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

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

Restraint over Revenge: Emotional Bias, Reformative Punishment, and Plato's Contribution to Modern International Criminal Law

Emiliano J. Buis*

2.1. Introduction

The historical and conceptual evolution of international criminal law can be read as an open thread of tension between emotional punishment and more rationalising endeavours – in short, between retribution and individual reform. In order to justify its creation, at the end of World War II, the Nuremberg and Tokyo international military tribunals were presented as an improvement of previous revenge-based reactions, as a more sophisticated tool in the path towards the achievement of justice. Nevertheless, some authors have criticised this experience by stating that, in spite of its alleged explanations, these courts were heavily influenced by strong feelings on behalf of the victors against those who had just lost the war. Revenge and justice have always been at the core of the debates and sometimes coexisted in the creation of international tribunals.

According to a contemporary account that was declassified by the British government in October 2012, Winston Churchill opposed the es-

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establishment of the Nuremberg tribunals after World War II because he wanted Nazi leaders to be summarily executed and others to be imprisoned without judicial proceedings. This proposal, presented at the Yalta conference in February 1945, was rejected by Joseph Stalin, who claimed that public judgments would promote positive propaganda value, and Franklin D. Roosevelt, who contended that the American people were rather expecting institutionalised trials.¹

From different perspectives, both Marxist and Realist scholars have made it clear that these international legal developments can be shown as emotional constructions that are often very far away from the rationality their architects seemed to endorse in order to justify their necessity. “To realists”, Gary Bass writes in a book on the politics of international criminal courts, “a war crimes tribunal is simply something that the countries that decisively win a war inflict on the helpless country that loses it. It is punishment, revenge, spectacle – anything but justice”.²

The *ad hoc* international criminal tribunals, created by the Security Council as a result of the conflicts in the former Yugoslavia and Rwanda,³ have generated interesting debates on the tension between the alleged legality of the procedures and the identification of a vindictive approach of the international community to specific situations that needed to be solved locally.⁴

A similar line of thought, of course, seems to have accompanied the International Criminal Court (‘ICC’) from its very beginning at the Rome Conference. Unlike its predecessors, the ICC has been described as a contemporary institution built as a result of diplomatic agreements on the bases of legal legitimacy, due process, and institutionalised complementarity. However, its alleged selectivity has drawn sustained criticism from

¹ Ian Cobain, “Britain favoured execution over Nuremberg trials for Nazi leaders”, in *The Guardian*, 26 October 2012.

² Gary J. Bass, *Stay the Hand of Vengeance: The Politics of War Crimes Tribunals*, Princeton University Press, Princeton, 2000, p. 11.

³ The International Criminal Tribunal for the Former Yugoslavia (‘ICTY’) was established by the United Nations Security Council (‘UNSC’) Resolution 827/93, whereas the International Criminal Tribunal for Rwanda (‘ICTR’) was established the following year by UNSC Resolution 955/94.

⁴ Payam Akhavan, “Beyond Impunity: Can International Criminal Justice Prevent Future Atrocities?”, in *American Journal of International Law*, 2001, vol. 95, p. 12, considers that both tribunals helped to marginalise nationalist political leaders and other forces allied to ethnic war and genocide, and were able to discourage vengeance by victim groups.

different theoretical perspectives, which have highlighted a problematic political context. For example, in a lecture delivered back in 2009, Hans Köchler addressed the politicisation of international criminal justice, considering that the ICC was more interested in exerting global revenge than in promoting universal justice.⁵ That may or may not be true, but there has been a discussion between retributive and restorative justice in place in the last years as a result of the need to strike a balance between the role of victims and defendants in international tribunals.

Revenge has been considered a key element in international *politics*, a form of negative reciprocity that consists in seeking emotional satisfaction at the suffering of another.⁶ It has been frequently stated that international justice is a struggle against retaliation, since revenge, associated with anger, is an over-reaction that tends to inflict exaggerated and unreasonable suffering.⁷ Courts such as the *ad hoc* tribunals or the ICC operate in a “turbulent world where power matters”, where a small number of stronger countries intervene and operate far away from the imperatives of international justice.⁸ This explains why punishment – exacted by the most powerful – has not always responded to a proportional infliction of penalties but rather depended on the perception of harm or the subjective experience of maltreatment. The moral rejection of vindictive impulses has triggered a less politicised – and more rationalised – image of international justice.⁹ Based on the reading of the case law from the *ad hoc* tribunals, it could be said that the aim of punishment in international crimi-

⁵ Hans Köchler, “Global Justice or Global Revenge? The ICC and the Politicization of International Criminal Justice”, lecture delivered at the World Conference for International Justice, *United against the Politicization of Justice*, Khartoum, Sudan, 6 April 2009 (on file with the author).

⁶ On the importance of revenge in the context of interstate relations, see Oded Löwenheim and Gadi Heimann, “Revenge in International Politics”, in *Security Studies*, 2008, vol. 17, pp. 685–724. Although the paper focuses on the reaction of states that inflict suffering and explains the reasons behind revengeful retaliation, most of the arguments are relevant to discussions on the negative affective aspects of judicial revenge by judges in international courts.

⁷ Wesley Cragg, *The Practice of Punishment*, Routledge, London, 1992, pp. 16–19.

⁸ Citing an author who has dwelt on US power and international criminal justice, see David Bosco, *Rough Justice: The International Criminal Court in a World of Power Politics*, Oxford University Press, Oxford, 2014, p. 1.

⁹ Robert Nozick, *Philosophical Explanations*, Harvard University Press, Cambridge, 1981, pp. 366–67, has stressed the idea that revenge is opposed to the disinterestedness and ‘dispassion’ that are typical to just punishment.

nal tribunals has been somewhat unclear: keeping away from any possible connection to emotional payback, it has been attributed to general prevention, special deterrence, retribution, and – to a much lesser extent – rehabilitation.¹⁰

The long-term consequences of international prosecutions in the discouragement of future offences have been acknowledged,¹¹ even if the deterrent effects have appear to have been modest in practice so far.¹² There has been protracted confusion around the justifications put forward to endorse punishment at an international level. It has been suggested that the traditional purposes in criminal law should be supplemented.¹³ A lack of consensus around the justifications could arguably weaken the legitimacy of international sanctions, especially in situations where those affected oppose and attack the justice process, as was the case in the former Yugoslavia. It would be helpful if the perceived dichotomy or antithesis between retributivism and deterrence¹⁴ could be overcome. A more coherent and embracing theory of punishment could foster a better convergence of the interests of truth and justice.¹⁵ Ralph Henham has stated that, in any case, there is a need to re-conceptualise sentencing if restorative justice is intended to become a core purpose of international criminal justice: then judges should balance the interests of victims and stakeholders.¹⁶ Such an

¹⁰ Damien Scalia, *Du principe de légalité des peines en droit international pénal*, Bruylant, Brussels, 2011, pp. 280–85.

¹¹ Philipp Kastner, *International Criminal Justice in Bello?: The ICC Between Law and Politics in Darfur and Northern Uganda*, International Humanitarian Law Series, vol. 34, Martinus Nijhoff Publishers, Leiden, 2012, p. 10. On deterrence in international criminal law, see Payam Akhavan, “Justice in The Hague, Peace in the former Yugoslavia? A Commentary on the UN War Crimes Tribunal”, in *Human Rights Quarterly*, 1998, vol. 20, no. 4, pp. 737–816.

¹² David Wippman, “Atrocities, Deterrence, and the Limits of International Justice”, in *Fordham International Law Journal*, 1999, vol. 23, pp. 473–88.

¹³ On these objectives (with bibliography), see Mihaela Mihai, “Socializing Negative Emotions: Transitional Criminal Trials in the Service of Democracy”, in *Oxford Journal of Legal Studies*, 2011, vol. 31, no. 1, p. 112.

¹⁴ On a dubious claim concerning the uselessness of these categories for practical purposes in international criminal law, see Alexander K.A. Greenawalt, “International Criminal Law for Retributivists”, in *University of Pennsylvania Journal of International Law*, 2014, vol. 35, no. 4, pp. 969–1044.

¹⁵ Ralph Henham, “The Philosophical Foundations of International Sentencing”, in *Journal of International Criminal Justice*, 2003, vol. 1, no. 1, pp. 64–85.

¹⁶ Ralph Henham, “Towards Restorative Sentencing in International Criminal Trials”, in *International Criminal Law Review*, 2009, vol. 9, p. 832.

approach, in which ending impunity implies balancing rights (of victims) and accountability (of perpetrators), emerges against the background of the perceived humanitarianism that international tribunals have pursued in furtherance of a restorative function.¹⁷

The implicit language in these approaches points to the rationale underlying international criminal law. Since the work of judges and tribunals involves delicate exercise of discretion (including respect for authority, sovereignty and its limits, and punishment of perpetrators), it may be unavoidable that there is an emotional dimension that can help explain the fortune of international criminal justice. Facing a desire for revenge, a humanitarian sentiment of compassion or benevolence resonates with many judges and other lawyers involved in questions of guilt and sentencing.

Is there an historical *Hinterland* to all these considerations? Can history illustrate this state of affairs and even clarify some of what most scholars consider to be recent tensions in international criminal justice? Despite possible, isolated examples that could be related to *post bellum* regulations, international criminal law (as we know it today) was unknown in the times of Classical Greece and Rome. This does not imply that no connection can be suggested between ancient Greek thought and the foundations of international justice. In this chapter, I will address this possible connection by drawing attention to the specific discussion of emotion, revenge, humanitarian benevolence and punishment, since I believe that some classical Greek philosophical discussions can shed light on some of the current debates surrounding the work of international tribunals. In particular, I will first deal with the concept of 'emotion' and its importance in reflections in international legal discourse (Section 2.2.). Against this interpretative framework, I will then focus on Plato's doctrines, which can provide interesting insights into key problems related to both the consolidation of modern international criminal law and hindrances thereto (Section 2.3.).

¹⁷ This is the main argument of Sara Kendall, "Beyond the Restorative Turn: The Limits of Legal Humanitarianism", in Christian De Vos, Sara Kendall and Carsten Stahn (eds.), *Contested Justice: The Politics and Practice of International Criminal Court Interventions*, Cambridge University Press, Cambridge, 2015, pp. 352–76.

