Philosophical Foundations of International Criminal Law: Foundational Concepts

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E-Offprint:

Barrie Sander, "Justifying International Criminal Punishment: A Critical Perspective", in Morten Bergsmo and Emiliano J. Buis (editors), *Philosophical Foundations of International Criminal Law: Foundational Concepts*, Torkel Opsahl Academic EPublisher, Brussels, 2019 (ISBNs: 978-82-8348-119-8 (print) and 978-82-8348-120-4 (e-book)). This publication was first published on 21 February 2019. This e-offprint was released with a new copyright page on 16 December 2022.

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.*

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Justifying International Criminal Punishment: A Critical Perspective

Barrie Sander*

6.1. Introduction

Is it justifiable to punish perpetrators of international crimes? It might be tempting to ignore this foundational question in light of the momentous suffering that tends to result from the commission of mass atrocities. The gravity of such crimes usually invites "intuitive-moralistic answers",[1] making the debate about the proper justification for punishment seem of mere academic interest.[2] Yet, the importance of providing a justification for punishment should not be underestimated. Punishment may be defined as "the intentional incapacitation or infliction of pain by an authoritative institution on one who has been deemed liable to such treatment".[3] In the field of international criminal justice, punishment is generally equated with the kind of punishment that can be delivered by international criminal courts and tribunals, namely incarceration. Importantly, incarcerative

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1 Immi Tallgren, "The Sensibility and Sense of International Criminal Law", in *European Journal of International Law*, 2002, vol. 13, no. 3, p. 564.

2 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. 43, p. 39.

3 Larry May and Shannon Fyfe, *International Criminal Tribunals: A Normative Defense*, Cambridge University Press, Cambridge, 2017, p. 50.

punishment is a form of violence,[4] which, without justification, may constitute nothing more than the arbitrary imposition of pain and suffering.[5]

Against this background, this chapter seeks to critically examine the principal theories that have been advanced to justify the imposition of incarcerative punishment on individuals convicted of participating in the commission of international crimes. Adopting a critical perspective, the chapter begins by unveiling and questioning the assumptions that underlie the dominant justificatory theories of international criminal punishment – namely, retributivism (6.2), utilitarianism (6.3), and expressivism (6.4). The chapter then turns to provide some initial reflections on how post-conflict justice might be reimagined without the imposition of incarcerative punishment at its core (6.5), before offering some concluding remarks (6.6).

At the outset, it is important to clarify two definitional points. First, by 'international crimes', this chapter refers to the so-called 'pure' or 'core' international crimes – encompassing, at a minimum,[6] crimes against humanity, genocide, serious war crimes, and the crime of aggression – which are distinguished by the fact that their criminal character originates in international rather than domestic law.[7] Second, the present inquiry

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4 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, p. 575. See also, Robert Cover, "Violence and the Word", in Martha Minow, Michael Ryan and Austin Sarat (eds.), *Narrative, Violence, and the Law: The Essays of Robert Cover*, University of Michigan Press, Michigan, 1993, p. 203 ("Legal interpretive acts signal and occasion the imposition of violence upon others: A judge articulates her understanding of a text, and as a result, somebody loses his freedom, his property, his children, even his life").

5 See similarly, R.A. Duff and David Garland, "Introduction: Thinking about Punishment", in R.A. Duff and David Garland (eds.), *A Reader on Punishment*, Oxford University Press, Oxford, 1994, p. 2 ("Punishment requires justification because it is morally problematic […] because it involves doing things to people that (when not described as 'punishment') seem morally wrong"); and Kent Greenawalt, "Punishment", in *Journal of Criminal Law and Criminology*, 1983, vol. 74, no. 2, p. 346 ("Since punishment involves pain or deprivation that people wish to avoid, its intentional imposition by the state requires justification").

6 It is a matter of contestation whether other crimes, such as piracy, slavery, terrorism, and torture fall within this definition. See, in this regard, Robert Cryer, Håkan Friman, Darryl Robinson and Elizabeth Wilmshurst, *An Introduction to International Criminal Law and Procedure*, 3rd edition, Cambridge University Press, Cambridge, 2014, p. 8.

7 Luban, 2010, p. 569–72, see *supra* note 4. See also, International Military Tribunal, *Trial of the Major War Criminals before the International Military Tribunal*, vol. 1, Nuremberg,

should be distinguished from two other theoretical questions of international criminal justice:[8] first, the question of whether and how punitive power can exist at the supranational level without a sovereign;[9] and second, the overall function or purpose of international criminal law.[10] The first question concerns the identification of a supranational *ius puniendi*, while the second concerns the elaboration of a principled justification of international criminalisation. Without diminishing the importance of these questions, the present chapter focuses on the distinct, though related, inquiry of identifying the proper purpose of and justification for punishing international crimes.[11] Questions concerning the existence of a supranational *ius puniendi* and the justification for international criminalisation are only touched upon to the extent that they have been discussed in the context of the justificatory accounts of international criminal punishment that form the focus of this chapter.[12]

1947, p. 223 ("international law, in exceptional circumstances, ought to bypass the domestic legal order, and criminalise behaviour directly"). See similarly, Paola Gaeta, "International Criminalization of Prohibited Conduct", in Antonio Cassese (ed.), *The Oxford Companion to International Criminal Justice*, Oxford University Press, Oxford, 2009, p. 65 (noting that "with regard to the core crimes the *jus puniendi* has ceased to be an exclusive state prerogative; furthermore, it is exercised at the international level on behalf of the international community as a whole" and that "[t]hese are crimes directly criminalized at the international level"); and Robert Cryer, "The Doctrinal Foundations of International Criminalization", in M. Cherif Bassiouni (ed.), *International Criminal Law: Volume I, Sources, Subjects, and Contents*, Martinus Nijhoff Publishers, Leiden, 2008, p. 108 (noting that the fundamental point to understand about 'core' international crimes is that "the locus of the criminal prohibition is not the domestic, but the international legal order").

8 For discussion, see generally, Kai Ambos, *Treatise on International Criminal Law: Volume I: Foundations and General Part*, Oxford University Press, Oxford, 2013, pp. 56–73.

9 See generally, Kai Ambos, "Punishment without a Sovereign? The *Ius Puniendi* Issue of International Criminal Law: A First Contribution towards a Consistent Theory of International Criminal Law", in *Oxford Journal of Legal Studies*, 2013, vol. 33, no. 2, p. 293.

10 See generally, Kai Ambos, "The Overall Function of International Criminal Law: Striking the Right Balance Between the *Rechtsgut* and the Harm Principles: A Second Contribution Towards a Consistent Theory of ICL", in *Criminal Law and Philosophy*, 2015, vol. 9, no. 2, p. 301.

11 See similarly, May and Fyfe, 2017, p. 51, see *supra* note 3 ("Even if an international institution has the requisite authority to punish, there should still be an identifiable purpose or goal of punishment").

12 In particular, questions concerning whether it is possible to identify a legitimate source of authority to punish at the supranational level have been raised in the context of academic

6.2. Retributivism

The dominant accounts that initially emerged to justify the punishment of international crimes tended to mimic the theories of retributivism and utilitarianism initially devised to justify incarcerative punishment for domestic crimes.[13] The automatic transposition of such theories to the international stage has generally encountered two challenges:[14] first, these theories are accompanied by any weaknesses inherent to them at the domestic level; and second, the assumptions underlying these theories are not always appropriate when applied to the unique contexts in which international crimes typically occur.

Although encompassing several different strands of thought,[15] the animating idea behind *retributive* theories of punishment is the notion of

critiques concerning whether it is possible to justify the imposition of punishment for international crimes.

13 These overarching categories have been recognised in the majority of case law before international criminal courts. See, for example, Ambos, 2013, p. 69, fn. 141, see *supra* note 8 (citing relevant references to the jurisprudence of the ICTY and ICTR that confirms that the principal purposes of punishment are retribution and deterrence). The recognition of the importance of retributivism and utilitarianism is also prevalent in both domestic and international criminal scholarship. See, for example, Michael S. Moore, *Placing Blame: A General Theory of the Criminal Law*, Oxford University Press, Oxford, 1997, pp. 91–92 (summarising the two pure theories of punishment with respect to domestic crime); and Naomi Roht-Arriaza, "Punishment, Redress and Pardon: Theoretical and Psychological Approaches", in Naomi Roht-Arriaza (ed.), *Impunity and Human Rights in International Law and Practice*, Oxford University Press, New York, 1995, p. 13 (noting that, in the international criminal context, criminal justice theories "generally divide punishment rationales into two broad categories – utilitarian and retributive").

14 David S. Koller, "The Faith of the International Criminal Lawyer", in *New York University Journal of International Law and Politics*, 2008, vol. 40, no. 4, p. 1025. See also, Luban, 2010, p. 575, see *supra* note 4 (noting that "standard justifications […] all raise familiar and difficult justificatory problems, which […] take on different configurations in ICL than those familiar from domestic criminal justice"); Sloane, 2007, p. 40, see *supra* note 2 ("Justifications for punishment common to national systems of criminal law cannot be transplanted unreflectively to the distinct legal, moral, and institutional context of ICL"); and Mark A. Drumbl, *Atrocity, Punishment, and International Law*, Cambridge University Press, Cambridge, 2007, p. 32 ("the perpetrator of mass atrocity is qualitatively different than the perpetrator of ordinary crime […] suggesting the need to judiciously contemplate a novel schematic of punishment for the extraordinary international criminal").

15 For a useful overview of the different strands of retributivist thought, see generally, Thom Brooks, *Punishment*, Routledge, New York, 2012, pp. 15–34; Deirdre Golash, *The Case Against Punishment: Retribution, Crime Prevention, and the Law*, New York University Press, New York, 2005, at chaps. 3 and 4; R.A. Duff, *Punishment, Communication, and*

desert. Punishment is morally justified because criminals deserve to be punished, penal sanctions serving to give perpetrators their "just deserts".[16] As Michael Moore has put it, "Moral responsibility ('desert') in such a view is not only necessary for justified punishment, it is also sufficient".[17] Retributive theories that seek to *justify* punishment in this way are generally referred to as 'positive' retributive theories, to be distinguished from their 'negative' variety which seek more modestly to *set limits* on the criminal process leading up to punishment as well as the severity of punishment itself.[18] Since positive retributivism is premised on a perpetrator suffering punishment as repayment for a past transgression, retributive theories have generally been referred to as "backward-looking".[19] Nonetheless, it should also be remembered that, in its depic-

Community, Oxford University Press, Oxford, 2001, pp. 19–30; and Michael S. Moore, *Placing Blame: A General Theory of the Criminal Law*, Oxford University Press, Oxford, 1997, at part I. See also, in the international criminal context, Alexander K.A. Greenawalt, "International Criminal Law for Retributivists", in *University of Pennsylvania Journal of International Law*, 2014, vol. 35, no. 4, p. 969.

16 Duff, 2001, p. 21, see *supra* note 15 ("Retributivists assert a justificatory relationship between past crime and present punishment. That relationship is expressed by the idea of 'desert'").

17 Moore, 1997, p. 91, see *supra* note 15.

18 See, for example, Duff, 2001, p. 19, see *supra* note 15 (noting that "while a negative retributivist tells us only that we *may* punish the guilty, or that it would not be unjust to punish them, a positive retributivist holds that we *ought* to punish the guilty, or that justice *demands* their punishment") (emphasis in original). See also, in the international criminal context, Greenawalt, 2014, pp. 998–1001, see *supra* note 15 (discussing minimalist theories of retributivism).

19 See, for example, H.L.A. Hart, "Punishment and the Elimination of Responsibility", in H.L.A. Hart (ed.), *Punishment and Responsibility: Essays in the Philosophy of Law*, Oxford University Press, Oxford, 2008, p. 160 (contrasting the "forward-looking Utilitarian approach" to justifying punishment with "two backward-looking requirements" closely associated with retributive theories); Duff and Garland, 1994, p. 8, see *supra* note 5 ("Consequentialist theories of punishment are instrumentalist and forward-looking […] [while] [r]etributivist theories are intrinsicalist and backward-looking"); and George P. Fletcher, *Basic Concepts of Criminal Law*, Oxford University Press, Oxford, 1998, p. 33 (noting the debate between "those who believe that punishment should be imposed *retrospectively*, solely as an imperative of justice, as a way of addressing, negating, and overcoming the criminal act committed" and "[o]thers that hold that the aims of punishment are at least partly *prospective*: the purpose of imposing suffering on the offender should be to improve the welfare of society") (emphasis in original).

tion of punishment as an intrinsic future good, retributivism may also be viewed in prospective terms.[20]

An important feature of positive retributive theories is that they aim to treat individuals as rational moral agents, as ends in themselves and not merely as means for the promotion of other extrinsic purposes.[21] Relatedly, the moral responsibility of the perpetrator also gives society the duty to punish,[22] though this is usually understood more modestly to mean that society has "*a* duty to detect, convict, and punish the guilty – a duty that must compete with other duties and demands that might sometimes defeat it".[23]

With respect to international crimes, the positive retributivist position finds its clearest expression in the preamble to the Rome Statute of the International Criminal Court ('ICC'), which affirms that "the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured".[24] More broadly, Andrew Woods has argued that "the international criminal

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20 John Gardner, "Introduction", in H.L.A. Hart (ed.), *Punishment and Responsibility: Essays in the Philosophy of Law*, Oxford University Press, Oxford, 2008, p. xv (Gardner notes that all justifications of punishments are forward-looking in the sense that "they explain how the justified thing promises to make the world a better place, or at least to avoid its getting any worse". The distinctive feature of retributivism does not reside in any attempt to defy this axiom, but rather that "it finds some intrinsic – not merely instrumental – value in a certain type of suffering, namely in suffering that is deserved").

21 See Immanuel Kant, *The Philosophy of Law: An Exposition of the Fundamental Principles of Jurisprudence as a Science of Right*, in William Hastie (trans.), TandT Clark, Edinburgh, 1887, p. 195 ("Juridical punishment can never be administered merely as a means for promoting another Good either with regard to the Criminal himself or to Civil Society […] For *one man ought never to be dealt with merely as a means subservient to the purpose of another*, nor be mixed up with the subjects of Real Right") (emphasis added).

22 See, for example, Moore, 1997, p. 91, see *supra* note 15 (noting that, for a retributivist, "the moral responsibility of an offender also gives society the *duty* to punish") (emphasis in original). This duty to punish has its roots in the Kantian conception of a "categorical imperative". See, Kant, 1887, p. 195, see *supra* note 21 ("The penal law is a categorical imperative; and woe to him who creeps through the serpent-windings of Utilitarianism to discover some advantage that may discharge him from the Justice of Punishment").

23 Duff, 2001, p. 19, see *supra* note 15 (emphasis in original).

24 Rome Statute of the International Criminal Court, adopted 17 July 1998, entry into force 1 July 2002, Preamble, para. 4 ('ICC Statute') (http://www.legal-tools.org/doc/7b9af9/).

regime in general – and its sentencing practice in particular – appear to be animated by a deep retributive impulse".[25]

Yet, notwithstanding its popularity, there are at least three challenges to retributive justifications of international criminal punishment. As will be seen, some of these challenges have more purchase than others.

6.2.1. The Selectivity Challenge

First, there is the challenge of selectivity.[26] According to Diane Amann, "as a result of selectivity and randomness, just deserts have been meted out inconsistently, in very few conflicts, and on only a few defendants", thereby undermining the goal of retribution.[27] Selectivity in the imposition of international criminal punishment is rooted in a range of causes.[28] For example, there are a range of political impediments to the prosecution of international crimes, including legal limitations on the jurisdiction of international criminal courts as well as practical obstructions to the collection of evidence and enforcement of arrest warrants. In addition, the combined effect of the overwhelming scope of mass atrocity situations and the

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[25] Andrew K. Woods, "Moral Judgments and International Crimes: The Disutility of Desert", in *Virginia Journal of International Law*, 2012, vol. 52, no. 3, p. 638. See also, Drumbl, 2007, p. 150, see *supra* note 14 ("Retribution is the dominant stated objective for punishment of atrocity perpetrators at the national and international levels"); Ralph Henham, "Developing Contextualized Rationales for Sentencing in International Criminal Trials: A Plea for Empirical Research", in *Journal of International Criminal Justice*, 2007, vol. 5, no. 3, pp. 757–58 (identifying a "pervading ideology of retributivism" within international criminal justice); and Allison Marston Danner, "Constructing a Hierarchy of Crimes in International Criminal Law Sentencing", in *Virginia Law Review*, 2001, vol. 87, no. 3, pp. 449–50 (noting that retribution "may be considered the dominant sentencing model in international law").

[26] On the selectivity challenge, see generally, Greenawalt, 2014, pp. 987–900, see *supra* note 15; Larry May, *Aggression and Crimes against Peace*, Cambridge University Press, Cambridge, 2008, pp. 330–31; Drumbl, 2007, pp. 151–54, see *supra* note 14; Diane Marie Amann, "Group Mentality, Expressivism, and Genocide", in *International Criminal Law Review*, 2002, vol. 2, no. 2, pp. 116–17; and Bill Wringe, "Why Punish War Crimes? Victor's Justice and Expressive Justifications of Punishment", in *Law and Philosophy*, 2006, vol. 25, no. 2, pp. 163–71. On international criminal law's selectivity more generally, see generally, Mirjan Damaska, "What is the Point of International Criminal Justice?", in *Chicago-Kent Law Review*, 2008, vol. 83, no. 1, pp. 360–63; and Robert Cryer, *Prosecuting International Crimes – Selectivity and the International Criminal Law Regime*, Cambridge University Press, Cambridge, 2005.

[27] Amann, 2002, p. 117, see *supra* note 26.

[28] See similarly, Greenawalt, 2014, p. 987, see *supra* note 15.

limited resources of prosecuting institutions means that a degree of selectivity is to some extent unavoidable. As a result, only a small subset of perpetrators of international crimes are punished in practice. The result is what Mark Drumbl has referred to as "a retributive shortfall",[29] with very few individuals or entities receiving their just deserts. Moreover, in several contexts, the concern has arisen that international criminal punishment amounts to little more than victors' justice, discriminating amongst offenders on the basis of their allegiances, rather than implementing any notion of just deserts.[30]

Despite its intuitive appeal, this challenge is in fact not fatal to the retributive justification of international criminal punishment. As Alexander Greenawalt has explained:[31]

> [T]he fact that a great majority of the guilty escape punishment, does not by itself clarify which rationale guides the punishment of those who are prosecuted. If the guilty are punished because of their desert, then retributivism continues to supply a plausible account of international criminal justice, at least with respect to those suspects. […] [T]he more pertinent question is not whether retributivism is compatible with conditions of selectivity, but instead how commitments to retributive justice are best reconciled with an international criminal justice system that, like all criminal justice systems, is necessarily selective.

In other words, while selectivity is not irrelevant to a retributivist's views on international criminal justice,[32] this challenge does not under-

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29 Drumbl, 2007, p. 153, see *supra* note 14.

30 See, for example, Damaska, 2008, p. 361, see *supra* note 26 ("when international prosecutors bring to justice only, or mainly, criminals from weak nations, the result is that they discriminate among human rights abusers on the basis of their citizenship"); Drumbl, 2007, p. 153, see *supra* note 14 (noting that one problem with the retributive shortfall in the international criminal context is that "many powerful states and organizations are absolved of responsibility"); and Wringe, 2006, p. 164, see *supra* note 26 (noting the concern that the punishment of war criminals by international tribunals "does not represent the application of impartial moral principles to individuals on both sides of conflicts. Instead it typically only involves the inflicting of harsh treatment on selected members of the losing side").

31 Greenawalt, 2014, pp. 989–90, see *supra* note 15.

32 See, for example, May, 2008, p. 331, see *supra* note 26 ("To say that there is a retributive shortfall is to commit one only to say that more needs to be done in this area of law than is

mine the theory's ability to justify the punishment that *is* inflicted in practice.[33]

6.2.2. The Adequacy Challenge

Second, there is the challenge of adequacy. If retributive theories demand that punishment "fit" the crime committed, it becomes difficult to conceive of any punishment that could adequately match the gravity of international criminality.[34] As the Supreme Court of Israel in the *Eichmann*

currently being done"); and Damaska, 2008, p. 362, see *supra* note 26 (noting that the challenge of selectivity merely points to the need for international criminal courts "to make incremental headway toward a system unstained by the flaw of selectivity"). See also, Robert Cryer, "Sudan, Resolution 1593, and International Criminal Justice", in *Leiden Journal of International Law*, 2006, vol. 19, no. 1, p. 218 ("it is best to accept that perfect compliance with rule of law standards remains some way off, but that it is better to ensure that some international crimes are prosecuted than to risk no prosecutions by too strict an application of the principle").

33 See, in this regard, Margaret M. deGuzman, "Choosing to Prosecute: Expressive Selection at the International Criminal Court", in *Michigan Journal of International Law*, 2012, vol. 33, no. 12, p. 303 ("Even national systems do not punish all wrongdoers, but retribution can justify the punishment they do inflict"); and Drumbl, 2007, p. 151, see *supra* note 14 ("Selectivity is inevitable in the operation of law even in a robustly ordered and purportedly egalitarian domestic polity").

34 See, for example, Lawrence Douglas, "From IMT to NMT: The Emergence of a Jurisprudence of Atrocity", in Kim C. Priemel and Alexa Stiller (eds.), *Reassessing the Nuremberg Military Tribunals: Transitional Justice, Trial Narratives, and Historiography*, Berghahn Books, New York, 2012, p. 289 ("the problem of adequate punishment […] has vexed all atrocity trials"); Sloane, 2007, p. 81, see *supra* note 2 ("In a talionic sense, of course, no punishment can fit the most horrendous international crimes"); Mark J. Osiel, "Why Prosecute? Critics of Punishment for Mass Atrocity", in *Human Rights Quarterly*, 2000, vol. 22, no. 1, p. 129 (noting the argument that since "we possess no punishment more severe than execution, we have none that captures and corresponds to the full severity of the wrongdoer's acts in such cases. Because his evil is so "radical," it mocks our efforts to punish it"); and Gary Jonathan Bass, *Stay the Hand of Vengeance – The Politics of War Crimes Tribunals*, Princeton University Press, Princeton, 2000, p. 13 ("There is no such thing as *appropriate* punishment for the massacres at Srebrenica or Djakovica; only the depth of our legalist ideology makes it seem so") (emphasis in original). This sentiment is also reflected in empirical studies. See, for example, Janine Natalya Clark, "The Impact Question: The ICTY and the Restoration and Maintenance of Peace", in Bert Swart, G. Alexander Zahar, and Göran Sluiter (eds.), *The Legacy of the International Criminal Tribunal for the Former Yugoslavia*, Oxford University Press, Oxford, 2011, p. 68 (noting the finding of her empirical study in Bosnia and Herzegovina that Bosnian Muslim interviewees "unanimously insisted that ICTY sentences are too lenient" with some accusing the ICTY of "rewarding war criminals").

case put it, "Even as there is no word in human speech to describe deeds such as the deeds of [Eichmann], so there is no punishment under human law sufficiently grave to match [his] guilt".[35]

Again, however, this challenge is not fatal to the retributive justification of international criminal punishment. The challenge mistakenly assumes that retributivism demands a particular measure of punishment. As Michael Moore has clarified, while retributivists are "committed to the principle that punishment must be graded in proportion to desert […] they are not committed to any particular scheme nor to any particular penalty as being deserved".[36] The so-called "fit", therefore, clearly refers to a particular *type* of proportionality.[37] Retributivism demands *ordinal* proportionality, which requires the scaling of punishment according to the gravity of the offence.[38] Ordinal proportionality entails three requirements:[39]

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35 Supreme Court of Israel, *Attorney-General of the Government of Israel v. Adolf Eichmann*, 29 May 1962, in *International Law Reports*, 1968, vol. 36, p. 341. See also, Hannah Arendt, "Letter to Karl Jaspers of 17 August 1946", in Lotte Köhler and Hans Saner (eds.), Robert Kimber and Rita Kimber (trans.), *Hannah Arendt/Karl Jaspers Correspondence: 1926-1969*, Harcourt Brace Jovanovich, New York, 1992, p. 54 ("It may well be essential to hang Göring, but it is totally inadequate. That is, this guilt, in contrast to all criminal guilt, oversteps and shatters any and all legal systems. That is the reason why the Nazis in Nuremberg are so smug").

