

# BOSTON UNIVERSITY SCHOOL OF LAW

WORKING PAPER SERIES, PUBLIC LAW & LEGAL THEORY  
WORKING PAPER NO. 06-17



## **THE EXPRESSIVE CAPACITY OF INTERNATIONAL PUNISHMENT**

ROBERT D. SLOANE

This paper can be downloaded without charge at:

The Boston University School of Law Working Paper Series Index:  
<http://www.bu.edu/law/faculty/papers>

The Social Science Research Network Electronic Paper Collection:  
<http://www.ssrn.com/abstract=900641>

# THE EXPRESSIVE CAPACITY OF INTERNATIONAL PUNISHMENT

*Robert D. Sloane\**

## ABSTRACT

*Modern international criminal law (ICL) developed in the aftermath of World War II as an alternative to the proposal, espoused by Winston Churchill among others, that major Axis war criminals be summarily executed on sight. Because of this pedigree and the unconscionable nature of the crimes, ICL jurisprudence and scholarship have largely neglected the paramount question fundamental to any criminal justice system: the justifications for and legitimate goals of punishment. Insofar as a coherent jurisprudence of ICL sentencing can be said to exist at all, it remains correspondingly impoverished and unprincipled — comparable in some respects to that of the indeterminate federal sentencing system criticized by Judge Marvin E. Frankel in his famous polemic, *Criminal Sentences: Law Without Order* (1973).*

*This Article analyzes the extent to which the conventional goals of punishment in national law can or should be transposed to the distinct legal, moral, and institutional context of ICL. It argues that the expressive capacity of punishment best captures both the nature of international sentencing and its realistic institutional capacity to make a difference in view of the legal, political, and resource constraints that will continue, for the foreseeable future, to afflict ICL. The transposition to ICL of the standard justifications for punishment in national law proves deeply problematic in large part because ICL attempts to combine the paradigms of two very different legal fields: (i) classical international law — a profoundly consensual body of law based on broadly shareable norms among states; and (ii) national criminal law — a profoundly coercive body of law often understood to embody the most fundamental, particularistic norms and values of a local polity.*

*ICL therefore differs from national criminal law in several respects relevant to the social institution of punishment, including the nature of (i)*

---

\* Assistant Professor of Law Designate, Boston University School of Law; Associate-in-Law, Columbia Law School. I acknowledge with gratitude the helpful comments of Mahnoush Arsanjani, Anthony Colangelo, Michael Dorf, Brandon Garrett, Paul Kahn, Hoi Kong, Tom Lee, Gerard E. Lynch, Thomas Pogge, W. Michael Reisman, James J. Silk, and Jeremy Waldron.

*the community that authorizes ICL, (ii) the crimes addressed by it, and (iii) the perpetrators judged by it. These differences tend to compromise the coherence or efficacy (or both) of conventional crime-control and retributive justifications for punishment. Insofar as these justifications or penal goals remain plausible, it is largely because of the expressive dimensions of punishment.*

*ICL's ability to contribute to the lofty objectives ascribed to it depends far more on enhancing its value as authoritative expression than on ill-fated efforts to identify "appropriate" punishments for crimes that strain our moral intuitions. For this reason, I urge, among other potential developments in the law and practice of sentencing by international criminal tribunals: (i) the institution of sentencing hearings as an essential component of ICL; (ii) greater attention to social, psychological, and political context and the role of the defendant vis-à-vis collective entities (states, armies, and so forth) as aggravating or mitigating factors; and (iii) a focus on enhancing jurisprudential exchange between national and international criminal justice institutions.*

## TABLE OF CONTENTS

|   |     |
|---|-----|
| Abstract .....  | i   |
| Table of Contents .....   | iii |
| I. ICL in Perspective: Expectations and Strategies .....  | 7   |
| A. Nature of the Community: Proxy Justice, Global Stability, and<br>Global Humanity .....                         | 10  |
| B. Nature of the Crimes: Collectivity, Secondary Harms, and the<br>Diffusion of Culpability .....                 | 21  |
| 1. Collective Perpetration .....  | 21  |
| 2. Collective Victims .....   | 22  |
| 3. Collective Mens Rea .....  | 23  |
| 4. Implications for Sentencing .....  | 24  |
| C. Nature of the Perpetrators: Moral Agency in the “Maelstrom of<br>Violence” .....                               | 26  |
| 1. The Plausibility of Moral Choice .....   | 26  |
| 2. Beyond Caricatures .....   | 30  |
| II. From Retributive Origins to an Emerging Jurisprudence .....   | 32  |
| A. Post-War Origins .....   | 32  |
| B. International Human Rights: Abolitionism, Proportionality, and the<br>International Rehabilitative Ideal ..... | 33  |
| C. The Beginnings of an ICL Sentencing Jurisprudence .....  | 35  |
| IV. Legitimacy, Efficacy, and the Expressive Capacity of International<br>Punishment .....                        | 36  |
| A. Deterrence .....   | 39  |
| 1. The Benthamite Model .....   | 39  |
| 2. The Moral Educative Model .....  | 44  |
| B. Retribution .....  | 47  |
| 1. Retribution as Vengeance Regulation .....  | 47  |
| 2. The “Unfair Advantage” Thesis .....  | 50  |
| C. Expressive Proportionality .....   | 52  |
| D. Audience and Expressive Clarity .....  | 55  |
| E. Rehabilitation: Literal, Societal, and Theological .....   | 56  |
| Conclusion: International Sentencing Reform and the Rome Statute .....  | 60  |



## INTRODUCTION

To date, scant attention has been paid to sentencing in international criminal law (ICL); indeed, in the historic practice of international criminal tribunals, “the sanction imposed appears to be little more than an afterthought.”<sup>1</sup> This is understandable, for ICL as a field remains in its infancy, but unfortunate, for punishment is the distinctive feature of criminal law, and sentencing the vehicle through which it pursues and expresses its objectives, both practical and moral. The absence of an articulated ICL philosophy of or justification for punishment and the dearth of sentencing principles can be ascribed chiefly to two factors: As a theoretical matter, the abhorrent nature of ICL violations and the catastrophic circumstances that serve as the principal catalyst for ICL’s development — the rupture, by war, national, religious or ethnic conflict, or otherwise, of basic social norms against brutal violence<sup>2</sup> — invite “intuitive-moralistic answers,” making debate about the rationales for punishing serious human rights atrocities seem pejoratively academic;<sup>3</sup> as a practical matter, perhaps in part for that reason, the principal positive-law instruments drafted to govern international trials of ICL violations say remarkably little about the purposes of punishment and include comparably laconic sentencing provisions.<sup>4</sup>

Punishment, however, whether authorized by international or national

---

<sup>1</sup> William A. Schabas, *International Sentencing: From Leipzig (1923) to Arusha (1996)*, in III INTERNATIONAL CRIMINAL LAW 171, 171 (M. Cherif Bassiouni ed., 2d ed. 1999) [hereafter Schabas, *International Sentencing*]; see also Alison Marston Danner, *Constructing a Hierarchy of Crimes in International Criminal Law Sentencing*, 87 VA. L. REV. 415, 418, 434 & n.81 (2001); Jose E. Alvarez, *Crimes of State/Crimes of Hate: Lessons From Rwanda*, 24 YALE J. INT’L L. 365, 408 (1999).

<sup>2</sup> Payam Akhavan, *The International Criminal Tribunal for Rwanda: The Politics and Pragmatics of Punishment*, 90 AM. J. INT’L L. 501, 501 (1996) [hereafter Akhavan, *Politics and Pragmatics*].

<sup>3</sup> See GARY JONATHAN BASS, STAY THE HAND OF VENGEANCE: THE POLITICS OF WAR CRIMES TRIBUNALS 13 (2000); Immi Tallgren, *The Sensibility and Sense of International Criminal Law*, 13 EUR. J. INT’L L. 561, 564 (2002).

<sup>4</sup> RODNEY DIXON & KARIM KHAN, ARCHBOLD INTERNATIONAL: PRACTICE, PROCEDURE AND EVIDENCE OF INTERNATIONAL CRIMINAL COURTS 483 (2003); Mark Drumbl, *Collective Violence and Individual Punishment: The Criminality of Mass Atrocity*, 99 NW. U. L. REV. 539, 551-52 (2005). See Rome Statute of the International Criminal Court, July 17, 1998, art. 78(1), U.N. Doc. A/CONF.183/9\* (1998), 37 I.L.M. 999 (1998) [hereafter Rome Statute]; Aspects of Establishing an International Tribunal for the Prosecution of Persons Responsible for the Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia, Report by the Secretary-General, 48th Sess., Annex, art. 113, U.N. Doc. S/25704 (1993), 32 I.L.M. 1159 (1993) [hereafter ICTY Statute]; S.C. Res. 955, U.N. SCOR, 49th Sess., Annex, art. 23(2), 3453d mtg., U.N. Doc. S/RES/955 (1994), 33 I.L.M. 1598 (1994) [hereafter ICTR Statute].

law,<sup>5</sup> requires justification; otherwise, it is simply cruelty.<sup>6</sup> And sentencing practices, international no less than national, should reflect and foster its goals. Yet in penal theory, as elsewhere, “the mechanical transfer of domestic criminal law principles to the international context is fraught with dangers.”<sup>7</sup> Justifications for punishment common to national systems of criminal law cannot be transplanted unreflectively to the distinct legal, moral, and institutional context of ICL.<sup>8</sup>

Use of the national law analogy in diverse areas of international legal theory and practice boasts a long pedigree and an equally long and powerful history of criticism.<sup>9</sup> But application of the national law analogy proves particularly problematic for ICL because it strives to combine the paradigms of two very different legal fields: (1) classical international law — a profoundly consensual body of law based on broadly shareable norms among nation-states and occupied mainly with their rights and duties *inter se*; and (2) national criminal law — a profoundly coercive body of law often understood to embody the most fundamental norms and values of a local community, generally that of a single nation-state (or political subdivision).<sup>10</sup> In particular, ICL differs from national criminal law in at least three significant ways that the national law analogy can obscure.

First, unlike national criminal law, ICL purports to serve multiple

---

<sup>5</sup> For clarity, I use the adjective “national,” rather than the semantically equivalent “municipal,” “internal” or “domestic,” to refer to nation-states.

<sup>6</sup> Kent Greenawalt, *Punishment*, 74 J. CRIM. L. & CRIMINOLOGY 343, 346 (1983); see also *Coker v. Georgia*, 433 U.S. 584, 592 (1977) (describing punishment that does not contribute to any penal goal as “nothing more than the purposeless and needless imposition of pain and suffering”).

<sup>7</sup> Steven R. Ratner, *The Schizophrenias of International Criminal Law*, 33 TEX. INT’L L.J. 237, 251 (1998). For two recent critiques of this “mechanical transfer,” see Drumbl, *supra* note 4; Tallgren, *supra* note 3; see also HANNAH ARENDT, *EICHMANN IN JERUSALEM: A REPORT ON THE BANALITY OF EVIL* 291-92 (1963) (“Can we apply the same principle that is applied to a governmental apparatus in which crime and violence are exceptions and borderline cases to a political order in which crime is legal and the rule?”).

<sup>8</sup> See BASS, *supra* note 3, at 13 (“The application of national law to war crimes is in many ways the legal equivalent of a bad analogy.”); see also Tallgren, *supra* note 3, at 565-66; see generally Laurel E. Fletcher & Harvey M. Weinstein, *Violence and Social Repair: Rethinking the Contribution of Justice to Reconciliation*, 24 HUM. RTS. Q. 573 (2002) (critiquing the presumed merits of the criminal justice model from the perspective of sociology and collective psychology); Mark J. Osiel, *Why Prosecute? Critics of Punishment for Mass Atrocity*, 22 HUM. RTS. Q. 118 (2000) (surveying nine critiques of the viability or propriety of criminal justice as a means of responding to mass atrocities).

<sup>9</sup> E.g., GEORGE KENNAN, *AMERICAN DIPLOMACY, 1900-1950*, at 95 (1951); Hedley Bull, *Society and Anarchy in International Relations*, in *DIPLOMATIC INVESTIGATIONS* 35 (Herbert Butterfield and Martin Wight ed. 1966).

<sup>10</sup> Louise Arbour, *Progress and Challenges in International Criminal Justice*, 21 FORDHAM INT’L L.J. 531, 531 (1997); see also Tallgren, *supra* note 3, at 562.

communities, including both literal ones — for example, ethnic or national communities — and the figurative “international community,” which, needless to say, is not monolithic; it consists of multiple, often competing, constituencies and interests. ICL attempts to mediate between the divergent interests and goals of several bodies of law (national and international) promulgated by these overlapping, but far from identical, constituencies. At sentencing, arrayed against these diverse communal interests and objectives is the convicted’s core liberty interest.

Second, the national law analogy can obscure the collective character of ICL crimes (war crimes, crimes against humanity, genocide, and aggression), a feature that distinguishes them from most similar crimes of violence in the national sphere.<sup>11</sup> Arguably, the collective nature of the victim of international crimes — for example, a national, racial or ethnic group — aggravates the culpability of the perpetrator, just as the prejudicial motive and harm of a bias crime render an assault or murder, for example, more blameworthy because of secondary harms.<sup>12</sup> At the same time, the collective nature of the perpetrator, his role and status relative to the nation-state, military organization or other collective entity implicated by ICL crimes, arguably mitigates culpability in some circumstances insofar as collectivity might be thought to diffuse moral responsibility, mitigating each perpetrator’s guilt in some proportion to that of the collective.<sup>13</sup>

Third, perpetrators of ICL crimes often act in a normative universe that differs dramatically from the relatively stable, well-ordered society that most national criminal justice systems take as their baseline. ICL crimes typically occur during periods of war, ethnic conflict or other societal breakdown and chaos characterized by the erosion, if not inversion, of basic social norms against violence, either generally or relative to certain demonized and dehumanized ethnic, political, religious, national or racial

---

<sup>11</sup> *E.g.*, Prosecutor v. Tadic, Case No. IT-94-1, Judgment, ¶ 191 (July 15, 1999) (“Most of the time [ICL] crimes do not result from the criminal propensity of single individuals but constitute manifestations of collective criminality: the crimes are often carried out by groups of individuals acting in pursuance of a common criminal design.”); *see also* George P. Fletcher, *The Storrs Lectures: Liberals and Romantics at War: The Problem of Collective Guilt*, 111 YALE L.J. 1499, 1514 (2002); Payam Akhavan, *Justice in the Hague, Peace in the Former Yugoslavia? A Commentary on the United Nations War Crimes Tribunal*, 20 HUM. RTS. Q. 737, 781 (1998) [hereafter Akhavan, *Justice in the Hague*]; For convenience, I will at times refer collectively to war crimes, crimes against humanity, genocide, and aggression as “international crimes” or “ICL crimes.”

<sup>12</sup> Danner, *supra* note 1, at 466; *see* Wisconsin v. Mitchell, 508 U.S. 476, 488 (1993) (accepting the argument that a bias-crime statute “singles out for enhancement bias-inspired conduct because this conduct is thought to inflict greater individual and societal harm,” for “bias-motivated crimes are more likely to provoke retaliatory crimes, inflict distinct emotional harms on their victims, and incite community unrest”).

<sup>13</sup> Fletcher, *supra* note 11, at 1512, 1538.

groups.<sup>14</sup> Conceptualizing war criminals and *genocidaires* as deviants from fundamental societal norms may make less sense where their criminal conduct, while deviant by reference to international norms and general principles of law common to civilized nations, nonetheless becomes in some sense *normative* within the criminal's literal community, be it national, ethnic, racial or martial.<sup>15</sup>

These observations do not necessarily impugn ICL's coherence or viability as a criminal justice system. But they undoubtedly call for far greater attention to the features that distinguish it. The process of adjudication, however, is an awkward stage at which to recognize and accommodate the salient distinctions. Efforts to modify the ICL trial process itself would be likely to raise questions about fundamental fairness to the defendants and to conflict with due process standards guaranteed by international human rights law. It would be ironic and counterproductive were ICL trials to undermine some international human rights standards in an effort to vindicate others.<sup>16</sup> Sentencing, by contrast, tends to be a far more flexible process; it can more readily be tailored to accommodate the factors relevant to appraising culpability in contexts that often differ dramatically from those presumed by national criminal justice systems. Many issues highlighted by critiques of the national law analogy might thereby be addressed without undermining the integrity and relative uniformity of international due process standards.

This Article offers and defends an expressive account of punishment by international criminal tribunals, which aims to maximize its efficacy while responding to issues of justice, due process, and proportionality raised by a closer examination of the flaws in the analogy between national and international criminal justice. I argue that the expressive dimensions of punishment best capture both the nature of international sentencing and its realistic institutional capacity to make a difference given the legal, political, and resource constraints that will continue, for the foreseeable future, to

---

<sup>14</sup> W. Michael Reisman, *Legal Responses to Genocide and Other Massive Violations of Human Rights*, 59 *LAW & CONTEMP. PROBS.* 75, 77 (1996).

<sup>15</sup> See ARENDT, *supra* note 7, at 294-95; Mark Osiel, *The Banality of Good: Aligning Incentives Against Mass Atrocity*, 105 *COLUM. L. REV.* 1751, 1755 & nn.13-15, 1769 (2005); Drumbl, *supra* note 4, at 549-50, 566-67; Tallgren, *supra* note 3, at 573-75.

<sup>16</sup> See William A. Schabas, *Sentencing by International Tribunals: A Human Rights Approach*, 7 *DUKE J. COMP. & INT'L L.* 461, 516 (1997) [hereafter Schabas, *A Human Rights Approach*]; cf. Jan Christoph Nemitz & Steffen Wirth, *Some Observations on the Law of Sentencing of the ICC*, 13 *INT'L CRIM CT. MONITOR* 13, 13 (Dec. 1999) (emphasizing that the ICC "must not only pronounce . . . principles of legal conduct but must also itself serve as an example of such legal behaviour," and that "[f]or this reason, a just and consistent sentencing practice is paramount: the slightest hint of bias, or suspicion that the Court might have passed an unjust or disproportionate judgement, could severely affect this . . . most important aim");

plague international criminal tribunals. ICL's ability to contribute to the lofty objectives ascribed to it depends far more on enhancing its value as authoritative expression than on ill-fated efforts to identify the "right" punishment, whatever that could mean, for often unconscionable crimes.<sup>17</sup>

In Part I, while recognizing the force of the critique of the national law analogy, I offer some critiques of that critique and attempt to put it into perspective. ICL, I emphasize, must be conceived, not as a panacea, but as one element of what should be a more comprehensive strategy to prevent and address the circumstances that give rise to serious human rights atrocities. I consider briefly some of the global challenges to ICL. My principal concern, however, is not to appraise ICL's value against other transitional justice mechanisms. With the advent of the ICC, the proliferation of hybrid tribunals, and the increasing invocation of universal jurisdiction to try ICL crimes, I assume, at least for the purposes of this Article, that ICL has become a fixture of the international legal landscape that will continue to evolve rapidly. My hope is to clarify more precisely the objectives that ICL might realistically further and to consider how greater attention to punishment — the distinctive feature of any system of criminal law — and its manifestation in the ICL sentencing process might enhance the ability of ICL to contribute to them.

In Part II, I analyze three significant ways in which ICL differs from national criminal justice, focusing on the distinctive nature of the communities, crimes, and perpetrators implicated by ICL generally and international tribunals applying ICL in particular. I argue that, at least for purposes of conceptualizing punishment and sentencing, these tribunals should not, contrary to the prevailing view, be conceived as institutions designed to dispense proxy justice — that is, as substitutes for national criminal justice systems disabled by a lack of political will or resources. I also explore whether and to what extent the collective and psychological pathologies manifest in ICL crimes should bear on their punishment.

In Part III, I briefly trace the transition in ICL penal jurisprudence from a relatively crude retributive impulse, exemplified by the post-World War II trials of the Axis war criminals, to the increasingly complex, but largely haphazard, approach manifest in the judgments of the ad hoc tribunals for the former Yugoslavia and Rwanda. The idea of applying the unwieldy machinery of a newly designed international criminal justice system to the

---

<sup>17</sup> BASS, *supra* note 3, at 13 ("There is no such thing as *appropriate* punishment for the massacres at Srebrenica or Djakovica; only the depth of our legalist ideology makes it seem so."). Bass also quotes a well-known letter from Hannah Arendt to Karl Jaspers in which she remarks that "[i]t may well be essential to hang Göring, but it is totally inadequate. That is, this guilt, in contrast to all criminal guilt, oversteps and shatters any and all legal systems." *Id.*

Axis war criminals, which today strikes many as relatively uncontroversial, emerged as an alternative to the proposal, espoused by Winston Churchill and others, that they be summarily executed. In part for that reason, the post-War architects of ICL gave little thought to the propriety or justification of ICL punishment. Until the recent proliferation of ICL, the product of post-Cold War human rights crises in the Balkans, Rwanda, East Timor, and elsewhere, it would have been impossible to speak of an ICL sentencing jurisprudence.<sup>18</sup> Convicted war criminals, absent substantial mitigation, were killed. By the 1990s, however, international human rights law, which embraces the rehabilitative ideal but at the same time insists on a “just deserts” concept of proportionality in sentencing, had evolved so as to render it intolerable to continue to sentence all convicted ICL criminals to death — particularly given the aspiration of the international human rights movement to abolish capital punishment altogether. The judgments of the ad hoc tribunals now offer some tentative guidance on sentencing, but the jurisprudence has not, by and large, grappled with the difficult moral, legal, and practical questions raised by the ways in which ICL differs profoundly from national criminal justice. Resource constraints, which led the ad hoc tribunals to abandon distinct sentencing hearings at an early stage, also impeded the growth of a sentencing jurisprudence.

In Part IV, I argue that the expressive capacity of punishment best accommodates the confluence of ICL and international human rights law. I analyze the extent to which the standard justifications for punishment in national criminal law can or should be transposed to the distinct legal, moral, and institutional context of ICL. Each conventional account of punishment offers some insights that should be integrated into a comprehensive account of ICL’s penal goals, but the highly distinct nature of ICL relative to national criminal justice compromises the coherence or efficacy (or both) of conventional crime-control (deterrence, incapacitation, and rehabilitation) and retributive justifications for punishment. The principal value of ICL punishment lies in its expressive dimensions, which more accurately capture the nature of international sentencing and ICL’s realistic institutional capacity to contribute to the ambitious objectives ascribed to it. International criminal tribunals can contribute most effectively to world public order as self-consciously expressive penal institutions: publicly condemning acts deplored by international law, acting as an engine of jurisprudential development at the local level, and

---

<sup>18</sup> The absence of a sentencing jurisprudence does not necessarily distinguish ICL. In the United States, for example, until the latter half of the twentieth-century, it would have been difficult to speak of a federal sentencing jurisprudence. KATE STITH AND JOSÉ A. CABRANES, *FEAR OF JUDGING: SENTENCING GUIDELINES AND THE FEDERAL COURTS* 23 (1993).

encouraging the legal and normative internalization of international human rights and humanitarian law. At the same time, international human rights law requires that the deterrent or retributive goals to which a focus on the expressive capacity of punishment may contribute be tempered and constrained by considerations of due process, rehabilitation, proportionality, and justice.

I conclude by briefly considering what practical guidance this account of ICL punishment offers for the substantive law and process of sentencing by international criminal tribunals. In particular, I suggest, it counsels, first, the institutionalization of sentencing hearings as a vital component of ICL trials; second, greater attention to context and the role of the defendant vis-à-vis any implicated collective entities (states, armies, tribes, and so forth) as relevant aggravating or mitigating circumstances and a jurisprudence that distinguishes rank-and-file perpetrators from the architects and orchestrators of ICL crimes (and those on the spectrum between these poles); and finally, efforts to increase the level and quality of jurisprudential exchange between international and national criminal-justice institutions — for the efficacy of international criminal tribunals ultimately depends on their ability to contribute to the development and enforcement of ICL “at the local level, where all of us live.”<sup>19</sup>

I stress that ICL, properly conceived, means more than international criminal tribunals, the focus of this Article; it includes the synergistic efforts of national and hybrid courts applying ICL, experiments with universal jurisdiction, and transitional justice mechanisms including truth commissions and lustration. I do not intend the account of ICL punishment and sentencing offered here as a universal answer to the sentencing issues faced by local and hybrid courts, some of which undoubtedly differ in degree and kind. It may, however, provide guidance, for the international goals of ICL sentencing should always, in my judgment, be factored into determinations of just punishment for ICL crimes.