2.2. Emotions, Crimes and International Law

At the beginning, the study of emotions was confined to philosophers,¹⁸ before turning to the field of psychology, from which it derives current theoretical input.¹⁹ Emotions gradually started to invade the reflections of all human and social sciences.²⁰ A group of authors, inspired by the first steps taken by Charles Darwin, promoted an organic vision that places the origins of emotions in nature. They would try to find categories based on neurobiology, independent of linguistic and cultural differences.²¹ This ‘biologist’ perspective – which postulates that emotions are repeated unchanged in different historical and social spheres – was later challenged by the so-called cultural (or relativist) theories.

Authors embedded in cultural relativism identify the existence of an ideological construction of emotions that changes according to time, place and a series of variables conditioning its appearance and features.²² In line with this way of revisiting emotions, gestures that show affective experiences are far from being mere manifestations that repeat from one place to another; rather, emotions are meaningful only in the context in which they are experienced. In other words, instead of serving only to reveal feelings,

¹⁸ Cf. Michel Meyer, *Le Philosophe et les passions*, Presses Universitaires de France, Paris, 2007; Peter Goldie, *The Oxford Handbook of Philosophy of Emotion*, Oxford University Press, Oxford, 2010.

¹⁹ For instance, Keith Oatley, *Best Laid Schemes: The Psychology of Emotions*, Cambridge University Press, Cambridge, 1992.

²⁰ For the purposes of this chapter, and following the model which has been suggested by previous work, I will refer to the concepts of ‘emotion’, ‘affection’ and ‘feelings’ as synonyms. For a more detailed and accurate perspective, see António R. Damásio, *Descartes’ Error: Emotion, Reason and the Human Brain*, Harper Collins, New York, 1994.

²¹ See, for instance, Paul Ekman, *Emotions in the Human Face*, Cambridge University Press, Cambridge, 1982, who discusses universal emotions and their facial expressions, which – according to him – remain unchanged. David Buss, *The Evolution of Desire: Strategies of Human Mating*, Basic Books, New York, 1994, focuses on common transcultural experiences that can be identified in affective terms.

²² For example, James Clifford and George E. Marcus (eds.), *Writing Culture: The Poetics and Politics of Ethnography*, University of California Press, Berkeley, 1986. On the variation of emotions in history, see Peter N. Stearns, “History of Emotions: Issues of Change and Impact”, in Michael Lewis and Jeannette Haviland-Jones (eds.), *Handbook of Emotions*, 2nd edition, Guilford Press, New York, 2000, pp. 16–29.

emotional experiences are conditioned by circumstances and, therefore, are symbolic.²³

Cognitivist theories, meanwhile, deal with the claim that emotions provide value judgments, imply the appreciation or evaluation of an external 'object' perceived and interpreted. Emotions become thus a social phenomenon.²⁴ It is interesting to dwell on this cognitive imprint, which allows us to identify in every emotion a cultural and interpersonal process that is not spontaneous.

Some eclectic positions have finally tried to overturn the traditional dichotomy between neo-Darwinians and cognitivists: in conceiving that emotions represent a complex reality, it seems that natural, cultural, biological and social elements coexist in the affective dimension.²⁵

From my perspective, emotions should be defined as a broad set of differentiated, biologically-based complexes that are constituted by interactions between physical and socio-cultural systems.²⁶ Martha Nussbaum has stated that emotions are not natural elements, but rather constructs learned and reinforced through social interactions.²⁷ In this double dimension, then, feelings convey information about people and unconscious

²³ Janet Beavin Bavelas and Nicole Chovil, "Faces in Dialogue", in James A. Russell and José Miguel Fernández Doll (eds.), *The Psychology of Facial Expression*, Cambridge University Press, Cambridge, 1997, pp. 337–39. In an important contribution that will be dealt with later in this chapter, David Konstan, *The Emotions of the Ancient Greeks: Studies in Aristotle and Classical Literature*, University of Toronto Press, Toronto, 2006, p. 5, considers an analogy. He compares the identification of emotions to the cultural perception of colours, which can be classified differently according to the cultural circumstances affecting the evaluation. This conclusion makes it impossible to consider emotions as universal products.

²⁴ Cf. Albert Bandura, *Aggression: A Social Learning Analysis*, Prentice Hall, Englewood Cliffs, 1973.

²⁵ Some scholars, like Paul E. Griffiths (in *What Emotions Really Are: The Problem of Psychological Categories*, University of Chicago Press, Chicago, 1994), draw a distinction between two different kinds of emotions on the basis of the degree of 'naturalness' of feelings involved: the 'highest' emotions are considered to be the cognitive ones (among which are envy, guilt, jealousy or love). In my opinion, attempts to classify emotions are problematic, since they often lose sight of the general features of emotions and stigmatise affective experiences by labelling their content and characteristics.

²⁶ Rose McDermott, "The Feeling of Rationality: The Meaning of Neuroscientific Advances for Political Science", in *Perspectives on Politics*, 2004, vol. 2, p. 692.

²⁷ Cf. Martha Nussbaum, *Upheavals of Thought: The Intelligence of Emotions*, Cambridge University Press, Cambridge, 2001; Martha Nussbaum, *Hiding from Humanity: Disgust, Shame and the Law*, Princeton University Press, Princeton, 2004.

processes that then become conscious and affect their perceptions.²⁸ According to recent neuropsychological studies,²⁹ emotions are essential prerequisites for understanding the behaviour of subjects and, therefore, for explaining the emergence of the rules that frame their actions.³⁰

Law, as expressed by Susan Bandes, is pervaded with emotions.³¹ In criminal law, for example, there has been a big debate on the presence of affections in the courtroom, especially taking into account that litigants frequently make reference to a subjective dimension when trying to convince the jury members. What role should emotions play in addressing facts and, then, in condemning or releasing an alleged criminal? It has been a widespread position to argue that, as opposed to the natural impulses of affections which are typical to criminal cases, judges should refrain from displaying any sort of emotional bias. Terry Maroney – one of the scholars who dedicated more efforts to the topic – suggested that there is a conventional image of a judge acting as a dispassionate person, creating in modern times a stereotype based on a “persistent cultural script of judicial dispassion”.³² Even if recent work has been done on the positive role of judicial emotions as an instrument that might help the judge arrive at correct decisions,³³ at the end of the day there is always a strong practical argument for judges to refrain from acting on an emotional basis. However, the idea that emotion and reason are contradictory phenomena, which stands at the core of Western judicial culture, needs to be revisited, and few attempts have been made to reveal what lies behind the much appreciated ‘objectivity’ of jurors.³⁴ One of these attempts consists in ac-

²⁸ Gerald L. Clore, “Cognitive Phenomenology: Feelings and the Construction of Judgment”, in Leonard L. Martin and Abraham Tesser (eds.), *The Construction of Social Judgments*, Erlbaum, Hilldale, 1992, pp. 133–63.

²⁹ Damásio, 1994, pp. 127–63, see *supra* note 20.

³⁰ This is the central idea in Nico H. Frijda, *The Emotions*, Cambridge University Press, Cambridge, 1986.

³¹ Susan Bandes, “Introduction”, in Susan Bandes (ed.), *The Passions of Law*, New York University Press, New York, 1999, p. 1.

³² Terry Maroney, “The Persistent Cultural Script of Judicial Dispassion”, in *California Law Review*, 2011, vol. 99, pp. 629–81.

³³ Pavel Vasilyev, “Beyond Dispassion: Emotions and Judicial Decision-Making in Modern Europe”, in *Rechtsgeschichte*, 2017, vol. 25, pp. 277–85.

³⁴ One example of this approach, that insists on revealing the “emotional” background behind the ambition for objectivity, can be found in Stina Bergman Blix and Åsa Wettergren, “A Sociological Perspective on Emotions in the Judiciary”, in *Emotion Review*, 2016, vol. 8, no. 1, pp. 32–37.

knowledging that, far from consolidating an unwary reaction, there exists a conscious adjustment of feelings and expressions in the judiciary, an operation that Arlie R. Hochschild has called “emotion management”.³⁵

The widespread reflection on the emotional experience of judges sitting in national courts, as we have just mentioned, has had its difficulties in spreading to the international debate, in spite of the number of recent contributions that have been suggesting the importance of the emotional shift in international law.³⁶ Very few voices have so far discussed the emotional bias of judges sitting in international tribunals. One notorious exception is Vesselin Popovski, who has claimed for a demotionalisation of the international criminal process in order for courts to be granted legitimacy.³⁷

Examining the pros and cons of emotional bias in the judiciary (and even its feasibility) can be better achieved if its theoretical background is revealed. In my opinion, this understanding – or at least the identification of the interests at stake – requires a philosophical exploration, since the relationship between the affections and the judicial resolution of controversies has a long-standing tradition in legal thinking.

³⁵ Arlie Russell Hochschild, *The Managed Heart: Commercialization of Human Feeling*, University of California Press, Los Angeles, 1983; Arlie Russell Hochschild, “Ideology and Emotion Management: A Perspective and Path for Future Research”, in Theodore D. Kemper (ed.), *Research Agendas in the Sociology of Emotions*, State University of New York Press, New York, 1990, pp. 117–42.

³⁶ On emotions and international relations, see, for instance, Neta C. Crawford, “The Passion of World Politics: Propositions on Emotion and Emotional Relationships”, in *International Security*, 2000, vol. 24, no. 4, pp. 116–56; Roland Bleiker and Emma Hutchison, “Fear No More: Emotions and World Politics”, in *Review of International Studies*, 2008, vol. 34, no. 1, pp. 115–35; Brent E. Sasley, “Theorizing States’ Emotions”, in *International Studies Review*, 2011, vol. 13, pp. 452–76; George E. Marcus, *The Sentimental Citizen: Emotion in Democratic Politics*, Pennsylvania State University Press, University Park, 2002; Andrew A.G. Ross, *Mixed Emotions: Between Fear and Hatred in International Conflict*, University of Chicago Press, Chicago, 2014. On the emotional turn in international law, see Gerry Simpson, “The Sentimental Life of International Law”, in *London Review of International Law*, 2015, vol. 3, no. 1, pp. 3–29.

