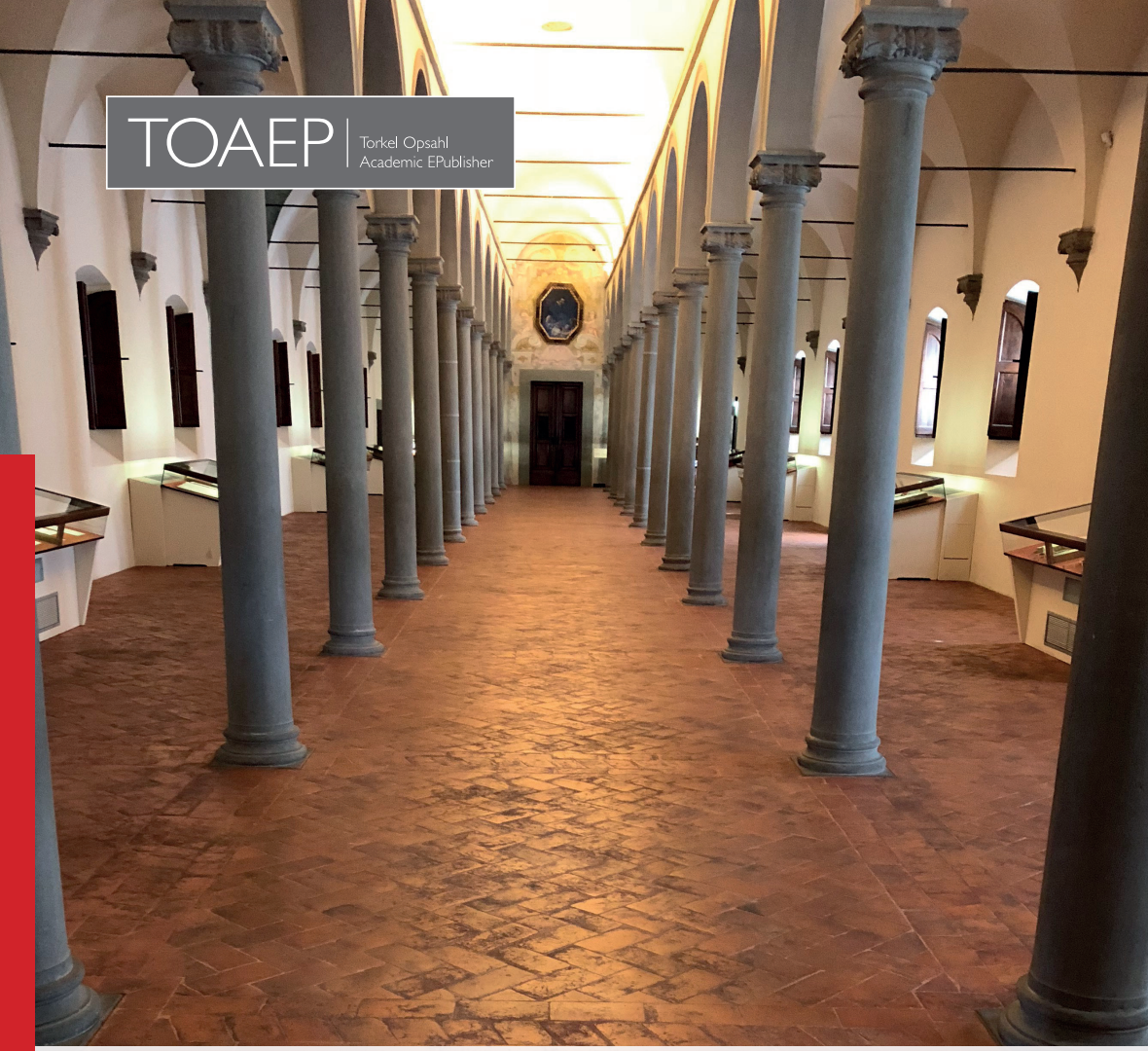
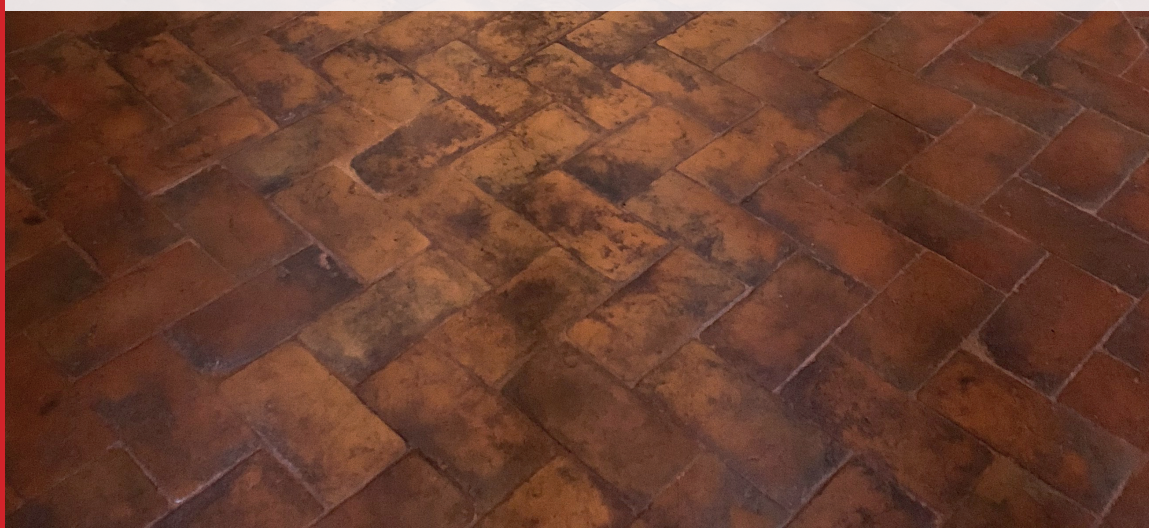


Philosophical Foundations of International Criminal Law: Foundational Concepts

Morten Bergsmo and Emiliano J. Buis (editors)



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Front cover: *The old library in San Marco Convent in Florence which served as an important library for the development of Renaissance thought from the mid-1400s. The city leadership systematically acquired original Greek and Latin texts and made them available in the library, which offered unusually open access for the time. They became part of the foundations of the Renaissance.*

Back cover: *Detail of the floor in the old library of the San Marco Convent in Florence, showing terracotta tiles and a pietra serena column. The clay and stone were taken from just outside the city, faith-ful to the tradition in central Italy that a town should be built in local stone and other materials. The foundational building blocks were known by all in the community, and centuries of use have made the buildings and towns of Tuscany more beautiful than ever. Similarly, it is important to nourish detailed awareness of the foundational building blocks of the discipline of international criminal law.*

7

Impunity: A Philosophical Analysis

Max Pensky*

7.1. Introduction

This exploration of the content and implications of the concept of impunity in international criminal law begins with a quote from Justice Robert Jackson's famous statement at the opening of the Nuremberg trials on 21 November 1945, a moment when, for all practical purposes, international criminal law in the modern sense of that term began. The enduring fame of Jackson's opening statement rests on his appeal to law as a higher and better response to massive wrongdoing by wielders of political power than the sheer demand for retribution directed against the gallery of horrible men assembled that day. That the victorious allied powers would not simply have these men summarily shot – which both Churchill and Stalin thought was the obvious option – but rather, as Jackson famously put it, would choose to "[…] 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".[1]

It is a noble and enduring sentiment. But it is not the quote I referred to above, which comes just a few moments later. Turning to the assembled accused, Jackson continued:

> In the prisoners' dock sit twenty-odd broken men. Reproached by the humiliation of those they have led almost as bitterly as by the desolation of those they have attacked, their personal capacity for evil is forever past. It is hard now to perceive in these men as captives the power by which as Nazi leaders they once dominated much of the world and terrified most of it. Merely as individuals their fate is of little

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1 Robert Jackson, "Opening Statement Before the International Military Tribunal", 21 November 1945 (www.legal-tools.org/doc/bbc82b/).