36 Moore, 1997, p. 88, see *supra* note 15. A similar argument may be levelled at domestic crimes. See, for example, Osiel, 2000, p. 129, see *supra* note 34 (noting that this challenge is "true, but trivial" since "many ordinary offenders commit multiple offenses for which they cannot "repay" […] in "fitting" measure, within their remaining life span").

37 On the distinction between different types of proportionality, see Andrew von Hirsch, "Censure and Proportionality", in R.A. Duff and David Garland (eds.), *A Reader on Punishment*, Oxford University Press, Oxford, 1994, pp. 128–30. For a recent discussion in the international criminal context, see Greenawalt, 2014, pp. 981–84, see *supra* note 15.

38 von Hirsch, 1994, p. 128, see *supra* note 37. On the application of ordinal proportionality in the international criminal context, see Sloane, 2007, p. 83, see *supra* note 2 (proposing reliance on ordinal proportionality as a means to "begin to calibrate crime and punishment in ICL sentencing in a non-arbitrary fashion notwithstanding that, emotively, virtually all of the relevant crimes seem to demand the harshest penalties").

39 von Hirsch, 1994, pp. 128–29, see *supra* note 37. On the challenges of meeting the demands of ordinal proportionality in the international criminal context, see Drumbl, 2007, pp. 154–63, see *supra* note 14 (Drumbl sets out "three realities" revealed by his review of the sentencing of international criminals which challenge the application of ordinal proportionality in practice: first, that sentences for international crimes are not generally longer than for serious ordinary domestic crimes; second, that sentences for international crimes before international tribunals are not generally longer than when pronounced by domestic courts despite international tribunals exercising jurisdiction over the most serious offenders;

first, *parity*, which requires that offenders convicted of crimes of similar gravity deserve penalties of comparable severity; second, *rank-ordering*, which requires that punishments should be ordered to ensure that their relative severity reflects the gravity-ranking of the crimes involved; and third, *spacing*, which requires that the spacing between different penalties reflects the comparative gravity of the offences. Ordinal proportionality is to be distinguished from *cardinal* proportionality, which refers to the ultimate *limits* of punishment that a criminal justice system may impose for any crimes.[40] It is perfectly consistent for a retributive theory to acknowledge constraints on the severity of punishment without undermining its central proposition that some form of punishment is justified based on an offender's desert.[41]

6.2.3. The 'Desert' Challenge

A final challenge to positive retributive theories of punishment is the most compelling: the need for retributivists to defend the role of 'desert' in providing the justificatory link between the commission of an international crime and the imposition of punishment.[42] To meet this challenge, sev-

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and third, significant disparity within and among international criminal institutions in terms of the severity of sentences, something which is not consistently explicable in terms of the gravity of the crime).

40 von Hirsch, 1994, p. 129, see *supra* note 37. Cardinal constraints on punishment, typically imposed by human rights standards, are particularly important in the international criminal context in order to avoid punishments of an extraordinary nature. See, for example, Drumbl, 2007, p. 157, see *supra* note 14:

> If the retributive value of punishing extraordinary international criminals truly were to be engaged, perhaps punishment would have to exceed anything ordinary. Truly proportionate sentences then might involve torture or reciprocal group eliminationism. That is a terrifying path. In such a scenario, survivors would become as depraved as their tormentors.

41 See, for example, Kirsten J. Fisher, *Moral Accountability and International Criminal Law: Holding Agents of Atrocity Accountable to the World*, Routledge, Abingdon, 2012, p. 54 ("Punishment can be distributed on a sliding scale, recognizing that the harm inflicted by the punishing institution will not equal the harm caused by the crime but is deserved as some form of payback"). See, however, Lawrence Douglas, Austin Sarat and Martha Merrill Umphrey, "At the Limits of Law: An Introduction", in Lawrence Douglas, Austin Sarat and Martha Merrill Umphrey, *The Limits of Law*, Stanford University Press, Stanford, 2005, pp. 4–5 ("Legal responses to mass crimes are, then, at best symbolic gestures […] [which] symbolize little besides their own impotence").

42 See, for example, Golash, 2005, p. 49, see *supra* note 15 ("the retributivist must demonstrate that the rightness of punishment derives directly from the wrongness of crime");

eral different accounts of positive retributivism have been put forward. Yet, whether applied with respect to domestic or international crimes, these accounts have generally been found wanting.[43] In the remainder of this section, two accounts will be examined: the moral intuitions theory; and the unfair advantage theory.

6.2.3.1. The Moral Intuitions Theory

According to Michael Moore's retributive account, reliance may be placed on *our moral intuitions* to justify punishment.[44] Moore conducts a Kantian thought experiment in which we are to imagine that we have committed a grave wrong, which causes us to feel the emotion of guilt in response.[45] The emotion of guilt that we feel in respect of our own wrongdoing is characterised as "virtuous" (in Moore's words, "the only tolerable response of a moral being") and therefore less suspect in its origins than emotions that may be incited in third persons by the wrongdoing.[46] Moore

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Duff and Garland, 1994, p. 8, see *supra* note 5 (noting that a common criticism of retributive theories is that they fail to provide "any genuinely non-consequentialist account of the justificatory relationship between crime and punishment"); and Hugo Adam Bedau, "Retribution and the Theory of Punishment", in *Journal of Philosophy*, 1978, vol. 75, no. 11, p. 616. Bedau notes the central dilemma for the retributivist in the following terms:

> Either he [the retributivist] appeals to something else – some good end – that is accomplished by the practice of punishment, in which case he is open to the criticism that he has a non-retributivist, consequentialist justification for the practice of punishment. Or his justification does not appeal to something else, in which case it is open to the criticism that it is circular and futile.

43 See, for example, Dennis J. Baker, *Glanville Williams Textbook of Criminal Law*, Sweet and Maxwell, London, 2012, p. 40:

> lawyers and philosophers are now practically unanimous in rejecting this proposition […] that wrongdoing is a sufficient condition of punishment (they do not argue that all wrongdoers must be punished); they say only that it is a necessary condition (no one can properly be punished who is not a wrongdoer).

See also, Koller, 2008, p. 1025, see *supra* note 14 ("the retributive theory of punishment largely has been discredited in domestic criminal justice since the very beginnings of modern criminology"). For a comprehensive review of the various critiques that have been raised against different positive retributive accounts of punishment in the domestic context, see generally, Golash, 2005, see *supra* note 15.

44 Moore, 1997, p. 99, see *supra* note 15 ("Most people react to […] atrocities with an intuitive judgment that punishment (at least of some kind and to some degree) is warranted").

45 *Ibid*., pp. 145–49.

46 *Ibid*., pp. 147, 164 (describing "the virtue of our own imagined guilt" and noting that "when that emotion of guilt produces the judgment that one deserves to suffer because one

proceeds to argue that the virtuous nature of this emotion of guilt gives it "good epistemic credentials",[47] which may serve to validate the judgment that we are guilty and ought to be punished.[48] From here, it is a small step for Moore to generalise this judgment about our own deserved punishment to others who commit like wrongs: "To refuse to grant [others] the same responsibility and desert as you would grant yourself is […] an instance of what Sartre called bad faith, the treating of a free, subjective will as an object".[49]

Moore's account is unpersuasive in two respects. First, by relying on intuitions, Moore's account is vulnerable to the response that intuitions *to punish* may not be shared by all members of a community. This weakness is arguably exacerbated in the international context, given the plurality of systems and notions of justice within the international community.[50] Second, Moore's account fails to justify why the State or the international community should act on moral intuitions that are incited by our own wrongdoing. It is entirely plausible that we could agree that such emotions are morally appropriate responses to certain forms of crime, whilst also maintaining that the State or the international community should not act on them and should instead find other less destructive means of expressing them.[51]

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has culpably done wrong, that judgment is not suspect because of its emotional originals in the way that the corresponding third person judgment might be").

47 *Ibid*., p. 147.

48 *Ibid*., pp. 147–48.

49 *Ibid*., p. 149.

50 See, for example, deGuzman, 2012, pp. 304–05, see *supra* note 33 (noting that "[t]he claim that "intuitions of justice" derive from a moral organ shared by all humans has been convincingly attacked" and adding that "notions of justice are highly contested and depend on a range of social, political, and economic factors"); and Miriam J. Aukerman, "Extraordinary Evil, Ordinary Crime: A Framework for Understanding Transitional Justice", in *Harvard Human Rights Journal*, 2002, vol. 15, p. 56 ("The problem with such intuition-based arguments for retribution is that not everyone shares the desire to punish; in fact, some victims plead for clemency for their tormentors").

51 See, for example, Duff, 2001, p. 25, see *supra* note 15:

> Moore's argument appears to amount to little more than an appeal to the intuition (expressed in first-person cases through the emotion of guilt) that "the guilty deserve to suffer": it does not tell us *why* they should suffer, or why guilt should generate the judgment that I ought to suffer, or *what* they ought to suffer, or why it should be a proper task for the *state* to inflict that suffering. (emphasis in original)

6.2.3.2. The Unfair Advantage Theory

A separate account, commonly referred to as *the unfair advantage theory*,[52] asserts that punishment is justified on the basis of the principle of reciprocity.[53] This account is premised on the idea that the criminal law serves as both a provider of benefits (such as freedom and security) and an imposer of burdens of self-restraint on all individuals subject to it. By accepting the benefits that flow from law-abiding self-restraint, the principle of reciprocity holds that each individual in society must also accept the burden of obeying the law. When individuals break the law, they abandon the burden that others have assumed and thereby gain an unfair advantage. In such circumstances, punishment is justified to deprive criminals of the unfair advantage that they might otherwise retain.

Again, however, whether applied to domestic or international crimes, there are several difficulties with the unfair advantage justification of punishment. First, it is unclear how the unfair advantage that a wrongdoer purportedly gains from his offence may be eliminated by the imposition of punishment. As Andrew von Hirsch has queried:[54] "In what sense does his being deprived of rights *now* offset the extra freedom he has arrogated to himself *then* by offending?" Second, by equating the commission of crimes with the gain of an unfair advantage, the theory ends up distorting the essential character of crime.[55] In the domestic context, to

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52 The theory is commonly traced to the work of Herbert Morris and Jeffrie Murphy based on the writings of Immanuel Kant. Both authors subsequently moved away from the theory. See von Hirsch, 1994, p. 130, fn. 2, see *supra* note 37. For a useful overview of the development of Jeffrie Murphy's thoughts on retributivism, see generally, Jeffrie G. Murphy, "Legal moralism and retribution revisited", in *Criminal Law and Philosophy*, 2007, vol. 1, no. 1, p. 5.

53 For critical discussion of the unfair advantage theory, see generally, Golash, 2005, pp. 81–85, see *supra* note 15; Duff, 2001, pp. 21–23, see *supra* note 15; von Hirsch, 1994, pp. 116–18, see *supra* note 37; and Jean Hampton, "The retributive idea", in Jeffrie G. Murphy and Jean Hampton, *Forgiveness and Mercy*, Cambridge University Press, Cambridge, 1988, pp. 114–17. For recent discussion of the theory in the international criminal context, see generally, Greenawalt, 2014, pp. 994–98, see *supra* note 15; and Sloane, 2007, pp. 80–81, see *supra* note 2.

54 von Hirsch, 1994, p. 117, see *supra* note 37.

55 See, for example, Duff, 2001, p. 22, see *supra* note 15 ("The criminal wrongfulness of rape, for instance, in virtue of which it merits punishment, does not consist in taking an unfair advantage over all those who obey the law"); and Hampton, 1988, pp. 116–17, see *supra* note

depict the punishment of murderers or rapists in terms of the removal of an *advantage* appears to presuppose our recognition that their actions, or the consequences that flow from them, are inherently desirable.[56] Yet, as Deirdre Golash has observed, in such cases "it is not so much the offender's gain, as the victim's loss, that seems most unfair, and which, moreover, seems to govern the retributive intuition that the penalty should be matched to the seriousness of the crime".[57] This insight applies with even greater force in the international criminal context, which generally concerns offences that cause extraordinary harm to victims. As Robert Sloane has explained:

> it would be bizarre to conceptualize the *génocidaire* as a freerider on the hypothetical social contract of others not to destroy national, ethnic, racial, or religious groups, or to regard a serious human rights abuser as arrogating to himself a benefit that others voluntarily relinquished in their common interest.[58]

As the preceding examination reveals, retributivists have struggled to provide a convincing account of how the notion of 'desert' can provide the justificatory link between the commission of a crime and the imposition of punishment. It is this issue, more than questions that arise concerning the selectivity and inadequacy of international criminal punishment, that poses a particularly compelling challenge to retributive justifications of punishment for international crimes.

6.3. Utilitarianism

The animating idea behind utilitarianism is that a particular social practice is justified only if its consequences are sufficiently good to outweigh the

53 ("this theory of retribution fails in a fully adequate way to link our condemnation of a wrongdoer *to that which makes his conduct wrong*") (emphasis in original).

56 Hampton, 1988, p. 116, see *supra* note 53.

57 Golash, 2005, p. 83, see *supra* note 15.

58 Sloane, 2007, p. 80, see *supra* note 2 (Sloane also points out that the unfair advantage theory makes little sense in the international criminal context given the unique sociological conditions of mass atrocities, including State complicity in the commission of the crimes and the lack of deviance amongst lower-level offenders who tend to be conforming to societal norms when committing the crimes in question). For a critical discussion of Sloane's critique, see Greenawalt, 2014, pp. 994–98, see *supra* note 15.

harm of its imposition.[59] In other words, utilitarian theories justify social practices by their "contingent, instrumental, contribution to some independently identifiable good".[60]

In the criminal law context, the primary good that has been identified to justify the imposition of punishment is social protection or crime

[59] See, for example, Duff, 2001, p. 3, see *supra* note 15 (noting that the "central slogan" of consequentialism is that "punishment can be justified only if it brings some consequential good"); and Greenawalt, 1983, p. 351, see *supra* note 5 (noting that utilitarian theories adhere to the idea that "likely consequences determine the morality of action"). Utilitarianism is usually rooted in Jeremy Bentham's principle of utility. See Jeremy Bentham, *An Introduction to the Principles of Morals and Legislation*, in John Bowring (ed.), 1843, reprinted in Joshua Dressler, *Cases and Materials on Criminal Law*, 5th edition, Thomson Reuters, 2009, at p. 34:

> By the principle of utility is meant that principle which approves or disapproves of every action whatsoever, according to the tendency which it appears to have to augment or diminish the happiness of the party whose interest is in question; or, what is the same thing in other words, to promote or to oppose that happiness.

[60] Duff, 2001, p. 6, see *supra* note 15. For retributivists, utilitarian accounts are open to the objection that they treat criminals as a means to an end rather than as an end in themselves. For a discussion of this troubling aspect of utilitarian accounts, see Bill Wringe, "War Crimes and Expressive Theories of Punishment: Communication or Denunciation?", in *Res Publica*, 2010, vol. 16, no. 2, pp. 122–24; and Duff, 2001, pp. 13–14, see *supra* note 15. Some theorists have tried to overcome such difficulties by recourse to mixed-theories which combine utilitarian aims with retributive restraints on punishment. See, for example, H.L.A. Hart, "Prolegomenon to the Principles of Punishment", in H.L.A. Hart, *Punishment and Responsibility: Essays in the Philosophy of Law*, Oxford University Press, Oxford, 2008, p. 9:

> Much confusing shadow-fighting between utilitarians and their opponents may be avoided if it is recognized that it is perfectly consistent to assert *both* that the General Justifying Aim of the practice of punishment is its beneficial consequences *and* that the pursuit of this General Aim should be qualified or restricted out of deference to principles of Distribution which require that punishment should be only of an offender for an offence. (emphasis in original)

See also, John Rawls, "Two Concepts of Rules", in *Philosophical Review*, 1955, vol. 64, no. 1, p. 5 (proposing that "utilitarian arguments are appropriate with regard to questions about practices, while retributive arguments fit the application of particular rules to particular cases"). H.L.A. Hart's proposed reconciliation between retributive and utilitarian theories has also been picked up in international criminal literature. See, for example, Darryl Robinson, "A Cosmopolitan Liberal Account of International Criminal Law", in *Leiden Journal of International Law*, 2013, vol. 26, no. 1, p. 132 ("while utilitarian arguments are relevant and important, we also require a *deontological* justification, showing that the punishment is 'deserved'") (emphasis in original).

prevention.[61] In particular, two categories of crime prevention have generally been recognised by criminal law scholars:[62] general deterrence; and specific deterrence. The distinction between these two categories centres on the intended target audience:[63] specific deterrence applies to individual offenders whereas general deterrence applies to society at large. Although specific deterrence has been referred to in passing by international criminal courts and tribunals,[64] it is generally accepted that it will rarely be

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61 See, for example, Jeremy Bentham *et al*., "Deterrence", in Andrew von Hirsch, Andrew Ashworth and Julian V. Roberts (eds.), *Principled Sentencing: Readings on Theory and Policy*, Hart Publishing, Oxford, 2009, p. 39; George P. Fletcher, *The Grammar of Criminal Law: American, Comparative, and International: Volume One: Foundations*, Oxford University Press, Oxford, 2007, p. 248; and Duff, 2001, p. 4, see *supra* note 15.

62 Tallgren, 2002, p. 569, see *supra* note 1 ("The consequentialist or relativist theory of punishment bases its justification for punishing on the possibility of prevention by means of general or special prevention"). Other scholars have identified a broader range of crime prevention categories. See, for example, Fletcher, 2007, p. 248, see *supra* note 61 (noting four goals under the general heading of "social protection" as a purpose of punishment: general deterrence, special deterrence, rehabilitation, and isolation); Sloane, 2007, p. 69, see *supra* note 2 (including the following within the category of crime-control: "deterrence, specific and general; incapacitation, which can be conceived as an extreme form of specific deterrence insofar as, if successful, it obviates any recidivism concerns; and rehabilitation"); and Greenawalt, 1983, pp. 351–52, see *supra* note 5 (identifying a range of beneficial consequences that utilitarians have thought can be realised by punishment, including: general deterrence; norm reinforcement; individual deterrence; incapacitation; reform; and vengeance).

63 Jeremy Bentham, "Punishment and Deterrence", in Andrew von Hirsch, Andrew Ashworth, and Julian V. Roberts (eds.), *Principled Sentencing: Readings on Theory and Policy*, Hart Publishing, Oxford, 2009, p. 53 ("[T]he prevention of offences divides itself into two branches: *particular prevention*, which applies to the delinquent himself; and *general prevention*, which is applicable to all the members of the community without exception") (emphasis in original).

64 See, for example, ICTY, *Prosecutor v. Mucić et al.*, Trial Chamber, Judgment, 16 November 1998, IT-96-21-T, para. 1234 ("the accused should be sufficiently deterred by appropriate sentence from ever contemplating taking part in such crimes again") (http://www.legal-tools.org/doc/6b4a33/); and ICTY, *Prosecutor v. Kordić and Čerkez*, Appeals Chamber, Judgment, 17 December 2004, IT-95-14/2-A, para. 1076 ("Both individual and general deterrence serve as important goals of sentencing") (http://www.legal-tools.org/doc/738211/). See, however, Payam Akhavan, "Justice in The Hague, Peace in the Former Yugoslavia? A Commentary on the United Nations War Crimes Tribunal", in *Human Rights Quarterly*, 1998, vol. 20, no. 4, p. 750 (noting that "it should not be concluded that specific deterrence is altogether irrelevant" and pointing to "evidence that suggests that targeting political and military leaders and subjecting them to a threat of punishment […] can generate a form of immediate deterrence").

necessary since most international criminal perpetrators are unlikely ever to replicate the circumstances in which they originally committed their crimes.[65]

For the most part, therefore, international criminal courts,[66] as well as international criminal justice scholars,[67] have tended to focus on the

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[65] See, for example, Fisher, 2012, p. 52, see *supra* note 41:

> international crimes, such as genocide and crimes against humanity, are committed in unique environments that foster and promote particular criminal behaviour. It is unlikely that such an environment would present itself again to these individuals and therefore it is unlikely that punishment would be necessary to ensure non-recidivism.

See also, Luban, 2010, p. 575, see *supra* note 4 ("special deterrence will seldom be necessary, because the defendant in the dock of an international tribunal is unlikely ever again to be in the circumstances in which he committed his crime"); and Sloane, 2007, p. 85, see *supra* note 2 (noting the lack of concern about recidivism in the international criminal context). The unlikelihood of recidivism is also reflected by international criminal courts. See, for example, ICTY, *Prosecutor v. Kunarac et al.*, Trial Chamber, Judgment, 22 February 2001, IT-96-23-T and IT-96-23/1-T, para. 840 ("the likelihood of persons convicted here ever again being faced with an opportunity to commit war crimes, crimes against humanity, genocide or grave breaches is so remote as to render its consideration in this way unreasonable and unfair") (http://www.legal-tools.org/doc/fd881d/).

[66] See, for example, Drumbl, 2007, p. 169, see *supra* note 14 ("the focus overwhelmingly is on general deterrence"); and "Developments in the Law: International Criminal Law", in *Harvard Law Review*, 2001, vol. 114, no. 7, p. 1963 ("concern with general deterrence pervades the official and unofficial statements of tribunal insiders"). For references to the case law of the UN *ad hoc* tribunals, which generally identify deterrence as an important purpose of sentencing, see generally, Kai Ambos, "Crimes Against Humanity and the International Criminal Court", in Leila Nadya Sadat (ed.), *Forging a Convention for Crimes Against Humanity*, Cambridge University Press, Cambridge, 2011, p. 299, fn. 99. It should be noted, however, that some international criminal courts have been more cautious in their reliance on general deterrence as a justification for punishment. See, for example, ICTY, *Prosecutor v. Duško Tadić*, Appeals Chamber, Judgment in Sentencing Appeals, 26 January 2000, IT-94-1-A and IT-94-1-A *bis*, para. 48 (noting that deterrence "must not be accorded undue prominence in the overall assessment of the sentences to be imposed on persons convicted by the International Tribunal") (http://www.legal-tools.org/doc/df7618/).

[67] See, for example, Payam Akhavan, "Beyond Impunity: Can International Criminal Justice Prevent Future Atrocities?", in *American Journal of International Law*, 2001, vol. 95, no. 1, p. 10 ("individual accountability for massive crimes is an essential part of a preventive strategy and, thus, a realistic foundation for a lasting peace"); Antonio Cassese, "Reflections on International Criminal Justice", in *Modern Law Review*, 1998, vol. 61, no. 1, p. 2 ("the impunity of the leaders and organisers of the Armenian genocide […] gave a nod and a wink to Adolf Hitler and others to pursue the Holocaust some twenty years later"); and Richard J. Goldstone, "Justice as a Tool for Peace-Making: Truth Commissions and International Criminal Tribunals", in *New York University Journal of International Law and Politics*, 1996, vol. 28, no. 3, p. 490 ("If political and military leaders believe they are like-

general deterrent effect of international criminal punishment. Notable in this regard, is the utopian tone of international criminal punishment's general deterrent aspirations. For instance, drawing on several preambulatory references in the ICC, International Criminal Tribunal for former Yugoslavia ('ICTY') and International Criminal Tribunal for Rwanda ('ICTR') Statutes,[68] Darryl Robinson has observed how international criminal punishment has been accorded ambitiously high expectations, aspiring to *end* impunity, as compared to domestic criminal law, which appears to aim more modestly to *manage* crime by reducing or at the very least visibly responding to criminality.[69]

In order to justify these deterrent credentials, it has been asserted that the imposition of punishment may serve as a means for increasing the costs or reducing the benefits of perpetrating international crimes in the future.[70] In other words, punishment is considered to serve as a credible threat or warning to potential offenders that future wrongdoing will be sanctioned. Once such individuals realise that they cannot escape sanction for committing atrocities, they will be less likely to carry out such crimes.[71]

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ly to be brought to account by the international community for committing war crimes, that belief in most cases will have a deterrent effect"). Interestingly, Jeremy Bentham argued that general prevention "ought to be the chief end of punishment" since "[i]f we could consider an offence which has been committed as an isolated fact, the like of which would never recur, punishment would be useless" and "[i]t would be only adding one evil to another". See Bentham, 2009, p. 54, see *supra* note 63.