³⁷ According to him, “judges need to remain un-biased, non-emotional, looking only at the facts and laws when delivering sentences”; cf. Vesselin Popovski, “Emotions and International Law”, in Yohan Arriffin, Jean-Marc Coicaud and Vesselin Popovski (eds.), *Emotions in International Politics: Beyond Mainstream International Relations*, Cambridge University Press, Cambridge, 2016, p. 185.

The so-called ‘affective turn’, which seems to have made its way into the legal sphere only recently,³⁸ can be traced in its origins to the experience of Greek philosophers, who were in fact the first to understand that emotions (*páthe*) could provide a basis to understand judicial performance. In the case of ancient Athens, emotions were already deemed to be socially relevant,³⁹ since according to David Konstan, their identification involved an awareness of other subjectivities.⁴⁰ *Páthe* were seen as responses to actions that generate consequences for our own (or someone else’s) relative social status⁴¹ and should be interpreted thus as symbolic constructions which have great value in political terms.⁴² As I intend to show, the inputs provided by the classical Greek experience can be extremely useful in re-thinking the problems related to the benefits and risks involving the display of certain emotions in legal procedures.

The public representation of emotions in the ancient Greek world responded to social patterns which turned them into cultural constructions under social control. Joining the conclusions of a very interesting debate on the construction of common emotional experiences in religious rituals,⁴³ I contend that it might be possible to identify in classical Greece what Barbara Rosenwein called a legal ‘emotional community’.⁴⁴ When dealing with justice and revenge, ancient Greeks can be seen as a group

³⁸ Bandes, 1999; see *supra* note 31; Terry A. Maroney, “Law and Emotion: A Proposed Taxonomy of an Emerging Field”, in *Law and Human Behavior*, 2006, vol. 30, no. 2, pp. 119–42; Susan Bandes and Jeremy A. Blumenthal, “Emotion and the Law”, in *Annual Review of Law and Social Science*, 2012, vol. 8, pp. 161–81.

³⁹ Angelos Chaniotis, “Unveiling Emotions in the Greek World: Introduction”, in Angelos Chaniotis (ed.), *Unveiling Emotions: Sources and Methods for the Study of Emotions in the Greek World*, Steiner Verlag, Stuttgart, 2012, p. 15.

⁴⁰ This is the thesis endorsed by David Konstan, *The Emotions of the Ancient Greeks: Studies in Aristotle and Classical Literature*, University of Toronto Press, Toronto, 2006.

⁴¹ *Ibid.*, p. 40.

⁴² *Ibid.*, p. xiii: “The emotions, as opposed to drives or appetites, depend on the capacity for symbolization. For the Greeks, persuasion was central to the idea of an emotion, whether in the law courts, in political assemblies, or in the various therapies that relied on verbal interactions to change the judgments that are constitutive of the passions”.

⁴³ Angelos Chaniotis, “Emotional Community through Ritual. Initiates, Citizens, and Pilgrims as Emotional Communities in the Greek World”, in Angelos Chaniotis (ed.), *Ritual Dynamics in the Ancient Mediterranean: Agency, Emotion, Gender, Representation*, Steiner Verlag, Stuttgart, 2011, pp. 264–90.

⁴⁴ Barbara H. Rosenwein, *Emotional Communities in the Early Middle Ages*, Cornell University Press, Ithaca, 2006, p. 2.

that adhered to the same norms of emotional expression, valuing the same (or related) emotions on law and its possibilities.

The example of the earliest case of transitional justice on record is useful here.⁴⁵ In 404 BC, by the end of the Peloponnesian War, an oligarchy was established at Athens. It lasted four months during which massacres were committed and half of the population was forcibly displaced.⁴⁶ When democracy was re-established, there was a delicate balance between retribution and forgiveness: those who had held the highest offices under the regime of the Thirty Tyrants were prosecuted and found guilty of atrocities committed against the people (they could be condemned to death unless they were in exile), but it was decided to grant amnesty to all the rest.⁴⁷ Aristotle records these events, emphasising that the cancellation of responsibility for past actions was a commendable decision (*Ath. Pol.* 40.2–3):

δοκοῦσιν κάλλιστα δὴ καὶ πολιτικώτατα ἀπάντων καὶ ἰδίᾳ
καὶ κοινῇ χρῆσασθαι ταῖς προγεγενημέναις συμφοραῖς· οὐ
γὰρ μόνον τὰς περὶ τῶν προτέρων αἰτίας ἐξήλειψαν, ἀλλὰ

⁴⁵ Jon Elster, *Closing the Books: Transitional Justice in Historical Perspective*, Cambridge University Press, Cambridge, 2004. I have already discussed the historical aspects of this episode in Emiliano J. Buis, “Between *Isonomia* and *Hegemonia*: Political Complexities of Transitional Justice in Ancient Greece”, in Morten Bergsmo, CHEAH Wui Ling, SONG Tianying and YI Ping (eds.), *Historical Origins of International Criminal Law: Volume 3*, , Torkel Opsahl Academic EPublisher, Brussels, 2015, pp. 57–60.

⁴⁶ The orator Isocrates relates in his *Areopagiticus* that the Thirty Tyrants killed fifteen hundred people without trial and forced more than five thousand to leave the city and take refuge in the Piraeus (οἱ μὲν γὰρ ψηφίσματι παραλαβόντες τὴν πόλιν πεντακοσίους μὲν καὶ χιλίους τῶν πολιτῶν ἀκρίτους ἀπέκτειναν, εἰς δὲ τὸν Πειραιᾶ φυγεῖν πλείους ἢ πεντακισχιλίους ἠνάγκασαν, 7.67). The Greek text corresponds to Isocrates, *Isocrates*, vol. 2, George Norlin ed. and trans., Harvard University Press, Cambridge, 1980. The *Constitution of the Athenians* (35.4) also notes that no fewer than fifteen hundred individuals were killed. This is undoubtedly the best documented instance of *stasis* in the period just after the Peloponnesian War, as presented by Josiah Ober, “Conflictos, controversias y pensamiento político”, in Robin Osborne (ed.), *La Grecia Clásica: 500-323 a. C.*, Critica, Barcelona, p. 128.

⁴⁷ On this episode and its repercussions in modern cases of transitional justice, cf. Elster, 2004, see *supra* note 45, pp. 7–8; Adriaan Lanni, “Transitional Justice in Ancient Athens: A Case Study”, in *University of Pennsylvania Journal of International Law*, 2010, vol. 32, no. 2, pp. 551–94. On other possible examples of amnesty laws in classical Greece, cf. Gertrude Smith, “The Prytaneum in the Athenian Amnesty Law”, in *Classical Philology*, 1921, vol. 16, pp. 345–46.

καὶ τὰ χρήματα Λακεδαιμονίοις, ἃ οἱ τριάκοντα πρὸς τὸν πόλεμον ἔλαβον, ἀπέδοσαν κοινῇ [...]⁴⁸

But [the Athenians] appear both in private and public to have behaved towards the past disasters in the most completely honorable and statesmanlike manner of any people in history; for they not only blotted out recriminations with regard to the past, but also publicly restored to the Spartans the funds that the Thirty had taken for the war [...]⁴⁹

The only contemporary evidence that has survived concerning these events comes from indirect references in Andocides' speech *On the Mysteries*. After having been arrested and tried for entering a sacred precinct when forbidden by a decree – because he had participated in the sacrileges of 415 BC – the orator argues that the decree denying him entry to the precinct is null and void as a result of the amnesty following the restoration of democracy in the autumn of 403. It is in this context that Andocides describes the advantages of the new regime in general and of the amnesty in particular, in the following terms (1.81):

ἐπειδὴ δ' ἐπανήλθετε ἐκ Πειραιῶς, γενόμενον ἐφ' ὑμῖν τιμωρεῖσθαι ἔγνωτε ἔαν τὰ γεγενημένα, καὶ περὶ πλείονος ἐποιήσασθε σῶζειν τὴν πόλιν ἢ τὰς ιδίας τιμωρίας, καὶ ἔδοξε μὴ μνησικακεῖν ἀλλήλοις τῶν γεγενημένων.⁵⁰

After your return from Piraeus you resolved to let bygones be bygones, in spite of the opportunity for revenge (τιμωρεῖσθαι). You considered the safety of Athens of more importance than the settlement of private scores; so both sides, you decided, were to forget the past (μὴ μνησικακεῖν).⁵¹

The prohibition on bringing up the bad things that had happened (μὴ μνησικακεῖν)⁵² is interpreted as a decision in favour of the salvation

⁴⁸ The Greek text is that of Aristotle, *Constitution d'Athènes*, George Mathieu and Bernard Haussoulrier eds. and trans., Les Belles Lettres, Paris, 2002.

⁴⁹ Aristotle, *Athenian Constitution. Eudemian Ethics. Virtues and Vices*, Harris Rackham ed. and trans., Harvard University Press, Cambridge, 1952.

⁵⁰ The Greek text in this and the following quotation corresponds to Antiphon and Andocides, *Minor Attic Orators*, vol. 1, Kenneth John Maidment ed. and trans., Harvard University Press, Cambridge, 1968.

⁵¹ *Ibid.*

⁵² On the expression and its complex connotations, cf. Edwin Carawan, "The meaning of *mē mnēsikakein*", in *Classical Quarterly*, 2012, vol. 62, no. 2, pp. 567–81, who translates it as 'recall-wrong'. As noted by David Cohen, "The rhetoric of justice: strategies of reconcilia-

of the city and against the survival of a spirit of revenge unsuitable in the public sphere.⁵³ Later in the speech, Andocides insists upon a strict opposition between an act of public justice (forgetfulness that begets concord) and private retribution (which prolongs suffering); he stresses the wisdom and prudence of the former (1.140):

νυνὶ πᾶσι τοῖς Ἑλλήσιν ἄνδρες ἄριστοι καὶ εὐβουλότατοι
δοκεῖτε γεγενῆσθαι, οὐκ ἐπὶ τιμωρίαν τραπόμενοι τῶν
γεγενημένων, ἀλλ' ἐπὶ σωτηρίαν τῆς πόλεως καὶ ὁμόνοιαν
τῶν πολιτῶν. συμφοραὶ μὲν γὰρ ἤδη καὶ ἄλλοις πολλοῖς
ἐγένοντο οὐκ ἐλάττους ἢ καὶ ἡμῖν· τὸ δὲ τὰς γενομένας
διαφορὰς πρὸς ἀλλήλους θέσθαι καλῶς, τοῦτ' εἰκότως ἤδη
δοκεῖ ἀνδρῶν ἀγαθῶν καὶ σωφρόνων ἔργον εἶναι.

