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Towards a Unique Theory of International Criminal Sentencing

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CHAPTER 10

TOWARDS A UNIQUE THEORY OF INTERNATIONAL CRIMINAL SENTENCING

Jens David Ohlin

I. INTRODUCTION

International criminal justice is currently faced with a crisis, one born from a multitude of ironic and diverse sources. International justice, as an institution, exists to bring perpetrators to justice, yet in many instances perpetrators found guilty by competent authorities receive sentences that one usually associates with garden-variety crimes. When compared against sentences handed down in the United States for regular crimes,¹ the sentences of international criminal tribunals are typically far lower, even though the crimes at these tribunals are far greater in both moral depravity and legal significance.² This strikes some observers as problematic, given

¹ For example, the national average sentence for regular murder in the United States is around 279 months, or 23 years. See J. Gibson, 'How Much Should Mind Matter? *Mens Rea* in Theft and Fraud Sentencing', (1997) 10 *Federal Sentencing Reporter* 136 (citing statistics from 1994). Over the course of 10 years the sentences have moderated, but only slightly, with the average sentence for murder totaling 228.4 months. See U.S. Sentencing Commission, *Sourcebook of Federal Sentencing Statistics, Fiscal Year 2005* §3, tbl.7 (2006).

² For example, Naser Orić received a two-year prison sentence for failing to prevent the murder of Serb prisoners, under a theory of superior responsibility, although his conviction was subsequently quashed. More distressingly, Prcać received a five-year sentence for torture and other crimes in connection with the Omarska Camp cases. See Judgement, *Prosecutor v. Kvočka et al.*, Case No. IT-98-30/1-A, A. Ch., ICTY, 28 February 2005. In reviewing these and other cases, one prosecutor at the ICTY referred to the sentences handed down by the tribunal in general as 'inexplicably lenient'. See M.B. Harmon and F. Gaynor, 'Ordinary Sentences for Extraordinary Crimes', (2007) 5 *JICJ* 683, at 683. One might point, in contrast, to the large number of defendants at the ICTY who have indeed received substantial sentences. See, e.g., Stakić (40), Jelisić (40), Krstić (35), Brdjanin (30), Kunarac (28), Žigić, Kordić (25), Radić, Naletilić, Kovač, Bralo, Dragan Nikolić, Momir Nikolić, D. Tadić (20), Šantić, Češić, Delić (18). Also, the sentences at the ICTR have been, in comparison with the ICTY, noticeably longer. See, e.g., Akayesu, Gacumbitsi, Kambanda, Kamuhanda, Kayishema, Muhimana, Musema, Nindabahizi, Niyitegeka, Rutaganda, Seromba (life), Kajelijeli (45), Ngeze, Semanza (35), Barayagwiza (32), Nahimana (30), Ntakirutimana, Ruzindana, Simba (25). However, it is nonetheless true that the ICTY has not followed a similar course of handing down life sentences and that, as of 2007, only *one* defendant (Galić) has received a life sentence from the ICTY. Furthermore, other sentences at the ICTY have been much shorter: e.g. Obrenović (17), Sikirica, Simić, Vasiljević, Zelenović, Landžo (15), Krnojelac (15 after prosecution appealed sentence of 7.5), Bala, Babić (13), Rajić, Josipović, Vuković (12), Plavšić (11), Deronjić, Furundžija, Todorović (10), D. Jokić, Blaškić, Mucić (9), Banović, M. Tadić (8), Strugar (7.5), M. Jokić, Aleksovski, Kvočka (7), Čerkez, Kos, Zarić (6), Došen, Erdemović, Prcać, Simić (5), Hadžihasanović (3.5), Kolundžija (3), Kubura (2). The sentence of Blaškić is particularly noteworthy since in that case the Appeals Chamber reduced the Trial Chamber's sentence

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the natural intuition that the special gravity of international crimes requires greater punishment.³ In one sense this phenomenon may simply be a reflection of the widening gulf between American and European standards of punishment,⁴ at least with regard to the ICTY, where Europeans account for half of the judges. While the justice system of the former has increasingly bowed to political pressures to increase penalties imposed on convicted felons and decrease opportunities for parole, many domestic justice systems of the latter have experimented increasingly with progressive policies designed to rehabilitate prisoners and return them to society as fully functioning members of the community (though European nations themselves are not wholly immune from political pressure to increase penalties).⁵ However, the problem with regard to international criminal

...of 45 years to 9 years after a successful appeal and *de novo* sentencing. See Judgement *Prosecutor v. Blaškić*, Case No. IT-95-14-A, A. Ch., ICTY, 29 July 2004, paras. 726-29. To understand the true importance of these statistics, it is imperative to understand the basic methodology of comparative law. This chapter does not argue that international criminal justice has not handed down lengthy sentences in some circumstances. Indeed, the sentences quoted above, as well as those handed down by the Special Court for Sierra Leone – Brima and Kanu (50), Kamara (45), Kondewa (20) – demand a more subtle thesis. Rather, I wish to explore the *comparative* thesis that sentences in the United States are comparatively longer than sentences at the international level, even for crimes such as individual cases of drug dealing, carjacking (18 USC §2119), and murder, and include a greater willingness to hand down life sentences, and even the death penalty, in more circumstances than in the international arena, even in cases with only a single victim (carjacking) or, in the case of drug dealing, arguably no ‘victims’ in the traditional sense of the term. Indeed, to explain the situation in the United States to a European audience, it is perhaps only necessary to refer to *Lockyer v. Andrade*, 538 US 63 (2003), where the US Supreme Court upheld two *consecutive* sentences of 25 years to life for stealing \$150 worth of videotapes, under a California ‘three strikes’ statute that provides life sentences for even petty theft if the defendant has prior felonies on his record. As a comparative matter, it is indisputable that this severity of punishment exists to a far less an extent at the international level. Such comparative statements are the scholarly coin with which legal comparativists trade. Given the vast number of crimes for which life sentences are routinely handed down in the United States, the relatively small number of life sentences handed down by the ICTR, as well as the few lengthy sentences handed down by the ICTY, cannot cast doubt on this basic conclusion.

³ See, e.g., Harmon and Gaynor, ‘Ordinary Sentences for Extraordinary Crimes’, *supra* note 2, at 711 (‘a slap on the wrist of the offender is a slap in the face of the victims’).

⁴ For a general discussion, see the instructive study by J.Q. Whitman, *Harsh Justice: Criminal Punishment and the Widening Divide between America and Europe* (New York: Oxford University Press, 2003).

⁵ The issue of political pressure for increased sentencing in the United States is discussed in W.J. Stuntz, ‘The Pathological Politics of Criminal Law,’ (2001) 100 *Michigan Law Review* 505, 529-30 (discussing the unique dynamics of political pressure facing legislators to increase criminal penalties). Stuntz quite astutely notes that ‘pleasing voters might mean producing rules the voters want. But this requires that the rules be simple and understandable, the sort of thing politicians can use in campaign speeches and advertisements. Sentencing offers some examples. Mandatory minimum sentences for drug or gun crimes and “three strikes” laws are simple rules that voters can comprehend and politicians can use in stump speeches.’ Not every European country has experimented with progressive penal policies, and several nations including France and Germany flirted in the 1970s with increased punishment in response to terrorism. See Whitman, *Harsh Justice*, *supra* note 4, at 69-71 (noting that ‘while France and Germany have experienced nothing like the American drive toward harsher punishment for all classes of offenders ... they have grown harsher *only with regard to a shrinking class*

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sentencing extends beyond this well-travelled dichotomy. Since the creation of the ICTY and ICTR in 1993 and 1994, judges have been handing down sentences for war crimes, crimes against humanity, and genocide, with neither a robust system of sentencing procedures nor any coherent theoretical vision of why we are sentencing international criminals in the first place.⁶ This chapter aims to remedy this oversight, by attacking the second question first, on the assumption that only by first developing a coherent theoretical account of international sentencing can practitioners then hope to devise a well-crafted system of procedure to achieve these goals.

The chapter proceeds in three parts. First, it discusses the growing gulf between European and American attitudes about punishment and concludes that the dominant European models, while both well-intentioned and successful in the domestic context, are less relevant for cases dealing with international crimes. Second, the chapter will argue that international criminal justice is predicated on retributive notions and that accordingly, its sentencing policy must follow suit. Finally, it will conclude by suggesting the necessary procedural changes, ranging from theoretical changes in how we understand the concept of proportionality to practical suggestions such as the creation of an international sentencing commission to guide judges in their *ad hoc* sentencing determinations, as well as the creation (or return)

...of mostly violent offenders') (emphasis in original). The important point here is that European countries such as France, Germany, and the Netherlands do not demonstrate harshness with regard to mid-level offenders in the same manner as the United States. *Ibid.*, at 71; see also M. Tonry and K. Hatlestad (eds.), *Sentencing Reform in Overcrowding Times: A Comparative Perspective* (Oxford: Oxford University Press, 1997) (explaining reduction in prison sentences in Germany, Finland, the Netherlands, Switzerland, Sweden, and other European countries); U.V. Bondeson, *Alternatives to Imprisonment: Intentions and Reality* (Oxford: Westview Press, 1994) 20-21 (discussing development of conditional sentence and probation). Furthermore, even the limited continental harshness has arguably been dwarfed by the recent US penal responses to 9/11, including statutes that impose draconian penalties for providing material support to terrorists. See, e.g., 18 USC §2332 (homicide of US nationals); 18 USC § 2332a (use of weapons of mass destruction); 18 USC §2332b (acts of terrorism transcending national boundaries); 18 USC §2332d (financial transactions with foreign state supporting terrorism); 18 USC § 2332f (bombing public locations, government facilities, public transportation systems, and infrastructure facilities); 18 USC §2339 (harboring or concealing terrorists); 18 USC § 2339A (material support while intending to commit crimes); 18 USC §2339C (providing funds for use in terrorism). See *United States v. Al-Arian*, 308 F. Supp. 2d 1322, 1329 n.7 (M.D. Fl. 2004) (compiling statutory provisions).

⁶ Judges in many cases simply cite a litany of standard rationales for punishment, without indicating which one is doing the real work of the argument. For example, in *Tadić*, the court indicated that the factor of deterrence 'must not be accorded undue prominence in the overall assessment of the sentences to be imposed on persons convicted by the International Tribunal.' Of course, this raises the question of which factor is the real basis, because the Appeals Chamber declined to follow this holding with a positive and complete statement of the appropriate rationale for international punishment. See Judgement in Sentencing Appeals, *Prosecutor v. Tadić*, Case No. IT-94-1-A & IT-94-1-Abis, A. Ch., ICTY, 26 January 2000, para. 48. See also R. Sloane, 'Sentencing for the "Crime of Crimes": The Evolving "Common Law" of Sentencing of the International Criminal Tribunal for Rwanda', (2007) 5 *JICJ* 713, at 716 (describing sentencing at the ICTR as mere 'afterthought').

of separate sentencing phases at international trials. As for methodology, this paper assumes a connection between theory and procedure, in the sense that the proper procedural mechanics for sentencing may only be finalised once we have developed a coherent theory underlying the punishment of international criminals.⁷ These are the most paramount issues that international criminal justice faces and cannot be swept aside simply because the political and diplomatic obstacles to sentencing reform are too high.

II. GULF BETWEEN EUROPEAN AND AMERICAN ATTITUDES ABOUT PUNISHMENT

As has been amply explored by comparative legal scholars such as James Q. Whitman, attitudes about criminal punishment differ quite sharply between the American and European continents. This disagreement can be seen in the theoretical posture toward punishment in the United States, including a more prominent place for retributive and expressivist concerns, longer prison sentences, harsh treatment while in prison, and capital punishment in extreme cases.⁸ By contrast, most Western European penal systems demonstrate a greater concern for rehabilitation, shorter prison terms,⁹ dignified treatment in prison, and a near-total abolition of capital punishment, even for extreme crimes.¹⁰ I will address each briefly.

First, consider the differences in sentencing theories. Most European penal systems are built around a commitment to rehabilitating prisoners and returning them to productive society.¹¹ Such systems are often evaluated

⁷ The argument for this methodological assumption is that criminal procedure seeks to maximise certain values and goals (e.g. human rights norms, truth-seeking, fairness, etc.), and that one chooses the procedure best suited to achieve those goals. One cannot design the procedural framework without first laying the theoretical foundation.