68 See ICC Statute, para. 5, see *supra* note 24 (stating a determination "to put an *end* to impunity") (emphasis added); UN Security Council Resolution 827 (1993), UN Doc. S/RES/827, 25 May 1993, Preamble, para. 5 (stating a determination "to put an *end* to such crimes") (emphasis added) (http://www.legal-tools.org/doc/dc079b/); and UN Security Council Resolution 955 (1994), UN Doc. S/RES/955, 8 November 1994, Preamble, para. 6 (stating a determination "to put an *end* to such crimes") (emphasis added) (http://www.legal-tools.org/doc/f5ef47/).

69 Darryl Robinson, "The Identity Crisis of International Criminal Law", in *Leiden Journal of International Law*, 2008, vol. 21, no. 4, p. 944.

70 ICTR, *Prosecutor v. Kambanda*, Trial Chamber, Judgment and Sentence, 4 September 1998, ICTR 97-23-S, para. 28 (referring to deterrence as a means for "dissuading for good those who will attempt in future to perpetrate such atrocities") (http://www.legal-tools.org/doc/49a299/).

71 See, for example, Julian Ku and Jide Nzelibe, "Do International Criminal Tribunals Deter or Exacerbate Humanitarian Atrocities?", in *Washington University Law Review*, 2006, vol. 84, no. 4, pp. 789–90:

Despite the simplicity of its logic, this account has been subject to significant scrutiny in the international criminal context. Beyond the difficulty of empirically measuring the deterrent effect of punishment in any context,[72] a number of challenges have been identified within international criminal scholarship that question the deterrent capacity of *international criminal* punishment more specifically.[73]

6.3.1. The Probabilities Challenge

First, there is the challenge of probabilities. According to economic models of crime, effective deterrence requires three components: certainty, severity and celerity of punishment.[74] Punishment will act as a general deterrent to the extent that the penalties are certain to be imposed, sufficiently severe, and imposed sufficiently soon after the offence takes

> the assumption that ICTs [international criminal tribunals] can deter future atrocities by ending a culture where offenders escape sanctions for committing humanitarian atrocities. By subjecting such offenders to the credible threat of an ad hoc ICT or ICC prosecution, such a culture of impunity would slowly be undermined. Realizing that an ICT prosecution is possible, offenders would be more likely to refrain from committing atrocities.

[72] See, for example, deGuzman, 2012, p. 307, see *supra* note 33 (noting "the difficulty of proving the counterfactual – that criminal conduct would have occurred but for the existence of particular legal rules"); Carsten Stahn, "Between 'Faith' and 'Facts': By What Standards Should We Assess International Criminal Justice?", in *Leiden Journal of International Law*, 2012, vol. 25, no. 2, pp. 265–66 ("Hardly any empirical study has managed to demonstrate impact credibly and to trace clear patterns of causation and weigh intermediate causes") and Tallgren, 2002, p. 569, see *supra* note 1 (noting that "any criminal justice system operates in a world of likelihoods, possibilities and beliefs that does not easily submit itself to 'empirical truths' or 'clear analysis'" and adding that "the assessment of prevention is one of the most difficult and controversial issues in criminal law theory").

[73] Aspects of the sections that follow draw on passages first elaborated in Barrie Sander, "International Criminal Justice as Progress: From Faith to Critique", in Morten Bergsmo, CHEAH Wui Ling, SONG Tianying and YI Ping (eds.), *Historical Origins of International Criminal Law: Volume 4*, Torkel Opsahl Academic EPublisher, Brussels, 2015, pp. 799 ff (http://www.toaep.org/ps-pdf/23-bergsmo-cheah-song-yi).

[74] von Hirsch, 2009, p. 40, see *supra* note 61. Other scholars have narrowed this list to two components, severity and certainty of punishment. See, for example, Drumbl, 2007, pp. 169–70, see *supra* note 14; Ku and Nzelibe, 2006, p. 792, see *supra* note 71; Tallgren, 2002, p. 575, see *supra* note 1; and Akhavan, 1998, p. 796, see *supra* note 64.

place.[75] Each of these components has proven challenging to satisfy in the international criminal context.

In terms of *severity*, perpetrators of mass atrocity tend to operate in environments where pre-existing sanctions, including possible death and imprisonment from the conflict itself, provide a level of severity far greater than any threat of punishment likely to be meted out by any criminal institution in the future.[76]

With respect to *certainty* and *celerity* of punishment, the reality of international criminal justice is that there is an extremely low probability of prosecution or arrest of offenders.[77] Whether as a result of the restrictive jurisdictional mandates of criminal courts that limit the scope of prosecutions,[78] or the dystopian realities that hinder securing arrests or evi-

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75 Of these components, statistical research in the domestic criminal law context has confirmed that severity is the least important, with associations between severity of punishment and crime rates being fairly weak. See, for example, Andrew von Hirsch, Anthony E. Bottoms, Elizabeth Burney and Per-Olot Wikström, "Deterrent Sentencing as a Crime Prevention Strategy", in Andrew von Hirsch, Andrew J. Ashworth and Julian V. Roberts (eds.), *Principled Sentencing: Readings on Theory and Policy*, Hart Publishing, Oxford, 2009, p. 57.

76 See, for example, Ku and Nzelibe, 2006, p. 807, see *supra* note 71 (indicating that perpetrators of humanitarian atrocities "routinely face sanctions which are likely to be more severe and certain than any meted out by an existing or future [ICL court or tribunal]"); and Tallgren 2002, pp. 589–90, see *supra* note 1 (noting that, by contrast to domestic systems, where "criminal law is the most concrete and severe means to intervene in the legal status and life of an individual", in the international system a range of other sanctions that target the State directly and individuals indirectly are greater in severity meaning that criminal law is not "the *ultima ratio* for the international community").

77 See, for example, Fisher, 2012, p. 52, see *supra* note 41 ("so few international criminals are brought to trial that the slight possibility of capture and punishment is unlikely to weigh heavily as a deterrent"); Leslie P. Francis and John G. Francis, "International Criminal Courts, the Rule of Law, and the Prevention of Harm: Building Justice in Times of Injustice", in Larry May and Zachary Hoskins (eds.), *International Criminal Law and Philosophy*, Cambridge University Press, Cambridge, 2014, p. 70 ("The conditions and opportunities that lead people to commit atrocities are often distant in time, in space, and in the probability of getting caught"); and Drumbl, 2007, p. 169, see *supra* note 14 (noting "the very low chance that offenders ever are accused or, if accused, that they ever are taken into the custody of criminal justice institutions").

78 See, for example, Theodor Meron, "Does International Criminal Justice Work?", in Theodor Meron, *The Making of International Criminal Justice: A View from the Bench: Selected Speeches*, Oxford University Press, Oxford, 2011, p. 142 ("there are whole swathes of the world that remain out of the jurisdiction of any international criminal tribunal").

dence,[79] criminal courts have been hindered from delivering a "credible and authoritative communication of a threatened sanction".[80]

Yet, despite the force of these observations, it remains a matter of contestation whether the low probability of international criminal punishment that characterises international criminal justice in the present is surmountable. For some, the low probability is merely a temporary state of affairs on the road to a system of truly global justice free from State interference.[81] Theodor Meron, for example, has argued that rather than "despairing over the prospects of deterrence, the international community should enhance the probability of punishment".[82] The challenge with this response is that it is based on a faith in the evolutionary potential of the field of international criminal justice that lacks any empirical grounding.[83]As several critical scholars have observed, the accommodation of international criminal law to State power seems to be "the constitutive condition" for its existence and operation.[84] Grietje Baars, for example, has argued that it is important not to overlook the fact that the so-called "impunity gap" that exists within international criminal justice today is created by the power relations that exist within the field.[85] As such, a bet-

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79 See, for example, Robinson, 2008, p. 944, see *supra* note 69 (noting "the dystopian realities faced by ICL", namely "the severity and scale of the crimes and the extreme difficulty of securing arrests").

80 Sloane, 2007, p. 72, see *supra* note 2. See also, Koller, 2008, p. 1027, see *supra* note 14 ("deterrence theory is generally assumed to require a credible threat of prosecution, but prosecutions of more than a handful of perpetrators of major atrocities appear unlikely"); and Aukerman, 2002, p. 67, see *supra* note 50 ("the fact that in the wake of mass atrocities only a small number of those implicated will ever be prosecuted undermines the logic of the deterrence argument").

81 Robert Cryer, *Prosecuting International Crimes: Selectivity and the International Criminal Law Regime*, Cambridge University Press, Cambridge, 2005, pp. 230–31. For a critique of this argument, see Sarah M.H. Nouwen, "Legal Equality on Trial: Sovereigns and Individuals before the International Criminal Court", in *Netherlands Yearbook of International Law*, 2012, vol. 43, p. 179.

82 Theodor Meron, "From Nuremberg to The Hague", in *Military Law Review*, 1995, vol. 149, pp. 110–11.

83 Nouwen, 2012, p. 179, see *supra* note 81.

84 Adam Branch, *Displacing Human Rights: War and Intervention in Northern Uganda*, Oxford University Press, Oxford, 2011, p. 206.

85 Grietje Baars, "Making ICL history: on the need to move beyond prefab critiques of ICL", in Christine Schwöbel (ed.), *Critical Approaches to International Criminal Law: An Introduction*, 2014, Routledge, Abingdon, p. 208.

ter term to characterise this gap would be "planned impunity", the recognition of impunity's planned nature serving as an acknowledgement that the low probability of punishment cannot simply be "corrected".[86] Similarly, Sara Kendall has argued for greater recognition of the fact that the ultimate constituents of international criminal punishment are not conflict-affected communities but States, who constitute the "shareholders" of global justice and therefore limit its "material conditions of possibility".[87]

Regardless of which of these divergent outlooks one considers more persuasive, the fact remains that under present conditions, the slow pace and uncertain enforcement of international criminal law is enough to render the deterrent effect of international criminal punishment highly questionable.

6.3.2. The Non-Deterrability Challenge

Second, there is the challenge that the unique character of most international crimes is such that the logic of general deterrence appears to be inapplicable to them. The logic of general deterrence is premised on the ability of punishment to deter future offenders through rational and prudential dissuasion.[88] The dissuasive message of punishment is *rational* to the extent that it seeks to provide potential offenders with reasons to renounce crime, and *prudential* to the extent that it appeals to potential offenders' self-interest (as opposed to their conscience) in avoiding punishment.[89] As Payam Akhavan has put it, deterrence presupposes "the existence of identifiable or determinate causes of criminal behavior that are the

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86 *Ibid*. See also, Grietje Baars, "Law(yers) Congealing Capitalism: On the (Im)possibility of Restraining Business in Conflict through International Criminal Law", PhD thesis, University College London, 2012, pp. 307–08 (advocating a move "away from *legal* emancipation and toward *human* emancipation") (emphasis in original).

87 Sara Kendall, "Commodifying Global Justice: Economies of Accountability at the International Criminal Court", in *Journal of International Criminal Justice*, 2015, vol. 13, no. 1, p. 134.

88 Antony Duff, 2001, p. 4, see *supra* note 15. Some scholars refer to this problem in terms of whether or not certain crimes or criminals are "deterrable". See, for example, Aukerman, 2002, p. 68, see *supra* note 50; and Jan Klabbers, "Just Revenge? The Deterrence Argument in International Criminal Law", in *Finnish Yearbook of International Law*, 2001, vol. 12, p. 253.

89 Duff, 2001, p. 4, see *supra* note 15. See similarly, Tallgren, 2002, pp. 572–73, see *supra* note 1.

targets of punishment".[90] Yet, assumptions of perpetrator rationality and prudence are ill-fitting in many mass atrocity contexts.

With respect to perpetrator *rationality*, Mark Drumbl has provocatively questioned whether "genocidal fanatics, industrialized into well-oiled machineries of death, make cost-benefit analyses prior to beginning their work".[91] According to Drumbl, there are two unsettling realities that undermine the assumption of perpetrator rationality in mass atrocity contexts:[92] first, the fact that many perpetrators desire to belong to violent groups; and second, the fact that joining a violent group may be the only viable survival strategy. Moreover, in many mass atrocity situations, governments and society may condone the atrocities being committed so that perpetrators do not view their actions as ones that require deterrence.[93] Rather, violence may be seen as normal or even politically or morally justified.[94] Indeed, several situationist social psychological studies have confirmed that various characteristics of the social environments in which mass atrocities tend to occur, including the role played by authority figures and peer pressure, are likely to complicate the ability of international criminal courts to deter future atrocities.[95]

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90 Akhavan, 1998, p. 741, see *supra* note 64.

91 Drumbl, 2007, p. 171, see *supra* note 14. See similarly, Tallgren, 2002, p. 584, see *supra* note 1; Frédéric Mégret, "Three Dangers for the International Criminal Court: A Critical Look at a Consensual Project", in *Finnish Yearbook of International Law*, 2001, vol. 12, p. 203; and Martha Minow, *Between Vengeance and Forgiveness: Facing History After Genocide and Mass Violence*, Beacon Press, Boston, 1998, p. 50. But see Sloane, 2007, p. 73, see *supra* note 2 (cautioning that "it would be misguided to assimilate all war criminals and *genocidaires* to a single psychological profile").

92 Drumbl, 2007, pp. 171–72, see *supra* note 14.

93 Roht-Arriaza, 1995, p. 14, see *supra* note 13.

94 Branch, 2011, p. 203, see *supra* note 84.

95 For useful overviews of the relevant social psychological literature, see generally, Saira Mohamed, "Deviance, Aspiration, and the Stories We Tell: Reconciling Mass Atrocity and the Criminal Law", in *Yale Law Journal*, 2015, vol. 124, no. 5, pp. 1642–48; Mikaela Heikkilä, *Coping with International Atrocities through Criminal Law: A Study into the Typical Features of International Criminality and the Reflection of these Traits in International Criminal Law*, Åbo Akademi University Press, Turku, 2013, pp. 38–70; Deirdre Golash, "The Justification of Punishment in the International Context", in Larry May and Zachary Hoskins (eds.), *International Criminal Law and Philosophy*, Cambridge University Press, Cambridge, 2014, pp. 211–17; and Laurel E. Fletcher and Harvey M. Weinstein, "Violence and Social Repair: Rethinking the Contribution of Justice to Reconciliation", in *Human Rights Quarterly*, 2002, vol. 24, no. 3, pp. 603–17.

With respect to perpetrator *prudence*, the ability of punishment to deter will generally be most effective on individuals motivated by narrow self-interest, rather than sacrificing such interests for broader goals.[96] In mass atrocity situations, however, it is common to find instigators of international crimes acting for what they perceive to be a cause beyond narrow self-interest or even out of blind hatred.[97] In such circumstances, the deterrent effect of punishment may be minimal.

Moreover, even in contexts where it *is* possible to maintain that the politically elite instigators of mass atrocities are acting rationally and instrumentally to retain power,[98] it is nonetheless equally plausible that such politicians may knowingly accept the risk of prosecution, rationally concluding that international crime does in fact pay.[99] Indeed, at least one empirical study seems to support this position, concluding that, rather than deterring future atrocities, the threat of international criminal punishment may serve to exacerbate them by reducing incentives for political settlements.[100]

As these challenges indicate, assertions proclaiming the instrumental value of international criminal punishment to deter the commission of international crimes appear to be out of touch with the realities of societies afflicted by mass atrocities. As Immi Tallgren puts it:

> It seems that in the current project of international criminal justice, the special circumstances of the criminality in question and thereby also the additional difficulties in affecting

96 Golash, 2014, p. 211, see *supra* note 95.

97 See similarly, *ibid*., p. 217; and Klabbers, 2001, pp. 253 and 266, see *supra* note 88.

98 Akhavan, 1998, pp. 753–65, see *supra* note 64.

99 See similarly, Ku and Nzelibe, 2006, p. 807, see *supra* note 71; Koller, 2008, p. 1028, see *supra* note 14; Aukerman, 2002, p. 69, see *supra* note 50. See also, Judith N. Shklar, *Legalism – Law, Morals, and Political Trials*, Harvard University Press, Cambridge, 1964, p. 187.

100 Ku and Nzelibe, 2006, pp. 817–31, see *supra* note 71. See similarly, Benjamin Schiff, "The ICC's Potential for Doing Bad When Pursuing Good", in *Ethics and International Affairs*, 2012, vol. 26, no. 1, p. 78; Meron, 2011, p. 151, see *supra* note 78; and Anonymous, "Human Rights in Peace Negotiations", in *Human Rights Quarterly*, vol. 18, no. 2, 1996, p. 258.

> the behaviour of the potential criminals addressed are largely ignored or, rather, intentionally passed over in silence.[101]

6.4. Expressivism

As the preceding sections have demonstrated, traditional retributive and utilitarian justifications of punishment have proven difficult to transpose to the international criminal context. At least partially in response to such challenges, the past decade has witnessed a turn by a range of scholars and practitioners towards *expressivist* justificatory theories of punishment.[102]

Although expressivism encompasses a range of ideas from different disciplines,[103] the animating assumption behind most stands of expressivist thought is simple: social practices, including but by no means limited to punishment,[104] carry meanings and transmit messages quite apart from

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[101] See similarly, Tallgren, 2002, pp. 571–72, see *supra* note 1.

[102] See, for example, Ambos, 2015, p. 324, see *supra* note 10 (noting "the *centrality* of the concept of 'expressivism' focusing on the (possible) communicative function of punishment" in the international criminal context) (emphasis added); Timothy William Waters, "A Kind of Judgment: Searching for Judicial Narratives After Death", in *George Washington International Law Review*, 2010, vol. 42, no. 2, pp. 293–94 (noting a "recent turn to expressive theories to justify ICL"); and deGuzman, 2012, p. 313, see *supra* note 33 (noting that "[a] growing number of scholars have turned to expressive theories to justify international criminal law processes and punishment"). A similar turn towards expressive theories also occurred in domestic criminal law scholarship some decades ago. This turn has traditionally been rooted in a seminal article by Joel Feinberg: Joel Feinberg, "The Expressive Function of Punishment", in Joel Feinberg, *Doing and Deserving: Essays in the Theory of Responsibility*, Princeton University Press, New Jersey, 1970, p. 95, reprinted in *A Reader on Punishment*, in R.A. Duff and David Garland (eds.), Oxford University Press, Oxford, 1994, p. 73. See, for example, Leo Zaibert, *Punishment and Retribution*, Ashgate Publishing, Aldershot, 2006, p. 45 (referring to expressivism as "the latest fad in the philosophy of punishment"); and Carol S. Steiker, "Foreword: Punishment and Procedure: Punishment Theory and the Criminal-Civil Procedural Divide", in *Georgetown Law Journal*, 1997, vol. 85, no. 4, p. 803 (crediting Joel Feinberg with "inaugurating the "expressionist" turn in punishment theory").

[103] See, for example, Tim Meijers and Marlies Glasius, "Expression of Justice or Political Trial? Discursive Battles in the Karadžić Case", in *Human Rights Quarterly*, 2013, vol. 35, no. 3, p. 724 (noting that expressivism is "not a uniform approach"); and Amann, 2002, pp. 117–18, see *supra* note 26 ("The term "expressivism" comprehends ideas put forward by a number of scholars, who draw from disciplines that include law and economics, semiotics, philosophy, and sociology").

[104] See, in this regard, David Garland, *Punishment and Modern Society: A Study in Social Theory*, Clarendon Press, Oxford, 1990, p. 255:

their consequences.[105] As David Garland observes in his seminal study on punishment and modern society, any social practice can be viewed either as a form of *social action*, namely "in cause-and-effect terms as an institution which 'does things'", or as a form of *cultural signification*, namely "in interpretative what-does-it mean terms as an institution which 'say things'".[106] Yet, as Garland later elaborates, this analytical distinction between the instrumental and the symbolic is of little use in the criminal law context where "the social act of punishment, however mundane, is at the same time an expression of cultural meaning".[107] It is this notion of punishment as an expression of meaning that lies at the core of expressivist theories of punishment.

In order to critically examine expressivist justifications of international criminal punishment, our point of departure is to recognise two distinctions.

First, it is important to distinguish the expressive *character* of punishment (a *descriptive* claim) from an expressive *justification* for punishment (a *normative* claim).[108] It is entirely plausible to assert that punish-

> [T]he important thing to realize is that *all* practices, of whatever kind, are potentially signifying practices. Whatever else it does, even the most mundane form of conduct in the social world is also a possible source of expression, of symbolization, and of meaningful communication – every action is also a gesture.

105 Cass R. Sunstein, "On the Expressive Function of Law", in *East European Constitutional Review*, 1996, vol. 5, no. 1, p. 66. See also, David Luban, "State Criminality and the Ambition of International Criminal Law", in Tracy Isaacs and Richard Vernon (eds.), *Accountability for Collective Wrongdoing*, Cambridge University Press, Cambridge, 2011, p. 71 ("Expressive theories […] rest on the premise that actions can express attitudes and send messages, quite apart from their consequences"); and Dan M. Kahan, "What Do Alternative Sanctions Mean?", in *The University of Chicago Law Review*, 1996, vol. 63, no. 2, p. 597 ("Actions have *meanings* as well as consequences") (emphasis in original).

106 Garland, 1990, p. 250, see *supra* note 104.

107 *Ibid*., p. 255. See also, Kahan, 1996, p. 653, see *supra* note 105 ("What punishments *say* […] is an irreducible component of what they *do*") (emphasis in original).

108 See, for example, Duff and Garland, 1994, p. 14, see *supra* note 5 (distinguishing the "expressive character of punishment" from the question "why should […] censure be expressed by means of penal sanctions which inflict hard treatment and suffering on the offender"); Michael Davis, "Punishment as Language: Misleading Analogy for Desert Theorists", in *Law and Philosophy*, 1991, vol. 10, no. 3, p. 313 (distinguishing between "(a) "descriptive expressionism", which offers a definition of punishment or a description of punishment's function, and (b) "normative expressionism", which offers a rationale or justification of punishment"); Igor Primoratz, "Punishment as Language", in *Philosophy*,

ment has an expressive function, without making the further normative claim that punishment is justified by virtue of its expressive character.[109] As Michael Davis has put it, "No particular function of punishment *necessarily* has a role in its justification".[110] Our focus here is on the different *normative* theories of expressivism that have been advocated to *justify* punishment. Nonetheless, it should also be recognised that most of these theories share the underlying assumption that punishment has a symbolic significance that distinguishes it from other types of penalties.[111]

Second, it is also important to distinguish between two different types of normative expressivism: on the one hand, *intrinsic* expressivist theories justify punishment in retributive terms as an expressive end that is valuable in and of itself;[112] on the other, *extrinsic* expressivist theories

1989, vol. 64, no. 248, p. 188 (distinguishing "the definition of punishment" from "*normative* expressionism") (emphasis in original); Feinberg, 1970, p. 75, see *supra* note 102 (distinguishing "the *definition* of legal punishment" from "the *justification* of legal punishment as a general practice") (emphasis in original).