The whole of Greece thinks that you have shown the greatest generosity and wisdom in devoting yourselves, not to revenge (τιμωρίαν), but to the preservation of your city and the reuniting of its citizens. Many before now have suffered no less than we; but it is very rightly recognized that the peaceable settlement of differences requires generosity and self-control (σωφρόνων).⁵⁴

This original means of dealing with *stásis* or internal strife – eschewing punishment and mandating forgetfulness – had a clear aim: to

tion and revenge in the restoration of Athenian democracy in 403 BC”, in *European Journal of Sociology (Archives Européennes de Sociologie)*, 2001, vol. 42, no. 2, p. 339: “the relevant phrase which grounds the amnesty is typically translated as ‘to forget’ or ‘not to remember’ what the oligarchs had done. In this context, however, the crucial phrase ‘not to *mnesikakein*’ actually means not to hold a grudge in the sense in which this is understood in a revenge society: that is, not to seek vengeance”. A passage from the *Constitution of the Athenians* repeats the language of Andocides when affirming that “no one was permitted to hold the past against anyone (τῶν δὲ παρεληλυθότων μηδενὶ πρὸς μηδένα μνησικακεῖν ἐξεῖναι) except the Thirty, the Ten, the Eleven, and those who were in charge in the Piraeus; and not even against them if they should render their accounts” (39.6). This evidence is not original, however, since the agreement of 403 did not include exceptions to the obligation of μὴ μνησικακεῖν (according to Edwin Carawan, “Amnesty and Accountings for the Thirty”, in *Classical Quarterly*, 2006, vol. 56, no. 1, pp. 57–76, this passage combines the content of the original agreement with exceptions that were added later).

⁵³ Similarly, the particular role of local amnesties in the transitional experiences of Mozambique and South Africa as a better institutional alternative to the traditional Western approaches to justice has been studied by Helena Cobban, *Amnesty After Atrocity? Healing Nations After Genocide and War Crimes*, Routledge, New York, 2007.

⁵⁴ Antiphon and Andocides, 1968, see *supra* note 50.

end the civil war⁵⁵ and restore democratic values.⁵⁶ In a time of political transition, the sentence and the amnesty provided emotional relief as they permitted the re-establishment of Athenian unity and social peace without the need to revisit negative emotions related to revenge, which meant returning to the past.⁵⁷

This example prepares the setting to a brief exploration of the Platonic theoretical contributions on justice, punishment and the role of judicial emotions.

2.3. Learning from Punishment in Plato: Suppressing Anger?

According to Aristotle (*Rhetorics* 2.2, 1378a-30-32), anger (*orgé*) is a longing (ὄρεξις), accompanied by pain (μετὰ λύπης), for a revenge (τιμωρίας) due to a real or apparent insult (διὰ φαινομένην ὀλιγοψίαν) affecting a man or one of his friends, when such an insult is undeserved (τοῦ ὀλιγοψεῖν μὴ προσήκοντος). According to this vision, *orgé* entails certain pleasure, he says, since it is gratifying to inflict a penalty over a person who deserves it. This relationship between anger and revenge has drawn several authors to consider that *orgé* in Athens was an emotion closely related to the democratic body, a collective emotion that could be unleashed when citizens were called to defend the *pólis* and its institutions. This is done by retaliating against a specific individual who acted unjustly.⁵⁸

This feature explains the frequent reference to the verb ὀργίζω in the ancient sources related to the functioning of Athenian law courts.⁵⁹ In

⁵⁵ Christopher J. Joyce, “The Athenian Amnesty and Scrutiny of 403”, in *Classical Quarterly*, 2008, vol. 58, no. 2, pp. 507–18.

⁵⁶ The Thirty Tyrants were seen as enemies of the democratic regime. Cohen, 2001, p. 347, see *supra* note 52, clearly states: “In the political discourse of fourth century Athens, the Thirty Tyrants came to stand for the antithesis of the rule of law”.

⁵⁷ Lanni, 2010, see *supra* note 47, pp. 593–94.

⁵⁸ On ancient Greek anger, cf. Danielle Allen, “Angry Bees, Wasps and Jurors: the Symbolic Politics of *orgé* in Athens”, in Susanna M. Braund and Glenn W. Most (eds.), *Ancient Anger: Perspectives from Homer to Galen*, Yale Classical Studies, no. 32, Cambridge University Press, Cambridge, 2003, pp. 76–98; William V. Harris, *Restraining Rage: The Ideology of Anger Control in Classical Antiquity*, Harvard University Press, Cambridge, 2001; Konstan, 2006, see *supra* note 40, pp. 41–76 (especially in its relationship to democracy, pp. 75–76).

⁵⁹ Cf. Lene Rubinstein, “Stirring Up Dicastic Anger”, in Douglas Cairns and Ronald Knox (eds.), *Law, Rhetoric, and Comedy in Classical Athens: Essays in Honour of Douglas M. MacDowell*, The Classical Press of Wales, Swansea, 2004, pp. 187–204; Évelyne Scheid-

his *Against Leochites*, for instance, Isocrates (20.6) states that, after an act of *adikia*, free men need to become angry and exert revenge. Similarly, if an injustice is committed on purpose, Demosthenes explains that anger and punishment (*timoria*) should go hand in hand (*On the Crown*, 18.274).

In the context of what we can call the first attempt at the consolidation of an affective psychology,⁶⁰ Plato's perspective on the limits of anger can be useful when assessing the reality underlying the administration of justice, as it shows the difficult coexistence between revenge and justice.⁶¹ His dialogues provide us with the earliest example of reformatory punishment in Western thought, since they display a revision of the Athenian conception of punishment, which is challenged by a new conception. In this 'paradigm shift',⁶² the angry punisher willing to rectify an unbalanced social order is replaced by a rational judge whose intention is to educate or reform a diseased wrongdoer who committed an injustice because he was sick and needed to be cured. Plato offers a subversion of the traditional paradigms of justice on which Athens was based. In his opinion, criminal justice is a cure, a way of responding to social disruption, and not an opportunity to exercise anger and exert power against the enemy.

Our study of the texts should definitely start with *Protagoras* 323d–324b. In this moment of the dialogue, Socrates agrees with Protagoras when he considers that people who punish for the sake of irrational passions and look to the past are bestial, as part of an argument for reforma-

Tissinier, "Les revendications de la vengeance dans les plaidoyers attiques", in Michel Molin (ed.), *Les régulations sociales dans l'antiquité*, Presses Universitaires de Rennes, Rennes, 2006, pp. 97–113; Évelyne Scheid-Tissinier, "Le rôle de la colère dans les tribunaux athéniens", in Pauline Schmitt Pantel and François de Polignac (eds.), *Athènes et le politique: Dans le sillage de Claude Mossé*, Albin Michel, Paris, 2007, pp. 179–98; Victor Bers, "Appeals to Pity and Displays of Anger", in *Genos Dikanikon: Amateur and Professional Speech in the Courtroom of Classical Athens*, Center for Hellenic Studies, Trustees for Harvard University, London, 2008, pp. 77–98.

⁶⁰ H.N. Gardiner, "The Psychology of Affections in Plato and Aristotle", in *The Philosophical Review*, 1918, vol. 27, no. 5, p. 469.

⁶¹ On emotions in Plato, see the short but interesting introduction by Lidia Palumbo, *Eros, Phobos, Epithymia: Sulla natura dell'emozione in alcuni dialoghi di Platone*, Loffredo, Naples, 2001. Her selection of sources, however, does not provide the reader with a comprehensive picture.

⁶² Danielle S. Allen, *The World of Prometheus: The Politics of Punishing in Democratic Athens*, Princeton University Press, Princeton, 2000, pp. 245–81.

tive punishment based on the values of social virtue. In 324a–b, Protagoras had presented the essential grounds for his argument:

εἰ γὰρ ἐθέλεις ἐννοῆσαι τὸ κολάζειν, ὃ Σώκρατες, τοὺς ἀδικοῦντας τί ποτε δύναται, αὐτό σε διδάξει ὅτι οἱ γε ἄνθρωποι ἡγοῦνται παρασκευαστὸν εἶναι ἀρετήν. οὐδεὶς γὰρ κολάζει τοὺς ἀδικοῦντας πρὸς τούτῳ τὸν νοῦν ἔχων καὶ τούτου ἕνεκα, ὅτι ἡδίκησεν, ὅστις μὴ ὥσπερ θηρίον ἀλογίστως τιμωρεῖται· ὁ δὲ μετὰ λόγου ἐπιχειρῶν κολάζειν οὐ τοῦ παρελθυθέντος ἕνεκα ἀδικήματος τιμωρεῖται—οὐ γὰρ ἂν τό γε πραχθὲν ἀγένητον θείῃ—ἀλλὰ τοῦ μέλλοντος χάριν, ἵνα μὴ αὖθις ἀδικήσῃ μήτε αὐτὸς οὗτος μήτε ἄλλος ὁ τοῦτον ἰδὼν κολασθέντα.

For if you will consider punishment, Socrates, and what control it has over wrong-doers, the facts will inform you that men agree in regarding virtue as procured. No one punishes (κολάζει) a wrong-doer from the mere contemplation or on account of his wrong-doing, unless one takes unreasoning vengeance (τιμωρεῖται) like a wild beast. But he who undertakes to punish (κολάζειν) with reason (μετὰ λόγου) does not avenge (τιμωρεῖται) himself for the past offence, since he cannot make what was done as though it had not come to pass; he looks rather to the future, and aims at preventing that particular person and others who see him punished (κολασθέντα) from doing wrong again.⁶³

Protagoras makes a distinction here between two kinds of punishment, namely punishment that aims to reform and punishment that seeks to remedy the past.⁶⁴ He uses the word ‘*kolázein*’ to refer to reformative punishment and ‘*timoreísthai*’ to denote a retributive punishment related to revenge.⁶⁵ Reasonable self-control here seems to be opposed to emotional backlash. In this set of concepts, *timoría* – personal vengeance – is clearly marginalised. Socrates argues with Protagoras’ analysis of why virtue is teachable, but never dismisses the dichotomy: whereas most peo-

⁶³ The Greek text and the translation are taken from Plato, *Lysis. Symposium. Gorgias*, Walter Rangeley Maitland Lamb ed. and trans., Harvard University Press, Cambridge, 1967.