⁸ Again, the proposition here is comparative in nature. Factors above and beyond retributive theories contribute to the situation in the United States, including the aforementioned political pressure. See *supra* note 5 and related text.

⁹ See A. Freiberg, 'What's It Worth? A Cross-Jurisdictional Comparison of Sentence Severity,' in C. Tata and N. Hutton (eds.), *Sentencing and Society: International Perspectives* (Aldershot: Ashgate Publishing, 2002), at 237-8 (review of statistical literature showing that US and Russia imprison the most, Japan and Scandinavia the least). Also, Whitman notes at 72 that the man who stabbed Monica Seles received probation for his violent crime '[f]ollowing normal German practice'.

¹⁰ There is ample evidence that many European jurisdictions place greater weight on such matters and are moving in a contrary direction to the United States. See, e.g., Whitman, *Harsh Justice*, *supra* note 4, at 74-5 (discussing the 'widening divide in Western punishment' and concluding that '[t]he result is undoubtedly that the situation in the prisons of Europe has gotten much better than the situation in the prisons of America'); C. Pfeiffer, 'Alternative Sanctions in Germany: An Overview of Germany's Sentencing Practices', National Criminal Justice Reference Service (February 1996).

¹¹ See Whitman, *Harsh Justice*, *supra* note 4, at 73 (noting that in Germany, 'individualization, oriented toward treatment and resocialization, remains unchallenged orthodox doctrine in the practice of punishment, even if academics occasionally raise doubts about it'); K.S. Sharples, *The Legal Framework of Judicial Sentencing Policy: A Study Based on the Dutch and English Systems* (Amsterdam, University Press, 1972) 170.

by the degree to which they lower recidivism rates.¹² Prisoners also receive incredible access to educational and vocational programs, as well as healthcare (including mental health), so that they emerge from their sentences in good condition. But this is more than just a commitment to humane treatment.¹³ It also implicates one of the leading moral justifications for the institution of punishment. If punishment is justified primarily because it rehabilitates prisoners and, in so doing, promotes social utility, then penal institutions must be organised to maximise these goals.¹⁴ By contrast, American penal institutions are, comparatively speaking, increasingly justified by either deterrence or retribution.¹⁵ Although a fierce moral and theoretical debate rages between these two schools of thought, what unites them is a political commitment, in the US at least, that prison sentences should not only be long but, in the paraphrased words of Hobbes, produce a life in prison that is 'nasty, brutish, and short'.¹⁶ For retributivists, prison sentences for severe crimes need to be long to capture the moral depravity of these acts adequately, consistent with Kantian and deontological inspirations.¹⁷ For deterrence theorists, prison sentences need to be adequately long to deter other potential criminals from engaging in future crimes. This also counsels against making prisons comfortable. The very point of establishing such institutions is to paint a sufficiently grave picture so as to incentivise others to comply with the

¹² However, it is important not to overstate the degree of uniformity among Continental or European attitudes. Indeed, scholars have advanced retributivist arguments and policies in Germany and elsewhere, while a thriving debate about deterrence policies exists in the United States. For example, a recent wave of scholarship has considered the deterrent effect of capital punishment. Compare C.R. Sunstein and A. Vermeule, 'Is Capital Punishment Morally Required? Acts, Omissions, and Life-Life Tradeoffs', (2005) 58 *Stanford Law Review* 703, 711 (finding 'substantial deterrent effect') with J.J. Donohue and J. Wolfers, 'Uses and Abuses of Empirical Evidence in the Death Penalty Debate', (2005) 58 *Stanford Law Review* 791, 794 ('existing evidence for deterrence is surprisingly fragile'). See also M.L. Radelet and R.L. Akers, 'Deterrence and the Death Penalty: The Views of the Experts', (1996) 87 *Journal of Criminal Law & Criminology* 1, at 10 ('wide consensus among America's top criminologists that scholarly research has demonstrated that the death penalty does, and can do, little to reduce rates of criminal violence').

¹³ See, e.g., T. Lappi-Seppälä, 'Sentencing and Punishment in Finland: The Decline of the Repressive Ideal', in M. Tonry and R.S. Frase (eds.), *Sentencing and Sanctions in Western Countries* (Oxford: Oxford University Press, 2001) 92 ('During the late 1960s, not only did flaws in the treatment ideology become more evident but demands for more adequate and less repressive criminal law grew louder').

¹⁴ See Whitman, *Harsh Justice*, *supra* note 4, at 73.

¹⁵ See, e.g., P.L. Griset, *Determinate Sentencing: The Promise and the Reality of Retributive Justice* (Albany: SUNY Press, 1991).

¹⁶ Constitutional litigation over prison conditions is limited by the standard set by the Supreme Court in *Wilson v. Seiter*, 501 US 294 (1991), which requires that inmates prove deliberate indifference on the part of prison officials in order to succeed in an Eighth Amendment claim. Consequently, such claims are rarely successful.

¹⁷ See Immanuel Kant, *The Philosophy of Law*, translated by W. Hastie (1887); M.S. Moore, 'The Moral Worth of Retribution' in F. Schoeman (ed.), *Responsibility, Character and the Emotions: New Essays in Moral Psychology* (Cambridge: Cambridge University Press, 1987) (though noting that retributivists need not adhere to the principle of *lex talionis*). See also M.S. Moore, *Placing Blame: A General Theory of Criminal Law* (Oxford: Clarendon Press, 1998).

demands of the law.¹⁸ Although conditions might be restricted by basic standards of non-brutality as evidenced by human rights law standards, they must retain their unpleasant character for the institution to fulfill its basic consequentialist goal of deterrence.¹⁹

Second, there is a wide disparity in the length of prison sentences between the United States and Europe.²⁰ In addition to the Federal Sentencing Guidelines which establish guidelines – once mandatory, now advisory²¹ – for federal crimes, each state has its own sentencing practices. What unites all of them, however, is the assumption that violent crimes – rape, murder, etc. – deserve lengthy prison terms, including life in prison for the worst offenders. By contrast, most European jurisdictions hand down prison sentences that are comparatively shorter.²² To name just one example, a Spanish court handed down sentences for 21 out of 28 suspects charged in the Madrid train bombings.²³ Many of the prison sentences were between 10 and 15 years – sentences that would shock many US observers as being absurdly low considering the severity of the crime in question (a terrorist attack that killed 191 individuals).²⁴ Indeed, some European jurisdictions have even abolished, by statute, life sentences.²⁵

¹⁸ Although criminal law theory is usually not couched in such economic terms, some theorists are pushing it in this direction. See G. Becker, 'Crime and Punishment: An Economic Approach', (1968) 76 *Journal of Political Economy* 169. For more recent expressions, see N. Kumar Katyal, 'Conspiracy Theory', (2003) 112 *Yale Law Journal* 1307, 1315; R.A. Posner, 'An Economic Theory of the Criminal Law', (1985) 85 *Columbia Law Review* 1193 (deriving basic criminal prohibitions from the concept of efficiency); M. Osiel, 'The Banality of Good: Aligning Incentives Against Mass Atrocity', (2005) 105 *Columbia Law Review* 1751 (discussing 'whether an economic vantage point and cast of mind might shed some light on improving the law's response to such horrific events'). Although I do not share Osiel's inclination to view and analyse atrocity through the lens of economic incentives, Osiel's contribution is nonetheless significant because he recognises the need for a unique theory of punishment for international crimes, and correctly notes that criminologists have ignored this question. See *ibid.*, at 1755.

¹⁹ See Posner, 'An Economic Theory of the Criminal Law', *supra* note 18, at 1208 (noting that imprisonment is important as a tool for criminals 'who cannot be made miserable enough by having their liquid wealth, or even their future wealth, confiscated').

²⁰ See Whitman, *Harsh Justice*, *supra* note 4, at 56; see also T. Weigend, 'Sentencing in West Germany', in M. Tonry and F.E. Zimring (eds.), *Reform and Punishment: Essays on Criminal Sentencing* (Chicago and London: University of Chicago Press, 1983) 23 ('Sentencing inequality in the United States can mean the difference between twenty years in prison and three years... Critics of arbitrary sentencing in Germany, by contrast, compare fifty-day fines... with thirty-day fines').

²¹ See *United States v. Booker*, 125 S. Ct. 738, 756 (2005).

²² See T. Weigend, 'Sentencing in West Germany', *supra* note 20, at 23 ('The high incident of dangerous crime may thus lead to a siege mentality on the part of American legislatures and judges which is absent from German legal thinking and practice').

²³ On 18 July 2008, a Spanish court reversed convictions for four of the defendants.

²⁴ The self-proclaimed mastermind of the plot, Rabei Osman Sayed Ahmed, was convicted in Italy and sentenced to 10 years in prison. He faced terrorism charges in Spain and was acquitted.

²⁵ For example, the maximum penalty in Norway is 21 years and the maximum penalty in Spain is 40 years.

Third, European and American prisons differ with regard to the treatment that inmates receive while in prison. As already stated above, American prisons allow access to vocational and educational programs, but not nearly to the same degree as most Western European countries.²⁶ More importantly, however, European prisons are more committed to recognising the dignity of prisoners by treating them with respect.²⁷ American prisoners are constantly subjected to humiliating and degraded experiences, whether by prison guards or other inmates.²⁸ Such degradations also motivate public shaming rituals and punishments, designed to degrade the criminal by publicising both his crime and his punishment.²⁹ Sexual offenders who are released from prison have their names and pictures published in newspapers or posted on telephone poles.³⁰

Finally, to state the obvious, Americans and Europeans have widely differing attitudes about the death penalty. While many jurisdictions in the United States retain the death penalty, every member of the European Union has abolished it.³¹ At first, the abolitionist movement in Europe excluded extreme cases in wartime or emergencies, but now the abolition is total, even in cases dealing with mass murder and terrorism.³² Also,

²⁶ These are generalities. For example, Whitman notes that prison conditions in France are, in some cases, deplorable. See Whitman, *Harsh Justice*, *supra* note 4, at 76.

²⁷ In Europe, the dignity of prisoners is considered to be a requirement of international law imposed by the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. However, no analogous legal dialogue exists in the United States, in part because the US ratification of the convention came with an express reservation that its treaty commitment with regard to criminal punishment would not extend beyond the limits imposed by the Eighth Amendment. The issue and its relevance is discussed in Whitman, *Harsh Justice*, *supra* note 4, at 60.

²⁸ See Whitman, *Harsh Justice*, *supra* note 4, at 60 ('Prison conditions are thus in some ways not as bad in the United States as one might think. Nevertheless, they certainly *are* bad, especially by contrast with Germany.'). Certainly such conditions also exist in European prisons, and homosexual rape is also a problem in both France and Germany. As a comparative proposition, though, it is still true that prison conditions in the United States are worse than in Europe, and there is less public pressure in the United States than in western European countries to improve them. This point is especially important for international criminal justice, since no defendants convicted at the ICTY or ICTR are currently serving their sentences in the United States, while many are serving sentences in European prisons.

²⁹ Shaming penalties are gaining in popularity in the United States, especially in the area of sex crimes. Also notable is their use for non-violent offences, such as failure to pay child support.

³⁰ M. Woolhouse, 'Can bans protect kids from attack?', *The Boston Globe*, 16 July 2006 (describing campaign by local residents to force convicted sex offender out of neighbourhood by, *inter alia*, posting his picture on telephone poles).

³¹ For a comprehensive survey, see the leading book on the subject by W.A. Schabas, *The Abolition of the Death Penalty in International Law* (3rd ed., Cambridge: Cambridge University Press, 2002).