> consequence to the world. […] What makes this inquest significant is that these prisoners represent sinister influences that will lurk in the world long after their bodies have returned to dust. We will show them to be living symbols of racial hatreds, of terrorism and violence, and of the arrogance and cruelty of power. They are symbols of fierce nationalisms and of militarism, of intrigue and war-making which have embroiled Europe generation after generation, crushing its manhood, destroying its homes, and impoverishing its life. They have so identified themselves with the philosophies they conceived and with the forces they directed that any tenderness to them is a victory and an encouragement to all the evils which are attached to their names. Civilization can afford no compromise with the social forces which would gain renewed strength if we deal ambiguously or indecisively with the men in whom those forces now precariously survive.[2]

Like so much about the Nuremberg legacy, this benediction at the moment of birth of international criminal law is deeply ambiguous.[3] For the spirit of modern positive criminal law that Jackson appeals to – its capacity for reasonable judgment, a core element of its normative basis – is that individual persons are to be held accountable for acts they committed, not for the norms or groups they symbolise or represent.[4] Subjecting them to legal attention, and imposing punitive sanctions on them in the event of a criminal conviction, must be compatible with their status as equal subjects before the law. Justifying their treatment in terms of anything else than this status is facially a violation of the rule of law itself, the same set of values Jackson holds out as the only rational alternative to mere vengeance and the reproduction of violence.

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2 *Ibid*.

3 See Patricia M. Wald, "Running the Trial of the Century: The Nuremberg Legacy", in *Cardozo Law Review*, 2006, vol. 24, no. 7, pp. 1559–1597.

4 Obviously, the status of individual criminal responsibility in international law is contested – it is merely the fact that it is rightly contested that concerns us here and not whether there is a single correct answer to this question. For a recent general treatment, see Elies van Sliedregt, *Individual Criminal Responsibility in International Law*, Oxford University Press, Oxford, 2012.

At the same time, Jackson is inaugurating an *international* criminal tribunal, tasked with charting a course for what amounted to an open legal terrain. Familiar justifications for the legal authority to try and punish, and the crimes that individuals can be punished for could not be assumed. In many cases, they had to be invented (as subsequent accusations of retroactivity of the law emphasised). Jackson knew that the effort to transplant the norms and practices familiar to modern, Western domestic legal systems into the world of international relations, especially in the emerging constellation of a bipolar world order, would be neither direct nor tidy. It would need the slow, piecemeal and tentative development characteristic of well-functioning legal systems – a process for which there was, at that moment, no time.

The International Military Tribunal at Nuremberg was tasked with prosecuting acts that were inherently collective and political in nature, singling out the gravest of abuses by highly-placed wielders of political power. It could not help but make new law in the attempt to impose existing law – with the risk of contradicting the very procedural legal values Jackson appealed to.

Jackson was possessed of a legal intelligence both subtle and capacious. Despite a profoundly pragmatic cast of mind, he also understood the depth of the matter before him. The quote above expresses that understanding, and the range of unsatisfactory compromises and qualifications he saw as necessary. We might call this range of compromises 'Jackson's Hedge'. At the same time as he appealed to familiar rule of law values as a bulwark against the politicisation of legal matters in the wake of genocidal and atrocity violence, he offered, at least implicitly, a very substantial qualification of just that appeal, hedging the bet that this contradiction could be kept within acceptable bounds.

When violent crime is inherently political and collective, then the moral weight usually attached to the prosecution of crimes as public harms loses its familiar rationale. The legal authority of the victorious allied powers was clearly a violation of judicial impartiality: the introduction of new classes of international crimes risked violating the core principle of *nullem crimen, nullem ponem sine lege*. The presumption of innocence, and of punishment for acts and acts alone, were undermined by the open declaration of the extra-legal ambitions of the prosecution. The description of the aim of prosecution as expressing moral condemnation of an ideology, rather than the legal attention to individual actions, risked

reducing law to scapegoating. The justification for legal punishment could not plausibly be identical to whatever argument might appear most convincing in the domestic case.

Jackson appealed to rule of law values while also, with the left hand so to speak, tacitly acknowledging the risks implicit in a prosecution that did not also remain clear about the substantial differences between international and domestic criminal law.

In one form or another, 'Jackson's Hedge' has remained a definitive feature in the development of international criminal law since its reactivation in the middle of the 1990s, though rarely expressed with Jackson's directness. It has remained a practice poised between a narrowly legalistic self-understanding derived from familiar norms of the rule of law, on the one side, and a broader political vision for the role of universal normative values in reining in the abuses of sovereign State power on the other. But unresolved questions at the heart of international criminal law continue to reduce its effectiveness, prestige and prospects. One such unresolved question – what is international criminal law *for*, what is its 'general justifying aim' in contrast to the domestic case – crystallises in the question of the status of *impunity* in international criminal law's developmental arc. It is that question in international criminal law that this chapter explores.

The remarkable rise in prominence and influence of international criminal law over the past near quarter-century cannot be denied. Since national, regional and global actors began offering institutional responses to mass crimes in the former Yugoslavia and Rwanda, and continuing through the emergence of the International Criminal Court ('ICC'), international criminal law has seen dramatic growth in the creation of new formal courts and tribunals, and in new or re-oriented civil society institutions. This flowering of international criminal law has also had profound effects on the academic study of law and international relations, recasting a host of older standard topics concerning the proper role and extent of criminal legal procedure, questions of individual and group responsibility for moral catastrophes, and the nature and proper limits of traditional State sovereignty.

Yet despite this dramatic twenty-five-year arc of growth and development in international criminal law, numerous signs now point in troubling direction for all those who welcome this arc as one of increased justice and protections for vulnerable persons and groups. Opinions about

the legitimacy, efficacy and prospects for the ICC have of course always been decidedly mixed. The United Nations ('UN') backed international and mixed tribunals too have frequently come under pointed criticism, not only for their slow pace but also for the mismatch between (high) expectations and (low) prosecutorial results. As the world experiences a resurgence of 'neo-sovereigntist', often overtly nationalist and protectionist reactions to the broader cosmopolitan project of which international criminal law was one relatively small part, international criminal law too has begun to experience a notable slackening and possibly even a reversal of its arc of development.

In part, the roadblocks and slippages of the project of international criminal law can and should be taken as growing pains, as foreseeable features of a multi-sided, difficult, and long-term realignment of very deeply entrenched attitudes about the (relatively) new category of international crime. In part, international criminal law institutions, notably the ICC, have not infrequently caused, or at least unnecessarily intensified, opposition by States and blocs. Irritated by real or imagined neo-colonialist or neo-realist features of international criminal law, many State actors have intensified their opposition to its border-crossing features such as universal jurisdiction. Others show waning interest in financial and political support for ongoing or new international criminal law initiatives, discouraged by the glacial pace and relatively high cost of criminal justice as a response to mass political violence.