#### I. ICL IN PERSPECTIVE: EXPECTATIONS AND STRATEGIES

Immi Tallgren rightly asks why “it generally seems to be taken for granted that whatever objectives and justifications work — or are supposed to work — on the national level should also, without any extra effort, cover the decisions and actions taken by states in concert.”<sup>20</sup> Efforts to transpose general principles of criminal law common to many national legal systems to the substantially distinct moral, legal, and institutional setting of ICL may be misguided. Part of the problem, however, which I want to emphasize at

---

<sup>19</sup> Alvarez, *supra* note 1, at 483.

<sup>20</sup> Tallgren, *supra* note 3, at 565-66; *see also* Drumbl, *supra* note 4, at 542-44, 566-67.

the outset, lies in the overzealousness of some proponents, which creates unduly high expectations about what ICL can or should manage to accomplish. The ambitious goals ascribed to ICL include combating impunity, individuating guilt, promoting accountability, contributing to the reestablishment of international peace and security, deterring future atrocities, achieving retribution, creating an accurate historical record, and fostering both national and international reconciliation.<sup>21</sup> But it should go without saying that ICL can only be expected to augment, not substitute for, other strategies — diplomatic, economic, military, and developmental — to address serious human rights crises.<sup>22</sup>

Prospectively, international law must focus far more than it has in the past on developing and implementing prophylactic strategies to prevent largescale human rights atrocities in the first place. Where those strategies fail, military intervention must, I believe, remain an option.<sup>23</sup> Retrospectively, international law should certainly combat a culture of impunity for human rights violations. But overemphasis on the ICL paradigm to the exclusion of alternative accountability mechanisms, such as lustration in the eastern European states of the former Soviet bloc or South Africa's innovative Truth and Reconciliation Commission, would be misguided and probably counterproductive.<sup>24</sup> ICL remains only one tool, and by no means always the most appropriate or efficacious one, for addressing the diverse circumstances that give rise to largescale human rights atrocities and violations of the laws of war.<sup>25</sup> Even if international law now creates a duty to prosecute under some circumstances,<sup>26</sup> it surely does not prohibit complementary mechanisms for confronting the daunting

---

<sup>21</sup> See, e.g., *Developments in the Law: International Criminal Law*, 114 HARV. L. REV. 1943, 1961 (2001); Nemitz & Wirth, *supra* note 16, at 13.

<sup>22</sup> Cf. Payam Akhavan, *Justice in the Hague*, *supra* note 11, at 740 (“Nor is it befitting to subscribe to the judicial romanticism in some circles that views the ICTY as a panacea for all the ills of the former Yugoslavia.”).

<sup>23</sup> For thoughtful discussions, see MICHAEL WALZER, *The Politics of Rescue*, in ARGUING ABOUT WAR 67-81 (2004); MICHAEL IGNATIEFF, *Human Rights as Politics*, in HUMAN RIGHTS AS POLITICS AND IDOLATRY 37-48 (2001).

<sup>24</sup> See James J. Silk, *International Criminal Justice and the Protection of Human Rights: The Rule of Law or the Hubris of Law?* (unpublished manuscript, on file with author) (critiquing overemphasis on the prosecutorial model of international human rights protection).

<sup>25</sup> Reisman, *supra* note 14, at 79; see also Report of the Secretary-General, *The Rule of Law and Transitional Justice in Conflict and Post-Conflict Situations*, Aug. 23, 2004, at 1, S/2004/616\* (emphasizing the need “to eschew one-size-fits-all formulas”).

<sup>26</sup> See Diane Orenlichter, *Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime*, 100 YALE L.J. 2537 (1991); see also Ronald C. Slye, *The Legitimacy of Amnesties Under International Law and General Principles of Anglo-American Law: Is a Legitimate Amnesty Possible?*, 43 VA. J. INT'L L. 173, 182-91 (2001).

political, social, and legal issues that face states emerging from internal strife, civil war, genocide, repressive regimes, and other circumstances in which widespread ICL violations characteristically occur.

Tragically, however, states historically fail to mobilize the political will to act to prevent or forestall mass atrocities until they reach horrific proportions — and often not even then.<sup>27</sup> The North Atlantic Treaty Organization's military intervention in Kosovo represented an encouraging, if controversial, precedent. Yet in retrospect, in the post-9/11 world and in view of the deplorable failure to take decisive action in Darfur, Kosovo appears to represent an exception enabled by a unique combination of circumstances rather than to herald a new era of multilateral interventions to prevent largescale human rights atrocities. By contrast, since the end of the Cold War, states have shown both political will and enthusiasm for ICL prosecutions. With the advent of the ICC, and the increasingly frequent invocation of universal jurisdiction by national courts,<sup>28</sup> ICL will probably continue to evolve rapidly at both the national and international levels.

We should continue to debate the merits (and demerits) of ICL as an international legal response to largescale human rights atrocities, particularly because, insofar as undue attention to or reliance on ICL distracts from prophylactic strategies or excuses failures to take prompt action in the face of imminent crises, it emerges as no more than “cynical theater.”<sup>29</sup> There is more than a little truth to the critique that international prosecutions in the wake of mass atrocities operate as a “fig leaf” to cloak and ameliorate the collective guilt of states and world leaders for their failure to intervene earlier or more decisively.<sup>30</sup> ICL's rapid development in the 1990s can be traced in part to the shameful failure of states to muster the collective political will to prevent or forestall systematic human rights atrocities, most notably, in the Balkans and Rwanda. This may account for some of the unrealistic expectations about its short-term potential to achieve objectives like the reconciliation of states torn by ethnic conflict or genocide, or the restoration of international peace and security in a region.

But the origin of a practice neither defines its fixed purpose nor limits its potential utility. And realistically, retrospective prosecutions may at times be the only international legal response practically available given the

---

<sup>27</sup> See SAMANTHA POWER, “A PROBLEM FROM HELL”: AMERICAN AND THE AGE OF GENOCIDE (2002) (documenting and analyzing the reasons for the persistent failure of the United States to act to prevent or forestall genocide).

<sup>28</sup> See LUC REYDAMS, UNIVERSAL JURISDICTION: INTERNATIONAL AND MUNICIPAL LEGAL PERSPECTIVES 1 (2003); Anthony J. Colangelo, *The New Universal Jurisdiction: In Absentia Signaling Over Clearly Defined Crimes*, 36 GEO. J. INT'L L. 537 (2005).

<sup>29</sup> Akhavan, *Justice in the Hague*, *supra* note 11, at 745.

<sup>30</sup> *Id.* at 744-45 (discussing the skepticism and cynicism with which some greeted the establishment of the ICTY).

constraints of international politics. In view of ICL's resilience and development, we should, I think, acknowledge that for better or worse, states have made a decision to devote considerable resources — intellectual, economic, diplomatic, and otherwise — to establishing an international criminal justice system for war crimes and human rights atrocities, at the heart of which lies the nascent ICC. Not as apologists but as realists, the relevant question then becomes not how ICL measures up against theoretically better or arguably more effective, but practically unavailable, international strategies, but rather, what goals can and should ICL realistically serve? How can we increase its efficacy and legitimacy?

We must also bear in mind that just as national criminal prosecutions represent only one component of a state's overall policy to control crime, which may include, in addition, policing strategies, social programs, education, economic development, and so forth, so international criminal prosecutions should be — and should be expected to be — only one component of a broader strategy toward international human rights atrocities. Tallgren, who offers a thoughtful critique of ICL based on flaws in the national law analogy, nonetheless recognizes that the critique itself relies on a somewhat unfair analogy: "The 'international criminal justice system' is assumed to function following the mechanisms of an idealized national system that cannot be localized anywhere."<sup>31</sup>

These qualifications aside, critiques of the analogy to national criminal justice raise many legitimate concerns, foremost among them, issues raised by the nature and priority of the diverse community interests implicated by ICL; the corporate character of ICL crimes; and the often dramatically distinct sociopolitical context in which violations of ICL characteristically occur.

## II. AN APPRAISAL OF THE NATIONAL LAW ANALOGY

### A. *Nature of the Community: Proxy Justice, Global Stability, and Global Humanity*

Systems of criminal law presuppose its value to one or more communities;<sup>32</sup> in the case of a national criminal justice system, to the community of that state's citizens. The imprimatur of a community distinguishes the unauthorized infliction of suffering from lawful

---

<sup>31</sup> Tallgren, *supra* note 4, at 566-67.

<sup>32</sup> 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 5 (1769) (criminal law concerns "the whole community, considered as a community, in its social aggregate capacity").

punishment.<sup>33</sup> Punishment, in turn, is justified by its value to a community. Theories of punishment necessarily invoke the interests and values of the community that prescribes it to justify, by reference to its consequences or some perceived moral imperative, the legally sanctioned infliction of suffering. Deterrence, like incapacitation, seeks to protect the community from crime, whether by the same person or future putative criminals; rehabilitation strives to reform the criminal to promote his productive reintegration into the community; and retribution, unlike vengeance, is understood to vindicate certain communal norms and interests.

Punishment in national legal systems, for all its complexity, can be appraised in terms of the objectives of a single community or polity. Which communal interests ICL purports to serve is less clear. At times, we speak of ICL in terms of interests and values comparable to those identified with national criminal justice, for example, the rights and retributive interests of literal victims defined, typically, by nationality, religion or ethnicity; in this regard ICL emerges as a system of proxy justice for disenfranchised local communities victimized by widespread human rights atrocities. At other times, we emphasize the interests and values of the figurative international community, either as a community of states or in terms of the more elusive, somewhat mystical, notion of a community of mankind, a *civitas maxima*. To appraise punishment in the ICL context, we need to ask in the first place which community, literal or figurative, ICL should deem its principal referent, for the interests of different communities not infrequently conflict.<sup>34</sup>

To cite one well-known example of the tensions this can introduce: The ICTR has struggled, with very limited success, to strike the proper balance between the interests of the states that established it through concerted international action — states that maintain strong commitments to emerging

---

<sup>33</sup> In terms of Hart's well-known enumeration of the elements of punishment, punishment "must be imposed and administered by an authority constituted by a legal system against which the offence is committed." H.L.A. HART, *Prolegomenon to the Principles of Punishment*, in PUNISHMENT AND RESPONSIBILITY: ESSAYS IN THE PHILOSOPHY OF LAW 5 (1968); see also Greenawalt, *supra* note 6, at 343-46.

<sup>34</sup> See, e.g., Mahnoush H. Arsanjani & W. Michael Reisman, *The Law-in-Action of the International Criminal Court*, 99 AM. J. INT'L L. 385, 393 n.35 (2005) (citing a report by the Refugee Law Project of Makerere University, which criticizes referral of the crisis in northern Uganda to the ICC as undermining "the legitimacy of the ICC at the grassroots level" because of "the disjuncture between international conceptions of justice and local community traditions, values, and notions of justice"). cf. Osiel, *supra* note 15, at 1756 ("No one who attends transitional justice conferences in postconflict societies can long fail to notice the near total disconnect between the discourse of local participants, often focused on historically specific grievances about who did what horrible thing to whom, and of we more 'cosmopolitan,' peripatetic academic consultants, touting larger lessons drawn from other countries recently facing similar predicaments.").

international human rights norms — and the retributive penal interests of Rwanda and its nationals. The latter objected vociferously, for example, to the Security Council’s decision not to authorize capital punishment in the ICTR Statute,<sup>35</sup> and to the ICTR’s decision, since retracted, to release Jean-Bosco Barayagwiza, a notorious *genocidaire*, because of the prosecution’s alleged violation of his due process rights.<sup>36</sup> Incidents like these highlight the not infrequent tension between the interests of the figurative international community and those of the literal (local or national) communities that ICL also ostensibly serves.<sup>37</sup> International penal interests may, and hopefully will, overlap to some degree with those of the affected local communities. Still, instances of conflict, as in Rwanda, remain inevitable.<sup>38</sup>

The prevailing paradigm for ICL conceives of it “as a means of filling in for national justice,”<sup>39</sup> that is, as proxy justice pursued by international institutions and actors on behalf of local communities victimized by international crimes. This view finds support in several comparatively recent developments in ICL. For purposes of sentencing, for example, the statutes of the ICTY and the ICTR include a *renvoi* to the national law and practice of the former Yugoslavia and Rwanda, respectively.<sup>40</sup> Arguably, this implies a conception of the ad hoc tribunals as institutions designed to

---

<sup>35</sup> The Statute of the ICTR limits punishment to imprisonment. ICTR Statute, art. 23(1). Rwandan law authorizes the death penalty. Because the ICTR enjoys jurisdictional primacy over Rwandan courts, *id.*, art. 8(2), and has sought to prosecute the most culpable offenders, as a practical matter, the leader, orchestrators, and architects of the genocide will not face the death penalty, while rank-and-file perpetrators, who have been relegated to Rwanda’s local courts, will. This anomaly, among other factors, led Rwanda to vote against the Security Council resolution establishing the ICTR. See Akhavan, *Politics and Pragmatics*, *supra* note 2, at 507-08.

<sup>36</sup> *Barayagwiza v. Prosecutor*, Decision on the Prosecutor’s Request for Review and Reconsideration, No. ICTR-97-19-AR72 (Mar. 31, 2000); *Prosecutor v. Barayagwiza*, No. ICTR-97-19-AR72 (Nov. 3, 1999). For analysis, see William A. Schabas, *Case Report: Barayagwiza v. Prosecutor*, 94 AM. J. INT’L L. 563 (2000).

<sup>37</sup> See Jenia Turner, *Nationalizing International Criminal Law*, 41 STAN. J. INT’L L. 1, 25-26 (2005).

<sup>38</sup> Surely, for example, survivors of a future genocide may find it difficult to understand why the Rome Statute not only excludes capital punishment but generally limits terms of incarceration to thirty years. Rome Statute, art. 77.

<sup>39</sup> Ruti Teitel, Book Review, 98 AM. J. INT’L L. 872, 874 (2004) (reviewing POST-CONFLICT JUSTICE (M. Cherif Bassiouni ed. 2002)); see also Steven Glickman, *Victims’ Justice: Legitimizing the Sentencing Regime of the International Criminal Court*, 43 COLUM. J. TRANSNAT’L L. 229, 257 (2004) (describing the ICC’s purpose as “to supplant (at least temporarily) defunct domestic criminal justice systems”).

<sup>40</sup> ICTY Statute, art. 24(1) (instructing trial chambers to consider “the general practice regarding prison sentences in the courts of the former Yugoslavia”); ICTR Statute, art. 23(1) (same with reference to Rwanda).

substitute for disabled national systems. In fact, we know that the drafters included these references to the general practice of the former Yugoslavia and Rwanda out of a conservative regard for the principle *nulla poena sine lege*.<sup>41</sup> The ad hoc tribunals do not, in any event, consider themselves bound by the penal practices of these states.<sup>42</sup>

A far more compelling argument for the proxy-justice model of international criminal tribunals proceeds from the lauded principle of complementarity. To many, this principle, which conditions the admissibility of a case brought to the ICC on the characterization of the relevant state as “unable or unwilling genuinely to carry out the investigation or prosecution,”<sup>43</sup> implies that the ICC acts as a substitute for national criminal justice systems disabled by a lack of political will or resources. In a technical sense, this may be true,<sup>44</sup> but it is also misleading. For a number of closely related reasons, international criminal tribunals do not, and as a practical matter, probably cannot offer proxy justice to the victims of serious human rights atrocities.<sup>45</sup>

Given their limited resources, international tribunals will never be able to prosecute more than a tiny fraction of the perpetrators of crimes that implicate hundreds, if not thousands.<sup>46</sup> The subset selected for prosecution has historically been, and will inevitably remain, contingent on discretionary political decisions made by international rather than local officials.<sup>47</sup> Of course, international lawyers increasingly agree that both

---

<sup>41</sup> Schabas, *A Human Rights Approach*, *supra* note 16, at 468-69, 482.

<sup>42</sup> *See, e.g.*, Prosecutor v. Erdemović, Case No. IT-96-22-T, Sentencing Judgment (Nov. 29, 1996), ¶ 40; *see also* Stuart Beresford, *Unshackling the Paper Tiger — The Sentencing Practices of the Ad Hoc Criminal Tribunals for the Former Yugoslavia and Rwanda*, 1 INT’L CRIM. L. REV. 33, 48-49 (2001).

<sup>43</sup> Rome Statute, art. 17. *See* Ruth B. Phillips, *The International Criminal Court Statute: Jurisdiction and Admissibility*, 10 CRIM. L.F. 61, 77 (1999).

<sup>44</sup> *But see* Arsanjani & Reisman, *supra* note 34, at 391-97 (observing that the first situation being investigated by the Prosecutor of the ICC arose from a voluntary referral by the implicated state, Uganda, even though its courts cannot, at least in the sense intended by the drafters of the Rome Statute, genuinely be characterized as “unable or unwilling genuinely” to investigate and prosecute crimes arising out of the conflict between the Ugandan government and the rebel Lord’s Resistance Army).

<sup>45</sup> *See* Alvarez, *supra* note 1, at 403.

<sup>46</sup> Report of the Secretary-General, *The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies*, Aug. 23, 2004, ¶ 46, U.N. Doc. S/2004/616 (2004); Akhavan, *Justice in the Hague*, *supra* note 11, at 775.

<sup>47</sup> *See* MARTHA MINOW, BETWEEN VENGEANCE & FORGIVENESS 30-31, 38-40 (1998); Diane Marie Amann, *Group Mentality, Expressivism, and Genocide*, 2 INT’L CRIM. L. REV. 93, 116 (2002). The highly political nature of ICL prosecutions — that only some serious international atrocities (and only some of the perpetrators of those atrocities) have been or will be prosecuted because of the realities of international power and politics — is a valid objection as far as it goes to the international criminal justice system as a whole. *See*

practical and moral reasons counsel a strong, if not exclusive, focus on the leaders, orchestrators, and architects with the greatest responsibility for the crimes rather than the rank and file,<sup>48</sup> and in a recent policy statement, the Prosecutor of the ICC expressly adopted this strategy.<sup>49</sup> But it will not always conform to the priorities of the victims, many of whom would naturally want to see the direct perpetrators of crimes affecting them or their kin punished. Their penal interests, understandably, will likely be more emotively retributive than those of a figurative international community invested in more abstract, long-term goals: ending the culture of impunity for human rights violators, contributing to the reestablishment of international peace and security, promoting the global rule of law, and so forth.<sup>50</sup> Experience with the ad hoc tribunals also consistently shows that local communities implicated by their work perceive them as distant, foreign, alien, and often illegitimate.<sup>51</sup>

Steps can and should be taken to improve the responsiveness of international tribunals to local needs and priorities. Trials, for example, might be held, where possible, in the state where the atrocities took place.<sup>52</sup> At their core, however, the problems identified above can only be reduced, not eliminated. They inhere in the nature and constitution of international criminal tribunals, with judicial and prosecutorial personnel, structures,

Amman, *supra*, at 116 (“A random confluence of political concerns produced ad hoc tribunals for just two out of a number of conflicts that warranted such treatment.”); Drumbl, *supra* note 4, at 581. But given that the system exists, efforts to bring greater coherence, justice, and due process to its operation remain valuable nonetheless, and in the long term, may render the political selectivity of the system less tolerable to its constituents.

<sup>48</sup> E.g., Carla Del Ponte, *Prosecuting the Individuals Bearing the Highest Level of Responsibility*, 2 J. INT’L CRIM. JUST. 516 (2004); SECOND ANNUAL REPORT OF THE INTERNATIONAL TRIBUNAL FOR THE PROSECUTION OF PERSONS RESPONSIBLE FOR SERIOUS VIOLATIONS OF INTERNATIONAL HUMANITARIAN LAW COMMITTED IN THE TERRITORY OF THE FORMER YUGOSLAVIA SINCE 1991, U.N. GAOR, 50th Sess. Agenda Item 49, at 13, ¶ 31, U.N. Doc. A/50/365, 2/1995/728 (1995); *but see* Alvarez, *supra* note 1, at 458 (challenging the assumption that elites necessarily deserve more severe punishments than low-level perpetrators directly responsible for crimes of brutal violence).

<sup>49</sup> ICC, Office of the Prosecutor, Paper on Some Policy Issues Before the Office of the Prosecutor 7 (Sept. 2003).

<sup>50</sup> Alvarez, *supra* note 1, at 406 & n. 207, 454 n.450; *see also* Jose E. Alvarez, *Rush to Closure: Lessons of the Tadic Judgment*, 96 MICH. L. REV. 2031, 2092 (1998) (“Some might contend that victims and survivors would derive more satisfaction from participation in trials leading to convictions of their actual torturers and rapists; that both groups might find greater catharsis from seeing such persons in the dock than from seeing their commanders — usually strangers to those victimized — who gave impersonal orders or encouraged such crimes generally.”).

<sup>51</sup> *See* Turner, *supra* note 37, at 24-25.

<sup>52</sup> The seat of the ICC is in The Hague, but trials may be held elsewhere by agreement. Rome Statute, art. 3.

statutes, and mandates established by states acting in diplomatic fora rather than by national leaders acting in national fora. With respect to the ICC, for example, its Prosecutor and judges, directly,<sup>53</sup> and the assembly of states parties, architecturally, not any particular local community, determine the priority and propriety of bringing particular cases.<sup>54</sup> These actors will exercise their discretion with foremost reference to the international interests they represent.<sup>55</sup> The ICC may be able to bolster local efforts at national justice and improve its solicitude for the victims, but it neither can nor should radically restructure itself in response to the highly divergent local circumstances and legal, political, and social cultures implicated by each situation referred to it.<sup>56</sup>

Complementarity recognizes (correctly, in my judgment) that national prosecutions, *if* genuine, feasible, and fair, more effectively serve the manifold goals ascribed to ICL than do international prosecutions.<sup>57</sup>

---

<sup>53</sup> See Rome Statute, arts. 17-19. Note, in particular, that the Court may, in its discretion, find a case inadmissible on the ground that it “is not of sufficient gravity to justify further action by the Court.” *Id.*, art. 17(d).

<sup>54</sup> The priorities of these actors cannot, of course, be equated simply with any monolithic international community. Because the ICC will frequently operate “*in the midst* of the conflict” rather than “*after* the acute and violent situation in which the alleged crimes occurred has been resolved by military victory or political settlement,” Arsanjani & Reisman, *supra* note 34, at 385-86, it may well generate conflict both *within* different sectors of the international community (for example, between political and judicial priorities), as well as *between* the international community and implicated local communities.

<sup>55</sup> In the context of Rwanda, for example, the existence of the ICTR has undoubtedly privileged international goals “over the desires of many of those who have been most immediately affected by the genocide.” Alvarez, *supra* note 1, at 409-10. The ICC does not enjoy the jurisdictional primacy criticized by Alvarez. Yet once the Court takes jurisdiction of a case, it seems unrealistic to expect that the manifold international pressures on the Prosecutor and Court will not result in a similar pattern, for “international tribunals are accountable to, and respond most readily to, international lawyers’ jurisprudential and other agendas and only incidentally to the needs of victims of mass atrocity.” *Id.* at 410. I do not mean to suggest that the ICC, or any other international criminal tribunal, should neglect the interests of local communities harmed by the ICL violations; nor that the Prosecutor will not cooperate with national authorities both to accommodate (to some degree) the latter’s penal interests and to maximize the efficiency of international justice. The Court has already worked with local authorities in the Democratic Republic of the Congo and Uganda, the sites of the first two situations it decided to investigate. See Hans-Peter Kaul, *Construction Site for More Justice: The International Criminal Court After Two Years*, 99 AM. J. INT’L L. 370 (2005).

