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# PUNISHMENT RATIONALES IN INTERNATIONAL CRIMINAL JURISPRUDENCE: TWO READINGS OF A NON-QUESTION

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## **Punishment Rationales in International Criminal Jurisprudence: Two Readings of a Non-Question**

*Sergey Vasiliev\**

The defendants who had been convicted were called after the recess to be sentenced. Standing there before us they behaved like men. I felt sick and miserable. We had seen them day-in day-out for a year. What right had I [...] I knew they deserved it.

Francis Biddle

‘Why punish perpetrators of international crimes?’ The answer to the question asked in the title of this book may appear too self-evident for it to be seriously posed, unless the purpose is to provoke or polemicize. All the more so in the present times when policy debates and public rhetoric on accountability and redress for atrocities often short-circuit on international criminal justice institutions, which are typically presented as the ultimate machinery for enforcing international law against the gravest violations. An experimental and contingent enterprise in early 1990s, international criminal justice derived its initial credit of moral authority from the stated ambition to improve on the Nuremberg and Tokyo precedents.<sup>1</sup> The project has since attained a substantial degree of acceptance and ‘normalcy’, if there is indeed such a thing when it comes to adjudication of crimes extraordinary in scope and gravity. Over the past two and a half decades, international criminal law has developed into a grandiose industry holding a considerable symbolic and political leverage and distinguished by a sophisticated institutional culture, normative and conceptual apparatus, and professional practices and routines. Although its track record and social impacts remain deeply contested, even increasingly so, it has certainly got something – without implying enough – to show for all the financial and human capital investments. Scores of persons have been convicted by international and hybrid tribunals and sentenced to lengthy prison sentences for core crimes committed in the former Yugoslavia, Rwanda, Cambodia, Sierra Leone and some other African countries (yet, most problematically, not much anywhere else).

The mechanics of individual guilt and criminal punishment have become a default response to situations of humanitarian crisis and mass atrocity. Thus, whenever the question ‘why punish?’ is posed, the tables are quickly turned on those daring ask it: Why *not* punish?

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<sup>1</sup> Report of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, UN Doc. A/49/342-S/1994/1007, 29 August 1994, paras. 3, 10, 54, 71, 190-198.

What else – let them go free? Yet, this answer does not truly engage with the question, and the tone of unassailable certainty hardly extinguishes it. The above quotation from the memoir of Justice Francis Biddle, the American judge at the Nuremberg International Military Tribunal (IMT), is paradigmatic.<sup>2</sup> It captures, in not so many words, the excruciating self-doubt, emotional discomfort, and moral anguish accompanying the act of punishment – the act which, one would expect, should be taken for granted, in particular in the case of someone found guilty of the most heinous crimes. Supposedly, today’s international judge is struggling with the same cognitive dissonance of knowing that convicts must be punished while feeling uneasy about doing it to them. Like Justice Biddle, she will have qualms about her entitlement to punish and seek consolation in just deserts, deterrence, and other justifications.

The debate on the goals of punishment is of respectable vintage in domestic criminal law philosophy and not new in international criminal law either. A short bibliographic survey also evinces that, if not entirely passé, it may well be past its heyday. Most of the key publications, with a few exceptions, date back to a decade or more ago.<sup>3</sup> The scholarly attention towards justifications of international criminal punishment has been scarce as of late. Prematurely so, it must be said, as international penology arguably has no coherent theory of punishment on offer that could help guide international courts or systematically critique their practice. The bulk of scholarship has been preoccupied with *how* convicts are to be punished, i.e. the determination of an appropriate sentence and weighing of different relevant factors in arriving at a just calculus. Since the fundamental justifications of punishment in international criminal law have largely mirrored those in the domestic sphere, scholars have interrogated the analogy with domestic penal philosophy<sup>4</sup> and the applicability of the retributivist, deterrent, and

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<sup>2</sup> F. Biddle, *In Brief Authority* (New York: Doubleday, 1962) 476.

<sup>3</sup> W.A. Schabas, ‘Sentencing by International Tribunals: A Human Rights Approach’ (1996-1997) 7 *Duke Journal of Comparative & International Law* 461; J.C. Nemitz, ‘The Law of Sentencing in International Criminal Law: The Purposes of Sentencing and the Applicable Method for the Determination of the Sentence’ (2001) 4 *Yearbook of International Humanitarian Law* 87; S. Beresford, ‘Unshackling the Paper Tiger: The Sentencing Practices of the Ad Hoc International Criminal Tribunals for the Former Yugoslavia and Rwanda’ (2001) 1 *International Criminal Law Review* 33; O.A. Olusanya, *Sentencing War Crimes and Crimes against Humanity under the International Criminal Tribunal for the Former Yugoslavia* (Groningen: Europa Law Publishing, 2005); M. Bagaric and J. Morss, ‘International Sentencing Law: In Search of a Justification and Coherent Framework’ (2006) 6 *International Criminal Law Review* 191; R.D. Sloane, ‘Sentencing for the Crime of Crimes, The Evolving “Common Law” of Sentencing of the International Criminal Tribunal for Rwanda’ (2007) 5 *Journal of International Criminal Justice* 713; M.B. Harmon and F. Gaynor, ‘Ordinary Sentences for Extraordinary Crimes’ (2007) 5 *Journal of International Criminal Justice* 683; M.A. Drumbl, *Atrocity, Punishment and International Law* (New York: Cambridge University Press, 2007); J.D. Ohlin, ‘Towards a Unique Theory of International Criminal Sentencing’ in G. Sluiter and S. Vasiliev (eds.), *International Criminal Procedure: Towards a Coherent Body of Law* (London: Cameron May, 2009); S. d’Ascoli, *Sentencing in International Criminal Law: The UN ad hoc Tribunals and Future Perspectives for the ICC* (Oxford: Hart, 2011).

<sup>4</sup> On the domestic analogy (objection), see the contribution by Elies van Sliedregt in this Volume. See also e.g. F. Harhoff, ‘Sense and Sensibility in Sentencing – Taking Stock of International Criminal Punishment’ in O. Engdahl and P. Wrangé (eds.), *Laws at War – The Law as it was and the Law as it Should Be* (Leiden: Brill, 2008) 123-134.

expressivist rationales to international criminal law.<sup>5</sup> Whilst such critique is a stepping stone towards articulation of a punishment theory tailored to international criminal justice, a concerted rethink of the international penal philosophy is far from complete.

The present Volume is a timely opportunity to reinvigorate this effort and take the debate to a new level, regardless of whether a coherent international punishment theory can be constructed, let alone made to bear upon the future sentencing practice. This Chapter's contribution consists, firstly, in unveiling the functions of the punishment teleology in the jurisprudence of international and hybrid criminal courts; and, secondly, in analysing the tribunals' penological discourse on a meta-level. Why is it that those courts feel compelled to discuss punishment rationales over and over again in their judgments, and to say *why* they punish? The Chapter posits that because the criminal law framework imposes rigid constraints on the degree to which judges can engage with the 'why punish?' question, teleological ruminations in judgments represent speech acts by which courts preach international criminal law's founding articles of faith.