As David Luban wrote over five years ago, in other words, the honeymoon period for international criminal law has, without doubt, come to an end.[5] The intervening years have not been any more encouraging. And while it is too soon to begin to speak of divorce, the major motivation for this chapter is the claim that some more deliberate reflection is needed on how international criminal law's arc of progress can regain momentum – or possibly be saved from crashing.

As a very small contribution to that larger project, this chapter asks whether one part of the problem that international criminal law faces in motivating the continued commitment of its various State and non-State participants is lack of clarity in the most basic justifying aim of interna-

[5] David Luban, "After the Honeymoon: Reflections on the Current State of International Criminal Justice", *Journal of International Criminal Justice* 11 (3), 2013, pp. 505–515.

tional criminal law – what the pursuit of international criminal law is for. The project as large, costly, and potentially lengthy as the development of international criminal law requires at the very least a coherent and compelling set of justificatory reasons to convince its range of shareholders to continue it.

Such a large project cannot be justified by appeal to a single norm, reason, or aim. International criminal law seeks a plurality of goods. But those various goods must be compatible with one another, and placed in some reasonable hierarchy so that even critics can identify which among them is plausibly the most significant motivating aim or compelling norm that international criminal law is trying to realise. Without clarity about what international criminal law is *for*, defending the arc of development of international criminal law becomes significantly more difficult and, ultimately, unlikely.

7.2. Impunity as the Principal Norm of International Criminal Law

The prime candidate for the position of the principal norm or aim of international criminal law – at least if we are to take our lead from international criminal law's most visible founding documents and apologists – is the *battle against impunity*. Formulations like "combating" impunity, countering or reducing impunity, closing an "impunity gap", ending a "culture of impunity" or similar formulations are so frequent in contemporary international criminal law that it is worth exploring how this particular goal – henceforth the 'anti-impunity norm'[6] – has emerged as a general justifying aim situated at the top of a hierarchy of international criminal law's reasons to exist.

The UN Office of the High Commissioner for Human Rights understands "battling impunity" as the core of the organisation's mission of human rights protection.[7] The Rome Statute's Preamble declares the ICC to be "[d]etermined to put an end to impunity for the perpetrator of [inter-

[6] The author has earlier made reference to the "impunity norm", however, the formulation 'anti-impunity norm' is used here in the interest of clarity. See Max Pensky, "Two Cheers for the Impunity Norm", in *Philosophy and Social Criticism*, 2016, vol. 42, no. 4–5, pp. 487–499.

[7] Office of the United Nations High Commissioner for Human Rights, "Combating Impunity and Strengthening Accountability and the Rule of Law" (www.legal-tools.org/doc/02a241/).

national] crimes and thus to contribute to the prevention of these crimes".[8] The United Nations has adopted an anti-impunity norm as a yardstick in the global effort to enforce and protect basic human rights.[9] In other documents, the UN defines the work of the International Criminal Tribunal for Rwanda as motivated by the "global fight against impunity",[10] and documents the legacy of the International Tribunal for the former Yugoslavia as the "end of impunity".[11]

Outside of the UN and its related legal and diplomatic bodies, the identification of impunity as the primary antagonist for international criminal law is also now virtually standard. Legal working groups such as the Brussels Group for International Justice have formulated various versions of principles to combat impunity in the prosecution of international justice and human rights enforcement.[12] A broad range of legal scholarship has sought to articulate and advocate for the goal of combating impunity as the clearest expression of the legal version of human rights protection.[13]

Perhaps just as influentially, a range of large, well-funded international human rights organisations have also been caught up in this norm shift. Non-governmental organisations such as Amnesty International, Human Rights Watch, and International Crisis Group (to name only a few), which had until the end of the millennium generally sought to pressure rights-abusing States through the medium of public naming and shaming and other political processes, pivoted sharply toward a criminal-

8 Rome Statute of the International Criminal Court, adopted 17 July 1998, entry into force 1 July 2002, Preamble, para. 5 ('ICC Statute') (www.legal-tools.org/doc/7b9af9/).

9 United Nations Commission for Human Rights, "Report of the Independent Expert to Update the Set of Principles to Combat Impunity: Updated Set of principles for the protection and promotion of human rights through action to combat impunity", UN Doc. E/CN.4/2005/102/Add.1, 8 February 2005 (www.legal-tools.org/doc/639fa9/).

10 International Criminal Tribunal for Rwanda (available on the legacy web site of the International Criminal Tribunal for Rwanda).

11 International Tribunal for the Former Yugoslavia (available on the legacy web site of the International Tribunal for the former Yugoslavia).

12 Brussels Group for International Justice, "Brussels Principles Against Impunity and for International Justice", November 2002 (www.legal-tools.org/doc/7205b9/).

13 See, for instance, Diane Orentlicher, "Settling Accounts: The Duty to Prosecute Human Rights Violators of a Prior Regime", in *Yale Law Journal*, 1991, vol. 100, no. 8, pp. 2537–2615; Naomi Roht-Arriaza (ed.), *Impunity and Human Rights in International Law*, Cambridge University Press, Cambridge, 1995.

legal mission as the anti-impunity norm won wide acceptance.[14] In this sense, the anti-impunity norm has not only become hegemonic in international criminal law but has migrated to adjacent areas of international law and advocacy, such that now human rights enforcement has largely become a matter of criminal law.

As legal scholar Karen Engel has recently put it:

> [s]ince the beginning of the twenty-first century, the human rights movement has been almost synonymous with the fight against impunity. Today, to support human rights means to favor criminal accountability for those individuals who have violated international human rights or humanitarian law. It also means to be against amnesty laws that might preclude such accountability.[15]

[14] A representative sampling would include Amnesty International, "Absolute Impunity: International Law and the Conduct of Militias in Iraq" October 2014 (www.legal-tools.org/doc/12cbe5/); Human Rights Watch, "Afghanistan: Crisis of Impunity" July 2001 (www.legal-tools.org/doc/614a93/); International Crisis Group, "The Politics of Ending Impunity", 24 February 2009 (www.legal-tools.org/doc/0d08d9/); and Impunity Watch.

[15] Karen Engle, "Anti-Impunity and the Turn to Criminal Law in Human Rights", in *Cornell Law Review*, 2015, vol. 100, pp. 1069–1129. Engle analyses, in particular, the dramatic change in the conduct of Amnesty International ('AI') once the anti-impunity norm becomes definitive for its organisational mission over the course of the years on either side of the turn of the millennium. Engle quotes AI's updated mission statement from 1991:

> AI believes that the phenomenon of impunity is one of the main contributing factors to [gross human rights violations]. Impunity, literally the exemption from punishment, has serious implications for the proper administration of justice…International standards clearly require states to undertake proper investigations into human rights violations and to ensure that those responsible are brought to justice.

Engel notes the potentially negative implications of the pivot to international criminal prosecution as the central justifying aim of AI and other large human rights non-governmental organisations:

> [A]s criminal law has become the enforcement tool of choice, it has negatively affected the lens through which the human rights movement and the international law scholars who support it view human rights violations. In short, as advocates increasingly turn to international criminal law to respond to issues ranging from economic injustice to genocide, they reinforce an individualised and de-contextualised understanding of the harms they aim to address, even while relying on the state and on forms of criminalization of which they have long been critical. (p. 1071).

7.3. Narrow and Broad Conceptions of Impunity

Surprisingly, given the wide and rapid dissemination and adoption of the anti-impunity norm, the actual *content* of that norm, the precise meaning of the term 'impunity', and why battling it (whatever that entails) is of such paramount value, remains strikingly under-examined. This next section offers such an analysis, distinguishing between a narrow and a broad conception of impunity. This section will show that these narrow and broad conceptions of the concept have frequently been used interchangeably, even though their meanings and implications are distinct, and where the distinctions bear substantive implications.