³² The death penalty was restricted by the Second Optional Protocol to the International Covenant on Civil and Political Rights Aiming at the Abolition of the Death Penalty, 15 December 1989, 1642 UNTS 414 (hereinafter, Second Optional Protocol), which allows reservations pursuant to Article 2 that explicitly contemplates reservations for use of the death penalty 'in time of war pursuant to a conviction for a most serious crime of a military

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the abolition movement in the United States is largely organised around constitutional arguments that the practice violates either the Due Process Clause³³ or the Cruel and Unusual Punishment Clause,³⁴ while the abolition movement in Europe makes reference to evolving standards of international law.³⁵ However, American courts are usually hostile, with a few notable exceptions, to the idea that evolving standards of human rights as embodied in international law can constrain American judicial sovereignty in any meaningful way.³⁶

This split has had a huge effect on international criminal justice, though the split has gone unnoticed by most scholars working in the field.³⁷ First, international criminal justice is dominated by Europeans, both at the institutional level and at the individual level.³⁸ The major institutions are Hague-centric or placed in other corners of the world. Indeed, even the upcoming trial of Charles Taylor at the Special Court for Sierra Leone will be convened in The Hague.³⁹ While the ICTR of course is convened

...nature committed during wartime'. However, the Thirteenth Protocol of the European Convention on Human Rights calls for abolition of the death penalty in all circumstances. For an analysis of this evolution, compare J.D. Ohlin, 'Applying the Death Penalty for Crimes of Genocide', (2005) 99 *American Journal of International Law* 747, with W.A. Schabas, 'War Crimes, Crimes Against Humanity and the Death Penalty', (1997) 60 *Albany Law Review* 733.

³³ See, e.g., *United States v. Quinones*, 205 F. Supp. 2d 256 (SDNY 2002) (opinion by Judge Rakoff holding that death penalty violates due process clause), rev'd, 313 F.3d 49 (2d Cir. 2002).

³⁴ See, e.g., *Atkins v. Virginia*, 536 US 304 (2002) (execution of mentally retarded is cruel and unusual punishment under the Eighth Amendment).

³⁵ See particularly the Universal Declaration of Human Rights, the European Convention on Human Rights, and the International Convention on Civil and Political Rights.

³⁶ The notable exception is Justice Kennedy, who wrote in *Roper v. Simmons*, 543 US 551 (2005), that '[o]ur determination that the death penalty is disproportionate punishment for offenders under 18 finds confirmation in the stark reality that the United States is the only country in the world that continues to give official sanction to the juvenile death penalty.' However, even in Justice Kennedy's formulation, the standards imposed by international law were merely illustrative, but not constraining: 'This reality does not become controlling, for the task of interpreting the Eighth Amendment remains our responsibility.' *Ibid.*, at 575.

³⁷ I took great pains to point out the problems with abolition with regard to crimes against genocide, though the issue remains largely unaddressed. See generally Ohlin, 'Applying the Death Penalty for Crimes of Genocide', *supra* note 32.

³⁸ While it is true that some prominent US lawyers have served in significant positions at the ICTY and ICTR, as a comparative matter their contributions have been eclipsed by their European colleagues. Furthermore, the relationship is dialectical, because international criminal law currently occupies a comparatively marginal presence in US legal culture, compared with most European legal cultures that place great weight on the legal status of international criminal law. Indeed, US lawyers in some circles still adhere to the notion that neither public international law nor international criminal law is real 'law'. See, e.g., *International Law: Norms, Actors, Process* (New York: Aspen/Kluwer, 2006) 983 and *passim* (standard US casebook discussing 'ontological' question of whether international law is real law). Such a view would not be seriously entertained on the law faculty of a leading law school in, say, the Netherlands.

³⁹ Several scholars have discussed the inherent limitations by taking justice out of the hands of local officials and placing it within the discretion of the international community. See J.E. Alvarez, 'Crimes of States/Crimes of Hate: Lessons from Rwanda', (1999) 24 *Yale Journal of International Law* 365, at 408. That being said, the Charles Taylor trial in The Hague

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in Tanzania, the point is simply that the institutions are not based in the United States.⁴⁰ At the individual level, the vast majority of lawyers at the *ad hoc* and permanent tribunals are non-American, a surprising reality when one remembers that many of the key legal figures at Nuremberg – the beginning of ICL – were Americans.⁴¹ Furthermore, the number of European scholars working in ICL far outnumbers the relatively few Americans who are working in the field.⁴² Of course, one might note that the institutions and individuals are all European because the United States has recently declined to participate in the project of international criminal justice in a meaningful way.⁴³ In addition to the usual concerns about sovereignty that influenced US policy regarding the ICC, an international tribunal was not even considered by the United States or Iraq for Saddam Hussein, nor did the US even consider international trials for captured al Qaeda terrorists.⁴⁴

...was necessitated by the fact that there was no adequate domestic judicial system in place to conduct such a trial of political importance, and a trial in the region would have risked regional disorder. See UN Security Council Resolution 1688 ('the continued presence of former President Taylor in the subregion is an impediment to stability and a threat to the peace of Liberia and of Sierra Leone and to international peace and security in the region'). In many instances, what is lost by removing the judicial process from the community where the atrocities occurred is more than outweighed by the gains from conducting a trial in a non-biased and legally sophisticated forum. Nonetheless, scholars need to be more attentive to the fact that these transfers to international jurisdiction frequently involve the imposition of new sentencing criteria that are widely out of step with local standards.

⁴⁰ Although this fact may change some day in the future, the lack of an international tribunal in the United States is symptomatic of the continuing American scepticism with participation in international legal institutions. See S.B. Sewall and C. Kaysen (eds.), *The United States and the International Criminal Court: National Security and International Law* (Lanham, MD: Rowman & Littlefield, 2000).

⁴¹ Any list would have to include Robert Jackson (IMT prosecutor), Telford Taylor (prosecutor at the US Military Tribunals sitting at Nuremberg), Francis Biddle (IMT judge), and Murray Bernays (military judge responsible for conspiracy and criminal organisation strategies). For a discussion of the relevant personalities, see T. Taylor, *The Anatomy of the Nuremberg Trials: A Personal Memoir* (New York, Knopf, 1992). Jurists from France and the Soviet Union also made significant contributions, though the legal structure of the proceedings (including criminalising aggression) can be directly traced to Americans, such as Bernays and Henry Stimson, in the War Department. See P. Maguire, *Law and War: An American Story* (New York: Columbia University Press, 2001) 94-5.

⁴² The major journals in the field are all based in Europe, including the *Journal of International Criminal Justice* (edited in Florence, published in Oxford) and the *International Criminal Law Review* (Leiden). No specialised ICL journals currently exist in the United States. Most importantly, the number of US scholars working in international criminal law (as opposed to human rights law), given the large size of today's US legal academia, is very small when compared with law faculties in, for example, the Netherlands. This may change in the future.

⁴³ After initially signing the Rome Statute under the Clinton administration, the United States not only declined to ratify the treaty, but also 'unsigned' the treaty in the opening days of the Bush Administration. See N. Green, 'Stonewalling Justice,' (2004) 26 *Harvard International Review* 34.

⁴⁴ For a discussion of this issue, see Ohlin, 'Applying the Death Penalty for Crimes of Genocide', *supra* note 32, at 749.

I wish to argue here that the current situation is disastrous for two reasons. First, judges at the *ad hoc* tribunals engage in sentencing decisions with little regard to a coherent vision underlying the incarceration of international criminals, leading in turn to inconsistent sentences.⁴⁵ Furthermore, this lack of a coherent vision, one that is truly transnational and transregional, has led to a failure to adopt robust criminal procedures for dealing with international criminal sentences. Finally, and most importantly, the current situation has led to the over-influence of domestic standards of sentencing at the international tribunals, especially at the ICTY, resulting in sentences that may fail to reflect the moral and legal gravity of the offences involved.⁴⁶ This argument will be defended in the following sections of this chapter by arguing that many of the central rationales that justify sentences at the domestic level— primarily consequentialist— do not apply with equal force at the international level. International criminal law therefore requires a *sui generis* sentencing rationale. If one accepts this argument, the problem must be regarded as essential for achieving ICL's stated goal of ending impunity.⁴⁷ The solution will be presented in the final section of this chapter: comprehensive *procedural* reform of international criminal sentencing. By reforming post-trial sentencing procedures through the creation of a sentencing commission, detailed but optional guidelines, and a distinct sentencing phase, judges will be encouraged to develop this under-theorised area of ICL into a coherent body of law.

III. STANDARD VIEWS OF PUNISHMENT FAIL IN INTERNATIONAL CRIMINAL JUSTICE

Having established that international criminal justice lacks a *sui generis* sentencing regime and instead relies on importation of domestic sentencing theories only partially relevant for international crimes, we must now explore the central thesis of this chapter: that these institutions are inappropriate for a system of international criminal justice.

Before proceeding, it should be absolutely clear that this paper does not seek to dislodge the privileged place that progressive sentencing theories have within some European domestic criminal law systems. I am willing at the moment to concede, for the sake of argument, that European models of

⁴⁵ See Osiel, 'The Banality of Good: Aligning Incentives Against Mass Atrocity', *supra* note 18, at 1821; Sloane, 'Sentencing for the "Crime of Crimes"', *supra* note 6, at 716; Harmon and Gaynor, 'Ordinary Sentences for Extraordinary Crimes', *supra* note 2, at 683.

⁴⁶ See Harmon and Gaynor, 'Ordinary Sentences for Extraordinary Crimes', *supra* note 2, at 683-6. However, Harmon and Gaynor do not explicitly recognise this factor as a source of the problem.

⁴⁷ Impunity is explicitly mentioned in the Rome Statute preamble, in which the State Parties express their determination 'to put an end to impunity for the perpetrators of these crimes'. Although a treaty preamble is not meant to create a legal duty or responsibility, it is nonetheless emblematic of the international attitude that functions as a foundation for international criminal justice. As far as I am aware, no scholar has explicitly connected the failure to create an adequate sentencing regime with the notion of impunity.

rehabilitation, reeducation and dignified treatment of prisoners are more appropriate than competing models, at least within the context of domestic criminal law. The argument here is confined to the specific circumstances of international criminal justice. Essentially, although these institutions and practices work in the domestic context, they are inappropriate for crimes of genocide, crimes against humanity, and war crimes, and it is especially unfortunate that domestic penal practices have been imported without consideration of their suitability to international criminal justice. I would submit that international criminal law would do better to look to the standard institutions of *jus in bello* – the law of war – than domestic criminal law.⁴⁸

Consider first our commitment to reeducation and rehabilitation. In the domestic context, it may make sense to offer services for the prison population that needs to be reintroduced into society. The idea here is to reform the criminal – both his habits and his mindset – and to rid him of criminal tendencies.⁴⁹ Many of these notions have now been enshrined both in penal policy as well as basic human rights standards.⁵⁰ In the international context, however, one must ask whether it makes sense to attempt rehabilitation in cases of genocide and crimes against humanity.⁵¹ For individuals who believe that members of an ethnic group are ‘sub-

⁴⁸ The appropriate judicial precedent for the law of war is the system of military justice that dominates in most Western democracies. Far from being judicially naïve, such military institutions have a reputation for demonstrating remarkable fidelity to basic principles of criminal law and procedural protections, even if punishments are occasionally harsh. For an example, see the US Uniform Code of Military Justice, 10 USC §§ 801 *et seq.* It is important to distinguish between the harsh punishments meted down by courts martial, on the one hand, and the kind of rough battlefield justice advocated by Churchill, who suggested quick battlefield trials for members of the Nazi General Staff, followed by summary execution. The appropriate balance is the one achieved at Nuremberg – severe punishments after rigorous trials conducted according to the rule of law. This sentiment is embodied in the famous phrase from Justice Jackson: ‘That four great nations, flushed with victory and stung with injury stay the hand of vengeance and voluntarily submit their captive enemies to the judgment of the law is one of the most significant tributes that Power has ever paid to Reason.’ For a discussion, see generally G. Robertson, *Crimes Against Humanity: The Struggle for Global Justice* (New York: The New Press, 2003).

⁴⁹ This idea implicates a medical model of punishment, one amply explored in Michel Foucault’s *Discipline and Punish: The Birth of the Prison* (New York: Vintage, 1978).

⁵⁰ The most telling example of applying basic principles of human rights to the penal process is the *Soering* case that held that the so-called death row phenomenon – languishing in prison while awaiting execution as the appeals process winds down – is an inhuman and degrading punishment in violation of the European Convention on Human Rights. See *Judgement, Soering v. UK*, Application no. 14038/88, 7 July 1989, para. 105.