The Chapter starts off by reflecting on the theoretical and practical relevance of the question 'why punish?' in international criminal justice. Section I sets forth the two readings of it, or two levels on which it can be answered. Section II presents statements on the aims of punishment by some international and hybrid courts as a way to trace the evolution of penal philosophy in judicial discourse. The ritualism, monotony and limited practical value of that discourse point to what courts actually do, as opposed to saying what they do, when meting out punishment. Section III puts this emphatic performativity in the judges' treatment of rationales in a methodological perspective, in particular the ongoing normative *v.* empirical tension in the discipline. For the courts, 'why punish?' can only be a non-question because treating it otherwise would have required them to overreach the belief system upon which the project is founded and which it is made to reinforce.

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<sup>5</sup> On validity of specific rationales, see e.g. A.K.A. Greenawalt, 'International Criminal Law for Retributivists' (2014) 35 *University of Pennsylvania Journal of International Law* 969; J. Klabbers, 'Just Revenge? The Deterrence Argument in International Criminal Law' (2001) 12 *Finnish Yearbook of International Law* 249; J. Ku and J. Nzelibe, 'Do International Criminal Tribunals Deter or Exacerbate Humanitarian Atrocities?' (2006) 84 *Washington University Law Review* 777; H. Jo and B. Simmons, 'Can the International Criminal Court Deter Atrocity?' (2016) 70 *International Organization* 443; B. Wringer, 'Why Punish War Crimes? Victors Justice and Expressive Justifications of Punishment' (2006) 25 *Law and Philosophy* 159; 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* 81.

## I. What's in the Question?

Before describing what different jurisdictions have said (or failed to say) about the goals of punishment, it is worth pausing on the meta-issue: the 'why' of 'why punish?' What is the importance of asking this question, and can doing so shed light on the ontology of the discipline? Is it consequential for the current configuration of international penal responses and the tribunals' *praxis*?

### 1. *Why Ask?*

The debate on justifications of international criminal punishment and the quest for the penal theory of international criminal law go back to the earliest instances of international prosecution. Before the notion of individual punishment for international crimes went mainstream through the institutionalisation of international criminal justice, whether there is a point in punishing someone for the 'unimaginable atrocities' had been a genuine question. Can human punishment do justice to the extraordinary nature of such crimes and the ordinary set of penalties fit the bill? This query was famously articulated by Hannah Arendt in *The Origins of Totalitarianism*. The 'vastest, most improbable scale' on which Nazi crimes had been committed, she wrote, 'render[ed] all punishments provided by the legal system inadequate and absurd'. These were the 'crimes which men can neither punish nor forgive'.<sup>6</sup>

After the Nuremberg and Tokyo IMT trials concluded, reflection on punishment justifications continued as an academic exercise.<sup>7</sup> Paradoxically, not much changed with the advent of UN ad hoc Tribunals five decades later whose legal frameworks were conspicuously silent on the purposes of punishment.<sup>8</sup> With international criminal justice embedding itself firmly in the institutional landscape in early 1990s, the fundamental debate on penal philosophy gained no traction in practice where it was treated in such a way as if it had long been settled. As Greenawalt observed, the international criminal law approach became over-determined (and simultaneously under-determined) by domestic penal theories.<sup>9</sup> Certainly, in this area of international criminal law, as in many others, practice shapes the agenda and theory is only secondary.<sup>10</sup> So here too, the limited demand for theory affected supply. The international crimi-

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<sup>6</sup> H. Arendt, *The Origins of Totalitarianism*, 3<sup>rd</sup> ed. (New York: Harcourt Brace & Company, 1973) 439 and 459 ('the unpunishable, unforgivable absolute evil which could no longer be understood and explained by the evil motives of self-interest, greed, covetousness, resentment, lust for power, and cowardice; and which therefore anger could not revenge, love could not endure, friendship could not forgive').

<sup>7</sup> E.g. F. Hassan, 'The Theoretical Basis of Punishment in International Criminal Law' (1983) 15 *Case Western Reserve Journal of International Law* 39, 48 et seq.

<sup>8</sup> ICTY Statute, Art. 24 and ICTR Statute, Art. 23.

<sup>9</sup> Greenawalt, 'International Criminal Law for Retributivists', 976-977.

<sup>10</sup> On the relationship between theory and practice, see the contribution by Alex Whiting in this Volume.

nal law scholarship has been more preoccupied with the question of ‘how’ rather than ‘why’.<sup>11</sup>

Many writers have focused on consistency, proportionality and individualization in sentencing, using these principles to evaluate whether the punishments the tribunals meted out were appropriately harsh or otherwise.<sup>12</sup> Substantial research efforts – enriched by empirical approaches –, have been devoted to the putative inconsistency of sentencing across cases and across courts, with some scholars charging that it is irrational and unpredictable and others arguing that this problem is imaginary.<sup>13</sup> In face of this disagreement, scholars have advocated for greater transparency and clarity of sentencing determinations, in particular through developing guidelines.<sup>14</sup> Cross-tribunal – vertical as well as horizontal – inconsistency has mostly been regarded as problematic, although pluralism in sentencing also had its defenders.<sup>15</sup>

The sub-discipline of international sentencing still has a long way to go until ‘a consistent and robust theory of international criminal punishment’<sup>16</sup> can be attained, despite notable efforts to that end.<sup>17</sup> Given the predominant emphasis on sentencing modalities, scholarship has fallen short of developing a normative theory of punishment uniquely suited for international

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<sup>11</sup> For notable exceptions, see I. Tallgren, ‘The Sensibility and Sense of International Criminal Law’ (2002) 13 *European Journal of International Law* 561; M.J. Osiel, ‘Why Prosecute? Critics of Punishment for Mass Atrocity’ (2000) 22 *Human Rights Quarterly* 118. The discipline of transitional justice arguably has a stronger track record of posing the ‘why punish’ question than the international criminal justice literature.

<sup>12</sup> A.M. Danner, ‘Constructing a Hierarchy of Crimes in International Criminal Law Sentencing’ (2001) 87 *Virginia Law Review* 415; M.M. de Guzman, ‘Harsh Justice for International Crimes?’ (2014) 39 *Yale Journal of International Law* 1; J.D. Ohlin, ‘Proportional Sentences at the ICTY’ in B. Swart et al. (eds.), *The Legacy of the International Criminal Tribunal for the Former Yugoslavia* (Oxford: Oxford University Press, 2011); Harmon and Gaynor, ‘Ordinary Sentences for Extraordinary Crimes’, 711.