Briefly, a *narrow* conception of impunity equates impunity with the wrongful *failure to punish* individual perpetrators of international crimes by a legal body with jurisdiction, whereas a *broad* conception of impunity defines impunity as a *lack of accountability*, where 'accountability' is understood to refer potentially to sanctions (whether legal or otherwise) imposed on persons (whether convicted criminals or not) or alternatively to the application of other, usually less well-defined sorts of political or social norms.[16] As will be argued later in the chapter, a failure to punish can indeed be *one* form that a lack of accountability can take. But it is hardly the only one. And while a 'lack of accountability' is a very vague complaint, international criminal law should make this broader conception of impunity determinate enough to show why criminal law, in particular, is suited to remedy it. While these conceptions may coincide where punishment itself is taken as a legal mechanism for delivering accountability to individual perpetrators of international crimes, there are clearly multiple avenues for the two senses of impunity to separate. Conflating them

[16] The use of the term "conception" to refer to the broad and narrow versions of the impunity norm is meant to appeal to the distinction between concepts and conceptions familiar from Rawls. See John Rawls, *A Theory of Justice*, Harvard University Press, Cambridge, Massachusetts, 1999. In the present context, it is assumed that the concept of impunity is capable of explication and application according to (at least) two different conceptions, and the range of shortcomings and lack of clarity that this chapter tries to identify in each of the two conceptions are meant to be taken as internal to the conceptions themselves, that is, that they fail to make the entailments of the impunity norm sufficiently determinate according to their own internal criteria. At the same time, conflating these two conceptions is the source of significant confusion, so the task is to determine in what sense the two conceptions can be seen as compatible, and in which senses not.

unreflectively has led to a costly lack of clarity concerning what international criminal law is actually for.

Beginning with the most influential legal documents, any attempt to determine the current definition of impunity should start with UN Special Rapporteur Louis Joinet's report to the UN Social and Economic Council on the 'Question of Impunity for Perpetrators of Human Rights Violators', which determined the meaning of impunity as:

> the impossibility, de jure or de facto, of bringing the perpetrators of human rights violations to account - whether in criminal, civil, administrative or disciplinary proceedings - since they are not subject to any inquiry that might lead to their being accused, arrested, tried and, if found guilty, convicted, and to reparations being made to their victims.[17]

Other influential legal writings offering definitions of impunity include the more recent Brussels Principles Against Impunity and for International Justice, defining impunity as "failing to investigate, prosecute and try natural and legal persons guilty of serious violations of human rights and international humanitarian law".[18]

Black's Law Dictionary defines impunity pithily as simply "the exemption or protection from penalty or punishment"; while Amnesty International defines it more broadly, if vaguely, as "convey[ing] a sense of wrongdoers escaping justice or any serious form of accountability for their deeds". Further, in a review of various uses of the term, Christopher Joyner has defined impunity as "exemption or freedom from punishment and connotes the lack of effective remedies for victims of crimes. Within the context of human rights law, impunity implies the lack of or failure to apply remedies for victims of human rights violations".[19] Charles Harper, meanwhile, defines impunity in a broader yet also more determinate sense:

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[17] United Nations Commission for Human Rights, "Question of the Impunity of Perpetrators of Human Rights Violations (Civil and Political)", UN Doc. E/CN.4/Sub.2/1997/20, 26 June 1997 (www.legal-tools.org/doc/5f81bd/).

[18] Brussels Group for International Justice, 2002, see *supra* note 12.

[19] Christopher C. Joyner, "Redressing Impunity for Human Rights Violations: The Universal Declaration and the Search for Accountability", in *Denver Journal of International Law and Policy*, 1998, vol. 26, pp. 591–624.

> Impunity is the means by which persons accused of crimes against humanity escape being charged, tried and punished for criminal acts committed with official sanction in time of war or dictatorial rule. Impunity can be achieved through amnesty laws passed or decreed by governments under whose authority the crimes were committed or by a successive government. It can result from presidential pardons given convicted criminals who thus remain unpunished. Impunity can also occur by default - the deliberate lack of any action at all.[20]

Even this abbreviated selection of definitions from legal texts and scholarship illustrates a distinction between a *narrow* and a *broad* conception of impunity. According to the narrow conception, impunity is the lack of the due imposition of legal sanction, that is, of *punishment*. Punishment, in turn, is taken either explicitly or implicitly as the rightful harming (whether in a permissive or obligatory sense) of an individual person as a response to that person's criminal wrongdoing; as a deliberate and proportional setback of interests that could reasonably be ascribed to a convicted criminal, where the mechanism of such a setback is generally assumed to be a period of confinement by the State.[21]

7.3.1. The Narrow Conception of Impunity

According to this narrow conception, impunity occurs just when those who ought to be punished for serious violations of international law go unpunished. It implies, but does not specify, some *external* cause for the missing punishment, and entails the normative claim that such a failure is a serious wrong, both procedurally (wronging the otherwise legitimate and obligatory application of criminal law) and morally (wronging facially a range of distinct moral agents including victims, perpetrators, and citizens in general).[22]

This lack of specificity in the narrow conception concerning the underlying causes of a wrongful absence of punishment is significant. We

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[20] Charles Harper, "From Impunity to Reconciliation", in Charles Harper (ed.), *Impunity: An Ethical Perspective*, WCC Publications, Geneva, 1996, p. viii.

[21] For a standard account, see Joel Feinberg, *The Moral Limits of the Criminal Law Volume I: Harm to Other*, Oxford University Press, Oxford, 1988.

[22] See Pensky, 2016, see *supra* note 6.

must infer that such causes rest outside of the normal operation of a system of criminal legal justice. As a normative concept, wrongful absence of punishment implies a prior wrong, of which impunity is the result. This suggests that impunity, however serious a disvalue or wrong it may be intrinsically, is also evidence of a prior wrong (and not a mere failure of legal procedure), and that a demand to battle impunity may also be taken as an indictment of the wrongs that generate it. A mistrial due to prosecutorial incompetence, for instance, would not qualify as an instance of impunity, any more than, say, a duly convicted perpetrator whose punishment does not take place due to his death prior to its imposition, or an earthquake that destroys the only available prison. Impunity as wrongfully missing punishment implies that wrong of missing punishment itself is traceable back to a prior wrong in which the normal operation of criminal justice is wrongfully interfered with. While prosecutorial incompetence would not generally be taken as a cause of impunity (but would indicate some other kind of failure), bribing a judge, intimidating witnesses, or tampering with evidence would, as would using political power in more diffuse ways to ensure that one would not come under legal attention in the first place.

The narrowness of the narrow conception – defining impunity as missing punishment of individual perpetrators – does not succeed in capturing the distinctiveness of international criminal law in contrast to the domestic analogue. The reason for the shortcoming of the narrow conception is already implicit in the idea of its narrowness. Due to the inherently collective and political nature of the kind of crimes that international criminal law seeks to punish and prevent, and given that the impunity norm has become the principle formulation of that distinctive legal mission, the *mere* lack of punishment of individual perpetrators is too small a normative wrong to serve as international criminal law's general justifying aim, and the distinction between that aim and the broader social goals of domestic criminal legal systems. We would not regard it as an instance of impunity for a dreadfully immoral person to be acquitted on the basis of a procedurally good-enough prosecution. Though we may have good reason to regret that the bad man will not be rightfully harmed, we cannot see it as wrong that he is not, if his trial is fair. Sometimes (we hope infrequently) criminal law works this way. That is the cost of commitment to the rule of law – even in the special case of international criminal law, where accused perpetrators, as former wielders of political power, may

have once openly boasted about the deeds for which they may subsequently be acquitted.