⁵¹ Part of the importation may be explained by the nexus between human rights law and international criminal law. The former concentrates on rehabilitation as an appropriate goal for penal sanctions. See, *e.g.*, Article 10 (3) of the ICCPR: ‘The penitentiary system shall comprise treatment of prisoners the essential aim of which shall be their reformation and social rehabilitation.’ For an example, see *Judgement, Prosecutor v. Hadžihasanović*, Case No. IT-01-47-T, T. Ch., T. Ch. II, ICTY, 15 March 2006, para. 2080 (‘The Chamber also finds that the Accused Hadžihasanović has a character which can be rehabilitated and that he thus merits a reduced sentence’).

human' and ought to be 'destroyed in whole or in part,' through eradication, mass murder and rape, or expulsion from a territory, such mindsets are not susceptible to reform through programs of 'reeducation.'⁵² This problem is exacerbated by the fact that international criminal justice focuses, for the most part, on major organisers of genocide and crimes against humanity, as opposed to street level participants.⁵³ Could Hitler, Himmler or Eichmann have been reformed of their genocidal commitments while in prison to such an extent that they could be rehabilitated and returned to productive use in society?⁵⁴ To the contrary, our experience with genocidal Nazi war criminals suggests that those who serve prison sentences for genocide spend the rest of their lives as apologists for the genocidal regimes they served.⁵⁵

Second, the policy goal of deterrence is equally problematic in cases of international criminal justice.⁵⁶ While criminals in the domestic context

⁵² For examples, one need only consult the trial of Milošević, who appeared utterly unfazed by his time in incarceration and used his trial to further publicise his Weltanschauung. For an innovative description of the trial, see M. Steinitz, 'The Milosevic Trial – Live! An Iconical Analysis of International Law's Claim of Legitimate Authority,' (2005) 3 *JICJ* 103-23 (discussing the symbolism of the interpersonal dynamics of the trial).

⁵³ This argument is not based on the idea that all such criminals are inherently similar. Rather, the argument is based on the inherent similarity of genocide and the other core international crimes, as compared with domestic crimes. It must be conceded that lower-level defendants who engage in war crimes because they are simply following orders or fear for their lives, e.g. Erdemović, may be legitimately reeducated and reintroduced to society. See also C.R. Browning, *Ordinary Men: Reserve Police Battalion 101 and the Final Solution in Poland* (New York: Harper, 1992). But it is unclear if the same holds true for organisers of a joint criminal enterprise to commit genocide, whose criminal actions are not motivated by a desire to follow military orders but rather a desire to achieve a genocidal outcome based on the belief, as a matter of science, that another ethnic group is inherently sub-human. Such attitudes are usually so closely held that they are not subject to revision. Cf. E. Staub, *The Roots of Evil: The Origins of Genocide and Other Group Violence* (New York: Cambridge University Press, 1992) 76 (discussing the fanatic as perpetrator).

⁵⁴ See M. Drumbl, 'Collective Violence and Individual Punishment: The Criminality of Mass Atrocity,' (2005) 99 *Northwestern University Law Review* 539, at 590 (deterrence based on unproven assumption of perpetrator rationality in the chaos of massive violence). Drumbl correctly argues that domestic criminal law theories regarding sentencing are irrelevant for international criminal law.

⁵⁵ Indeed, Hitler's time in prison after the Beer Hall Putsch did not deter him from engaging in future acts of violence and historical evidence suggests that it had the reverse effect: it radicalised him, inspired him to write *Mein Kampf*, and laid the seeds for his eventual rise to power. However, not every case study is as black and white as this. Some might wish to point to the story of Erdemović, who demonstrated apparently sincere remorse after his appearance before the ICTY on charges of crimes against humanity for shooting civilians in a massacre. It is important to note, however, that Erdemović's remorse began before his trial – he committed the killings only after his life and that of his family was threatened by his commanding officer – and that his remorse was not generated by his time in prison and was already in evidence before his trial was even concluded and certainly before his sentence began. For a discussion of the *Erdemović* case, see A. Fichtelberg, 'Liberal Values in International Criminal Law: A Critique of *Erdemović*,' (2008) 6 *JICJ* 3-19.

⁵⁶ Ralph Henham asserts that current international criminal sentencing practice is built primarily around retributivism. See his 'Developing Contextualized Rationales for Sentencing in International Criminal Trials: A Plea for Empirical Research,' (2007) 5 *JICJ* 757-78, at

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may or may not be motivated by fear of punishment – the empirical point is still hotly debated⁵⁷ – war criminals are even less susceptible to the usual inducements.⁵⁸ Those who kill and rape civilians are motivated by a variety of factors – genocidal hatred, war-induced rage, etc. – and

...757. However, it is unclear what the basis is for this sweeping assumption. Although Henham cites *Aleksovski*, the Appeals Chamber in that case responded to a Prosecutor's office submission arguing that the central aim of international sentencing was to deter future crimes. Instead of rejecting this assertion, the ICTY Appeals Chamber simply indicated that retribution was an 'equally important factor' and cited the need to make 'plain the condemnation of the international community of the behavior in question'. See Judgement, *Prosecutor v. Aleksovski*, Case No. IT-95-14/1-A, A. Ch., ICTY, 24 March 2000, para. 185 (increasing Trial Chamber sentence of two and a half years to seven years minus time already served). However, the subsequent sentences of the ICTY Appeal Chamber, see *supra* note 2 and related text, call into question whether these sentences are anything more than empty rhetoric. Furthermore, other trial chambers have specifically rejected retributivism as a basis for international sentencing. See Judgement, *Prosecutor v. Blaškić*, Case No. IT-95-14, T. Ch. I, ICTY, 3 March 2000, para. 761, where the Trial Chamber specifically prioritised deterrence as the leading basis for sentencing. This line of reasoning also follows Judgement, *Prosecutor v. Delalić et al.*, Case No. IT-96-21, T. Ch. II, ICTY, 16 November 1998, para. 1234, noting that deterrence is 'probably the most important factor in the assessment of appropriate sentences for violations of international humanitarian law.' The Chamber even argued that 'the accused should be sufficiently deterred by appropriate sentence from ever contemplating taking part in such crimes again, persons in similar situations in the future should similarly be deterred from resorting to such crimes.' It seems implausible to think that future war criminals will be deterred by sentences from an international court, given the nature of these conflicts and the fact that war criminals are usually motivated by extreme versions of genocidal hatred, racial animus, or war-like aggression. Furthermore, the Trial Chamber in *Čelebići* rejected retributivism in the strongest possible language, noting that '[t]he theory of retribution, which is an inheritance of the primitive theory of revenge, urges the Trial Chamber to retaliate to appease the victim' and concluding that '[r]etributive punishment by itself does not bring justice.' See *ibid.*, at para. 1231. The Trial Chamber argued that retributivism by itself was inconsistent with the reconciliatory aspirations of the Security Council to restore peace and security in the region, and then spoke positively about protection of society, rehabilitation, and deterrence. Other trial chambers have treated retributivism as just one among many competing rationales. See Sentencing Judgement, *Prosecutor v. Tadić*, Case No. IT-94-1-T, T. Ch., ICTY, 14 July 1997, para. 61 ('Further, while the purpose of criminal law sanctions include such aims as just punishment, deterrence, incapacitation of the dangerous and rehabilitation, the Trial Chamber accepts that the "modern philosophy of penology [is] that the punishment should fit the offender and not merely the crime."'); Judgement, *Prosecutor v. Delalić et al.*, Case No. IT-96-21, A. Ch., ICTY, 20 February 2001, para. 806 (concluding that deterrent and retributive goals should be more important than rehabilitation and specifically rejecting Article 10 (3) ICCPR and Article 5 (6) of the American Convention on Human Rights.). For a discussion, see also W.A. Schabas, 'Penalties,' in A. Cassese *et al.* (eds.), *The Rome Statute of the International Criminal Court: A Commentary* (Oxford: Oxford University Press, 2002) 1517-18 (noting also that the Appeals Chamber attached some weight to retributive concerns in *Aleksovski* and *Čelebići*).

⁵⁷ The issue is most often researched within the context of the death penalty. See Sunstein and Vermeule, 'Is Capital Punishment Morally Required?', *supra* note 12, at 711; Donohue and Wolfers, 'Is Capital Punishment Morally Required?', *supra* note 12, at 794; Radelet and Akers, 'Deterrence and the Death Penalty', *supra* note 12, at 10. For a discussion of the issue within criminal law generally, see P.H. Robinson and J.M. Darley, 'The Role of Deterrence in the Formulation of Criminal Law Rules: At Its Worst When Doing Its Best', (2003) 91 *Georgetown Law Journal* 949, at 953.

⁵⁸ The problems associated with deterrence are explored by David Wippman in his article 'Atrocities, Deterrence, and the Limits of International Justice', (1999) 23 *Fordham International Law Journal* 473.

most of these are not the types of motivations that can be altered by the knowledge that, possibly, just possibly, one might face criminal liability at an *ad hoc* or permanent international tribunal.⁵⁹ Indeed, war criminals are uniquely willing to engage in their conduct regardless of the personal cost, because, as combatants, they face death every day.⁶⁰ Against the backdrop of a violent death in a military conflict, the possibility of a prison term is nothing significant.⁶¹ (Those who occupy command positions in either the military or civilian leadership – who are removed from daily military danger – are often fuelled by feelings of megalomania and again are sometimes insensitive to rational inducements.) Also, prisoners convicted at the ICTY are often housed in prisons in countries such as Norway and Sweden, where prison conditions are excellent, including televisions and access to places of religious worship for engaging in quiet reflection.⁶² If anything, such conditions would be a welcome change from military service – not something to be feared.

As a final point, consider also an expressivist theory of punishment.⁶³ It is possible that international criminal punishment might be legitimately justified on these grounds.⁶⁴ Perhaps the whole point of such sentences is to express society's condemnation of such horrendous activity. In this

⁵⁹ Indeed, even though Erdemović and those in analogous situations (e.g. duress) were not motivated by genocidal hatred, they too would not be affected by indirect or direct deterrence, since the duress applied against them functioned to outweigh all other competing factors.

⁶⁰ Granted, not all war criminals are members of the military or paramilitary. Some defendants are politicians (e.g. Stakić, Milošević, Karadžić, etc.), while others are members of the private sector (Nahimana, Barayagwiza and Ngeze were media executives). Even within this civilian group, though, many (such as Stakić) are personally engaged in the military campaign in some fashion. See, e.g. Judgement, *Prosecutor v. Stakić*, Case No. IT-97-24-T, T. Ch. II, ICTY, 31 July 2003, para. 368 (noting that cooperation with military authorities was so close that Stakić eventually wore a military uniform and carried a weapon, even though he was a civilian politician).

⁶¹ Payam Akhavan argues that a deterrence model for international criminal justice can work by instilling respect for the rule of law, though it is unclear how this happens given that genocidal criminals act outside the boundaries of civilised conduct. See his 'Justice in the Hague, Peace in the Former Yugoslavia?', (1999) 20 *Human Rights Quarterly* 737, at 744. Noted jurist Theodor Meron also apparently believes that war criminals can be deterred through expansion of war crimes prosecutions. See T. Meron, 'From Nuremberg to the Hague,' (1995) 149 *Military Law Review* 107.

⁶² Defendants convicted at the ICTR – apart from those that still remain in the UN Detention Facility in Arusha (Tanzania) – are currently housed in prisons in Mali and Italy which replicate the standard prison conditions for domestic crimes in these countries. Benin, Swaziland, France, Sweden and, more recently, Rwanda, have also signed a cooperation agreement with the ICTR to house convicted defendants, but have not yet received any.

⁶³ On the relationship between retributivism and expressivism, see H.L.A. Hart, *Punishment and Responsibility* (New York and Toronto: Oxford University Press, 1968) 234-35. See also J. Feinberg, 'The Expressive Function of Punishment,' in J. Feinberg, *Doing and Deserving: Essays in the Theory of Responsibility* (Princeton: Princeton University Press, 1970). Cf. A. von Hirsch, *Censure and Sanctions* (Oxford: Clarendon Press, 1993) 9.