<sup>13</sup> Asserting that sentencing is inconsistent: e.g. Drumbl, *Atrocity, Punishment and International Law*, 6; U. Ewald, ‘Predictably Irrational – International Sentencing and its Discourse against the Backdrop of Preliminary Empirical Findings on ICTY Sentencing Practices’ (2010) 10 *International Criminal Law Review* 365. Contesting this claim: e.g. J. Meernik and K.L. King, ‘The Sentencing Determinants of the International Criminal Tribunal for the Former Yugoslavia: An Empirical and Doctrinal Analysis’ (2003) 16 *Leiden Journal of International Law* 717; Harhoff, ‘Sense and Sensibility in Sentencing’, 134-135; J. Meernik, ‘Sentencing Rationales and Judicial Decision Making at the International Tribunals’ (2011) 92 *Social Science Quarterly* 588; B. Holá et al., ‘Is ICTY Sentencing Predictable? Empirical Analysis of ICTY Sentencing Practice’ (2009) 22 *Leiden Journal of International Law* 79; B. Holá et al., ‘Consistency of International Sentencing: ICTY and ICTR Case Study’ (2012) 9 *European Journal of Criminology* 539.

<sup>14</sup> E.g. B. Holá, ‘Consistency and Pluralism of International Sentencing: An Empirical Assessment of the ICTY and ICTR Practice’ in E. van Sliedregt and S. Vasiliev (eds.), *Pluralism in International Criminal Law* (Oxford: Oxford University Press, 2014); B. Holá, ‘Sentencing of International Crimes at the ICTY and ICTR: Consistency of Sentencing Case Law’ (2012) 4 *Amsterdam Law Forum* 3, 4. Cf. Harhoff, ‘Sense and Sensibility in Sentencing’, 139 (favouring more detailed explanations of sentencing outcomes but opposing the idea of binding guidelines).

<sup>15</sup> N. Combs, ‘Seeking Inconsistency: Advancing Pluralism in International Criminal Sentencing’ (2016) 41 *Yale Journal of International Law* 1; A.K.A. Greenawalt, ‘Pluralism of International Criminal Law’ (2012) 86 *Indiana Law Journal* 1063, 1125.

<sup>16</sup> See the Introduction by the editors.

<sup>17</sup> E.g. Ohlin, ‘Towards a Unique Theory of International Sentencing’; Greenawalt, ‘International Criminal Law for Retributivists’.

criminal justice. Nor has it proffered a satisfactory conceptual framework that could help gauge and explain the importance of punishment teleology for the tribunals' sentencing practice.<sup>18</sup> In fact, key aspects of the international penal system have long gone presumed and under-theorized. Limited attention has been paid until most recently to the poorly-designed regime for the enforcement of sentences – an afterthought rather than an integral, carefully engineered part of the justice enterprise.<sup>19</sup> The same transpires from scholarly complacency with the unimaginative toolkit of penalties and continuous neglect in law and in practice of (additional) non-custodial sanctions such as fines and forfeitures.<sup>20</sup> The predominance of custodial punishment as a virtually exclusive penalty in international criminal law has not been seriously questioned, even though potential alternatives (for example, community service) may be more in sync with the objectives of international justice.<sup>21</sup>

These matters cannot be considered in isolation from the basic issue of rationales: 'how' is secondary to 'why'. What kinds of penalties are suited for the system, how they are to be determined in individual cases, where and how they are to be served, are but a few questions that cannot be answered without clarifying the reasons for imposing punishment and objectives it is meant to achieve in the first place. Any reformist agenda to optimize the penal regime and perfect practice would lack conceptual grounding so long as the issue of penal objectives is circumvented. It is not this Chapter's objective to provide such grounding, much less settle the teleological debates; instead, it is to examine the treatment this question has received in jurisprudence. Accordingly, the next paragraph highlights the two readings of 'why?' which will serve as analytical lenses in the following survey of judicial approaches. This binocular vision enhances the understanding of how judges have dealt with the query and the parameters of their discourse on the subject.

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<sup>18</sup> For an outline of such a conceptual framework, see the contribution by Gerhard Werle and Aziz Epik in this volume.

<sup>19</sup> On the normative and practical problems raised by the fragmented sentence enforcement regime, see R. Mulgrew, *Towards the Development of the International Penal System* (Cambridge: Cambridge University Press, 2013); D. Abels, *Prisoners of the International Community: The Legal Position of Persons Detained at International Criminal Tribunals* (The Hague: T.M.C. Asser Press, 2012).

<sup>20</sup> ICTY Statute, Art. 24(1) and ICTR Statute, Art. 23(1) ('The penalty imposed by the Trial Chamber shall be limited to imprisonment.'). But cf. ICC Statute, Art. 77(2) and ICC, Decision on Sentence pursuant to Article 76 of the Statute of 22 March 2017 (TC), *Bemba et al. (Bemba II)*, ICC-01/05-01/13-2123-Corr 22-03-2017, p. 99 (imposing fines on Kilolo and Bemba). M.G. Martínez, 'Forfeiture of Assets at the International Criminal Court: The Short Arm of International Criminal Justice' (2014) 12 *Journal of International Criminal Justice* 193.

<sup>21</sup> On the problematic 'quasi-monopoly' of incarceration, see M.A. Drumbl, 'International Punishment from "Other" Perspectives' in R. Mulgrew and D. Abels (eds.), *Research Handbook on International Penal System* (Cheltenham: Edward Elgar, 2016) 383-385.



## 2. Two Readings

There are at least two layers to ‘why punish?’ and two ways of asking it, giving rise to different issues. It is instructive to see whether and how these have been taken up by the judges. One cannot presume that the tribunals would be equally prepared to attend to both aspects.

The accent on *why* in ‘why punish?’ prods one to look at theories justifying the act of punishment without questioning the presumed need for it. This reading has been influential in the mainstream literature interrogating the validity of domestic analogies in respect of penological rationales. The debate on international penalties has been obsessed with the issue of importability into international criminal law of traditional retributivist and utilitarian considerations (deterrence, retribution, rehabilitation, and incapacitation) and expressivism-based rationales (stigmatisation, denunciation, engraining rule of law etc.). Each of these theories has its defenders and critics. There are wide-ranging views on which of the penological justifications is more compelling for international criminal justice, considering the special nature of the crimes and of the offenders.

The intonational emphasis on *punish* (‘why *punish?*’) puts a dent in the very idea that punishment is an appropriate response. It is another way of asking whether a convict must indeed be punished through criminal law, rather than, say, summarily executed or inflicted a type of harm Churchill had in mind for the Nazi leaders.<sup>22</sup> This opens up yet other avenues: convicts could be forgiven, amnestied or pardoned, required to submit themselves to a truth and reconciliation process, traditional justice mechanism, etc. Insofar as this reading asks whether criminal guilt must have punishment as a consequence, it effectively displaces an assumption that it must – the orthodoxy that has seldom been questioned, in the past or nowadays.<sup>23</sup>

Unlike the first reading, the second is nothing short of a radical challenge to the international *criminal* justice enterprise as a whole. The institute of punishment is so central to the criminal law that the question ‘why *punish?*’ is equivalent to ‘why *criminal law?*’ The liberal criminal justice paradigm is inflexible. Whether it recognizes retributivist or utilitarian justifications, or both to an extent, it admits of no alternative ways of dealing with crime falling short of punishment. It is suspicious of penalties straying from the conventional forms. Serious crimes should entail custodial sentences, possibly combined with other sanctions whilst

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<sup>22</sup> G.J. Simpson, *Law, War and Crime: War Crimes, Trials and the Reinvention of International Law* (Cambridge: Polity Press, 2007), 21 (Churchill’s proposal was to have the captured Nazi leaders castrated).