109 See, for example, Matthew D. Adler, "Expressive Theories of Law: A Skeptical Overview", in *University of Pennsylvania Law Review*, 2000, vol. 148, no. 5, p. 1414 ("the fact that the institution we call "punishment" is essentially expressive [as a descriptive matter] hardly makes out the normative claim that punishment is justified in virtue of its expressive cast").

110 Davis, 1991, p. 313, see *supra* note 108.

111 This insight is commonly traced to the work of Joel Feinberg. See, Feinberg, 1970, p. 74, see *supra* note 102 ("Punishment, in short, has a *symbolic significance* largely missing from other kinds of penalties") (emphasis in original). For recognition of the expressive function of punishment in the international criminal context, see, for example, Meijers and Glasius, 2013, p. 724, see *supra* note 103 (recognising the expressive value of punishment); Connor McCarthy, "Victim Redress and International Criminal Justice: Competing Paradigms, or Compatible Forms of Justice?", in *Journal of International Criminal Justice*, 2012, vol. 10, no. 2, p. 366 ("individual punishment is the conventional means by which recognition or denunciation may be given expression"); Sloane, 2007, p. 42, see *supra* note 2 (defending an expressive account of punishment by international criminal courts); Drumbl, 2007, p. 174, see *supra* note 14 (discussing the ways in which "punishment […] has significant messaging value"); and Danner, 2001, p. 490, fn. 380, see *supra* note 25 (citing relevant jurisprudence supporting the expressive function of punishment).

112 See, for example, R.A. Duff and David Garland, "Preface: J. Feinberg, 'The Expressive Function of Punishment'", in R.A. Duff and David Garland (eds.), *A Reader on Punishment*, Oxford University Press, 1994, p. 71 (referring to expressivism "in *intrinsicalist* terms (it is intrinsically right that criminals should suffer condemnation […])") (emphasis in original); Davis, 1991, p. 315, see *supra* note 108 (referring to "intrinsic expressionism" as possessing "the backward-looking virtues of traditional retributivism", requiring "an "internal" connection between the crime to be punished and the punitive response"); Primoratz, 1989, pp. 201–02, see *supra* note 108 (referring to "[i]ntrinsic expressionism",

justify punishment in utilitarian terms as an expressive means to achieving certain beneficial consequences.[113] Given their close proximity to retributive and utilitarian theories, it is often queried whether expressive accounts are sufficiently distinct from traditional justifications of punishment.[114] For present purposes, it is not important whether expressivist accounts can be conceptually disconnected from retributive and utilitarian justifications of punishment; instead, the pertinent question is whether expressivist theories are able to render more sophisticated and persuasive accounts of these traditional justifications.[115]

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which "does not construe the expression of moral condemnation that is punishment as a means to an end external to it, but as intrinsically right and proper"); H.L.A. Hart, "Postscript: Responsibility and Retribution", in H.L.A. Hart, *Punishment and Responsibility: Essays in the Philosophy of Law*, 2nd edition, Oxford University Press, 2008, p. 235 (referring to one form of expressivism, pursuant to which "the public expression of condemnation of the offender by punishment of his offence may be conceived as something valuable in itself").

113 See, for example, Duff and Garland, 1994, p. 71, see *supra* note 112 (referring to expressivism "in *consequentialist* terms (the state should impose expressive punishments because they will or might bring about certain beneficial consequences)") (emphasis in original); Davis, 1991, pp. 313–14, see *supra* note 108 (referring to "extrinsic expressionism" as "fundamentally utilitarian", pursuant to which "[p]unishment must be valuable primarily because of its effect on society, not because of what punishment is "in itself""); Primoratz, 1989, pp. 192 and 202, see *supra* note 108 (referring to "extrinsic expressionism" as "a variety of utilitarianism", pursuant to which "[p]unishment is seen as valuable not in itself, but as a means"); and H.L.A. Hart, "Postscript: Responsibility and Retribution", in H.L.A. Hart, *Punishment and Responsibility: Essays in the Philosophy of Law*, Oxford University Press, Oxford, 2008, p. 235 (referring to one form of expressivism as "trembling on the margin of a Utilitarian theory", pursuant to which the public expression of condemnation of the offender by punishment "is valuable only because it tends to certain valuable results, such as the voluntary reform of the offender, his recognition of his moral error, or the maintenance, reinforcement, or 'vindication' of the morality of the society against which the person punished has offended").

114 See, for example, Brooks, 2012, p. 122, see *supra* note 15 ("The biggest challenge then for expressivists is not that their theory of punishment is ultimately not compelling, but that it is not satisfactorily distinctive"); Aukerman, 2002, p. 86, see *supra* note 50 ("because other approaches to criminal justice rely on the communication of particular messages, like those of deterrence or moral reformation, the communicative paradigm is intertwined with, though conceptually distinct from, [such other approaches]"); and Kahan, 1996, p. 601, see *supra* note 105 (conceding that "[i]t might be the case that any plausible conception of the expressive view can be fit into the framework of deterrence or retributivism").

115 Sloane, 2007, p. 71, see *supra* note 2 ("insofar as deterrent and retributive theories of punishment can be transposed to the ICL context notwithstanding flaws in the national law

6.4.1. Intrinsic Expressivism

Intrinsic expressivist accounts seek to justify punishment by identifying some internal or inherent connection between crime and the symbolic character of punishment. In other words, the expressive character of punishment is used to inform the retributive notion of desert.[116] In the international criminal context, two intrinsic accounts have been relied upon to justify the punishment of perpetrators of international crimes.

6.4.1.1. Victim-Based Expressivism

The first account is the victim-based expressivist theory of domestic criminal law theorist Jean Hampton,[117] a theory that has garnered support from a range of international criminal scholars not only as a means to justify punishment,[118] but also as a means to determine the degree of culpability

analogy, it is largely because of the expressive dimensions of punishment"); Danner, 2001, p. 490, see *supra* note 25 ("Expressive theory can inform both retributive and utilitarian philosophies of punishment"); Kahan, 1996, p. 604, see *supra* note 105:

> [T]he question should not be whether expressive condemnation can be successfully disconnected from deterrence and retribution, but whether it's possible to develop sensible conceptions of the latter theories without reference to the expressive view. I believe that it isn't; punishment theorizing that disregards the expressive view is necessarily incomplete.

[116] See, for example, *ibid*., p. 602 ("On this account, an individual deserves punishment when he engages in behavior that conveys disrespect for important values. The proper retributive punishment is the one that appropriately expresses condemnation and reaffirms the values that the wrongdoer denies").

[117] See generally, Jean Hampton, "Correcting Harms Versus Righting Wrongs: The Goal of Retribution", in *UCLA Law Review*, 1992, vol. 39, no. 6, pp. 1659 ff.; and Hampton, 1988, pp. 122–43, see *supra* note 53. For critical discussions of Hampton's theory, see generally, Nathan Hana, "Say What? A Critique of Expressive Retributivism", in *Law and Philosophy*, 2008, vol. 27, no. 2, pp. 139–42; Golash, 2005, pp. 52–60, see *supra* note 15; Adler, 2000, pp. 1422–25, see *supra* note 109; and David Dolinko, "Some Thoughts About Retributivism", in *Ethics*, 1991, vol. 101, no. 3, pp. 549–54.

[118] See, for example, Shachar Eldar, "Exploring International Criminal Law's Reluctance to Resort to Modalities of Group Responsibility: Five Challenges to International Prosecutions and their Impact on Broader Forms of Responsibility", in *Journal of International Criminal Justice*, 2013, vol. 11, no. 2, p. 345 (relying on Hampton's theory to justify the imposition of international criminal punishment on individuals); Luban, 2011, pp. 71–72, see *supra* note 105 (relying on Hampton's victim-based expressive account); Aukerman, 2002, p. 55, fn. 80, see *supra* note 50 (referring to victim-based expressive theories as "attractive" for providing a useful way to distinguish between retribution and vengeance); and Roht-Arriaza, 1995, pp. 17–21, see *supra* note 13 (discussing the victim-centred view of punishment which characterizes the criminal sanction "as a form of redress"). For critical

of individuals, and hence the severity of sentences, for particular offences.[119] Hampton's account is based on the expressive character of both wrongdoing and punishment. For Hampton, the actions of a wrongdoer contain a message about their value relative to that of their victims.[120] By their actions, wrongdoers create the *appearance* of degrading their victims,[121] something Hampton refers to as "diminishment".[122] By representing their victims as worth far less than their actual value, wrongdoers represent themselves as elevated, thereby according themselves a value they do not have.[123] In this way, the conduct of a wrongdoer causes "a moral injury" to their victim, which constitutes an expressive harm to the acknowledgement and realisation of the victim's value.[124] Hampton's justification of punishment is founded on this conception of wrongdoing.

For Hampton, a retributive response – whether punitive or otherwise – is one that aims to "vindicate the value of the victim denied by the wrongdoer's action".[125] Such a response must strive "first to re-establish

remarks in the international criminal context, see generally, Pablo de Greiff, "Deliberative Democracy and Punishment", in *Buffalo Criminal Law Review*, 2002, vol. 5, no. 2, pp. 396–97.

119 See, for example, Amy J. Sepinwall, "Failures to Punish: Command Responsibility in Domestic and International Law", in *Michigan Journal of International Law*, 2009, vol. 30, no. 2, pp. 286–302 (relying on Hampton's account to argue that the failure to punish form of superior responsibility entails an "expressive injury" that makes the superior a party to the underlying offence); and Adil Ahmad Haque, "Group Violence and Group Vengeance: Toward a Retributivist Theory of International Criminal Law", in *Buffalo Criminal Law Review*, 2005, vol. 9, no. 1, p. 310 (arguing that the "expressive harm" of genocidal intent, which not only denies the equal moral worth of victims but also seeks "to create a social world in which that denial is an operating principle in society", warrants enhancing punishment for genocidal acts compared to other international crimes).

120 Hampton, 1988, p. 124, see *supra* note 53.

121 Hampton, 1992, pp. 1672–73, see *supra* note 117 (Hampton's theory is based on a Kantian theory of value, pursuant to which "human beings *never* lose value as ends-in-themselves, no matter what kind of treatment they receive". Consequently, Hampton emphasises that a wrongful act can only ever give "the appearance" of degradation) (emphasis in original).

122 *Ibid*., p. 1673.

123 *Ibid*., p. 1677. See also, Luban, 2011, p. 72, see *supra* note 105 (noting that expressive theories "are not committed to the idea that perpetrators intend their actions to communicate their expressive messages […] The robber's contemptuous attitude toward the victim is built into the action regardless of whether the robber consciously thinks contemptuous thoughts or means to communicate them").

124 Hampton, 1992, p. 1685, see *supra* note 117.

125 *Ibid*., p. 1686.

the acknowledgement of the victim's worth damaged by the wrongdoing, and second, to repair the damage done to the victim's ability to realize her value".[126] Such a response must constitute a means of planting the flag of morality, thereby annulling the appearance of the wrongdoer's superiority.[127] According to this perspective, it is not so much the victim's value that is elevated by the imposition of a retributive response; rather, it is the wrongdoer's claim to elevation over the victim that is denied or countered.[128] Interestingly, Hampton's account does not require that the response take the form of incarcerative punishment to count as retribution.[129] Nonetheless, Hampton argues that incarcerative punishment is "uniquely suited" to this task of vindicating the victim's relative worth.[130] Moreover, Hampton also asserts that the way in which a society responds to particular instances of wrongdoing is a reflection of how that society values its individuals.[131] A failure to punish can send the message that society also denies the value of a victim and thereby contribute further to his or her diminishment.[132]

Hampton's victim-focused theory is particularly appealing in the international criminal context given the increasing attention paid to the

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[126] *Ibid*.

[127] Hampton, 1988, pp. 130–31, see *supra* note 53 (Hampton argues that her theory provides a coherent explanation for Georg Wilhelm Friedrich Hegel's assertion that punishment "annuls the crime", noting that while the imposition of punishment "can't annul the act itself, […] *it can annul the false evidence seemingly provided by the wrongdoing of the relative worth of the victim and the wrongdoer*") (emphasis in original). See further, Georg Wilhelm Friedrich Hegel, *Philosophy of Right*, in T.M. Knox (trans.), Clarendon Press, Oxford, 1942 (1820). For critical discussion of Hegel's theory, see generally, Golash, 2005, pp. 50–52, see *supra* note 15; and Larry May, *Crimes Against Humanity: A Normative Account*, Cambridge University Press, Cambridge, 2005, pp. 222–24.

[128] Hampton, 1988, p. 138, see *supra* note 53.

[129] Hampton, 1992, p. 1694, see *supra* note 117; and Hampton, 1988, p. 126, see *supra* note 53.

[130] Hampton, 1992, p. 1695, see *supra* note 117; and Hampton, 1988, p. 128, see *supra* note 53.

[131] Hampton, 1992, p. 1691, see *supra* note 117 (noting that, by imposing punishments that are too lenient with respect to particular instances of wrongdoing, "the punisher ratifies the view that the victim is indeed the sort of being who is low relative to the wrongdoer").

[132] *Ibid*., p. 1692.

needs of victims by international criminal courts.[133] However, as a justification for punishment, the theory faces two challenges.

First, it is not clear how the imposition of incarcerative punishment is able to express the equality of value that exists between victim and wrongdoer. As Deirdre Golash has observed, "just as the offender seeks a competitive victory over her victim, punishment represents a competitive victory over the offender".[134] Rather than expressing equality of value, it is arguably more intuitive to think of incarcerative punishment as representing that the wrongdoer is of lower value than the victim.[135] In other words, punishment seems to diminish the wrongdoer, just as crime diminishes the victim.[136]

Second, even if the previous challenge can be overcome, it is not clear that incarcerative punishment represents a particularly distinctive or effective way to vindicate the victim's status.[137] Hampton's account seems more suited to justifying victim redress and compensation rather than incarcerative punishment.[138] Indeed, Hampton even acknowledges that,

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133 See generally, Barrie Sander, "The Expressive Limits of International Criminal Justice: Victim Trauma and Local Culture in the Iron Cage of the Law", in *European Society of International Law Conference Paper Series*, 2015, no. 5.

134 Golash, 2005, p. 53, see *supra* note 15.

135 *Ibid*.

136 *Ibid*., p. 55. See also, Dolinko, 1991, p. 552, see *supra* note 117 ("it is surely not true that whatever would correct (or "nullify") a mistaken moral claim is *ipso facto* morally permissible").

137 Adler, 2000, p. 1424, see *supra* note 109 ("it is only contingently true that the best way for government to reverse this status harm is to *communicate* something") (emphasis in original).

138 See, for example, Hana, 2008, p. 142, see *supra* note 117 ("Many non-punitive techniques […] can, with the right conventions in place, be used to express the criticism, beliefs, attitudes and so on that are needed to affirm equal worth on Hampton's view"); Golash, 2005, p. 55, see *supra* note 15 (noting that the vindication of the victim's status "can be made by requiring compensation for the harm done, thus shifting the consequences of the wrongdoer's behavior back to him, as is regularly done in the context of civil suits"); and Adler, 2000, p. 1424, see *supra* note 109 (noting that "governments might more effectively achieve equality of status between victim and wrongdoer by coercing the payment of reparations from one to the other"). See also, Martti Koskenniemi, "From Impunity to Show Trials", in *Max Planck Yearbook of United Nations Law*, 2002, vol. 6, p. 11 (noting that often victims "do not so much expect punishment […] but rather a recognition of the fact that what they were made to suffer was "wrong", and that their moral grandeur is symbolically affirmed").

according to her account, "retribution is actually a form of compensation to the victim".[139] With this in mind, it is perhaps unsurprising that Conor McCarthy recently relied on Hampton's account to justify the regime of victim redress at the ICC.[140] Victim redress mechanisms as well as civil suits more generally are arguably more suited to vindicating the victim's value, as required by Hampton's account.[141]

6.4.1.2. The Communicative Theory

The second intrinsic expressivist theory that has been advanced in the international context is a *communicative* account. The principal exponent of this account is Antony Duff, based on his extensive work on criminal punishment in the domestic context.[142] Interestingly, Duff's communicative account is not confined to justifying the imposition of incarcerative

[139] Hampton, 1992, p. 1698, see *supra* note 117.

[140] McCarthy, 2012, p. 351, see *supra* note 111.

[141] *Ibid*.

[142] See generally, Antony Duff, "Authority and Responsibility in International Criminal Law", in Samantha Besson and John Tasioulas (eds.), *The Philosophy of International Law*, Oxford University Press, Oxford, 2010, p. 589; Antony Duff, "Can We Punish the Perpetrators of Atrocities?", in Thomas Brudholm and Thomas Cushman (eds.), *The Religious in Responses to Mass Atrocity: Interdisciplinary Perspectives*, Cambridge University Press, Cambridge, 2009, pp. 79–104; Antony Duff, "Punishment, Retribution and Communication", in Andrew von Hirsch, Andrew J. Ashworth and Julian V. Roberts (eds.), *Principled Sentencing: Readings on Theory and Policy*, Hart Publishing, Oxford, 2009, p. 126; R.A. Duff, *Punishment, Communication, and Community*, Oxford University Press, Oxford, 2001; R.A. Duff, "Punishment, Communication, and Community", in Matt Matravers (ed.), *Punishment and Political Theory*, Hart Publishing, Oxford, 1998, pp. 48 ff.; and R.A. Duff, "Response to von Hirsch", in Matt Matravers (ed.), *Punishment and Political Theory*, Hart Publishing, Oxford, 1999, pp. 83 ff. For critical discussion of Duff's communicative account of punishment, see generally, Wringe, 2010, see *supra* note 60; Golash, 2014, pp. 220–23, see *supra* note 95; Hana, 2008, pp. 142–48, see *supra* note 117; de Greiff, 2002, pp. 390 ff., see *supra* note 118; Golash, 2005, see *supra* note 15, chap. 6; Andrew von Hirsch, "Punishment, Penance, and the State", in Matt Matravers (ed.), *Punishment and Political Theory*, Hart Publishing, Oxford, 1999, pp. 69 ff.; Duncan Ivison, "Justifying Punishment in Intercultural Contexts: Whose Norms? Which Values?", in Matt Matravers (ed.), *Punishment and Political Theory*, Hart Publishing, Oxford, 1999, pp. 88 ff.; and Thomas Baldwin, "Punishment, Communication, and Resentment", in Matt Matravers (ed.), *Punishment and Political Theory*, Hart Publishing, 1999, pp. 124 ff.

punishment; it also attaches an independent, non-instrumental significance to criminal trials and convictions.[143]

According to Duff's account, criminal trials play a distinctive role in engaging the defendant in "a communicative enterprise".[144] Rather than serving merely as a means for identifying individuals to be punished, trials serve as *fora* in which defendants are "called to account" by the State whose laws they are alleged to have broken.[145] The trial represents a process through which defendants are answerable for their actions.[146] Duff stresses that his approach is "communicative",[147] addressing the defendant as a responsible agent, and giving him or her "a central, active role in the process".[148] If, by the end of the trial, the defendant is found guilty, the verdict that follows serves not merely to initiate the imposition of punishment, but also as a formal, public message of censure owed to the offender, the victims, and society as a whole.[149] The conviction of the offender is important for communicating the censure that the offender deserves for the crime committed.[150] Specifically, the offender is expected to understand and accept that he has committed a wrong for which society now censures him.[151] Moreover, this public censure is important for con-

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143 Duff, 2010, p. 593, see *supra* note 142. See generally, Duff, 2001, pp. 35–72 and 80–82, see *supra* note 15.

144 Duff, 2010, p. 593, see *supra* note 142.

145 *Ibid*., p. 594.

146 *Ibid*.

147 *Ibid*., p. 593 (referring to "communication rather than expression, since whereas expression is an essentially one-way activity that requires only an audience or object, communication is (at least in intention) a two-way process that seeks actively to engage the other"). See also Duff, 2001, p. 79, see *supra* note 15 (preferring the term "communication" because it involves "a *reciprocal* and *rational* engagement") (emphasis in original).

148 Duff, 2010, p. 594, see *supra* note 142.

149 See, Duff, 2001, pp. 28–29, see *supra* note 15. Noting that censure of conduct declared to be wrong is owed to:

> its victims, as manifesting that concern for them and for their wronged condition that the declaration itself expressed[;] [...] the society whose values the law claims to embody, as showing that those values are taken seriously[;] […] [and] the offenders themselves, since an honest response to another's wrongdoing, a response that respects him as a responsible moral agent, is criticism or censure of that wrongdoing.

See generally, *ibid*., pp. 112–15.

150 *Ibid*., p. 80.

151 *Ibid*.

veying the message that society takes crime seriously and is committed to holding the wrongdoings of responsible agents to account.[152] An important aspect of Duff's account of trials and convictions, therefore, is that it treats and addresses individuals as responsible members of society, seeking to *persuade* offenders to refrain from criminal wrongdoing rather than *compelling* them to do so.[153]

It does not automatically follow from Duff's account of the communicative nature of criminal trials and convictions that the subsequent imposition of incarcerative punishment is justifiable.[154] For this purpose, Duff characterises punishment as "a species of secular *penance*" that is able to communicate the censure that offenders deserve.[155] Specifically, Duff advocates the "three Rs" of punishment, it being hoped that through the burden of hard treatment, an offender will come "to *repent* his crime, to begin to *reform* himself, and thus *reconcile* himself with those he has wronged".[156] Such an account is retributive in the sense that it justifies punishment as the communication of deserved censure, but also shares the forward-looking purpose of Duff's account of criminal trials and convictions in seeking to persuade wrongdoers to repent for their crimes.[157]

Duff's account is attractive to the extent that it captures the dialogical nature of the criminal law process. Nonetheless, as a justification of incarcerative punishment, it runs into a number of difficulties.

First, the account is premised on the defendant being called to account "to their fellow citizens (in whose name the courts act) for public wrongs committed, *in virtue of their shared membership of the political*

[152] *Ibid*., p. 72 (noting that "to mean what we say in condemning some conduct as wrong is to be committed to censuring those engaged in it (assuming that we have the standing to do so)").

[153] *Ibid*., p. 81.

[154] *Ibid*., p. 82 (noting that "censure can be expressed by a formal conviction, or by a purely symbolic punishment that burdens the offender only insofar as she takes its message of censure seriously").

[155] *Ibid*., p. 30.

[156] *Ibid*., pp. 106–12.

[157] *Ibid*., p. 30.

community".[158] In other words, in order to ensure a moral dialogue between the punishing institution and the defendant, this account requires that wrongdoers belong to the same community as those who punish them.[159] The challenge in the international criminal context lies in determining whether a shared community exists to which perpetrators of international crimes belong and to which they may therefore be called to account for their actions.[160] As Duff readily acknowledges, the answer to this question may differ depending on the type of community that is considered to be required for this purpose.[161]

If a shared *political* community is required, then, given the implausibility of portraying humanity as a political community,[162] punishment is only likely to be justifiable for international crimes in two scenarios. First, where the case involves a domestic court holding to account its own citizens, the perpetrators may be held to answer to the political community within and against which they committed their international crimes.[163] Second, an international court may also claim legitimate authority to act as a surrogate in the name of such a community, though only where it has been delegated jurisdiction by the relevant political commu-

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158 Duff, 2010, p. 595, see *supra* note 142. For useful discussions of this requirement, see generally, Greenawalt, 2014, pp. 991–94, see *supra* note 15; and Wringe, 2010, see *supra* note 60.