<sup>56</sup> Hybrid courts, which employ a mixture of national and international or foreign laws, procedures, and personnel, are analytically distinct. They serve to bolster—at the financial, legal, and normative levels—the capacity and legitimacy of national courts, but they do not function as institutions structured principally to serve international penal interests. See Laura A. Dickinson, *The Promise of Hybrid Courts*, 97 AM. J. INT’L L. 295 (2003).

<sup>57</sup> See Alvarez, *supra* note 1, at 459-62; see also Turner, *supra* note 37.

Principal responsibility for controlling, judging, and punishing the conduct of individuals during times of war and other serious widespread violence must remain in the first instance on the highly organized, and often well-disciplined, collective entities — states, armies, and their cognates — implicated. ICL, in this regard, benefits from and indeed relies on the “dual positivization” of its legal norms.<sup>58</sup> Despite the vilification of the state in ICL discourse, we should always bear in mind, as Michael Ignatieff emphasizes in the context of international human rights enforcement, that the best guarantor of compliance with the laws of war and other ICL norms is not international law and institutions; it is a functioning state.<sup>59</sup>

But it does not follow that once an international tribunal assumes jurisdiction, it should conceive of itself or strive to function as a proxy for local interests. As a matter of functional capacity, it is doubtful that it can; as a matter of democratic legitimacy, it is unclear how it could. The avowed mission of international criminal tribunals, historically and today, is to prosecute “the most serious crimes of concern to the *international* community as a whole.”<sup>60</sup> The drafters of the Rome Statute did not design the Court with a view to the satisfaction of local penal interests. Nor is the Court intended to replicate the process to which a defendant would be subject under an able and willing system of national criminal law. With regard to sentencing, the drafters deliberately omitted any reference to national penal law and practice in the interest of “equality of justice through a uniform penalties regime for all persons convicted by the Court.”<sup>61</sup>

International criminal tribunals, unlike national courts, derive their authority from the concerted action of states, acting either pursuant to

---

<sup>58</sup> See Jeremy Waldron, *Torture and Positive Law: Jurisprudence for the White House*, 105 COLUM. L. REV. 1681, 1747 (2005) (“International law operates and can be enforced to a certain extent on its account and through its own institutions and agencies. But particularly in human rights law and humanitarian law, international covenants and conventions operate best when they are matched by parallel provisions of national constitutions and legislation.”) (quoting Gerald L. Neuman, *Human Rights and Constitutional Rights: Harmony and Dissonance*, 55 STAN. L. REV. 1863, 1864 (2003)).

<sup>59</sup> MICHAEL IGNATIEFF, *WHOSE UNIVERSAL VALUES? THE CRISIS IN HUMAN RIGHTS* 19 (1999).

<sup>60</sup> Rome Statute, pmbl. (emphasis added); see also *id.*, art. 5(1) (same); *id.*, art. 1 (vesting the Court with jurisdiction over “the most serious crimes of *international* concern”) (emphasis added). The International Military Tribunal (IMT) at Nuremberg characterized the Axis crimes not as offenses against a particular ethnic or national group (for example, the Jews or the French), but against the international community. Similar pronouncements appeared in the Treaty of Versailles, which framed Kaiser Wilhelm II’s indictment in terms of the deliberately ambiguous rubric of “a supreme offense against international morality and the sanctity of treaties.” Treaty of Peace Between the Allied and Associated Powers and Germany, June 28, 1919, art. 227, 226 Consol. T.S. 188, 285.

<sup>61</sup> Rolf Einar Fife, *Article 77: Applicable Penalties*, in COMMENTARY ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT 985, 986 (Otto Triffterer ed. 1999).

multilateral treaties (the IMT and the ICC) or under the authority of Chapter VII of the U.N. Charter, itself a multilateral treaty (the ad hoc tribunals for the former Yugoslavia and Rwanda). The Hobbesian notion of an implicit social contract — whereby individuals surrender certain rights to the state, which then gets a monopoly on legitimate coercion, in exchange for a measure of security — is strained in this context. And the concept of an international community is notoriously problematic and ambiguous. Unlike national communities, comprised of persons bound together by, at a minimum, territory, and, more often than not, by features such as values, language, culture, laws, history, and social norms, the international community defies a monolithic definition. Often, it functions as no more than a convenient shorthand for a broad array of global actors (including but not limited to states), processes, values, and interests.<sup>62</sup>

To develop a fair, principled, and consistent regime for international sentencing, however, we should nonetheless take seriously the project of identifying penal interests that reflect what we generally mean by an international community in the ICL context. A crime may be “of concern to the international community as a whole” because it threatens either state interests (the focus of traditional, Westphalian international law) or certain paramount values of mankind (a concept redolent of natural law and identified with the modern international human rights movement). To say that international criminal tribunals punish “the most serious crimes of concern to the international community as a whole” implies the latter meaning. The former, by contrast, generally calls to mind “transnational” crimes that can more effectively be investigated, prevented or prosecuted through international regimes of cooperation, including treaties proscribing certain substantive conduct and extradition and other treaties facilitating procedural cooperation.<sup>63</sup>

---

<sup>62</sup> See, e.g., Michael D. Ramsey, *International Materials and Domestic Rights: Reflections on Atkins and Lawrence*, 98 AM. J. INT’L L. 69, 79 (2004) (noting that the “comfortable rhetoric” of an international community “disguises the fact that there is no ‘world community’ with a simple and easily accessible opinion to be had for the asking,” but “only hundreds of societies, with diverse and conflicting national practices”); Dickinson, *supra*, note 56, at 303 (emphasizing that “there is never one, monolithic international community,” but rather “multiple international constituencies: communities of nation-states (such as UN members, Security Council members, NATO countries, the Council of Europe, and the Organization of American States), communities of non-governmental organizations (NGOs) (such as human rights NGOs, humanitarian NGOs, or development NGOs), or communities of other actors such as corporations, academics, and on and on”).

<sup>63</sup> Examples include narcotics trafficking, terrorism, transnational organized crime, and interference with the mail or international submarine cables. See, e.g., United Nations Convention Against Transnational Organized Crime, Nov. 15, 2000, S. Treaty Doc. No. 108-16 (2004), G.A. Res. 25, Annex I, U.N. GAOR, 55th Sess., U.N. Doc. A/RES/55/25

In fact, ICL implicates both the shared values of humanity and the shared interests of states to varying degrees. Aggression, for example, leaving aside the intractable debate about its definition for the moment,<sup>64</sup> disrupts the peaceful and stable international order that the U.N. Charter regime strives to preserve, implicating the interests of the international community *qua* community of states. It also poses a widespread threat to life and liberty, core values of humanity and universal human rights, implicating the interests of the international community *qua* community of mankind. Equally, while widespread or systematic human rights violations that qualify as war crimes or crimes against humanity implicate primarily the international interests of mankind,<sup>65</sup> since the establishment of the ICTY, it has been recognized in international law that violations of ICL on this scale also endanger the international interests of states to the extent that they rise to the level of a threat to international peace and security within the meaning of Article 39 of the U.N. Charter.<sup>66</sup> This, after all, was the authority invoked by the Security Council for the establishment of the ad

---

(2000); International Convention for the Suppression of the Financing of Terrorism, Jan. 10, 2000, G.A. Res. 109, U.N. GAOR, 54th Sess., 76th mtg., U.N. Doc. A/RES/54/109 (2000), 39 I.L.M. 270 (2000); International Convention for the Suppression of Terrorist Bombings, Jan. 12, 1998, G.A. Res. 164, U.N. GAOR, 52nd Sess., U.N. Doc. A/RES/52/164 (1998), 37 I.L.M. 249 (1998); Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, Dec. 20, 1988, 28 I.L.M. 493 (1989); Convention for the Suppression of Unlawful Seizure of Aircraft, Dec. 16, 1970, 22 U.S.T. 1641, 860 U.N.T.S. 105; Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, Sept. 23 1971, 24 U.S.T. 564, 974 U.N.T.S. 177; Convention for the Protection of Submarine Cables, Mar. 14, 1884, 24 Stat. 989, 11 MARTENS NOUVEAU RECUEIL (ser. 2) 281. Extradition treaties tend to be bilateral, though regional multilateral treaties exist. *E.g.*, European Convention on Extradition, Dec. 13, 1957, 359 U.N.T.S. 273 (1957).

<sup>64</sup> The Rome Statute includes aggression as a crime within the ICC's jurisdiction subject to the significant provisos that it must be defined satisfactorily and the conditions for its prosecution specified. Rome Statute, art. 5(1)(d), 5(2). A serious obstacle to defining aggression under international law is the uncertain relationship between the Security Council's *political* role in determining the existence of a threat to international peace and security and a putative international criminal tribunal's *legal* role in determining guilt for the initiation of aggressive war. *See* Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. U.S.), 1986 I.C.J. 14, 290 (Schwebel, J., dissenting) (emphasizing that "while the Security Council is invested by the Charter with the authority to determine the existence of an act of aggression, it does not act as a court in making such a determination"; rather, "[i]t may arrive at a determination of aggression — or, as more often is the case, fail to arrive at a determination of aggression — for political rather than legal reasons").

<sup>65</sup> *See, e.g.*, Prosecutor v. Erdemovic, Case No. IT-96-22-A (Nov. 29, 1996), ¶¶ 19, 28.

<sup>66</sup> W. Michael Reisman, *Haiti and the Validity of International Action*, 89 AM. J. INT'L L. 82, 83 & n.3 (1995).

hoc tribunals for the former Yugoslavia and Rwanda.<sup>67</sup> In short, to adapt Michael Walzer's terminology, ICL violations may threaten both "global stability" and "global humanity."<sup>68</sup>

Giving primacy to transnational penal interests will inevitably cause friction with certain local communities, as it has in the past, but from a moral, institutional, and legal perspective, it more accurately and appropriately captures the values that punishment by international tribunals can realistically serve. Just as national criminal law conceives of crime as an offense against the state as a collective, not the individual members of that collective immediately harmed by it, so ICL may be conceived analogously as concerned principally with the penal interests and values of the international community as a collective, not local political and social orders.<sup>69</sup> Rather than persist in the futile and impracticable effort to make genuinely international criminal tribunals mimic national courts by

---

<sup>67</sup> See S.C. Res. 955, U.N. SCOR, 49th Sess., 3453d mtg., U.N. Doc. S/RES/955 (1994), 33 I.L.M. 1600 (1994) (establishing the ICTR); S.C. Res. 808, U.N. SCOR, 48th Sess., Annex, U.N. Doc. S/25704 (1993), 32 I.L.M. 1159 (1993) (establishing the ICTY); cf. Note of the President of the Security Council, U.N. SCOR, 47th Sess., 3046th mtg. at 3, U.N. Doc. S/23500 (1992). The assertion that widespread or systematic ICL violations can constitute a threat to international peace and security sufficient to justify action by the Security Council under Chapter VII of the U.N. Charter, while subject to skepticism in some quarters, cf. *Prosecutor v. Tadic*, Case No. IT-94-1-AR72, Decision on Defence Motion for Interlocutory Appeal on Jurisdiction (Oct. 2, 1995), ¶ 27, 35 I.L.M. 32, 42 (1996) (rejecting jurisdictional challenge based on the argument "that the establishment of the International Tribunal had neither promoted, nor was capable of promoting, international peace, as the current situation in the former Yugoslavia demonstrates"), is not implausible. The collateral consequences of largescale human rights atrocities include "cross-border violence, substantial refugees flows, serious regional instability, or appreciable harm to the nationals of another state." Michael J. Matheson, *United Nations Governance of Post-Conflict Societies*, 95 AM. J. INT'L L. 76, 83 (2001); see also Akhavan, *Justice in the Hague*, *supra* note 11, at 740. Consider, for example, the aftermath of the Rwandan genocide, which led thousands of Hutu *genocidaires*-cum-refugees to seek sanctuary in the state then known as Zaire, ultimately precipitating the demise of the Mobutu regime and contributing to, if not causing, what has been characterized as a virtual world war in central Africa. Is it coincidental that one of the first situations being investigated by the ICC is in the same state, now known as the Democratic Republic of Congo? For a recent example, see Lydia Polgreen, *Refugee Crisis Grows as Darfur War Crosses a Border*, N.Y. TIMES, Feb. 28, 2006, at A1.

<sup>68</sup> WALZER, *The Politics of Rescue*, in ARGUING ABOUT WAR, *supra* note 23, at 74.

<sup>69</sup> Victims, in both national criminal law and ICL, may be, and ideally should be, beneficiaries of the criminal law. International tribunals should take steps to improve their solicitude for the victims and to enhance their legitimacy in the eyes of local communities. But criminal law, national and international alike, does not and should not function principally as a proxy for the victim's desire for talionic vengeance. This is not to suggest that ICL need not concern itself with the needs of victims; it is only to say that the failure of ICL tribunals to respond perfectly to the desires of the community victimized by ICL and the related tensions that inevitably result do not condemn the enterprise.

dispensing proxy justice, ICL should candidly acknowledge that these tribunals serve distinct goals and constituencies.

To avert misunderstanding, I stress that the jurisdiction of international tribunals should, in my view, remain the exception; indeed, as the Prosecutor of the ICC noted in a recent policy statement, “the absence of trials by the ICC, as a consequence of the effective functioning of national systems, would be a major success.”<sup>70</sup> Where the jurisdiction of an international tribunal properly lies, however, it is by reference principally to international penal interests that an internally consistent, just, and principled sentencing scheme can be developed. The sentencing practices of the ICC cannot differ dramatically from case to case as a function of the national laws and practices of different affected states; they should not, that is, require the Court to impose disparate sentences for similar criminal conduct based on where the crimes took place or the nationalities of the victims. Whatever may be said about disparity in ICL sentencing more generally, that kind of disparity would raise grave doubts about the ICC’s legitimacy.<sup>71</sup> Complementarity suggests that where state authorities can and will genuinely investigate or prosecute, international penal interests dissipate; where they cannot or will not, those interests become paramount.

In short, the authority and legitimacy of international criminal tribunals derive from and rely on international rather than local laws and values. National criminal justice for ICL violations should remain the norm; hybrid courts offer a valuable alternative in situations in which the political will, but not the capacity, to investigate and prosecute exists;<sup>72</sup> but where an international tribunal assumes jurisdiction, international rather than local penal interests provide the more appropriate metric for evaluating the institution of punishment and developing an internally consistent, fair, and principled law of international sentencing.

---

<sup>70</sup> ICC, Office of the Prosecutor, Paper on Some Policy Issues Before the Office of the Prosecutor 3 (Sept. 2003).

<sup>71</sup> See Danner, *supra* note 1, at 441-42 & n.105. Disparity will almost certainly remain an issue in a different sense: Under the ICC complementarity regime, whether a perpetrator faces national or international justice, and therefore the sentence to which he may be exposed, may depend on a variable unrelated to culpability, the ability and willingness of national authorities to prosecute. But in that event, the penal interests at stake remain national in the first instance. The perpetrator cannot complain if his sentence would have been lower under international law, any more than perpetrators of national crimes can justly complain that the sentence they would have received in another state with concurrent jurisdiction over the same crime would have been less severe.

<sup>72</sup> See Dickinson, *supra* note 56, at 310; *but see* Arsanjani & Reisman, *supra* note 34, at 402 (noting that the hybrid courts for Sierra Leone and Cambodia, which were to be funded by voluntary contributions, face severe funding problems that call into question the viability of this model).

*B. Nature of the Crimes: Collectivity, Secondary Harms, and the Diffusion of Culpability*

The transnational nature of the interests implicated by ICL should guide consideration of the goals to which any effort to develop principles of international sentencing should be directed. But the nature of the crimes and perpetrators — the moral circumstances in which they act and the collective character of the offenses — circumscribes the manner in which those goals can and should be pursued. ICL crimes share a collective or corporate character that distinguishes them from the bulk of national crimes; they can accurately be described, in some sense, as “collective crimes.”<sup>73</sup> To appreciate precisely how the collective nature of international crimes may bear on sentencing, however, we need to distinguish between several different senses, for they arguably cut in different directions vis-à-vis the primary sentencing metrics of harm and culpability.<sup>74</sup> In particular, international crimes can be described as collective in at least three ways: They may involve to varying degrees (i) collective perpetrators, (ii) collective victims, and (iii) a collective or corporate mens rea.

1. Collective Perpetration

George Fletcher offers a compelling argument to the effect that all international crimes necessarily involve a collective perpetrator,<sup>75</sup> generally a state, army, or similar authority. As a categorical claim, this view strikes me as mistaken.<sup>76</sup> But improbable counterexamples aside, it is surely

---

<sup>73</sup> Akhavan, *Justice in the Hague*, *supra* note 11, at 781; *see also* Osiel, *supra* note 15, at 1752 & n.4 (2005); Drumbl, *supra* note 4, at 571; Fletcher & Weinstein, *supra* note 8, at 605.

<sup>74</sup> The Rome Statute says little about sentencing, *see* arts. 76-78, but broadly, it adopts harm (“gravity of the crime”) and culpability (“individual circumstances of the convicted person”) as the determinants of sentences. *Id.*, art. 78(1).

<sup>75</sup> Fletcher, *supra* note 11, at 1514-25.

<sup>76</sup> As I understand the law, to use Fletcher’s examples, a lone soldier, acting without the explicit or tacit approval of his superiors, who refuses quarter to enemy soldiers would be guilty of a war crime despite the absence of collective authorization, *see id.* at 1521; and a Sinophobe in Connecticut who kills the first two Chinese men he encounters, with intent to destroy the Chinese people at least in part, would be technically guilty of genocide despite the idiosyncratic nature of his crime in context. *Id.* at 1523. The mens rea for genocide, unlike that for crimes against humanity, does not require *knowledge* of “a widespread or systematic attack.” *Cf.* Prosecutor v. Nindabahizi, Case No. ICTR-2001-71 (July 15, 2004), ¶ 471 (killing of a single individual with the requisite intent constitutes genocide). Equally, for war crimes (to use a current example), it seems clear that an American soldier in Iraq who tortures a prisoner at Abu Ghraib is guilty of a violation of the Geneva Conventions whether he acts as a “bad apple” or in pursuance of an official policy promulgated at some level of the military or civilian hierarchy.

correct that in the vast majority of cases, international criminals act on behalf of or in furtherance of a collective criminal project: waging aggressive war, destroying an ethnic, national, racial or religious group, carrying out a widespread or systematic attack against a civilian population or systematically violating the rights of protected persons under the Geneva Conventions.<sup>77</sup> For sentencing purposes, it suffices to accept that collective perpetration is, if not an indispensable element of each ICL crime, an almost invariable feature of them in practice.

## 2. Collective Victims

The second collective aspect of international crimes concerns the nature of the victim. With respect to some crimes, the collective nature of the victim is clear. To qualify as a crime against humanity, for example, one or more enumerated bad acts must be directed “against any civilian population.”<sup>78</sup> Genocide, similarly, requires the specific “intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such,”<sup>79</sup> and the ad hoc tribunals have emphasized that “the victim is the group itself, not merely the individual,”<sup>80</sup> indeed, that “[t]he individual is the personification of the group.”<sup>81</sup> Waging aggressive war, too, plainly involves a collective victim, typically another state.

War crimes, however, present a more complex analysis. The Geneva Conventions require that the culpable act be perpetrated against a member of one of the protected groups: civilians, soldiers rendered *hors de combat* or prisoners of war.<sup>82</sup> Yet war crimes do not involve a group victim in the

---

<sup>77</sup> *But see* Danner, *supra* note 1, at 472 & n.238. (stating that “war crimes may often be committed by soldiers acting on their own rather than according to a larger policy,” and that “the chapeau of the war crimes provisions in both Statutes [the ICTR and ICTY Statutes] require neither an illegal collective action nor an act targeted at someone because of his affiliation with a group”).

<sup>78</sup> Rome Statute, art. 7(1); *see also* ICTY Statute, art. 5; ICTR Statute, art. 3.

<sup>79</sup> Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, art. II, 78 U.N.T.S. 277.

<sup>80</sup> Prosecutor v. Niyitegaka, Case No. ICTR-96-14 (May 16, 2003), ¶ 410; *accord* Prosecutor v. Rutaganda, Case No. ICTR 96-3-I, Judgment (Dec. 6, 1999), ¶ 60 (“[T]he victim of the crime of genocide is the group itself and not the individual alone.”).

<sup>81</sup> Prosecutor v. Nahimana, Barayagwiza and Ngeze, Case No. ICTR-99-52-T (Dec. 3, 2003), ¶ 948.

<sup>82</sup> Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 3114; Convention for the Amelioration of the Condition of the Wounded, Sick, and Shipwrecked Members of the Armed Forces at Sea, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85; Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135; Convention Relative to the Protection of Civilians in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287.

same sense as crimes against humanity and genocide; they do not necessarily visit secondary harms on members of the targeted group, whether a civilian population or a national, ethnic, racial or religious group.<sup>83</sup> Rather, “[t]he protected person requirement is better seen as a limitation on jurisdiction than an element requiring any particular mens rea on the part of the defendant.”<sup>84</sup> As a practical matter, however, international tribunals have historically prosecuted systematic rather than isolated war crimes. The Rome Statute strongly reinforces this trend, vesting the Court with jurisdiction over war crimes “in particular when committed as part of a plan or policy or as part of a large-scale commission of such crimes.”<sup>85</sup>

### 3. Collective Mens Rea

International crimes also characteristically involve a collective or corporate mental state, a consciousness of action on behalf of or in furtherance of a collective project. Crimes against humanity require knowledge of a widespread or systematic attack against a civilian population;<sup>86</sup> genocide, while theoretically a crime that can be perpetrated by a single person, as a practical matter almost always involves a *shared* specific “intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such”<sup>87</sup> Aggression (conceptually) and war crimes (characteristically) likewise involve consciousness of acting as part of a group — for example, a state, military unit or paramilitary organization — engaged in a common effort.

Legal philosophers frequently invoke Rousseau’s distinction between two different sorts of collective action or intention: statistical or aggregative, on the one hand, and communal or associative, on the other.<sup>88</sup> “Collective action is communal,” Dworkin writes, “when it cannot be reduced just to some statistical function of individual action, when it presupposes a special, distinct, collective *agency*. It is a matter of individuals acting together in a way that merges their separate actions into a further, unified, act that is together *theirs*.”<sup>89</sup> International crimes implicate collective action and intention in this associative, communal or corporate sense. The collective mens rea of a genocidal mob cannot be equated with

---

<sup>83</sup> See Glickman, *supra* note 39, at 245-46.

<sup>84</sup> Danner, *supra* note 1, at 472 n.238.

<sup>85</sup> Rome Statute, art. 8(1).

<sup>86</sup> *Id.*, art. 7(1).

<sup>87</sup> Genocide Convention, art. 1. See Amann, *supra* note 47, at 93.

<sup>88</sup> RONALD DWORKIN, FREEDOM’S LAW: THE MORAL READING OF THE CONSTITUTION 19-20 (1996); Fletcher, *supra* note 11, at 1509-10 (citing JEAN-JACQUES ROUSSEAU, THE SOCIAL CONTRACT (Maurice Cranston ed., St. Martin’s Press 1968) (1762)).