<sup>23</sup> E.g. K. Jaspers, *The Question of German Guilt* (translation E.B. Ashton) (New York: Fordham University Press, 2000), 30 (‘Crime meets with *punishment.*’); N. Bernaz, ‘Sentencing and Penalties’ in W.A. Schabas and N. Bernaz (eds.), *Routledge Handbook of International Criminal Law* (London: Routledge, 2011), 289 (‘The imprisonment of these criminals seems to be an almost natural way of addressing the public’s indignation towards their crimes and, arguably, it provides the surviving victims with some form of closure and a sense of justice.’).

more lenient measures would be found wanting because they are neither proportionate to the gravity of the crime nor an adequate deterrent.

The mentality of suspicion towards non-punitive responses is built in international criminal law. One paradigmatic example is the ICC Prosecutor's misgivings about Colombia's Legal Framework for Peace as part of the draft Peace Accord. In 2013 the Office of the Prosecutor (OTP) communicated to the Colombian government its considerations about the possibility of suspended, alternative or reduced sentences for the FARC members. In the OTP's view, suspended sentences would fall short of effective penal sanctions<sup>24</sup> and fail the complementarity test of a genuine effort to bring perpetrators to justice.<sup>25</sup> More recently, the ICC Appeals Chamber ruled in the *Bemba II* case that a conditionally suspended sentence is not a penalty available under the ICC legislation and cannot be imposed by the Trial Chamber exercising an 'inherent power'.<sup>26</sup>

The out-of-box reading of 'why *punish*?' is more likely to provoke serious consideration in the formative stages such as in the lead up to Nuremberg. This is when the powers-that-be – parties prevailing in a conflict or members of a new regime emerging from a political transition – are facing the choice between submitting the vanquished or ousted opponents to a criminal law process, non-punitive transitional justice measures, and doing nothing of that kind. Sometimes the former option is favoured, other times not, and on occasions no choice can be made at all. In the recent years, international criminal justice finds itself at an existential crossroads. The project has been facing a legitimacy crisis and increasingly confronted with an array of fundamental critiques.<sup>27</sup> One complaint is the imposition of a historically, conceptually, and culturally narrow notion of justice which is represented matter-of-factly as 'international' in the sense of 'global' or 'universal'.<sup>28</sup> Calls for loosening and transcending the limited punitive paradigm through pluralisation of institutional and cultural responses to mass atrocity situations represent a pushback against the hegemonic construction of international

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<sup>24</sup> J. Stewart, 'Transitional Justice in Colombia and the Role of the International Criminal Court', 13 May 2015, Bogota, Colombia, p. 11: 'Suspending sentences for those most responsible for war crimes and crimes against humanity would amount to shielding the persons concerned from criminal responsibility. It could also suggest that proceedings were conducted in a manner that was inconsistent with an intent to bring the persons concerned to justice.'

<sup>25</sup> Statement of ICC Prosecutor, Fatou Bensouda, on the conclusion of the peace negotiations between the Government of Colombia and the Revolutionary Armed Forces of Colombia – People's Army, 1 September 2016: 'The paramount importance of genuine accountability – which by definition includes effective punishment – in nurturing a sustainable peace cannot be overstated.'

<sup>26</sup> ICC, Judgment of 8 March 2018 (AC), *Bemba et al. (Bemba II)*, ICC-01/05-01/13-2276-Red, paras. 3, 73-80 (striking down as *ultra vires* the suspended sentences for Mangenda and Kilolo).

<sup>27</sup> In more detail, S. Vasiliev, 'The Crises and Critiques of International Criminal Justice' in K.J. Heller et al. (eds.), *Oxford Handbook of International Criminal Law* (Oxford: Oxford University Press, 2020).

<sup>28</sup> S.M.H. Nouwen and W.G. Werner, 'Monopolising Global Justice: International Criminal Law as Challenge to Human Diversity' (2015) 13 *Journal of International Criminal Justice* 157.

criminal law as a liberal criminal justice system. The obnoxious rendition of ‘why *punish?*’ has therefore become ever more pressing.

At this juncture, it is time to turn to judicial statements on punishment rationales in international and hybrid criminal courts. Penological discourse in sentencing judgments reveals judges’ adherence to specific penal philosophies, and how different chambers have made use of them. The next section inventories justifications of international punishment in jurisprudence and notes the features of judicial discourse going to the dual aspect of the ‘why punish’ question.

## II. What Courts Say: Rationales in Case Law

### 1. Nuremberg and Tokyo International Military Tribunals

The London and Tokyo Charters each endowed the respective Tribunal with a ‘right’ (IMT) and a ‘power’ (International Military Tribunal for the Far East (IMTFE)) to impose upon convicts ‘death or such other punishment as shall be *determined by it to be just*’.<sup>29</sup> This may be taken as alluding to the retributivist rationale of ‘just deserts’ as the primary penal justification.<sup>30</sup> The IMT and IMTFE sentencing rulings were remarkably short and did no more than list individual sentences, without clarifying the goals pursued or the reasons for the specific penalties.<sup>31</sup> Out of nineteen Nuremberg convicts, twelve were sent to the gallows, three got life imprisonment, and four definite prison terms; in Tokyo out of twenty-five defendants seven were sentenced to death, sixteen to life imprisonment, and only two to definite terms in prison. Three IMT accused (Hans Fritzsche, Franz von Papen and Hjalmar Schacht) were acquitted, but there were no acquittals in Tokyo.<sup>32</sup>

The IMT judges’ penological views could in part be inferred from the inconclusive *obiter dictum* dismissing the *nullum crimen* challenge against the charge of the crimes against peace:<sup>33</sup>

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<sup>29</sup> IMT Charter, Art. 27; IMTFE Charter, Art. 16.

<sup>30</sup> See also N. Boister and R. Cryer, *The Tokyo International Military Tribunal: A Reappraisal* (Oxford: Oxford University Press, 2008), 247.

<sup>31</sup> ‘Sentences’ in *Trial of the Major War Criminals before the International Military Tribunal, Nuremberg 14 October 1945 – 1 October 1946*, Vol. I (Nuremberg: International Military Tribunal, 1947), 365-367; ‘Majority Judgment’ in N. Boister and R. Cryer (eds.), *Documents on the Tokyo International Military Tribunal: Charter, Indictment and Judgments* (Oxford: Oxford University Press, 2008), 626-628 [49,854] (simply pronouncing the sentences for each of the twenty-five accused: either death by hanging or life imprisonment).