As the *wrongful* absence of punishment subsequent to a procedurally correct criminal conviction, impunity is certainly an injustice, quite possibly a very harmful one, and in many ways indeed a grave one. But if narrow impunity is equated with impunity *simpliciter*, then the impunity norm – the general justifying norm of international criminal law – would say only that the "battle against impunity", or "combating impunity" or indeed "fighting a culture of impunity" – calls only for the confinement, for some period of months or years, of a small number of men. Why would that be important enough to justify the developmental arc of international criminal law? This is one of the problems, I think, that Jackson's Hedge refers to.

This question may lead us into a relatively familiar set of arguments on the general topic of the justification for international criminal law punishment – that is, whether the arguments for the justification of criminal punishment familiar from the domestic case apply when transferred to the international level, and whether the relative weightiness of reasons for and against punishment change once we scale up from municipal to international criminal law.

On the domestic level, legal philosophers have dealt with the question of the sovereign State's *permission or obligation* to punish criminals through a range of by-now well-worn arguments. Insofar as the narrow conception has any convincing power, its defenders will need to take some position on this well-worn philosophical debate as well. Here we need only register the familiar distinctions among retributivist arguments (that the State must punish a criminal because justice demands it), the consequentialist argument (that punishing criminals generates social benefits and reduces social ills more effectively than other available remedies), and the expressivist argument (that the State has a legitimate interest, even an obligation, in punishment as a means to communicate disapprobation for public wrongs).

This chapter takes no particular position on which of these options for justifying the State's coercive power to rightfully harm citizens is the strongest, in the sense of offering the best defence for the narrow conception. The appraisal of the relative strengths and weaknesses of arguments like these is not likely to translate from the domestic context to that of international criminal law without significant differences. This too is a

part of Jackson's Hedge: the idea that international criminal law is a *near* match or analogue to the domestic case, and so a defence of the State's right or duty to punish that goes through on the domestic level will perforce go through for international criminal law as well, even with the tacit reservation (the hedge) that the difference between domestic and international criminality is not ultimately a matter of gravity alone but also refers to the political and collective nature of international crimes.[23] This hedge – as in Jackson's equivocation regarding whether the punishment of individual perpetrators ultimately matters *for them* or rather for the collective movements or ideologies they *symbolise or represent* – seems to offer a retributivist argument with one hand, while withdrawing it, and replacing it with an expressivist or consequentialist alternative with the other.

Whatever else one can say about its intuitive appeal in the case of international crime, in particular, retributivism presents difficulties as the basis for justifying international prosecutions. The reasons for this lie uncomfortably close to the core distinctive feature of international criminal law, the assignment of individual moral and legal responsibility to individual persons for acts with an irreducibly collective dimension. The same distinctiveness of international criminal law – the collective and political nature of international crimes, and (frequently) the status of accused as former wielders of political power – can be interpreted both as aggravating or mitigating factors in the individual moral responsibility of perpetrators: aggravating, since political power wielders are those who bear a special status as trustees of the law and of the welfare of those under their authority and betrayed that trust and used that same political power to victimise their own population. And yet the collective nature of international crimes can also be taken as a serious consideration for mitigation, both on the part of 'small fish' and even for political and military leaders whose distance from the actual work of killing can often be considerable.

On the other hand, retribution as a justification for international criminal law punishment does have one feature powerful than other available alternatives. This feature lies less in the demand for proportionate rightful harming of individual persons than in the *obligatory* character of

[23] For a parallel discussion, see the familiar argument from Mark Drumbl, *Atrocity, Punishment, and International Law*, Cambridge University Press, Cambridge, 2007.

hard or strong retributivist accounts.[24] Emphasising the obligatory character of retribution shifts the weight of justification from the harm the perpetrator deserves to what the legal authority must do to discharge *its own* duties.

Consequentialist defences of international criminal law punishment focus naturally on the question of general deterrence, and here indeed there would seem to be a close match between the arguments' pros and cons on the international and domestic levels. In both contexts, the question of deterrence through punishment is empirical, and hence shares the challenges characteristics of under-supported empirical claims. After all, for the consequentialist defence of the narrow conception of impunity to succeed, one would have to show that the failure to punish is a serious disvalue in its own right, and not a mere proxy or indirect indicator of other disvalues such as a lack of legal certainty or physical security, or seriously reduced prospects of a successful democratic transition, or loss of trust in State authority. Further, one would also have to prove that the available means for reducing the disvalue of impunity to an acceptable level are themselves available, at an acceptable cost, without identifiable alternatives. International criminal law has always asserted, as a sort of promissory note never (yet) redeemed, that threatened sanctions deter would-be perpetrators of international crimes.[25] It has not sufficiently responded to the openness of the empirical question of deterrence.

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[24] The author has developed a fuller account of a form of hard *pro tanto* retributivism in Max Pensky, "Jus Post Bellum and Amnesties", in Larry May and Elizabeth Edenberg (eds.), *Jus Post Bellum and Transitional Justice*, Cambridge University Press, Cambridge, 2013, pp. 152–177.

[25] See the Rome Statute, Preamble, see *supra* note 8: "Determined to put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes[…]". See also, the Brussels Principles Against Impunity, see *supra* note 12: "Impunity holds disastrous consequences: it allows the perpetrators to think that they will not have to face the consequences of their actions, it ignores the distress of the victims and serves to perpetuate crime. Impunity also weakens state institutions, it denies human values and debases the whole of humanity". Of this list, certainly the last two, as claims without any need of empirical support, may stand. The rest are empirically testable, but the Principles do not refer to any data supporting the claim. See Payam Akhavan, "Beyond Impunity: Can International Criminal Justice Prevent Future Atrocities?", in *American Journal of International Law*, 2001, vol. 95, no. 1, pp. 7–31; David Wippman, "Atrocities, Deterrence, and the Limits of International Justice", in *Fordham International Law Journal*, 1999, vol. 23, no. 2, pp. 473–488; Dan Saxon, "The International Criminal Court and the Deterrence of Crimes", in Serena Sharma and Jennifer Welsh (eds.), *The Responsibility*

Perhaps sensitive to this, most international criminal law scholars who have addressed this issue have adopted some version of an expressivist or communicative approach for justifying the punishment of international crimes.[26] While this is not the place for an extended discussion, the expressivist defence of international punishment is not particularly promising, despite its widespread least-worst popularity as a defence of the narrow conception. International punishment cannot reasonably be expected to communicate rule of law or other values with anything like the force and clarity that would justify international criminal law as worth the price. While domestically the law expresses the voice of the State authority, no such clarity of voice is available in the international arena, where courts derive their authority in highly indirect ways and must appeal to abstractions – the shocked conscience of humanity and similar formulations – to explain the bases of their expressive prerogative. Further, expressivist arguments for international punishment suffer from the same weakness as their domestic analogues. They assert, but do not argue for, the claim that punishment is the all-things-considered best medium of expression for rule of law values.[27]

to Prevent: Overcoming the Obstacles of Atrocity Prevention, Oxford University Press, Oxford, 2016. For a contrasting view on this question see Kathryn Sikkink, "Explaining the Deterrence Effect for Human Rights Prosecutions for Transitional Societies", in *International Studies Quarterly*, 2010, vol. 54, pp. 939–63.