<sup>89</sup> DWORKIN, FREEDOM’S LAW, *supra* note 88, at 20.

the sum total of each individual *genocidaire*'s mens rea; rather, it is a shared, associative mens rea, a consciousness of being part of a common project, of acting *as* a group. Equally, waging war, obviously, is not a mere matter of each soldier engaging in combat with the enemy; it involves highly disciplined coordination and a chain of command.<sup>90</sup>

#### 4. Implications for Sentencing

These aspects of collectivity, which may be present to varying degrees depending on the nature of the crime and the circumstances, arguably pull in different directions with respect to culpability. Consider first the collective nature of the victim. Several scholars and jurists, as well as the characteristic rhetoric of international law, suggest that this feature aggravates culpability. Danner, for example, advocating a view expressed by Judge Cassese in his separate opinion in the *Tadic* sentencing appeal,<sup>91</sup> offers a compelling case for regarding, say, a murder committed as a crime against humanity or act of genocide as more serious than the same act committed as a war crime, all other factors bearing on culpability being held constant: crimes against humanity and genocide resemble bias crimes under national law and produce comparable secondary harms that render the same act more culpable.<sup>92</sup> From this perspective, the collective nature of ICL crimes arguably *enhances* culpability.

But the analogy to hate crimes, while offering important insights, seems incomplete. A collective victim, a racial, national or ethnic group, for example, characterizes hate crimes. But hate crimes do not necessarily

<sup>90</sup> Fletcher, *supra* note 11, at 1514-15.

<sup>91</sup> Prosecutor v. Tadic, Case No. IT-94-1, Judgment in Sentencing Appeals (Jan. 26, 2000) (separate opinion of Cassese, J.). The jurisprudence of the ad hoc tribunals has engendered a debate over whether, all other circumstances being held constant, a crime against humanity should be deemed more serious than war crime, or an act of genocide more serious than a crime against humanity. Compare, e.g., Prosecutor v. Erdemovic, Case No. IT-96-22 (Oct. 7, 1997), ¶ 26 (ICTY Appeals Chamber) (McDonald and Vohrah, JJ., joint separate opinion) (invalidating Erdemovic's guilty plea in part because neither defense counsel nor the Trial Chamber "had explained to [him] that a crime against humanity is a more serious crime [than a war crime] and that if he had pleaded guilty to the alternative charge of a war crime he could expect a correspondingly lighter punishment"), and Prosecutor v. Kambanda, Case No. ICTR-97-23-S, Sept. 4, 1998, ¶ 14 (expressing "no doubt" that "violations of Article 3 common to the Geneva Conventions and of the Additional Protocol II thereto, . . . are considered as lesser crimes than genocide or crimes against humanity"), with Prosecutor v. Tadic, No. IT-94-1, Jan. 26, 2000, ¶ 69 (ICTY Appeals Chamber) ("[T]here is in law no distinction between the seriousness of a crime against humanity and that of a war crime."). The latter position has prevailed in the ICTY, though several jurists continue to dissent from it. E.g., Prosecutor v. Furundzija, No. IT-95-17/1-T, July 21, 2000 (declaration of Vohrah, J.).

<sup>92</sup> Danner, *supra* note 1, at 465.

evinced collective perpetration or what might be termed the cloak of collective authority. To commit them, that is, individuals need not be associated with or acting on behalf of some collective, state or organizational policy or practice.<sup>93</sup> By contrast, for international crimes, the collective character and authority of the perpetrator and the associated corporate mens rea, in addition to the collective nature of the victim, characterizes the culpable conduct. These collective features of ICL crimes arguably *diminish* culpability insofar as they diffuse moral responsibility and counsel distributing “guilt among the parties to a criminal transaction,” mitigating each perpetrator’s guilt in some proportion to that of the collective.<sup>94</sup>

Again, however, the analysis remains incomplete, for these observations apply differently depending on the defendant’s status and role vis-à-vis the crimes, “the individual circumstances of the convicted person.”<sup>95</sup> On the one hand, the collective authority, power, and influence that enables military and civilian elites to orchestrate a genocide, to instigate a widespread or systematic attack against a civilian population or to order, tacitly encourage or simply tolerate (by failing to prevent or punish) war crimes seems to call for a more severe penalty.<sup>96</sup> The participation, instigation, encouragement or even tacit condonation of a military or civilian elite often causes more aggregate harm than the individual crimes, however deplorable, of a rank-and-file participant. The cloak of collective authority poses a heightened danger, and its manipulation and abuse by elites should be penalized accordingly.<sup>97</sup> Conversely, for rank-and-file

---

<sup>93</sup> Of course, they may: the Ku Klux Klan or a neo-Nazi group, for example.

<sup>94</sup> Fletcher, *supra* note 11, at 1538; *see also id.* at 1539 (arguing that, for example, “the guilt of the German nation as a whole [for the crimes of the Nazis] should mitigate the guilt of particular criminals like Eichmann, who is guilty to be sure, but guilty like so many others of a collective crime,” and that “[c]onsidering the guilt of the nation in the sentencing process would provide a concrete and practical way to recognize collective guilt in criminal trials”).

<sup>95</sup> Rome Statute, art. 78(1).

<sup>96</sup> *See* Danner, *supra* note 1, at 470 & n.228; *see also* Fletcher, *supra* note 11, at 1511-12 (“Criminal organizations pose a heightened danger in their collective interdependence and reciprocal support, a danger that exceeds the aggregative threat of the individuals constituting a conspiracy.”).

<sup>97</sup> While it would be misguided to assert categorically that elites always deserve more punishment than subordinates, “the degree of responsibility generally increases as we draw further away from the man who uses the fatal instrument with his own hands and reach the higher levels of command.” *Attorney-General v. Eichmann*, 36 I.L.R. 11, 237 (1968). The sentencing jurisprudence of the ad hoc tribunals for the former Yugoslavia and Rwanda recognizes this aggravating circumstance under the rubric of abuse of power, authority or trust. *E.g.*, *Prosecutor v. Kambanda*, No. ICTR-97-23-S (Sept. 4, 1998), ¶ 44 (“Abuse of positions of authority or trust is generally considered an aggravating factor.”); *Prosecutor v. Krstic*, No. IT-98-33, Aug. 2, 2001, ¶ 709 (emphasizing that “a person who abuses or

participants, acting within a collective context and often within a formal command structure, the collective nature of the crimes arguably reduces their culpability. To appreciate why, we need to consider not only the nature of the crimes but the sociopolitical context and psychology of the perpetrators.

*C. Nature of the Perpetrators: Moral Agency in the “Maelstrom of Violence”*

1. The Plausibility of Moral Choice

Collective crimes frequently evolve from collective pathologies. Reisman remarks that “many of the individuals who are directly responsible [for ICL crimes] operate within a cultural universe that inverts our morality and elevates their actions to the highest form of group, tribe, or national defense. After years or generations of acculturation to these views, the perpetrators may not have had the moral choice that is central to our notion of criminal responsibility.”<sup>98</sup> Tallgren argues to similar effect that “the offender is likely to belong to a collective, sharing group values, possibly the same nationalistic ideology. In such a situation, the offender may be less likely to break the group values than the criminal norms.”<sup>99</sup> Citing Hannah Arendt’s well-known reflections on the trial of Adolph Eichmann,<sup>100</sup> Milgram’s famous experiment,<sup>101</sup> and other research on the “criminological, psychological and sociological” characteristics of many ICL crimes and perpetrators,<sup>102</sup> he contends that “contrary to most national criminality which is understood to constitute social deviation, acts addressed as international crimes can, in some circumstances, be constituted as conforming to a norm.”<sup>103</sup>

The collective pathology of international crimes must, in my view, be

---

wrongly exercises power deserves a harsher sentence than an individual acting on his or her own, for “[t]he consequences of a person’s acts are necessarily more serious if he is at the apex of a military or political hierarchy and uses his position to commit crimes”).

<sup>98</sup> Reisman, *supra* note 14, at 77.

<sup>99</sup> Tallgren, *supra* note 3, at 573.

<sup>100</sup> ARENDT, *supra* note 7.

<sup>101</sup> STANLEY MILGRAM, *OBEDIENCE TO AUTHORITY* (1974).

<sup>102</sup> Tallgren, *supra* note 3, at 571; *see* Fletcher & Weinstein, *supra* note 8, at 606-17 (comprehensively reviewing the psychological and other social science literature on the effect of collective action and social pressure on choice).

<sup>103</sup> Tallgren, *supra* note 3, at 575 (footnote omitted); *see also* Drumbl, *supra* note 4, at 549-50, 567-68; *cf.* ARENDT, *supra* note 7, at 294-95 (observing that in some circumstances ICL demands “that human beings be capable of telling right from wrong even when all they have to guide them is their own judgment, which, moreover, happens to be completely at odds with what they must regard as the unanimous opinion of all those around them”);

factored into any morally and pragmatically defensible account of their punishment. But the assertion that many perpetrators of serious international crimes lack the kind of moral choice central to our ordinary conception of criminal responsibility may imply two very different objections: first, from a deontological perspective, that to punish behavior predetermined strongly or even absolutely by circumstances beyond a person's control is unjust; and second, from a utilitarian perspective, that it is simply ineffective, for the person likely lacks the kind or degree of agency that makes the threat of sanctions an appreciable deterrent. I consider the latter objection below in connection with the analysis of deterrent rationales for punishment in the ICL context. Here, I want to explore the former objection.

I doubt that it is accurate in any meaningful legal or moral sense to conceive of ICL as a body of "criminal law that could be obeyed only by exceptional individuals" or to assert that the typical perpetrator "could not have acted or could not have been required to act otherwise."<sup>104</sup> To say that a person "could not have acted otherwise" may mean either that (i) given a strong form of philosophical determinism, no one can act otherwise than as he does, that the very concept of moral responsibility is incoherent; or more modestly, (ii) given certain legal and normative assumptions about the conditions for voluntary action that beget criminal responsibility, a particular criminal "could not have acted otherwise" because one or more of those conditions did not exist in the circumstances in which he acted, for example, he lacked the kind or degree of control over his muscles or mind that humans ordinarily possess (or believe they possess).<sup>105</sup>

The former argument, that perpetrators of international crimes lack moral choice, that is to say, choice of a kind or to a degree sufficient to justify punishment, is a variant of a familiar *reductio ad absurdum* argument about determinism and responsibility, the "argument from causation,"<sup>106</sup> which Michael Moore expresses succinctly in this syllogism:

1. All human actions and choices are caused by factors beyond the actor's control (the determinist premise).
2. If an action or choice is caused by factors beyond the actor's control, then that action or choice is morally excused

---

<sup>104</sup> Drumbl, *supra* note 4, at 135; Tallgren, *supra* note 3, at 573.

<sup>105</sup> See H.L.A. HART, *Acts of Will and Responsibility*, in PUNISHMENT AND RESPONSIBILITY: ESSAYS IN THE PHILOSOPHY OF LAW 90, 95-97 (1968).

<sup>106</sup> See John L. Hill, *Freedom, Determinism, and the Externalization of Responsibility in the Law: A Philosophical Analysis*, 76 GEO. L.J. 2045, 2048-49 & n.16 (1988); Michael S. Moore, *Causation and the Excuses*, 73 CAL. L. REV. 1091, 1112-13 (1986); Greenawalt, *supra* note 6, at 348.

(the moral version of the causal theory of excuse).

3. If an action or choice is morally excused, then that action or choice should not be legally punishable (the theory of punishment making moral culpability at least a necessary condition of legal liability). Therefore:

4. No action and choices should be legally punishable (the conclusion of universal legal excuse).<sup>107</sup>

Few, however, really mean to challenge ICL's legitimacy based on this syllogism, for while it is entirely coherent, which is not to say correct,<sup>108</sup> it would impugn not only the moral basis of ICL (and, for that matter, our intuitions about national criminal law), but many central precepts of civil law, for example, the voluntarist assumptions of contract law and the principle of fault in tort law. Perhaps the strong form of philosophical determinism is accurate, but no legal system can genuinely incorporate it and still function.<sup>109</sup> No legal system operates on the assumption that no one

---

<sup>107</sup> Moore, *supra* note 106, at 1113.

<sup>108</sup> *Id.* at 1143 (arguing that criminal responsibility can be reconciled with determinism by defining responsibility, as G.E. Moore did, to require only "the freedom (or power) to give effect to one's own desires," that "[o]ne's choices, or willings . . . themselves be causes of actions," but not "that such choices be uncaused" by extrinsic factors) (citing G.E. MOORE, *ETHICS* 84-95 (1912)); *but see* Isaiah Berlin, *Historical Inevitability*, in *LIBERTY* 94, 116 n.1 (Henry Hardy ed. 2002) (criticizing a similar conception of freedom). The syllogism also relies on peculiarly modern sensibilities about free will, desert, and moral responsibility. *See* FRIEDRICH NIETZSCHE, *ON THE GENEALOGY OF MORALITY* 39 (Maudemarie Clark & Alan J. Swensen trans. & ed. 1998) (1887) ("The thought, now so cheap and apparently so natural, so unavoidable, a thought that has even had to serve as an explanation of how the feeling of justice came into being at all on earth — "the criminal has earned his punishment *because* he could have acted otherwise" — is in fact a sophisticated form of human judging and inferring that was attained extremely late; whoever shifts it to the beginning lays a hand on the psychology of older humanity in a particularly crude manner.").

<sup>109</sup> *See* HERBERT PACKER, *THE LIMITS OF THE CRIMINAL SANCTION* 74-75 (1968) ("The idea of free will in relation to conduct is not, in the legal system, a statement of fact, but rather a value preference having very little to do with the metaphysics of determinism and free will. . . . Very simply, the law treats man's conduct as autonomous and willed, not because it is, but because it is desirable to proceed as if it were."); *see also* Isaiah Berlin, *Historical Inevitability*, in *LIBERTY*, *supra* note 108, at 122-23 ("I do not wish to say that determinism is necessarily false, only that we neither speak nor think as if it could be true, and that it is difficult, and perhaps beyond our normal powers, to conceive what our picture of the world would be if we seriously believed it; so that to speak, as some theorists of history (and scientists of a philosophical bent) tend to do, as if one might (in life and not only in the study) accept the determinist hypothesis, and yet continue to think and speak much as we do at present, is to breed intellectual confusion."). A purely utilitarian criminal justice model can justify punishment without denying strict determinism, for "[w]hether or not human acts are completely determined by prior causes, punishment can be an

can be held responsible for anything, that all conduct can ultimately be traced to some combination of hard-wired internal circumstances, themselves a product of either nature or nurture, and external circumstances, neither of which leaves room for a meaningful conception of moral choice. The law operates in the realm of normative ethics, not metaethics.

For this reason, it does not suffice to point to circumstances like war, nationalistic fervor or interethnic violence and assert categorically that voluntary conduct sufficient to beget criminal responsibility under those circumstances is a fiction. Perhaps extreme circumstances simply make it easier to recognize that moral choice is always a fiction; they differ in degree but not in kind. This form of hard determinism, in the ICL context, also does not explain why the figurative compulsion created by circumstances of war, mass violence, collective psychology, and so forth should be qualitatively more problematic for the concept of moral choice than any other causal factor, say, extreme socioeconomic deprivation. Consider the “rotten social background” defense: that a defendant’s economic and social background “so greatly determines his or her criminal behavior that we feel it unfair to punish the individual.”<sup>110</sup> At the theoretical level, given the strong form of determinism, it is not clear that the excuse of duress, that the defendant had no choice but to act as he did because of physical coercion, really differs from the “rotten social background” defense, that the defendant had no choice but to act as he did because of overpowering hard-wired impulses attributable to his socioeconomic circumstances. Both defenses assert that certain causes, whether a “gun to the head” or socioeconomic determinants, effectively deprive a person of the agency required for moral choice and criminal responsibility.

The point here is not to take sides in this perennial philosophical debate; it is only to say that if we truly believe ICL punishment cannot be justified where war criminals and *genocidaires* “could not have acted otherwise,” that phrase must not be understood as a global claim about determinism, but more modestly, as an assertion that certain legal and normative assumptions we make about the conditions for voluntary action that beget criminal responsibility do not exist under the circumstances. Yet the nature and scope of the objection have never been articulated. The real task for international criminal lawyers involves working out what conditions vitiate

---

efficacious prior cause.” Greenawalt, *supra* note 6, at 353. But few theorists (and even fewer laypersons) embrace such models, which remain subject to well-known objections.

<sup>110</sup> Richard Delgado, “*Rotten Social Background*”: *Should the Criminal Law Recognize a Defense of Severe Environmental Deprivation*, in MURPHY, *supra* note \_\_, at 249, 249; *see also* David L. Bazelon, *The Morality of the Criminal Law*, 49 S. CAL. L. REV. 385 (1976).

moral or legal responsibility and why.<sup>111</sup> Did the person act under duress, unusual provocation, fear or diminished mental capacity? If so, should those conditions exonerate or only mitigate punishment? The question, in the words of the IMT, “whether moral choice was in fact possible,”<sup>112</sup> must be considered against the backdrop of the general philosophical presumptions common to modern legal systems: agency, moral responsibility, culpability, and so forth.<sup>113</sup> This is not to suggest that the dramatically distinct circumstances characteristic of ICL violations and the collective character of the crimes should be disregarded; to the contrary, they compel serious attention. But categorical assertions about the nature (or lack) of moral choice evade rather than offer guidance on the practical questions that international criminal tribunals must address: to what extent such circumstances should be deemed exculpatory, aggravating or mitigating.

## 2. Beyond Caricatures

Several competing visions of the perpetrators of ICL crimes predominate in the literature arguably relevant to these questions. On one, rooted in the social, historical, and psychological studies referred to earlier, war criminals, *genocidaires*, and other participants in largescale or systematic human rights atrocities emerge as automatons enslaved by a mob mentality, incited by ethnic, national, racial or religious hatred, and so strongly predisposed to criminal conduct that it arguably makes little sense to regard them as moral agents accountable for their actions. (I stress that in practice few defendants prosecuted by international tribunals resemble this caricature.) The Rwandan genocide, in which thousands of Hutus systematically slaughtered Tutsis with machetes and other rudimentary weapons offers an (arguably) compelling example of this view.<sup>114</sup> Consider, too, the child soldiers enlisted by the Lord’s Resistance Army, the subject of the ICC’s first investigation: Abducted as minors, compelled to kill and

---

<sup>111</sup> See, e.g., MICHAEL WALZER, *JUST AND UNJUST WARS* 304-27 (1977) (analyzing the conditions for responsibility for war crimes); see also Fletcher, *supra* note 11, at 1543 (arguing that by “creating an orthodoxy of hate,” the state or society bears collective guilt, for it “deprives people of their second-order capacity to rein in their criminal impulses,” a factor that should in some circumstances mitigate individual guilt and therefore punishment).

<sup>112</sup> Judgment of the International Military Tribunal for the Trial of German Major War Criminals, Nuremberg, Sept. 30 & Oct. 1, 1946, Cmd. 6964, *reprinted in* 41 AM. J. INT’L L. 172 (1947).

<sup>113</sup> Cf. GABRIEL TARDE, *PENAL PHILOSOPHY* 55 (1912) (“The criminal, had he so wished, external or internal circumstances remaining the same, could have not committed his crime; he himself was aware of this possibility; therefore he is guilty of having committed it.”).

<sup>114</sup> See, e.g., GÉRARD PRUNIER, *THE RWANDA CRISIS* 243 (1995).

fight under duress, and socially and psychologically conditioned to commit acts of extraordinary brutality and violence,<sup>115</sup> it surely makes little sense, from either a retributive or consequentialist perspective, to prosecute and incarcerate them. Non-punitive rehabilitation would be both more appropriate and more effective.

On another view, however, in tension with but paradoxically also closely related to the first, the prototypical war criminal or *genocidaire* emerges as Hannah Arendt's Adolph Eichmann, the model of bureaucratic and calculating, but at the same time banal, evil. While this vision, like the former, characterizes the perpetrator as "ordinary," it elicits very different intuitions about the propriety of applying the criminal law paradigm. The rank-and-file international criminal is not conceptualized as a mindless instrument of the architects of ICL crimes, inculcated with ethnic hatred and psychologically conditioned to act as he does, but rather as an ordinary person who consciously chooses, albeit in an aberrant sociopolitical context, to participate in knowingly horrendous acts, often for social, political or economic gain. This vision of the quintessential calculating bureaucrat, unlike the alternative one of the rank-and-file perpetrator acting under the figurative compulsion of psychological, social, and political circumstances, offers a far more compelling moral case for applying the criminal law. Civilian and military elites present yet another paradigm: Far from being unable to act otherwise, they personify the cynical, deliberate, and calculated instigation of ICL crimes as a tool in the service of greed or power.

None of these caricatures, of course, accurately portrays the nature of all war criminals and *genocidaires* or captures the tremendously complex constellation of factors that may lead persons to engage in unconscionable crimes. It seems equally misguided to either denounce or condone the propriety of applying principles of national criminal law to ICL crimes on the basis of them. What we need is greater sensitivity not only to the gravity of the crime, but to the individual circumstances of the defendant, in particular, his role and background. ICL undoubtedly seeks to regulate and judge conduct in circumstances of war, ethnic violence, and other extreme conditions that differ radically from those prevailing in a well-ordered, peacetime society — circumstances that arguably expose the tenuousness of common assumptions about moral choice, responsibility, and culpability. To some degree, however, those assumptions underlie the criminal law generally; they do not, by themselves, constitute a global objection to ICL. Rather, the radically different circumstances in which ICL violations typically occur affect how, not whether, these assumptions apply. The

---

<sup>115</sup> See HUMAN RIGHTS WATCH, *STOLEN CHILDREN: ABDUCTION AND RECRUITMENT IN NORTHERN UGANDA* (2003); HUMAN RIGHTS WATCH, *THE SCARS OF DEATH* (1997).

extent to which the conventional rationales for punishment can or should be transposed to ICL depends on paying closer attention to the nature and circumstances of the violations, a process most effectively addressed not in the context of trial, where the determination of guilt or innocence rightly predominates, but at sentencing.

## II. FROM RETRIBUTIVE ORIGINS TO AN EMERGING JURISPRUDENCE

### A. *Post-War Origins*

How well has ICL sentencing addressed these issues? The historical record is poor. ICL's components, especially the laws of war, originated well before Nuremberg, and history offers several early examples of international efforts to prosecute war criminals and other perpetrators of what would now be defined as ICL crimes.<sup>116</sup> But the discipline of ICL as a distinct legal field originated in the aftermath of World War II. Regrettably, if understandably, the emotive atmosphere in which it developed did not conduce to sustained consideration of the goals of punishment and sentencing. At the time, the very notion that the most culpable Axis leaders and war criminals, men like Göering, should be subjected to the unwieldy and costly processes of the law proved controversial. Far from raising questions about the rationale for their punishment, international criminal trials emerged as an alternative to the proposal, espoused by Winston Churchill among others, that Axis leaders be summarily executed by firing squad. In the oft-quoted statement of Anthony Eden, then Britain's Foreign Secretary, many felt that "[t]he guilt of such individuals is so black that they fall outside and go beyond the scope of any judicial process."<sup>117</sup> While the American, French, and Soviet position in favor of the establishment of an international tribunal ultimately prevailed, no one questioned that the sentence for the major architects of the Axis crimes, absent very compelling factors in mitigation, should be death.<sup>118</sup> Customary international law at the time also prescribed capital punishment for war crimes.<sup>119</sup>

The IMT Charter therefore authorized "death or such other punishment as shall be determined . . . to be just,"<sup>120</sup> and the International Military Tribunal for the Far East (IMTFE) adopted this skeletal sentencing

---

<sup>116</sup> See BASS, *supra* note 3, at 5 (characterizing war crimes trials as "a fairly regular part of international politics" that emerged well before Nuremberg).

<sup>117</sup> TELFORD TAYLOR, *THE ANATOMY OF THE NUREMBERG TRIALS* 29 (1992).

<sup>118</sup> See Schabas, *International Sentencing*, *supra* note 1, at 180-81.

<sup>119</sup> *Id.* at 171 & n.2; see also HOWARD S. LEVIE, *TERRORISM IN WAR* 264 (1993).