<sup>32</sup> Concluding that the IMT and IMTFE sentencing policies were not at great variance, see Boister and Cryer, *The Tokyo International Military Tribunal*, 253; cf. R.H. Minear, *Victor’s Justice: The Tokyo War Crimes Trial* (Princeton: Princeton UP, 1971), 31 fn. 24 (claiming that the Tokyo IMT sentencing was harsher).

<sup>33</sup> The discussion of the *nullum crimen* challenge to war crimes and crimes against humanity charges was even more curt and reticent on underlying penal philosophy. Referring to articles of the 1907 Hague Convention and the 1929 Geneva Convention as the bases for the criminalization of the respective conduct, the IMT held bluntly:

To assert that it is unjust to punish those who in defiance of treaties and assurances have attacked neighboring states without warning is obviously untrue, for in such circumstances the attacker must know that he is doing wrong, and so far from it being unjust to punish him, it would be unjust if his wrong were allowed to go unpunished.<sup>34</sup> [...] Crimes against international law are committed by men, not by abstract entities, – and only by punishing individuals who commit such crimes can the provisions of international law be enforced.<sup>35</sup>

These *dicta* hint to the penological approach informed by negative deontic retributivism that sees punishment as an inexorable and just consequence of the crime.<sup>36</sup> The convicted Nazi leaders *had* to be punished – not necessarily because of the intrinsic virtuousness of punishment as a response to criminal wrongdoing, but rather because *not* punishing them was not affordable. It would have been unjust and it would have frustrated the enforcement of international law.

The IMTFE judgment omitted to address punishment goals and to clarify how these impacted the sentences. In fact, the penalties were subject of heated debates during deliberations.<sup>37</sup> In acknowledging fundamental differences, individual judges elaborated on the matter in their separate opinions.<sup>38</sup> Notably, the opinion of Sir Justice William Webb, the President of the Tribunal, contains pertinent observations. He regarded general deterrence as the principal justification – the view not fully in tune with convictions of his brothers in the majority – and he strongly opposed capital punishment.<sup>39</sup> The IMTFE President took the sentencing approach of the Nuremberg Tribunal as a point of reference and flagged what to him was a contradiction. Despite pronouncing the crime of aggression to be ‘the supreme international crime’, the IMT ‘proceeded to impose life sentences and less on accused found guilty not merely of conspiring to wage, and planning and waging wars of aggression but also of war

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‘that violation of these provisions constituted crimes for which the guilty individuals were punishable is too well settled to admit of argument’: ‘Judgment’ in Trial of the Major War Criminals before the IMT, Vol. I, 253.

<sup>34</sup> ‘Judgment’ in Trial of the Major War Criminals before the IMT, Vol. I, 219.

<sup>35</sup> ‘Judgment’ in Trial of the Major War Criminals before the IMT, Vol. I, 223.

<sup>36</sup> A.A. Haque, ‘Retributivism: The Right and the Good’ (2013) 32 *Law and Philosophy* 59.

<sup>37</sup> Boister and Cryer, *The Tokyo International Military Tribunal*, 254.

<sup>38</sup> Separate dissenting opinions of Judges Bernard (France) and Pal (India) departed from the majority judgment in part of the verdicts and did not squarely address punishment and sentences. The dissent of Judge Röling (Netherlands), who would have acquitted Hata, Hirota, Kido, Shigemitsu and Togo and convicted and sentenced some of the others differently than the majority did, gave no insight into his penal philosophy. See ‘Opinion of Member for the Netherlands (Mr. Justice Röling)’ in Boister and Cryer, *Documents on the Tokyo IMT*, 775 [178].

<sup>39</sup> Boister and Cryer, *The Tokyo International Military Tribunal*, 255 (explaining this attitude by his concern about the validity of convictions and by his devout Catholic’s concern with mercy).

crimes and crimes against humanity; whereas an accused found guilty simply of crimes against humanity was sentenced to death by hanging.’<sup>40</sup>

Justice Webb suggested that the explanation for this incongruity was that in not imposing death sentences on the defendants found guilty on Count 1, the IMT ‘took into account the fact that aggressive war was not universally regarded as a justiciable crime when they made war’.<sup>41</sup> Since the crimes of the Nuremberg defendants were ‘far more heinous, varied and extensive than those of the Japanese accused’, he posited, the latter were to be treated with no less consideration than the Germans. This led Justice Webb to conclude that ‘none of the Japanese accused should be sentenced to death for conspiring to wage, or planning and preparing, or initiating, or waging aggressive war’. With respect to crimes against humanity and war crimes, his view was that deterrence to others was ‘universally acknowledged [as] the main purpose of punishment’, and that life imprisonment ‘under sustained conditions of hardship in an isolated place or places outside of Japan’ would have been a ‘greater deterrent to men like the accused’ than ‘the speedy termination of existence on the scaffold or before a firing squad’.<sup>42</sup> Despite expressing his disagreement with some of the sentences handed down by the majority and doubt that they were ‘most likely to achieve the main purpose of punishment’, Sir Webb did not record dissent in this regard as he did not regard those penalties to be manifestly excessive or inadequate.<sup>43</sup> In the dissenting camp, Justice Röling pronounced in a similar vein on non-applicability of death penalty to those convicted of a crime against peace alone. But he was not as opposed to the supreme penalty as the President, which he considered appropriate where the convicts had also been found guilty of conventional war crimes.<sup>44</sup>

In his separate concurring opinion, Justice Jaranilla of the Philippines regarded some of the penalties as ‘too lenient, not exemplary and deterrent, and not commensurate with the gravity of the offense or offenses committed’.<sup>45</sup> He lamented that those sentences might be seen as ‘weakness and failure’, given that ‘[t]here can be and there is no comparison between national crimes and those monstrous international crimes against peace, war crimes and crimes against

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<sup>40</sup> ‘U.S.A. and Others v. Araki and Others. Separate Opinion of the President’ in Boister and Cryer, Documents on the Tokyo IMT, 637 [15], referring to Dönitz (10 years’ imprisonment), Von Neurath (15 years’ imprisonment) and Raeder (life imprisonment).

<sup>41</sup> ‘Separate Opinion of the President’ in Boister and Cryer, Documents on the Tokyo IMT, 638 [17] (‘Many international lawyers of standing still take the view that in this regard the Pact of Paris made no difference.’).

<sup>42</sup> ‘Separate Opinion of the President’ in Boister and Cryer, Documents on the Tokyo IMT, 638 [17] (also referring to the senior age of some of the accused: ‘It may prove revolting to hang or shoot such old men.’)

<sup>43</sup> ‘Separate Opinion of the President’ in Boister and Cryer, Documents on the Tokyo IMT, 639 [21].