⁶⁴ See Drumbl, 'Collective Violence and Individual Punishment', *supra* note 54, at 592 (noting that international criminal law expresses the primary of international law itself).

case, 'society' is the international community.⁶⁵ However, if this is the case, then clearly we want to express that genocide and crimes against humanity are far greater crimes than single cases of murder. They are moral catastrophes deserving of the highest condemnation we can muster. If that is the underlying background of the sentencing philosophy of international criminal justice,⁶⁶ the sentencing schemes should be much higher than those available in the domestic context.⁶⁷ Unfortunately, however, cases of complicity in crimes against humanity, genocide, and war crimes, have often yielded sentences (at least at the ICTY) that may not adequately express the world community's outrage over the moral indignities that the victims suffered.⁶⁸

This is especially problematic given that the central stated goal of international criminal justice, as expressed in the Rome Statute, is to end impunity for international crimes. However, when someone is complicit in genocidal acts, of conspiring to murder or participating in the murder of thousands of individuals, and then spends only 10 or 20 years in a comfortable prison watching cable television and engaging in pleasant recreational activities, then we must ask ourselves some serious questions about whether, in some sense, genocidal criminals are getting away with murder.⁶⁹ This is precisely the danger when sentences are too short and served in comfortable surroundings.

Given that none of these models are appropriate for international criminal justice, it is striking that producing a general theory of international sentencing is not higher on the agenda for international judges and scholars.⁷⁰ The only remaining model – retributivism – is the least popular,

⁶⁵ This may be especially important in cases of genocide, where the international law trial both establishes a historical record and also expresses the international community's judgement that the facts constitute genocide. See *ibid.*, at 593. See also Sentencing Judgement, *Prosecutor v. Sikirica*, Case No. IT-95-8-S, T. Ch., ICTY, 13 November 2001, para. 149 (discussing the truth-finding function as a fundamental objective of international tribunals).

⁶⁶ See R.D. Sloane, 'The Expressive Capacity of International Punishment: The Limits of the National Law Analogy and the Potential of International Criminal Law,' (2007) 43 *Stanford Journal of International Law* 39.

⁶⁷ See, e.g., von Hirsch, *Censure and Sanctions*, *supra* note 63, at 15.

⁶⁸ See Harmon and Gaynor, 'Ordinary Sentences for Extraordinary Crimes', *supra* note 2, at 683-6 (noting inadequacy of ICTY punishments); see also Drumbl, 'Collective Violence and Individual Punishment', *supra* note 54, at 565 (discussing sentences generally for international and national crimes).

⁶⁹ One well-publicised case involves the sentence of Biljana Plavšić, the Bosnian Serb president, who served her prison sentence in a comfortable Swedish prison complete with recreational activities, including horseback riding, a massage room, and saunas. See Sentencing Judgement, *Prosecutor v. Plavšić*, Case No. IT-00-39, T. Ch., ICTY, 27 February 2003 (eleven-year sentence for crimes against humanity). Prosecutors dropped a genocide charge against Plavšić after she agreed to plead guilty to persecution as a crime against humanity. For a discussion of the case and the sentencing controversy, see N.A. Combs, 'International Decisions', (2003) 97 *American Journal of International Law* 929, at 935; P. McLoughlin, 'Serb War Criminal Plavšić Goes to Swedish Jail', *Reuters News Service*, 27 June 2003.

⁷⁰ A few scholars have adequately noted the urgency of the problem, though it is unclear

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both in the United States and in Europe.⁷¹ But as we shall see in the following section, it is retributivism that most closely tracks the policy goal of international criminal justice and the unique factors present in the law of war. Furthermore, as will be demonstrated in the final section, the relative paucity of judicial development in this crucial area stems from the lacuna of procedural mechanics in the (now non-existent) sentencing phase when compared with the judicial development of substantive international criminal law and the rich and detailed procedures of the guilt phase.

IV. THE RETRIBUTIVE MODEL

Retributivism is built around the central premise that the guilty deserve to be punished.⁷² Under this view, the criminal justice system, from the police to the courts to the prisons, is designed to ensure that this policy goal is achieved. The guilty should be punished and the more guilty should be punished even more. There is an *a priori* good created by such punishments that extends beyond any contingent instrumental benefits that the punishments might have. Although some deterrent or other consequentialist effects might ensue, the real justification for the project comes from the inherent moral worth of punishing those who deserve to be punished.⁷³ To do so helps to vindicate the Right over the Wrong (to borrow the Germanic phrase).

In particular, punishments for genocide and crimes against humanity fit this profile. Genocide in particular is the ultimate crime because it involves the destruction not just of one individual but of an entire people.⁷⁴ Those individuals who plan, participate or otherwise organise

...if these scholarly accounts have had any impact on judges. The impact is difficult to measure for two reasons. First, judges frequently offer little substantive argumentation to justify their sentences. Second, judges at the international tribunals rarely cite scholarly materials in their judgements, preferring instead to rely on case law, both from the tribunals themselves and, where necessary, from war crimes tribunals dating back to World War II.

⁷¹ Drumbl argues that retributivism is the main sentencing theory dominating the tribunals at this time, though his reasons for this conclusion are unclear. See Drumbl, 'Collective Violence and Individual Punishment', *supra* note 54, at 560-61. My reading of the sentencing judgements suggests that while Nuremberg was dominated by retributive policies, the current tribunals in their practice, as opposed to their rhetoric, are more motivated by concerns of deterrence and rehabilitation imported from the domestic penal sphere. This is the only way to explain the lower sentences at the ICTY.

⁷² For an expression of the principle, see G.P. Fletcher, *Rethinking Criminal Law* (New York: Oxford University Press, 2000 [1978]) 459-63 (linking retribution, desert, and culpability).

⁷³ See *ibid.*, at 462 (maximum level of punishment is set by the degree of wrongdoing).

⁷⁴ Although academic debates continue about the appropriate list of protected groups under the Genocide Convention, the originator of the concept, Raphael Lemkin, envisioned genocide as the eradication of a human *genos*, a national group. See R. Lemkin, *Axis Rule in Occupied Europe: Laws of Occupation, Analysis of Government and Proposals for Redress* (Washington, DC: Carnegie Endowment for International Peace, 1944). The moral gravity of the crime stems not from the murder of a large number of individuals (covered by war crimes and crimes against humanity), but the distinct harm of cultural eradication, thus suggesting that

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genocidal campaigns are singled out in our justice system for particular disapprobation. Such individuals deserve to be severely punished for their outrageous conduct, because to do otherwise would be to allow them to escape responsibility for their crimes, resulting in impunity – the chief enemy of international criminal justice. In the case of genocide, it may not matter that neither rehabilitation nor deterrence apply as rationales for its punishment. Indeed, if there is any area of the law where retributive sentiments are justified, it is in the context of genocide and crimes against humanity, where the damage to the moral fabric of society is so severe that the international justice system goes to extreme lengths – harnessing the powers of the Security Council under Chapter VII of the UN Charter – to see that the guilty are punished.⁷⁵ Such a hijacking of the international system is warranted not just by instrumental values (seeing that particular individuals are rehabilitated), but also by *a priori* goals, including the punishment of the guilty just because those who are guilty of genocide deserve to be punished.

There is always a difficulty in explaining retributive sentiments to those who do not share them.⁷⁶ Indeed, criminal law theorists working within the retributive paradigm often have little to say to defend their worldview. Such conversations invariably return to the foundational statement that the guilty deserve their punishment, and that escaping one's just deserts is a moral wrong. Although such statements are posited, there is little that can be offered in the way of justifying this worldview to a consequentialist more concerned with deterrence or rehabilitation. Nonetheless, it is important not to place the burden of such a defence squarely on the shoulders of the retributivist. The burden must also fall on the consequentialist to explain why punishing the guilty is important in cases of genocide and crimes against humanity when the usual consequentialist goals – deterrence and rehabilitation – are at best difficult to implement and at worst irrelevant. Why then punish the *genocidaires* at all?

One might object that this entire discussion is not an appropriate subject matter for international criminal lawyers, who are accustomed to dealing with legal doctrine, not abstract moral philosophy underlying the institution

...those who carry out these crimes deserve special punishment. For a discussion of *genos* as opposed to *ethnos* as the root of the concept, see W.A. Schabas, *Genocide in International Law: The Crime of Crimes* (Cambridge: Cambridge University Press, 2000) 25.

⁷⁵ For an analysis of this phenomenon, see G.P. Fletcher and J.D. Ohlin, 'The ICC – Two Courts in One,' (2006) 4 *JICJ* 428.

⁷⁶ Cf. W.A. Schabas, 'Sentencing by International Tribunals: A Human Rights Approach,' (1997) 7 *Duke Journal of Comparative & International Law* 461, at 502 ('At best, the retributive sentiments of victims and their families, and of the public in general, must be taken into account in developing appropriate policies to deal with punishment for gross human rights abuses. But their encouragement may have unwanted and unhappy side effects, particularly where society is concerned with rebuilding and reconciliation. It should not be forgotten that many of the most appalling crimes in both the former Yugoslavia and Rwanda were committed in the name of retribution for past grievances.').

of punishment. This may be true, certainly now that international criminal justice has flourished into an autonomous legal field, complete with legal rules that have their own status independent of the preexisting moral codes from which they initially derived both their inspiration and legitimacy. Now such international legal rules have their own status, with an institutional background, complete with professional lawyers trained in their interpretation and manipulation through skilled advocacy. This objection may be true, and if it is, it indicates an appropriate role for scholars of international criminal justice, schooled in the philosophical foundations of international criminal justice, in much the same way that domestic criminal law is dominated not just by practitioners and scholars but also by philosophers of criminal law dedicated to solving such foundational puzzles.

This is by far the most important conceptual puzzle for international criminal justice. Given that the usual consequentialist rationales for punishment do not apply with enough force in cases of genocide and crimes against humanity, the choice is either to recognise the uniquely retributive goal of these prosecutions or to simply let the criminals go free. The latter, of course, is not an option. Within this retributive framework, however, more work remains to be done. International criminal law must establish a coherent theory of punishment applicable to its context. I will offer in the remaining pages of this section a brief outline of what such a theory would look like, though a complete defence cannot be offered here. The details of the account must be left as a future research project to be given top priority.

When properly understood, punishment in international criminal law is at once retributivist and consequentialist, but at two different levels. In addition to the basic fact that the guilty deserve to be punished, the victims of various conflicts – say the Kurds in Iraq, the Kosovars in Yugoslavia, the Tutsi in Rwanda – may *feel* that the guilty deserve to be punished. I am making a distinction here between the actual retributive foundations for international criminal justice on the one hand, and the retributive beliefs that victim groups may hold. Such groups are usually not concerned either with deterrence or with rehabilitation. Their sole concern is to achieve justice for the wrongs that were committed against their children, their parents, or their spouses. In this sense the victims are frequently motivated by retributivist sentiments.⁷⁷

However, if the victims feel as if the perpetrators will not get the punishment that they deserve – because they will not be caught, because there are no

⁷⁷ Some victims may be influenced by deterrence in the sense that they yearn for a politically stable security situation and an end to bloodshed. To the extent that they believe that a tribunal might positively influence such an outcome, they may be inclined to view a tribunal's work through that lens. Although no empirical data is available, I submit that this is the minority view among victims.

tribunals within which to try them, or because the sentences will be too low⁷⁸ – then the victims may decide to engage in self-help measures and take matters into their own hands. This is where the consequentialist rationale for international criminal punishment does come into play, but it is entirely different from the usual goals as typically understood in domestic criminal law. In this sense, the point of international criminal tribunals is, in many cases, to convince victims to put down their arms and forgo reprisal attacks, and to submit their grievances to the rule of law. This dynamic is central to international criminal justice, especially since both the creation of the ICTY and the ICTR, as well as binding ICC referrals from the Security Council, are based on the Security Council's Chapter VII authority to take measures to restore international peace and security. In this manner, then, criminal law intersects with international law, insofar as the criminal justice system for individuals is used as a way to help promote international peace and collective security.⁷⁹

However, even with this context of international peace and security, it is critically important to remember that at the level of the victims, the justification is retributive. International peace and security can only be achieved if the victims believe that the inherent retributive goals of the criminal process are being fulfilled. If they lose confidence in the system, the process collapses and the ultimate goals of international security are threatened as well, because the warring factions will continue to fight. This is especially true in cases where a victim group does not have the ability to respond with military force at the moment of its slaughter, but may postpone reprisals for years – decades even – until their military or political strength is greater. It is in this way that past wrongs fester until they infect future generations as well.⁸⁰

It is somewhat ironic, then, that international law must recognise the basic, foundational elements of retributivism in the criminal process, if the non-retributive goals of public international law are to be achieved. If the retributive goals are ignored, victims lose confidence in the system, the guilty are not adequately punished, the moral fabric to the international community is not repaired, ethnic conflict reignites, and the twin goals of collective peace and security, as codified in the UN Charter, are not respected. This is what I meant when I argued initially that international criminal law must develop a unique theory of punishment.

