ *Ibid.*, p. 17.

which, if it is a right principle of action and of approbation [in] any one case, is so in every other".¹⁸

In conceding that there does not exist any direct proof from *psychological* to *moral* hedonism, Bentham respects Hume's argument that what 'ought' to be done cannot be deduced from what 'is' done. This lack of direct proof, is however, compatible with what John Stuart Mill later termed 'indirect proof'. Both Bentham and Mill, who was one of the main heirs of Bentham's utilitarianism, held that 'is' and 'ought' could be connected in a practical and psychological sense in the minds of humans.

In the words of another of the great architects of utilitarianism, Henry Sidgwick (1838–1900), "no cogent inference is possible from the psychological generalization to the ethical principle, but the mind has a natural tendency to pass from the one position to the other: if the actual ultimate springs of our volition are always our own pleasures and pains, it seems *prima facie* reasonable to be moved by them in proportion to their pleasantness and painfulness, and therefore to choose the greatest pleasure or the least pain on the whole".¹⁹

For Bentham, Hume's distinction between 'is' and 'ought' was important as an argument for the uncertainty of all knowledge. All statements can only admit of degrees of probability. There is no certainty in human knowledge, neither in jurisprudence nor in the natural sciences. This is an important point for Bentham. As H.L.A. Hart put it, Bentham "believed that, in general, tyranny and oppression in politics were possible only where claims to infallibility of judgment were presumptuously made and stupidly conceded. It was necessary to oppose to these arrogant claims the truth that all human judgment, 'opinion', or 'persuasion' is fallible".²⁰

This view on the fallibility of all human knowledge became important in the further development of liberal thought. Mill in his famous book *On Liberty* (1859) maintained that because human judgments are

¹⁸ *Ibid.*, p. 23.

¹⁹ Henry Sidgwick, *The Methods of Ethics*, 7th edition, Macmillan and Company, Limited, London, 1907, p. 42.

²⁰ H.L.A. Hart, "Bentham: Lecture on a Master Mind", in Robert S. Summers (ed.), *More Essays in Legal Philosophy: General Assessments of Legal Philosophies*, Basil Blackwell Publishing, Oxford, 1971, p. 31. Hart, however, criticises Bentham's position on why the claim to infallibility is always false, pointing to Bentham's limitations as a philosopher (pp. 31–32).

fallible, freedom of thought and discussion are necessary to let the best arguments win. The view contains important incentives for democracy and rule of law, since it holds that any government who suppresses free thought and speech implicitly acts in contravention of the nature of human knowledge.

In sum, Bentham neither presented the principle of utility as *self-evident* nor *possible to prove*. His strategy was rather to show that competing principles failed, and that it was a reasonable principle given how humans are motivated to act. In any case, no principle or judgment are infallible, and to pretend so leads to tyranny and oppression.

This leads to my *fourth and final comment*, namely that Bentham explicitly explains that the principle of utility accounts for all kinds of actions, including “not only of every action of a private individual, but of every measure of government”. It should be used both to “censure” existing legislation – to assess whether it tends to augment or diminish the happiness of affected parties – as well as to be applied by lawmakers to ensure that new legislation produces overall “benefit, advantage, pleasure, good, or happiness” (which are but a few of the words that Bentham used to describe his approved end goal).²¹

In Bentham’s system of law, the civil code is of the greatest importance for maximising happiness. This field of law is concerned with the distribution of rights and duties (or benefits and burdens), and should maximise the four sub-ends of utility: subsistence, abundance, security, and equality.

To function well, however, civil law must be supported by a well promulgated and effective implementation of ‘penal law’. The purpose of ‘penal law’, which can impose sanctions or punishment for certain acts which, because they tend to diminish happiness, are classified as offences, is to give effect to the civil law.

A State must also have a ‘constitutional code’, which is concerned with the powers, rights, and duties of public officials, and their modes of appointment and dismissal. Also, in this context, penal law plays an important role in giving effect to relevant parts of constitutional law. The penal, civil, and constitutional law together forms ‘substantive law’, which is again given effect by the ‘adjective law’, or the law of judicial

²¹ According to Hart, Bentham gave altogether 58 synonyms for ‘pleasure’, see *ibid.*, p. 24.

procedure. There is also the 'law concerning the judicial establishment', which gives effect to the adjective law.

All these branches of law should, according to Bentham, be designed to augment happiness and diminish pain for all affected parties.

12.1.2. The Relevancy of Bentham's Philosophy

It might be apt, at this stage, to comment on the question of the relevancy of Bentham's thought to contemporary discussions of the foundational questions of international criminal law.

As a starting point, it should be noted that, for Bentham, there were no doubts about the relevance of the principle of utility and other utilitarian principles for assessing any legal system, including criminal law. To assess legislation in terms of its effects on society or for certain groups of society has become standard, not solely because of Bentham, although utilitarianism has certainly played its part in promoting the use of consequentialist criteria.

In contemporary discussions about the role and effect of international criminal law, utilitarian criteria are referred to such as in discussions about the effects of international or national prosecutions of core international crimes for the peace and/or the overall well-being of societies affected by the crimes as well as for categories of affected persons, such as victims, witnesses, suspects, and accused.

In many areas, Benthamite concerns have proved influential in the way societies perceive how legislation should be formed and applied. Relevant examples include:

1. Frequent use of utilitarian justifications of, and prescriptions on, the role of criminal law and punishment in terms of achieving positive effects for society;
2. Utilitarian-based demand for equality of everyone before the law, including women who are often provided less protection by the law, and government agents, who often remain above the law; and
3. Utilitarian-based arguments for the importance of clarity and simplification in legal language. For law and punishment to be successful in preventing crime, and thereby diminishing pain and augmenting happiness, the law has to be understood by ordinary people and punishment has to be meted out in proportion to the gravity of the crime in a comprehensible way.

A study of how Bentham reasoned about such topics may yet deepen our understanding of them, and strengthen our ability to argue in favour of sound principles. That is not to say, of course, that he should function as a moral arbiter or authority of what is good or bad in contemporary international criminal law and in the way international or national jurisdictions apply that branch of law.

A more constructive way of making use of Benthamite concerns would be to take inspiration from them to question the soundness of practices, values and ideas inherent in international criminal law. In providing answers to such questions, the foundations of international criminal law may be strengthened.

There are also other relevant aspects of Bentham's thinking, such as his criticism of the concept of 'natural rights' and his analysis of systemic corruption of the legal profession. He also presented a vision of an international legal order, including the establishment of a world court, to secure peace and co-operation among States.

Whole new fields of international law have come into existence since Bentham's times, such as international human rights law, international humanitarian law, and international criminal law. However, his reasoning on the law-like character of international law and its role in promoting overall happiness and preventing war might still be of relevance for contemporary debates about the status and role of international law.

Due to his own frustration with the English government and other governments that did not follow-up on reforms, Bentham also delved into strategic questions: how to promote reform ideas when faced with powerful groups that could lose benefits if reforms were enacted. His thinking on such issues may still have something to offer in a contemporary context.

Despite Bentham's frustrations over reluctant governments, he became increasingly influential in his own time and remains so in current times.²² He inspired, *inter alia*, prominent political and legal philosophers such as Mill, Austin and Hart. Utilitarianism remains an important branch of contemporary ethical philosophy, and legal positivism remains among

²² Like few other philosophers, Bentham experienced the forming of a 'sect' of followers, establishing their own magazine, *The Westminster Review*, founded in 1823; and the establishment of a university by inspiration of his ideas, the London University College, in 1826.

the main strands of contemporary legal philosophy. Both have borrowed heavily from Bentham's ideas.

There is certainly much to question and criticise in Bentham's thinking. I maintain, however, that there is also a lot to take note of and make use of in improving democratic institutions and legislation; both on the national and the international level.

In short, I find Bentham and Benthamite concerns especially relevant to recent discussions on the philosophical foundations of international criminal law in five aspects:

Firstly, he presented comprehensive ideas about the civilising functions of law, including criminal law, and which conditions law must meet to fulfil such functions. He was very much aware of the *negative* aspects of laws – for instance in restricting human freedom and inflicting pain and suffering on those who were subject of lawful punishment. Based on such considerations, he contended that legislation had to be designed well and be based on sound principles to maximise overall happiness. Institutions had to be redesigned bearing these concerns in mind. Reforming and improving legislation and practice is an ongoing process, and will never end.

Secondly, his thinking and visions about international law as a tool to preventing wars and improving inter-State relations. His idea of codifying an international legal code also led him to see the need to establish an international court able to decide on disputes between States. He did not develop the foundations for international criminal law as such, but he clearly depicted needs for sanctioning violations of international norms by representatives and even heads of States. This means that some conditionality was inherent in Bentham's thinking when it comes to the sovereignty of States.

Thirdly, his thinking about creating conditions conducive of reforms and improvements of legislation may have valid points for contemporary efforts to build wider consensus on the practice of international criminal law. Politicisation, corruption and other forms of failures of legal practice may weaken popular and State support for both the norms of international criminal law as well as their application. Bentham may provide useful ideas on how to overcome obstacles to reform and mobilise wider support of the norms.

Fourthly, Bentham may provide useful ideas for contemporary discussions on how to reform and develop further international criminal law

to protect the most important values of humanity. He emphasised that reforming legislation should be based on a principled approach, evaluating the result or consequences of legislation in terms of protecting the well-being of the greatest number. It may be argued that, so far, international criminal law has mainly been developed as an *ad hoc* response to situations of massive crimes, and only a few States have been influential in forming it. As part of a systematic approach, more States should be invited to join discussions on how to further develop international criminal law, providing it with greater authority. An important part of the discussion should be to systematically identify the most important values of humankind to be protected by the law.

Fifthly, it is part of Bentham's strategy of influencing legislation that if he succeeded in one country, that country could serve as a model for legislation in other States. Transposed onto the role of contemporary international criminal law, the complementary principle of the Rome Statute may serve exactly that function. It may lead to reforms strengthening national jurisdictions because functioning States prefer to be able to prosecute crimes themselves and avoid interference by the ICC.²³

In this way, the Rome Statute may serve as a model for national legislation and over time build capacity at the national level to prosecute core international crimes. This may even be the most important function of international criminal law and the ICC, since the beneficial influence on society of national prosecution of grave crimes tends to be larger than the influence of more distant international prosecution. Bentham may have applauded such an outcome, since for him the most important function of law is to influence society by producing maximum happiness and minimum pain. He would think that this could be done better domestically than internationally.

In this view, the ICC would be a successful institution if it were able to influence national jurisdictions effectively to genuinely prosecute international crimes, leaving few cases for the institution itself to deal with.

²³ Articles 17 and Article 53(2)(b) of the Rome Statute of the International Criminal Court ('ICC Statute') define the principle of complementarity. The complementary nature of the ICC is stated in the Preamble of the ICC Statute:

The International Criminal Court established under this Statute shall be complementary to national criminal jurisdictions.

See ICC Statute, 17 July 1998, in force 1 July 2002 (www.legal-tools.org/doc/7b9af9/).

12.2. Bentham's Intellectual Profile

Bentham came from a family of lawyers. Both his father and grandfather were lawyers working in London. His father intended for him to follow and surpass them as practising lawyers. However, Bentham was not an impressive speaker, and he was not impressed himself by the state of English laws at the time. Rather than making money by practicing law, he turned to a study of what the law might be or how it could be improved.