<sup>44</sup> ‘Opinion of Member for the Netherlands (Mr. Justice Röling)’, in Boister and Cryer, Documents on the Tokyo IMT, 775 [178] (‘no one should be sentenced to death for having committed a crime against peace. Internment for life is, at this state, the appropriate punishment for this crime. [...] [Those who] should have been guilty of conventional war crimes, [...] should have been punished with the supreme penalty.’).

<sup>45</sup> ‘Concurring Opinion By the Honorable Mr. Justice Delfin Jaranilla, Member from the Republic of the Philippines’ in Boister and Cryer, Documents on the Tokyo IMT, 659 [34].

humanity which are against all mankind and which should [...] transcend national considerations if civilization is, as it should, survive.’ That said, Justice Jaranilla did not rule out the entitlement of the defendants who were incurably ill, to ‘such leniency as human conscience may permit’.<sup>46</sup> Whilst he appeared to accept both retribution and deterrence as valid justifications, the particular gravity and even monstrosity of the crime against peace to him required harsher penalties regardless of any instrumentalist considerations. Judge Jaranilla’s position therefore aligned more closely with retributivist philosophy tacitly espoused by the majority.

## 2. *UN ad hoc Tribunals*

The UN ad hoc Tribunals left behind a prolific legacy of sentencing jurisprudence. Unlike their predecessors, both the ICTY and ICTR almost invariably included dedicated paragraphs on penal rationales in their sentencing rulings.<sup>47</sup> This discussion typically constituted one of the four layers of analysis that fed into sentencing determinations. The other three, from the general to the particular, were: (i) sentencing principles applicable across all cases (individualisation, proportionality, and consistency); (ii) general practice regarding prison sentences in the former Yugoslavia and Rwanda respectively; and (iii) case-specific factors of gravity and individual circumstances going to aggravation or mitigation. The latter two were mandatory for consideration as per statutes.<sup>48</sup> The penal teleology rests on the apex of this framework, being the most abstract of the sentencing determinants.

On average, the more frequently mentioned rationales were: (a) general and special deterrence; (b) retribution; (c) public reprobation, condemnation, and stigmatisation by the international community; and (d) rehabilitation. The list was fluctuating over time and varied across chambers.<sup>49</sup> Some earlier judgments only mentioned retribution and deterrence,<sup>50</sup> or deterrence and reconciliation,<sup>51</sup> whilst others added rehabilitation and further aims.<sup>52</sup> Notably, the

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<sup>46</sup> ‘Concurring Opinion By the Honorable Mr. Justice Delfin Jaranilla’ in Boister and Cryer, Documents on the Tokyo IMT, 659 [35].

<sup>47</sup> Exceptions were rare: ICTY, Sentencing Judgement of 13 November 2001 (TC), *Sikirica et al.*, IT-95-8-S; ICTY, Judgement of 2 August 2001 (TC), *Krstić*, IT-98-33; ICTR, Judgement and Sentence of 25 February 2004 (TC), *Ntagerura et al.*, ICTR-99-46-T; ICTR, Judgement and Sentence of 28 April 2005 (TC), *Muhimana*, ICTR-95-1B-T, paras. 588-589; MICT, Judgement of 11 April 2018 (AC), *Šešelj*, MICT-16-99-A, para. 179.

<sup>48</sup> ICTY Statute, Art. 24(1) and (2); ICTR Statute, Art. 23(1) and (2).

<sup>49</sup> Noting the diversity of nomenclature, Holá, ‘Sentencing of International Crimes at the ICTY and ICTR’, 6.

<sup>50</sup> ICTR, Judgement and Sentence of 4 September 1998 (TC), *Kambanda*, ICTR-97-23-S, para. 28; ICTR, Sentence of 2 October 1998 (TC), *Akayesu*, ICTR-96-4-T, para. 19; ICTR, Sentence of 5 February 1999 (TC), *Serushago*, ICTR-98-39-S, para. 20.

<sup>51</sup> ICTR, Judgment and Sentence of 1 December 2003 (TC), *Kajelijeli*, ICTR-98-44A, para. 945; ICTR, Judgment of 17 June 2004 (TC), *Gacumbitsi*, ICTR-2001-64-T, paras. 335-336; ICTR, Judgment of 22 January 2004, *Kamuhanda*, ICTR-99-54A-T, paras. 753-755.

<sup>52</sup> ICTR, Sentence of 21 May 1999 (TC), *Kayishema and Ruzindana*, ICTR-95-1-T, para. 2 (retribution, deterrence, rehabilitation, and the protection of society); ICTY, Sentencing Judgement of 10 December 2003 (AC),

invocation of these goals was routinely justified with reference to the object and purpose of establishing the ad hoc Tribunals.<sup>53</sup> The objectives of deterrence and combatting impunity were put on an equal footing with promoting reconciliation, discovery of truth, and the restoration and maintenance of peace.<sup>54</sup>

Chambers interpreted specific rationales in ways broadly corresponding to domestic theories, albeit with occasional deviations. In a number of cases, the ICTY contrasted retribution to vengeance and, falling back on the familiar notion of ‘just deserts’, underlined that retribution implies ‘a just and appropriate punishment, and nothing more’.<sup>55</sup> The deterrent function of punishment, consisting of the discouragement from the commission of similar crimes in the future, was couched in the dual terms of general and special deterrence meant to deter unidentified potential offenders and turn the punished individual from reoffending, respectively.<sup>56</sup> The expressivist objectives of ‘stigmatisation’, ‘reprobation’, and promoting the culture of

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*Obrenović*, IT-02-60/2-S, para. 49 (retribution, deterrence, and rehabilitation); ICTR, Sentencing Judgement of 16 November 2007, *Rugambarara*, ICTR-00-59-T, para. 11 (referring to deterrence, retribution and rehabilitation as ‘relevant principles considered by the Chamber when imposing a sentence’). A string of appellate judgments specified ‘individual and general affirmative prevention’ separately from ‘individual and general deterrence’ as well as ‘reprobation’: ICTY, Judgement of 29 July 2004 (AC), *Blaškić*, IT-95-14-A, para. 678; ICTY, Judgement of 17 December 2004 (AC), *Kordić and Čerkez*, IT-95-14/2-A, para. 1073; ICTY, Judgement of 17 March 2009 (AC), *Krajišnik*, IT-00-39-A, para. 802.

<sup>53</sup> See judgments referenced in note 51; ICTY, Sentencing Judgement of 29 November 1996 (TC), *Erdemović*, IT-96-22-T, (*Erdemović I Sentencing Judgment*), paras. 57-58 (‘The International Tribunal’s objectives as seen by the Security Council – i.e. general prevention (or deterrence), reprobation, retribution (or “just deserts”), as well as collective reconciliation – fit into the Security Council’s broader aim of maintaining peace and security in the former Yugoslavia. These purposes and functions of the International Tribunal as set out by the Security Council may provide guidance in determining the punishment for a crime against humanity.’); ICTR, *Serushago* Sentence, para. 19; ICTY, Sentencing Judgement of 11 November 1999 (TC), *Tadić*, IT-94-1-Tbis-R117, (*Tadić II Sentencing Judgment*), para. 7.