One might object that this account places too much emphasis on the demands of the victims. Victims might demand all sorts of remedial

⁷⁸ See Combs, 'International Decisions', *supra* note 69, at 936 (victims reacted with 'predictable outrage' to Plavšić sentence).

⁷⁹ For a full description of this theory, see J.D. Ohlin, 'On the Very Idea of Transitional Justice', (2007) 8 *Whitehead Journal of Diplomacy and International Relations* 51.

⁸⁰ See Combs, 'International Decisions', *supra* note 69, at 937 (noting the possibility of bitterness generated by international criminal trials).

measures in response to their suffering, some of which may be warranted, but others which may not be warranted. In any event, whether such responses are warranted must be established independently, as it were, in the sense that it is not *because* the victims have demanded it that we institute such measures. Otherwise the argument would prove too much, because anything the victims demand would have to become policy.

This objection misunderstands the structure of the unique theory. At the most foundational level, the warrant for punishing international crimes is retributivist – the perpetrators deserve to be punished. Switching our gaze to the collective level – the world of nation-states, international law, and peace and security – helps us to understand the consequences of not recognising the true and ineluctable retributive nature of the criminal process. At the level of international law, the endeavour of international criminal justice is justified by consequentialist commitments. But at the level of criminal law, the practice of punishment is justified by retributivist commitments. Like a Rorschach test, one can look at different levels when one considers international criminal justice and see different things. When one evaluates the practice of institutions, one considers the fate of collectives and the consequentialist goals of peace and security take centre focus, but when one evaluates the sentences of particular individuals, then one focuses more tightly on retributive concerns: the offender, his crime, and the moral gravity of the offence. It should be no surprise that international criminal law involves a combination of both, depending on which level one examines, since the field itself involves the intersection of international law and criminal law norms. International criminal justice is the intersection of these two fields, and its sentencing philosophy ought to account for this.

V. PROCEDURAL CHANGES

Having identified the contours of a unique theory of international criminal sentencing – retributive at the individual level, consequentialist at the level of international law – it now remains to chart the procedural changes required to bring this vision to fruition. Although there may be more, there are at least three considerations: (1) the return of a distinct sentencing phase after trial; (2) the creation of a sentencing commission to guide judges in exercising their discretion; and (3) the drafting of international sentencing guidelines by the commission. These procedural changes will promote the institutional development of a *sui generis* system of international sentencing.

1. Require a distinct sentencing phase

The most important procedural change required is the establishment of a distinct sentencing phase during the trial process. The ICTY flirted

with a separate sentencing phase in its infancy,⁸¹ though it abandoned the procedure for less than fully articulated reasons.⁸² For example, Tadić and Erdemović were both sentenced in distinct sentencing phases. However, the ICTY changed this procedure in 1998 with the amendment of Rules 85 and 87⁸³ in an effort to increase efficiency. Scholars have generally assumed that the rationale was motivated by a desire to decrease the overall length of proceedings and avoid reduplication of evidence and testimony.⁸⁴ However, it is uncertain if the elimination of the sentencing phase has been successful against this barometer. For example, character witnesses and other evidence only relevant to sentencing must now be presented during the consolidated trial phase, thus prolonging the time required to return a verdict on guilt.⁸⁵ This suggests that the preferred procedure, even on efficiency grounds, is bifurcation.⁸⁶

Scholars have generally noted that the ICC will return to the practice of a separate sentencing phase.⁸⁷ This decision was required, in part, by the growing complexity of sentencing under the Rome Statute, which allows for victim participation under Rules 89 and 91 and consideration of reparations under Rule 94. Furthermore, the factors that determine sentencing under Rule 145, including mitigating and aggravating circumstances, are substantial, and arguably cannot be efficiently evaluated within the same

⁸¹ See ICTY Bulletin No. 12, *The Penalties at the ICTY: Determination and Enforcement* ('Unlike the Nuremberg trials, where sentences were handed down concurrently with the verdicts, the RPE envisage sentencing as a distinct phase. This is particularly indicated by Rule 100'). Rule 100 (which remains in effect) allows the Prosecutor and Defence, after conviction on a guilty plea, to submit information to the court relevant to sentencing.

⁸² See Sloane, 'Sentencing for the "Crime of Crimes"', *supra* note 6, at 734; W.A. Logan, 'Confronting Evil: Victims' Rights in an Age of Terror', (2008) 96 *Georgetown Law Journal* 721, at 773; S.D. Murphy, 'Progress and Jurisprudence of the International Criminal Tribunal for the Former Yugoslavia', (1999) 93 *American Journal of International Law* 57, at 92 (discussing ICTY decision to eliminate sentencing phases).

⁸³ See Murphy, 'Progress and Jurisprudence of the International Criminal Tribunal for the Former Yugoslavia', *supra* note 82, at 92. Rule 85 (A) (vi) states that evidence at trial shall include 'any relevant information that may assist the Trial Chamber in determining an appropriate sentence if the accused is found guilty on one or more of the charges in the indictment.' Rule 87 (C) states that 'If the Trial Chamber finds the accused guilty on one or more charges contained in the indictment, it shall impose a sentence in respect of each finding of guilt and indicate whether such sentences shall be served consecutively or concurrently, unless it decides to exercise its power to impose a single sentence reflecting the totality of the criminal conduct of the accused.'

⁸⁴ See A.N. Keller, 'Punishment for Violations of International Criminal Law: An Analysis of Sentencing at the ICTY and ICTR', (2001) 12 *Indiana International & Comparative Law Review* 53, at 68; M.A. Drumbl and K.S. Gallant, 'Sentencing Policies and Practices in the International Criminal Tribunals', (2003) 15 *Federal Sentencing Reporter* 140, at 142.

⁸⁵ On this point, see S. Zappalà, *Human Rights in International Criminal Proceedings* (New York: Oxford University Press, 2003) 198.

⁸⁶ Cf. C. Safferling, *Towards an International Criminal Procedure* (Oxford, Oxford University Press, 2001) 376.

⁸⁷ See ICC Rule 143. Cf. Logan, 'Confronting Evil', *supra* note 82, at 773 (citing G.A. Knoops, *An Introduction to the Law of International Criminal Tribunals: A Comparative Study* (2003) 117).

trial proceeding as the guilt phase. However, the exact contours of future ICC sentencing procedure are unknown.⁸⁸

The ICC framework is echoed by substantial scholarly support for the bifurcation of sentencing from the guilt phase.⁸⁹ Scholars have noted multiple rationales for bifurcation, but by far the most important is the fairness associated with allowing a defendant to offer mitigating evidence – including remorse – without the risk of compromising an assertion of innocence.⁹⁰ In a consolidated proceeding, defendants as a practical matter are precluded from expressing remorse for a crime that they claim not to have committed, for the simple reason that one cannot have personal remorse for actions one has not committed.⁹¹ In a similar vein, defendants may wish to call different witnesses during a sentencing phase whose testimony might be adverse to their interests during the guilt phase of the trial.⁹² Therefore, consolidated proceedings are not only not justified by efficiency grounds, they are also supported by a human rights oriented approach to criminal procedure.⁹³

There is an intuitive connection between this point and the desire to encourage detailed deliberation by the court on sentencing matters. If litigants are given the opportunity to present arguments specifically tailored to the question of sentencing, the court will be more likely to respond with a decision that not only carefully considers those arguments, but also presents a coherent vision and detailed rationale for the handing down of a specific sentence.⁹⁴ Ideally, such decisions will be closely tailored

⁸⁸ Compare Drumbl and Gallant, 'Sentencing Policies and Practices in the International Criminal Tribunals', *supra* note 84, at 142 ('The Rome State of the ICC, on the other hand, appears to favor a separate sentencing hearing') and Safferling, *Towards an International Criminal Procedure*, *supra* note 86, 315 (Article 76 contemplates separate sentencing phase) with Zappalà, *Human Rights in International Criminal Proceedings*, *supra* note 85, 198 ('The system as defined by this amendment has also been adopted as a model for the ICC Statute' and noting that sentencing evidence is presented prior to determination of guilt).

⁸⁹ See Logan, 'Confronting Evil', *supra* note 82, at 773.

⁹⁰ *Ibid.*; R. Henham, *Punishment and Process in International Criminal Trials* (Aldershot: Ashgate, 2005) 61. For an example, see Judgement, *Prosecutor v. Mrkšić*, Case No. IT-95-13/1-T, T. Ch. II, ICTY, 27 September 2007, para. 699.

⁹¹ This argument was considered and rejected by the ICTY in Judgement, *Prosecutor v. Brđjanin*, Case No. IT-99-36-T, T. Ch. II, ICTY, 1 September 2004, para. 1077-81. See also Judgement, *Prosecutor v. Vasiljević*, Case No. IT-98-32-A, A. Ch., ICTY, 25 February 2004, para. 177 ('The Appeals Chamber is of the view that an accused can express sincere regrets without admitting his participation in a crime, and that that is a factor which may be taken into account.'). The Appeals Chamber did not explain how this would be possible. See W.A. Schabas, *The UN International Criminal Tribunals* (Cambridge: Cambridge University Press, 2006) 429.

⁹² See Zappalà, *Human Rights in International Criminal Proceedings*, *supra* note 85, 198.

⁹³ *Ibid.*, at 198-9 (noting that the human rights view is supported by ICTY Rule 6 which prevents trial phase consolidation in cases pending at the time of the amendment so as not to 'prejudice the rights of the accused'). Zappalà correctly concludes that the rule concedes that the change reduces the level of procedural protections offered to the defense. *Ibid.*, at 199.

⁹⁴ Logan, 'Confronting Evil', *supra* note 82, at 773, footnote 366. This would point the way towards what Sloane refers to as a mature jurisprudence of sentencing. See Sloane, 'Sentencing for the "Crime of Crimes"', *supra* note 6, at 734.

to the unique circumstances of international criminal justice, rather than simply copied from the domestic sphere.⁹⁵

Commentators have already noted the degree to which sentencing appears to be an afterthought, and that the judges at the ICTY and ICTR do little more than list the permissible aggravating and mitigating circumstances, recite the facts of the case, and then impose a length of imprisonment.⁹⁶ In the words of one scholar, there appears to be little concern with 'grounding the ad hoc tribunals' sentences, including the prohibition on the death penalty, in a coherent moral or philosophical framework.'⁹⁷

Requiring a distinct sentencing phase would encourage international judges to make explicit the legal and factual findings that support their decisions, as well as engage in the moral and legal reasoning about the defendant's culpability and the necessary sentence to match that culpability.⁹⁸ These sentencing phases should be conducted in accordance with appropriate procedural mechanisms to allow for the new evidence not introduced during the guilt phases of the trial, including so-called 'victim impact' testimony from the prosecution,⁹⁹ as well as defence evidence of mitigating circumstances that affect the defendant's individual culpability. Separating such evidence from the guilt phase of the trial will not only improve sentencing decisions but will also clarify the goals of the guilt phase of the trial and remove evidence from that phase that has no direct bearing on the defendant's guilt or innocence as to the specific factual allegations against him. Arguably, character witnesses called during the guilt phase (whether by the prosecution or defence) will offer testimony that is highly prejudicial as to the defendant's guilt and furthermore will only be probative as to sentencing.