What was so frustrating with the English laws of his time? In his first book, *A Fragment on Government* (1776), Bentham distinguishes between the 'Expositor', who explains "to us what, as he supposes, the Law is", and the 'Censor', who observes "to us what he thinks it ought to be".²⁴ The book is a critique of Blackstone's *Commentaries on the Laws of England* (1765–69). Bentham saw in Blackstone, who was a celebrated authority on English law at the time, a representative of a widespread and damaging attitude, namely that the increasing crime rate in the country had nothing to do with the state of its laws.

There were other problems with Blackstone, according to Bentham, but the main point seems to be that in his exposition of England's laws, he did not see the need for reform. Bentham was, in the words of Bentham scholar James Steintrager, convinced that "the confusions, uncertainties and obscurity of the penal law and its enforcement were causing the increasing crime rate which he saw afflicting the country".²⁵

Blackstone's commentary contained another important fallacy. Its constitutional theory was inspired by John Locke (1632–1704), and referred to fictitious entities such as 'state of nature', 'social contract' and 'natural rights'. According to Bentham, these were dangerous fictions, which could easily result in violent and anarchical revolutions.

England experienced at Bentham's time rapid social changes due to the industrial revolution and socio-economic upheaval. For many observers, these rapid changes were an important part of explaining the increasing crime rate.

For Bentham, however, the emphasis was not on social problems but on the lacking quality of England's penal laws. They were a wholly

²⁴ Jeremy Bentham, in F.C. Montague (ed.), *A Fragment on Government*, The Lawbook Exchange, New Jersey, 2001, p. 98.

²⁵ Steintrager, 2004, p. 15, see *supra* note 4.

unsystematic mix of customs and (often badly) codified laws. In his own copy of *A Fragment on Government*, Bentham wrote that “this was the very first publication by which men at large were invited to break loose from the trammels of authority and ancestor-wisdom in the field of law”.²⁶

Bentham’s recipe for solving the problems was first and foremost legal reform; and then secondly political reform. He grew up in an era in which the natural sciences were making rapid strides, both in theory and in their application. His vision was to remedy the problems and conflicts of his day, by imitating the methods of the natural sciences. Like Newton had succeeded by founding on “a single law a complete science of nature”, Bentham thought he had found “an analogous principle capable of serving for the establishment of a synthetic science of the phenomena of moral and social life”.²⁷

He thought about himself as a reformer who was destined to introduce a new scientific approach to the reform of penal codes – both in England and in any other country. He was the Newton of the moral and social sciences. His reform ambitions were not confined to England: “That which is Law, is, in different countries, widely different: while that which ought to be, is in all countries to a great degree the same. The Expositor, therefore, is always the citizen of this or that particular country: The Censor is, or ought to be the citizen of the world”.²⁸ His global ambitions are evidenced by his active promotion of reform proposals in a number of countries in Europe and America.

This self-asserting belief that by applying the principle of utility, he could reshape legislation in any country and thereby solve their main social and political problems, providing maximum happiness for the largest number, of course led to criticism. Even some of his followers, such as Mill, described him as ‘one-eyed’, lacking experience, and being overly rigid in his insistence on having discovered an Archimedean point.²⁹

²⁶ Quoted from *ibid.*, p. xi.

²⁷ Elie Halévy, *The Growth of Philosophic Radicalism*, Mary Morris trans., Beacon Press, Boston, 1955, p. 3.

²⁸ Bentham, 2001, p. 98, see *supra* note 24.

²⁹ John Stuart Mill, “‘Bentham’, Essays on Ethics, Religion and Society”, in J.M. Robson and F.E.L. Priestly (eds.), *The Collected Works of John Stuart Mill*, vol. X, University of Toronto Press, 1969, p. 94 and pp. 77–115 in general.

However, there is much that points otherwise. From his inspiration from natural sciences, there is certainly a great deal of optimism. He realised, however, that morals and legislation are much more complex than natural sciences. He also knew, despite his programmatic declaration of psychological hedonism, that human nature is complex. He was aware of difficulties which stood in the way of his project, such as men not having a “clear view of their own interest”. Religion, superstition and fictions could lead men astray from reason and their own best interest.

The science of calculating which legal norms or individual actions would provide maximum happiness and minimum pain is not an easy one. It can hardly be a quantitative science as indicated by such terms as ‘felicity calculus’. It might be that Steintrager is close to the truth when he says that Bentham, above all, “found the principle of utility attractive because of its heuristic nature. The principle of utility was meant to generate a system, but it was intended to be an open system, one characterised by flexibility and development through the medium of rational discourse”.³⁰

Regardless of how Bentham is portrayed, the focus in our context should be on what is constructive and worth taking seriously today. His reaction to increasing crime rates in England at his time might have been one-sided. His optimism that he could achieve similar gains as Newton had done in natural science by applying the principle of utility may have been naïve. However, his insistence that legislation should serve the well-being of the many, not only of the rulers, or the lawyers, or other groups that benefitted from imperfect legislation, is a sound one.

12.2.1. The Misery of Bad Legislation and its Healing

Bentham seems to have been convinced that there was more serious crime in England than in any other country in Europe.³¹ The consequence of this situation was increasing unhappiness for an increasing number of victims, culprits, and for a large part of the population who suffered from an atmosphere of insecurity. For Bentham, this picture of his motherland was distressing because he believed that a lot of this unhappiness was unnecessary.

³⁰ Steintrager, 2004, p. 11, see *supra* note 4.

³¹ I base the outline in this section on Steintrager's reading of Bentham, based on extensive consultation of unpublished manuscripts.

Even though extreme poverty and socio-economic upheaval was partly to be blamed for the high crime rate, weaknesses in legislation and juridical praxis was a more important factor. Legislation could be compared with medicine. It was, however, an art and science of healing on a grand scale, namely, of healing the whole body politic.

In England, Bentham contended, men often committed crimes because they did not know that their actions were criminal. Even if they did know, the penal sanctions anticipated were often too lenient to deter them or the application of sanctions was uncertain. Heinous crimes went unpunished or were only subject to minor sanctions while small illegal acts could be punished with severity. Acts which were rightly classified as crimes were punished without considering the nature of the crime or its circumstances.

There were several other problems, such as overly technical and unnecessarily complicated rules of evidence. The rules of procedures led to cases taking years to be finalised, while high fees and taxes prevented just treatment for many. Another problem was that the rights and duties of the citizens were not well defined, and the law was not properly promulgated. A systematic problem was that the access to judgments that functioned as precedents was often difficult. Such precedents were often collected in books written in Latin and therefore inaccessible to anyone except judges and lawyers.

There was therefore no way in which the public could know what the law was. The legal status of an act was unclear since precedents often were inconsistent with one another.

Bentham's vivid critical exposé of the state of England's legislation at his time may at some points resonate with the current state of legislation and legal practice in parts of the world. His proposals for how to remedy the deficiencies, may at several points remind of some of the steps proposed by current legal reform movements and human rights groups.

Some of the steps Bentham proposes are obvious – such as easing access to legislation, organise and systematise legislation in reasonable and understandable terms, improve rules of procedure and evidence so that cases can be decided within reasonable time, and so on – while others are subtler and sophisticated.

In this chapter, I will refer only to a few of his most important proposals and analyses. It is pertinent to mention, however, that even if Ben-

tham thought of legislative reform – based on the principle of utility – as being of primary importance in remedying the dismal state of crime in England, he did not think that even the best legislation could completely solve the problems. Even though he was a rationalist in the sense that he believed humans apply reason in choosing to perform acts that promote their own best interests (happiness), he realised that there were plenty of passions and delusions that could lead humans astray.

He did, however, believe that crime could be reduced substantially by codifying law and systematically promulgating it. Law statues should be made so anyone of ordinary intelligence could discover with relative ease which actions constituted crimes. He had high ambitions for the completeness possible for penal law, stating that it should contain “no *terra incognitae*, no blank spaces”. It should be divided into sections so that individuals involved in certain activities can have access to a digest of relevant laws.

To succeed in reducing crime, Bentham argued that there was a need of a rational system of classifying offences. In the works of Blackstone and other legal authorities of his time there was no classificatory system to be found. The result was that their writings were as confused and complicated as the common law itself. Instead branches of law had to be divided into two parts and “then each of those parts into two others; and so on”. In this way a detailed and accurate map of the law may be achieved.³²

12.2.2. Bentham's Concept of Law

The misery of legislation had, however, a deeper cause in the way language function in legal texts. Scholars mostly agree that Bentham's theories about law and legal language is among his most original thought.³³

³² Readers of Bentham will recollect this model from his texts on legislation. Almost a third of the *Introduction to the Principles of Morals and Legislation* is devoted to a chapter on “Division of Offences”, see *supra* note 6.

³³ According to Hart, Bentham's theories on ‘fictions’ “anticipated by a century part of Bertrand Russell's doctrine on logical constructions and incomplete symbols. That doctrine, [...] was looked upon by many English and American philosophers as the paradigm of philosophical method and the prime solvent of philosophical perplexities”. See Hart, 1971, p. 19, *supra* note 20. Bentham also pioneered another important idea, namely that “sentences not words are the unit of meaning”, which were later re-discovered by Gottlob Frege (1848–1925) and Ludwig Wittgenstein (1889–1959) in his *Tractatus Logico-Philosophicus* (Prop. 3.3 and 3.3.4).

His view on law is dependent on his understanding of the concept of ‘human liberty’, which is founded in the liberal tradition. According to this thinking, liberty is *absence of restraint and interference from society and rulers*. To the extent that one is not hindered by others, one has liberty and is free. There has never been a natural state of freedom, according to Bentham, and since people have always lived in society there is nothing like a ‘social contract’. However, in society there is a distinction between *public* and *private* life. Liberty as non-interference by the society or the rulers is morally good since it is reflecting the greatest happiness principle.

Due to his view on liberty, Bentham followed Thomas Hobbes (1588–1679) in viewing law as ‘negative’. Based on the principle of utility, liberty must be positive because it provides happiness, while law is negative since it restricts liberty. It follows that the control which the State exerts by legislation must be limited to maintain individual freedom.

Law is nevertheless necessary to social order, and good laws, promoting happiness and well-being to the greatest number, is essential to good government. The problems that arises from bad legislation is therefore of the greatest importance to solve. Unlike many earlier thinkers, Bentham denied that there exists any ‘natural law’, which could be invoked to reject, amend or provide with authority existing law. Instead, his persuasion was that the principle of utility was the only sound basis for criticising and improving legislation.

For Bentham, law is a phenomenon of large societies with a sovereign – a person or a group of persons with supreme power. Laws in such societies are a subset of the sovereign’s commands: general orders that apply to classes of actions and people and are backed up by the threat of sanctions. This view was further developed by Austin and legal positivism. A consequence of the view is that law that contains morally questionable norms, or commands morally evil actions, or is not based on consent, is still law.

A popular misunderstanding is that legal positivism necessarily means that one must be *satisfied* with existing law. This is refuted by Bentham and other legal positivists. Understanding the phenomenon of law must be clearly distinguished from assessing or censuring (as Bentham would say) existing law. Large parts of Bentham’s publications are devoted to criticising legislation as well as juridical practice and to proposing better legislation. He also held that disobedience towards the law, stem-

ming from considerations applying the principle of utility, was sometimes justified.

However, he was convinced that invoking *natural rights* or *natural law arguments* did not lead to increase in the overall happiness of the members of society. Rather it led to revolutions, anarchy and pain, as demonstrated by developments in France after the 1789 revolution and the proclamation of the *Declaration of the Rights of the Man and of the Citizen*.