⁶⁴ According to Leo Zaibert, “Punishment and Revenge”, in *Law and Philosophy*, 2006, vol. 25, p. 81, this passage “continues to be the predominant view amongst philosophers of law regarding the relationship between punishment and revenge”. The paper discusses modern approaches to the interplay between the two concepts.

⁶⁵ On the Greek vocabulary for punishment – especially the antithesis between *timoría* and *kólasis* – see Allen, 2000, see *supra* note 62, pp. 68–72.

ple consider that to be punished means to suffer something bad, Socrates contends that suffering justice is getting something beautiful. Hence the act of 'suffering justice' cannot be considered as an unpleasant experience or as an evil but rather implies having one's life enhanced by justice.⁶⁶ Rage (*thymós*) is opposed to virtue; by condemning the spontaneity of retribution, Protagoras rationalises a collective sanction which has an instructive and moralising purpose towards the community.⁶⁷ It is the basis of a new morality founded on a rational will to reform.⁶⁸ As Mackenzie explains, this position will echo Plato's own theory – which will be presented in other dialogues – in which "rational punishment [...] looks to the future by preventing the offender himself from repeating the offence and by deterring others to emulate him".⁶⁹

In the dialogue *Gorgias*, Plato holds the opinion that moral wrongs harm those who commit them. Socrates's interlocutor, Polus, argues that wrongdoers are wretched and those who escape punishment are worse than those who face them (473b–c). Punishment in fact should grant a benefit for the offenders, as stated in the many questions asked by Socrates in 477a: he who pays the penalty suffers what is good (ἀγαθὰ ἅρα πάσχει ὁ δίκην διδούς), because he becomes better if he is justly punished

⁶⁶ This paragraph comes from Anastasios Ladikos, "Plato's View on Capital Punishment", in *Phronimon*, 2005, vol. 6, no. 2, p. 52.

⁶⁷ Olivier Renaut, *Platon: La médiation des émotions: L'éducation du thymos dans les dialogues*, J. Vrin, Paris, 2014, pp. 62–63. According to Létitia Mouze, "Les émotions dans la théorie esthétique et politique platonicienne", in Sylvain Roux (dir.), *Les émotions*, J. Vrin, Paris, 2009, p. 23: "tout le problème du législateur est donc de rationaliser la sensibilité, et de ce point de vue, de la rendre spécifiquement humaine". According to her, art, education, and legislation have the same objective: to humanise emotions (p. 24).

⁶⁸ This seemingly unemotional restraint, as it will be explained later, does not exclude compassion under certain circumstances. John R. Wallach, *The Platonic Political Art: A Study of Critical Reason and Democracy*, The Pennsylvania State University Press, University Park, 2001, p. 161, states that "with respect to the institution of punishment, Protagoras notes how Athenians regard with pity those individuals who either lack a valuable trait that normally comes by nature or possess a regrettable trait that they have acquired by chance, but pitilessly chastise those who lack qualities that come by exercise and training".

⁶⁹ Mary Margaret Mackenzie, *Plato on Punishment*, Cambridge University Press, Cambridge, 1981, p. 189. Caution however should be applied when comparing Protagoras' position in the dialogue with the Platonic views. That said, it seems clear to me that the references in Protagoras are extremely useful in order to understand Plato's penology. On a thorough examination of the passages mentioned *supra* as an embodiment of Protagoras' authentic views, see R.F. Stalley, "Punishment in Plato's *Protagoras*", in *Phronesis*, 1995, vol. 40, no. 1, pp. 1–19, who concludes that both Protagoras and Socrates represent some of the arguments which will be included in Plato's later dialogues.

(βελτίων τὴν ψυχὴν γίγνεται, εἴπερ δικαίως κολάζεται), and thus relieved from the badness of soul (κακίας ἄρα ψυχῆς ἀπαλλάττεται ὁ δίκην διδούς).⁷⁰ Punishment is therefore owed to the wrongdoer because he has made a mistake on the best way to live, which is of course to comply with the demands of justice. In educating the offender, it is possible to return him to a better (just) life. In other words, punishment has the purpose of purging the diseased wrongdoers from their moral sickness; it promotes self-control or *sophrosýne*, the moral virtue related to restraint.⁷¹ This amounts to an attack on the irrationality of retribution.

In *Timaeus* 86d–e, Socrates will hold that no one is voluntarily evil,⁷² since evil turns out to be the consequence of disease, physical weakness or a bad upbringing:

καὶ σχεδὸν δὴ πάντα ὅποσα ἡδονῶν ἀκράτεια καὶ ὄνειδος ὥς ἐκόντων λέγεται τῶν κακῶν, οὐκ ὀρθῶς ὀνειδίζεται· κακὸς μὲν γὰρ ἐκὼν οὐδεὶς, διὰ δὲ πονηρὰν ἔξιν τινὰ τοῦ σώματος καὶ ἀπαίδευτον τροφήν ὁ κακὸς γίγνεται κακός, παντὶ δὲ ταῦτα ἐχθρὰ καὶ ἄκοντι προσγίγνεται.⁷³

And indeed almost all those affections which are called by way of reproach “incontinence in pleasure,” as though the wicked acted voluntarily, are wrongly so reproached; for no one is voluntarily wicked but the wicked man becomes wicked by reason of some evil condition of body and unskilled nurture, and these are experiences which are hateful to everyone and involuntary.⁷⁴

No one does wrong willingly, Socrates says. Hence a person who acts unjustly cannot be blamed because he acts as a result of circumstances which are out of his control. Since his actions are not voluntary, and should be attributed to his parents (or to nobody in particular), it would be

⁷⁰ As expected, the verb *kolázein* is used here. On the limits of Socrates’ case in this passage, see Andrew Stauffer, *The Unity of Plato’s Gorgias: Rhetoric, Justice, and the Philosophical Life*, Cambridge University Press, Cambridge, 2006, p. 77.

⁷¹ Mackenzie, 1981, p. 184, see *supra* note 69.

⁷² Cf. *Protagoras* 345d ff. and *Laws* 731c ff.

⁷³ The Greek text for the quotations of the play is that of Plato, *Platonis Opera*, John Burnet ed. and trans., Oxford University Press, Oxford, 1903.

⁷⁴ The translation used for the text of *Timaeus* is by Plato, *Timaeus. Critias. Cleitophon. Menexenus. Epistles*, R.G. Bury ed. and trans., Harvard University Press, Cambridge, 1925.

most unfair to consider he is willingly evil.⁷⁵ Since he is infected, his cure is the responsibility not of himself but of others, who will do their best to restore his path towards what is good. Wickedness is against our own interest, and therefore no one really desires to be wicked.⁷⁶ As people do not seek to act in a wicked way deliberately, wicked men cannot be put to blame, for pursuing evil means having one's true desires perverted by factors which exceed our control (87b):

ἔτι δὲ μαθήματα μηδαμῇ τούτων ἰατικά ἐκ νέων μανθάνηται, ταύτῃ κακοὶ πάντες οἱ κακοὶ διὰ δύο ἀκουσιώτατα γιγνόμεθα· ὧν αἰτιατέον μὲν τοὺς φυτεύοντας ἀεὶ τῶν φυτευομένων μᾶλλον καὶ τοὺς τρέφοντας τῶν τρεφομένων, προθυμητέον μὴν, ὅπῃ τις δύναται, καὶ διὰ τροφῆς καὶ δι' ἐπιτηδευμάτων μαθημάτων τε φυγεῖν μὲν κακίαν, τοῦναντίον δὲ ἐλεῖν.

And when, moreover, no lessons that would cure these evils are anywhere learnt from childhood – thus it comes to pass that all of us who are wicked become wicked owing to two quite involuntary causes. And for these we must always blame the begetters more than the begotten, and the nurses more than the nurslings; yet each man must endeavor, as best he can, by means of nurture and by his pursuits and studies to flee the evil and to pursue the good.

Committing an offence, thus, is the result of an unwilling mistake that has to be corrected. In this re-establishment of the right track, the metaphor of disease is relevant.⁷⁷ The criminal possesses a vicious disposition and, according to *Timaeus*, human vice occurs through the disorder of the body (86b1) and all psychological disorders can be justified by physical explanations. As a result, and just as it happens with bodily sufferings, vice needs to be treated by medical means. It can be cured, and

⁷⁵ But parents who educate wrong should be in fact also unwillingly acting as such towards their children. On this paradox, Gregory Vlastos, "Reasons and Causes in the *Phaedo*", in *Platonic Studies*, Princeton University Press, Princeton, 1973.

⁷⁶ Mackenzie, 1981, see *supra* note 69, p. 143.

⁷⁷ See *ibid.*, p. 177. Medical images and metaphors related to health are frequent in Plato, as shown by Elizabeth E. Pender, *Images of Persons Unseen. Plato's Metaphors for the Gods and the Soul*, Academia Verlag, Sankt Augustin, 2000, pp. 199–206. See also Mario Vegetti, *La medicina in Platone*, Il Cardo, Venice, 1995, and Álvaro Vallejo Campos, "Socrates as a Physician of the Soul", in Gabriele Cornelli (ed.), *Plato's Styles and Characters*, Walter de Gruyter, Berlin, 2016, pp. 227–39.

punishment therefore should be interpreted as an efficient medicine that the *pólis* should provide.⁷⁸

With the exception of *Republic* – which has been considered a totalitarian exercise of mind, in which virtue cannot be taught⁷⁹ – in Plato's works, punishing always implies an education (*máthesis*) born out of a concern for the soul of the wrongdoer. This is what Socrates claims when defending himself from the charges brought by Meletus against him for corrupting the youth (*Apology* 26a):

εἰ δὲ ἄκων διαφθείρω, τῶν τοιούτων καὶ ἀκουσίων ἀμαρτημάτων οὐ δεῦρο νόμος εἰσάγειν ἐστίν, ἀλλὰ ἰδίᾳ λαβόντα διδάσκειν καὶ νοουθετεῖν· δῆλον γὰρ ὅτι ἐὰν μάθω, παύσομαι ὃ γε ἄκων ποιῶ. σὺ δὲ συγγενέσθαι μὲν μοι καὶ διδάξαι ἔφυγες καὶ οὐκ ἠθέλησας, δεῦρο δὲ εἰσάγεις, οἱ νόμος ἐστὶν εἰσάγειν τοὺς κολάσεως δεομένους ἄλλ' οὐ μαθήσεως.