⁹⁵ Indeed, the Trial Chamber in *Delalić* started its analysis by referring to Article 33 of the SFRY Penal Code. See Judgement, *Prosecutor v. Delalić et al.*, Case No. IT-96-21, T. Ch. II, ICTY, 16 November 1998, para. 1230. The support for this reliance comes from ICTY Statute Article 24 (1) and has baffled some scholars. See Safferling, *Towards an International Criminal Procedure*, *supra* note 86 at 315. However, this application of Article 24 (1) is perhaps required by the principle of legality, such that defendants at the ICTY are not subject to greater penalties than they would have endured under preexisting domestic law in Yugoslavia. See Secretary General's Report to the Security Council, S/25074, 3 May 1993; Zappalà, *Human Rights in International Criminal Proceedings*, *supra* note 85, 196; G. Mettraux, *International Crimes and the Ad Hoc Tribunals* (Oxford: Oxford University Press, 2005) 344. One unfortunate consequence of this reliance is that it impedes development of a *sui generis* sentencing jurisprudence.

⁹⁶ See Sloane, 'Sentencing for the "Crime of Crimes"', *supra* note 6, at 713.

⁹⁷ See Alvarez, 'Crimes of States/Crimes of Hate: Lessons from Rwanda', *supra* note 39, at 409.

⁹⁸ Sentencing phases are also supported by Harman and Gaynor, 'Ordinary Sentences for Extraordinary Crimes', *supra* note 2, at 683, who argue for longer sentences at the ICTY. However, Harman and Gaynor argue, contrary to my position, that tribunals should give greater weight to deterrence. As should already be abundantly clear, a misplaced commitment to both deterrence and rehabilitation is the source of the problem – not the solution. The only solution is to recognise the true retributive nature of international criminal justice, and encourage sentences which adequately represent the moral desert of the offenders.

⁹⁹ On the proper role of victims in the criminal process, see G.P. Fletcher, *With Justice For Some*:

2. An International Sentencing Commission

The second suggested procedural reform is the creation of an International Sentencing Commission. Judges currently exercise *ad hoc* discretion in making sentencing determinations, with the result that there is little consistency between sentences at the ICTY. At the ICC, Rule 145 of the Rules of Procedure and Evidence calls for the penalty to reflect 'the culpability of the convicted person' by balancing all relevant factors, including mitigating and aggravating factors, as well as the extent of the damage caused, the harm to the victims, the nature of the unlawful behaviour, the means used to execute the crime, the degree of participation, as well as other factors. Rule 145 also specifically mentions that aggravating factors include, *inter alia*, abuse of power, acts of cruelty and acts against multiple victims, whether the victims were defenceless, and motives of discrimination. It is telling, though, that the provision on fines – Rule 146 – is longer than Rule 145 on the determination of sentences.

The Rome Statute currently includes a wide variety of procedures governing the sentencing of individuals, the transfer of individuals to custodial states to serve their term of imprisonment, who shall bear the cost, when a sentence can be reviewed (Article 110), how to determine the location of the prison sentence, the right of states enforcing a sentence to place some restrictions on how the sentence is imposed, but restricting these states from reducing or lengthening the sentence. The procedures in this regard are already robust and well defined, except in the area that is most important: what the appropriate penalties should be for particular crimes. Every scholar has a basic idea that proportionality is a laudable goal,¹⁰⁰ but there is nothing in either the Rome Statute itself or the Rules of Procedure and Evidence to guide judges in making sentencing determinations for crimes of genocide and crimes against humanity.¹⁰¹

An International Sentencing Commission would perform a valuable pedagogical function by educating judges and fostering dialogue among international criminal lawyers from all sides of the proceedings. Independent staff would conduct both empirical and theoretical research regarding international sentencing. Judges would become more aware of the unique challenges involved in sentencing for international crimes. Moreover, they might genuinely value and trust the counsel they receive from independent experts whose analysis is more independent than what judges hear in court from defence attorneys and prosecutors. The most important goal of this pedagogical process would be to encourage judges to consider the sentencing process carefully and produce sophisticated

Victims' Rights in Criminal Trials (New York: Addison Wesley, 1995).

¹⁰⁰ See, e.g., Safferling, *Towards an International Criminal Procedure*, *supra* note 86, 314.

¹⁰¹ See Sloane, 'Sentencing for the "Crime of Crimes"', *supra* note 6, at 89 (rejecting 'rigid' guidelines similar to the US federal Sentencing Reform Act but proposing a rational and

sentencing decisions that articulate in detail the legal basis for each particular sentence handed down.

3. International sentencing guidelines

An International Sentencing Commission would fill this gap by establishing general guidelines, in much the same way that the US Sentencing Guidelines aid the sentencing process in the federal courts.¹⁰² These guidelines were once mandatory, but are now advisory after the US Supreme Court ruled that they infringed the basic constitutional right to a jury trial because the guidelines relied on factual determinations made by a judge, instead of a jury.¹⁰³ The guidelines created by an International Sentencing Commission would take as their starting point the factors identified by Rule 145 of the Rules of Procedure, but would render them in greater detail, and include specific guidelines for each offence.¹⁰⁴ The rules would not be mandatory, but rather persuasive, in that they would establish clearly some basic principles to guide sentencing, so that each judge was not working from a blank slate.¹⁰⁵ For example, commission guidelines could include a directive indicating a hierarchy of criminal offences, with genocide at the top, against which mitigating and aggravating factors would then be considered. As it stands now, aggravating and mitigating factors are considered, but they are considered against a blank slate, *i.e.* there is no norm against which the aggravating or mitigating factors operate, thus rendering the factors somewhat meaningless. Indeed, international courts have explicitly refrained from establishing a hierarchy of international crimes.¹⁰⁶ The creation of sentencing guidelines, and the work of the sentencing commission in general, might force international judges to

flexible scheme to convey aggravating and mitigating factors).

¹⁰² For a discussion generally of the value of sentencing guidelines, see A. von Hirsch *et al.*, *The Sentencing Commission and its Guidelines* (Boston: Northeastern University Press, 1987) 11; J.C. Coffee, Jr. and M. Tonry, 'Hard Choices: Critical Trade-Offs in the Implementation of Sentencing Reform through Guidelines', in M. Tonry and F.E. Zimring (eds.), *Reform and Punishment*, *supra* note 20, at 155. Compare with M. Tonry, *Sentencing Matters* (Oxford: Oxford University Press, 1996) 85-89 (discussing shortcomings of guidelines).

¹⁰³ See *United States v. Booker*, 125 S. Ct. 738, 756 (2005).

¹⁰⁴ The suggestion has been made by others as well. See, *e.g.*, A. Dubinsky, Note, 'An Examination of International Sentencing Guidelines and a Proposal for Amendments to the International Criminal Court's Sentencing Structure', (2007) 33 *New England Journal on Criminal & Civil Confinement* 609, at 635-6.

¹⁰⁵ By making the guidelines optional, they would avoid the problems of inflexibility that plagued the US sentencing guidelines. However, they would only be useful insofar as they were considered persuasive authority by justices at the court and the degree to which they were actually consulted by judges when they rendered their sentencing judgements. There is reason to think that judges would both consult and cite them, since there is so little legal guidance that the judges may currently make reference to when explaining their decisions about prison terms.

¹⁰⁶ See, *e.g.*, Judgement, *Prosecutor v. Kunarac et al.*, Case No. IT-96-23, T. Ch. I, ICTY, 22 February 2001, para. 851; Drumbl and Gallant, 'Sentencing Policies and Practices in the International

confront a difficult theoretical question that they might otherwise prefer to ignore.

4. Effects of the procedural changes

In order for the sentencing procedures of international criminal justice to develop fully, a greater sensitivity to questions of proportionality must be encouraged. The aforementioned International Sentencing Commission is one way of encouraging this goal, in that the guidelines produced by the Commission would help ensure consistency across defendants and across courtrooms.

However, it is important not to enshrine a fallacious sense of proportionality. There is some temptation to use proportionality as an argument for leniency.¹⁰⁷ Here is how the argument is usually developed. First, one defendant receives a life sentence for organising genocide or promoting crimes against humanity. Arguably, the first defendant is the worst sort of criminal the system will deal with. Then, a second defendant successfully argues that he is less culpable than the first defendant, and therefore also argues that proportionality requires that he receive a lower sentence.¹⁰⁸ Finally, a third defendant makes the same argument, as do others, with the result that many defendants receive sentences that are scaled down – all in the name of proportionality, to such a degree that one wonders whether the less culpable defendants are receiving appropriate sentences.¹⁰⁹

It is important in this regard to distinguish between defendant-relative proportionality and offence-gravity proportionality.¹¹⁰ The first concept

Criminal Tribunals', *supra* note 84, at 142-3.

¹⁰⁷ For example, after Nuremberg, US High Commissioner John J. McCloy was concerned that Krupp's treatment was out of line with the sentences received by other industrialists, who were given light sentences or acquitted in the *Flick* trial. This led to a series of commutations by McCloy and the Peck Commission.

¹⁰⁸ See, e.g., Appellant Hassan Ngeze's Request for the Appeal Chamber to take Appropriate Steps to Rectify the Differential and Unequal Treatment Between the ICTR and ICTY in Sentencing Policies and Other Rights, *Prosecutor v. Nahimana et al.*, Case No. ICTR-99-52-A, 28 November 2005, para. 22.

¹⁰⁹ Judges in the other industrialist trials after *Flick* relied on the leniency of these decisions as a rationale for extending the lenient treatment, arguing, in part, that stiff sentences would violate proportionality among the various 'white collar' defendants. An initial expression of leniency against a small group of industrialists gave birth to continuing pressure for leniency against all accused industrialists, based largely on the theory that the most culpable defendants (the direct perpetrators) ought to receive the severest penalties, while the least culpable defendants (those who merely aided or abetted the genocide) ought to receive lighter penalties. In a more recent example, this argument was made by the defence but rejected by the ICTR in Decision on Hassan Ngeze's Motion Requesting to Rectify the Differential and Unequal Treatment Between the ICTR and ICTY in Sentencing Policies and Other Rights, *Prosecutor v. Nahimana et al.*, Case No. ICTR-99-52-A, A. Ch., 23 February 2006.

¹¹⁰ This distinction is analogous to one drawn by A. von Hirsh in 'Criminology: Commensurability and Crime Prevention: Evaluating Formal Sentencing Structures and Their Rationale', (1983) 74 *The Journal of Criminal Law and Criminology* 209, at 212 (defining

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requires that defendants receive sentences that are proportional to other defendants who are more or less culpable, such that the worst defendants get the highest sentences and the least culpable defendants get the lowest sentences.¹¹¹ Given that there is a limit to the maximum sentence – life in prison – defendant-relative proportionality can only be achieved by reducing the sentences of the other defendants.

However, this strategy may pose problems for the second concept, offence-gravity proportionality. This second concept requires that the punishment be proportional – *i.e.* reflect the gravity of the offence – which means that even lower-level defendants convicted of serious crimes such as genocide may deserve the highest sentences that the system can offer, *i.e.* life in prison. In these cases, defendant-relative proportionality and offence-gravity proportionality are actually at cross purposes, in that fidelity to defendant-relative proportionality may lead a court to lower the sentence of a defendant to such a degree that it violates the intuitive directives of offence-gravity proportionality. As I shall now discuss, this result is problematic, especially when considered against the background value of ending impunity for international crimes.

When the two senses of proportionality are at cross purposes with each other, it requires that we engage in a preliminary ranking of the two, so that we can decide which sense of proportionality ought to be maximised, if indeed we can only maximise one. I would submit that the retributive aims of international criminal justice counsel in favour of prioritising offence-gravity proportionality, because convicted war criminals will only get the punishment that they deserve if they are punished according to the gravity of the offence for which they are convicted. Lowering their sentences in order to make it proportional with other, more culpable, defendants only runs the risk that the sentence will not adequately reflect the moral desert of the offender.¹¹² However, I concede that I cannot offer a full-blown defence of this prioritisation of the two concepts within the confines of this chapter. The subject will have to be explored in greater depth in another forum. However, it is clear that these two aspects of proportionality are in severe tension in international criminal justice.

This intuitive dilemma, internal to the notion of proportionality itself, is rarely recognised by international judges. It is imperative that future

... parity, cardinal proportionality and ordinal proportionality as three requirements of desert commensurability). See also A. von Hirsch, 'Proportionality in the Philosophy of Punishment', (1992) 16 *Crime & Justice* 55, at 75. However, the terms are not without their critics. See, *e.g.*, J. Davis, 'The Science of Sentencing: Measurement Theory and von Hirsch's New Scales of Justice,' in Tata and Hutton (eds.), *Sentencing and Society*, *supra* note 9, at 338.