159 Alan Norrie, "Justice on the Slaughter-bench: The Problem of War Guilt in Arendt and Jaspers", in *New Criminal Law Review*, 2008, vol. 11, no. 2, pp. 196–97.

160 Duff, 2010, p. 597, see *supra* note 142. Alexander Greenawalt has recently noted that Duff's challenge is in fact a broad one that:

> implicitly calls into question much broader developments in international law, such as the rise of human rights law, which is premised on the idea that the international community as a whole has a stake in how individual states treat their own citizens, […] [as well as] the institutional mechanisms underlying ICL […] by which states limit their sovereignty more broadly.

See Greenawalt, 2014, p. 992, see *supra* note 15.

161 See Duff, 2010, pp. 597–604, see *supra* note 142.

162 See, for example, Duff, 2010, p. 600, see *supra* note 142 (noting the implausibility of trying "to portray humanity as a *political* community") (emphasis in original); Larry May, "Reply to the Critics: Humanity, International Crime, and the Right of Defendants", in *Ethics and International Affairs*, 2006, vol. 20, no. 3, p. 374 (conceding that "there is no political community to which all humans belong"); and David Luban, "A Theory of Crimes Against Humanity", in *Yale Journal of International Law*, 2004, vol. 29, no. 1, pp. 124–41.

163 Duff, 2010, p. 598, see *supra* note 142.

nity for this purpose.[164] The challenge in each of these scenarios lies in the fact that in mass atrocity contexts, where communities are literally ripped apart, there may not be a surviving political community to which the perpetrator should answer.[165]

Yet, as Duff observes, it may not be necessary to identify a shared *political* community to justify the imposition of punishment: a shared *moral* community may be sufficient.[166] Nonetheless, even the identification of a shared moral community poses distinct challenges. Given that conceptions of right and wrong tend to be inverted in mass atrocity situations, it may be difficult to identify a moral commonality between the punishing institution and the defendant in the international criminal context.[167]

To illustrate the difficulties involved, we may usefully recall the challenges faced by Hannah Arendt in her attempt to justify the punishment of Adolf Eichmann.[168] Arendt began her account by claiming that Eichmann had committed "a crime against mankind", in which "an altogether different order is broken and an altogether different community is violated".[169] Yet, having initially invoked the possibility of an "order of mankind" in this way,[170] Arendt then proceeded to undermine the existence of such an order by contending that Adolf Eichmann's death sen-

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164 *Ibid*., p. 599.

165 *Ibid*.

166 *Ibid*., p. 600. See also, Damaska, 2008, p. 347, see *supra* note 26 ("this species of justice presupposes that acts which it threatens with punishment are contrary to existing and reasonably clear moral fundamentals, or, alternatively, that they flout agreements on basic protections – even if those do not spring from a common theoretical source"). On the challenges of identifying a shared moral community of humanity, see generally, Craig Reeves, "'Exploding the Limits of Law': Judgment and Freedom in Arendt and Adorno", in *Res Publica*, 2009, vol. 15, no. 2, p. 137; and Norrie, 2008, see *supra* note 159.

167 See similarly, Reeves, 2009, p. 139, see *supra* note 166 (noting "the problem of how to make sense of *judgment across morally contrastive backgrounds*") (emphasis in original); and Norrie, 2008, p. 208 , see *supra* note 159 ("Where right and wrong have been turned upside down, where lies the commonality between judge and judged that makes a finding of guilt possible?").

168 These insights are based on those raised by Craig Reeves and Alan Norrie in two papers. See, Reeves, 2009, p. 137, see *supra* note 166; and Norrie, 2008, see *supra* note 159.

169 Hannah Arendt, *Eichmann in Jerusalem: A Report on the Banality of Evil*, revised and enlarged edition, Penguin Books, 1994, p. 272.

170 *Ibid*.

tence was justifiable on the sole basis that "no one, that is, no member of the human race, can be expected to want to share the earth with [him]".[171] In other words, Eichmann deserved his punishment, not as a member of a shared moral community of humanity, but as an outcast.[172] Interpreting this passage, Alan Norrie has observed that Arendt's contention seems to be that "punishment must step outside the terms of a common humanity, grounded in the possibility of common moral values and responses, judgments and responsibilities, in order to hang Eichmann".[173] Yet, it is precisely such a shared normative space that is required for punishment to be justifiable.[174]

Even if it is not possible to identify a shared moral community of humankind in an empirical sense, it may be possible to establish such a community in a transcendent sense.[175] In this vein, Alan Norrie has recently relied on Karl Jaspers' conception of "metaphysical guilt", understood as "an unconditional relation between all human beings", to justify the imposition of punishment for international crimes.[176] Duff seems to argue along similar lines,[177] positing that such a community may find its

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171 *Ibid*., p. 279.

172 Norrie, 2008, p. 203, see *supra* note 159.

173 *Ibid*., pp. 203 and 223 (noting that "Arendt's solution to the problem of how one punishes an Eichmann is to treat him as one who lacks the full moral capacities of the human being, but this acknowledges the lack of moral community that otherwise makes justice possible"). See also, Reeves, 2009, p. 142, see *supra* note 166 (noting the contradiction in Arendt's account between on the one hand suggesting that "the community that exists by virtue of the capacity to judge includes Eichmann because that capacity is attributable to all" and on the other hand suggesting that "since Eichmann and all of those like him *failed* to judge, they had stepped outside of that community, placing them seemingly beyond the pale of judgment after all") (emphasis in original).

174 *Ibid*., pp. 139 (noting "the need for a standpoint capable of constituting a shared normative space that had better not rely on the peculiarities of particular moral communities") and 159 (noting that "Arendt's perspectival theory […] threatens to undermine any normative standpoint capable of grounding valid judgments across morally contrastive empirical communities").

175 See, for example, Norrie, 2008, pp. 223–24, see *supra* note 159.

176 *Ibid*., p. 224. See also, Reeves, 2009, pp. 160–62, see *supra* note 166 (relying on Adorno's idea of "a human solidarity that transcends all individual interests" as a basis for an objective community, grounded by "the basic natural-historic commonality which unites all as subjects who experience […] freedom as a suppressed potential").

177 Duff also notes, however, that "the existence of a community is often *a matter more of aspiration* than of achieved fact, and a recognition of human community could be a recog-

roots in "our shared humanity",[178] the recognition that others are fellow human beings deserving of our respect and concern, as well as our "shared life",[179] the fact that our lives consist of certain shared human concerns and needs. Indeed, from this perspective, the creation of the ICC may be considered to represent "one of the ways in which the moral ideal of a human community might be given more determinate and effective institutional form".[180] Similar sentiments have also found favour with several other scholars in the international criminal context.[181]

Even if the challenge of identifying a relevant community is overcome, Duff's account still shoulders the heavy burden of making plausible the claim that punishment in the form of incarceration is conducive to setting in motion a process of self-reflection and repentance on the part of the wrongdoer.[182] As Nietzsche famously observed, "punishment makes

nition of what we should aspire to create". See, Duff, 2010, p. 601, see *supra* note 142 (emphasis added). See similarly, Haque, 2005, p. 297, see *supra* note 119 ("International tribunals may […] strive to *constitute* an international moral community rather than reflect one that already exists") (emphasis in original).

178 Duff, 2010, p. 601, see *supra* note 142.

179 *Ibid*.

180 *Ibid*., p. 601. For further discussion, see Duff, "Can We Punish the Perpetrators of Atrocities?", 2009, pp. 93 ff., see *supra* note 142. See also, Salif Nimaga, "An International *Conscience Collective*? A Durkheimian Analysis of International Criminal Law", in *International Criminal Law Review*, 2007, vol. 7, no. 4, p. 617 (noting that the ICC trial of Thomas Lubanga Dyilo may be considered as "an attempt to contribute to the establishment and confirmation of the international community's normative foundations").

181 See, for example, Greenawalt, 2014, p. 993, see *supra* note 15 (offering his support for the view that there does exist "a sufficient shared sense of common humanity" to justify the application of international criminal law); and Ambos, 2013, p. 314, see *supra* note 9. Ambos argues that:

> [a] supranational *ius puniendi* can be inferred from a *combination* of the incipient stages of *supranationality* of a value-based world order and the concept of a world society composed of world citizens whose law – the '*world citizen law*' (*Weltbürgerrecht*) – is derived from universal, indivisible and interculturally recognised human rights predicated upon a Kantian concept of human dignity.

182 de Greiff, 2002, p. 397, see *supra* note 118. See also, Golash, 2014, pp. 222–23, see *supra* note 95 (noting that "[t]o the extent that the message of condemnation can be sent in other ways, the justification for using punishment to do so […] is weakened"); Hana, 2008, p. 145, see *supra* note 117 (arguing that Duff "underestimates the psychological complexities attending criticism and punishment" and that "generating remorse and repentance […] have no straightforward connection with one of punishment's essential elements […]: the aim to impose suffering"); Baldwin, 1998, pp. 125–27, see *supra* note 142 (disputing

men harder and colder, it concentrates, it sharpens the feeling of alienation; it strengthens the power to resist".[183] It is here that the lack of a shared *political* community between wrongdoer and punishing institution may prove problematic. According to Judith Shklar, international criminal trials tend to be ones in which "the most fundamental moral and political values [are] the real personae".[184] Consequently, any punishment that follows from conviction by an international criminal court is more likely to be interpreted by the wrongdoer as the continuation of political struggle or even as a form of political victimisation.[185] This perspective is supported by the political character of most international crimes. David Luban, for example, has characterised crimes against humanity as crimes against our status as political animals: first, "by perverting politics",[186] since the commission of such crimes by States or State-like organisations reveals them to be not just horrible crimes but "horrible *political* crimes, crimes of politics gone cancerous";[187] and second, "by assaulting the individuality and sociability of the victims in tandem".[188] The political character of international criminality often creates an intimate connection between the acts and intentions of the defendant on the one hand and their political beliefs on the other; in such contexts, *who* is subject to punishment be-

whether the imposition of hard treatment can generate repentance on the part of wrongdoers as Duff suggests); and H.L.A Hart, *Law, Liberty, and Morality*, Stanford University Press, 1963, p. 66 (noting that "it is not clear, if denunciation is really what is required, why a solemn public statement of disapproval would not be the most "appropriate" or "emphatic" means of expressing this").

183 Friedrich Nietzsche, *On the Genealogy of Morality*, 2nd edition, in Keith Ansell-Pearson (ed.), Carol Diethe (trans.), Cambridge University Press, 2006, p. 54.

184 Shklar, 1964, p. 155, see *supra* note 99. See also, Gerry J. Simpson, *Law, War and Crime: War Crimes Trials and the Reinvention of International Law*, Polity Press, 2007, p. 13 (characterizing war crimes trials as "the proceduralized clash of competing ideologies").

185 Golash, 2014, p. 221, see *supra* note 95.

186 Luban, 2004, p. 120, see *supra* note 162.

187 *Ibid*., p. 117 (emphasis in original).

188 Luban, 2004, p. 120, see *supra* note 162. See also, Devin O. Pendas, *The Frankfurt Auschwitz Trial, 1963–1965: Genocide, History, and the Limits of the Law*, Cambridge University Press, Cambridge, 2006, p. 303 (noting that, with regard to the Holocaust, "what is at stake is not simply a state-sponsored breach of social order but *a state-enacted negation of the very possibility of social order*. The Holocaust was not simply the murder of millions of individuals; *it was the abolition of the very principle of social solidarity*") (emphasis added).

comes inseparable from *what* is being punished.[189] With this in mind, the emotional attachment between the defendant and the punishing institution that is typically required for the message of punishment to be effectively transmitted is usually lacking in the international criminal context, particularly since justice tends to be imposed by a distant and elusively defined international community.[190] As Deirdre Golash has argued, "faced with a choice between their own value attachments and attachments to those they see as punishing them, [international criminals] will readily choose the former".[191] In such circumstances, the plausibility of justifying the imposition of punishment as a means of instigating a form of secular penance is difficult to maintain.

In response to this challenge, Duff maintains that the moral possibility of punishment does not depend on its actual success in bringing wrongdoers to answer for, to repent or to make amends for their crimes, it being necessary that we address wrongdoers as people who *could* respond appropriately. Yet, as Golash has argued, if Duff's account is to convincingly claim to treat persons as valuable in their own right, "we must at a minimum show that there is some reason to think that [punishment] will have the intended effect, even if we are for other reasons precluded from promising its efficacy".[192]

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189 See, for example, Scott Veitch, "Judgment and Calling to Account: Truths, Trials and Reconciliations", in R.A. Duff, Lindsay Farmer, Sandra Marshall and Victor Tadros (eds.), *The Trial on Trial Volume 2: Judgment and Calling to Account*, Hart Publishing, 2006, p. 165 (noting that, in the case of criminals trials of political dissidents, "*who* is being tried does not seem separable from the question of *what* is being tried") (emphasis in original).

190 Golash, 2014, p. 221, see *supra* note 95. On the difficulties of Duff's communicative account in intercultural contexts more generally, see Ivison, 1999, p. 88, see *supra* note 142.

191 Golash, 2014, p. 221, see *supra* note 95.

192 Golash, 2005, p. 130, see *supra* note 15. See, in this regard, Duff, 2009, p. 91, see *supra* note 142 ("we must address the wrongdoer as someone who *could* respond appropriately, else there is no sense in seeking a response from him; but the value and importance of the attempt to engage him in a penal dialogue does not depend on its actual or likely success.") (emphasis in original). See also, Ivison, 1999, p. 106, see *supra* note 142 (submitting that Duff's claim "disconcerts" by suggesting that "we can insulate ourselves from the moral discomfort of punishment, by fulfilling certain justificatory conditions so as to locate ourselves somehow beyond moral reproach").

6.4.2. Extrinsic Expressivism

In contrast to intrinsic expressivist accounts of punishment, extrinsic expressivist accounts seek to justify punishment in terms of its beneficial consequences. As such, extrinsic expressivist accounts are utilitarian in character, punishment deemed valuable not in itself, but only as a means to securing societal benefits. In the international criminal context, two extrinsic expressivist accounts have found favour amongst scholars.[193]

6.4.2.1. The Moral Education Theory

The first account depicts punishment as a form of moral education or positive prevention.[194] This account seeks to provide a more convincing argument for the deterrent effect of punishment than traditional utilitarian accounts; rather than viewing punishment as a threat that deters through fear, it is argued that punishment plays a role in shaping and restoring societal values, and thereby encourages the development of habitual conformity with international criminal norms.[195] Payam Akhavan, a strong

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[193] Aspects of the sections that follow draw on passages first elaborated in Sander, 2015, p. 749, see *supra* note 73.

[194] See, for example, Ambos, 2013, p. 71, see *supra* note 8 (noting that "German scholar Hans-Heinrich Jescheck identified ideas of general prevention in a positive (supporting the respect of the law) and negative (deterring) sense in the Nuremberg judgments"); Fisher, 2012, p. 56, see *supra* note 41 (referring to punishment as "a moral educator"); Luban, 2011, p. 71, see *supra* note 105 (referring to the German criminological theory of "positive prevention"); Drumbl, 2007, p. 174, see *supra* note 14 (referring to punishment operating as "moral educator"); Georg Schwarzenberger, "The Eichmann Judgment: An Essay in Censorial Jurisprudence", in Gerry J. Simpson (ed.), *War Crimes Law Volume II*, Ashgate, 2004, p. 255 (noting, with respect to criminal law, that "[i]n its deterrent and corrective aspects it fulfils social functions of an essentially educational nature"); and Johannes Andenaes, "The General Preventive Effects of Punishment", in *University of Pennsylvania Law Review*, 1966, vol. 114, no. 7, p. 950 (referring to "the *moral* or *socio-pedagogical* influence of punishment") (emphasis in original).

[195] Sloane, 2007, p. 75, see *supra* note 2. See also, Ambos, 2013, p. 73, see *supra* note 8 (noting that international criminal punishment serves the purpose of "creating a universal legal consciousness, in the sense of positive general and integrating prevention calling for reconciliation and reparation"); Allison Zuckerman, "The Expressive Necessity of Gender-Based Violence Prosecutions", in *International Law Studies*, 10 May 2013, pp. 9–10 (noting that "ICL prosecutions and punishments are thus an effort to cement ideas that certain acts are undeniably wrong" and that "ICL both represents and reinforces the expressive power of international law in action"); Damaska, 2008, p. 345, see *supra* note 26 (noting that international criminal courts "should aim their denunciatory judgments at strengthening a sense of accountability for international crime by exposure and stigmatization of

advocate of this account, has explained how criminal justice systems are accustomed to producing "a flow of moral propaganda" such that the imposition of punishment on a wrongdoer is transformed into "a means of expressing social disapproval".[196] By transforming popular conceptions of right and wrong,[197] this moral propaganda may ultimately contribute to a process whereby such values are internalised by members of society and habitual conformity with the law is thereby fortified.[198] In this way, crimi-

these extreme forms of inhumanity"); Drumbl, 2007, p. 174, see *supra* note 14 ("Punishment internalizes – and even reinforces – social norms among the public and, thereby, from the expressivist perspective proactively promotes law-abiding behavior"); Aukerman, 2002, p. 73, see *supra* note 50 ("prosecutions reinforce moral norms and contribute to a shared understanding that certain behavior is wrong"); "Developments in the Law: International Criminal Law", 2001, p. 1966, see *supra* note 66 (noting the aim of international criminal courts "to inculcate the norms of international humanitarian law so thoroughly that the credible threat of external punishment is no longer necessary to prevent offenses"); Kahan, 1996, p. 603, see *supra* note 105 (noting that "the expressive theory might reinforce deterrence […] through preference formation", pursuant to which "[t]he law can discourage criminality not just by "raising the cost" of such behavior through punishments, but also through instilling aversions to the kinds of behavior that the law prohibits"); and T. Mathiesen, "General Prevention as Communication", in R.A Duff and David Garland (eds.), *A Reader on Punishment*, Oxford University Press, Oxford, 1994, p. 221 ("punishment may be viewed as a *message* from the state": "First, punishment is a message which intends to say that crime does not pay (deterrence). Secondly, it is a message which intends to say that you should avoid certain acts because they are morally improper or incorrect (moral education). Thirdly, it is a message which intends to say that you should get into the habit of avoiding certain acts (habit formation)").

196 Akhavan, 1998, p. 746, see *supra* note 64. See also, Andenaes, 1966, p. 950, see *supra* note 194 (noting how "from law and the legal machinery there emanates a flow of propaganda which favors such respect [for the values which the law seeks to protect]").

197 It is a point of contention amongst scholars whether punishment is able to convey both the values of a community *and* the moral reasons behind them, or whether it is limited to only expressing the former. For a useful discussion, see Fisher, 2012, pp. 59–60, see *supra* note 41 (concluding that punishment is best characterised "as an educative tool for the promotion of values: it communicates the values of the community; it reinforces them and emphasizes the community's commitment to these values. It may not, however, be capable of expressing why the community holds the values that it does").

198 Akhavan, 1998, p. 747, see *supra* note 64. See also, Andenaes, 1966, p. 951, see *supra* note 194 (noting that "with fear or moral influence as an intermediate link, it is possible to create unconscious inhibitions against crime, and perhaps to establish a condition of habitual lawfulness"). For criticism of Akhavan's viewpoint, see Mégret, 2001, p. 203, see *supra* note 91 (noting that his "argument subtly assumes what it was supposed to prove").

nal courts can influence future behaviour through punishment by altering the underlying norms of a society.[199]

Although the moral education account has principally been recognised by international criminal courts in the context of justifying the imposition of punishment,[200] it should be noted that this account is also applicable to other social practices within the criminal law process. For instance, criminal *trials* are also powerful vehicles for norm projection. As Bill Wringe has explained, "[t]he best way to express a commitment to the rule of law is to subject to it even those who might otherwise think that they were likely to escape it".[201] Moreover, the principle of complementarity at the ICC has triggered several States to reform their domestic criminal justice systems so as to incorporate the substantive law of the ICC Statute. As David Luban has noted, through such processes "new norms get spliced into the DNA of domestic law", a form of norm projection potentially having far greater impact for altering the political values of society than the broadcast of a small number of international trials.[202]

Underpinning the moral education account is the recognition that punishment has both retrospective and prospective dimensions.[203] Accord-

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199 See, for example, Fisher, 2012, p. 59, see *supra* note 41 (noting the deterrent power of criminal courts "by changing norms rather than invoking incentives"); and Damaska, 2008, p. 345, see *supra* note 26 (arguing that "it seems more appropriate for international courts to place greater emphasis on suasion than on threats as their main preventive strategy").

200 See, for example, ICTY, *Prosecutor v. Kordić and Čerkez*, Appeals Chamber, Judgment, 17 December 2004, IT-95-14/2-A, para. 1080, see *supra* note 64 ("The sentencing purpose refers to the educational function of a sentence and aims at conveying the message that rules of international humanitarian law have to be obeyed under all circumstances. In doing so, the sentence seeks to internalize these rules and the moral demands they are based on in the minds of the public"); and ICTY, *Prosecutor v. Blaškić*, Appeal Chamber, Judgment, 29 July 2004, IT-95-14-A, para. 678 (noting the following purpose of sentencing: "individual and general affirmative prevention aimed at influencing the legal awareness of the accused, the victims, their relatives, the witnesses, and the general public in order to reassure them that the legal system is being implemented and enforced") (http://www.legal-tools.org/doc/88d8e6/).

201 See, for example, Wringe, 2006, p. 184, see *supra* note 26.

202 David Luban, "After the Honeymoon: Reflections on the Current State of International Criminal Justice", in *Journal of International Criminal Justice*, 2013, vol. 11, no. 3, p. 511.

203 See, for example, Fisher, 2012, p. 57, see *supra* note 41 (noting how "punishment can communicate that the society renounces and condemns certain behaviour rather than condones it" and also "reaffirms the authority and strength of particular laws"); Mark J. Osiel, *Mass Atrocity, Collective Memory, and the Law*, Transaction Publishers, 1997, p. 148 (not-

ing to this account, the imposition of punishment represents a moment of "appropriation and disappropriation, of avowal and disavowal, of symbolic loss and gain".[204]

With respect to the *retrospective* dimension, the infliction of punishment censures past transgressions of wrongdoing.[205] In this sense, the imposition of punishment marks the final act of what Harold Garfinkel famously referred to as a "status degradation ceremony", contributing to the expression of moral indignation at the crimes of the accused through a public denunciation.[206] In this context, the importance of punishment lies

ing that courts "do not merely pass judgment upon the past, but articulate social norms in ways designed to be binding upon the future"); Ruti G. Teitel, *Transitional Justice*, Oxford University Press, Oxford, 2000, p. 217 (noting that, in the transitional justice context, "punishment [is] informed by a mix of retrospective and prospective purposes"); and Roht-Arriaza, 1995, p. 17, see *supra* note 13 (noting that expressivism is "both backward looking, in that moral criticism is based on an offender's past acts, and forward looking, in that its goal is to change future behavior by establishing clear societal standards against which such behavior may be measured"). See also, Robert Cryer, Håkan Friman, Darryl Robinson and Elizabeth Wilmshurst, *An Introduction to International Criminal Law and Procedure*, 2nd edition, Cambridge University Press, Cambridge, 2010, p. 29 (noting that the international criminal process is designed both to make offenders "understand what was wrong with what they have done", whilst also "reaffirming the norm in the community").