There was also another possible unwanted result of insufficient understanding of law: oppression, legal corruption and barbarism, as exemplified by the state in England.

In criticising both what he called the 'anarchical fallacies' resulting from declaring natural rights, as well as the unfortunate situation with English law, Bentham applied his theory on logical fictions.

Understanding law involves understanding concepts such as 'rights', 'obligations', 'contracts', 'property', 'immunity', 'privilege', and so on. This proves rather difficult. In the empiricist tradition, which Bentham adheres to, understanding is provided by *perception*. To allow for the understanding of things that are not directly perceived, Locke and Hume, the primary advocates of empiricism, distinguished between 'simple' and 'complex' ideas. A complex idea, such as that of a golden mountain, can be understood only because it can be analysed in terms of its simple constituents.

However, this technique does not work for legal terms. Bentham therefore invented an alternative way of giving meaning to such terms, called 'paraphrasis'. The idea is not to translate complex words into simpler words, but to translate the whole sentence of which it forms a part into another sentence. He called the legal terms in question 'fictional entities', and works out for several of them how sentences containing them can be translated to sentences that eventually only contains 'real entities'.

A much-used example is the term 'rights', which are explained by Bentham in terms of sentences about 'duties'. A right I have may be restated in terms of the imposition of duties on others who are obliged to fulfil my right. 'Duty' is of course also a 'fictional entity', never to be perceived directly, but a new paraphrasis may lead to something perceivable. Sentences about duties can be translated into sentences about the threat of moral disapproval or punishment. To have a duty is then to be

under a threat of being sanctioned if the duty is not fulfilled. Finally, being under a threat of a sanction amounts to being under a threat of imposition of pain.

In this way, we reach what Bentham calls ‘real entities’. A famous quote from *A Fragment on Government* reads: “*pain* and *pleasure* at least are words which a man has no need, we may hope, to go to a Lawyer to know the meaning of”.³⁴ With such clarifiers the law can become clear for lawyers and laymen alike.

The problem was that English common law terminology was full of fictions, and that judges, lawyers and laymen alike did not distinguish between them and real entities. There was a widespread belief that there were real objects which corresponded to the abstract words.

For Bentham, it was therefore not enough that common law was adequately codified, classified and promulgated as statutory law. The language of law should be transformed. He developed whole new sets of terms for a ‘universal jurisprudence’, with definitions consisting of simple ideas and which could replace the technical, ambiguous, obscure and fictitious language of English jurisprudence.

Even though he never presented his theory of fictions in full, it remains at the hearth of his explanations of why legal reform is necessary and how it can be done. For him the project is not limited to refining and clarifying terminology. The task of legal philosophy, which Bentham in this context calls the “metaphysics of jurisprudence”, is to clarify what is meant when we use certain words. Without such clarity, humans are destined to remain slaves to authority and the customs of barbaric times.

12.2.3. Bentham’s Attack on Natural Rights

No doubt, Bentham’s criticism of the state of England’s legislation at the time had many valid points. Some of the points he made may even be valid for contemporary legislation in many States. For any State to reduce crime and create a secure environment, the task of clarifying, simplifying, systematising and making accessible its penal code remains a task of primary importance. The proposals on how what he calls ‘legal fictions’ may be translated into more readily understandable terms is also constructive, even though Bentham may have overstated the negative impact they have.

³⁴ Bentham, 1776, p. 121, see *supra* note 24.

Also, Bentham's realisations of why his reform proposals were often not followed up on, have valid points.³⁵ He may have understood early on that reform was difficult, even though he later gave the impression that it took him a long time to fully realise how difficult it was. He realised that the people in power, adhering to the 'principle of self-preference' rather than the 'principle of utility', did not want reform. All his proposals were designed to improve the lot of the greater number, and thereby they could also threaten the interests of the few in power: the rulers and certain professional groups that benefitted from the situation, such as lawyers, judges, legislators, booksellers, and who gained financially from a confused legal situation.

He also realised that even those who would benefit the most from his proposals, people in general, in many cases were not ready to accept them because of fear of change and lack of understanding of complex matters.

Another striking feature of Bentham's reform proposals are their universal aspirations. In the same way that the laws of physics are the same everywhere, the principles of high-quality legislation and politics are valid everywhere. Of course, his main devotion was to improve the situation in England, but he made proposals for improved legislation in many other countries. In principle, Bentham was proposing a 'universal censorial jurisprudence', which criticises law as it is considering what the law ought to be, and what ought to be transcends the boundaries of any given nation. It appeals to a universal standard – the 'principle of utility' – which is valid for all human's and societies.

Strikingly, Bentham's 'censorial jurisprudence' functions similar to the way international human rights function today. Human rights have become a universal standard from where domestic legislation and juridical practice may be *censored*. International human rights institutions provide model legislation and legal advice, like Bentham and his followers did. Similar frustrations as Bentham experienced also exist. National authorities often disregard or cheat in their following-up on the advices.

The analogy could even be extended to the codification of international criminal law in the Rome Statute. It is hard to imagine that Bentham would have been anything but positive towards such an endeavour

³⁵ An overview of Bentham's reflections on the obstacles to reform is provided in Steintrager, 2004, chap. 2, see *supra* note 4.

that in his terms would clarify the law and serve as a model for domestic legislation.

Equally striking, however, is Bentham's attack on predecessors of the modern human rights movement, namely, thinkers that referred to the natural rights of all human beings in political declarations. For any contemporary reading, his denouncing of the 1789 French *Declaration of the Rights of the Man and of the Citizen* seems overblown. A comment by Hart may enlighten an important point:

It seems to me that Bentham really was afraid not merely of intemperate invocations of the doctrine of Natural Rights in opposition to established laws, but sensed that the idea of rights would always excite a peculiarly strong suspicion that the doctrine of utility was not an adequate expression of men's moral ideas and political ideals. There is, I think, something strident or even feverish in Bentham's treatment of rights which betrays this nervousness.³⁶

Bentham's view on fictional entities – such as legal rights – was that they needed to be translated and established on firmer foundations. Legal rights, however, had an important place in legislation and political life, and should not be disposed of.

Natural rights, however, were not fictional but *fabulous* entities and 'contradictions in terms'. Legal rights could be analysed in terms of the corresponding duties and the threat made by law of sanctions against those who did not fulfil their duties. This was not possible for natural rights since they were not part of any law at all. They were more akin to poetry, than to legal language. Unfortunately, the language of law had been infested with such entities.

The purpose of the legislator requires that both the composer and the reader be as much as possible in their sober senses that they may be able (the one for the purpose of determining what he shall command, the other for that of knowing what he is to obey) to distinguish every object as perfectly as possible from all other with which it is in danger of being confounded. No kind of enthusiasm ought either the Legislator

³⁶ Hart, 1971, p. 33, see *supra* note 20.

or the Judge to have about them, not even the enthusiasm of humanity.³⁷

Bentham invented a whole range of expressions to describe that natural rights are non-existing, such as calling them 'counterfeit rights', 'nonsense on stilts' and so on. More constructive, however, is his suggestions that the reference to natural rights is a way of arguing or stating a strong wish about which *legal* rights there ought to be. He would then add that this must be done with care in order not to create expectations and enthusiasm that could lead to anarchical consequences.

Supposing that natural rights exist is wrong for another reason as well, because it indicates that these rights would be the same for all time. According to Bentham, only those systems of rights that produce utility should be upheld. Over time, different conditions may mean that we must restate rights or change them altogether. It is therefore a mistake to think that any rights are unalterable.

In the utilitarian view on rights, they are reduced to tools to promote the principle of utility. In this author's view, important features of rights are then lost, such as their defence of the dignity, autonomy, privacy and personal freedom; in particular of persons belonging to vulnerable groups of society.³⁸

According to Hart, Bentham failed to see that 'rights' have a different time direction than the principle of utility, which always points to the future consequences of actions to assess whether they are acceptable. Reasons for ascription of moral rights "must refer to the present properties or past actions of the individuals who are said to have moral rights as in themselves sufficient grounds for treating them in a certain way independently of the beneficial consequences to society of doing so".³⁹

The point is that rights do not depend on an analysis of future consequences, but on whether a person has done something that make her or

³⁷ Steintrager, 2004, p. 9, see *supra* note 4. The quotation is from University College London, Bentham Manuscript, Box 27, p. 123.

³⁸ Cf. Hugo Adam Bedau, "'Anarchical Fallacies': Bentham's Attack on Human Rights", in *Human Rights Quarterly*, 2000, vol. 22, no. 1, pp. 261–79. Bedau argues that Bentham's restrictive utilitarian view misses the key points of human rights, and that they should instead be derived from "recognition of our common nature as rational, autonomous, moral agents for whom liberty, privacy and other goods are paramount, rather than from any collective or aggregative fact about net social welfare or the general happiness". (p. 278).

³⁹ Hart, 1971, pp. 38 ff., see *supra* note 20.

him *deserve* certain treatment. The claim of natural and human rights is that if only a person is born as human being she or he qualifies to certain basic rights. Even if treating someone according to human rights has neutral or negative consequences for the overall well-being of affected persons, the rights should be respected.

In many cases, there would not be a conflict between the results of applying the principle of utility and applying human rights. However, it is easy to find examples where there are. For instance, should the law permit applying torture if you by torturing a person could obtain information that could save innocent civilians from a terrorist attack? Utilitarian and human rights consideration would provide opposite answers. In human rights, the prohibition of torture is an absolute one, resulting in a certain inflexibility that Bentham would oppose.⁴⁰

12.2.4. Punishment and Criminal Responsibility

The philosophical foundation of any criminal law – which imposes forms of punishment on those who are found guilty of breaching the law – must entail a theoretical justification for punishment as such. Traditionally, such justifications have been either ‘consequentialist’ or ‘deontological’.

In general, the practice of punishment could be justified by reference either to ‘forward-looking’ or to ‘backward-looking’ considerations. If the former prevails, then the theory is likely to be ‘consequentialist’ and likely some version of utilitarianism. According to this view, the point of the practice of punishment is to increase overall net social welfare by reducing or ideally, preventing crime.

If the latter prevail, the theory is ‘deontological’. In this approach, punishment is seen either as a good in itself or as a practice required by justice. A ‘deontological’ justification of punishment is likely to be a ‘retributive’ justification.

There is also a third alternative, providing justifications in hybrid combinations of these two independent alternatives.⁴¹

⁴⁰ For the sake of the argument, I disregard considerations about the effectiveness of torture in getting reliable information. Much modern research indicates that coercive interrogation methods are not to be relied on. See for example Norwegian researcher Asbjørn Rachlew, “From interrogating to interviewing suspects of terror: Towards a new mindset”, in *Penal Reform International*, 14 March 2017.

⁴¹ Hugo Adam Bedau and Erin Kelly, “Punishment”, in *Stanford Encyclopaedia of Philosophy*, 31 July 2015.

The consequentialist views punishment as justified to the extent that its practice achieves (or is believed to achieve) an end-state such as “happiness for the greatest number”, general welfare or another specified common good. Most philosophers today would modify this view by introducing various constraints on punishment, such as those following from human rights or other humanistic considerations. Whether these constraints can in turn be justified by their consequences is not a necessary condition. An important part of the theory of punishment is thus a careful articulation of the norms that provide these constraints on the practice and their rationale.

As we have seen, the assessing of the future consequences of individual actions, application of legal norms and implementation of government decrees is at the centre of Bentham's normative approach. His justification of punishment follows the same logic.