[26] For the most developed of these, see Bill Wringe, "Why Punish War Crimes? Victor's Justice and Expressive Justifications of Punishment", in *Law and Philosophy*, 2006, vol. 25, pp. 159–191. See also Robert D. Sloane, "The Expressive Capacity of International Punishment: The Limits of the National Law Analogy and the Potential of International Criminal Law", in *Stanford Journal of International Law*, 2007, vol. 39, pp. 39–94.

[27] As a thought experiment to test this, suppose a State authority has a budget of one million Euros in order to respond to committed atrocities. It has two choices: either spend the money in prosecution and, if the prosecution results in convictions, the imposition of punishment, in the form of long prison sentences for a small number of high-level perpetrators; or, it can spend the same million Euros on a weeklong public event, gathering the nation's political figures, entertainers, sports heroes and so on, all with the goal of expressing strong moral disapprobation – publicly expressing the collective rejection of the atrocity crimes, disapproval of the perpetrators, and resolve to make its utmost efforts for non-recurrence. A consistent expressivist should have no preference between these two options provided both adequately and equally express general moral disapprobation. This makes expressivism into something other than a theory of *punishment*, until some additional premise grounds the presumption that punishment is an apt response to wrongdoing inde-

7.3.2. The Broad Conception of Impunity

In contrast to the narrow conception, a *broad* conception of impunity extends the meaning of the wrong of impunity beyond the mere absence of due punishment to some wider legal failure, including (but not necessarily limited to) investigation, indictment, and prosecution. In fact, we may wonder why the broad conception of the impunity norm limits itself to criminal procedure at all, in favour of other social goals including reconciliation, security, reparations, memory policies, and so on. Broad impunity implies that perpetrators lack accountability for their actions, and subjection to criminal law is but one form that accountability may take.

This broad impunity conception certainly has the advantage over its narrow counterpart of opening up the possible sites of wrongfulness beyond the mere lack of punishment. Unfortunately, the price paid for this broadness is vagueness regarding just where the wrong of impunity is best located. For example, is the lack of an entire criminal procedure broad impunity? That seems implausible, given that we would not ordinarily see impunity as arising, say, from a legal procedure where a competent investigation resulted in a prosecutorial decision not to indict due to the poor quality of evidence or unavailability of witnesses, just as we could not speak of impunity applying to an acquittal following a procedurally good-enough criminal trial.

If impunity is taken as a sort of proxy measure for a range of other related but distinct undesirable legal or political outcomes, how should we think about the appropriate and reasonable tasks of law to address them? How should we think about ways of striking appropriate balances or making tough choices when legal and extra-legal values cannot be pursued together? Why think about desired outcomes such as healing of victims and survivors, enacting and funding reparations programs, reforming damaged institutions, or finding common ground between former political adversaries in terms of criminal law at all? And why should perpetrators and their fates, in particular, be the preferred site for realising these values?

The trouble with the broad conception, in other words, is that by defining impunity (merely) as the absence of accountability, it is unable to

pendent of its expressive power – since expressive power is a capacity that may attach to many things, of which punishment is merely one.

provide guidance on what minimally must occur, legally speaking, to an alleged perpetrator of international crimes in order for the legal authority to discharge its obligations; for the victims to have their right to legal remedy fulfilled; and for the perpetrator to get what he legally deserves. This broadness-as-vagueness is what makes the broad definition of impunity as 'lack of accountability' so inadequate, since the definition leads nowhere for the question of what (minimally) must be done, legally, to and with the perpetrator for the desired but undefined quality of accountability to be the result. The primary reason for this broadness-as-vagueness is that the concept of 'accountability' – which serves as a rough opposite to that of impunity – is also under-defined. Like impunity, accountability exhibits substantially different conceptions, whose unreflective conflation lies beneath much of the confusion of the anti-impunity norm. If the narrow impunity conception is too narrow, the broad conception must be made broad-but-determinate, and this requires that we subject the concept of accountability to analysis as well.

How can we make the broad conception of the anti-impunity norm determinate enough to provide us with a clear alternative to the overly narrow conception? And further, how can we make the broader anti-impunity norm express determinate features of international criminal *law*, rather than, say, international, regional or domestic politics and public policy, reconciliation programs, reparations initiatives, or other aspects of State or civil society responses to international crimes? If punishment is too narrow, what offers itself as an alternate conception that is *broad but legal*, in the sense of appealing to norms, institutions and practices that distinguish law from policy and politics?

7.4. Sanction Accountability and Deliberation Accountability

A preliminary conception of accountability would define it as a more or less institutionalised mechanism or procedure for the non-violent constraint of the exercise of power.[28] In this sense, a power-wielder is ac-

[28] The conception of accountability developed here draws on the work of Robert Keohane and collaborators. See, in particular, Ruth W. Grant and Robert O. Keohane, "Accountability and Abuses of Power in World Politics", in *American Political Science Review*, 2005, vol. 99, no. 1, pp. 29–43. Keohane's work focuses on how global governance institutions freed from national polities can still operate in ways that are accountable to those whom they affect. While Keohane focuses primarily on international financial institutions, the

countable just in case there is some established mechanism – a set of norms or institutions, a spectrum of established practices – that effectively identifies, determines and counters abuses of power – exercises of power exceeding the already established limits of the power-wielder's permissive authority.[29]

This marks a difference in principle between accountability mechanisms and related practices of bargaining or negotiation. It is also why accountability must include some specification of the *sanctioning mechanism* attached to the accounting agent. To be accountable, a power wielder must not only be liable to have its policies and decisions measured against a pre-determined public standard by a pre-established and distinct agent.[30] That agent must also have a pre-determined sanctioning power of its own, known to both parties, a power that will be brought to bear in case of an illegitimate use of power. Accountability is a procedure for the imposition of a pre-determined sanction as an institutional response to transgressed limits of a power-wielder's established authority, imposed by the shareholder or stakeholders from which the power wielder's legitimate authority is derived. Let us call this conception of accountability, which focuses on the pre-determined imposition of sanction as a function of transgressed limits of established power, 'sanction accountability'.

Sanction accountability focuses attention on the consequences or outcome of an accountability procedure – the sanction is apt or due only in reference to the limits already placed on the power of any power-wielding agent. But in itself, the sanction-based conception says little if anything about what that procedure is. Now contrast this with another

question is equally germane to international courts in general and the International Criminal Court in particular.

29 For good, though now already dated, overviews see Matthew Flinders, *The Politics of Accountability in the Modern State*, Ashgate, Burlington, 2001; Michael W. Dowdle (ed.), *Public Accountability: Designs, Dilemmas, and Experiences*, Cambridge University Press, Cambridge, 2006.

30 Flinders similarly defines political accountability as:

> […] modalities of oversight and constraint on the exercise of state power. It refers to the capacity of citizens to keep in check those who possess public authority through mechanisms compelling these office-holders to give reasons for their actions and, when performance is deemed unsatisfactory, to sanction them by media-enabled protest, legal challenges, or, more routinely, the withdrawal of electoral support for the governing party. *Ibid*, p. 3.

conception of accountability that foregrounds the *kind of procedure* that accountability is, rather than the *kind of outcomes* that the procedure generates.