<sup>120</sup> Agreement for the Prosecution and Punishment of Major War Criminals of the European Axis, Aug. 8, 1945, art. 27, 59 Stat. 1544, 82 U.N.T.S. 279.

provision verbatim.<sup>121</sup> The judgments of each paid scant attention to sentencing. Neither held distinct sentencing hearings.<sup>122</sup> Despite a few isolated statements justifying international punishment by reference to its presumed deterrent value,<sup>123</sup> the principal impetus for punishment after World War II consisted in an emotive reaction to the sheer magnitude and unconscionability of the crimes. Insofar as a coherent penal theory can be inferred from the post-War trials, it seems to be a crude retributivism,<sup>124</sup> notwithstanding Justice Jackson's famous remark in his opening statement before the IMT: "That four great nations, flushed with victory and stung with injury stay the hand of vengeance and voluntarily submit their captive enemies to the judgment of the law is one of the most significant tributes that Power has ever paid to Reason."<sup>125</sup>

*B. International Human Rights: Abolitionism, Proportionality, and the International Rehabilitative Ideal*

In time, however, international human rights law evolved to aspire to abolish the death penalty, and more generally, to emphasize rehabilitation as the paramount goal of punishment.<sup>126</sup> The International Covenant on Civil and Political Rights, for example, limits the application of the death penalty with a view to its ultimate abolition and describes "reformation and social rehabilitation" as "the essential aim" of incarceration.<sup>127</sup> Indeed, a number of European states regard life imprisonment as "cruel, inhuman or degrading treatment or punishment" contrary to modern human rights

---

<sup>121</sup> Charter for the International Military Tribunal for the Far East, Apr. 26, 1946, art. 16. T.I.A.S. No. 1589.

<sup>122</sup> Schabas, *A Human Rights Approach*, *supra* note 16, at 461 & n.2 (1997).

<sup>123</sup> *See* Schabas, *International Sentencing*, *supra* note 1, at 173-74.

<sup>124</sup> Daniel J. Pickard, *Proposed Sentencing Guidelines for the International Criminal Court*, 20 LOY. L.A. INT'L & COMP. L.J. 123, 129-39 (1997); Schabas, *International Sentencing*, *supra* note 1, at 189; Schabas, *A Human Rights Approach*, *supra* note 16, at 500-501.

<sup>125</sup> TAYLOR, *supra* note 117, at 167.

<sup>126</sup> Schabas, *A Human Rights Approach*, *supra* note 16, at 464, 503; WILLIAM A. SCHABAS, *THE ABOLITION OF THE DEATH PENALTY IN INTERNATIONAL LAW* (3d ed. 2002).

<sup>127</sup> International Covenant on Civil and Political Rights (ICCPR), Dec. 19, 1966, arts. 6(2), 6(5)-(6), 10(3), 999 U.N.T.S. 171; *see also* Second Optional Protocol to the International Covenant on Civil and Political Rights, G.A. Res. 44/128, Annex, 44 U.N. GAOR Supp. (No. 49) at 207, U.N. Doc. A/44/49 (1989); American Convention on Human Rights, Nov. 22, 1969, arts. 4(2)-(5), 5(6), 1114 U.N.T.S. 123; Standard Minimum Rules for the Treatment of Prisoners, art. 58, U.N. Doc. A/CONF/611 (1957), Annex 1, E.S.C. Res. 663C, 24 U.N. ESCOR Supp. No. 1, U.N. Doc. E/3048, amended by E.S.C. Res. 2076, 62 U.N. ESCOR Supp. No. 1, at 35, U.N. Doc. E/5988 (1977); Protocol No. 6 to the European Convention for the Protection of Human Rights and Fundamental Freedoms Concerning the Abolition of the Death Penalty, April 28, 1983, Euro. T.S. No. 114.

norms.<sup>128</sup> These developments, of course, sit uneasily with the sentencing practices of the post-War tribunals. International law also embraces proportionality in sentencing as a general principle of law; contemporary international criminal tribunals must develop some principled way to distinguish between crimes that, in their sheer magnitude and brutality, all seem to demand severe punishment.<sup>129</sup> Surely, Dusko Tadic, notwithstanding a conviction for crimes against humanity and war crimes that included horrific acts of murder and torture, should not be deemed as culpable or sentenced as severely as Jean Kambanda, the former interim prime minister of Rwanda and a principal architect of the genocide. But it is unclear what factors should be considered to arrive at an appropriate sentence for each — or for those defendants that do not fall clearly into the polar categories of “big fish” and “small fry.”

International human rights law thus renders the retributivist impulse for ICL punishment, as manifested in the post-World War II trials, conceptually and practically problematic. It is difficult to conceive of a punishment other than death that could fit most serious ICL crimes in a talionic sense. Yet authorizing capital punishment in constitutive ICL instruments would undermine international efforts to abolish it categorically. More generally, it is far from clear that terms of incarceration imposed by international tribunals can, even assuming they should, rehabilitate serious war criminals and *genocidaires*. Until recently, few ICL judgments even mentioned rehabilitation as a sentencing objective;<sup>130</sup> some explicitly discounted its value or propriety.<sup>131</sup> The sentencing judgments of the ad hoc tribunals refer variously, and without much elaboration or consistency, to retribution and

---

<sup>128</sup> Schabas, *International Sentencing*, *supra* note 1, at 176-77 & n.49; Schabas, *A Human Rights Approach*, *supra* note 16, at 480, 509.

<sup>129</sup> Prosecutor v. Blaskić, Case No. IT-95-14 (Mar. 3, 2000), ¶ 796 (recognizing proportionality as a general principle of law); *see also* Prosecutor v. Akayesu, Sentence, Case No. ICTR-96-4 (Oct. 2, 1998), ¶ 40; Danner, *supra* note 1, at 450 & nn.127-28. In Prosecutor v. Musema, Case No. ICTR-96-13-A, (Nov. 16, 2001), the Appeals Chamber rejected the argument that the defendant’s life sentence should be reduced because an (arguably) similarly situated defendant, Serushago, had received only fifteen years’ imprisonment. The court concluded that despite “superficial similarities,” Musema’s case, unlike Serushago’s, did not present “exceptional circumstances in mitigation,” and “[c]onsequently, the circumstances of the two cases are not so similar to justify a claim that the Trial Chamber erred by imposing a disproportionate sentence in respect of Musema.” *Id.* ¶ 390.

<sup>130</sup> Schabas, *International Sentencing*, *supra* note 1, at 192; Mark A. Drumbl & Kenneth S. Gallant, *Sentencing Policies and Practices in the International Criminal Tribunals*, 15 FED. SENT. R. 140, 2002 WL 32121741, at \*3 (Dec. 2002).

<sup>131</sup> *E.g.*, Prosecutor v. Kunarac, Case No. IT-96-23, Sentencing Judgment, ¶ 844 (Feb. 22, 2001).

deterrence as the twin goals of sentencing.<sup>132</sup>

### C. *The Beginnings of an ICL Sentencing Jurisprudence*

The ICTY and ICTR Statutes represent only a slight improvement over their predecessor instruments in this regard. Each contains a skeletal provision vesting the tribunals with discretion to impose a term of imprisonment based on “such factors as the gravity of the offence and the individual circumstances of the convicted person”; a *renvoi* to the national practice of the former Yugoslavia and Rwanda, respectively; and a provision for restitution.<sup>133</sup> The Rules of Procedure and Evidence developed by the tribunals augment this minimal framework, but only in abstract terms, providing for consideration of aggravating and mitigating circumstances, without specifying what factors might qualify.<sup>134</sup> The jurisprudence of the tribunals has gone some way toward filling out these gaps. Both the ICTY and ICTR have considered a variety of aggravating and mitigating factors, including, in the former category, “leadership (superior) position of the accused, terrorizing victims, sadism, cruelty and humiliation, espousal of ethnic and religious discrimination, and the number of victims”; and in the latter, “superior orders, necessity, duress, voluntary intoxication, automatism, insanity, and self-defense,” as well as “entry of a guilty plea and acceptance of responsibility, remorse, voluntary surrender to the tribunal(s), ‘substantial’ cooperation with the prosecutor, post-conflict conduct, previous good character, benevolent attitude toward the victims, and age.”<sup>135</sup>

These factors largely mirror those common to national legal systems.<sup>136</sup> Notably absent is any explicit consideration of the social, political or psychological circumstances characteristic of war and other large-scale violence; or of the collective nature of the crimes — factors which may, depending on the status of the accused, either aggravate or mitigate individual culpability. In *Prosecutor v. Krstic*, the ICTY said that “[i]n

---

<sup>132</sup> Danner, *supra* note 1, at 444 & n.109.

<sup>133</sup> ICTY Statute, art. 24; ICTR Statute, art. 23.

<sup>134</sup> ICTY Rules of Procedure and Evidence, Rule 101; ICTR Rules of Procedure and Evidence, Rule 101. The sole exception to this general lack of concrete guidance in the positive law is that both statutes specify superior orders as a mitigating factor. ICTY Statute, art. 7(4); ICTR Statute, art. 6(4).

<sup>135</sup> M. CHERIF BASSIOUNI, AN INTRODUCTION TO INTERNATIONAL CRIMINAL LAW 327-28 (2003) (footnotes omitted); *see also* Drumbl, *supra* note 4, at 561-66 (surveying aggravating and mitigating factors cited by international and hybrid criminal courts); Beresford, *supra* note 42, at 53-82 (surveying penal jurisprudence of the ad hoc tribunals for Rwanda and Yugoslavia).

<sup>136</sup> Drumbl, *supra* note 4, at 565.

determining the appropriate sentence, a distinction is to be made between the individuals who allowed themselves to be drawn into a maelstrom of violence, even reluctantly, and those who initiated or aggravated it and thereby more substantially contributed to the overall harm. Indeed, reluctant participation in the crimes may in some instances be considered as a mitigating circumstance.”<sup>137</sup> That statement, however, stands virtually alone in the jurisprudence; the tribunals have implemented it, if at all, haphazardly.<sup>138</sup>

ICL sentencing has thus evolved from retributive origins at Nuremberg to an increasingly nuanced body of law that recognizes the complexity of punishment in the context of catastrophic violence or war, defying the simple classification of ICL violations as obviously calling for the death penalty. At the same time, confusion about the justifications for punishment and its distribution among different kinds of defendants plagues the jurisprudence.<sup>139</sup> Furthermore, while the judgments of international criminal courts often describe the crimes as comparatively more severe than crimes of violence under national law, such as murder,<sup>140</sup> the penalties imposed for them often seem incongruously lenient, at least by a retributive metric.<sup>141</sup> The ICTR recently noted, for example, that rape, torture, and murder as crimes against humanity have been punished by average sentences of, respectively, between twelve and fifteen years, five and twelve years, and twelve and twenty years.<sup>142</sup> In short, the present state of the law on international sentencing resembles in a number of respects that of the indeterminate federal sentencing system critiqued by Judge Frankel in his famous polemic, *Criminal Sentences: Law Without Order*.<sup>143</sup>

#### IV. LEGITIMACY, EFFICACY, AND THE EXPRESSIVE CAPACITY OF INTERNATIONAL PUNISHMENT

Conventional justifications for punishment fall into two broad

<sup>137</sup> See *Prosecutor v. Krstic*, Case No. IT-98-33-T, Judgment (Aug. 2, 2001), ¶ 711.

<sup>138</sup> In *Prosecutor v. Blaskić*, No. IT-95-14, Mar. 3, 2000 (Trial Chamber), the Trial Chamber observed: “It appears that, independently of duress, the context in which the crimes were committed, namely the conflict, is usually taken into consideration in determining the sentence to be imposed. Such was the case in the *Tadic*, *Celebici* and *Aleksovski* cases. Though mentioned in these cases, this factor does not seem to have been decisive in fixing the sentence.” *Id.* ¶ 770.

<sup>139</sup> See Ralph Henham, *The Philosophical Foundations of International Sentencing*, 1 J. INT’L CRIM. J. 64, 65 (2003); see also Drumbl, *supra* note \_\_, at 566.

<sup>140</sup> Glickman, *supra* note 39, at 230; see also Danner, *supra* note 1, at 488.

<sup>141</sup> Glickman, *supra* note 39, at 247-48 & n.70.

<sup>142</sup> *Prosecutor v. Semanza*, Case No. ICTR-97-20-T, Judgment and Sentence (May 15, 2003), ¶ 564.

<sup>143</sup> MARVIN E. FRANKEL, *CRIMINAL SENTENCES: LAW WITHOUT ORDER* (1973).

categories: crime-control and retributivist theories. The former include deterrence, specific and general;<sup>144</sup> incapacitation, which can be conceived as an extreme form of specific deterrence insofar as, if successful, it obviates any recidivism concerns;<sup>145</sup> and rehabilitation. The latter, retributivism or “just deserts,” though often conceived in Kantian terms, originated in theological conceptions of justice, and from an anthropological perspective, in the *lex talionis* common to many early legal systems.

Given the diversity of transnational penal interests, and the diversity of views about what counts as an appropriate justification for punishment,<sup>146</sup> it would be misguided and likely futile to offer a monolithic theory about the goals of international sentencing.<sup>147</sup> Furthermore, particularly in the international context, it is important to bear in mind H.L.A. Hart’s insight that the “general justifying aim” for punishment need not be coterminous with the justification for its application or proper distribution in concrete cases: the questions “why punish,” “who should be punished,” and “how

---

<sup>144</sup> Special deterrence, punishment’s tendency to prevent the person punished from himself engaging in future criminal conduct, has rightly been marginalized in the sentencing jurisprudence of the ad hoc tribunals, for “the likelihood of persons convicted here ever again being faced with an opportunity to commit war crimes, crimes against humanity, genocide or grave breaches is so remote as to render its consideration in this way unreasonable and unfair.” *Prosecutor v. Kunarac*, Case No., IT-96-23-T & IT-96-23/1-T (Feb. 22, 2001), ¶ 840.

<sup>145</sup> Incapacitation, an extreme form of special deterrence, seems equally inapposite. With the exception, perhaps, of some future Napoleon, few war criminals seem to pose a real danger of recidivism requiring incapacitation. By the time most orchestrators of serious human rights atrocities can be apprehended and prosecuted, they typically pose no future danger. Some may nonetheless deserve a life sentence, but not because of concerns about future dangerousness were they released after a finite term. On the other hand, indictment, investigation, and prosecution can disempower, discredit, and delegitimize tyrannical leaders, stigmatizing them as international fugitives, unable to travel freely, and at risk of having their assets frozen. *Developments in the Law: International Criminal Law*, 114 HARV. L. REV. 1943, 1962 & n.31 (2001). Milosevic’s indictment, for example, arguably contributed to his political demise. Payam Akhavan, *Beyond Impunity: Can International Criminal Justice Prevent Future Atrocities?*, 95 AM. J. INT’L L. 7, 9 (2001). The saga of Pinochet’s attempted prosecution by Spain under a theory of universal jurisdiction likewise seems to have lifted the veneer of political invulnerability that formerly prevented local efforts to bring him to justice. This quasi-incapacitative goal, however, is a political tool that precedes the trial process; or, following Hart, it may be understood as one justification for the establishment of an international criminal justice system but not, I think, as a consideration relevant to the distribution of punishment, that is, to sentencing.

<sup>146</sup> See, e.g., John Rawls, *Two Concepts of Rules*, 64 PHIL. REV. 3, 4 (1955).

<sup>147</sup> Cf. Henry M. Hart, Jr., *The Aims of the Criminal Law*, 23 LAW & CONTEMP. PROB. 401, 401 (1958).

much should they be punished” may be usefully distinguished.<sup>148</sup> Most ICL scholarship addresses the former, logically antecedent, question: Why establish an international criminal justice system? As we move from theory to practice, however, from the justification for an international system of punishment to the operationalization of that system, we confront, in the end, individuals rather than abstractions. The rhetorical goals of international justice offer little guidance on whether the gravity of a defendant’s crimes and his individual circumstances call for a term of incarceration of five years, twenty-five years or life.

Each conventional goal of punishment in national law offers insights, but analysis of the extent to which retributive and deterrence theories can or should be coherently transposed to the international context reveals that the primary value that international punishment can realistically serve consists in its expressive functions.<sup>149</sup> An expressivist account of punishment best captures both the nature of international sentencing and its most promising institutional capacity to make a difference given the momentous political and resource constraints that international tribunals inevitably face, for ICL’s ability to contribute to crime-control and retributive goals ultimately depends in large part on its value, legitimacy, and persuasiveness as authoritative expression. This conclusion, in turn, counsels more attention to the sentencing process than international tribunals have historically paid.

Expressivism is not or need not be, strictly speaking, a self-sufficient “justification” for punishment;<sup>150</sup> it is a function and essential characteristic of punishment as a social institution. Incarceration and other forms of “hard treatment” do not impose suffering only, or even primarily, as a means to deter crime or to exact a debt owed by the criminal to society. Rather, “punishment is a conventional device for the expression of attitudes of resentment and indignation, and of judgments of disapproval and reprobation, on the part either of the punishing authority himself or of those

---

<sup>148</sup> H.L.A. HART, *Prolegomenon to the Principles of Punishment*, in PUNISHMENT AND RESPONSIBILITY 3-5 (1968); *see also* Rawls, *supra* note 146, at 5 (proposing, in the context of penal theory, a distinction between “justifying a practice as a system of rules to be applied and enforced, and justifying a particular action which falls under those rules”); *but see* JEREMY WALDRON, *THE RIGHT TO PRIVATE PROPERTY* 331 (1988) (arguing that “[w]hether an account of the General Justifying Aim of an institution generates any implications so far as distribution is concerned depends entirely on the character of the General Justifying Aim”).

<sup>149</sup> *See* JOEL FEINBERG, *The Expressive Function of Punishment*, in *DOING AND DESERVING* 95 (1970); *see also* ROBERT NOZICK, *PHILOSOPHICAL EXPLANATIONS* 370-74 (1981).

<sup>150</sup> *See* Dan M. Kahan, *What Do Alternative Sanctions Mean?*, 63 U. CHI. L. REV. 591, 601 (1996) (defending a view of expressivism that “demurs to the claim of analytical interdependence” but shows that, nonetheless, expressivism necessarily informs “plausible conceptions of deterrence and retributivism”).

‘in whose name’ the punishment is inflicted. Punishment, in short, has a *symbolic significance* largely missing from other kinds of penalties.”<sup>151</sup>

As a descriptive matter, expressivism aptly captures the nature of ICL punishment and the characteristic tenor of the sentencing judgments of the ad hoc tribunals.<sup>152</sup> By punishing the perpetrators of serious international crimes, to paraphrase Feinberg, the international community attempts authoritatively to disavow that conduct, to indicate symbolically its refusal to acquiesce in the crimes, to vindicate international human rights norms and the laws of war, and to absolve ethnic or national communities, as collectives, of guilt by punishing individual perpetrators.<sup>153</sup>

As a normative matter, the expressive functions of punishment can be transposed to the distinct moral and institutional context of ICL without straining the coherence of the national law analogy, for expressivism self-consciously focuses less on the immediate instrumental value of punishment — as a tool of either retribution or deterrence on the rational actor model — and more on the long-term normative values served by any system of criminal law. It may well be quixotic to expect ICL to exert a significant deterrent effect on war criminals and *genocidaires* merely through its potential to increase the perceived costs of international crime. It may well be morally problematic for international tribunals, which represent and serve the interests of a figurative international community, to regard themselves as agents of retribution on behalf of victims who often regard them as illegitimate or worse. But international sentencing holds the potential effectively to fulfill the expressive function of punishment by conveying its distinctive symbolic significance. And insofar as deterrent and retributive theories of punishment can be transposed to the ICL context notwithstanding flaws in the national law analogy, it is largely because of the expressive dimensions of punishment.

### A. *Deterrence*

#### 1. The Benthamite Model

Human rights activists, diplomats, scholars, prosecutors, jurists, and journalists alike frequently ascribe the recurrence of large-scale human

---

<sup>151</sup> FEINBERG, *supra* note 149, at 98; *see also* Kahan, *supra* note 150, at 599 (“Punishment is *not* just a way to make offenders suffer; it is a special social convention that signifies moral condemnation.”); Hart, *supra* note 147, at 404-05.

<sup>152</sup> Amann, *supra* note 47, at 123 (noting that “[t]he judgments of *ad hoc* tribunals have retained an expressivist flavor”); Danner, *supra* note 1, at 490 & n.308 (collecting illustrative cases).

<sup>153</sup> *See* FEINBERG, *supra* note 149, at 101-05.

atrocities to impunity,<sup>154</sup> by which they generally mean the absence of criminal punishment. Kenneth Roth, the executive director of Human Rights Watch, argues that “[b]ehind much of the savagery of modern history lies impunity. Tyrants commit atrocities, including genocide, when they calculate they can get away with it.”<sup>155</sup> Writing in favor of the ICTY, Theodor Meron, now one of its judges, suggested that “[a]bandoning the tribunal now would have a negative impact on the behavior of the parties to the conflict . . . . On the ground, those committing war crimes would infer that regardless of their past or future violations they will not be held criminally accountable by the international community.”<sup>156</sup> On this view, punishment deters because potential war criminals know and fear the consequence of the law, that is, the pain of incarceration, and act to avoid it.<sup>157</sup>

But in the first place, deterrence, so conceived, requires the credible and authoritative communication of a threatened sanction. The figurative nature of the international community poses tremendous obstacles to this enterprise. It is one thing for a criminal justice system clearly to communicate a threat within a literal community, for example, a state or political subdivision, where constituents speak the same language, share sources of information, witness, at least intermittently, the operation of the machinery of the criminal justice system (police, courts, etc.), and ideally have good reason to believe, as Holmes wrote, that the law will keep its promises.<sup>158</sup> It is quite another for a culturally foreign and geographically distant tribunal, which lacks its own police force and enforces the law sporadically and inconsistently at best, to communicate a credible threat authoritatively, particularly where local norms, as Arendt and others have emphasized, may point strongly in the opposite direction.

Second, if the rational-actor model of deterrence is suspect in the national context, it is exponentially so in the international, where war, largescale violence, and collective pathologies, as well as the institutional and resource limitations of ICL, can be expected to distort the viability of

<sup>154</sup> See Danner, *supra* note 1, at 446 nn.115-17.

<sup>155</sup> Kenneth Roth, *The Case for Universal Jurisdiction*, FOREIGN AFF., Sept./Oct. 2001, 150, at 150.

<sup>156</sup> THEODOR MERON, *The Case for War Crimes Trials in Yugoslavia*, in WAR CRIMES LAW COMES OF AGE, 187, 196 (1998). Much of the jurisprudence of the ad hoc tribunals emphasizes the deterrent objective of punishment. *E.g.*, Prosecutor v. Rutaganda, No. ICTR-96-3-T (Dec. 6, 1999), ¶ 456; Prosecutor v. Delalić, No. IT-96-21-T (Dec. 16, 1998), ¶ 1234; Prosecutor v. Kambanda, No. ICTR-97-23-S (Sept. 4, 1998), ¶ 26.

<sup>157</sup> See Richard Posner, *An Economic Theory of the Criminal Law*, 85 COLUM. L. REV. 1193 (1985).

<sup>158</sup> 1 HOLMES-LASKI LETTERS 806 (Mark DeWolfe Howe ed. 1953); see also OLIVER WENDELL HOLMES, *THE COMMON LAW* 46 (Mark DeWolfe Howe ed. 1963) (1881).

the familiar cost-benefit calculus on which that model depends. It is doubtful that the average war criminal or *genocidaire* weighs the risk of prosecution, discounted by the likelihood of apprehension, against the perceived benefits of his crimes. And even if he does, “it is not irrational to ignore the improbable prospect of punishment given the track record of international law thus far.”<sup>159</sup>

Third, the collective nature of ICL crimes means that “group think,” undue obedience to authority, and other phenomena familiar from the social psychology research canvassed by Fletcher and Weinstein may well interfere with this kind of calculation.<sup>160</sup> Bentham wrote that punishment cannot deter “[w]here the penal provision, though it were conveyed to a man’s notice, could produce no effect on him, with respect to preventing him from engaging in any act of the sort in question.”<sup>161</sup> While he had in mind circumstances like infancy, insanity, and intoxication, the principle applies equally to any psychological or physical condition that negates or overrides the fear of penal sanctions. The chaotic circumstances of war, largescale violence, ethnic conflict or genocide clearly qualify.