¹¹¹ Von Hirsch refers to this as ordinal proportionality. See Von Hirsch, 'Proportionality in the Philosophy of Punishment', *supra* note 110, at 77.

¹¹² It may not be clear to all that this is the right question. For a defence of desert as the primary consideration for the punishment of international crimes, see *supra* section IV.

sentencing judges not only appreciate this theoretical tension, but hand down sentences that are consistent with an understanding of both senses of proportionality. The creation of a sentencing commission, sentencing guidelines, and a separate sentencing phase will hopefully encourage judges to confront and resolve these issues more directly. Arguably, when one sense of proportionality must yield to the other, judges must understand that first and foremost, their duty is to hand down sentences that adequately reflect the true gravity of the offence charged.¹¹³ In this sense, the sentencing commission could be of invaluable guidance, because it could establish a hierarchy between different offences and the circumstances that might aggravate and mitigate such conduct,¹¹⁴ while at the same time establish sentences that depart from the goal of defendant-relative proportionality when the case in question requires this result (because of the demands of offence-gravity proportionality).

One source for the tension between these two senses of proportionality stems from the fact that the worst offenders cannot be executed under current guidelines of international criminal justice. As I have argued elsewhere, it is an exaggeration to claim that applying the death penalty for crimes of genocide violates international law as such.¹¹⁵ Although European states have ratified the optional protocols abolishing the death penalty in all circumstances, including for grave crimes in times of war and emergency, it would be incorrect to say that customary international law prohibits the imposition of the death penalty for crimes against humanity and genocide.¹¹⁶ Rather, the brief history of international criminal justice indicates that many trials, both international and domestic, have proceeded under rules that allowed the death penalty, including the International Military Tribunal at Nuremberg, the subsequent US Military Trials at Nuremberg, the Far East Tribunal, as well as national courts trying Eichmann and Saddam Hussein.¹¹⁷

¹¹³ This duty is arguably codified in Rule 145 (1) (a) of the ICC RPE that calls for sentences that reflect 'the culpability of the convicted person.' It is interesting to note that the rule does not state that punishment cannot *exceed* the culpability of the offender, but rather implies that the punishment must *equal* the culpability of the offender, which suggests that the norm may be violated by sentences that are too low (in addition to those that are too high). Also, Article 77 of the Rome Statute allows for life sentences only upon a finding that such a sentence is required by the 'extreme gravity of the crime', though the provision does not *require* a life sentence for any crime.

¹¹⁴ Compare with Judgement, *Prosecutor v. Kunarac et al.*, Case No. IT-96-23, T. Ch. I, ICTY, 22 February 2001, para. 851.

¹¹⁵ For a full analysis, see Ohlin, 'Applying the Death Penalty for Crimes of Genocide', *supra* note 32, at 747 (arguing that the emerging customary norm prohibiting the death penalty does not apply in cases of genocide).

¹¹⁶ See *ibid.*, at 752-53 (discussing insufficient state practice for formation of customary norm).

¹¹⁷ Some recent national prosecutions for genocidal acts have proceeded without the death penalty. See, e.g., *Niyonteze v. Public Prosecutor*, Trib. militaire de cassation, 27 April 2001, available at <http://www.vbs.admin.ch/internet/OA/d/urteile.htm> (Swiss court exercising

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Of course, the parties to the Rome Statute will not amend the rules of the court to allow for executions, even for cases dealing with a modern-day Hitler, because the penalty contravenes human rights norms that are well-entrenched in Europe and elsewhere.¹¹⁸ The question of abolition within the context of the law of war cannot be separated from the politics and human rights discourse associated with abolition in domestic criminal law, where outrageous conduct still dominates capital prosecutions in places like China and Iran.¹¹⁹ There are at least three distinct consequences of international criminal justice's abolitionism.

First, judges should be sensitive to the problems of proportionality created by the lack of the death penalty as an available option at international tribunals, and that even the highest sentence – life in prison – may be inadequate to represent the moral gravity of some offences, especially in cases dealing with the highest perpetrators for crimes of genocide and crimes against humanity. This is relevant when it comes time to sentence lower-rung defendants and to decide whether these defendants should receive correspondingly lower punishments.¹²⁰ In making such determinations, judges use the previous sentences for other perpetrators as the baseline for making these relative comparisons.¹²¹ If, however, the sentences for the most culpable perpetrators do not adequately match the moral gravity of the offence (because human rights standards do not allow us to impose such punishments), then perhaps these original sentences are inappropriate as starting benchmarks from which to make such comparisons.

Second, judges must be aware that the abolitionist structure of international criminal justice is not representative of non-European penal systems,

... universal jurisdiction in case against former mayor accused of ordering massacre of Tutsi and moderate Hutu. The case is discussed in Luc Reydam's, 'Case Report: *Niyonteze v. Public Prosecutor*', (2002) 96 *American Journal of International Law* 231. Also, the Canadian government prosecuted Desire Munyaneza, a Rwandan Hutu living in Canada, for genocide. However, examples of national prosecutions for genocide resulting in death sentences include Saddam Hussein in Iraq and the Rwandan execution of criminals implicated in the genocide there. For a description of the latter, see J.C. McKinley Jr., 'As Crowds Vent Their Rage, Rwanda Publicly Executes 22,' *The New York Times*, 25 April 1998, at A1.

¹¹⁸ For a discussion of the political issues in this area, see Ohlin, 'Applying the Death Penalty for Crimes of Genocide', *supra* note 32, at 754 (noting that the Security Council's decision to forgo the death penalty for the ICTY and ICTR was motivated, *inter alia*, by political considerations regarding domestic abolitionism).

¹¹⁹ See, e.g., 'China,' in Amnesty International, Report 2003, available at <http://web.amnesty.org/report2003/indexeng> (documenting at least 1921 death sentences and 1060 executions in 2002, though estimating that the true number may be higher).

¹²⁰ Cf. Judgement, *Prosecutor v. Kunarac et al.*, Case No. IT-96-23, T. Ch., ICTY, 22 February 2001, para. 859 (where the court recognised that the defendant would have been subject to the death penalty under the SFRY Criminal Code given the severity of the offences). However, in other cases the reference has had the opposite effect. See Judgement, *Prosecutor v. Mrkšić*, Case No. IT-95-13/1-T, T. Ch. II, ICTY, 27 September 2007, para. 708 (referring to Serbian prosecutions in which an appeal reduced an eight-year sentence to two years).

¹²¹ See, e.g., Judgement, *Prosecutor v. Kvočka et al.*, Case No. IT-98-30/1, T. Ch., ICTY, 2 November 2001, para. 732.

many of which still include the death penalty, especially in some African countries, the United States, Russia,¹²² China, Iran, the Middle East, and some Caribbean countries.¹²³ This was of particular concern after the Rwandan genocide, when the Rwandan representative to the United Nations, Manzi Bakuramutsa, complained bitterly about the lack of the death penalty at the proposed ICTR, and on that basis voted against the Security Council resolution creating the Tribunal.¹²⁴ Many of the geographical localities where international criminal law is likely to be active – war-torn areas of the globe – may be those where the death penalty is still an active part of the domestic penal system.¹²⁵ Insofar as international criminal law hopes to be truly international in scope, international courts should be cognisant of the fact that, at the moment, sentencing policies do not represent the sentencing philosophy of a good portion of the world.¹²⁶ In order to maintain consensus, the field has ‘defined sentences down’ to the lowest common denominator that all participants are comfortable with. In situations where the victims come from these non-abolitionist countries, judges must remain particularly sensitive to this complex dynamic.

Third, both judges and scholars must pay particular attention to the potentially negative incentives created by the current sentencing policies. As has been noted before, defendants tried in domestic courts may face penalties, including death sentences, which far outstrip the sentences handed down at international tribunals.¹²⁷ This is especially problematic given the tendency in international criminal justice to try the most culpable defendants in an international forum, while leaving lower level participants for local courts. This creates the unfortunate result that the lowest level participants may face the death penalty for their criminal conduct, while the worst offenders, including the architects, may escape this fate if they

¹²² Russia is a special case because although it retains death penalty legislation, it has not executed anyone since 1996 in accordance with a moratorium on the application of this penalty established by Yeltsin to bring Russia into compliance with Council of Europe standards. In 1999, the Constitutional Court also entered a moratorium on the imposition of this penalty until a nationwide jury system could be established.

¹²³ For a complete list, see Ohlin, ‘Applying the Death Penalty for Crimes of Genocide’, *supra* note 32, at 750-51.

¹²⁴ See UN Doc. S/PV.3453, at 14-15 (1994) (‘the establishment of so ineffective an international tribunal would only appease the conscience of the international community rather than respond to the expectations of the Rwandese people and of the victims of genocide in particular’).

¹²⁵ Rwanda abolished the death penalty in 2007. See Organic Law No. 11/2007 of 16 March 2007 Concerning Transfer of Cases to the Republic of Rwanda from the International Criminal Tribunal for Rwanda and from Other States and Organic Law No 31/2007 of 25 July 2007 Regarding the Abolition of the Death Penalty.

¹²⁶ Cf. Alvarez, ‘Crimes of States/Crimes of Hate: Lessons from Rwanda’, *supra* note 39, at 408, footnote 215.

¹²⁷ For a discussion of this problem, see *ibid.*, at 407 (‘For Rwandan survivors of the 1994 genocide there is considerable hypocrisy in the United Nations’ insistence that those defendants lucky enough to face trial at the ICTR will not face the kinds of penalties, including death, imposed under Rwandan law, even if they were the foremost leaders of genocide.’).

are transferred to Arusha or The Hague. This dynamic, noted before by scholars, will get even worse now that the *ad hoc* tribunals are being replaced by a permanent court operating under rules of complementary jurisdiction.¹²⁸

VI. CONCLUSION

Establishing a coherent theory of international criminal sentencing is of more than just philosophical interest. Establishing a coherent account of why we punish international war criminals will help determine numerous practical areas of international criminal law, several of which have been outlined in this essay. There may be more. However, at the least, a coherent theory of sentencing will impact not just on the length of sentences and how they are determined, but also the manner in which they are served. To take just one final example, judges who sentence a criminal before the International Criminal Court must decide where the criminal should serve his sentence. According to Chapter 12 of the Rules of Procedure and Evidence, it is the Presidency that may decide where a defendant is to serve his prison sentence. Although there is nothing *a priori* problematic about such discretion, it is important that whichever organ exercises this function carefully consider the underlying goals and philosophy of punishment when making these determinations.

I have, in this chapter, offered an outline of a coherent theory of international criminal punishment. In short, the usual justifications for domestic punishment, including rehabilitation and deterrence, are inapposite, and international sentencing is based on – or ought to be based on – retributive considerations, as embodied in the Rome Statute’s plea in its preamble to end impunity for international crimes. Those who commit these international crimes ought to be punished simply because of the intrinsic moral worth of these prosecutions: the guilty deserve to be punished. However, at the level of international law, collective peace and security demands that we remain faithful to these retributive goals, because failure to punish the guilty adequately will threaten the very confidence in the system that allows victims and other groups to forgo reprisals and submit their grievances to the rule of law and the procedures of criminal justice – to stay the hand of vengeance, as it were.

The specific procedural proposals discussed in this chapter would help advance this unique account of international sentencing. Creation of an international sentencing commission would garner support from all participants in the system, regardless of political viewpoint. A commission would create an institution whereby the details of international sentencing

¹²⁸ On complementarity, see J.T. Holmes, ‘Complementarity: National Courts versus the ICC,’ in Cassese *et al.* (eds.), *The Rome Statute Commentary*, *supra* note 56, at 667.

could be further discussed and codified with greater legal clarity and precision. Participation in this commission should be broad-based, encompassing every major region (including the United States), include the work of a wide number of respected scholars and jurists, and provide a framework for meaningful and incisive debate about sentencing, as opposed to rehashing the received wisdom on the subject. The goal of justice itself demands that we give renewed attention to this most basic and foundational question about international criminal law.