The proper aim and justification for punishment is to produce pleasure and prevent or reduce pain. However, punishment is painful. The only viable justification of it is therefore to prove that the pain inflicted on the person who is punished, is outbalanced by the reduction in pain or increase of pleasure it causes for all affected persons.

If the threat of punishment is deterring people from doing things which would produce more pain – such as rape, theft, murder or committing international crimes – then punishment is justified. A consequence of the theory is also that the amount of pain which is inflicted must be less than the reduction of pain or the happiness it produces. In other words, there must be a valuation of the likely pains produced by future offences, which can be averted by setting out a meted punishment.

This way of reasoning does not implicate that the punishment should be similar to the offence. If punishment is, however, justified as a *deliberate form of revenge*, such ideas of mimicking the offence come to the fore. For Bentham, this is an example of applying the principle of ‘sympathy and antipathy’, whereby you punish according to your feelings, “if you hate much, punish much: if you hate little, punish little: punish as you hate”.⁴² Instead, punishment should be a tool to improve society by deterring future offences and rehabilitating criminals.

⁴² Bentham, 1876, p. 17, see *supra* note 6.

Currently, there may be six prevailing standard justifications of punishment. According to these views, we punish criminals because it:

1. serves justice by giving criminals the hard treatment they deserve ('retributivism');
2. deters everyone from committing crimes ('deterrence');
3. helps to morally educate both the criminal and society at large ('moral education');
4. allows society to express its moral values ('expressivism');
5. helps restore the victims along with their friends and families ('restitutivism'); and, finally
6. provides a controlled, peaceful outlet for socially disruptive emotions ('social safety valve theory').

Even though each of these justifications may carry different weight, I think they are all part of what we today would come up with if pressed to justify punishing criminals. "Each of the traditional theories helps illuminate what we stand to gain from an effective institution of punishment", in the words of Christopher H. Wellman. I also agree with him, that of the six, the second might be the most important.⁴³

In Nordic countries, the so-called 'general' and 'individual' prevention of crimes is at the centre of the foundations of penal legislation. Such considerations also have a prominent place in many other countries and in international jurisdictions.

It is thus hard to question that Benthamite views have prevailed. However, different from his exclusionist approach of treating justifications, the utilitarian justifications have prevailed in concert with others. Depending on circumstances, as of today, many would be willing to refer to all six justifications mentioned above as valid, however, granting Bentham that deterrence and moral education should be viewed as most important.

In thinking about criminal responsibility, Bentham's view is restrictive, based on a narrow understanding of what can legitimately constitute a 'reason for action'. According to Hart, the restrictive view has its origin

⁴³ Christopher Heath Wellman, "Piercing Sovereignty: A Rationale for International Jurisdiction Over Crimes That Do Not Cross International Borders", in R.A. Duff and Stuart Green (eds.), *Philosophical Foundations of Criminal Law*, Oxford University Press, Oxford, 2013, p. 461.

in Bentham's denial that the past actions of an individual who is said to have moral rights could serve as "sufficient ground for treating them in a certain way independently of the beneficial consequences to society of doing so".⁴⁴ To invoke past achievements as a reason to grant someone special treatment today is in Bentham's eyes "a form of bad faith which uses the language of reason to express personal 'antipathy or sympathy', mere irrational sentiment".⁴⁵

Few of Bentham's passages are more revealing of his way of thinking than the following:

It is the principle of antipathy which leads us to speak of offences as *deserving* punishment. It is the corresponding principle of sympathy which leads us to speak of certain actions as *meriting* reward. This word *merit* can only lead to passion and error. It is *effects* good or bad which we ought alone to consider.⁴⁶

In line with this restrictive line of thought about what can be a reason for rewarding or punishing someone, Bentham also has diverging views on how to justify mental conditions of criminal responsibility. In any civilised legal system, if a person was insane, a young child, under duress, or could not control himself when committing a crime, he or she should not be liable to punishment or blame.⁴⁷

Even if Bentham accepts this doctrine, he turns "its face to the future away from the past. We are to observe such restrictions on the use of punishment not because there is any intrinsic objection to punishing a man who at the time of the crime lacked 'a vicious will' or lacked the 'free use of his will but because his punishment will be 'inefficacious'".⁴⁸

This approach is, in my view, counter-intuitive. However, Bentham's challenging of traditional justifications of punishment and criminal responsibility – and a range of other concepts – still has some bearing. Even if we do not accept that future consequences are the *only* relevant

⁴⁴ Hart, 1971, p. 38, see *supra* note 20.

⁴⁵ *Ibid.*

⁴⁶ Jeremy Bentham, *Theory of Legislation*, 2nd edition, Trübner & Co., London, 1871, p. 76.

⁴⁷ The doctrine of *mens rea* as a necessary condition of criminal responsibility and liability for punishment is prescribed in Articles 30 and 31 of the ICC Statute, see *supra* note 23.

⁴⁸ Hart, 1971, p. 40, see *supra* note 20. See also Bentham, 1876, chap. XV, *supra* note 6.

concerns when justifying punishment or determining the limits of criminal responsibility, they should be part of the consideration.

His approach also has the beneficial effect of bringing to the discussion on the foundations of punishment, questions on how to strengthen the component of rehabilitation and moral education.

12.2.5. Extending the Principle of Utility to International Law

Bentham did not write extensively on international law. He did nevertheless play a crucial role by re-naming the field and providing a vision for international law's role in securing world peace and happiness for all nations. He was of the view that international law should play a similar role in the society of States as national law played in the society of individuals. It should be shaped to provide happiness for the greatest number of States.

He coined the English word 'international' in the last chapter of his book *An Introduction to the Principles of Morals and Legislation*, to replace the term 'law of nations'. The term 'law of nations' is a misnomer, according to Bentham and "were it not for the force of custom, it would seem rather to refer to internal jurisprudence" of nations.

In discussing how jurisprudence may be classified, Bentham suggests that it can be divided in terms of "the political quality of the persons whose conduct is the subject of the law". He states that persons "may [...] be considered either as members of the same state, or as members of different states; in the first case, the law may be referred to the head of *internal*, in the second case, to that of international jurisprudence".⁴⁹

In putting Bentham's view on international law in context, he had a rather Eurocentric view on the globalisation taking place at his time, while also acknowledging the important role of the United States as a model of representative democracy, and arguing for de-colonisation. It was in his view primarily the European States that civilised the world, although there were many deficiencies in their legislation and political life.

Accordingly, he promoted his first book, *A Fragment on Government*, as the product of a global moment in British and human history because it was published just after James Cook's return from his second voyage around the world in 1775. In the preface, he notes that "[t]he age we live in is a busy age; in which knowledge is rapidly advancing towards

⁴⁹ *Ibid.*, p. 326.

perfection. In the natural world, in particular, everything teems with discovery and with improvement. The most distant and recondite regions of the earth traversed and explored [...] are striking evidences, were all others wanting, of this pleasing truth”.⁵⁰

The context of Bentham's thinking about international matters and the regulation that international law may provide thus seems to be the expanding British and European empires. This was, however, somewhat balanced by his application of the principle of utility, which defined its subjects to have equal status.

In framing the concept of international law, his starting point was his critical appraisal of Blackstone's exposition on the law of nations. *A Fragment of Government* may have been inspired by global expansion of the British Empire, but it was first and foremost a critique of Blackstone's account of municipal law. *A Comment on the Commentaries*, which Bentham drafted between 1774 and 1776, and which the *Fragment* was based on, remained incomplete and was never published by Bentham. It is in this work; however, that he explains what he thinks is wrong with Blackstone's account of the law of nations.⁵¹

Not surprisingly, among Bentham's chief concerns was that Blackstone included the law of nature in the concept of the law of nations, as well as mutual compacts, treaties, leagues and agreements, which were of doubtful legal content. It might be that Bentham did not treat Blackstone's account fairly;⁵² however the direction of his criticism was clearly in line with his thoughts about how to improve international legislation presented thirteen years later, in *An Introduction to the Principles of Morals and Legislation*.

In an often-quoted footnote to his introduction of the term international jurisprudence,⁵³ he explains that “the word *international*, it must be acknowledged, is a new one; though, it is hoped, sufficiently analogous and intelligible. It is calculated to express, in a more significant way, the

⁵⁰ Jeremy Bentham, *A Fragment on Government*, printed for T. Paine, P. Elmsly and E. Brooke, London, 1776, p. i.

⁵¹ Cf. M.W. Janis, “Jeremy Bentham and the Fashioning of International Law”, in *American Journal of International Law*, April 1984, vol. 78, no. 2, pp. 405–18. *The Comment on the Commentaries* was first published in 1928. It is currently available in *The Collected Works of Jeremy Bentham*, Oxford University Press, Oxford, 2008.

⁵² Cf. Janis, 1984, p. 408, see *supra* note 51.

⁵³ Bentham, 1871, see *supra* note 46.

branch of the law which goes commonly under the name of the *law of nations*".

It is clear from Bentham's further explanations of international law, that it deals exclusively with the rights and obligations of States between themselves and not about rights and obligations of individuals. He also assumed that foreign transactions before municipal courts were decided by internal, not international, rules. In effect, without ever mentioning that he realised to have done so, Bentham "excluded from the domain of his 'international law' all of those rules mentioned by Blackstone that concerned individual rights and obligations. [...] More or less inadvertently, Bentham changed the boundaries of the field he sought to define".⁵⁴

There are several other important aspects of Bentham's view on the status and scope of international law. His disciple, John Austin is well-known for his conclusion that international law lacks lawlike qualities. He viewed it as rules established merely by general opinion, such as laws of honour or law set by fashion.⁵⁵ According to Austin, law-like qualities included that legal provisions should be based on a command of the sovereign and those violating it should face sanctions.

Since there was no international sovereign and because the sanctions for violating international law were only moral, Austin rejected the claim that international law really was law at all. Bentham may have expressed similar views; however, his main line of thought was quite different. In a manuscript called *Of Laws in General*,⁵⁶ he elaborates further on necessary qualities of laws. He contended that "concessions of sovereign are not laws" and that "a treaty made by one sovereign with another is not itself a law". He also held that the enforcement of the treaties depended only on moral and religious sanctions.

He nevertheless pointed out that national sovereigns *could* make international law, and that *real* law could be enforced only with a religious or a moral sanction. It seems then that we "have strong suggestions that Bentham, for himself, was at least sometimes satisfied that there was

⁵⁴ Janis, 1984, p. 410, see *supra* note 51.

⁵⁵ John Austin, *The Province of Jurisprudence Determined*, Weidenfeld & Nicholson, London, 1954, p. 201.

⁵⁶ *Of Laws in General* was not part of the 1843 John Bowring edition of Bentham's collected works, but was only discovered in 1939. It was published in 1945 under the title *The Limits of Jurisprudence Defined*. Hart edited the manuscript and published it in 1970, under the title *Of Laws in General*.

enough to international law that was lawlike to let one call it law".⁵⁷ In this, he was later followed by Hart, who famously argued in the *Concept of Law* (1961) that "no other social rules are so close to municipal law as those of international law".⁵⁸

More important than Bentham's discussions on the status of international law at his time, is his four essays with proposals of principles of international law.⁵⁹ It is the first, *Objects of International Law* and the fourth, *A Plan for a Universal and Perpetual Peace*, which identifies most clearly Bentham's aims for international law.