We should avoid overstating these critiques. They do not show that, for ICL, “deterrence doesn’t work.”<sup>162</sup> In the first place, skepticism about deterrence is not unique to ICL. Within nation-states, too, the evidence supporting general deterrence is inconclusive and difficult to interpret.<sup>163</sup> Few believe that would-be war criminals will “read the resolutions of the Security Council and stop their grave violations of international

---

<sup>159</sup> MINOW, *supra* note 47, at 50; David Wippman, *Atrocities, Deterrence, and the Limits of International Justice*, 23 FORDHAM INT’L L.J. 473, 476-77 (1999) (“For most offenders, especially low-ranking offenders, the risk of prosecution must appear to be almost the equivalent of losing the war crimes prosecution lottery.”); *see also* Tallgren, *supra* note 3, at 570-76; Danner, *supra* note 1, at 439 & n.97; Jose E. Alvarez, *Rush to Closure: Lessons of the Tadic Judgment*, 96 MICH. L. REV. 2031, 2079-80 (1998); Akhavan, *Justice in the Hague*, *supra* note 11, at 741. In fact, scant empirical evidence exists on the deterrent potential of ICL. Historical and anecdotal evidence is inconclusive at best. *See* BASS, *supra* note 3, at 290-95; Fletcher & Weinstein, *supra* note 8, at 592; Wippman, *supra*, at 474-75; Theodor Meron, *War Crimes Law Comes of Age*, 92 AM. J. INT’L L. 462, 463 (1998).

<sup>160</sup> Fletcher & Weinstein, *supra* note 8, at 603-17; *see also* Wippman, *supra* note 159, at 478-79 (“The natural human tendency to obey authority is compounded by military training, propaganda vilifying members of the opposite community, a belief in the justice of one’s cause, and the threat of penalties, for failure to comply with orders.”)

<sup>161</sup> JEREMY BENTHAM, INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION (1824), in JOHN STUART MILL & JEREMY BENTHAM, UTILITARIANISM AND OTHER ESSAYS 99 (Alan Ryan ed. 1987).

<sup>162</sup> JAMES Q. WILSON, THINKING ABOUT CRIME 121 (rev. ed. 1983); *see also id.* at 123 (noting that a number of well-designed studies indicate that deterrence does work to some degree and in certain contexts).

<sup>163</sup> *See id.* at 117-21.

humanitarian law” or “be indoctrinated to refrain from further breaches of the law and to support the shared values of the international community if one of [their] co-fighters . . . receive[s] a 15-year prison sentence in the Hague.”<sup>164</sup> But equally, few believe that “ordinary” murderers consult national penal statutes and undertake cost-benefit analyses before killing.

Furthermore, as emphasized earlier, it would be misguided to assimilate all war criminals and *genocidaires* to a single psychosocial profile, say, that of the paranoid automaton, inculcated with hatred and psychologically conditioned to act as he does by propaganda, social pressure, primordial cultural influences, and so forth. Often, elites responsible for large-scale or systematic international crimes can be described accurately as “conflict entrepreneurs,” those who manipulate values and the tools of state power as a means to aggrandize their own social, economic or political power.<sup>165</sup> This vision of the typical criminal not only seems intuitively more blameworthy than the rank-and-file perpetrator swept up in the “maelstrom of violence,” but also, perhaps, more deterrable. While elites may calculate that the risk of apprehension and prosecution remains insignificant, the fact remains that they calculate, weighs costs and benefits in a manner that seems more susceptible to external incentives.

Finally, the power of ICL to disempower elites through stigma and reputational injury should not be underestimated. “Leaders may be desperate, erratic, or even psychotic, but incitement to ethnic violence is usually aimed at the acquisition and sustained exercise of power. . . . Momentary glory and political ascendancy, to be followed by downfall and humiliation, are considerably less attractive than long-term political viability.”<sup>166</sup> In this regard, the mere issuance of an indictment, the very prospect of a trial, is itself the “punishment” by which ICL may deter.

---

<sup>164</sup> Tallgren, *supra* note 3, at 567.

<sup>165</sup> See Rosa Ehrenreich Brooks, *The New Imperialism: Violence, Norms, and the “Rule of Law,”* 101 MICH. L. REV. 2275, 2302 (2003).

<sup>166</sup> Payam Akhavan, *Beyond Impunity: Can International Criminal Justice Prevent Future Atrocities,* 95 AM. J. INT’L L. 7, 12 (2001) [hereafter Akhavan, *Beyond Impunity*]. To maximize the deterrent value of ICL, then, prosecutors probably should focus, as they increasingly have, on increasing the real risk of apprehension and prosecution for the elites who orchestrate ICL crimes rather than the rank and file mobilized to carry them out. Empirical studies validate a view expressed early on by Beccaria: “Crimes are more effectively prevented by the *certainty* than the *severity* of punishment.” CESARE BECCARIA, ON CRIMES AND PUNISHMENTS (1764), in READINGS IN JURISPRUDENCE AND LEGAL PHILOSOPHY 346, 349 (Morris R. Cohen & Felix S. Cohen ed. 1951); *accord* Prosecutor v. Furundžija, Case No. IT-95-17/1-T (Dec. 10, 1998), ¶ 290 (“It is the infallibility of punishment, rather than the severity of the sanction, which is the tool for retribution, stigmatisation, and deterrence.”). For an overview of the empirical work, see ANDREW VON HIRSCH, ET AL., CRIMINAL DETERRENCE AND SENTENCE SEVERITY: AN ANALYSIS OF RECENT RESEARCH (1999).

While the deterrence value of ICL, conceived in utilitarian terms, remains largely aspirational, available empirical evidence does suggest that it has “dissuad[ed] some war crimes,” albeit not “general programs of extermination,” and its prospects may be enhanced by a “relatively credible threat of prosecution” where it matters the most, that is, relative to elites.<sup>167</sup>

Still, to paraphrase Jeffrey Murphy’s summary of the problems with deterrence generally: Some war criminals and *genocidaires* do not weigh the costs and benefits of criminal conduct in a dispassionate way (though it would likely be wrong to say that they act irrationally relative to their perceived interests); others, particularly megalomaniacal elites, calculate (often correctly), that they will get away with it, or that the risk of apprehension and prosecution remains small; still others may be so idiosyncratically devoted to genocide or ethnic cleansing as to be “undeterrable by anything short of massive military force, and maybe not even that.”<sup>168</sup> Often, the chief war criminals will be coterminous with a state’s political elite; national prosecutorial and judicial institutions may be too corrupt or subservient to that elite; and ordinary moral norms about the treatment of other human beings may be eroded, if not inverted, by the circumstances of war or perceived crisis. While some elites may be susceptible to deterrence on the rational-actor model, other megalomaniacal tyrants — Milosevic, Pol Pot, Idi Amin, “Emperor” Bokassa — tend to share a psychological sense of infallibility and invulnerability that makes it less likely that they will rationally weigh the real probability of apprehension and prosecution, even if it can be increased, against their immediate goals: power, territorial acquisition, obliteration of an ethnic group.<sup>169</sup> In his opening statement at Nuremberg, Justice Jackson emphasized that “[p]ersonal punishment, to be suffered only in the event the war is lost, is probably not to be a sufficient deterrent to prevent a war

---

<sup>167</sup> BASS, *supra* note 3, at 294. From a pragmatic perspective, prosecuting elites, somewhat counter-intuitively, actually requires fewer resources relative to the breadth of the indictments than cases against low-level perpetrators, for the doctrine of command responsibility sweeps a wider evidentiary net, expands the limits of relevant evidence, and “[a]ccordingly, the temporal and geographical scope of evidence that may be invoked in support of prosecutions is very wide.” Akhavan, *Justice in the Hague*, *supra* note \_\_, at 779.

<sup>168</sup> BASS, *supra* note 3, at 291; see JEFFRIE G. MURPHY & JULES L. COLEMAN: *PHILOSOPHY OF LAW: AN INTRODUCTION TO JURISPRUDENCE* 119 (1990).

<sup>169</sup> This is not, of course, to suggest that such figures cannot act rationally. Saddam Hussein acted rationally when he agreed to permit U.N. inspectors back into the country in the wake of a unanimously adopted Security Council resolution 1441. S.C. Res. 1441 (Nov. 8, 2002), 41 I.L.M. 250 (2003). Slobodan Milosevic acted rationally when he agreed to the Dayton Peace Accords. But the prospect of serving a sentence of incarceration for war crimes will be unlikely to enter into the rational calculations of such elites unless and until they believe that they may lose.

where the war-makers feel the chances of defeat to be negligible.”<sup>170</sup>

Because of the institutional and resource constraints that plague international tribunals, their mere existence cannot be expected to enhance the prospects for deterrence very much. Their efficacy depends more on their ability to contribute to the growth and development of national laws, ethical norms, and institutions, as well as to encourage and, at times, compel national criminal justice systems genuinely to investigate and prosecute. For this reason, the expressive value of ICL sentences, the extent to which they convey, reinforce, and encourage the growth of national legal and moral norms that conform to ICL, matters more than the relative severity of the punishment in any individual case. International criminal tribunals will deter most effectively, on the Benthamite model, if they encourage the growth of national institutions, laws, and ethical norms that can be applied with greater regularity and frequency.

## 2. The Moral Educative Model

General deterrence operates not only, or even primarily, through external restraints, that is, because subjects hear and fear the relevant sovereign’s commands backed by threats;<sup>171</sup> the criminal law also deters by its long-term role in shaping, strengthening, and inculcating values, which encourages the development of habitual, internal restraints.<sup>172</sup> “The law can discourage criminality not just by ‘raising the cost’ of such behavior through punishments, but also through instilling aversions to the kinds of behavior that the law prohibits.”<sup>173</sup> In the long term, this effect of punishment likely deters far more criminal conduct than conscious rational calculation based on a fear of sanctions. Most people do not resemble Holmes’s “bad man,” obeying the law based only on “a prophecy that if he does certain things he will be subjected to disagreeable consequences by way of imprisonment or the compulsory payment of money.”<sup>174</sup> In general, “the most effective form of law-enforcement is not the imposition of external sanction, but the inculcation of internal obedience.”<sup>175</sup> Payam Akhavan, a strong proponent of this view relative to ICL, argues that criminal sanctions

---

<sup>170</sup> II TRIALS OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL 102 (1947).

<sup>171</sup> JOHN AUSTIN, *THE PROVINCE OF JURISPRUDENCE DETERMINED* (1832).

<sup>172</sup> Greenawalt, *supra* note 6, at 351.

<sup>173</sup> Kahan, *supra* note 150, at 603.

<sup>174</sup> Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 HARV. L. REV. 457, 461 (1897).

<sup>175</sup> Harold Hongju Koh, *How is International Human Rights Law Enforced?*, 74 IND. L. REV. 1397, 1401 (1999)

instill voluntary or “good faith” respect for just conduct by discrediting inhumane and unjust conduct, the cumulative effect of which encourages habitual or subliminal conformity with the law. Thus, the prevention of future crimes is necessarily a long-term process of social and political transformation, entailing internalization of ideals in a particular context or “reality,” or the gradual penetration of principles into power realities.<sup>176</sup>

This claim, however, brings us back full circle to the political, social, and psychological issues flagged earlier. Deterrent mechanisms that rely on internal restraints, habituation to moral and legal norms, require a criminal justice system perceived as authoritative and legitimate.<sup>177</sup> But many targets of ICL, persons willing to perpetrate unconscionable crimes, do not regard the system in that way.<sup>178</sup> The rank and file, acting under the figurative compulsion of an inverted morality or collective pathology whereby ordinarily “prohibited conduct starts to appear as a holy obligation, a positive achievement,” will be unlikely to view their conduct as deviant from the community norms that matter most, that is, local ones.<sup>179</sup> As for the elite, those that manipulate values in the service of power, they already, by hypothesis, lack the internalized norms by which the moral-educative effect of punishment is thought to operate. Finally, at least one study “suggests that the internalization of norms is not sufficient to prevent atrocities.”<sup>180</sup> David Wippman, reviewing findings of the International Committee of the Red Cross (ICRC) on war crimes in Bosnia-Herzegovina, notes that the ICRC concluded that such norms, while fully understood, supported, and accepted by combatants and civilians alike, “broke down under the pressure of nationalist passions and hatred. They also broke down because a range of other wartime considerations diminished and superceded

---

<sup>176</sup> Akhavan, *Justice in the Hague*, *supra* note 11, at 741.

<sup>177</sup> Kahan, *supra* note 150, at 603 (“This sort of preference adaptation [to values embodied in criminal law] is most likely to take place when citizens perceive the law as expressing society’s moral condemnation of such conduct.”).

<sup>178</sup> See, e.g., *Developments in the Law: International Criminal Law*, 114 HARV. L. REV. 1943, 1967 (2001) (noting that “the logical prerequisite to moral education is a threshold level of social consensus that the prosecution process itself legitimate,” yet “[a]t present, a large proportion of the populations of the former Yugoslavia and Rwanda may not see the tribunals as sufficiently legitimate to heed the moral lessons the tribunals seek to teach”); Wippman, *supra* note 159, at 486 (“Serbs, for example, view the ICTY as biased, and might therefore refuse to accept its judgments as confirming important social norms.”).

<sup>179</sup> Tallgren, *supra* note 3, at 571, 575.

<sup>180</sup> Wippman, *supra* note 159, at 486.

them.”<sup>181</sup>

These observations suggest that once the social, cultural or political circumstances for the widespread manipulation of moral norms obtain, the efficacy of ICL as a mechanism of deterrence is slight. Insofar as possible, we should strive to prevent, not only individual criminal acts, but the emergence of the sociopolitical circumstances that breed mass atrocities in the first place.<sup>182</sup> Prophylactic strategies intended to address the roots of conflict and to forestall, for example, the emergence of “failed states” or the polarization of ethnic and national groups should be the principal focus of international efforts. To the extent that ICL distracts from these objectives, it is counterproductive. ICL would more effectively contribute to the process of norm internalization and stabilization by maximizing its synergy with other, mutually reinforcing strategies, including communications, development assistance, international human rights policy, the spread of liberal constitutionalism and democracy, diplomacy, and economic incentives.

Analysis of the viability and coherence of deterrence in ICL thus yields two overarching conclusions relevant to sentencing: First, it supports Danner’s view, echoing H.L.A. Hart, that while deterrence may offer sound reasons to establish an international criminal justice system, it provides scant “guidance in determining the lengths of particular sentences.”<sup>183</sup> Judges in the international context, even more than in the national, lack sufficient, and sufficiently reliable, information logically to assess the “costs and benefits of imposing a sentence of any particular length in individual cases.”<sup>184</sup> Second, the absolute severity of punishment in quantitative terms matters less than the relative severity of punishment as an expression of the condemnation that attends particular criminal acts under the circumstances. A sentence that local institutions and actors view as cogent, legitimate, authoritative, and persuasive, one disseminated to the broadest possible audience, may contribute to the long-term project of preventing ICL crimes through mediums other than direct communication of a threat to potential criminals — for example, by its influence on national jurisprudence, rules of conduct integrated into military manuals distributed

---

<sup>181</sup> *Id.* at 487 (internal quotation marks omitted).

<sup>182</sup> Akhavan, *Beyond Impunity*, *supra* note 166, at 10 (“The focus of punishment should be the prevention of . . . deliberately induced aberrant contexts, within which habitually lawful social relations degenerate into unrestrained violence,” for “[o]nce the population has fallen prey to a collective psychosis of ethnic fear and hatred, violent behavior becomes exceedingly difficult to circumscribe through threats of punishment.”).

<sup>183</sup> Danner, *supra* note 1, at 447.

<sup>184</sup> *Id.*; *see also id.* at 449 (“Without any empirical study, there is simply no reliable way to determine how much deterrent effect a particular sentence will have, even assuming that marginal differences in sentence length exert different deterrent effects.”).

to soldiers, the media, and in the long term, the values and perceptions that predominate “in the elite culture of international diplomacy as well as world public opinion in general.”<sup>185</sup>

### B. Retribution

Retributive justifications for ICL punishment, while historically predominant, emerge as problematic from several perspectives. Above all, despite the prevalence of secular philosophical versions, retributivism — with its characteristic discourse of “just deserts,” blameworthiness, and the restoration of some moral balance — remains strongly redolent of religious notions of justice ill-suited to a diverse international community of states and peoples.<sup>186</sup> And secular justifications for retributivism transposed to the ICL context make little sense largely because they presuppose a more coherent, univocal, and stable community than international law offers.

#### 1. Retribution as Vengeance Regulation

One prevailing legal-anthropological model of retribution — though, strictly speaking, it should be regarded as a kind of utilitarianism — views it as a socially condoned substitute for vengeance.<sup>187</sup> “The criminal law,” in Stephen’s oft-quoted maxim, “stands to the passion of revenge in much the same relation as marriage to the sexual appetite.”<sup>188</sup> Acts of retaliatory violence, if left unchecked, threaten to destroy the social bonds of the community. The institutions of criminal justice must therefore enable the discharge of instinctual desires for vengeance in an orderly, socially palatable manner. Punishment, on this view, is the means by which the state terminates the otherwise escalating cycles of retaliatory violence within its

---

<sup>185</sup> Akhavan, *Justice in the Hague*, *supra* note 11, at 742.

<sup>186</sup> See Greenawalt, *supra* note 6, at 347 (emphasizing that retributive sentiments “are often supported by notions of divine punishment for those who disobey God’s laws,” or more generally, by the notion that “punishment restores the moral order that has been breached by the original wrongful act”).

<sup>187</sup> HOLMES, *supra* note 158, at 35 (“It certainly may be argued, with some force, that it has never ceased to be one object of punishment to satisfy the desire for vengeance.”). That retributivism may originate in vengeance regulation does not mean that it must remain committed to the view that “punishment of offenders satisfies the desires for vengeance of their victims” or that “punishment is justified because without it vengeful citizens would take the law into their own hands,” for “the need to prevent private violence . . . is an essentially utilitarian justification.” Michael S. Moore, *The Moral Worth of Retribution*, in JEFFRIE G. MURPHY, *PUNISHMENT AND REHABILITATION* 94, 95 (3d ed. 1995).

<sup>188</sup> JAMES FITZGERALD STEPHEN, *HISTORY OF THE CRIMINAL LAW OF ENGLAND* 99 (1883).

community.<sup>189</sup> René Girard argues, for instance, that ritual sacrifice in ancient societies prevented their self-destruction, precipitated by the escalation of cycles of retaliatory violence.<sup>190</sup> The criminal law gradually assumes the role of regulating private vengeance or, euphemistically, administering justice.<sup>191</sup> Failure to fulfill this function culminates in the chaotic discharge of retributive instincts, characteristically in the form of largescale violence.

The anthropological vision of escalating blood feuds and patterns of collective violence conjured by Girard's thesis resonates with our view of the cataclysmic circumstances caused by war, chaotic collapse of the state, and mass violence that characterize cases of widespread ICL violations, for example, the cycles of interethnic violence between Hutus and Tutsis in twentieth-century Rwanda or Croats and Serbs in the Balkans.<sup>192</sup> Indeed, as Arendt wrote, despite some perfunctory nods in the direction of deterrence, Eichmann's trial remained fundamentally about retribution in this theological, quasi-talionic sense:

We refuse, and consider as barbaric, the propositions "that a great crime offends nature, so that the very earth cries out for vengeance; that evil violates a natural harmony which only retribution can restore; that a wronged collectivity owes a duty to the moral order to punish the criminal" (Yosal Rogat). And yet I think it is undeniable that it was precisely on the ground of these long-forgotten propositions that Eichmann was brought to justice to begin with, and that they were, in fact, the supreme justification for the death penalty.<sup>193</sup>

Some prominent jurists and scholars ascribe a comparable function to the ad

---

<sup>189</sup> Archaic law codes consistently manifest a concern with vengeance regulation. See James Q. Whitman, *At the Origins of Law and the State: Supervision of Violence, Mutilation of Bodies, or Setting of Prices*, 71 CHL.-KENT L. REV. 41, 43 (1995).

<sup>190</sup> See RENÉ GIRARD, *VIOLENCE AND THE SACRED* 8 (1972).

<sup>191</sup> *Id.* at 15.

<sup>192</sup> I do not mean to imply the oft-criticized view that the Rwandan genocide reflected no more than the reemergence of historical or primordial ethnic animosity. Studies of the genocide uniformly reject this view and emphasize the extent to which elites manipulated and exacerbated latent ethnic tensions as a means to political power. See generally ALISON DESFORGES, *LEAVE NONE TO TELL THE STORY* (1999); PHILIP GOUREVITCH, *WE WISH TO INFORM YOU THAT TOMORROW WE WILL BE KILLED WITH OUR FAMILIES* (1998). Equally, most scholars reject the vision of the conflict in the former Yugoslavia as the inevitable explosion of latent ethnic tensions between Bosnian Muslims, Croats, and Serbs in the aftermath of the demise of Tito's iron-fisted rule.

<sup>193</sup> ARENDT, *supra* note 7, at 277.

hoc tribunals.<sup>194</sup>

On reflection, however, this view of retribution as a response to modern ethnic “blood feuds,” and arguably, therefore, a proper rationale for ICL punishment, makes little sense. In the first place, the figurative nature of the international community renders the paradigm inapposite. Retributive views of punishment rooted in *lex talionis*,<sup>195</sup> whether anthropological or philosophical, depend on a conception of justice as a value that arises within a single, coherent community. ICL, however, must mediate between the interests of multiple communities, both literal and figurative, and international tribunals generally lack the local legitimacy required as a practical matter to discharge the anthropological function of vengeance regulation. They represent the amorphous international community rather than the literal “wronged collectivity,” that is, the particular local community purportedly “unbalanced” by the crimes. The personnel, rules, and institutions that comprise international tribunals conform to and promote international rather than local legal, social, and moral norms. It is far from clear how punishment by an international tribunal, which derives its authority from either treaty or a Security Council resolution (at bottom, a function of state consent to the U.N. Charter, itself a multilateral treaty), can be a legitimate proxy for the penal interests of the literal victims who suffer extraordinary crimes of violence. This disjuncture may well be a major reason that international tribunals often suffer from a perceived lack of legitimacy in relation to affected local communities or states.

And even were international tribunals able to act as proxies for disabled local institutions, the collective nature of international crimes renders the idea of punishment as the socialized discharge of communal instincts for vengeance misguided at best: What sense does it make to speak of a “wronged collectivity” where that very collectivity, in many cases, bears some culpability or moral responsibility for the relevant wrong? We can see this problem more clearly by turning to the conventional philosophical justifications for retribution, which, unlike Girard’s anthropological vision, insist on the Kantian maxim that punishment never be inflicted solely as a means to an extrinsic end: order, vengeance regulation, and so forth.<sup>196</sup>

---

<sup>194</sup> *E.g.*, International Tribunal for the Former Yugoslavia: First Annual Report, at 10, U.N. Doc. IT/68 (July 28, 1994) (report of then President of the ICTY Antonio Cassese) (stating that the “only civilized alternative to this desire for revenge is to render justice,” lest “feelings of hatred and resentment seething below the surface . . . , sooner or later, erupt and lead to renewed violence”); *see also Developments in the Law: International Criminal Law*, 114 HARV. L. REV. 1943, 1967-68 (2001)

<sup>195</sup> *But see* Michael S. Moore, *The Moral Worth of Retribution*, in MURPHY, *supra* note 187, at 94, 94-95 (describing common misperceptions about retribution, including that it necessarily implies some commitment to *lex talionis*).