But if I corrupt them involuntarily, for such involuntary errors the law is not to hale people into court, but to take them and instruct (διδάσκειν) and admonish them in private. For it is clear that if I am told about it, I shall stop doing that which I do involuntarily. But you avoided associating with me and instructing (διδάξαι) me, and were unwilling to do so, but

⁷⁸ On Plato's 'medical penology' both in its theoretical underpinnings and practical implementation, see the excellent discussion of relevant sources in Trevor J. Saunders, *Plato's Penal Code: Tradition, Controversy, and Reform in Greek Penology*, Clarendon Press, Oxford, 1991, pp. 139–95.

⁷⁹ After Glaucon describes the story of the Ring of Giges (a ring that grants its owner the power of becoming invisible) and asking if men would still be just, knowing that they cannot be seen, Socrates will argue that justice does not derive from the social construct related to the fear of being caught. The man who decides to abuse the power of the ring has become a slave of his own appetites, whereas the man who chooses not to use it is a rational man, since he stays in control of himself: his restraint amounts to happiness (*Republic* 10:612b). Such an extreme position (in which emotions and self-control are given facts that cannot be modified) seems to have been rejected by Plato in his later works, to the extent that his last work – *Laws* – has been perceived as a 'corrective' approach, more moderate, to the totalitarian theory presented in the *Republic*, where virtue cannot be taught and therefore education seems to have a very little effect in changing people. *Republic* has been traditionally neglected as a source for Plato's penology; nevertheless, Allen, 2000, see *supra* note 58, pp. 254–55, has shown that the work is essential for a complete understanding of the relationship between anger, justice, and punishment (for example, 440c–d).

you hale me in here, where it is the law to hale in those who need punishment (κολάσεως), not instruction (μαθήσεως).⁸⁰

Wrongdoers should be punished (*kolázein*) with the sole purpose of becoming virtuous. This moral regime, which excludes retributive sanctions resulting from anger (indicated by expressions such as *timoreîn* or *lambánein díken*), requires persuasion and obedience, both elements typical to the process of instruction.⁸¹ Shortly after the previous statement by Socrates in *Apology*, the philosopher will criticise his opponents for being “very violent and unrestrained” (πάνυ εἶναι ὕβριστης καὶ ἀκόλαστος) when they “brought this indictment in a spirit of violence and unrestraint and rashness” (ἀτεχνῶς τὴν γραφὴν ταύτην ὕβρει τινὶ καὶ ἀκολασίᾳ καὶ νεότητι γράψασθαι) (*Apology*, 26e).

In a similar vein, a short passage in *Laws* 862d shows that the Athenian considers that (instead of inflicting a penalty out of wrath) the task of the best laws should be to instruct:

ὅπως ὅτι τις ἂν ἀδικήσῃ μέγα ἢ σμικρόν, ὁ νόμος αὐτὸν διδάξει καὶ ἀναγκάσει τὸ παράπαν εἰς αὐτὸς τὸ τοιοῦτον ἢ μηδέποτε ἐκόντα τολμῆσαι ποιεῖν ἢ διαφερόντως ἤττον πολὺ, πρὸς τῇ τῆς βλάβης ἐκτίσει. ταῦτα εἴτε ἔργοις ἢ λόγοις, ἢ μεθ' ἡδονῶν ἢ λυπῶν, ἢ τιμῶν ἢ ἀτιμιῶν, καὶ χρημάτων ζημίας ἢ καὶ δώρων, ἢ καὶ τὸ παράπαν ὅτινι τρόπῳ ποιήσῃ τις μισῆσαι μὲν τὴν ἀδικίαν, στέρξαι δὲ ἢ μὴ μισεῖν τὴν τοῦ δικαίου φύσιν, αὐτὸ ἐστὶν τοῦτο ἔργον τῶν καλλίστων νόμων.

In this – that whenever any man commits any unjust act, great or small, the law shall instruct (διδάξει) him and absolutely compel him for the future either never willingly to dare to do such a deed, or else to do it ever so much less often, in addition to paying for the injury. To effect this, whether by action or speech, by means of pleasures and pains, honors and dishonors, money-fines and money-gifts, and in general by whatsoever means one can employ to make

⁸⁰ The text and translation of *Apology* are taken from Plato, *Euthyphro. Apology. Crito. Phaedo*, William Preddy ed. and trans., Harvard University Press, Cambridge, 1966.

⁸¹ Allen, 2000, see *supra* note 58, pp. 247–48: “In the Athenian context, the victim’s and the community’s anger generated the need for punishment, but Socrates argues that any claims that will be made about the need for punishment must be based on an assessment of what the wrongdoer’s soul needs”.

men hate injustice and love (or at any rate not hate) justice –
this is precisely the task of laws most noble.⁸²

The emphasis here is placed on a utilitarian perspective, insofar as the criminal should be taken back to the realm of justice by means of instruction and constraint.⁸³ But the situation becomes more complicated in Magnesia, since a distinction is made there between voluntariness and involuntariness, which has implications in the difference between culpability and responsibility. Therefore, *Laws* tries to reconcile the Socratic principle that no one does wrong willingly with a distinction between deliberate and unintentional harms.⁸⁴ Criminal actions may be different from accidents that ‘happen’ to someone (*Laws* 860d) – and therefore crimes cannot be ignored – but in any case, punishment should come as a way of reforming a criminal (disordered) disposition so that the wrongdoer will not make mistakes in his objectives in the future.⁸⁵

It has been suggested that Plato’s moral theory on justice and punishment seems to exclude irrational revenge and endorse some kind of pity or benevolence, insofar as criminals are unfortunate wrongdoers who should be saved from themselves; judges should improve their disposition.⁸⁶ Education implies a humanitarian approach to the wrongdoers, who become the object of pity or compassion.⁸⁷ The judge is thus perceived as a doctor-benefactor who, through punishment, has the good intention of offering a positive means to achieve virtue instead of sanctioning vice. As this implies an education in the right path towards positive values, then the didactic function of criminal justice is clear.⁸⁸

⁸² The text and the translation of *Laws* are taken from Plato, *Laws*, vols. 1–2, Robert Gregg Bury ed. and trans., Harvard University Press, Cambridge, 1967–68. According to Mouze, 2009, see *supra* note 67, pp. 31–32, in the more humane city described in *Laws*, a political use of emotions is endorsed; the dialogue therefore overcomes the traditional opposition between affections and reason.

⁸³ Saunders, 1991, see *supra* note 78, pp. 144–45, considers this passage as “the most radical penological manifesto ever written”.

⁸⁴ Christopher Bobonich, “Introduction”, in Christopher Bobonich (ed.), *Plato’s Laws: A Critical Guide*, Cambridge University Press, Cambridge, 2010, p. 3.

⁸⁵ Mackenzie, 1981, see *supra* note 69, p. 145.

⁸⁶ *Ibid.*, pp. 156–57.

⁸⁷ On the value of pity and law in ancient times, see David Konstan, *Pity Transformed*, Duckworth, London, 2001, pp. 27, 48.

⁸⁸ Several authors have discussed the need for a ‘didactic’ function of international courts. See, for instance, Lawrence Douglas, *The Memory of Judgment: Making Law and History*

Plato's theory, however, is complex and leaves room for discussion. In *Laws* 908a, several prisons are distinguished, one of them designed to keep those who cannot learn and have to be detained in a distant facility. It is a reference to those criminals who, unlike the great majority, cannot be cured because they committed severe crimes. It seems that the text allows for a difference in punishment.⁸⁹ Excessive emotion could be sometimes acceptable, whereas in most cases it is necessary to show pity towards the offender and refrain from acting in revenge (*Laws* 731c-d):

ἀλλὰ ἐλεεινὸς μὲν πάντως ὁ γε ἄδικος καὶ ὁ τὰ κακὰ ἔχων,
ἐλεεῖν δὲ τὸν μὲν ἰάσιμα ἔχοντα ἐγγωρεῖ καὶ ἀνείργοντα τὸν
θυμὸν πραῦναι καὶ μὴ ἀκραχολοῦντα γυναικείως
πικραινόμενον διατελεῖν, τῷ δ' ἀκράτως καὶ ἀπαραμυθήτως
πλημμελεῖ καὶ κακῷ ἐφίεναι δεῖ τὴν ὀργήν· διὸ δὴ θυμοειδῇ
πρέπειν καὶ πρᾶόν φάμεν ἐκάστοτε εἶναι δεῖν τὸν ἀγαθόν.

Now while in general the wrongdoer and he that has these evils are to be pitied, it is permissible to show pity to the man that has evils that are remediable, and to abate one's passion and treat him gently, and not to keep on raging like a scolding wife; but in dealing with the man who is totally and obstinately perverse and wicked one must give free course to wrath (ὀργήν). Wherefore we affirm that it behoves the good man to be always at once passionate and gentle.⁹⁰

Nevertheless, this exception to the rule does not require additional explanations and turns out to be coherent within Plato's penology. Even in the case of the incurable wrongdoers, punishment finds a rational justifi-

in *the Trial of the Holocaust*, Yale University Press, New Haven, 2001, who embraces the idea that the Nuremberg tribunals and the Eichmann trial can be used as a tool of collective pedagogy.

⁸⁹ On the exceptional punishment of death penalty in Plato, see Ladikos, 2005, see *supra* note 66.