A political power-wielder is accountable to shareholders just in case there is a settled relationship in which potential illegitimate uses of power must be *answered or accounted* for; that is, in which the accounting power *may duly demand justifications*. This distinguishes accountability from foreseeable negative consequences resulting from an abuse of power.[31]

Justifications – giving accounts – take the form of communicated reasons for actions. The power-wielder in an accountability relationship is accountable where and to the degree that it is liable to provide justifying reasons, of the right kind, to the relevant accounting agent where appropriately demanded, the reasons in question being ones that propose to justify the claim that a given policy or decision does not overstep the power-wielder's legitimate authority.

Call this second, process-based conception 'deliberation accountability'.[32] Deliberation refers to the irreducibly inter-subjective process of

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[31] On the basis of this distinction, the author disagrees with theories of democratic accountability, for instance in the work of Craig T. Borowiak, whose position on accountability as public answerability he largely shares. For Borowiak, an elected public official is accountable to her electorate in the sense that she can be removed from office in periodic elections should they see her representation as inadequate. (Or a corporation is accountable to consumers insofar as they can "punish" it by refusing to buy its products.) The process conception of accountability developed here is not *this* broad, since properly speaking a negative consequence such as losing one's political office is not a sanction, which implies the conscious imposition of harm as a result of a misdeed. Public officials are accountable to their electorates in other ways – for instance, they can be required to testify before parliamentary committees, can be censured or condemned, and in extreme cases removed for office for misdeeds or abuses of power. But voters vote for or against politicians for a variety of motives, so it is not plausible to see an elected official turned out of office as purely an instance of accountability. See Craig T. Borowiak, *Accountability and Democracy: The Pitfalls and Promise of Popular Control*, Oxford University Press, Oxford, 2011.

[32] See David Held and Mathias Koenig-Archibugi, "Introduction", in David Held and Mathias Koenig-Archibugi (eds.), *Global Governance and Public Accountability*, Blackwell, Malden and Oxford, 2005, p. 3. David Held and Mathias Koenig-Archibugi provide a lucid definition of (political) stakeholder accountability, and in doing so make an elegant bridge between what is termed here sanction accountability and deliberation accountability:

> Accountability refers to the fact that decision-makers do not enjoy unlimited autonomy but have to justify their actions *vis a vis* affected parties, that is, stakeholders. These stakeholders must be able evaluate the actions of the decision-makers and to sanction

the giving and accepting (or refusing) of justifying reasons as a core requirement for assigning accountability to a power-wielder. It also captures the commonsense intuition that being accountable to someone or something means being prepared to give an account of yourself – of what you did and why you did it, and why such actions or choices fell within your prerogative; why they did not extend beyond the established limits of your authority. This deliberative conception of accountability asserts that to be accountable is, at bottom, not a passive imposition of consequences alone, but an active, indeed an interactive relationship characterised by the public use of reasoning.

Clearly, this deliberative conception can and often does enter into tension with the sanction conception. In fact, this tension, in an untheorised form, has generated a great deal of unnecessary confusion in the theoretical literature. The deliberative conception rests on the core intuition that an agent is accountable if it must *answer for* its acts. But 'answerability' is all too quickly conflated with 'liability to be sanctioned', while in fact the demand to answer, if it is coherent, has to entail the *possibility of answering satisfactorily*, that is, of giving justifying reasons and having those reasons accepted. (This distinction parallels that in law between prosecution and punishment.) This means that deliberation accountability is achievable independently of sanction accountability – provided that the reasons one gives are accepted.[33] But the converse, of course – due sanctioning if reasons are accepted – would *not* even in prin-

them if their performance is poor, for instance by removing them from their positions of authority. Thus, effective accountability requires mechanisms for steady and reliable information and communication between decision-makers and stakeholders as well as mechanisms for imposing penalties.

[33] In this sense the idea of deliberation accountability bears obvious strong connections to what Rainer Forst means by a "context" or an institution of justification, and in fact it may be helpful to see accountability in the deliberative sense developed here as a version of a Forstian account of public practices of justification tracing back to a basic norm of justification or a version of the all-affected principle: those likely to be significantly affected by a policy have their status as moral persons duly respected only insofar and to the extent that the policy creator meets its obligation to provide them with justifying reasons for the policy and its foreseeable effects. See Rainer Forst, *The Right to Justification. Elements of a Constructivist Theory of Justice*, Columbia University Press, New York, 2012. The author has developed an alternative version of this interpretation of the all-affected principle in Max Pensky, "Two Cheers for Cosmopolitanism: Cosmopolitan Solidarity as Second-Order Inclusion", in *Journal of Social Philosophy*, 2007, vol. 38, no. 1, pp. 165–184.

ciple be justifiable. Hence the two forms of accountability presented here are *not symmetrical*. Sanction accountability *does* presuppose and require the satisfaction of deliberation accountability; it cannot be had in the absence of the latter.

Criminal law provides an illustration of this point. To be legally accountable is to be answerable to a due legal authority, in the sense that one must answer a criminal charge. Criminal defence requires presenting reasons of fact or law meant to justify a judgment of legal innocence. A successful legal defence, and hence an acquittal, is not at all a lack of accountability. If it is procedurally correct, then *deliberation* accountability has been achieved, so that the question of sanction accountability or its lack has no proper place.

7.5. Conclusion

If this distinction between accountability as sanction imposition, and accountability as deliberation or reason-giving, has any plausibility, then we can now use it to help clarify the relation between accountability and its opposite, broad-but-vague impunity.

International criminal law is a mechanism for bringing accountability to those power wielders who have overstepped the due or authorised limits of their use of political power. The publicity and determinacy of international criminal law offer procedural instructions that individual power-wielders – political and military leadership – can consult if they want to know what uses of their power will predictably elicit legal responses, including possible punishment. On the consequentialist premise of general deterrence, the hope is that such power wielders as rational choosers will factor the cost of possible punishment into their calculations regarding attractive versus unattractive alternatives of policy.

The narrowness of the narrow conception of impunity is the conflation of *sanction* accountability with *all* accountability, falsely assuming that punishing perpetrators of international crimes will satisfy the demand for accountability in the wake of atrocity violence. But there is in principle and practice no reason to think that it will. Legal sanction accountability – punishment – only arises subsequent to a procedurally correct conviction. While criminal trials have an essential forensic and empirical dimension – establishing the relevant facts surrounding an alleged criminal act – the moment of judgment, the determination of whether the facts as established fulfil the definition of a criminal statute – is what *creates*

rather than discovers an individual person's status as a criminal perpetrator. This is why the presumption of innocence is more than a mere procedural safeguard. Legal judgment responds to the act; it creates that act as a crime. This core principle, in fact, is precisely the point where Jackson's Hedge is at its most dangerous, if not openly self-contradictory, when it *assumes* that the 'broken men in the dock' are perpetrators of international crimes in a legal sense. No such assumption – unless it is a mere rhetorical gesture – is compatible with the rule of law.

The narrow anti-impunity norm is the imposition of one special kind of sanction accountability, tailored to individual persons. Sanction accountability of course extends beyond the focus on individual offenders in criminal law. *Collective* actors from States, to rebel groups, to corporations, can also be sanctioned – not by legal punishment, which applies only to individual natural persons, but by a range of various approaches ranging in severity from fines for mandatory reparations to compulsory disbanding. Many programs demanding mandatory changes in the structure or capacity of miscreant corporate actors have a sanctioning as well as a reforming intent. It is not hard to imagine cases where the realisation of sanction accountability for collective actors, and countering impunity for individual members of those collectives, come into conflict, as when prosecutors may rely on testimony in exchange for individual immunity. International criminal law has, at present, no clear way to adjudicate such scenarios, which on the whole have been settled *ad hoc* and have not left much record in the relevant case law or jurisprudence.