<sup>196</sup> Kant famously wrote that “only the *law of retribution (jus talionis)* . . . can specify

## 2. The “Unfair Advantage” Thesis

A prominent philosophical variant of retributivism, the “unfair advantage” or “benefits-and-burdens” thesis,<sup>197</sup> justifies retribution by positing a quasi-contractual relationship between individuals in a society. On this view, punishment is “a debt owed to the law-abiding members of one’s community; and, once paid, it allows re-entry into the community of good citizens on equal status.”<sup>198</sup> Herbert Morris explains punishment similarly: The criminal law specifies rules of conduct that benefit all members of a society while imposing a corresponding burden of “self-restraint” on each,<sup>199</sup> when a person violates those rules, “he has something others have — the benefits of the system — but by renouncing what others have assumed, the burdens of self-restraint, he has acquired an unfair advantage. . . . Justice — that is, punishing such individuals — restores the equilibrium of benefits and burdens by taking from the individual what he owes, that is, exacting a debt.”<sup>200</sup>

These contractual models of retributive punishment, as the exaction of a debt owed to society, also make little sense in the ICL context. In the first place, it would be bizarre to conceptualize the *genocidaire* as a free-rider on the hypothetical social contract of others not to destroy national, ethnic, racial or religious groups,<sup>201</sup> or to regard a serious human rights abuser as arrogating to himself a benefit that others voluntarily relinquished in their common interest.<sup>202</sup> An economic view of criminal justice as

---

definitely the quality and quantity of punishment; all other principles are fluctuating and unsuited for a sentence of pure and strict justice because extraneous considerations are mixed into them.” IMMANUEL KANT, *THE METAPHYSICS OF MORALS* (Mary Gregor ed. & trans., 1991) (1797).

<sup>197</sup> See Andrew von Hirsch, *Censure & Proportionality*, in *A READER ON PUNISHMENT* 115, 116-18 (Anthony Duff & David Garland eds. 1994) (overview and criticism of the “unfair advantage” theory).

<sup>198</sup> Jeffrie G. Murphy, *Marxism and Retribution*, 2 *PHIL. & PUB. AFF.* 217 (1973).

<sup>199</sup> Herbert Morris, *Persons and Punishment*, 52 *THE MONIST* 475 (Oct. 1968)

<sup>200</sup> *Id.* For criticism of the so-called “unjust advantage” theory of retribution, see Andrew von Hirsch, *Censure & Proportionality*, in *A READER ON PUNISHMENT* 115, 116-18 & n.4 (Anthony Duff & David Garland eds. 1994). As von Hirsch notes, both Murphy and Morris have since backed away from this view. *Id.* at 116 & n.2.

<sup>201</sup> Convention on the Prevention and Punishment of the Crime of Genocide, Jan. 12, 1951, art. II, 78 U.N.T.S. 277.

<sup>202</sup> Retributive theories of the “unfair advantage” variety may offer a more coherent justification for punishment of war crimes. It makes some sense to conceive of the laws of war as a body of conduct agreed to by states for their mutual benefit. Violations, on this view, give rise to an imbalance of benefits and burdens, which punishment rectifies. Indeed, the laws of war historically recognized a practice redolent of this view, reprisals, whereby violations of the laws of war by one state gave rise to a reciprocal right of the

redistributing benefits and burdens does not comport with our conception of crimes of extraordinary brutality. Furthermore, conceptualizing the war criminal or *genocidaire* as a deviant from social norms may make little sense where the criminal conduct would be more accurately described as conforming to a norm that prevails within the criminal's literal community, be it national, ethnic, racial or martial.<sup>203</sup>

Finally, the circumstances of widespread ICL violations frequently involve the state not as the societal entity ensuring a just distribution of benefits and burdens, but on the contrary, as a prime force disrupting that distribution. The state, that is, which in national criminal justice systems would be conceived, on the retributivist view, as the obligee to which the criminal owes a societal debt, emerges in the ICL context as an entity that may well share culpability for the crime — for international crimes characteristically require the collective cloak of authority that only the state or cognate entities (for example, tribal authorities or paramilitaries) can confer on individuals. The paradigm of retribution as a mechanism for restoring the balance of benefits and burdens as between society and its members therefore seems utterly misplaced as applied to ICL crimes. To punish an individual perpetrator does not redistribute benefits and burdens or avert blood feuds threatened by unharnessed cycles of retaliatory vengeance, enabling a balancing of the communal scales or the maintenance of order within a nation-state. In fact, as the Serbian reaction to Milosevic's trial by the ICTY suggests, international criminal trials may well increase local dissonance and societal resentment within implicated nation-states and local communities, at least in the short term. The community that authorizes punishment, in short, might not be the one to which the purported societal debt is owed.

Retribution therefore emerges as a problematic justification for ICL punishment in large part because it presupposes both a coherent community and a relatively stable sociopolitical or legal order characterized by shared values. The circumstances that enable widespread violations of international humanitarian law and human rights atrocities generally involve the

---

other state to engage in otherwise prohibited wartime conduct. Punishment of individuals for war crimes might be conceived along similar lines as a means of restoring the balance of benefits and burdens disturbed by violations of rules established for the mutual benefit of combatants. In the modern era, however, this reciprocity rationale for the laws of war would strike many as at least partially anachronistic. International human rights law has reconceptualized international humanitarian law, in substantial part, as the human rights component of the laws of war, a body of standards designed to guarantee minimal levels of human dignity and decency even in times of systematic, lawful violence; hence modern international humanitarian law outlaws reprisals in all circumstances.

<sup>203</sup> See ARENDT, *supra* note 7, at 294-95; Drumbl, *supra* note 4, at 549-50, 567; Tallgren, *supra* note 3, at 573-75.

breakdown of precisely that order. “Where no civil society is,” Hobbes wrote, “there is no crime.”<sup>204</sup>

### C. *Expressive Proportionality*

The retributive paradigm also seems misplaced in the ICL context because it apparently offers little guidance on proportionality. In a talionic sense, of course, no punishment can fit the most horrendous international crimes: slaughter of innocent civilians, systematic rape as a tool of war or genocide, and so forth. At the same time, the circumstances of extraordinary crime strain our intuitions about desert. Consider the well-known case of Drazen Erdemovic: What punishment, if any, befits a soldier who chose under duress, a threat to his own life, to participate in the summary execution of hundreds of Muslim civilians?<sup>205</sup> (Tellingly, the jurisprudential debate in *Erdemovic* focused less on speculation about deterrence — both the plurality and the dissent agreed that their decisions would be unlikely to affect the behavior of persons confronted with like circumstances in future conflicts — than on the proper message to be expressed by the sentence.) This case, while unique in the overt manner in which it highlights moral and legal issues that ordinarily remain obscured by the sheer brutality of the crimes, raises questions about the extent to which the criminal law can realistically regulate brutal violence in circumstances where crime becomes, to some degree, normative.<sup>206</sup> For purposes of proportionality, the gravity of the harm caused by an ICL violation seldom offers a particularly helpful metric; rather, context, “the individual circumstances of the convicted person,”<sup>207</sup> is crucial.

International human rights law implicitly adopts the key Kantian principles that animate modern retributive theories: first, that punishment, while it may also serve broader social goals, must never regard the punished instrumentally in the first instance, as a mere means to an end; and second, that culpability is at least a necessary, if not a sufficient, condition for punishment.<sup>208</sup> It therefore forbids, for example, exemplary justice, even if that would better serve other legitimate penal objectives of the international criminal justice system, such as deterrence. These principles impose constraints on both the absolute and relative severity of punishment, cardinal and ordinal proportionality. Of course, given the nature of the

---

<sup>204</sup> THOMAS HOBBS, *LEVIATHAN* 190 (M. Oakshott ed. 1957) (1651).

<sup>205</sup> *Prosecutor v. Erdemovic*, Case No. IT-96-22-A (Oct. 7, 1997).

<sup>206</sup> See generally Rosa Ehrenreich Brooks, *Law in the Heart of Darkness: Atrocity and Duress*, 43 VA. J. INT'L L. 861 (2003).

<sup>207</sup> Rome Statute, art. 78(1).

<sup>208</sup> Moore, *supra* note 187, at 94.

crimes at issue, efforts to calibrate crime and punishment according to the *lex talionis* principle would apparently require punishments that contemporary international human rights law prohibits.<sup>209</sup> What Beccaria wrote in relation to capital punishment seems apt here: “If the passions, or the necessity of war, have taught men to shed the blood of their fellow creatures, the laws, which are intended to moderate the ferocity of mankind, should not increase it by examples of barbarity . . . .”<sup>210</sup> ICL should be shaped, insofar as possible, to reinforce the core norms that it shares with international human rights law. Retributivism of the *lex talionis* variety has no place in this body of law.

But the expressive dimensions of retributivism nonetheless offer proportionality guidance. Few contemporary retributivists defend a *lex talionis* conception of proportionality. Andrew von Hirsch, for example, offers a retributive conception of ordinal proportionality that is parasitic on the expressive function of punishment.<sup>211</sup> It does not posit an *a priori* notion of the right penalty for different crimes, by reference to *lex talionis* or otherwise; it requires only that more culpable crimes be more severely punished. While a coherent ICL sentencing scheme requires some account of cardinal proportionality, the question how to assign a baseline, an anchor against which ICL crimes can be hierarchically ordered, seems less vital to the enterprise. The arbitrary establishment, but consistent application, of cardinal guidelines may be the best we can expect. It would be absurd to suppose that any particular term of years represents the correct penalty for, say, grave breaches of the Geneva Conventions.

One coherent, legitimate, and feasible basis for ordinal proportionality in international sentencing, however, is expressive: punishments should convey the right degree of international condemnation *relative* to other defendants within the jurisdiction of the relevant tribunal. To maintain its legitimacy, an international tribunal must express censure, disapproval, and condemnation equally across disparate local circumstances. Genocide should not be punished more or less severely in Rwanda than in the former Yugoslavia. This is emphatically not to say that every conviction for genocide merits a sentence of equal length. The expressive value of a sentence, its legitimacy and authority, depends on the extent to which it both embodies the moral and legal norms of the authorizing community and fits the circumstances of the offender in light of those norms.

Emphasizing the expressive function of punishment in the context of

---

<sup>209</sup> Drumbl, *supra* note 4, at 581.

<sup>210</sup> CESARE BECCARIA, ON CRIMES AND PUNISHMENTS (1764), in READINGS IN JURISPRUDENCE AND LEGAL PHILOSOPHY 346, 351 (Morris R. Cohen & Felix S. Cohen ed. 1951).

<sup>211</sup> von Hirsch, *supra* note 197, at 125.

ICL would enable tribunals to begin to address proportionality in a non-arbitrary way. No punishment, from a crude talionic perspective, can fit serious human rights atrocities, and any effort to rationalize ordinal proportionality on this basis would be doomed to futility. But from an expressive perspective, we can make rational judgments of proportionality consistent with a plausible concept of justice: “What justice demands is that the *condemnatory aspect* of the punishment suit the crime . . . . [T]he degree of disapproval expressed by the punishment should ‘fit’ the crime only in the unproblematic sense that the more serious crimes should receive stronger disapproval than the less serious ones . . . .”<sup>212</sup>

Where, in an international context, criminal conduct becomes normative, crimes by rank-and-file perpetrators should generally not be deemed as blameworthy as those by the elites responsible for creating the normative conditions conducive to those crimes. By reference to international penal interests, for example, Dusko Tadic’s harms obviously pale in comparison with those of, say, Radovan Karadzic or Ratko Mladic. By embracing an expressive account of proportionality and reorienting the metric of retributivism to the penal interests of the international community, we can begin to calibrate crime and punishment in ICL sentencing in a non-arbitrary fashion notwithstanding that, emotively, virtually all of the relevant crimes seem to demand the harshest penalties. For retribution, as for deterrence, the principal value of ICL punishment therefore lies in its expressive dimensions.<sup>213</sup> As the Appeals Chamber of the ICTY rightly emphasized, retribution in ICL “is not to be understood as fulfilling a desire for revenge but as duly expressing the outrage of the international community at these crimes.”<sup>214</sup>

---

<sup>212</sup> FEINBERG, *supra* note 149, at 118.

<sup>213</sup> Embracing an expressive function for ICL sentencing does not mean abandoning the side-constraint imposed by justice or “just deserts” theories: that individuals not be treated *solely* as a means to an extrinsic social end. To the contrary, the *right* to punish remains rooted in the acknowledgment of human beings as moral agents. Modulating the *degree* of punishment for expressive purposes — particularly once we recognize that no metaphysically correct term of incarceration corresponds to the gravity of the harm — is not objectionable based on the Kantian maxim.

<sup>214</sup> Prosecutor v. Aleksovski, Case No. IT-95-14/1, Judgment, ¶ 185 (Mar. 24, 2000); *accord* Prosecutor v. Stakic, Case No. IT-97-24, Judgment, ¶ 40 (July 31, 2003); *see also* Prosecutor v. Niyitegeka, Case No. ICTR-96-14 (May 16, 2003), ¶ 484; Prosecutor v. Rutaganda, Case No. ICTR-96-3 (Dec. 6, 1999), ¶ 456 (penalties “show[] . . . that the international community shall not tolerate the serious violations of international humanitarian law and human rights); Prosecutor v. Erdemovic, Case No. IT-96-22-T, ¶ 20-21 (Mar. 5, 1998) (ICTY “a vehicle through which the international community expresses its outrage at the atrocities committed in the former Yugoslavia”).

*D. Audience and Expressive Clarity*

Critiques of expressivism in international criminal justice focus on the potential distortion of the message.<sup>215</sup> What does even a comparatively long prison term for genocide communicate to a victim if the otherwise applicable national system would prescribe death for the same or an analogous crime? And how well do the channels for punitive communication work between international and national fora?<sup>216</sup> The expressive dimensions of punishment depend on its ability to convey the right meaning against the background of particular social norms,<sup>217</sup> which vary significantly between the states, societies, cultures, and other constituencies that comprise the international community. In part, the strong cross-cultural consensus that incarceration expresses condemnation mitigates this problem. But the force of this objection, in my judgment, counsels greater attention to communication and “public relations” strategies in ICL, a focus on making the ICL sentencing *process* more effectively express the extraordinarily high level of international condemnation of ICL crimes. Below, I suggest some potential steps that the ICC, for example, might take in this direction.

Yet the effective communication that matters in the expressivist view is not only that contained in the message to the convicted person or a potential future criminal. Expressivism, echoing Durkheim, focuses in part on the value of punishment to the community itself,<sup>218</sup> in this case the figurative international community. “The intended audience of such exhortations is

---

<sup>215</sup> *E.g.*, Tallgren, *supra* note 3, at 583 (arguing that cross-cultural and cross-national distinctions in the severity and meaning of varying punishments interferes with the clarity of the message conveyed by international criminal justice and may, to some audiences, even distort it in counterproductive ways); Drumbl, *supra* note 4, at 593 (arguing that “the expressive value of law and punishment is weakened by selectivity and indeterminacy in the operationalization of law and punishment, as well as the political contingency of the entire enterprise,” and that the expressive value of punishment will frequently be “externalized from afflicted local communities owing to the distance and mistrust evidenced between such communities and the machinery of international criminal justice”); Danner, *supra* note 1, at 491 n.310 (noting that “the validity of the expressive theory of punishment depends on factors external to the punishment itself,” and that “[t]his problem has been especially acute in the countries of the former Yugoslavia and Rwanda, where the media have either distorted the message or failed to deliver it at all”); Alvarez, *supra* note 1, at 458 (arguing that “even if one were to agree that high government officials’ actions, given their greater cumulative impact, merit graver punishment, this message is compromised . . . by contemporaneous sentences being handed down by Rwandan courts,” which “blunt the symbolic or deterrent value that exceptionalism seeks to achieve”).

<sup>216</sup> See *Developments in the Law: International Criminal Law*, 114 HARV. L. REV. 1943, 1971-72 & n.88 (2001).

<sup>217</sup> See Kahan, *supra* note 150, at 597-601.

<sup>218</sup> EMILE DURKHEIM, *THE DIVISION OF LABOR IN SOCIETY* (1893).

not just the wrongdoer of most concern to deterrence and retributive theorists. It is also the Everyone of most interest to expressive theorists: the law-abider and the lawmaker, the activist and the private citizen, and even the potential victim, today and tomorrow.”<sup>219</sup> The expressive function of punishment, that is, serves the communicator, not only the recipient of the punishment or the rogue states or tyrannical leaders to whom it may convey a message. Like-minded law-abiding states and citizens — for example, those comprising the assembly of states parties to the ICC — benefit from the affirmation of a common commitment to international human rights norms and the rule of law, and the sentencing process contributes to the formation of consensus on the propriety and meaning of different punishments.<sup>220</sup> Over time, punishment by international criminal tribunals can shape as well as express social norms. And the international sentencing process can reinforce and vindicate those norms even if it cannot, alone, realistically be expected to deter or fulfill retributive aspirations held by each affected local constituency.

#### *E. Rehabilitation: Literal, Societal, and Theological*

International human rights law, as noted, emphasizes rehabilitation as the paramount goal of punishment. Few, of course, expect war criminals to repent after serving their sentences and return to duty as model soldiers, or megalomaniacal elites to see the error of their ways and become benevolent dictators or benign elected officials in the future. Nor do many worry about recidivism, for “the likelihood of persons convicted [by international criminal tribunals] ever again being faced with an opportunity to commit war crimes, crimes against humanity, genocide or grave breaches is so remote as to render its consideration in this way unreasonable and unfair.”<sup>221</sup> Relative to ICL, rehabilitation, conceived in crime-control rather than humanistic terms, seems an inapposite goal. Perhaps for that reason, for all its prominence in international human rights law, it seldom receives attention in judicial judgments or scholarly analyses of the goals of international sentencing.<sup>222</sup> In an early judgment, the ICTY said that “it would seem that the particularities of crimes falling within the jurisdiction of the International Tribunal rule out consideration of the rehabilitative function of punishment.”<sup>223</sup>

---

<sup>219</sup> Amann, *supra* note 47, at 124.

<sup>220</sup> See Schabas, *A Human Rights Approach*, *supra* note 16, at 516.

<sup>221</sup> Prosecutor v. Kunarac, Case No., IT-96-23-T & IT-96-23/1-T (Feb. 22, 2001),

¶ 840.

<sup>222</sup> A notable exception is Schabas, *A Human Rights Approach*, *supra* note 16.

<sup>223</sup> Prosecutor v. Erdemovic, No. IT-96-22-T (Nov. 29, 1996), ¶ 66. Rehabilitative

The ICTY has since recognized rehabilitation as a potential objective of ICL punishment but described it in quasi-religious terms redolent of Martin Buber:<sup>224</sup> “[T]he process of coming face-to-face with the statements of victims, if not the victims themselves, can inspire — if not reawaken — tolerance and understanding of ‘the other,’ thereby making it less likely that if given an opportunity to act in a discriminatory manner again, an accused would not do so. Reconciliation and peace would thereby be promoted.”<sup>225</sup> As this passage makes clear, the idea of rehabilitation encompasses several distinct goals, some more relevant to, or practicable for, ICL sentencing than others.

Rehabilitation traditionally implied a social vision of the criminal as metaphorically if not literally sick and therefore in need of treatment. This medical model fell out of favor in the 1970s and 1980s, in large part, philosophically, because of its perceived denial of autonomy and moral agency, and practically, because of its perceived failure.<sup>226</sup> Rehabilitation of the medical model variety finds virtually no expression or support in the judgments of the ad hoc tribunals. Given the body of literature emphasizing the need to appreciate that psychosocial circumstances cause or contribute to collective crimes of extraordinary hatred and violence, this omission seems odd, even ironic. Many rank-and-file perpetrators of ICL crimes, on this view, should be conceived not as inherently evil but as average, all-too-human individuals who fell victim to manipulation by elites, rendering them metaphorically sick with irrational fear, nationalist passion or hatred. Many Bosnian Serbs, for example, were indoctrinated to believe that their Muslim neighbors, with foreign help, were poised to wage an imminent *jihad* against them and thus saw their crimes against Bosnian Muslims as self-defense. Plausibly, under ordinary circumstances, they would not have been inclined to crime, let alone to war crimes or crimes against humanity.

Today, the ICC faces the question how to deal justly with rebel soldiers of the LRA abducted as children and indoctrinated through example and extraordinarily brutal conditioning, which over time desensitized them and made them willing participants in terrible crimes, including mutilation,

---

considerations may nonetheless have tacitly influenced the Tribunal’s ultimate sentencing determination. Schabas, *A Human Rights Approach*, *supra* note 16, at 505 (observing that “despite the theory, the Trial Chamber appears to have imposed a sentence that is fundamentally clement, that appropriately considers a host of mitigating factors, and that notably takes into account the fact that the condemned man is remorseful and a good candidate for rehabilitation”).

<sup>224</sup> MARTIN BUBER, *I AND THOU* (Walter Kaufmann trans. & ed. 1970).

<sup>225</sup> *Prosecutor v. Nikolic*, Case No. IT-02-60/1-S (Dec. 2, 2003), ¶ 93.

<sup>226</sup> See FRANCIS A. ALLEN, *THE DECLINE OF THE REHABILITATIVE IDEAL: PENAL POLICY AND SOCIAL PURPOSE* (1981); Robert Martinson, *What Works? Questions and Answers About Prison Reform*, PUB. INT., Spring 1974.

rape, mass killing of civilians, and other ICL crimes. From a retributive perspective, it defies our intuitions to assert that children in circumstances like these deserve punishment; from a deterrent perspective, it would be absurd to suppose that children abducted and indoctrinated by violent conditioning can be significantly, if at all, deterred by the remote threat of prosecution. Nor will deterrence as a project of gradual norm penetration make a difference in this context: the normative universe in which children abducted by the LRA reach the age of criminal responsibility (eighteen, according to international law) destroys any habitual inhibitions against violence.

Realistically, the Prosecutor would be unlikely to go forward in these circumstances.<sup>227</sup> But child soldiers of the LRA highlight the problematic nature of moral responsibility in the ICL context.<sup>228</sup> Arguably, some rank-and-file participants in serious international crimes can to some degree be likened to this extreme case; hence the recurrent emphasis in the critical literature on social psychology and collective responsibility issues. On the one hand, as emphasized, it would be a mistake to assimilate all war criminals to this vision. But it would equally be a mistake to ignore the extent to which history and research show that “acts of exceptional cruelty can indeed be committed by ‘ordinary people’ under special circumstances.”<sup>229</sup> We have no reason to think, to take a hyperbolic case, that someone guilty of summary executions in the context of a brutal civil war, with atrocities committed on all sides, would be a serial killer in a relatively stable, peacetime society. Some low-level perpetrators may be suitable candidates for rehabilitation, and it would be contrary to the spirit if not the letter of international human rights law to refuse to consider mitigation in such cases. Doubtless rehabilitative considerations will in some cases conflict with the retributive penal interests of the victims. Where such conflicts exist, justice and the proper scope of international penal interests, including the synergy between ICL and international human rights norms, should prevail. The extent to which collective psychosocial factors should be deemed to mitigate culpability can be, and, I believe, should be addressed at the sentencing stage, where considerations of factual guilt no longer impair a more searching inquiry into the relative culpability

---

<sup>227</sup> The ICC lacks personal jurisdiction over persons under the age of 18 at the time of the relevant offense, Rome Statute, art. 26, and the Statute gives the Prosecutor discretion to decline to investigate where despite “the gravity of the crime and interests of victims, there are nonetheless substantial reasons to believe that investigation would not serve the interests of justice,” *id.*, art. 53(c).

<sup>228</sup> See Chen Reis, *Trying the Future, Avenging the Past: The Implications of Prosecuting Children for Participating in Internal Armed Conflict*, 28 COLUM. HUM. RTS. L. REV. 629 (1997).