204 Teitel, 2000, p. 67, see *supra* note 203.

205 See, for example, Fisher, 2012, p. 56, see *supra* note 41 (discussing how the infliction of punishment "aims to communicate to the perpetrator and the broader community a particular message of condemnation for specific behaviour that has been prohibited by that society and promulgated as law"); deGuzman, 2012, p. 313, see *supra* note 33 (noting that expressivists "view crime as an expressive act and consider punishment justified when it counters the wrongful expression inherent in the criminal act"); Diane Marie Amann, "Assessing International Criminal Adjudication of Human Rights Atrocities", in *Third World Legal Studies*, 2003, vol. 16, p. 175 (noting that the international criminal adjudication provides "a forum for enunciating societal condemnation of atrocities"); and Teitel, 2000, p. 50, see *supra* note 203 (noting how the process of exposing wrongs can have "transformative dimensions" for "affirmatively construct[ing] past wrongs in the public sphere and relegat[ing] them to a predecessor regime").

206 Harold Garfinkel, "Conditions of Successful Degradation Ceremonies", in *American Journal of Sociology*, 1956, vol. 61, no. 5, pp. 420–21. See also, Sloane, 2007, p. 71, see *supra* note 2 ("By punishing the perpetrators of serious international crimes […] the international community attempts authoritatively to disavow that conduct, [and] to indicate symbolically its refusal to acquiesce in the crimes"); and Diane F. Orentlicher, "'Settling Accounts' Revisited: Reconciling Global Norms with Local Agency", in *International Journal of Transitional Justice*, 2007, vol. 1, no. 1, p. 15 (By condemning past crimes through the strongest sanction used by the institutions of government to condemn them, exemplary trials could send a message to the future: This will not be tolerated again").

in its ability to inflict "shame, sanction, and stigma upon the antagonists".[207] The infliction of punishment on the wrongdoer conveys a powerful message that the violation of criminal norms is wrong and that wrongdoers must accept responsibility for their actions.[208] The importance of this condemnatory message is heightened in the mass atrocity context given the gravity of the crimes in question and the large numbers of victims that tend to be affected.[209] Consequently, it is perhaps unsurprising that references to the denunciatory function of punishment can be found in the sentencing judgments of several international criminal courts. For instance, the ICTY Trial Chamber in *Erdemović* described "public reprobation and stigmatisation by the international community" as one of the "essential functions" of punishment.[210] Similarly, in *Aleksovski*, the ICTY Appeals Chamber confirmed that one of the purposes of sentencing is "expressing the outrage of the international community at these crimes […] [and] the condemnation of the international community of the behaviour in question".[211]

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[207] Drumbl, 2007, p. 175, see *supra* note 14. See also, Teitel, 2000, p. 50, see *supra* note 203 ("Simple exposure of wrongs stigmatizes and can disqualify the affected persons from entire realms of the public or private spheres, positions of political leadership, or comparable authority in the successor regime").

[208] See, for example, Aukerman, 2002, p. 87, see *supra* note 50 ("the prosecution of those who commit genocide, war crimes, and other atrocities indisputably conveys a powerful message of condemnation"); and Akhavan, 1998, p. 749, see *supra* note 64 (noting that it is the "expression of disapproval by the world community that is at the core of the ICTY's mandate"). See also, David Luban, "Beyond Moral Minimalism", in *Ethics and International Affairs*, 2006, vol. 20, no. 3, pp. 354–55 (noting that international criminal courts "declare, in the most public way possible, that the condemned deeds are serious transgressions […] through the dramaturgy of *the trial process*") (emphasis added).

[209] See, for example, Golash, 2014, pp. 217–18, see *supra* note 95 (noting that "it is important to express condemnation of these crimes, because they are so serious and because they affect so many people").

[210] ICTY, *Prosecutor v. Erdemović*, Trial Chamber, Sentencing Judgment, 29 November 1996, IT-96-22-T, para. 65 (http://www.legal-tools.org/doc/eb5c9d/); ICTY, *Prosecutor v. Blaškić*, Trial Chamber, Judgment, 3 March 2000, IT-95-14-T, para. 763 (http://www.legal-tools.org/doc/e1ae55/); and ICTY, *Prosecutor v. Furundžija*, Trial Chamber, Judgment, 10 December 1998, IT-95-17/1-T, para. 289 (http://www.legal-tools.org/doc/e6081b/).

[211] ICTY, *Prosecutor v. Aleksovski*, Appeals Chamber, Judgment, 24 March 2000, IT-95-14/1-A, para. 185 (http://www.legal-tools.org/doc/176f05/). See also, SCSL, *Prosecutor v. Sesay et al.*, Trial Chamber, Sentencing Judgment, 8 April 2009, SCSL-04-15-T-1251, para. 15 ("the punishment of the offender must also adequately reflect the revulsion of the international community to such conduct, and denounce it as unacceptable") (http://www.legal-

Without diminishing the importance of the retrospective dimension, the moral education account emphasises that punishment need not only be viewed in negative terms as "an historically oriented vengeance for the past",[212] but may also be characterised in positive terms as "the assertion and vindication of that which the condemned act denied".[213] This *prospective* dimension of punishment encompasses the *reaffirmation* of existing community sentiments,[214] as well as the *creation* of new community values.[215]

tools.org/doc/fcc685/); and ICTY, *Prosecutor v. Kordić and Čerkez*, Trial Chamber, Judgment, 26 February 2001, IT-95-14/2-T, para. 852 ("Offences of this level of barbarity could not be more grave and those who participate in them must expect sentences of commensurate severity to mark the outrage of the international community") (http://www.legal-tools.org/doc/d4fedd/).

212 Edward M. Morgan, "Retributory Theater", in *American University Journal of International Law and Policy*, 1988, vol. 3, no. 1, p. 6.

213 *Ibid*. See also, Danner, 2001, p. 489, see *supra* note 25 ("punishment simultaneously expresses society's authoritative disavowal of a criminal act and its adherence to the values the perpetrator flouted by committing the act").

214 See, for example, Meijers and Glasius, 2013, p. 724, see *supra* note 103 (noting that, according to one perspective, "the law simply is an expression of dominant moral attitudes in society"); Fisher, 2012, pp. 58 (noting that the goal of punishment is "to express the community's values and its commitment to them") and 65 (noting that "punishment is necessary to reaffirm the whole order to a society shattered by the atrocity"), see *supra* note 41; deGuzman, 2012, p. 313, see *supra* note 33 (noting that norm expression through criminal law can function "as a means for communities to affirm their common identities"); Cryer, Friman, Robinson and Wilmshurst, 2010, p. 29, see *supra* note 203 (noting the role played by international criminal law in "reaffirming […] norm[s] in the community"); and Aukerman, 2002, p. 85, see *supra* note 50 (noting the view that punishment functions "as a collective response that demonstrates and reaffirms the real force of the common moral order. By punishing, a society expresses its shared moral outrage, strengthening and reinforcing the norms of social life").

215 See, for example, Aukerman, 2002, p. 85, see *supra* note 50 (noting the role played by punishment in "reaffirming, *or even creating*, social identity and/or social solidarity") (emphasis added). See also, deGuzman, 2012, p. 313, see *supra* note 33 (noting that international criminal courts have a role in "both crafting law to express valued social messages and employing law as a mechanism for *altering* social norms") (emphasis added); and Teitel, 2000, p. 220, see *supra* note 203 (noting "law's distinctive feature is its mediating function, as it preserves a threshold level of formal continuity while instantiating transformative discontinuity").

The notion of criminal courts *reaffirming* existing community values is rooted in a Durkheimian conception of punishment.[216] According to this conception, all societies possess an already-existing common moral order, which Durkheim famously referred to as the "conscience collective".[217] In light of this moral consensus, Durkheim considered punishment to have "a dualistic character":[218] on the one hand, the imposition of punishment is motivated by a shared emotional reaction to the transgressions committed by the wrongdoer;[219] on the other hand, these emotional outbursts of common sentiment serve a particular function, namely the reinforcement and maintenance of social solidarity within the community.[220] As Durkheim put it:[221]

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216 For a Durkheimian analysis of international criminal law, see generally, Nimaga, 2007, p. 561, see *supra* note 180.

217 See Émile Durkheim, *The Division of Labor in Society*, Macmillan, New York, 1933, p. 79 (describing the "conscience collective" as "the totality of beliefs and sentiments common to average citizens of the same society").

218 Garland, 1990, p. 34, see *supra* note 104.

219 Émile Durkheim, *Moral Education: A Study in the Theory and Application of the Sociology of Education*, Free Press of Glencoe, 1961, p. 176 (referring to punishment as a "palpable symbol through which an inner state is represented" and as "a notation, a language, through which […] the feeling inspired by the disapproved behaviour [is expressed]"). See also, de Greiff, 2002, p. 389, see *supra* note 118 (describing the expressive account of punishment as encompassing "theories that take the evil inflicted on the person punished to be the expression of an important social message, or in other words, talk about "punishment as language"); Kahan, 1996, pp. 594–95, see *supra* note 105 (referring to several commentators who have concluded that it makes sense to conceive of punishment as a language); Primoratz, 1989, pp. 187 (noting the view that "evil inflicted on the person punished is not an evil *simpliciter*, but rather the expression of an important social message – that punishment is a kind of language") and 200 (arguing that punishment serves to translate society's condemnation of an offender's misdeed into "the one language they are sure to understand: the language of self-interest"), see *supra* note 108; and James Boyd White, "Making Sense of What We Do: The Criminal Law as a System of Meaning", in James Boyd White, *Heracles' Bow: Essays on the Rhetoric and Poetics of the Law*, University of Wisconsin Press, 1985, p. 205 ("The law, of which legal punishment is a part, is a system of meaning; it is a language and should be evaluated as such").

220 See Garland, 1990, p. 33, see *supra* note 104 (noting that, for Durkheim, "it is the common expression of outrage that turns out to have a spontaneously functional effect. These outbursts of common sentiment – concentrated and organized in the rituals of punishment – produce an automatic solidarity, a spontaneous reaffirmation of mutual beliefs and relationships which serve to strengthen the social bond").

221 Durkheim, 1933, p. 90, see *supra* note 217. See also, Garland, 1990, p. 76, see *supra* note 104 (noting that the "major effect" or "main social function" of this Durkheimian concep-

> Although [punishment] proceeds from a quite mechanical reaction, from movements which are passionate and in great part non-reflective, it does play a useful role. […] Its true function is to maintain social cohesion intact, while maintaining all its vitality in the common conscience.

Scholars disagree whether punishment is a *conventional* device for expressing certain attitudes of criticism, resentment and indignation within the community,[222] or, as Durkheim seems to suggest, the *natural embodiment* of such attitudes.[223] In either case, however, punishment is characterised as a symbolic language for expressing *existing* shared community values.

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tion of punishment is "to enhance social solidarity by reaffirming the force of collective sentiments").

[222] See, for example, Kahan, 1996, pp. 593 ("Punishment is *not* just a way to make offenders suffer; it is a special social convention, that signifies moral condemnation") (emphasis in original), and 599, see *supra* note 105 ("the reason that only imprisonment and not conscription is regarded as punishment is that against the background of social norms only imprisonment expresses society's authoritative moral condemnation"); Feinberg, 1970, pp. 74 ("punishment is *a conventional device* for the expression of attitudes of resentment and indignation, and of judgments of disapproval and reprobation") (emphasis added), and 76 ("To say that the very physical treatment itself expresses condemnation is to say simply that certain forms of hard treatment have become the *conventional* symbols of public reprobation") (emphasis added), see *supra* note 102. See also, Hugo Adam Bedau, "Feinberg's Liberal Theory of Punishment", in *Buffalo Criminal Law Review*, 2001, vol. 5, no. 1, p. 115 (noting that according to Joel Feinberg's definition of punishment "[p]unishment just *is* the "conventional" device for that purpose [of expressing moral condemnation of offenders], whatever the intentions of a political society or of its relevant officials may be") (emphasis in original).

[223] See, for example, Primoratz, 1989, p. 199, see *supra* note 108 (supporting the view that "punishment is a *natural expression* of condemnation, repudiation, and similar feelings and attitudes, rather than a conventional device for expressing them") (emphasis added); A.J. Skillen, "How to Say Things with Walls", in *Philosophy*, 1980, vol. 55, no. 214, p. 517 (noting that punishment is "hardly purely conventional" and that "Feinberg vastly underrates the *natural appropriateness*, the non-arbitrariness, of certain forms of hard treatment to be the expression or communication of moralistic and punitive attitudes. Such practices *embody* punitive hostility, they do not merely 'symbolize' it") (emphasis added); and James Fitzjames Stephens, *A History of the Criminal Law of England*, Macmillan, London, 1883, vol. 2, pp. 80–82, reprinted in Dressler, 2009, p. 41, see *supra* note 59 (noting that "the sentence of the law is to the moral sentiment of the public in relation to any offence what a seal is to hot wax" and that "the infliction of punishment by law gives definite expression and a solemn ratification and justification to the hatred which is excited by the commission of the offence").

Beyond reaffirming existing community values, punishment may also *create* new social values. As David Garland has explained, penal sanctions "do not simply 'express' […] sentiments – they also seek to transform and reshape them in accordance with a particular vision of society".[224] There are two aspects to Garland's observation that warrant further elaboration.

First, Garland recognises that Durkheim's account neglects a "major axis of social life and social conflict – namely the relationship between competing groups".[225] While Durkheim is correct that some level of common conscience or sentiment may find its expression in punishment, he fails to acknowledge that deeply held sentiments are usually the product of a historical process of political struggle.[226] Rather than refer to the "conscience collective", the terms "dominant ideology" or "hegemony" may more accurately reflect the fact that we are dealing with "a dominant moral order, which is historically established by particular social forces".[227]

Second, Garland also recognises that punishment is not only a product of underlying community sentiments, but also an active participant in the shaping of such sentiments.[228] As Garland observes, it is "a two-way process":[229]

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[224] Garland, 1990, p. 54, see *supra* note 104.

[225] *Ibid*., p. 51.

[226] *Ibid*., p. 54.

[227] *Ibid*., p. 53.

[228] See also, more generally, James Cockayne, "Hybrids or Mongrels? Internationalized War Crimes Trials as Unsuccessful Degradation Ceremonies", in *Journal of Human Rights*, 2005, vol. 4, no. 4, p. 458 ("The very *raison d'être* of international(ized) criminal trials is *the transformation of the affected community*, aligning it morally and legally with the international community") (emphasis added); and Teitel, 2000, p. 67, see *supra* note 203 (noting "the criminal law's potential not merely as an instrument of stability but also as one of *social change*") (emphasis added).

[229] Garland, 1990, p. 249, see *supra* note 104 (emphasis added). See also, Kirsten Campbell, "Reassembling International Justice: The Making of 'the Social' in International Criminal Law and Transitional Justice", in *International Journal of Transitional Justice*, 2014, vol. 8, no. 1, p. 58 (noting that Durkheimian approaches tend to "mask the difficulty of capturing the role of international criminal justice in transitional contexts, in which mass crimes were intended to destroy the social collective, and criminal law attempts to remake it"); and Teitel, 2000, p. 67, see *supra* note 203 (noting that "what distinguishes transitional criminal measures is their attempt to instantiate and reinforce normative change"). For a

> Like any social institution, punishment is *shaped by* broad cultural patterns which have their origins elsewhere, but it also *generates* its own local meanings, values and sensibilities which contribute – in a small but significant way – to the *bricolage* of the dominant culture. Penal institutions are thus 'cause' as well as 'effect' with regard to culture.

It is through this ongoing reciprocal process that punishment may serve not only to reaffirm but also to reshape and construct new social values of a particular community.[230]

With its focus on norm projection and identity creation, three aspects of the moral education account of punishment have proven particularly attractive in the international criminal context.[231]

First, by focusing on the symbolic significance of punishment, the moral education account is able to make sense of the high degree of selectivity that characterises international criminal institutions. For instance, international criminal courts can still carry out an array of symbolic functions even if they only punish a small number of individuals.[232] Since

critical perspective of this position, see Pierre Schlag, "The dedifferentiation problem", in *Continental Philosophy Review*, 2009, vol. 42, no. 1, p. 37 (arguing that "if law and culture are not separable, then we really should not be asserting any relation between the two at all").

230 Garland, 1990, p. 276, see *supra* note 104 ("punishment does not just restrain or discipline 'society' – punishment helps create it").

231 See, for example, deGuzman, 2012, pp. 314–17, see *supra* note 33 (identifying several reasons why expressivism is "particularly appropriate for the ICC"); and Sloane, 2007, p. 71, see *supra* note 2 (summarising the descriptive and normative advantages of expressivist thinking in the international criminal context).

232 See, for example, deGuzman, 2012, p. 315, see *supra* note 33 (noting that "the ICC may effectively promote important moral norms with a small number of illustrative prosecutions"); Stahn, 2012, p. 280, see *supra* note 72 (noting that expressive theories "seek to mitigate existing 'selectivity' and 'enforcement' problems, by relying on the power of transparency and persuasion of international criminal courts to denounce the wrong and reinforce society's norms"); Stephanos Bibas and William W. Burke-White, "International Idealism Meets Domestic-Criminal-Procedure Realism", in *Duke Law Journal*, 2010, vol. 59, no. 4, p. 652 ("international criminal justice, which can use a few cases to send messages, is better than domestic criminal justice at the more symbolic function of punishing, vindicating victims, teaching, healing, and reconciling"); Nimaga, 2007, p. 616, see *supra* note 180 ("a trial that is thoroughly prepared, sensitively executed, well publicized, and globally discussed might have a large effect, for the reason that it is not seriously harmed by the limitations resulting from the relatively small numbers of cases that can handled in such a manner"); Martti Koskenniemi, "From Impunity to Show Trials", in *Max Planck*

institutions such as the ICC are not expected to respond to all serious violations of international criminal law, a failure to prosecute particular situations is far less likely to be viewed as acquiescing in any criminal conduct that has been committed than would be the case at the domestic level.[233] An international criminal institution that declines to prosecute may simply be recognising that a non-prosecutorial justice mechanism is able to adequately express the condemnation of wrongdoing and affirmation of community values that would otherwise be achieved through the criminal law process.[234]

Second, some scholars have argued that the global reach of international criminal courts makes them well equipped to become "the kinds of 'popular trials' that define a debate, remind us of the content and value of law, or serve as intergenerational 'signposts' in history".[235] In other words, the imposition of punishment by international criminal institutions may be characterised as a high-profile public performance, able to spark the attention of global media organisations and broadcast their messages to a global audience.

Finally, given the gradual nature of the norm-nurturing process, the moral education account also invites criminal courts to view their work as part of a longer-term process rather than to expect immediate impact.[236]

Yearbook of United Nations Law, 2002, vol. 6, p. 10 ("[I]n order to attain the symbolic, community-creating effect it is supposed to have, criminal law need not be applied to everyone. It is sufficient that a few well-published trials are held"); and Minow, 1998, p. 122, see *supra* note 91 (noting the dependence of international criminal institutions on "symbolism rather than effectuation of the rule of law" given that, at best, such institutions can try only "a small percentage of those actually involved in collective violence").

233 See, for example, deGuzman, 2012, p. 315, see *supra* note 33; and Golash, 2014, p. 219, see *supra* note 95 (noting that a failure to punish is less likely to be taken as condonation of wrongful behaviour in the international context "because the convention of punishing international crimes is not yet so deeply ingrained as to imply condonation by its absence").

234 deGuzman, 2012, p. 316, see *supra* note 33.

235 Drumbl, 2007, p. 175, see *supra* note 14. See also, Stahn, 2012, p. 279, see *supra* note 72 (noting that international criminal courts tend to have "a more 'attentive public' than most other judicial entities" and "a 'global reach' and 'audience'"); and deGuzman, 2012, p. 316, see *supra* note 33 (noting that "the ICC global platform and scope make it an especially effective mechanisms for expressing shared social norms").

236 See, for example, Sloane, 2007, p. 71, see *supra* note 2 (noting that "expressivism self-consciously focuses less on the *immediate* instrumental value of punishment […] and more on the *long-term* normative values served by any system of criminal law") (emphasis added); and Johannes Andenaes, "General Prevention Revisited: Research and Policy Implica-

As a consequence, the moral education account seemingly offers a more realistic appraisal of how criminal courts may contribute to crime prevention. As Mark Drumbl has observed:[237]

> Whereas it seems problematic to deter – through fear of distant and deferred punishment – violence once it is imminent or has already begun, it seems somewhat more plausible to inhibit the mainstreaming of hatemongering as politics owing to the consolidation, through law and punishment, of a social consensus regarding the *moral unacceptability* of such politics.

Yet, despite its attractive qualities, the moral education account of punishment nonetheless faces a number of challenges that should give scholars and practitioners pause for thought.

First, the moral education account of punishment faces a sociological legitimacy challenge.[238] In order for punishment to have the didactic impact suggested by this account, it is necessary that the criminal courts charged with imposing penal sanctions be perceived as authoritative by members of the local communities where the mass atrocities took place. Although it is often asserted that courts possess "a formal authority",[239] "a

tions", in *The Journal of Criminal Law and Criminology*, 1975, vol. 66, no. 3, p. 341 (noting that "the consideration of moral effects call for a long-term perspective" and that "[i]f a substantial part of the impact of the law is believed to lie in its power to support and reinforce social norms, one would not expect rapid changes in crime rates as a result of less than drastic changes in law or law enforcement").

237 Drumbl, 2007, p. 174, see *supra* note 14 (emphasis in original). See also Fiona O'Regan, "*Prosecutor vs. Jean-Pierre Bemba Gombo*: The Cumulative Charging Principle, Gender-Based Violence, and Expressivism", in *Georgetown Journal of International Law*, 2012, vol. 43, no. 4, p. 1354 (noting that expressivism "is designed to speak to […] those ordinary people who have not yet been exposed to the risk of becoming assimilated into violence, and strengthen their respect for the rule of law").

238 See Allen Buchanan and Robert O. Keohane, "The Legitimacy of Global Governance Institutions", in *Ethics and International Affairs*, 2006, vol. 20, no. 4, p. 405 (defining "sociological legitimacy" as whether a court "is widely *believed* to have the right to rule" as compared with "normative legitimacy", defined as whether a court "has *the right to rule*") (emphasis in original). See also, Marlies Glasius and Tim Meijers, "Constructions of Legitimacy: The Charles Taylor Trial", in *International Journal of Transitional Justice*, 2012, vol. 6, no. 2, p. 229 (utilising expressivism to theorise the connection between normative and sociological legitimacy of international criminal courts).

239 Waters, 2010, p. 287, see *supra* note 102 (noting "[t]he formal legal authority that attaches to a court judgment is different from mere opinion").

special prestige",[240] or "a semantic authority",[241] such authority cannot be presumed in the international criminal context.[242] As Lawrence Douglas has explained, any act of judging "implicitly involves a gesture of self-

[240] Michael R. Marrus, "History and the Holocaust in the Courtroom", in Ronald Smelser (ed.), *Lessons and Legacies V: The Holocaust and Justice*, Northwestern University Press, 2002, p. 228 (noting that "[u]nlike other sources, trials benefit from special prestige in most societies; attended with ceremony, they are widely considered in liberal, democratic countries to be means by which the collectivity allocates responsibility for criminal acts and registers its abhorrence of them").

[241] Ingo Venzke, *How Interpretation Makes International Law: On Semantic Change and Normative Twists*, Oxford University Press, Oxford, 2012, p. 147 (referring to the power of legal precedents in international law and noting in particular that "[t]he working of precedents underlies international courts' remarkably strong semantic authority in international legal discourse"). See also, Armin von Bogdandy and Ingo Venzke, "In Whose Name? An Investigation of International Courts' Public Authority and Its Democratic Justification", in *European Journal of International Law*, 2012, vol. 23, no. 1, p. 18 (defining "authority" as "the legal capacity to determine others and to influence their freedom, i.e., to shape their legal or factual situation").