⁹⁰ On this passage, Lorraine Smith Pangle, "Moral and Criminal Responsibility in Plato's *Laws*", in *The American Political Science Review*, 2009, vol. 103, no. 3, p. 469, interprets:

As citizens we should be as gentle as possible toward first offenders and youthful offenders who give reason to hope that they may be cured; we should willingly expend time and resources to help them and should not let irrational indignation get in our way. The Athenian indeed goes quite far in associating gentleness with the greatest strength and the ultimate manliness: this is part of his systematic attempt to reform thumos. Although anger looks manly, he suggests that it is really an expression of the bitterness of one who was impotent to stop a harm and who now is unable to feel whole again until one has lashed out in return.

cation. Inflicting a penalty is not aimed at their own reform but the benefit of others. So it happens in *Gorgias* 525c–d:

οἱ δ' ἂν τὰ ἔσχατα ἀδικήσωσι καὶ διὰ τὰ τοιαῦτα ἀδικήματα ἀνίατοι γένωνται, ἐκ τούτων τὰ παραδείγματα γίνεται, καὶ οὗτοι αὐτοὶ μὲν οὐκέτι ὀνίνανται οὐδέν, ἅτε ἀνίατοι ὄντες, ἄλλοι δὲ ὀνίνανται οἱ τούτους ὀρῶντες διὰ τὰς ἀμαρτίας τὰ μέγιστα καὶ ὀδυνηρότατα καὶ φοβερώτατα πάθη πάσχοντας τὸν αἰὲ χρόνον, ἀτεχνῶς παραδείγματα ἀνηρτημένους ἐκεῖ ἐν Ἄιδου ἐν τῷ δεσμοτηρίῳ, τοῖς αἰεὶ τῶν ἀδίκων ἀφικνουμένοις θεάματα καὶ νουθετήματα.

But of those who have done extreme wrong and, as a result of such crimes, have become incurable, of those are the examples (παραδείγματα) made; no longer are they profited at all themselves, since they are incurable, but others are profited who behold them undergoing for their transgressions the greatest, sharpest, and most fearful sufferings evermore, actually hung up as examples there in the infernal dungeon, a spectacle (θεάματα) and a lesson (νουθετήματα) to such of the wrongdoers as arrive from time to time.

If curable wrongdoers are dealt with through *kólasis* or reform, the incurable would exceptionally be subjected to *timoría* and, therefore, to *orgé*.⁹¹ But even in those cases there is an educational purpose in the very end. This instructive purpose is achieved by means of visual (θεάματα) and mental (νουθετήματα) strategies. The didactic is therefore met in any case: someone is improved through the act of punishment.⁹² Public good is rationally taken into consideration when *kólasis* occurs.

2.4. Suffering Universal Punishment in War? *Páthos* in Interstate *Nómos*

As explained so far, the opposition between irrational retribution and rational reform is a key element in the Platonic examination of punishment. But the different dialogues show that criminal justice and penal procedures only seem to be considered relevant within the domestic legislation of Athens, the Just City or Magnesia. The question that can be asked at this stage is: in what way could these philosophical contributions by Plato

⁹¹ See Allen, 2000, see *supra* note 62, pp. 278–80, who considers that this represents the ultimate limits of reform: “Anger arrives in the just city only when the limits of curability, the limits of Socratic punishment have been reached”.

⁹² Mackenzie, 1981, see *supra* note 69, p. 186.

on the rationalisation of emotions become relevant also at the international level? Even if the theory of punishment in Plato seems to be related to the domestic system of a *pólis*, the truth is that the Greeks were well aware of the existence of interstate regulations and their sources provide concrete information on the presence of rules (*nómoi*) which were applicable universally.

A series of current studies, which have attempted to reassess the complex nature of interstate relations in the Greek world,⁹³ have succeeded in demonstrating that the practice of external affairs and the creation of a close network of legal connections constituted one of the elements that most clearly reflected sovereign power in classical *póleis*,⁹⁴ and that it complied with specific legal regulations. Indeed, the existence of genuine customary 'inter-*pólis*' or 'intra-Hellenic' law practices – capable of regu-

⁹³ Among others, it is possible to emphasise the preliminary works by Coleman Phillipson, *The International Law and Custom of Ancient Greece and Rome*, vols. 1–2, Macmillan, London, 1911; Victor Martin, *La vie internationale dans la Grèce des cités (Ve-Ive s. av. J.-C.)*, Recueil Sirey, Geneva, 1940; George C. Ténèkides, "Droit international et communautés fédérales dans la Grèce des cités (Ve-IIIe s. av. J.C.)", in *Recueil des cours: de l'Académie de droit international de La Haye*, vol. 90, no. 2, Martinus Nijhoff, Leiden, 1956, pp. 475–652; Georges C. Ténèkides, *Les relations internationales dans la Grèce antique*, Fondation A.G. Leventis, Athens, 1993; Elias J. Bickerman, "Remarques sur le droit des gens dans la Grèce classique", in *Revue Internationale des Droits de l'Antiquité*, 1950, vol. 4, pp. 99–127; Derek J. Mosley, "Diplomacy in Classical Greece", in *Ancient Society*, 1972, vol. 3, pp. 1–16; Derek J. Mosley, *Envoys and Diplomacy in Ancient Greece*, Franz Steiner, Wiesbaden, 1973; Frank E. Adcock and Derek J. Mosley, *Diplomacy in Ancient Greece*, Thames and Hudson, London, 1975, which serve as basis for most current studies. A global picture of international law in antiquity can be seen in more recently in David. J. Bederman, *International Law in Antiquity*, Cambridge University Press, Cambridge, 2001, and in Dominique Gaurier, *Histoire du droit international: De l'Antiquité à la création de l'ONU*, Presses Universitaires de Rennes, Rennes, 2014, pp. 33–87. Supporter of a broader perspective of the phenomenon, Polly Low, *Interstate Relations in Classical Greece: Morality and Power*, Cambridge Classical Studies, Cambridge University Press, Cambridge, 2007, points out the presence of a conceptual framework of legal rules, beliefs and expectations underlying the development of interstate relations among Greek cities.

⁹⁴ "Each independent polis had its own territory, its own citizenry and government, and its own defense capacity; each, in theory at least, pursued its own foreign policy, and claimed to enjoy an ostensibly equal standing to other States in the Hellenic community. That community, in turn, was constituted not only by a common culture, but by an intricate web of legal relationships" (George A. Sheets, "Conceptualizing International Law in Thucydides", in *American Journal of Philology*, 1994, vol. 115, no. 1, p. 53). As regards the 'international' feature of such system from a legal perspective, see Roberto Ago, "The First International Communities in the Mediterranean World", in *British Yearbook of International Law*, 1982, vol. 53, no. 1, pp. 213–32.

lating permitted conduct among organised Greek communities and prescribing improper behaviour – disclose a regulatory order. Such order was believed to complement that of domestic systems (each *pólis*’ law) so, *mutatis mutandis*, it is not so distant from modern international law. Hence, when the sources mention expressions such as the ‘law of the Greeks’ (νόμος τῶν Ἑλλήνων, *nómos tôn Hellénon*), ‘common law’ (νόμος κοινός, *nómos koinós*) or the ‘right of all men’ (νόμος πάντων τῶν ἀνθρώπων, *nómos pánton tôn anthrópon*),⁹⁵ they are describing a legal system similar in many aspects to what the Romans will later identify as *ius gentium*.⁹⁶ In a famous passage of his *Republic*, Plato himself proposed to extend the existing rules already applicable to cases of *stásis* (that is, to armed conflicts among Greek *póleis*)⁹⁷ and cover those cases of war in which Greeks and barbarians confronted each other (469b5–471b8):

τί δέ; πρὸς τοὺς πολεμίους πῶς ποιήσουσιν ἡμῖν οἱ στρατιῶται; [...] ἐγὼ μὲν, ἔφη, ὁμολογῶ οὕτω δεῖν πρὸς τοὺς ἐναντίους τοὺς ἡμετέρους πολίτας προσφέρεσθαι πρὸς δὲ τοὺς βαρβάρους, ὥς νῦν οἱ Ἕλληνες πρὸς ἀλλήλους.⁹⁸

But again, how will our soldiers conduct themselves toward enemies? [...] “I,” he said, “agree that our citizens ought to

⁹⁵ Cf. Alessandro Bonucci, *La legge comune nel pensiero greco*, Bartelli, Perugia, 1903. In his Ph.D. dissertation at Freiburg University, Demetrius Wogasli (*Die Normen des altgriechischen Völkerrechtes* [Nomoi Koinoi tôn Hellénon], 1895) has particularly dealt with the general issue raised by the expression, though to a large extent his conclusions were overcome by historiographical criticism and new philological studies.

⁹⁶ For a detailed study on this (especially regarding the international legal scope of the laws of war), see Emiliano J. Buis, *La súplica de Eris: Derecho internacional, discurso normativo y restricciones de la guerra en la antigua Grecia*, Eudeba, Buenos Aires, 2015, and, more recently, *Taming Ares. War, Interstate Law and Humanitarian Discourse in Classical Greece* (Series on Studies in the History of International Law, vol. 26), Brill/Nijhoff, Leiden, 2018.

⁹⁷ Internal armed conflicts are frequently characterised in ancient Greece by analogy to international conflict or war, as shown by Julien du Bouchet, “Remarques sur le vocabulaire du conflit en Grèce ancienne”, in Hélène Ménard, Pierre Sauzeau and Jean-François Thomas (eds.), *La pomme d’Éris: Le conflit et sa représentation dans l’Antiquité*, Presses universitaires de la Méditerranée, Montpellier, 2012, p. 75. On *stasis*, see particularly Hans Joachim Gehrke, *Stasis: Untersuchungen zu den inneren Kriegen in den griechischen Staaten des 5. und 4. Jahrhunderts v. Chr.*, Beck, Munich, 1985; Nicole Loraux, *La cité divisée: l’oubli dans la mémoire d’Athènes*, Payot, Paris, 1997.