As to be expected, Bentham's method in the essays is to apply the principle of utility to international law, as he did to municipal law. Overall, he has an optimistic view of what international law might accomplish. The beginning of *Objects of International Law* sets the tone: "If a citizen of the world had to prepare a universal international code, what would he propose to himself as his object? It would be the common and equal utility of all nations: this would be his inclination and his duty".⁶⁰

Bentham questions whether a legislator, being a citizen of one nation, could at the same time be trusted to develop laws for the whole world. He attempts to resolve the dilemma by arguing in favour of surrendering national self-interest: "But ought the sovereign of a state to sacrifice the interests of his subjects for the advantage of foreigners? Why not? – provided it be in a case, if there be such a one, in which it would have been praiseworthy in his subjects to make the sacrifice themselves".⁶¹ His point of departure is clearly the principle of utility.

[...] the end that a disinterested legislator upon international law would propose to himself, would therefore be the great-

⁵⁷ Janis, 1984, p. 412, see *supra* note 51.

⁵⁸ H.L.A. Hart, in Joseph Raz and Penelope A. Bulloch (eds.), *The Concept of Law*, 3rd edition, Oxford University Press, Oxford, 2012, p. 237.

⁵⁹ Bentham did not make it easy for the scholar to detect his full meaning as to the proposals. In the latter half of the 1780s, he drafted a series of proposals under the general headings of "Law Inter National 1786" and "Pacification and Emancipation". These remained incomplete and in manuscript form until they were translated from French to English, edited and published as four essays in 1843, under the title *Principles of International Law*. They appeared in the second volume of Bowring's edition of Bentham's collected works. The essays are sketchy and reflect the editor's choice as to what to include.

⁶⁰ Jeremy Bentham, in John Bowring (ed.), *Principles of International Law*, vol. 2, William Tait, Edinburgh, 1838–43, p. 536.

⁶¹ *Ibid.*, p. 537.

est happiness of all nations taken together... he would follow the same route which he would follow with regard to internal laws. He would set himself to prevent positive international offences – to encourage the practice of positively useful actions.

He would regard as a positive crime every proceeding – every arrangement, by which the given nation should do more evil to foreign nations taken together, whose interests might be affected, than it should do good to itself. [...]

In the same manner, he would regard as a negative offence every determination, by which the given nation should refuse to render positive services to a foreign nation, when the rendering of them would produce more good to the last-mentioned nation, than it would produce evil to itself.⁶²

Bentham views war as a type of procedure by which nations endeavours “to enforce its rights at the expense of another nation”. He named the laws of peace the “substantive laws of the international code”, while the laws of war were the “adjective laws of the same code”. He proposes several ways to prevent war:

1. Homologation [codification] of unwritten laws which are considered as established by custom;
2. New international laws to be made upon all points which remain unascertained; upon the greater number of points in which the interests of two States are capable of collision; and
3. Perfecting the style of the laws of all kinds, whether internal or international. How many wars have there been, which have had for their principal, or even their only cause, no more noble origin than the negligence or inability of a lawyer or a geometrician!⁶³

Bentham thought that wars could be prevented by dealing more methodically with the various causes of a conflict, by elaborating new international rules where no such rules exist, and by making unwritten customs explicit. And as he believed internal peace and reduction of crime could be achieved domestically by systematic reforms based on the utility principle, he believed international peace was in sight if international law was improved in similar ways.

⁶² *Ibid.*, p. 539.

⁶³ *Ibid.*, p. 540.

The central theme of his *Plan for a Universal and Perpetual Peace*, the fourth of the essays on international law, is that to establish world peace nations should sacrifice national self-interest. He addresses proposals to all nations, especially to England and France, which include giving up of colonies, establishing free trade, reducing the navies to what is necessary to protect against pirates and the mutual reduction of the size of armies.

Bentham realised, however, that even if these reforms were to be adopted, there could still be conflicts between nations. He suggests therefore that to prevent disputes nations should agree to establish an international court of arbitration, “a common court of judicature for the decision of differences between the several nations, although such court were not to be armed with any coercive powers”.⁶⁴

As envisioned by Bentham, the international court would work by establishing gradual responses. The first would be the mere reporting of the Court's opinion. The second would be the circulation of the opinion in each nation to stimulate a favourable public reaction. The third would be “putting the refractory state under the ban of Europe”. And the fourth, last resort, would be that participating States would contribute and deploy armed contingents to enforce the court's decisions.

In a manuscript written in the 1820s, Bentham proposed a legislative alliance among “all civilised nations”, each to be represented by an envoy at a congress with both judicial and legislative authority. He criticised Emmerich de Vattel (1714–67) for providing inadequate foundations for a new international order. He argued that only an international order “grounded on the greatest happiness principle, [...] would, if the plan and execution be more moral and intellectual than Vattel's, possess a probability of superseding it, and being referred to in preference”.⁶⁵ <http://www.classicsofstrategy.com/2015/08/principles-of-international-law-bentham.html> - 38

In sum, Bentham introduced the English term ‘international law’ to replace the term ‘law of nations’, which he had found and criticised in Blackstone. He however narrowed the scope somewhat, restricting international law to only those rules which concern sovereign States among or

⁶⁴ *Ibid.*, p. 547.

⁶⁵ Quoted from Carolina Kenny, “Jeremy Bentham, Principles of International Law (1786–1789/1843)”, in *Classics of Strategy and Diplomacy*, 20 August 2015.

between themselves. That was Bentham's original meaning in crafting the term 'inter-national'.

Blackstone's 'law of nations' includes laws characterised by their sources, which are non-municipal. It includes rules provided in multistate agreements or practice or other non-municipal sources. It is more inclusive than Bentham's definition, and according to some commentators it includes much of what had been traditionally thought of as within the realm of the law of nations.⁶⁶

Bentham was called during his lifetime "legislator of the world".⁶⁷ That was not because he succeeded in codifying international law. He did not. What he did, however, to earn such a title was to propose a term – 'international law' – that became a success even in his own time.

There was, however, more to it. Bentham was a visionary well ahead of his time, believing that a codified international law, thoroughly based on the principle of utility, could change the world for the better. In the words of Janis, "[i]t should be no surprise that Bentham brought his reformatory zeal, albeit briefly, to international, as well as to municipal, law. Realist and idealist – Bentham displayed both the scepticism and the romanticism that still invests the discipline he named".⁶⁸

Bentham also included a proposal for a world institution – a world court – that could decide on contentious issues between the States. In other words, by strengthening the lawlike character of international law – by proposing an international institution that could legitimately impose sanctions on States that violated the law – he thought he could prevent war and build a peaceful world.

Finally, Bentham's central concern during the 1810s and 1820s was to promote codification of the municipal law of "nations professing liberal opinions". He argued that a code of law should be based on a rigorous logical analysis of the categories of human action, and that each enactment should be followed by the reasons which justified it. Such a comprehensive approach would signal a new era in legislation.

⁶⁶ Janis, 1984, p. 41, see *supra* note 51.

⁶⁷ José del Valle, a Guatemalan politician, wrote in a letter to Bentham: "Your works give you the glorious title of legislator of the world". See Kenny, 2015, endnote 45, *supra* note 65.

⁶⁸ Janis, 1984, p. 415, see *supra* note 51.

His idea was that, once one State had adopted such a code, other States would be obliged to follow its example. He attempted to persuade legislative authorities in the United States, Russia, Spain, Portugal, Greece, South and Central America, and elsewhere, to invite him to draft a code of law for them.⁶⁹

Bentham's concept of universal jurisprudence and his belief in rational model legislation, including all branches of law, is an important part of his legacy. Such international legislation as the Rome Statute of the ICC could be seen as such model legislation. The fact that States – if international core crimes take place on their territory or if their nationals are victims or offenders – must ascertain that they are willing and able to prosecute the crimes, build a strong case for them to copy the Rome Statute's definitions of the crimes. In effect, many countries have already incorporated or otherwise given the treaty's definitions effect in their national legal systems.

Bentham would, however, criticise the *ad hoc* manner in which international criminal law has been developed. He would favour a systematic approach, defining the most serious crimes that demanded a global legal response. It is an important part of his legacy not to merely accept the law as it is. One should quest for a better law, drafted by applying rational and systematic methods to achieve the set goal of global well-being.

12.3. Utilitarianism Refined

Bentham did not invent the 'principle of utility'. His achievement was to apply it in reform proposals to improve legislation in any State with liberal opinions. By doing so, he developed a range of distinctions of types of pains and pleasures, categorised and mapped types of offences, defined secondary ends such as subsistence, abundance, security, and equality, and developed other concepts to make utilitarianism work. He explained 14 types of pleasures, 12 types of pains, and defined four sources of them: the 'physical', the 'political', the 'moral' and the 'religious'.⁷⁰

⁶⁹ Bentham's correspondence with, and proposals to, authorities in these countries is published in: "Legislator of the World: Writings on Codification, Law, and Education", in Philip Schofield and Jonathan Harris (eds.), *The Collected Works of Jeremy Bentham*, Clarendon Press, Oxford, 1998.

⁷⁰ These themes are outlined in chapters III and V of *An Introduction to the Principles of Morals and Legislation*: see Bentham, 1876, *supra* note 6. Chapter XVI, "Division of Of-

In making his case for utilitarianism, he also developed aiding principles and proposals for mechanisms to ensure that those in charge of institutions would see it in their interest to apply the principle of utility. He had a realistic view about how the selfishness of persons in power could lead them to detract from the road to happiness for the largest number. The so-called ‘duty-and-interest-juncture-principle’ should be applied for instance in the poor house or in prisons to ensure that managers looked after those in their care. For instance, the salary of a governor should be reduced for every woman who died in childbirth. A prison director’s salary should vary with the number of juvenile inmates who survived from year to year. According to Bentham, this should be so because:

Every system of management which has disinterestedness pretended or real for its foundation is rotten at the root, susceptible of a momentary prosperity at the outset but sure to perish in the long run. That principle of action is most to be depended upon how’s influence is most powerful, most constant, most uniform, most lasting and most general among mankind. Personal interest is that principle and a system of economy built on any other foundations is built upon a quicksand.⁷¹

Another important feature of Bentham’s account of utilitarianism is that it is based on equality in two directions: (1) any individual’s pleasure and pain should count equally with the pleasure and pain of any other individual in the felicity calculus (“everybody to count for one, nobody for more than one”), which is shorthand for the utilitarian principle of justice, and (2) there is no distinction between the worth of the different forms of pleasure or pain. Intensity, duration or extent of pleasure or pain are though important factors legislators should take into consideration.

Even though Bentham can be criticised for not leaving some groups of society much chance of integrating utilitarian sentiments in their motivations, in principle he developed a refined system of evaluating actions on the individual level open for everyone to adopt.⁷² For this author, how-

fenses”, also includes a detailed outline of all categories of conceivable crimes and their subdivisions.

⁷¹ Quoted from Hart, “Bentham”, in Bhikhu Parekh (ed.), *Jeremy Bentham: Ten Critical Essays*, Frank Cass and Company Limited, 1974, p. 76.

⁷² For a criticism of Bentham along these lines, see Bhikhu Parekh, “Introduction”, in Bhikhu Parekh (ed.), *Jeremy Bentham: Ten Critical Essays*, Frank Cass and Company Limited, 1974.

ever, his insistence that *legislation* should adhere to the 'principle of utility' may be of even higher importance. He consequently therefore adhered to a view that while the foundation of law may be the *command of the sovereign*, it is its consequences for society that must be assessed to find out whether it should be reformed.