<sup>54</sup> ICTY, Judgement of 10 December 1998 (TC), *Furundžija*, IT-95-17/1-T, para. 288; ICTY, *Tadić II Sentencing Judgment*, para. 7; ICTY, Sentencing Judgement of 5 March 1998 (TC), *Erdemović*, IT-96-22-Tbis, (*Erdemović II Sentencing Judgment*), para. 21 (referring to the duty ‘to contribute to the settlement of the wider issues of accountability, reconciliation and establishing the truth behind the evils perpetrated in the former Yugoslavia. Discovering the truth is a cornerstone of the rule of law and a fundamental step on the way to reconciliation: for it is the truth that cleanses the ethnic and religious hatreds and begins the healing process.’).

<sup>55</sup> ICTY, *Erdemović I Sentencing Judgment*, para. 65 (‘The Trial Chamber also adopts retribution, or “just deserts”, as legitimate grounds for pronouncing a sentence for crimes against humanity, the punishment having to be proportional to the gravity of the crime and the guilt of the accused.’); ICTY, *Kordić and Čerkez Appeal Judgment*, para. 1075 (‘retribution should not be misunderstood as a way of expressing revenge or vengeance’); ICTY, *Krajišnik Appeal Judgment*, paras. 775 and 804; ICTY, Judgement of 24 March 2000 (AC), *Aleksovski*, IT-95-14/1-A, para. 185 (‘not to be understood as fulfilling a desire for revenge but as duly expressing the outrage of the international community at these crimes’); ICTY, Judgement of 26 February 2009 (TC), *Sainović et al.*, IT-05-87-T, Vol. 3 para. 1145; ICTY, Judgement of 24 March 2016 (TC), *Karadžić*, IT-95-5/18-T, para. 6026.

<sup>56</sup> ICTY, Judgement of 10 December 1998 (TC), *Furundžija*, IT-95-17/1-T, para. 288 (‘It is not only right that *punitur quia peccatur* (the individual must be punished because he broke the law) but also *punitur ne peccatur* (he must be punished so that he and others will no longer break the law). The Trial Chamber accepts that two important functions of the punishment are retribution and deterrence.’); ICTY, *Tadić II Sentencing Judgment*, para. 7; ICTY, *Blaškić Appeal Judgment*, para. 678 fn. 1420; ICTY, Sentencing Judgement of 18 March 2004 (TC), *Jokić*, IT-01-42/1-S, para. 33; ICTY, Sentencing Judgement of 11 March 2004 (TC), *Češić*, IT-95-10/1-S, para. 25; ICTY, *Kordić and Čerkez Appeal Judgment*, paras. 1076-1078; ICTY, Sentencing Judgement of 29 June 2004 (TC), *Babić*, IT-03-72-S, para. 45; ICTY, *Krajišnik Appeal Judgment*, paras. 776 and 804; ICTY, *Sainović et al. Trial Judgment*, para. 1146; ICTY, *Karadžić Trial Judgment*, para. 6026.

respect for the rule of law have also received recognition.<sup>57</sup> Oddly, however, some judgments failed to distinguish these objectives as autonomous, presenting them instead as mere aspects or corollaries of retribution.<sup>58</sup> Likewise, some chambers subsumed expressivism-based rationales within general deterrence.<sup>59</sup> From the domestic doctrinal angle, this is a peculiar understanding of expressivism, and of retribution and deterrence for that matter, given the conflation of distinct rationales.

Furthermore, the unwieldy formula commingling prevention and didacticism was employed at times to refer to what was presented as a separate justification: ‘individual and general affirmative prevention aimed at influencing the legal awareness of the accused, the victims, their relatives, the witnesses, and the general public in order to reassure them that the legal system is being implemented and enforced’.<sup>60</sup> As follows from the Appeals Chamber’s reading, this ‘affirmative prevention’ rationale has a strong association with ‘reprobation’ or

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<sup>57</sup> ICTY, *Erdemović* I Sentencing Judgment, paras. 64 (‘One of the purposes of punishment for a crime against humanity lies precisely in stigmatising criminal conduct which has infringed a value fundamental not merely to a given society, but to humanity as a whole.’) and 65 (‘the International Tribunal sees public reprobation and stigmatisation by the international community, which would thereby express its indignation over heinous crimes and denounce the perpetrators, as one of the essential functions of a prison sentence for a crime against humanity.’); ICTY, *Obrenović* Sentencing Judgment, para. 51 (‘It is hoped that the Tribunal and other international courts are bringing about the development of a culture of respect for the rule of law and thereby deterring the commission of crimes.’).

<sup>58</sup> ICTY, *Aleksovski* Appeal Judgment, para. 185 (‘a sentence ... should make plain the condemnation of the international community of the behaviour in question and show “that the international community was not ready to tolerate serious violations of international humanitarian law and human rights”.’ Footnotes omitted); ICTY, *Češić* Sentencing Judgment, para. 23 (‘penalty thus conveys the indignation of humanity for the serious violations of international humanitarian law for which an accused was found guilty.’); ICTY, *Obrenović* Sentencing Judgment, para. 50 (‘retribution is understood as the expression of condemnation and outrage of the international community at such grave violations of, and disregard for, fundamental human rights at a time when people may be at their most vulnerable, namely during armed conflict.’); ICTY, *Jokić* Sentencing Judgment, para. 31 (‘As a form of retribution, punishment expresses society’s condemnation of the criminal act and of the person who committed it and should be proportional to the seriousness of the crimes. The Tribunal’s punishment thus conveys the indignation of humanity for the serious violations of international humanitarian law for which an accused was found guilty.’); ICTY, *Blaškić* Appeal Judgment, para. 678 fn.1421 (‘Retribution and public reprobation and stigmatisation by the international community are similar purposes in the context of punishing crimes.’); ICTY, *Šainović et al.* Trial Judgment, para. 1145 (‘As a form of retribution, the sentence serves as condemnation by the international community of the crimes committed’); ICTY, *Karadžić* Trial Judgment, para. 6026 (‘Retribution is not to be interpreted as desire for revenge or vengeance but as an expression of the outrage of the international community at the crimes committed’).

<sup>59</sup> ICTR, *Kayishema and Ruzindana* Trial Sentence, para. 2 (‘As to deterrence, this Chamber seeks to dissuade for good those who will be tempted in the future to perpetrate such atrocities by showing them that the international community is no longer willing to tolerate serious violations of international humanitarian law and human rights.’); ICTY, *Babić* Sentencing Judgment, para. 45 (‘With regard to general deterrence, imposing a punishment serves to strengthen the legal order in which the type of conduct involved is defined as criminal, and to reassure society of the effectiveness of its penal provisions.’); ICTY, *Blaškić* Appeal Judgment, para. 678 fn. 1420.