[242] See, for example, Meijers and Glasius, 2013, p. 751, see *supra* note 103 (noting that the manner of the establishment of international criminal institutions "always leaves space, although to different degrees, for an argument that they were imposed on a people, and hence lack democratic legitimacy"); Bogdandy and Venzke, 2012, p. 8, see *supra* note 241 (characterising international courts more generally as "autonomous actors wielding public authority […] [whose] actions require a genuine mode of justification that lives up to basic tenets of democratic theory"); and Colleen Murphy, "Political Reconciliation and International Criminal Trials", in Larry May and Zachary Hoskins (eds.), *International Criminal Law and Philosophy*, Cambridge University Press, Cambridge, 2014, p. 241 (noting that "[i]nternational personnel are not always welcome in transitional contexts, nor are international or hybrid trials necessarily viewed as legitimate"). On the alleged democratic deficit of international criminal institutions, see Marlies Glasius, "Do International Criminal Courts Require Democratic Legitimacy?", in *European Journal of International Law*, 2012, vol. 23, no. 1, p. 45 (concluding that "there is no sound theoretical basis for the demand that international criminal courts should be democratically accountable to populations affected by crimes in order to be legitimate"); Bogdandy and Venzke, 2012, p. 40, see *supra* note 241, setting out several propositions to legitimise international courts:

> expanding roles for the public to play in judicial elections and in judicial proceedings, extending complementary political procedures, clearly marking the goal of systemic integration in judicial interpretation as well as in the dialogue between courts, and stressing the responsibility that municipal constitutional organs retain in implementing international decisions

See also, Aaron Fichtelberg, "Democratic Legitimacy and the International Criminal Court: A Liberal Defence", in *Journal of International Criminal Justice*, 2006, vol. 4, no. 4, p. 765 (advocating a liberal conception of institutional legitimation and submitting that so long as the ICC respects the rights of the accused to a fair trial, it is a legitimate institution).

legitimation", a justification of their right to perform the judicial function.[243] In the international criminal context, criminal courts are often characterised by their remoteness, both in terms of geographical location as well as personnel,[244] a factor which has served to undermine their sociological legitimacy in the localities where mass atrocities have taken place. For example, local communities lack any emotional attachment with international criminal courts, often perceiving them as imposing foreign forms of justice,[245] ignorant of the local history of the conflicts on which

[243] Lawrence Douglas, *The Memory of Judgment: Making Law and History in the Trials of the Holocaust*, Yale University Press, 2001, pp. 113–14. See also, Jaya Ramji-Nogales, "Designing Bespoke Transitional Justice: A Pluralist Process Approach", in *Michigan Journal of International Law*, 2010, vol. 32, no. 1, p. 8 ("For legal institutions to successfully perform an expressive function, the community whose norms are at issue must trust those who aim to alter these norms, and individuals with authority in the message-receiving community must participate in the process of clarifying and establishing new social norms"); Damaska, 2008, p. 345, see *supra* note 26 (noting that "there exists a necessary condition for their success in performing this socio-pedagogical role: they should be perceived by their constituencies as a legitimate authority", something which "hangs almost entirely on the quality of their decisions and their procedures"); Sloane, 2007, p. 76 see *supra* note 2 ("Deterrent mechanisms that rely on internal restraints, habituation to moral and legal norms, require a criminal justice system perceived as authoritative and legitimate"); "Developments in the Law: International Criminal Law", 2001, p. 1967, see *supra* note 66 (noting that "the logical prerequisite to moral education is a threshold level of social consensus that the prosecution process is itself legitimate"); and Andenaes, 1975, p. 342, see *supra* note 236 ("To exert a moral influence the law and the machinery for enforcement of it must be looked upon as wielding legitimate authority").

[244] The benefits of the remoteness of international criminal courts have also been well-documented. See, for example, Antonio Cassese and Paola Gaeta, *Cassese's International Criminal Law*, 3rd edition, Oxford University Press, 2013, p. 267 ("international criminal courts proper may be *more impartial* than domestic courts, for they are made of judges having no link with the territory or the state where the crimes were perpetrated") (emphasis in original); and Jose E. Alvarez, "Rush to Closure: Lessons of the Tadić Judgment", in *Michigan Law Review*, 1998, vol. 96, no. 7, p. 2095 (noting that advocates of international prosecutions generally submit that "international fora are preferable and require jurisdictional primacy because international tribunals are more legitimate – that is, less susceptible to accusations of bias or vengeance").

[245] See, for example, McCarthy, 2012, p. 370, see *supra* note 111; Janine Natalya Clark, "From Negative to Positive Peace: The Case of Bosnia and Hercegovina", in *Journal of Human Rights*, 2009, vol. 8, no. 4, p. 374 (noting that "[a]s a Tribunal that is geographically removed from the former Yugoslavia, that does not operate in the local languages of Bosnian/Croatian/Serbian, and that leans towards the unfamiliar adversarial common law system, the ICTY was always going to struggle to reach out to and engage local people"); and Tzvetan Todorov, "The Limitations of Justice", in *Journal of International Criminal Justice*, 2004, vol. 2, no. 3, p. 713.

they adjudicate,[246] and insensitive to local cultural practices.[247] This deficit of sociological legitimacy severely inhibits the ability of these courts to transmit didactic messages that are perceived as authoritative.[248]

Second, the ability of criminal courts to reawaken a collective conscience or even create new unifying social values within a local community is particularly challenging in post-conflict environments. Specifically, the notion of "shared moral intuitions" or "moral sentiments universally felt within society" is notably absent in societies that have been ripped apart by conflict.[249] Episodes of mass atrocity tend to disrupt any notion

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246 See, for example, Waters, 2010, p. 292, see *supra* note 102 (noting that international criminal courts and tribunals operate with "an almost total abstraction from and ignorance of the local communities whose conflicts the court must adjudicate"); and Lawrence Douglas, "The Didactic Trial: Filtering History and Memory into the Courtroom", in *European Review*, 2006, vol. 14, no. 4, p. 518 (noting the structural failings of the ICTY as "a geographically remote tribunal lacking an organic connection to the history of the region").

247 See, for example, Alison Dundes Renteln, "Cultural Defenses in International Criminal Tribunals: A Preliminary Consideration of the Issues", in *Southwestern Journal of International Law*, 2011, vol. 18, no. 1, p. 267; Maria Eriksson, *Defining Rape: Emerging Obligations for States under International Law?*, Martinus Nijhoff, 2011, pp. 507 ff.; Fabián O. Raimondo, "For Further Research on the Relationship between Cultural Diversity and International Criminal Law", in *International Criminal Law Review*, 2011, vol. 11, no. 2, p. 299; Tim Kelsall, *Culture under Cross-Examination: International Justice and the Special Court for Sierra Leone*, Cambridge University Press, Cambridge, 2009; JIA Bing Bing, "Multiculturalism and the development of the system of international criminal law", in Sienho Yee and Jacques-Yvan Morin (eds.), *Multiculturalism and International Law: Essays in Honour of Edward McWhinney*, Martinus Nijhoff, 2009, p. 629; Jessica Almqvist, "The Impact of Cultural Diversity on International Criminal Proceedings", in *Journal of International Criminal Justice*, 2006, vol. 4, no. 4, p. 746; and Ida L. Bostian, "Cultural Relativism in International War Crimes Prosecutions: The International Criminal Tribunal for Rwanda", in *ILSA Journal of International and Comparative Law*, 2006, vol. 12, no. 1, p. 1.

248 For a useful summary of various attempts to improve the sociological legitimacy of international criminal courts and tribunals, see Stuart K. Ford, "A Social Psychology Model of the Perceived Legitimacy of International Criminal Courts: Implications for the Success of Transitional Justice Mechanisms", in *Vanderbilt Journal of Transnational Law*, 2012, vol. 45, no. 3, pp. 406–09 (noting that according to existing international criminal scholarship, the following factors can be adjusted to improve the sociological legitimacy of international criminal courts: "(1) the process by which the court is created, (2) the location of the court, (3) the composition of the staff, (4) the institutional structure, (5) the procedures used during the trials, and (6) the court's outreach efforts").

249 Osiel, 1997, p. 36, see *supra* note 203.

of a collective conscience that may previously have existed,[250] and members of society tend to lose the trust they may previously have placed in each other.[251] Indeed, as Michael Ignatieff has remarked, such a task faces hurdles even in times of peace:[252]

> [N]ations are not like individuals: they do not have a single identity, conscience or responsibility. National identity is a site of conflict and argument, not a silent shrine for collective worship. Even authoritarian populist democracies like Serbia and Croatia never speak with one voice or remember the past with a single memory.

With this in mind, the capacity of the occasional punishment of a particular offender to create a new moral consensus within societies recently afflicted by mass atrocities seems implausible.

Finally, the moral education account is also undermined by empirical evidence that suggests that the internalisation of norms is insufficient to prevent atrocities.[253] In this regard, the International Committee of the Red Cross's ('ICRC') *People on War Project* is particularly enlightening.[254] The project, launched in 1999 to mark the 50th anniversary of the modern Geneva Conventions, entailed a worldwide consultation to provide the general public with the opportunity to give their wide-ranging perspectives on various facets of war.[255] ICRC staff conducted empirical research in 12 countries, including in-depth interviews, group discussions

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[250] *Ibid*. ("prosecution of […] perpetrators cannot hope to establish collective memory upon shared moral intuitions already deeply felt and culturally encoded, requiring only an occasion for their easy evocation").

[251] *Ibid*., p. 37 (noting that "[b]ecause social antagonists do not trust one another, they are strongly tempted to prefer alternatives to deliberation").

[252] Michael Ignatieff, "Articles of Faith", in *Index on Censorship*, 1996, vol. 25, no. 5, p. 116. See also, Jonathan Doak, "The Therapeutic Dimension of Transitional Justice: Emotional Repair and Victim Satisfaction in International Trials and Truth Commissions", in *International Criminal Law Review*, 2011, vol. 11, no. 2, p. 265 ("it seems inappropriate to view a community or society as 'healed' as though it were an individual with a conscience, identity and memory").

[253] David Wippman, "Atrocities, Deterrence, and the Limits of International Justice", in *Fordham International Law Journal*, 1999, vol. 23, no. 2, p. 483 ("the internalization of norms is not sufficient to prevent atrocities").

[254] See Greenberg Research, Inc., *Country report: Bosnia-Herzegovina: ICRC worldwide consultation on the rules of war*, November 1999.

[255] *Ibid*.

and national public opinion surveys.[256] On the basis of the consultation conducted in Bosnia-Herzegovina, the resulting country report summarised one of its findings as follows:[257]

> The high-profile breakdown of the rules of war in Bosnia-Herzegovina is all the more striking because both combatants and civilians are highly aware of the Geneva Conventions and fully supportive of norms that protect civilians in war. The limits did not give way because the Conventions or the norms were unknown or foreign to the participants. They broke down under the pressure of nationalist passions and hatred. They also broke down because a range of other wartime considerations diminished and superceded them. The rules of war have not been repudiated in the minds of those who have experienced this conflict. They were overwhelmed in large part by the rules on the ground, which created powerful exceptions, amendments or suspensions whereby millions of civilians joined the front lines.

This finding seems to suggest that the internalisation of the rules of war, even if successfully achieved through the punishment of international criminals, may not be effective in preventing their breakdown in the types of circumstances that tend to give rise to mass atrocity situations.

6.4.2.2. The Gratifying Victim Hatred Theory

Turning to the second extrinsic expressivist account, some scholars argue that by punishing the perpetrators of international crimes,[258] criminal

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[256] *Ibid*.

[257] *Ibid*., p. iv.

[258] Some scholars classify this function as a particular type of retributive theory. See, for example, Baker, 2012, p. 39, see *supra* note 43 ("Retributive justice can be explained as a refinement of the primitive urge to take revenge for injury"); Sloane, 2007, p. 78, see *supra* note 2 ("One prevailing legal-anthropological model of retribution […] views it as a socially condoned substitute for vengeance"); and Minow, 1998, p. 12, see *supra* note 91 ("Retribution can be understood as vengeance curbed by the intervention of someone other than the victim and by principles of proportionality and individual rights"). However, since the emphasis is placed on the *consequences* of punishment for the emotions of victims, it is better classified as utilitarian. See, for example, Moore, 1997, p. 89, see *supra* note 15 (noting that "[r]etributivism is not the view that punishment of offenders satisfies the desires for vengeance of their victims" nor is it "the view that punishment is justified because without it vengeful citizens would take the law into their own hands"); and Greenawalt, 1983, p. 352, see *supra* note 5 (noting that "[t]he utilitarian […] does not suppose that

courts can terminate,[259] or at the very least regulate,[260] ongoing cycles of vengeance amongst victims of mass atrocities. In particular, it is claimed

wrongful acts intrinsically deserve a harsh response, but he recognizes that victims, their families and friends, and some members of the public will feel frustrated if no such response is forthcoming" so "[s]atisfying these desires that punishment be imposed is seen as one legitimate aim in punishing the offender").

259 See, for example, Sloane, 2007, p. 78 see *supra* note 2 (noting that punishment "is the means by which the state terminates the otherwise escalating cycles of retaliatory violence within its community"); Austin Sarat, "When Memory Speaks: Remembrance and Revenge in *Unforgiven*", in Martha Minow (ed.), *Breaking the Cycles of Hatred: Memory, Law, and Repair*, Princeton University Press, 2002, p. 237 (noting that "[m]odern legality is founded on the belief that revenge must and can be repressed, that legal punishment can be founded on reason, that due process can discipline passion, and that these categories are both knowable and distinct"); Aukerman, 2002, p. 55, see *supra* note 50 (noting the view that "[l]aw serves to channel vengeance, thereby both discouraging less controlled forms of victims' justice, such as vigilantism, and restoring the moral and social equilibrium that was violently disturbed by the offender"); "Developments in the Law: International Criminal Law", 2001, p. 1967, see *supra* note 66 (noting that punishment is "a controlled substitute for vigilantism"); Ruti Teitel, "Bringing the Messiah Through the Law", in Carla Hesse and Robert Post (eds.), *Human Rights in Political Transitions: Gettysburg to Bosnia*, Zone Books, 1999, p. 183 (noting "the expectation that international criminal justice would establish a form of individual accountability that would break "old cycles of ethnic retribution" and thus advance ethnic "reconciliation""); Moore, 1997, p. 89, see *supra* note 15 (noting that, according to this perspective, "the harm that is punishment is justified by the good it does psychologically to the victims of the crime, whose suffering is thought to have a special claim on the structuring of the criminal justice system"); and Carlos Santiago Nino, *Radical Evil on Trial*, Yale University Press, 1996, pp. 146–47 (noting that trials "lessen the impulse toward private vengeance", "substitute institutional justice for private revenge", and thereby avoid "a possible blood bath").

260 See, for example, Harvey M. Weinstein and Eric Stover, "Introduction: conflict, justice and reclamation", in Eric Stover and Harvey M. Weinstein (eds.), *My Neighbour, My Enemy: Justice and Community in the Aftermath of Mass Atrocity*, Cambridge University Press, Cambridge, 2004, p. 14 (noting the perspective that "views justice as largely a means of *taming* vengeance (but not necessarily *excising* it) by transferring the responsibility for apportioning blame and punishment from victims to a court that acts according to the rule of law") (emphasis in original); Nancy L. Rosenblum, "Justice and the Experience of Injustice", in Martha Minow (ed.), *Breaking the Cycles of Hatred*, Princeton University Press, 2002, p. 78 (noting that "[w]ild revenge cannot be tamed but it can be outlawed and suppressed. […] Where systems of justice are absent or when the application of laws and remedies is biased or undependable, personal revenge and organized vengeance will out"); and Judith N. Shklar, *The Faces of Injustice*, Yale University Press, 1990, p. 94 (noting that "[i]f effective justice pre-empts, neutralizes, dilutes, and all but replaces revenge, it cannot abolish it, either as an emotion or as an active response available to us, especially in personal relations. For most people retributive justice *is* justice, but it remains a frustrating substitute for revenge, neither eliminating nor satisfying its urging") (emphasis in original).

that criminal courts can dissipate calls for revenge in two ways. First, it is argued that, by establishing individual responsibility over the collective assignation of guilt, criminal courts can assist victims to relinquish feelings of collective responsibility that may otherwise potentially degenerate into feelings of resentment and ultimately lead to further conflict.[261] Second, it is asserted that, by punishing wrongdoers, victims are able to see those who have wronged them pay for their crimes.[262]

Punishment on this account is characterised as a means for gratifying "feelings of hatred" that have been stirred within victims of crime.[263] By the act of punishing an offender, these feelings of revenge and resentment are rendered justifiable, punishment serving as a "definite expression" and "solemn ratification" of such sentiments.[264] One scholar who

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261 Annual Report of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, U.N. Doc. A/49/342, S/1994/1007, 29 August 1994, para. 16 (http://www.legal-tools.org/doc/cacdb7/):

> If responsibility for the appalling crimes perpetrated […] is not attributed to individuals, then whole ethnic and religious groups will be held accountable for these crimes and branded as criminal. […] [H]istory […] clearly shows that clinging to feelings of "collective responsibility" easily degenerates into resentment, hatred and frustration and inevitably leads to further violence and new crimes.

See also, Fletcher and Weinstein, 2002, p. 598, see *supra* note 95 (noting that "[t]he stated claim is that holding individuals accountable for these acts alleviates collective guilt by differentiating between the perpetrators and innocent bystanders, thus promoting reconciliation"); Alvarez, 1998, p. 2033, see *supra* note 244 (noting that "[t]ribunal advocates […] generally assume that only individual, not collective, attribution of responsibility can terminate historical cycles of inter-group bloodletting"); and Minow, 1998, p. 40, see *supra* note 91 (noting that "[t]he emphasis on individual responsibility offers an avenue away from the cycles of blame that lead to revenge, recrimination, and ethnic and national conflicts").

262 See, for example, Cassese, 1998, p. 6, see *supra* note 67 (noting that "*justice dissipates the call for revenge*, because when the Court metes out to the perpetrator his just deserts, then the victims' calls for retribution are met" and that "by dint of dispensation of justice, victims are prepared to be *reconciled*, with their erstwhile tormentors, because they know that the latter have now paid for their crimes") (emphasis in original).

263 James Fitzjames Stephen, *Liberty, Equality, Fraternity*, in R.J. White (ed.), Cambridge University Press, Cambridge, 1967, p. 152, cited in Moore, 1997, p. 89, see *supra* note 15 (submitting that punishment should be exacted "for the sake of gratifying the feeling of hatred – call it revenge, resentment, or what you will – which the contemplation of such [criminal] conduct excites in healthily constituted minds").

264 Stephens, 1883, pp. 80–82, see *supra* note 223, cited in Dressler, 2009, pp. 41–42, see *supra* note 59:

has given considerable thought to this aspect of punishment is Jeffrie Murphy, who coined the term "retributive hatred" to refer to the way punishment represents a response to sentiments of revenge and ill-will on the part of victims of crime.[265] Specifically, Murphy argues that when a crime has been perpetrated, it generates "feelings that another person's current level of well-being is undeserved or ill-gotten (perhaps at one's own expense) and that a reduction in that well-being will simply represent his getting his just deserts".[266] Murphy argues that such desires are "understandable, natural, and appropriate to the harm done" and that "although in most cases [such hatred] should be overcome, it still deserves a certain amount of respect".[267] On this view, therefore, punishment is in principle motivated by retributive hatred, serving as a means to restore "the proper moral balance".[268] Anthony Duff has summarised this account of punishment as follows:[269]

> [We should] see such emotions not as nonrational passions, but as expressions of moral *understanding* of crime and its implications […] Such emotions could then *in principle* motivate a system of criminal punishment that aims precisely to satisfy them by depriving criminals of their undeserved well-being.

> In short, the infliction of punishment by law gives definite expression and a solemn ratification and justification to the hatred which is excited by the commission of the offence […] The criminal law thus proceeds upon the principle that it is morally right to hate criminals, and it confirms and justifies that sentiment by inflicting upon criminals punishments which express it.

265 See Jeffrie G. Murphy, "Hatred: a qualified defense", in Jeffrie G. Murphy and Jean Hampton, *Forgiveness and Mercy*, Cambridge University Press, Cambridge, 1988, p. 90.

266 See *Ibid.*, p. 89.

267 See *Ibid.*, p. 90.

268 See *Ibid.*, pp. 89 (emphasis added) and 95 (noting that "[r]etributive hatred is thus in principle vindicated as a permissible, if not mandatory, response of a victim to wrongdoing"). It should be noted that Murphy goes on to question the acceptability of relying on retributive hatred *in practice* (pp. 96–108), concluding that the arguments against hatred "constitute a body of reasons so profound that instances where it is acceptable to proceed in spite of them are, in my judgment, rare" (p. 108).

269 Duff, 2001, p. 24, see *supra* note 15. See also Sloane, 2007, p. 78 see *supra* note 2 (noting that "[t]he institutions of criminal justice must […] enable the discharge of instinctual desires for vengeance in an orderly, socially palatable manner"). See generally, Jeffrie G. Murphy and Jean Hampton, *Forgiveness and Mercy*, Cambridge University Press, Cambridge, 1988.

This account has also found favour in the international criminal context. For instance, Antonio Cassese, in his role as then President of the ICTY, asserted that the "only civilized alternative to this desire for revenge is to render justice" and that the failure to provide a fair trial would cause "feelings of hatred and resentment seething below the surface […] [to] erupt and lead to renewed violence".[270]

Despite the support that this account has garnered, it nonetheless faces a number of challenges in its attempt to justify punishment for international crimes.

First, the assertion that the imposition of punishment is able to terminate cycles of revenge by attributing individual responsibility over the collective assignation of guilt fails to account for an important social psychological dimension of many mass atrocity situations. In the aftermath of episodes of mass violence, members of local communities tend to identify strongly with particular sides to the underlying conflict and consequently possess deeply entrenched internal narratives denying responsibility for any crimes committed by their social group.[271] This has generally been referred to as the myth of individual and collective victimhood that members of particular groups tend to pull over themselves as a means of group survival and protection in the aftermath of mass atrocity situations.[272] In such circumstances, the conviction and imposition of punishment on an individual is likely to be interpreted as a verdict on the responsibilities of the community and political group to which that individual belongs.[273]

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[270] Annual Report of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, 1994, para. 15, see *supra* note 261.

[271] See, for example, Eric Stover, *The Witnesses: War Crimes and the Promise of Justice in The Hague*, University of Pennsylvania Press, 2005, p. 143; Miklos Biro, Dean Ajdukovic, Dinka Corkalo, Dina Djipa, Petar Milin and Harvey M. Weinstein, "Attitudes toward justice and social reconstruction in Bosnia and Herzegovina and Croatia", in Eric Stover and Harvey M. Weinstein (eds.), *My Neighbour, My Enemy: Justice and Community in the Aftermath of Mass Atrocity*, Cambridge University Press, Cambridge, 2004, p. 195; Michelle Parlevliet, "Considering Truth: Dealing with a Legacy of Gross Human Rights Violations", in *Netherlands Quarterly of Human Rights*, 1998, vol. 16, no. 2, p. 159; and Ignatieff, 1996, p. 114, see *supra* note 252.

[272] See, for example, Stover, 2005, p. 5, see *supra* note 271; Ignatieff, 1996, p. 116, see *supra* note 252; See also, Fletcher and Weinstein, 2002, p. 589, see *supra* note 95.

[273] Frédéric Mégret, "What Sort of Global Justice is 'International Criminal Justice'?", in *Journal of International Criminal Justice*, 2015, vol. 13, no. 1, p. 90.

The consequences are twofold: first, as numerous empirical studies have confirmed,[274] the imposition of punishment on particular defendants is likely to cause cognitive dissonance amongst members of that defendant's social group, leading to a rejection of the attribution of responsibility by the criminal court in question;[275] and second, rather than condensing responsibility on the shoulders of the individual on trial, convictions are likely to be treated by the members of political or social group of the accused as an attack on their social identity.[276] In such circumstances, the imposition of punishment is less likely to pacify than aggravate relations within local communities already torn apart by episodes of mass violence.