12.3.1. John Stuart Mill

Mill played a crucial role in refining and making utilitarianism as an ethical doctrine accessible to the wider public. It could also be said that the most important question he dealt with – the balance between personal freedom and State control – was an inheritance from Bentham. Based on inspiration from Bentham and Adam Smith (1723–90), Mill wrote pivotal texts for the liberal democratic tradition in Western political thinking.

The main idea of this tradition is that even a democratically elected government is no guarantee of real liberty. The ruling elite may become a class removed from the people, and a popularly elected government may still oppress minority groups of society, leading to the 'tyranny of the majority'. In a democratic society, the vital question is therefore where to put the balance between the need for social control, and the freedom of the individual to think and act as he or she wish. Humans are by nature intolerant, and therefore must be disciplined by policies and laws that protect them against each other. This leads to Mill's famous principle for ensuring freedom:

The only purpose for which power can be rightfully exercised over any member of a civilised community, against his will, is to prevent harm to others. His own good, either physical or moral, is not a sufficient warrant. He cannot rightfully be compelled to do or forbear because it will be better for him to do so because it will make him happier, because, in the opinions of others, to do so would be wise, or even right.⁷³

Mill defined Bentham's qualities in terms of an "essentially practical mind. It was by practical abuses that his mind was first turned to speculation – by the abuses of the profession which was chosen for him, that of the law". According to Mill, Bentham was shocked to learn for the first

⁷³ John Stuart Mill, *On Liberty*, John W. Parker and Son, West Strand, London, 1859, p. 22.

time that English lawyers demanded a client “to pay for three attendances” when only one was given.⁷⁴

Unlike Bentham, Mill argued that pleasures differ in quality, and that pleasures that are rooted in one’s higher faculties should be weighted more heavily than baser pleasures. He held that people’s achievements of goals and ends, such as virtuous living, should be counted as part of their happiness. He explained that the sentiment of justice is based on utility, and that rights exist only because they are necessary for human happiness.

In his essay on utilitarianism, Mill discusses some of the criticisms of the doctrine – that it does not provide adequate protection for individual rights, that not everything can be measured by the same standard, and that happiness is more complex than reflected by the theory.⁷⁵ In proposing solutions he refines and develops the theory.

Like Bentham, Mill argued that the fact that a law would maximise well-being or minimise suffering is an obvious reason to adopt it. He did not, however, develop detailed assessments and proposals for reforms of laws as Bentham did. His main contribution related to the philosophy of law may have been in prescribing the limits of law, the need for legal protection of minority’s and individual rights in democratic societies, and definitions of liberty and freedom that explicitly and implicitly criticised definitions of State power and ideologies that could lead to tyranny, oppression – and international crimes.

12.3.2. John Austin

While Mill’s achievements included refining the ethical doctrine of utilitarianism, Austin’s *The Province of Jurisprudence Determined* (1832) is a classic in English jurisprudence, and exerted considerable influence on the development of legal philosophy. Austin also developed an ethical doctrine; however, in doing so he departed from Bentham in arguing for divine law being the basis of ethical doctrines. His ideas on divine law were similar to the so-called ‘theological Utilitarians’, including Archdeacon

⁷⁴ John Stuart Mill, “Bentham (1838)”, in John Stuart Mill, *Essays on Ethics, Religion and Society*, University of Toronto Press, Toronto, Routledge and Kegan Press, London, 1985, p. 80.

⁷⁵ John Stuart Mill, in George Sher (ed.), *Utilitarianism*, 2nd edition, Hackett Publishing Company, Inc., Indianapolis, 2001. The essay first appeared as a series of three articles published in Fraser’s Magazine in 1861. The articles were collected and reprinted as a single book in 1863.

William Paley, a highly influential British theologian of the late eighteenth century.

Largely through Bentham's influence, Austin was appointed professor of jurisprudence at the newly founded University of London in 1826. He resigned in 1834 and did not experience notably success in his lifetime. His book on jurisprudence became influential only after his death when his wife published a second edition in 1861.

Austin's goal was like Bentham's to transform law into utilitarian science. To do this, he thought it was necessary to purge the law of all moralistic notions and to define key legal concepts in strictly empirical terms. Law, according to Austin, is a social fact and reflects relations of power and obedience. According to this view, known as legal positivism, (1) law and morality are separate, and (2) all positive laws can be traced back to human lawmakers.

Drawing heavily on the thought of Bentham (although without having access to many of Bentham's unpublished manuscripts at the time), including his criticism of natural rights and natural law, Austin was the first legal thinker to work out a completely positivistic theory of law.

Austin argues that laws are general commands issued by a sovereign to members of an independent political society. They are backed up by credible threats of punishment or other adverse consequences ('sanctions') if they are not complied with.

A command is a declared wish that something should be done or is prohibited to do. Only general commands are laws, that is, commands that refers to a course of conduct or class of actions, not specific actions. Such commands give rise to legal duties to obey. All the key concepts in this account ('law', 'sovereign', 'command', 'sanction', 'duty') are defined in terms of empirically verifiable social facts. No moral judgment, according to Austin, is ever necessary to determine what the law is – though of course morality must be consulted in determining what the law should be. As a utilitarian, Austin believed that laws should promote the greatest happiness of society.

An important part of Austin's account of law, was his discussion of sovereignty in the last chapter of his book. Every independent political society not only has, but *must have*, a sovereign. This might be either a single person, or an aggregate of persons. The criteria for identifying the sovereign is that it receives habitual obedience from the bulk of the popu-

lation, but does not habitually obey any other determinate human superior. In every society “somewhat advanced in civilization”, the identity of the sovereign is clear. It is also clear that supreme power, the sovereign, may not be limited by positive law. Such a view is a contradiction in terms, since a person cannot legislate on his own behaviour.

In federal States, such as the United States, there is an extraordinary and ulterior legislature, according to Austin. The sovereign in this case consists of the States’ governments “as forming one aggregate body”, and their ratification of the Constitution establishes its legal validity. They also have a power to amend it, by three-quarter majority.

Austin held that international law was not “law properly so called”. His map of human law was then considerable narrower than Bentham’s. He divided human laws (namely, laws set down by men for men) into positive laws or laws ‘strictly so called’ (laws laid down by a sovereign) and laws laid down by men who were not political superiors or not in pursuance of legal rights. Laws ‘improperly so called’ are firstly laws by analogy, that is, laws of fashion, constitutional, and international law. Secondly, there are also laws by metaphor, such as the law of gravity.

According to Austin, public international law cannot be deemed to be law, since no specific sovereign can be identified as the author of the rules. There are neither proper sanctions against States that disregard its requirements.

12.3.3. H.L.A. Hart

When reading Bentham, Austin or Mill you soon encounter formulations and references that remind you that these thinkers lived in another time. H.L.A. Hart’s texts differ. They belong to our own post-war era. Many of his ideas and terminology is part of contemporary views of what constitutes law and legal systems. His most famous book, *The Concept of Law* (1961) is still read as an introduction to the theoretic study of law. He and Hans Kelsen (1881–1973) are probably the most influential twentieth century philosophers of law.

Hart served in British intelligence during World War II, and was well informed about crimes that had taken place, including the fact that German laws permitted many of those crimes.

There are important links between Hart, Bentham, Mill and Austin. Hart wrote about the previous thinkers, and acknowledged his intellectual debt to them. He shared their positivist approach to law, while also criti-

cising and refining their theories on several accounts. During his later years, he wrote much about Bentham and edited new versions of some of his works. In his 1963 publication *Law, Liberty, and Morality*, he wrote in the liberal tradition of Mill, applying Mill's 'harm principle' in arguing that homosexual intercourse between consenting adults should not be legally proscribed since it did not cause harm to somebody other than the participants.⁷⁶

In *The Concept of Law*, Hart presents law as a social construction, an historically contingent feature of certain societies.⁷⁷ Law emerges as one of several systematic forms of *social control*, administered by institutions. It both rests on and supersedes custom, providing a system of 'primary rules' that direct and appraise conduct. In advanced, legal societies, law also entails 'secondary rules' about how to identify, enforce, and change the primary rules.

There is an important distinction between the 'internal' and 'external' points of view or aspects of rules. If law is constructed of social rules, rules are made up of practice. And this practice has both an external and an internal aspect. The external aspect of a rule is its forming of *behavioural uniformity*: people act in a common way. Its internal aspect involves a complex attitude Hart calls 'acceptance': a willingness to use the uniformity as a standard to guide and assess behaviour. Acceptance is though not necessarily a reflection of approval. The acceptance may also be due to a wish of pleasing others, fear or conformism.⁷⁸

Among the secondary rules, the ultimate 'rule of recognition' has special importance.⁷⁹ It provides criteria of *legal validity* by determining which acts create law, and is based on the practice of those whose role it is to apply primary rules. It means that the foundation of a legal system is not constituted by moral justifications or logical presuppositions. Rather it is based on a customary social rule created by "a complex [...] practice of

⁷⁶ H.L.A Hart, *Law, Liberty, and Morality*, Stanford University Press, Stanford, 1963.

⁷⁷ There are several editions of the book available. For this study, I consulted Hart, 2012, see *supra* note 58.

⁷⁸ *Ibid.*, pp. 56–57.

⁷⁹ Other secondary rules are the rule of change, that is, the rule by which existing rules might be created, altered or deleted, and the rule of adjudication, that is, the rule by which society might determine when a rule has been violated and prescribe a remedy.

the courts, officials, and private persons in identifying the law by reference to certain criteria. Its existence is a matter of fact”.⁸⁰

Hart criticises Austin’s concept of law – or a simplified version of it – as commands or orders of a sovereign backed by threats. Hart agrees that there is significant conflict and disagreement about law; not merely consensus and agreement. There are many situations in which laws are not simply applied by courts to settle cases, but where judges settle arguable cases and thereby creates law. He would, however, argue that *consensus* at other points are necessary to make law function. The ‘rule of recognition’, at least, needs to rest on agreement about which activities make law.

In advanced societies, however, it may be that only *officials* accept and use “the system’s criteria of validity”. In such societies, “the acceptance of rules as common standards for the group may be split off from the relatively passive matter of the ordinary individual acquiescing in the rules by obeying them for his part alone”.⁸¹ The point is that while custom and social morality are immune to deliberate change and evolve only gradually, large and complex societies need mechanisms of social control that enable customs and other norms to be publicly ascertained and to be changeable. This is made possible by the emergence of institutions with power to identify, alter, and enforce the rules.

According to Hart, the result of this division of ‘normative labour’⁸² between the officials and ordinary people brings both benefits and costs: “The gains are those of adaptability to change, certainty, and efficiency [...] the cost is the risk that the centrally organised power may well be used for the oppression of numbers with whose support it can dispense, in a way that the simpler regime of primary rules could not”.⁸³

So even if Austin’s view is simplified and crude, there are ample examples of legal systems which does not express the values of its community, but rather the interests of the few. There is always a risk that law becomes legalistic or morally fallible. One of the strengths of Hart’s expo-

⁸⁰ Hart, 2012, p. 110, see *supra* note 58. Hart suggests that the rule of recognition in the United Kingdom is something like “whatever the Queen in Parliament enacts is law”.

⁸¹ *Ibid.*, p. 117.

⁸² I am using a term from Leslie Green’s “Introduction”, in Joseph Raz and Penelope A. Bulloch (eds.), *The Concept of Law*, 3rd edition, Oxford University Press, Oxford, 2012, p. xxix.