⁹⁸ The Greek text is that of Plato, *Platonis Opera*, vols. 1–5, John Burnet ed. and trans., Clarendon Press, Oxford, 1967–68.

deal with their Greek opponents on this wise, while treating barbarians as Greeks now treat Greeks.”⁹⁹

The desired universality of rules applicable to the enemy is based upon an idea of justice that tends to eliminate the difference between traditionally friendly Greeks and foreign enemies, thus breaking the centrality of the domestic order to endorse common laws promoting rational and measured behaviours. This may not be surprising if we consider that, by this time, the idea of cosmopolitanism was being consolidated by some emerging contemporary philosophical schools such as the Cynics.¹⁰⁰

A last episode from the end of the Peloponnesian War offers an interesting and quite exceptional example of the emotional bias involved in the creation of an international *ad hoc* tribunal.¹⁰¹ In his *Hellenica*, Xenophon explains that the Spartan general Lysander sailed from Rhodes to deal with revolting cities on the coast of Asia Minor in 405 BC. Having won a major naval victory in the Dardanelles, and having liberated those captured by the enemy, Lysander transferred his loot and his prisoners – among whom were Philocles, Adeimantus, and other Athenian generals – to Lampsacus. There he summoned his allies to a tribunal in order to judge the atrocities committed by his enemies, especially the Athenians, who had voted that, in the event of victory, they would cut off the hands of the vanquished (2.1.31–32):¹⁰²

Φιλοκλῆς δ' ἦν στρατηγὸς τῶν Ἀθηναίων, ὃς τούτους διέφθειρεν. ἐλέγετο δὲ καὶ ἄλλα πολλά, καὶ ἔδοξεν ἀποκτεῖναι τῶν αἰχμαλώτων ὅσοι ἦσαν Ἀθηναῖοι πλὴν Ἀδεϊμάντου, ὅτι μόνος ἐπελάβετο ἐν τῇ ἐκκλησίᾳ τοῦ περὶ τῆς ἀποτομῆς τῶν χειρῶν ψηφίσματος· ἡτιάθη μέντοι ὑπὸ τινῶν προδοῦναι τὰς ναῦς. Λύσανδρος δὲ Φιλοκλέα πρῶτον ἐρωτήσας, ὃς τοὺς Ἀνδρίους καὶ Κορινθίους κατεκρήμνισε,

⁹⁹ Plato, *Republic*, vols. 1–2, Paul Shorey ed. and trans., Harvard University Press, Cambridge, 1969.

¹⁰⁰ Diogenes of Sinope (c. 390–23 BC), who was a younger contemporary of Plato, was a Cynic philosopher who suggested that being a ‘citizen of the world’ was a way of rejecting local norms; cf. Anthony A. Long, “The concept of the cosmopolitan in Greek & Roman thought”, in *Daedalus*, 2008, vol. 137, no. 3, p. 50.

¹⁰¹ Further information on this episode from a legal perspective can be found in Buis, 2015, see *supra* note 45, pp. 50–54.

¹⁰² On the dangers facing prisoners of war, with special reference to this particular example, see Lawrence A. Tritle, “Men at Work”, in Brian Campbell and Lawrence A. Tritle (eds.), *The Oxford Handbook of Warfare in the Classical World*, Oxford University Press, Oxford, 2013, p. 289.

τί εἴη ἄξιός παθεῖν ἀρξάμενος εἰς Ἑλληνας παρανομεῖν,
ἀπέσφαξεν.¹⁰³

And it was Philocles, one of the Athenian generals, who had thus made away with these men. Many other stories were told, and it was finally resolved to put to death all of the prisoners who were Athenians, with the exception of Adeimantus, because he was the one man who in the Athenian Assembly had opposed the decree in regard to cutting off the hands of captives; he was charged, however, by some people with having betrayed the fleet. As to Philocles, who threw overboard the Andrians and Corinthians, Lysander first asked him what he deserved to suffer (παθεῖν) for having begun outrageous practices towards Greeks, and then had his throat cut.¹⁰⁴

As I explained elsewhere, the language in the narrative of the episode is quite similar to the discourse used by the Allied tribunals of last century's post-world war periods.¹⁰⁵ In fact, the reference to the Greeks collectively (εἰς Ἑλληνας) represents a significant appeal to the existence of legal norms that, insofar as they are overarching rules elevated above 'national' systems, seem to create rights and obligations at an interstate level: this is a new reference to the 'common' law of the Greeks, envisaged as a universal order. In any case, what I want to emphasise here, in light of those similarities, is the emotional implication of the court that was created.¹⁰⁶

¹⁰³ The Greek text is that of Xenophon, *Xenophontis Opera Omnia*, vols. 1–4, Edgar Cardew Marchant ed. and trans., Clarendon Press, Oxford, 1968–71.

¹⁰⁴ Xenophon, *Hellenica*, vol. 1, Carleton L. Brownson ed. and trans., Harvard University Press, Cambridge, 1918.

¹⁰⁵ Georges S. Maridakis, "Un précédent du Procès de Nuremberg tiré de l'histoire de la Grèce ancienne", in *Revue hellénique de droit international*, 1952, vol. 5, pp. 1–16, has studied the passage and concluded that Lysander's court represented a clear forerunner of the judicial process carried out in the International Military Tribunal at Nuremberg: notable similarities include the trial's international character (the involvement of the 'allies'), the victors' *ex post facto* decision to create the court, and the death sentence imposed on the accused without the possibility of appeal. A much more recent translation of his paper can be found in Georges S. Maridakis, "An Ancient Precedent to Nuremberg", in *Journal of International Criminal Justice*, 2006, vol. 4, no. 4, pp. 847–52). For opposite views on the episode, see Erich Kraske, "Klassische Hellas und der Prozess", in *Archiv des Völkerrechts*, 1953–54, vol. 4, pp. 183–89.

¹⁰⁶ Bosworth, 2012, p. 19, refers to it as a "kangaroo court".

The punishment imposed on the Athenian generals presupposes the application of a law that transcends the geographic boundaries of the city-state; nevertheless, the language of punishment still relates to the field of sentiments. When Xenophon underlines that “Lysander first asked him what he deserved to *suffer*”, the verb *patheîn* clearly indicates that even in *ad hoc* tribunals an affective dimension is introduced.¹⁰⁷ According to the text, the capital punishment imposed on Philocles and others is related to the will to cause suffering and thus to exert violence. Since death penalty was rejected in the Greek world as an unfair sanction,¹⁰⁸ the passage can cast some light on Plato's reasonings: *timoria* should be rejected since it draws people to react emotionally instead of finding ways to impose justice by educating the wrongdoer. This is compatible with Plato's closeness to Thucydides when agreeing that the underlying cause of Athenian imperialism can be attributed to a combination of greed (*pleonexia*) and the internalisation of specific sophistic teachings that supported negative affections and uncontrolled appetites as the best way of life.¹⁰⁹

This episode criticised by Xenophon – who was also a pupil of Socrates and contemporary to Plato – can provide an interesting example to justify the possible applicability at an interstate level of the ancient Greek notion of rational justice and the restriction of irrational and uncontrolled vengeance.¹¹⁰

2.5. Concluding Remarks

According to Saunders, the frequent use of myths in Plato's texts show a universal moral principle stating that injustice will always be punished in the end (*Gorgias* 523a–527c; *Phaedo* 81a, 107d–108c, 113d–114c; *Phae-*

¹⁰⁷ The verb is clearly related to the noun *páthos*, translated as ‘emotion’.

¹⁰⁸ On this, see Eva Cantarella, *I supplizi capitali in Grecia e a Roma (Origini e funzioni delle pene di morte nell' antichità classica)*, Rizzoli, Milan, 1996.

¹⁰⁹ This is the thesis defended by Scott Matthew Truelove, *Plato and Thucydides on Athenian Imperialism*, Ph.D. Dissertation, University of Texas, Austin, 2012. It should be remembered that according to Plato, *pleonexia* – a desire which is a disease typical to wild beasts – is the target of the legislator's therapeutic punishment (*Republic* 906b).

¹¹⁰ Martha Nussbaum has recently identified the constructive functions of ‘anger’, considering that it can be a rational emotion that relates to the ethical need of a dissuasive punishment. She seems to identify the origins of this tradition in Aristotle and the Stoics. As I hope to have shown, Plato offers an even earlier attempt to address this ‘transition-anger’. See Martha Nussbaum, *Anger and Forgiveness: Resentment, Generosity, and Justice*, Oxford University Press, Oxford, 2016.

drus 248c–249b; *Republic* 614a–619b; *Laws* 903b–905c, among others).¹¹¹ The recurrence of myths, in this sense, helps to explain the universality of Plato’s proposal and contributes to promote the analogy between the Platonic view of suppressing the negative emotional bias related to *timoría*, as described, and the evolution of a global contemporary international criminal law endorsed in a common and rational ethical foundation.¹¹²

The discussion on those passions related to the Athenian experience of justice, as provided in the Platonic corpus, could provide us with a useful philosophical framework to explore the problems related to the affective turn in international justice. As a final remark, I believe that Plato’s contribution can help us revisit the long-standing arguments on the value of emotions in judging.¹¹³ At the same time, they disclose the need to rationally overcome the theoretical foundations of revenge in order to consolidate curative benevolence, rational reform, and civic self-control as an educational basis for punishing in criminal proceedings.¹¹⁴

¹¹¹ Saunders, 1991, see *supra* note 78, pp. 196–211. On myths concerning punishment in Plato, see David Sedley, “Myths, Punishment, and Politics in the *Gorgias*”, in Catalin Partenie (eds.), *Plato’s Myths*, Cambridge University Press, Cambridge, 2009, pp. 51–76.

¹¹² It should be added here that Plato’s penology is intended to cover not only the citizens of the *pólis*, but also slaves and foreigners; cf. Saunders, 1991, see *supra* note 78, pp. 344–45. This last aspect has to be taken into account if we seek to expand the Platonic theory to an interstate dimension.

¹¹³ According to Plato, emotions in themselves are not negative. They depend heavily on the context, as concluded by Christina Tarnopolsky, “Plato on Shame and Frank Speech in Democratic Athens”, in Rebecca Kingston and Leonard Ferry (eds.), *Bringing the Passions Back In: The Emotions in Political Philosophy*, UBC Press, Vancouver, 2008, p. 59. And to the Greek mind, I may add, the context in which emotions are deployed is, to a certain extent, always political.

¹¹⁴ Stalley, 1995, see *supra* note 69, p. 19, states that all dialogues, in spite of their differences, “share the view that the city as a whole has a responsibility for training the characters of its citizens and that punishment plays an essential role in that process”.

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