[274] See, for example, Janine Natalya Clark, "The ICTY and Reconciliation in Croatia: A Case Study of Vukovar", in *Journal of International Criminal Justice*, 2012, vol. 10, no. 2, p. 414 (qualitative empirical study in Croatia); Clark, 2011, p. 77, see *supra* note 34 (qualitative empirical study in in Bosnia-Herzegovina); Laurel E. Fletcher and Harvey M. Weinstein, "A world unto itself? The application of international justice in the former Yugoslavia", in Eric Stover and Harvey M. Weinstein (eds.), *My Neighbour, My Enemy: Justice and Community in the Aftermath of Mass Atrocity*, Cambridge University Press, Cambridge, 2004, p. 44 (qualitative empirical study of thirty-two judges and prosecutors with primary or appellate jurisdiction for national war crimes trials in three areas of Bosnia-Herzegovina); and Biro, Ajdukovic, Corkalo, Djipa, Milin and Weinstein, 2004, p. 183, see *supra* note 271 (two surveys of attitudes and beliefs of inhabitants of three cities – Vukovar, Mostar, and Prijedor – in Croatia and Bosnia and Herzegovina in 2000 and 2001). However, see Timothy Longman, Phuong Pham and Harvey M. Weinstein, "Connecting justice to human experience: attitudes towards accountability and reconciliation in Rwanda", in Eric Stover and Harvey M. Weinstein (eds.), *My Neighbour, My Enemy: Justice and Community in the Aftermath of Mass Atrocity*, Cambridge University Press, Cambridge, 2004, pp. 223–24 (concluding from an empirical study of reconciliation in four communities in Rwanda that "although ethnic identity continues to divide Rwanda's population, it is important to note, that with the exception of the social justice scale, it is not a significant factor in determining openness to reconciliation").

[275] See, for example, Ford, 2012, pp. 427–30, see *supra* note 248 (explaining the effect of cognitive dissonance on ethnic Serbians with respect to indictments and convictions at the ICTY); Biro, Ajdukovic, Corkalo, Djipa, Milin and Weinstein, 2004, p. 195, see *supra* note 271 (drawing on numerous experiments in social psychology to show that in the process of the formation of a group identity, there is an important role played by categorising people as 'us' and 'them'); Eric Stover and Harvey M. Weinstein, "Conclusion: a common objective, a universe of alternatives", in Eric Stover and Harvey M. Weinstein (eds.), *My Neighbour, My Enemy: Justice and Community in the Aftermath of Mass Atrocity*, Cambridge University Press, Cambridge, 2004, p. 332; Fletcher and Weinstein, 2002, p. 588, see *supra* note 95; and Ignatieff, 1996, p. 114, see *supra* note 252.

[276] See similarly, Ford, 2012, p. 458, see *supra* note 248.

Second, the assertion that punishment is able to quench the desire of victims for revenge is questionable, particularly in the international context, in light of the plurality of cultures and notions of just deserts that exist within the international community.[277] In fact, empirical studies have confirmed that although victims of human rights abuses tend to favour recourse to criminal prosecution,[278] incarcerative punishment tends to offer only a very narrow response to their plight.[279] In particular, the imposition of incarcerative punishment is usually inadequate to alleviate the experience of injustice that victims have suffered.[280]

As the preceding analysis reveals, expressivism encompasses a variety of different strands of thought that have been relied upon to justify

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277 See, for example, Sloane, 2007, p. 77, see *supra* note 2 (noting that "retributivism – with its characteristic discourse of "just deserts," blameworthiness, and the restoration of some moral balance – remains strongly redolent of religious notions of justice ill-suited to a diverse international community of states and peoples"); and Aukerman, 2002, p. 56, see *supra* note 50 (noting that "[t]he problem with such intuition-based arguments for retribution is that not everyone shares the desire to punish; in fact, some victims plead for clemency for their tormentors").

278 See, for example, Ernesto Kiza, Corene Rathgeber, Holger-Christoph Rohne, *Victims of War: An Empirical Study on Victimization and Victims' Attitudes towards Addressing Atrocities*, Hamburger Edition, 2006, p. 97 (In this study, 79% of interviewees, comprising victims from conflicts in Afghanistan, Bosnia and Herzegovina, Cambodia, Croatia, the Democratic Republic of the Congo, Israel, Kosovo, Federal Republic of Macedonia, Palestinian Territories, Philippines, and Sudan, were in favour of prosecution for past atrocities).

279 See, for example, Clark, 2011, p. 70, see *supra* note 34 (noting that interviewees from all three ethnic groups in Bosnia-Herzegovina "perceived 'justice' as encompassing far more than just the trial and punishment of war criminals"); Nicola Henry, *War and Rape: Law, Memory and Justice*, Routledge, 2011, p. 125 (noting that "[j]ustice is much broader than the prosecution of a few offenders; it involves not simply legal justice, but social and political justice, including both practical and symbolic forms of security, safety and stability"); and Stover and Weinstein, 2004, pp. 323–24, see *supra* note 275:

> for survivors of ethnic war and genocide the idea of "justice" encompasses more than criminal trials […] It means returning stolen property; locating and identifying the bodies of the missing; capturing and trying *all* war criminals, from the garden-variety killers in their communities all the way up to the nationalist ideologues who had poised their neighbours with ethnic hatred; securing reparations and apologies; leading lives devoid of fear; securing meaningful jobs; providing their children with good schools and teachers; and helping those traumatized by atrocities to recover.

280 See, for example, Rosenblum, 2002, p. 79, see *supra* note 260 (noting that "we should not imagine that formal justice, cool and cognitive, quenches survivors' desire for revenge. Or that victims and their sympathizers find a fair trial and reasonable punishment an adequate response to the harm they have suffered").

the imposition of punishment for international crimes. Whilst these theories have generally been better attuned to the particular contexts in which mass atrocities typically occur than traditional retributive and utilitarian accounts, a number of challenges remain which question the capacity of expressivism to provide a general justification of international criminal punishment.

6.5. Pluralising Post-Conflict Justice

By raising critical questions of the principal theories that have been advanced to justify international criminal punishment, this chapter does not suggest that these challenges are necessarily insurmountable or that incarcerative punishment cannot be justified in any context. Rather, this chapter more modestly casts doubt on the plausibility of advancing a general justification for international criminal punishment that transcends context. As Mark Drumbl has argued:

> The modalities of international criminal law, in particular those related to punishment and sentence, tend to universalize through ideological preference instead of through an independent assessment of the social psychology of the violence, comparative reflection about how diverse justice traditions might punish, and development of multilateral interinstitutional conversations.[281]

By probing the underlying assumptions of retributive, utilitarian and expressivist theories of punishment, this chapter raises the prospect that incarcerative punishment for international crimes may be inappropriate in certain contexts. To raise this prospect is not to suggest that it is appropriate to ignore the commission of international crimes, but rather to argue in favour of an openness to pluralise how local and international communities respond to mass atrocity situations in practice.

Against this background, this section examines two alternative visions of post-conflict justice, which, if pursued by societies emerging from episodes of mass violence in particular contexts, would mark a shift away from the model of incarcerative punishment that currently dominates the field.

[281] Drumbl, 2007, p. 184, see *supra* note 14.

6.5.1. Criminal Justice Without Incarcerative Punishment

One alternative vision for post-conflict justice is *reformist* in nature, retaining the core tenets of international criminal justice in its present form, but relying on *non-incarcerative measures* to communicate and redress the wrongfulness of an individual's acts and omissions.[282]

The starting point for this vision is to recall that international criminal justice is already situated within a broader set of post-conflict justice options that include truth commissions, compensation and rehabilitation schemes, commemorations, and restorative justice measures.[283] With this in mind, it is not necessary to demonstrate that international criminal justice offers the optimal possible response to mass atrocity situations, but more modestly show that it contributes *something* to post-conflict situations that other measures do not achieve.[284] In this light, a reformist vision would emphasise that the contribution of a criminal court to post-conflict justice is rendered more through *the criminal process* rather than the punitive measure of incarceration that typically flows from a guilty verdict.[285] As Meijers and Glasius have recently explained:[286]

> Consider the several expressive functions of punishment that Joel Feinberg identifies: disavowal of the crime (it should not have happened); nonacquiesence (we were not a part of it); vindication of the law (the law should be honoured and

[282] See similarly, in the domestic criminal context, *ibid.*, pp. 161 ff. (advocating communicating censure and providing a degree of redress for domestic crimes through a range of mechanisms including formal condemnation, requiring compensation, and providing an opportunity for voluntary reconciliation and the making of amends).

[283] See generally, Teitel, 2000, see *supra* note 203.

[284] Tim Meijers and Marlies Glasius, "Trials as Messages of Justice: What Should Be Expected of International Criminal Courts?", in *Ethics and International Affairs*, 2016, vol. 30, no. 4, p. 434. See also, Golash, 2014, p. 218, see *supra* note 95 ("To the extent that trials are essential to narrative and understanding, it is thus more important to conduct trials and to condemn the guilty parties for international crimes than for ordinary domestic crimes").

[285] See, for example, Luban, 2010, p. 575, see *supra* note 4 (noting that, in international criminal contexts, "the centre of gravity often lies in the proceedings"); deGuzman, 2012, p. 300, see *supra* note 33 ("the rationales of international criminal law often relate as much to the processes of investigation, indictment, trial, and judgment as to the result of punishment"); and Duff, 2010, p. 597, see *supra* note 142 (agreeing that "the trial […] [is] central to international criminal law").

[286] Meijers and Glasius, 2016, p. 435, see *supra* note 284 (emphasis in original).

> we take it seriously); and the absolution of others (it was this person, no one else). All of these appear to be realised *by the trial and the verdict* in themselves, *not by the punishment*.

The expressive effects of criminal trials, for example, have been proclaimed by a range of scholars. Mark Osiel, for instance, has argued that trials represent didactic opportunities for hostile parties to engage each other in a civil manner and thereby begin to develop a measure of mutual trust, the drama of trials being akin to the "theater of ideas".[287] In addition, numerous scholars and practitioners have argued that trials provide significant opportunities for victims to be heard, serving as *fora* to restore their sense of dignity and worth,[288] as well as sites through which they can contribute to the construction of historical narratives.[289] Where trials culminate in judgments, these may also be understood as expressive mechanisms through which judges can construct historical narratives concerning the mass atrocity situation under examination,[290] as well as formally communicate and condemn the wrongfulness of a defendant's conduct if found guilty of the crimes charged.[291] Even the preliminary public

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287 Osiel, 1997, p. 290, see *supra* note 203. See also, Drumbl, 2007, p. 175, see *supra* note 14 ("trials can educate the public through the spectacle of theater – there is, after all, pedagogical value to performance and communicative value to dramaturgy").

288 See, for example, Nino, 1996, p. 147, see *supra* note 259 ("trials enable the victims of human rights abuses to recover their self-respect as holders of legal rights" based on "the fact that their suffering is listened to in the trials with respect and sympathy"); and Redress Trust, *The Participation of Victims in International Criminal Court Proceedings: A Review of the Practice and Consideration of Options for the Future*, 2012, p. 5 (noting that victim participation in international criminal trials constitutes an important mechanism "to formally recognise their suffering and to foster their agency and empowerment").

289 See, for example, Stover, 2005, p. 110, see *supra* note 271 ("Trials enable "the truth to come out" and provide a forum where the suffering of victims can be heard and acknowledged"); and Doak, 2011, p. 275, see *supra* note 252 ("It is said that truth-finding may serve to vindicate the victim's status as an innocent party and encourage perpetrators to accept responsibility; that it assists in reducing feelings of anger; and even that it constitutes a "psychological premise" that must be fulfilled in order to obtain justice and reconciliation for individual victims").

290 See generally, Richard Ashby Wilson, *Writing History in International Criminal Tribunals*, Cambridge University Press, Cambridge, 2011.

291 See, for example, May, 2008, p. 334, see *supra* note 26; William A. Schabas, "Sentencing by International Tribunals: A Human Rights Approach", in *Duke Journal of Comparative and International Law*, 1997, vol. 7, no. 2, p. 516 (noting that "[i]n international justice, the finding of guilt will be far more important than the actual sentence which is meted out"); and Bedau, 2001, p. 117, see *supra* note 222 (arguing that "a stronger case can be

events of arrest and formal charging have been shown to have expressive effects. Frédéric Mégret, for example, has argued that being charged by the ICC is in a sense a "double stigma", carrying the stigma attached to the substantive charge as well as the fact that one is being tried by a centralised institution of the international community.[292]

A reformist vision of post-conflict justice could even be taken a step further to include inquiries into various forms of collective responsibility, as well as the structural causes of extreme violence. Kirsten Ainley, for example, has proposed the establishment of "responsibility and truth commissions", which would have the authority to hold to account not just individuals but political, military, media and private sector groups through a combination of "naming of offenders (under carefully defined conditions) to generate condemnation of their acts, […] the removal of certain persons from office, the restructuring or destruction of public or private institutions that facilitated atrocity, sanctions, reparations programs, and acts of atonement".[293]

To these reformist visions of post-conflict justice, two objections may be raised. First, it may be contended that dispensing with incarcerative punishment entirely would remove an important avenue for victims to obtain acknowledgement that they have been subjected to unwarranted harm. In this vein, Meijers and Glasius have argued that "trial without punishment could too readily be interpreted as empty rhetoric", adding that "some kind of punishment remains inevitable because of the value that is conventionally attached to it: not punishing a criminal will be understood as not taking the crime seriously".[294] Yet, while this may be true within some societies – particularly, in the West – the convention of using incarcerative punishment to condemn wrongful behaviour may not hold as

for the guilty *verdict*, rather than the punitive *sentence*, as the conventional vehicle for public expressions of moral condemnation of offenders for their wrongdoing") (emphasis in original).

292 Frédéric Mégret, "Practices of Stigmatization", in *Law and Contemporary Problems*, 2013, vol. 76, nos. 3–4, p. 310.

293 Kirsten Ainley, "Excesses of Responsibility: The Limits of Law and the Possibilities of Politics", in *Ethics and International Affairs*, 2011, vol. 25, no. 4, pp. 425–26.

294 Meijers and Glasius, 2016, p. 436, see *supra* note 284. See also, Golash, 2014, p. 219, see *supra* note 95 ("Where punishment is the conventional vehicle for conveying deep social condemnation, not to punish can be taken as condonation of wrongful behavior").

much weight in societies where traditions of compensation and reconciliation continue to have resonance.[295] In addition, as Deirdre Golash has noted, it is arguable that in the international context "the convention of punishing international crimes is not yet so deeply ingrained as to imply condonation by its absence", particularly in light of the inevitable selectivity of international criminal prosecutions that results from a combination of political obstacles, resource constraints and the large number of possible indictees.[296] Finally, to the extent that a failure to impose incarceration *is* conventionally taken as condonation of wrongful behaviour, it is open to the international community to try to alter such a convention.[297] A criminal justice process that includes a platform for the voices of victims to be heard and a judgment for the history of the events under examination to be narrated and the wrongful acts of individuals to be condemned can also show sincerity, particularly if complemented by other justice mechanisms such as preventative intervention, assistance to victims, and orders to make compensation.[298] Moreover, as Mark Drumbl has recently argued, it is also possible to unmoor our understanding of punishment from "the iconic preference for jailhouses" to encompass a broader range of non-incarcerative measures such as "recrimination, shame, consequence, and sanction".[299]

Second, even if the first objection is surmountable, it may be argued that the expressive effects of criminal trials and judgments are also limited by many of the same obstacles encountered by incarcerative punishment, including the selectivity of international criminal prosecution and the detachment of criminal processes from local communities. Whether these limits are so problematic as to undermine having recourse to criminal justice processes is a matter of debate.[300] However, it is important to recognise two points in response to this objection: first, criminal trials and

[295] *Ibid*.

[296] *Ibid*.

[297] Golash, 2005, p. 163, see *supra* note 15 ("It is important to remember, however, that the use of punishment as recognition of wrong done is largely conventional, and conventions can be changed – not overnight, but eventually").

[298] Golash, 2014, p. 219, see *supra* note 95.

[299] Mark A. Drumbl, "Impunities", *Washington and Lee Public Legal Studies Research Paper Series*, Accepted Paper no. 2017–17 (2017), p. 21–22.

[300] See generally, Sander, 2015, p. 749, see *supra* note 73.

judgments raise comparatively less serious moral issues than those raised by the imposition of incarcerative punishment on individuals, thereby rendering the bar that needs to be passed to justify their adoption relatively lower than for incarceration; [301] and second, it is possible to acknowledge the expressive limits of a social practice, such as a criminal trial or judgment, without rejecting the value of the entire enterprise.[302] In this regard, it should be emphasised that this vision of post-conflict justice is offered not as a universal model, but more modestly as one option that may be deemed appropriate by particular communities in particular contexts.

6.5.2. From Criminal to Political and Social Justice

A more *radical* vision for post-conflict justice would entail a fundamental shift away from criminal justice towards political and social justice.[303] Such a vision has recently been elaborated by Mahmood Mamdani in a paper contrasting the post-conflict justice processes implemented in the aftermath of the Second World War and post-apartheid South Africa.[304]

Mamdani's point of departure is to critique the contemporary human rights movement for relying upon Nuremberg as "a template with which to define responsibility for mass violence".[305] For Mamdani, the logic of Nuremberg is "to think of [extreme] violence as criminal and of responsibility for it as individual".[306] Such a model is also "zero sum", defining individuals in binary terms as innocent or guilty, victims or perpetrators.[307] The particular circumstances that enabled and framed this neoliberal understanding of criminal justice at the time of Nuremberg were twofold:[308] first, the termination of an inter-State conflict, which

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[301] See similarly, Golash, 2005, p. 161, see *supra* note 15 ("The formal processes that we now use as a prelude to criminal punishment themselves serve many of the purposes ascribed to punishment, *without raising the same serious moral issues*") (emphasis added).

[302] See generally, Sander, 2015, see *supra* note 133.

[303] On "radical critique", see generally, Baars, 2014, p. 196, see *supra* note 85.

[304] Mahmood Mamdani, "Beyond Nuremberg: The Historical Significance of the Post-apartheid Transition in South Africa", in *Politics and Society*, 2014, vol. 43, no. 1, p. 61.

[305] *Ibid*., p. 62.

[306] *Ibid*., pp. 62 and 80.

[307] *Ibid*., p. 80.

[308] *Ibid*., pp. 64–66 and 80.

concluded with a clear victor under whose power justice could be administered; and second, the physical separation of the victims and perpetrators into different political communities that no longer need to live together in the post-conflict environment.

Moving away from the Nuremberg model of criminal justice, Mamdani advocates a shift towards political justice, as exemplified by the political process known as Convention for a Democratic South Africa ('CODESA'). As Mamdani explains, CODESA signifies "the larger political project that chartered the terms that ended legal and political apartheid and provided the constitutional foundation to forge a post-apartheid political order".[309] Importantly, CODESA responded to a different set of circumstances than Nuremberg:[310] first, the conflict in South Africa had not ended; and second, it was clear that the victims and perpetrators of the conflict would have to live in the same country going forward. Set in this context, CODESA prioritised the promotion of *political* justice, which is distinct from criminal justice in two respects:[311] first, political justice affects groups rather than targeting individuals; and second, the object of political justice is political reform rather than criminal punishment. By shifting from the criminal to the political, both sides to the conflict in South Africa were decriminalised and legitimised – former enemies transformed into political adversaries.[312] Moreover, the aim of the process was not to punish individuals for crimes, but "a change of rules that would bring them and their constituencies into a reformed political community".[313] In this light, Mamdani refers to political justice as "survivors' justice", where survivors are understood to include "all those who had survived apartheid: yesterday's victims, yesterday's perpetrators, and yesterday's beneficiaries".[314]

Mamdani argues that a CODESA-style inclusive political process constitutes a more appropriate response to the intra-State civil wars that typify contemporary episodes of mass violence in various African coun-

309 *Ibid*., p. 63.
310 *Ibid*., p. 67.
311 *Ibid*.
312 *Ibid*.
313 *Ibid*., pp. 67–68.
314 *Ibid*., p. 68.

tries. Criminal justice ill fits these contexts, which tend to be characterised by cycles of violence in which victims and perpetrators trade places.[315] In such circumstances, criminal justice's tendency to demonise the agency of the perpetrator and diminish the agency of the victim can result in a freezing of their identities, "leading to the assumption that the perpetrator is always the perpetrator and the victim is always the victim".[316] By contrast, political justice is able to recognise the political nature of extreme violence and acknowledge that such violence requires not merely criminal agency but a political constituency held together and mobilised by an underlying issue.[317] As Mamdani explains, by focusing on cycles of violence and the underlying issues that threaten the foundation of the political community, political justice dares to reimagine a new community "in which yesterday's victims, perpetrators, bystanders, and beneficiaries may participate as today's survivors".[318]

Beyond political justice, Mamdani also advocates social justice in the aftermath of extreme violence. Although some have criticised CODESA for evading issues of social justice, Mamdani argues that such criticisms are unreasonable since "[t]he political prerequisite for attaining social justice would have been a social revolution, but there was no revolution in South Africa".[319] In these circumstances, the most that could have been expected was for a non-binding process, such as South Africa's Truth and Reconciliation Commission, to have centre-staged *the need for* social justice in the future by "highlighting both beneficiaries and victims of apartheid as groups" and educating the population about "the structural horrors and social outcomes of apartheid as a mode of governing society".[320] Unfortunately, in South Africa, the Truth and Reconciliation Commission interpreted its mandate narrowly, evading issues of social justice in the process.

In response to Mamdani's vision of post-conflict justice, it may be objected that circumstances may arise where an inclusive political re-

315 *Ibid*., pp. 80–81.

316 *Ibid*., p. 81.

317 *Ibid*., p. 63.

318 *Ibid*., pp. 81–82.

319 *Ibid*., p. 71.

320 *Ibid*., pp. 78 and 82.

sponse to a conflict is simply not viable or appropriate. Yet, it is important to emphasise that Mamdani does not promote political post-conflict justice in universal terms. For Mamdani, a CODESA-style political process is less an alternative to Nuremberg than "a response to a different set of circumstances" and, as such, "a statement that Nuremberg cannot be turned into a universally applicable formula".[321]

6.6. Conclusion

This chapter has critically examined the principal theories that have been put forward to justify the imposition of punishment for international crimes and offered some initial reflections on how post-conflict justice might be reimagined without incarcerative punishment at its core. In forging this path, the underlying ambition of the chapter has been to demonstrate that the choices facing post-conflict societies are not binary – namely, either to implement the received wisdom of incarcerative punishment, on the one hand, or the vacuum of impunity, on the other. Rather, it is possible to imagine a more plural set of visions of post-conflict justice, stretching far beyond the imposition of incarceration to include diverse conceptions of criminal, political and social justice. Of course, which of these visions is implementable in any given context will be highly contingent on the power relations that exist both within the society that has experienced the atrocities in question as well as between States within the international community more generally. Nonetheless, what emerges from the different visions of post-conflict justice put forward in this chapter is a recognition that justice holds no singular definition and a realisation that it is entirely possible to imagine a world in which the failure to incarcerate is not characterised as the principal adversary in the aftermath of situations of mass atrocity.[322]

[321] *Ibid*., p. 67.

[322] See similarly, Karen Engle, "A Genealogy of the Criminal Turn in Human Rights", in Karen Engle, Zinaida Miller and D.M. Davis (eds.), *Anti-Impunity and the Human Rights Agenda*, Cambridge University Press, Cambridge, 2016, p. 49.

Publication Series No. 35 (2019):

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ISBNs: 978-82-8348-119-8 (print) and 978-82-8348-120-4 (e-book).