⁸³ H.L.A. Hart, in Joseph Raz and Penelope A. Bulloch (eds.), *The Concept of Law*, 3rd edition, Oxford University Press, Oxford, 2012, p. 202.

sure of the concept of law is that he shows that laws may fail not by accident, but because of their nature as social institutions.

So, law can be beneficial, but always at a price. It poses special risks of injustice, for instance against members of minorities, and of alienating its subjects from important norms that govern their lives. In the words of Leslie Green, Hart's view is that "[a] typical society under law depends less on broad social consensus than it does on a narrow official consensus. What the existence of law requires of the population in general is little more than acquiescence with respect to the mandatory norms of the system".⁸⁴

One must therefore be cautious; law is not always a reason for celebration. A critical approach to law is also needed because it sometimes pretends to an objectivity it does not have. Judges may say different things, but in fact they wield serious power to create law.

Law and adjudication are inherently political. In understanding law, a theory of law therefore needs the help of resources from social theory and philosophic inquiry. It is thus neither the sole preserve, nor even the natural habitat, of lawyers or law professors. It is but one part of a more general political theory.

A concept of law in terms of social constructions, constituted solely of social facts, is very different from a concept of law in terms of eternal natural norms. Perhaps the classic formulation of natural law, is Cicero's summary of a Stoic doctrine: "True law is right reason in agreement with Nature; it is of universal application, unchanging and everlasting [...] [T]here will not be different laws at Rome and at Athens, or different laws now and in the future, but one eternal and unchangeable law will be valid for all nations and for all times".⁸⁵

Modern proponents of natural law doctrines seldom subscribe to all elements of this classical account of the doctrine. However, after the Second World War, natural rights theories experienced a renaissance in Western jurisprudence, especially in Germany. The idea was that the Nazis had violated norms that were above and beyond the enacted laws in Germany; they had violated human rights and fundamental freedoms and could be

⁸⁴ *Ibid.*, p. xxix.

⁸⁵ Cicero, *De Re Publica*, III.xii.33, Clinton W. Keyes trans., Harvard University Press, Loeb Classical Library, Cambridge (MA), 1943, p. 211.

prosecuted for crimes against humanity. A law that permitted such crimes was not to be considered a valid law.⁸⁶

Also in the Anglo-American world, natural rights theories have strong proponents, such as John Finnis (1940–) and Ronald Dworkin (1931–2013).⁸⁷ Both developed their theories in response to Hart’s version of legal positivism, and their arguments became the starting points for comprehensive academic debate.

Dworkin maintained that “law includes not only norms found in treaties, customs, constitutions, statutes, and cases, but also moral principles that provide the best justification for the norms found there. While the things justified by moral principles are socially constructed, the justifications are not”.⁸⁸ These justifications are the same everywhere and at all times.

Hart’s concept of law denies that law includes such eternal moral principles. Law consists only of rules or principles which have been put there by humans. All rules have a pedigree, and they can all be changed. This denial does, however, not imply that Hart denies that there are *relations* between law and morality. There are several. Both law and morality are system of norms that say something about how we should live.

Another connection is related to the question of law’s purpose. Law is made for purposes such as guiding conduct, promoting the common good, for doing justice, or licensing coercion. Hart argues (in Chapter IX of *The Concept of Law*) that (1) human survival is morally good and that (2) a law which not aim at it would not be a law. Such a constitutive aim of law, does not, however, mean that it must succeed to remain law. A legal system failing to do what laws should do may remain a legal system.⁸⁹

⁸⁶ For classification of natural law theories and an account of the German post-war debates, see Henrich Henkel, *Einführung in die Rechtsphilosophie*, C.H. Beck Verlag, Munich, 1977.

⁸⁷ John Finnis, *Natural Law and Natural Rights*, 2nd edition, Oxford University Press, Oxford, 2011; Ronald Dworkin, *Taking Rights Seriously*, Harvard University Press, Cambridge (MA), 1978; Ronald Dworkin, *Law’s Empire*, Harvard University Press, Cambridge (MA), 1986.

⁸⁸ Green, 2012, p. xvii, see *supra* note 82.

⁸⁹ It remains an open question whether Hart withdrew this view, cf. *ibid.*, p. xxxv.

Moral principles may also be authorised to become part of law by a legitimate source of law. In this way, Hart interprets the constructivist doctrine in favour of what is called 'inclusive legal positivism'.

According to Hart, the value of legal theory lies not in helping advice clients or deciding cases. It rather contributes to understanding our culture and institutions and in underpinning any moral assessment of them. That assessment must be sensitive to the nature of law, and to morality, which comprises plural and conflicting values.

For this study, which aims at applying utilitarianism and legal positivism in the tradition of Bentham, Mill, Austin and Hart, on foundational issues of contemporary international criminal law, Hart's view on international law and its status as law proper is of especial relevance. Hart presents his concept of law as "a union of primary and secondary rules [...]" as a mean between juristic extremes. For legal theory has sought the key to the understanding of law sometimes in the simple idea of an order backed by threats and sometimes in the complex idea of morality".⁹⁰

According to Hart, the reason why we should not "attempt to narrow the class of valid laws by the extrusion of what was morally iniquitous" is that to do this does not "advance or clarify either theoretical inquiries or moral deliberation". The broader concept of law proved, in his analysis, to be consistent with "so much usage" and "on examination to be adequate".⁹¹

12.3.4. Hart's Concept of International Law

The case of international law is "converse", according to Hart. Here the problem is not that laws are morally iniquitous, but "the absence of an international legislature, courts with compulsory jurisdiction, and centrally organised sanctions."⁹² In Hart's view, international law lacks secondary rules – such as rules of recognition, change and adjudication – and therefore cannot be categorised as a developed legal system.

However, as Hart underlines, the union of primary and secondary rules should not be thought of as a necessary (or sufficient) condition for a system of law to be categorised as a 'legal system'. In his view, it is more

⁹⁰ Hart, 2012, p. 213, see *supra* note 58.

⁹¹ *Ibid.*, p. 213.

⁹² *Ibid.*

important to ask whether “the usage that speaks of ‘international law’ is likely to obstruct any practical or theoretical aim”.⁹³

To be sure, the issue is not about the proper use of words, Hart contends. The issue is about whether a general term should be applied to a set of international norms despite serious doubts that has been raised, such as concerning the sources of international law and concerning States as subjects.

An important part of his argument for international law to be categorised as law is to show that ‘voluntarist’ theories or theories of ‘auto-limitation’ fail. These theories attempt to “reconcile the (absolute) sovereignty of states with the existence of binding rules of international law, by treating all international obligations as self-imposed like the obligation which arises from a promise. Such theories are in fact the counterpart in international law of the social contract theories of political science.”⁹⁴

Hart’s point is that States *are* bound by international law obligations, not by deciding to be so but as members of international society. The ‘voluntarist’ approach fails because it is unable to explain how it is known that States are only bound by self-imposed obligations. Hart also points to the underlying rule which must exist that a State which takes upon itself certain obligations is “bound to do whatever it undertakes by appropriate words to do”.⁹⁵ A State may promise to perform a specific action, however, for that promise to become an obligation there must be a rule that promises create obligations. This rule is binding independently of the choice of the party bound by it.

Hart’s third argument refers to certain facts, such as the case of a new State. According to Hart, it has never “been doubted that when a new, independent state emerges into existence, [...] it is bound by the general obligations of international law, among others, the rule that give binding force to treaties”.⁹⁶

It is true, he contends, that international law resembles regimes that only contain primary rules, even though its rules are very different from rules in primitive societies. Many of its concepts, methods, and techniques are the same as those of modern municipal law.

⁹³ *Ibid.*, p. 214.

⁹⁴ *Ibid.*, p. 224.

⁹⁵ *Ibid.*, p. 225.

⁹⁶ *Ibid.*, p. 226.

An argument exists that since international law does not contain secondary rules, it must be a form of 'morality'. This view is mistaken, according to Hart, and is often associated with "the old dogmatism" stemming from Austin's concept of law as "orders backed by threats". Although it is possible to construe a concept of morality in this way, as denominating all systems of rules which are not backed by threats, it would not serve any practical or theoretical purpose. It would comprise systems which are very different in form and social function, and represent an overly crude classification.

There are several reasons for not classifying international law as a form of morality, such as the fact that States in arguments against other States that they think violate rules of international law refer to "precedents, treaties, and juristic writings; often no mention is made of moral rights or wrong, good or bad".⁹⁷ It is true that States sometimes adhere to moral arguments in denouncing the conduct of other States, but that happens also in case of violations of municipal law. Many rules of international law are also morally indifferent; such as rules that provide for the functioning of inter-State relations.

A typical function of law, unlike morality, is to introduce detailed distinctions, formalities and procedures that serve the purpose of maximising "certainty and predictability and to facilitate the proof or assessments of claims". This 'formalism' or 'legalism' is found in international law, clearly distinguishing it from 'morality'. That does not mean that all rules of international law must be of such moral neutral, formal character. "The point is only that legal rules *can* and moral rules *cannot* be of this kind."⁹⁸

The fact that there is no international legislature, which by applying certain procedures can change the rules of international law, like rules of morality cannot be changed by any legislature, is "a defect one day to be repaired", according to Hart. It is true that States may abide by rules of international law based on moral considerations. But the foundation of international law lay in wide adherence to its rules, which may be motivated rather by "calculations of long-term interest, or by the wish to continue a tradition or by disinterested concern for others", than by a sense of moral obligation.

⁹⁷ *Ibid.*, p. 228.

⁹⁸ *Ibid.*, p. 229.

Hart's conclusion is that, because international law lacks a legislature, courts with compulsory jurisdiction and officially organised sanctions, it resembles in form though not in content "a simple regime of primary or customary law". In content, however, it resembles advanced municipal law, and this makes it possible for lawyers to freely transfer from the one to the other.

In his time, Bentham concluded that international law was "sufficiently analogous" to municipal law to be called 'law'. Hart refines this conclusion by stating that "the analogy is one of content not of form; secondly, that, in this analogy of content, no other social rules are so close to municipal law as those of international law".⁹⁹

I hold this conclusion as still valid. However, for contemporary discussions his observations on how international law could become a developed system of law, may be of even greater importance. True to his descriptive approach, he does not argue that international law *should* become a developed system of law. But he states how that could happen, and an unspoken wish in that direction may perhaps be sensed.

It is true, he contends, that important relations between States are regulated by multilateral treaties, and sometimes arguments are made that these treaties also may be binding on other States that are not parties:

If this were generally recognized, such treaties would in fact be legislative enactments and international law would have distinct criteria of validity for its rules. A basic rule of recognition could then be formulated which would represent an actual feature of the system and would be more than an empty restatement of the fact that a set of rules are in fact observed by states. Perhaps international law is at present in a stage of transition towards acceptance of this and other forms which would bring it nearer in structure to a municipal system.¹⁰⁰

It should be noted that, since Hart wrote these words in the early 1960s, international law has indeed developed in directions which could further the transition. International courts have been established with binding jurisdiction over a subset of States, such as the European Court of Human Rights, the *ad hoc* tribunals for Rwanda and the former Yugosla-

⁹⁹ *Ibid.*, p. 237.

¹⁰⁰ *Ibid.*, p. 236.

via, and the ICC. Some of these jurisdictions have been imposed on a group of States by decisions of the United Nations Security Council, while others exist based on States' self-imposition. The ICC is in this respect a hybrid, since it can exercise jurisdiction over citizens of non-States Parties which commit ICC crimes within its jurisdiction on the territory of States Parties.