<sup>229</sup> Tallgren, *supra* note 3, at 574; *see also* Drumbl, *supra* note 4, at 569.

of particular defendants acting under diverse circumstances.

Rehabilitation in this literal sense, however, has received far less attention than the idea, again based on a questionable analogy, that international criminal justice can contribute to the figurative “rehabilitation” of communities riven by ethnic strife, war, a history of human rights atrocities, and so forth.<sup>230</sup> Many see this potential goal as a function of the individuation of guilt ostensibly fostered by ICL: “Blame should not rest on an entire nation but should be assigned to individual perpetrators of crimes and the responsible leaders.”<sup>231</sup> To punish individuals, on this view, can absolve others as well as the collective society from which they originate, enabling its reintegration into the figurative international community — as, for example, when the United Nations welcomed Yugoslavia back after its surrender of Milosevic to the ICTY.

Unfortunately, these views rest on questionable “theological and medical models” that have “solidified into articles of faith” rather than experience or research.<sup>232</sup> Studies of the effect of the Nuremberg trials on post-War Germans, for example, remain inconclusive at best,<sup>233</sup> and scant evidence suggests that this project of collective absolution has worked in either Bosnia or Rwanda. In fact, in Serbia, reports indicate that the prosecution of Milosevic, far from delegitimizing him, has been perceived as a reflection of international persecution of Serbs, emboldening Serbian nationalists. Within states, as the South African experience shows, truth commissions may well be more effective at achieving collective rehabilitation. ICL, at least as applied by international tribunals, is not particularly well-tooled to pursue societal rehabilitation.

---

<sup>230</sup> *E.g.*, TINA ROSENBERG, *THE HAUNTED LAND: FACING EUROPE’S GHOSTS AFTER COMMUNISM* xviii (1995) (“Nations, like individuals, need to face up to and understand traumatic past events before they can put them aside and move on to a normal life.”); Fletcher & Weinstein, *supra* note 8, at 597 (“The transitional justice literature is replete with discussion of the need for societies to ‘heal’ after mass violence.”); Turner, *supra* note 37, at 27.

<sup>231</sup> THEODOR MERON, *The Case for War Crimes Trials in Yugoslavia*, in *WAR CRIMES LAW COMES OF AGE* 187, 196 (1998); *see also* Jelena Pejic, *Creating an Permanent International Criminal Court: The Obstacles to Independence and Effectiveness*, 29 *COLUM. HUM. RTS. L. REV.* 291, 292 (1998); Richard J. Goldstone, *Fifty Years After Nuremberg: A New International Criminal Tribunal for Human Rights Criminals*, in *CONTEMPORARY GENOCIDES: CAUSES, CASES, CONSEQUENCES* 215 (Albert J. Jonman ed. 1996); Fletcher & Weinstein, *supra* note 8, at 598 & n.87 (noting that a broad spectrum of scholars and jurists, including Karl Jaspers, Antonio Cassese, Payam Akhavan, and Aryeh Neir embrace some variant of the view “that holding individuals accountable for [ICL crimes] alleviates collective guilt by differentiating between the perpetrators and innocent bystanders, thus promoting reconciliation”).

<sup>232</sup> Fletcher & Weinstein, *supra* note 8, at 600-601.

<sup>233</sup> *See* TONY JUDT, *POSTWAR: A HISTORY OF EUROPE SINCE 1945*, at 53-54, 58 (2005).

Furthermore, as several scholars emphasize, the liberal presumption against collective guilt biases us against and obscures the almost invariable collective element of ICL crimes, which casts doubt on a criminal law paradigm that hermetically separates the guilty from the innocent: At times, the state or another collective entity *does* bear blame or responsibility, even if the relative culpability of different actors that comprise that collective entity differs dramatically — from the passive acquiescence of the bystander to the (reluctant or enthusiastic) participation of the rank-and-file perpetrator to the deliberate incitement of the demagogue.<sup>234</sup>

Above all, perhaps, we should recognize that while aspirations about reconciliation and national healing may at times be laudable byproducts of international criminal justice, they do not count as self-sufficient reasons to sentence a particular perpetrator more or less severely. Similarly, we can debate the plausibility, validity or propriety of the Security Council's assertion that establishing the ad hoc tribunals will contribute to the restoration of international peace and security. But it would be odd, if not inappropriate, to sentence someone to more or less time in prison based solely on this aspiration. The Rome Statute expresses these goals in its preamble, but rightly, in my view, says nothing about them in its provisions on sentencing.

#### CONCLUSION: INTERNATIONAL SENTENCING REFORM AND THE ROME STATUTE

If the principal value served by ICL punishment is expressive, what implications does this have for the substance and process of sentencing by international criminal tribunals? I would suggest three: First and foremost, distinct sentencing hearings, which the ICTY abandoned for expedience, should be reinstated by the ICC and made an essential stage in the process of international criminal justice, not an “afterthought.”<sup>235</sup> Second, the ICC and ICL jurisprudence generally should develop — not rigid sentencing guidelines of the kind brought into disrepute by the federal Sentencing Reform Act<sup>236</sup> — but a rational (if flexible) scheme to convey aggravating and mitigating factors, which should take into account the defendant's individual circumstances and role relative to the state, military unit or other collective entity implicated by the crimes of conviction. Finally,

---

<sup>234</sup> Fletcher & Weinstein, *supra* note 8, at 581; *see also* Drumbl, *supra* note 4, at 568; Fletcher, *supra* note 11. Perhaps the most well-known exploration of these issues remains KARL JASPERS, *THE QUESTION OF GERMAN GUILT* (1947).

<sup>235</sup> Schabas, *International Sentencing*, *supra* note 1, at 171.

<sup>236</sup> Sentencing Reform Act of 1984, Pub. L. No. 98-473, 98 Stat. 1987 (1984) (codified in scattered sections of 18 U.S.C. and 28 U.S.C.).

international criminal tribunals should work to enhance the expressive potential of sentencing by ensuring the widespread publication and dissemination of judgments to the broadest possible audience and by maximizing the level of cooperation and jurisprudential exchange between national and international criminal justice institutions.<sup>237</sup>

Sentencing, in international no less than national criminal law, should be “a ritual of manifest moral significance.”<sup>238</sup> Indeed, the formal expression of communal condemnation assumes dramatic importance in ICL, where the standard justifications for and goals ostensibly served by criminal punishment — deterrence, retribution, rehabilitation, and incapacitation — seem less plausible, legitimate or efficacious. Yet after a few early experiments with holding a distinct sentencing phase,<sup>239</sup> the ad hoc tribunals abandoned this procedure by amendments to their internal rules, apparently based on considerations of expedience and cost,<sup>240</sup> and perhaps also on the unfamiliarity of sentencing hearings to international judges from civil law states. Instead, the tribunals now typically append their sentencing determinations to voluminous written judgments, rendering them relatively obscure and inaccessible to the public and largely eviscerating their distinctive symbolic significance. Furthermore, because the tribunals tend to issue a single sentence intended to cover the “totality of an accused’s conduct,” it becomes “difficult to determine the range of sentences for each specific crime.”<sup>241</sup> This is unfortunate, for “transactional” sentencing of this sort,<sup>242</sup> however expedient, impedes the growth of a mature sentencing jurisprudence that could provide guidance to national courts, where, because of the principle of complementarity and resource and other constraints, the bulk of future ICL prosecutions will be held.

The expressive functions of punishment — its potential to indicate authoritative disavowal of criminal conduct, signify non-acquiescence in the crimes, vindicate international norms, and (perhaps) absolve ethnic or national communities, as collectives, of guilt by inculcating individuals — depend on communication.<sup>243</sup> Sentences issued only in writing, tacked on to

---

<sup>237</sup> See, e.g., Victor Peskin, *Courting Rwanda: The Promises and Pitfalls of the ICTR Outreach Programme*, 3 J. INT’L CRIM. J. 950 (2005).

<sup>238</sup> STITH & CABRANES, *supra* note 18, at 81.

<sup>239</sup> See, e.g., Prosecutor v. Akakeysu, Case No. ICTR-96-4-T, Sentencing Judgment (Oct. 2, 1998); Prosecutor v. Tadic, Case No. IT-94-I-T, Sentencing Judgment (July 14, 1997).

<sup>240</sup> Sean D. Murphy, *Progress and Jurisprudence of the International Criminal Tribunal for the Former Yugoslavia*, 93 AM. J. INT’L L. 57, 92 (1999).

<sup>241</sup> Prosecutor v. Semanza, Case No. ICTR-97-20 (May 15, 2003), ¶ 562.

<sup>242</sup> See Prosecutor v. Niyitegeka, Case No. ICTR-96-14 (May 16, 2003), ¶ 483.

<sup>243</sup> See FEINBERG, *supra* note 149, at 101-05, 115.

dense, lengthy judicial decisions and unaccompanied by a public “ritual of manifest moral significance” that expresses the reprobative judgments of the relevant community, cannot fulfill these functions very effectively. The application of ICL by international criminal tribunals will almost certainly remain in large measure a symbolic exercise. Given resource and political constraints, the ad hoc tribunals, the ICC, and future international tribunals will never be able to function as a self-sufficient criminal justice system; they will never be able to try more than a fraction of the perpetrators.<sup>244</sup> It is the symbolic value — not the number — of convictions that matters most to the goals that sentencing by these tribunals can realistically be expected to fulfill.

Of course, given the gravity of most ICL crimes, juxtaposed against the constraints on the kind and degree of punishment imposed by international human rights law, one might reasonably question the ability of *any* sentence of incarceration to “duly express[] the outrage of the international community at [ICL] crimes.”<sup>245</sup> In part, this problem is insoluble: the normative goals of international human rights law impair the ability of punishment accurately to express the extraordinary global condemnation, anger, and retributive sentiments that these crimes elicit, particularly where the punitive norms of affected local communities would indicate a more severe penalty. The expressive value of punishment may, however, be enhanced not only by substantive changes in the severity of punishment but by considering how more effectively to make the “process the punishment,”<sup>246</sup> particularly for the elites on which the ICC intends to focus. A sentencing hearing would enable experimentation in this regard.

What would such a hearing involve? In bare outline, both the defense and the prosecution should surely be given an opportunity to make formal submissions with relevant mitigating and aggravating circumstances, including, where appropriate, psychological and other expert testimony.<sup>247</sup> Furthermore, tribunals should consider adopting the familiar practice of having an independent official prepare a presentencing report, which would explore, as the Rome Statute instructs, “the individual circumstances of the

---

<sup>244</sup> Wippman, *supra* note 159, at 480.

<sup>245</sup> Prosecutor v. Aleksovski, Case No. IT-95-14/1, Judgment, ¶ 185 (Mar. 24, 2000); *accord* Prosecutor v. Stakic, Case No. IT-97-24, Judgment, ¶ 40 (July 31, 2003).

<sup>246</sup> MALCOLM M. FEELEY, *THE PROCESS IS THE PUNISHMENT: HANDLING CASES IN A LOWER CRIMINAL COURT* (1979).

<sup>247</sup> See William A. Schabas, *Article 76: Sentencing*, in COMMENTARY ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT 979, 981-82 (Otto Triffterer ed. 1999) [hereafter Schabas, *Article 76: Sentencing*] (noting that the “*ad hoc* Tribunals have considered relevant information to include psychiatric and psychological reports, as well as testimony by the convicted person”).

convicted person.”<sup>248</sup> Because of the collective nature of ICL crimes, and the often dramatically different normative universe in which the perpetrators act, developing a sentencing process and jurisprudence that distinguishes different categories of defendants based on their status, role, and background seems not only appropriate but essential to the legitimacy of the enterprise.<sup>249</sup> And despite the bad press generated by the (until recently, mandatory) federal sentencing guidelines, the adoption of genuine sentencing *guidelines* by international tribunals would be a significant step toward rationalizing the sentencing process, particularly in cases of multiple convictions.<sup>250</sup> Finally, a focus on the expressive value of punishment counsels public pronouncement of the sentence, perhaps even of the hearing itself, disseminated to as broad an audience as possible.<sup>251</sup>

The Rome Statute offers a unique opportunity to refocus attention on the significance of sentencing to the goals of ICL. Like its predecessor instruments, it says little about sentencing. But the positive-law framework created by the statute lends itself to a judicial interpretive process that could more effectively serve the expressive dimensions of punishment. Article 77 authorizes the Court to impose a specified term of imprisonment not to exceed thirty years except where a life sentence is “justified by the extreme gravity of the crime and the individual circumstances of the convicted

---

<sup>248</sup> Rome Statute, art. 78(1); see Beresford, *supra* note \_\_, at 52.

<sup>249</sup> Regrettably, the “current case law of the Tribunal does not evidence a discernible pattern of the Tribunal imposing sentences on subordinates that differ greatly from those imposed on their superiors.” Prosecutor v. Krstic, Case No. IT-98-33 (Aug. 2, 2001) ¶ 709 & n.1493; see also Drumbl, *supra* note 4, at 583-84 (reviewing illustrative ICTY sentences). This is somewhat curious, for both the ICTY and the ICTR have embraced in principle that elites should be sentenced more severely than subordinates in the command structure, albeit subject to the significant proviso that the gravity of the offense remains the paramount consideration. See Prosecutor v. Musema, Case No. ICTR-96-13-A, Nov. 16, 2001 (Appeals Chamber), ¶¶ 382-83. The adjustments under the U.S. Federal Sentencing Guidelines for “organizer or leader,” “manager or supervisor,” “minor participant” and “minimal participant” would likely prove too crude for this purpose, but they suggest one plausible way to provide some structure to this dimension of ICL sentencing. U.S. SENTENCING GUIDELINES MANUAL §§ 3B1.1, 3B1.2 (2004). To establish gradations for different types of offenders need not imply low sentences for all rank-and-file perpetrators. See Prosecutor v. Delalic, Case No. IT-96-21-A, ¶ 847 (Feb. 20, 2001) (“In certain circumstances, the gravity of the crime may be so great that even following consideration of any mitigating factors, and despite the fact that the accused was not senior in the so-called overall command structure, a very severe penalty is nevertheless justified.”); accord Musema, *supra*, ¶¶ 382-83.

<sup>250</sup> See Beresford, *supra* note 42, at 82-86.

<sup>251</sup> See, e.g., JUDT, *supra* note 233, 53 (“The main Nuremberg Trial was broadcast twice daily on German radio, and the evidence it amassed would be deployed in schools, cinemas and reeducation centers throughout the country.”); Schabas, *Article 76: Sentencing*, *supra* note 246, at 983 (noting that the ICTR broadcast in Rwanda a summary of the *Akayesu* judgment).

person.”<sup>252</sup> Article 78 instructs the Court to determine sentences by taking “into account such factors as the gravity of the crime and the individual circumstances of the convicted person.”<sup>253</sup> Rule 145 of the draft Rules of Procedure and Evidence, however, goes beyond the minimal provisions of the ICTY and ICTR statutes, enumerating with greater specificity relevant aggravating and mitigating factors, including “the harm caused to the victims and their families, the nature of the unlawful behaviour and the means employed to execute the crime; the degree of participation of the convicted person; the degree of intent; the circumstances of manner, time and location; and the age, education, social and economic condition of the convicted person.”<sup>254</sup>

This emphasis on context, role, and circumstances is further reinforced by the inclusion, as one of two explicit mitigating factors, of “circumstances falling short of constituting grounds for exclusion of criminal responsibility, such as substantially diminished mental capacity or duress.”<sup>255</sup> Together, these provisions offer a positive-law framework that can be construed to recognize the potential mitigating role of context and the collective nature of ICL crimes for rank-and-file perpetrators “who allowed themselves to be drawn into a maelstrom of violence, even reluctantly.”<sup>256</sup> Rule 145(2)(b), conversely, can be construed to address those “who initiated or aggravated” the “maelstrom of violence,”<sup>257</sup> an aggravating factor reflected in the sentencing jurisprudence of the ad hoc tribunals and now codified in the Rome Statute as “[a]buse of power or official capacity.”<sup>258</sup> This construction also has the virtue of offering some guidance in interpreting Article 78’s authorization of life imprisonment “when justified by the extreme gravity of the crime and the individual circumstances of the convicted person,”<sup>259</sup> for Rule 145(3) speaks of the conditions for a life sentence being “evidenced by the existence of one or more aggravating circumstances.”<sup>260</sup>

---

<sup>252</sup> Rome Statute, art. 77(1).

<sup>253</sup> *Id.*, art. 78(1).

<sup>254</sup> Report of the Preparatory Commission for the International Criminal Court, Finalized draft text of the Rules of Procedure and Evidence, Nov. 2, 2000, Rule 145(1)(c) (“Determination of Sentence”), PCNICC/200/1/Add.1 (2000) [hereafter ICC Rules of Procedure and Evidence].

<sup>255</sup> *Id.*, Rule 145(2)(a)(i). The other enumerated mitigating circumstance reflects concerns extrinsic to culpability, the “person’s conduct after the [criminal] act, including any efforts by the person to compensate the victims and any co-operation with the Court.” *Id.*, Rule 145(2)(a)(ii).

<sup>256</sup> See *Prosecutor v. Krstic*, No. IT-98-33-T, Judgment (Aug. 2, 2001), ¶ 711.

<sup>257</sup> *Id.*

<sup>258</sup> ICC Rules of Procedure and Evidence, Rule 145(2)(b)(ii).

<sup>259</sup> Rome Statute, art. 78(2).

<sup>260</sup> The ICTR alluded to these role-based aggravating and mitigating factors but, in my

Most significantly, the Rome Statute, unlike its predecessors, presumptively “establishes the principle of a distinct sentencing phase.”<sup>261</sup> This represents a significant innovation not only because of its capacity to enhance the expressive value of ICL, but also because, as in the national context, the “failure to hold a separate sentencing hearing may put the accused at a real disadvantage during the trial.”<sup>262</sup> Of course, international criminal tribunals do not confront these issues in the constitutional context of the Sixth Amendment right to trial by jury. But similar due process tensions exist: A defendant may, for example, wish to introduce evidence in mitigation but hesitate to relinquish the right to remain silent and the privilege against self-incrimination.<sup>263</sup> The absence of a distinct sentencing stage in ICL may also threaten to compromise judicial neutrality, for evidence relevant only to sentencing — often of a highly inflammatory nature — must then be introduced at trial, where it may interfere with even the most professional judge’s ability to weigh the evidence relevant only to guilt or innocence dispassionately.<sup>264</sup> The recent proliferation of guilty pleas before international tribunals makes a distinct sentencing phase all the more crucial.

From a long-term perspective, a focus on the expressive capacity of

---

view, seriously misapplied them in a recent judgment. Elizaphan Ntakirutimana, a senior pastor at the Mugonero Complex, betrayed his parishioners, some of whom had actively sought his help during the genocide, by leading attackers to their hiding place, pointing out Tutsi refugees attempting to flee, and encouraging and inciting the attackers to kill them. While the Trial Chamber nominally emphasized “abuse of trust” as an aggravating factor, *see* Prosecutor v. Elizaphan Ntakirutimana, Case No. ICTR-96-10 (Feb. 21, 2003), ¶¶ 900-04, it gave grossly undue weight to evidence that “Ntakirutimana was essentially a person of good moral character until the events of April to July 1994 during which he was swept along with many Rwandans into criminal conduct,” *id.* ¶ 895, and therefore sentenced him to only ten years for genocide. Ntakirutimana, a mature and well-educated church elder who (as the evidence cited by the Trial Chamber makes clear) fully understood the wrongfulness of his conduct, *see id.*, is hardly the kind of rank-and-file participant whose punishment should be mitigated because he found himself “swept along with many Rwandans,” or as the *Krstic* court put it, because he “allowed [himself] to be drawn into a maelstrom of violence, even reluctantly.” Prosecutor v. Krstic, Case No. IT-98-33 (Aug. 2, 2001), ¶ 711.

<sup>261</sup> Schabas, *Article 76: Sentencing*, *supra* note 246, at 979.

<sup>262</sup> *Id.* at 981; *cf.* Apprendi v. New Jersey, 530 U.S. 466, 557 (Breyer, J., dissenting) (“[T]o require jury consideration of all such factors — say, during trial where the issue is guilt or innocence — could easily place the defendant in the awkward (and conceivably unfair) position of having to deny he committed the crime yet offer proof about how he committed it.”).

<sup>263</sup> Schabas, *Article 76: Sentencing*, *supra* note 246, at 981.

<sup>264</sup> *See* Andrew N. Keller, *Punishment for Violations of International Criminal Law: An Analysis of Sentencing at the ICTY and ICTR*, 12 IND. J. INT’L & COMP. L. REV. 53, 69-73 (2001) (arguing that the introduction of evidence relevant only to sentencing at the trial of Radislav Krstic compromised the ICTY’s perceived legitimacy).

punishment counsels greater attention to how law-abiding states and citizens, not only rogue states and the punished, perceive sentencing in international criminal law. The adoption of the Rome Statute itself prompted a number of states “to incorporate prohibitions on genocide, war crimes, and crimes against humanity into their criminal statutes,” lest the ICC “find them ‘unable’ to prosecute international crimes.”<sup>265</sup> ICC sentencing judgments, like the statute itself, hold a similar potential to influence the practice and policy of states by acting as an engine of jurisprudential and normative development where it matters the most, within nation-states.<sup>266</sup>

Any account of international sentencing must be realistic about its ability to achieve the ambitious and diverse goals ascribed to it. But far from being “of secondary importance in the overall scheme of international justice,”<sup>267</sup> as it has historically been treated, sentencing is as vital to the values and goals of ICL as adjudication. As the ICC begins to investigate and prosecute its first cases, it should bear in mind that the Rome Statute’s explicit provision for sentencing hearings offers an opportunity to reinvigorate and jurisprudentially develop the law and process of ICL sentencing, an overdue imperative. The beginnings of a “common law” of ICL sentencing, based on the judgments of the ad hoc tribunals and, to a lesser extent, hybrid and national courts applying ICL, provide a foundation on which to build. International criminal tribunals must develop coherent, fair, and principled sentencing practices, for their long-term success depends in part on the extent to which the social institution of punishment can be shaped to reflect, pursue, and in time, one hopes, justify their substantial costs.<sup>268</sup>

---

<sup>265</sup> See ICC, Office of the Prosecutor, Paper on Some Policy Issues Before the Office of the Prosecutor 3 (Sept. 2003) (“The existence of the Court has already encouraged States to incorporate as domestic law the crimes within the jurisdiction of the Court.”); see also Turner, *supra* note \_\_, at 8-9 & n.38 (also describing how Germany enacted domestic legislation to prosecute offenders in the wake of the First World War to avoid threats of an international tribunal). Sudan began, albeit likely in bad faith, to establish institutions for the domestic adjudication of ICL violations in the months culminating in referral of the situation of Darfur to the ICC.

<sup>266</sup> See Jonathan I. Charney, *International Criminal Courts and the Role of Domestic Courts*, 95 AM. J. INT’L L. 120, 123 (2001); Alvarez, *supra* note 1, at 483.

<sup>267</sup> Schabas, *International Sentencing*, *supra* note 1, at 171.

<sup>268</sup> See Report of the Secretary-General, *The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies*, U.N. Doc. S/2004/616\*, ¶ 42 (noting that the “two ad hoc tribunals have grown into large institutions, with more than 2,000 posts between them and a combined annual budget exceeding a quarter of a billion dollars—equivalent to more than 15 percent of the [United Nations] Organization’s total regular budget,” and that “[a]lthough trying complex legal cases of this nature would be expensive for any legal system and the tribunals’ impact and performance cannot be measured in financial numbers

---

alone, the stark differential between cost and number of cases processed does raise important questions”); Ralph Zacklin, *The Failings of the Ad Hoc International Tribunals*, 2 J. INT’L CRIM. JUST. 541, 545 (2004).