At the same time, criminal trials are capable of delivering at least some significant degree of *deliberation* accountability as well, captured in the very notion of an accused being compelled to give an account of himself in public, to answer the charges against him. A good deal of legal philosophy, especially in the work of the great legal theorist Antony Duff, has explored in detail how criminal trials can also be understood as public exercises of reason-giving and reason-taking. Duff remains skeptical about the vagueness of the authority of the stakeholders in international criminal trials in particular. But he supports the view that such trials can –

with some qualifications – be taken as exercises in what this chapter terms deliberation accountability.[34]

But we ought not to over-estimate the amount of deliberation accountability that the trial procedure alone is capable of generating. Whether adversarial or inquisitorial, trials are exercises to determine criminal guilt or innocence, not public catechisms of deliberative democracy. They are strategic, not consensus-driven. The interests of the accused cannot be expected to align with that of the legal authority. Those on trial for international crimes will rarely, if ever, make good participants in processes of public deliberation, which they will subvert if they can.[35] Inclusion in deliberation accountability is after all in part a kind of restoration to membership in a deliberating public, an acknowledgement of a kind of deliberative parity. This makes the expressivity of prosecution a complex matter. But international defendants are notoriously good at exploiting the legal structure to their advantage; as criminal defendants, they remain quite dangerous as participants in a public discourse. Jackson's Hedge, assuring us that the 'broken men' sitting in the dock no longer represent any real threat to a recovering State, was in this sense pure bluff.

But crucially, if criminal legal deliberation accountability can be complete in itself – in the event of an acquittal – then defenders of the anti-impunity norm must at least contemplate the prospect that a trial can provide satisfactory accountability, and hence counter (broad) impunity, independently of the (narrow impunity) question of punishment. Satisfaction of deliberation accountability – again, if the defendant is acquitted – is complete in itself, and this fact serves to emphasise the unacceptable narrowness of the narrow anti-impunity norm. *Sanction* accountability would only arise in the case of a correct conviction receiving no punishment due to a wrong either within or external to the legal procedure – threats, corruption, general incompetence, and so on.

So we now know that the problem with narrowness in the narrow impunity conception is that it conflates one kind of accountability (sanc-

[34] See, for instance, Antony Duff, "Authority and Responsibility in International Criminal Law", in Samantha Besson and John Tasioulas (eds.), in *The Philosophy of International Law*, Oxford University Press, Oxford, 2010, pp. 589–604.

[35] See Michael Scharf, "Chaos in the Courtroom: Controlling Disruptive Defendants and Contumacious Counsel in War Crimes Trials", in *Case Western Reserve Journal of International Law*, 2007, vol. 39, pp. 155–170.

tion) with accountability as such. What about the problem of indeterminacy or vagueness in the broad impunity conception?

A more helpfully determinate conception of broad impunity would consist in a coordinated legal and political approach whose policies consciously aim to maximise accountability in both the deliberative and (where appropriate) the sanction-based meanings of the term. This implies that tough choices will arise where the prospects for sanction accountability are low enough, at a likely high enough cost to the chances for deliberation accountability, as to forgo the one in order to maximise the other where they cannot be pursued together. It implies that prosecutorial strategies will frequently demand political considerations and discretion regarding issues of security, or reconciliation, or the provision of forensic truth, considerations that have little or no precise counterparts in domestic criminal law. It means that there will be times when subjecting former power-wielders to demands to give accounts of themselves – with all the attendant risks – must be justifiable independently of retribution-based desires for desert or payback. [36] Crucially, it may require that international criminal law part company from the domestic analogue in its capacity to foresee the provision of accountability through means far broader than the

[36] As David Luban writes:

> The curious feature about international criminal law (ICL) is that in it the emphasis shifts from punishments to trials. Thus, it is often said that the goal of ICL lies in promoting social reconciliation, giving victims a voice, or making a historical record of mass atrocities to help secure the past against deniers and revisionists. The legitimacy of these goals can be questioned, because they seem extrinsic to pure legal values. But what is often overlooked is that, legitimate or not, they are the goals of trials, not punishments. Indeed, the punishment of the guilty seems almost an afterthought (not to them, of course). Perhaps that is because, as one often says, no punishment can fit crimes of such enormity; or because compared with their trial, their punishment lacks didactic and dramatic force. Whatever the reason, it is remarkable that the centre of gravity so often lies in the proceedings rather than in their aftermath. That is not an objection to the trials, if they are conducted fairly. But the use of the trial as political theatre puts pressure on its fairness; furthermore, international trials have at best a spotty track record of promoting social reconciliation, giving victims a voice, and making a record. Under some circumstances, truth and reconciliation commissions may do a better job, without the need for punishment; if so, the question of what justifies punishments in international criminal trials becomes even more compelling.
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> David Luban, "Fairness to Rightness: Jurisdiction, Legality, and the Legitimacy of International Criminal Law", in Samantha Besson and John Tasioulas (eds.), *The Philosophy of International Law*, Oxford University Press, Oxford, 2010, pp. 575–576.

formal procedures of the criminal trial, and experiment with new deliberative accountability procedures.

This kind of institutional imagination and experimentation has not been lacking in international criminal law ever since the 'new wave' of the middle of the 1990s – think, for instance, of the mixed or hybrid domestic/international criminal tribunal, or the division of labour between international, domestic, and reworked 'traditional' procedures such as the *gacaca* in post-genocide Rwanda. This chapter cannot go into these kinds of experiments in any detail. But in general, it can be said that they have had only very modest success, and relatively little effect in motivating the institution and practice of international criminal law toward more deliberative practices. More promising in this area is the rise of so-called "positive complementarity" between the Office of the Prosecutor of the ICC and the legal and political authorities of States Parties, where matters of jurisdiction, prosecutorial strategy, the "interests of justice" and the overall role of criminal law in peacemaking and democratic transitions looks less like a legal version of foreign development aid, and more like a substantive dialogue.[37]

Still, these experiments leave the core problems of the anti-impunity norm untouched. They occur at the periphery of international criminal law when reform is needed at its centre. Legal theorists still occasionally use the term *lex ferenda* to express the view that adjudication often is based on the legal authority's perception of a gap between what the law is and what the law should be – and perhaps what it will one day be. Thus, it can be suspected that Jackson's Hedge – the attempt to see international criminal law as both staunchly traditional in its focus on individual criminal guilt, and opening up to a new world of international

[37] On the by-now voluminous literature on positive or active complementarity, see, in particular, William Burke-White, "Proactive Complementarity: The International Criminal Court and the National Courts in the Rome System of Justice", in *Harvard International Law Journal*, 2008, vol. 49, pp. 53–108; Michael A. Newton, "The Quest for Constructive Complementarity", in *Vanderbilt University Law School Public Law and Legal Theory Working Paper* 10–16; Carsten Stahn, "Taking Complementarity Seriously: On the Sense and Sensibility of 'Classical', 'Positive' and 'Negative' Complementarity", in Carsten Stahn and Mohamed el Zeidy (eds.), *The International Criminal Court and Complementarity: From Theory to Practice*, Cambridge University Press, Cambridge, 2011, pp. 262–270; Morten Bergsmo (ed.), *Active Complementarity: Legal Information Transfer*, Torkel Opsahl Academic EPublisher, Brussels, 2011 (www.legal-tools.org/doc/2cc0e3/).

politics at the same time – is best interpreted as an oblique appeal to that view.

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