The existence of such courts leads to judicial decisions ascertaining which rules, based on treaty or customary law, could be binding upon all States, irrespective of treaty obligations. However, it seems a way to go for States to reach consensus on so-called *jus cogens* norms.¹⁰¹

According to legal literature, the following international crimes may be characterised as *jus cogens*: aggression, genocide, crimes against humanity, war crimes, piracy, slavery, slave-related practices, and torture. The legal basis for this claim consists of:

1. international pronouncements recognising that these crimes are part of general customary law;
2. language in preambles or other provisions of treaties indicating that these crimes have a higher status in international law;
3. the large number of States which have ratified treaties related to these crimes; and
4. international investigations and prosecutions of perpetrators of these crimes.¹⁰²

Further arguments for including specific crimes in the *jus cogens* category are that they "affect the interests of the world community as a whole because they threaten the peace and security of humankind and because they shock the conscience of humanity".¹⁰³

In 1996 Professor M. Cherif Bassiouni stated that:

It is still uncertain in ICL whether the inclusion of a crime in the category of *jus cogens* creates rights or, as stated above, non-derogable duties *erga omnes*. The establishment of a

¹⁰¹ The term '*jus cogens*' means 'the compelling law' and, as such, a *jus cogens* norm holds the highest hierarchical position among all other norms and principles. Because of that standing, *jus cogens* norms are deemed to be 'peremptory' and non-derogable, cf. M. Cherif Bassiouni, "International crimes: *jus cogens* and obligation *erga omnes*", in *Law and Contemporary Problems*, Autumn 1996, vol. 59, no. 4, p. 67.

¹⁰² *Ibid.*, p. 68.

¹⁰³ *Ibid.*, p. 69.

permanent international criminal court having inherent jurisdiction over these crimes would be a convincing argument for the proposition that crimes such as genocide, crimes against humanity, and war crimes are part of *jus cogens* and that obligations *erga omnes* to prosecute or extradite flow from them.¹⁰⁴

The problem remains, however, that the Rome Statute of the ICC as it was adopted in 1998 does not provide for the ICC to have ‘inherent jurisdiction’, which is a doctrine of the English common law that a superior court has the jurisdiction to hear any matter that comes before it, unless a statute or rule limits that authority or grants exclusive jurisdiction to some other court or tribunal. Even so – the ICC only having limited temporary and territorial jurisdiction – it could be argued that it represents a further step in the direction of establishing rules binding upon all States.

States disobeying such rules, by committing international crimes, weakens the system, but does not destroy it. Municipal law is frequently violated without its status as law being questioned. However, it may be true that international law, and especially international criminal law, is more vulnerable.

The four points mentioned above constituting a legal basis for the claims of *jus cogens*-crimes may be a rule of recognition in the making. However, it is not functioning as such yet. Obviously, it is also a rather complicated rule.

12.4. Benthamite Perspectives on International Law

Bentham’s formative years took place in the context of the eighteenth-century Enlightenment. He engaged in a battle against both tradition and authoritarianism, as well as against anarchical fallacies and revolutions. He devoted a lifetime of developing a third way, namely, gradual reforms in legislation and policies based on the principle of utility. The end goal was for governments and legislators to ensure happiness for the greatest number of people. These were radical ideas at his time, but over time they became influential.

In 1871, 29 years after Bentham’s death, one of his translators, R. Hildreth concluded that “whatever may be thought of the principle of util-

¹⁰⁴ *Ibid.*, p. 74.

ity, when considered as the foundation of morals, no one now-a-days will undertake to deny that it is the only safe rule of legislation".¹⁰⁵

It was mainly due to Bentham and a small group of followers that the principle achieved such a status. Bentham's science of applying the principle has had a lasting effect on jurisprudence, legal theorising and in informing legislators up to the present. It is therefore pertinent to ask what can be learnt from him in discussing the foundations of international criminal law.

There can be no doubt that the 'principle of utility' is providing foundation for a branch of law that deals with heinous crimes, such as genocide, crimes against humanity and war crimes, which inflict unbearable pain and unhappiness on large numbers of human beings. These are crimes that in their very nature attack the well-being and even the existence of collectives of people. The crimes also have the potential of leading to further pain and unhappiness for the world community, leading to escalation of conflicts, wider security risks, humanitarian crisis, and so on.

Based on utilitarian premises, there is therefore wide space for inflicting pain in the form of prosecution and punishment of those bearing the responsibility for or performing such crimes. The main motivation would be to prevent such crimes from being committed again in the future; the end goal being ultimately to eliminate such crimes completely.

Challenged whether law is effective in preventing or eliminating such crimes to occur, Bentham offers a wide range of arguments and viewpoints. He presents convincing ideas about the civilising functions of law, including criminal law. However, he cautions that there are a set of necessary conditions law must meet to fulfil such functions. Legislation must be designed well and be based on sound principles to maximise overall happiness, and institutions must be redesigned bearing these concerns in mind, not the least taking into consideration that mechanisms must be in place to counter corruption and other negative practices to take root. Investigations and trials must be conducted effectively to avoid delays and high expenses.

Reforming and improving legislation and practice is an ongoing process. Reform efforts often lead to interest-based resistance by narrow groups who have something to lose from them, as Bentham experienced

¹⁰⁵ R. Hildreth, "Preface", in Jeremy Bentham, *Theory of Legislation*, 2nd edition, Trübner & Co., London, 1871, p. iii, see *supra* note 46.

himself. Strategic thinking about how to create conditions conducive of reforms and improvements of legislation is therefore of primary importance.

Bentham would insist to give priority to arguments that demonstrate how criminal law may benefit the overall well-being and positive development of society. As mentioned, this may have led him to embrace the complementarity principle of the Rome Statute. He would point to local trials having greater beneficial effects than more distant international trials or to the importance of international trials taking place in the proximity of crime affected societies whenever feasible.

The prospect of the ICC exerting jurisdiction if national jurisdictions were unable to do so, could lead to national legal reform. States prefer to be able to prosecute crimes themselves and avoid interference by the ICC, and in this way, the Rome Statute could serve as a model for national legislation and over time build capacity at the national level to prosecute core international crimes.

The consequentialist challenge stemming from Bentham's approach also have other aspects. International courts are often criticised by civil society organisations for conducting poor outreach or for creating expectations in affected communities, which they are unable to fulfil. Thinking justice in consequentialist terms would lead to international courts stepping up efforts to explain how justice works not only to those involved in trials but to the wider society.

The ICC might represent some progress in this regard from previous international criminal courts. There may, however, be more to be done. In pointing to the future beneficial consequences of prosecutions as their main *raison d'être* (deterrence of similar crimes), Bentham would ask for well-thought-out and well-resourced strategies of outreach being part of any international legal intervention into situations where core international crimes had taken place.

Bentham's justification for punishment was based on its overall tendency to produce more happiness than pain for affected persons. Only a well-organised State with rational and accessible laws, where legislators were elected by the people to apply the principle of utility in their legislative work, could succeed in achieving that. He had in mind that successful States in this regard, could serve as models for other States. He, however, also realised that even democratic and peaceful States could end up in

conflicts that would need international intervention to avoid violent wars to break out.

Consequently, he argued for international law to be reformed so it could become an effective tool in preventing wars and improving inter-State relations. His idea of codifying an international legal code also led him to see the need for establishing an international court able to decide on disputes between States. He did not develop foundations for international criminal law as such, but he clearly depicted needs for sanctioning violations of international norms by representatives and even heads of States. This means that some conditionality was inherent in Bentham's thinking about the sovereignty of States. I think he would have supported international criminal law as a way of ensuring utility-based punishment of the most serious crimes in cases where national States were unable or unwilling to do so.

He would, however, have wanted to introduce a systematic approach to reforming and developing further international criminal law. His method would be to ask which crimes are most detrimental to overall happiness among the greatest number of people. He would not erase the already existing crimes from the law book – aggression, crimes against humanity, genocide, and war crimes – but he would question whether other serious pain-inflicting crimes should be included, as discussed in the third volume in this series, *Philosophical Foundations of International Criminal Law: Legally Protected Interests*. Central to reform of international criminal law would be to ensure that the gravest crimes – with the largest negative consequences for specific societies, and ultimately to humankind – were included, and that they were expressed in language that could be understood by legal experts, governments as well as by ordinary people.

Were he alive today, Bentham would of course come up with his own reform proposals. But he would also have liked to see experts and representatives from as many countries as possible being involved in discussions about the proper scope of international criminal law. His vision was an alliance of States with liberal opinions perfecting legislation.

He would also have noticed the existence of a branch of international law named human rights law. He would have been worried by the fact that the declarations of human rights he criticised so vehemently had been followed up by the enactment by a large majority of States of the

Universal Declaration of Human Rights and a range of international legal documents protecting human rights, giving them status as legal rights.

Maybe he in the end would accept that as Newton's law on gravity later was shown by Albert Einstein to be incorrect and only valid in certain circumstances, his principle of utility also was valid only as a special case of a more all-encompassing theory. He would have to see that States with liberal opinions, fully respecting individual and minority human rights, are the only States in which the principle of utility could be applied without modifications. In other States, human rights concerns should in some cases override utilitarian conclusions to protect minorities' and individuals' rights from being sacrificed for the greater good of the majority.

12.5. Philosophical Foundations of International Criminal Law

Philosophical foundations of international criminal law may take diverse forms. Its inherent values, norms, rules, and concepts may be supported by reference to existing religious or philosophical principles and views. International criminal law – being both in theory and in practice, “a marriage between criminal justice and human rights activism”¹⁰⁶ – may be especially attractive for adherents of religious or philosophical schools that want to strengthen protection of core human values.

For the international human rights movement, however, international criminal law is not merely about seeing wrongdoers punished and thereby having some basic values confirmed. Its most important function may be to help end a global climate of impunity and lack of accountability in which grave abuses of human rights so regularly occur.

Bentham and the way of thinking he inspired come with a similar approach. He would see the most important function of international criminal law not in the fact that it gives legal effect to protection of natural rights (which do not exist, according to him), or protection of human dignity or any other preconceived highest value. Its most important function would be to promote the largest happiness of the greatest number by educating people and deterring crimes. He believed that the law could civilise and improve human societies even at moments when civilisation has broken down.

¹⁰⁶ Cf. Wellman, 2013, p. 477, see *supra* note 43

This approach also puts a test in front of international criminal law jurisdictions: do they contribute effectively to achieving these aims? If not: which reforms are needed to improve them?

In other words, the foundation given is conditional upon success. Bentham would, however, address failure not by revolutionary measures but by reforms.

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Philosophical Foundations of International Criminal Law: Correlating Thinkers

Morten Bergsmo and Emiliano J. Buis (editors)

This first volume in the series 'Philosophical Foundations of International Criminal Law' correlates the writings of leading philosophers with international criminal law. The chapters discuss thinkers such as Plato, Cicero, Ulpian, Aquinas, Grotius, Hobbes, Locke, Vattel, Kant, Bentham, Hegel, Durkheim, Gandhi, Kelsen, Wittgenstein, Lemkin, Arendt and Foucault. The book does not develop or promote a particular philosophy or theory of international criminal law. Rather, it sees philosophy of international criminal law as a discourse space, which includes a) correlational or historical, b) conceptual or analytical, and c) interest- or value-based approaches. The sister-volumes *Philosophical Foundations of International Criminal Law: Foundational Concepts* and *Philosophical Foundations of International Criminal Law: Legally Protected Interests* seek to address b) and c).

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