<sup>60</sup> See appeal judgments referenced in fn. 52; ICTY, Judgment of 14 January 2000 (TC), *Kupreškić et al.*, IT-95-16-T, para. 848 (‘another relevant sentencing purpose is to show the people of not only the former Yugoslavia, but of the world in general, that there is no impunity for these types of crimes. This should be done in order to strengthen the resolve of all involved not to allow crimes against international humanitarian law to be committed as well as to create trust in and respect for the developing system of international justice.’).



‘stigmatisation’ and its content is as close as it gets to expressivism.<sup>61</sup> The *Kordić and Čerkez* appeal judgment pointed out the special importance of ‘affirmative prevention’ as the sentencing purpose in international criminal law in light of the ‘the comparatively short history of international adjudication of serious violations of international humanitarian and human rights law’:

The unfortunate legacy of wars shows that until today many perpetrators believe that violations of binding international norms can be lawfully committed, because they are fighting for a ‘just cause’. Those people have to understand that international law is applicable to everybody, in particular during times of war. Thus, the sentences rendered by the International Tribunal have to demonstrate the fallacy of the old Roman principle of *inter arma silent leges* (amid the arms of war the laws are silent) in relation to the crimes under the International Tribunal’s jurisdiction.<sup>62</sup>

This rhetorical emphasis did not reverse the prominence of retributivism, with its focus on individualisation and proportionality, in favour of instrumentalism, be it education in the rule of law or deterrence.<sup>63</sup> That said, expressivism emerged in segments of sentencing case law as a kind of ultimate, catch-all objective.<sup>64</sup>

The weight to be accorded to various punishment objectives became subject of judicial dialogue as judges attempted ranking amongst them. A plethora of cases recognized the primacy of two traditional rationales: retribution and deterrence.<sup>65</sup> Initially, some trial chambers – for instance, in the *Čelebići* case – posited that deterrence is the prevalent rationale.<sup>66</sup> The Appeals Chamber accepted the importance of general deterrence but took issue with such a cate-

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<sup>61</sup> ICTY, *Krajišnik* Appeal Judgment, paras. 802 and 807 (‘The educational function of a sentence imposed by the Tribunal aims at conveying the message that rules of humanitarian international law have to be obeyed under all circumstances, and in doing so, the sentence seeks to internalise these rules and the moral demands they are based on in the minds of the public’); ICTY, *Kordić and Čerkez* Appeal Judgment, paras. 1081 (‘stigmatising the offender’s conduct and ending impunity serve the same goal pursued by affirmative general prevention: to reassure the public that the legal system has been upheld and to influence the public not to violate this legal system.’).

<sup>62</sup> ICTY, *Kordić and Čerkez* Appeal Judgment, para. 1082.

<sup>63</sup> ICTY, *Obrenović* Sentencing Judgment, para. 52 (‘One may ask whether the individuals who are called before this Tribunal as accused are simply an instrument through which to achieve the goal of the establishment of the rule of law. The answer is no.’).

<sup>64</sup> ICTY, *Obrenović* Sentencing Judgment, para. 54 (‘In conclusion, the Trial Chamber endorses these principles of punishment that readily lend themselves to promoting the rule of law and the realisation that violations thereof will not be tolerated.’).

<sup>65</sup> ICTY, Judgment of 20 February 2001 (AC), *Delalić et al.*, IT-96-21-A, 20 February 2001, para. 806; ICTY, *Kordić and Čerkez* Appeal Judgment, para. 1074; ICTY, Judgment on Sentencing Appeal of 20 July 2005 (AC), *Deronjić*, IT-02-61-S, paras. 136-137; ICTY, Judgment of 22 March 2006 (AC), *Stakić*, IT-97-24-A, para. 402; ICTY, *Deronjić* Sentencing Appeal Judgment, para. 136; ICTY, *Krajišnik* Appeal Judgment, para. 775; ICTR, Judgment of 28 November 2007 (AC), *Nahimana et al.*, ICTR-99-52-A, para. 1057; ICTY, *Karadžić* Trial Judgment, para. 6025.

<sup>66</sup> ICTY, Judgment of 16 November 1998 (TC), *Delalić et al.*, IT-96-21-T, paras. 1231 and 1234 (‘Retributive punishment by itself does not bring justice’; ‘Deterrence is probably the most important factor in the assessment of appropriate sentences for violations of international humanitarian law.’); ICTY, *Tadić* II Sentencing Judgment, para. 7.

gorical prioritisation. It repeatedly stated that deterrence ‘must not be accorded undue prominence in the overall assessment of the sentences to be imposed’.<sup>67</sup> All in all, the jurisprudence reaffirmed equal importance of retribution and deterrence without drawing a clear hierarchy.<sup>68</sup> The position was markedly different with regard to rehabilitation, which was also mentioned as the aim of punishment in numerous judgments. This rationale came to the fore especially in the guilty plea cases.<sup>69</sup> In some of these, the accused’s affirmative steps towards rehabilitation as a punishment goal, were held to be a mitigating factor.<sup>70</sup> But overall, chambers considered rehabilitation, taken in the abstract, to be subordinate to retribution and deterrence. Due to the serious nature of crimes, it was not to be accorded a predominant role in the determination of an appropriate sentence.<sup>71</sup>

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<sup>67</sup> ICTY, Judgement in Sentencing Appeals of 26 January 2000 (AC), *Tadić*, IT-94-1-A and IT-94-1-Abis, para. 48; ICTY, *Aleksovski* Appeal Judgement, para. 185; ICTY, Judgement on Sentencing Appeal of 4 February 2005 (AC), *Dragan Nikolić*, IT-94-02-A, para. 46; ICTY, *Kordić and Čerkez* Appeal Judgment, para. 1078; ICTY, *Delalić et al.* Appeal Judgement, para. 801. See also ICTY, *Babić* Sentencing Judgment, para. 45 (‘it would be unfair, and it would ultimately weaken respect for the legal order as a whole, to increase the punishment imposed on a person merely for the purpose of deterring others. Therefore, in determining the appropriate sentence, the Trial Chamber does not accord undue prominence to deterrence.’); ICTY, *Obrenović* Sentencing Judgment, para. 52; ICTY, *Češić* Sentencing Judgement, para.26; ICTY, *Jokić* Sentencing Judgement, para. 34; ICTY, *Šainović et al.* Trial Judgment, para. 1146.

<sup>68</sup> ICTY, *Furundžija* Trial Judgment, para. 288 (‘The Trial Chamber accepts that two important functions of the punishment are retribution and deterrence.’); ICTY, *Erdemović* I Sentencing Judgment, para. 64; ICTY, *Tadić* II Sentencing Judgment, para. 9 (‘The Trial Chamber shares the opinion expressed in the above-mentioned cases in respect of retribution and deterrence serving as the primary purposes of sentence.’); ICTY, *Aleksovski* Appeal Judgment, para. 185 (‘An equally important factor is retribution.’); ICTY, *Krajišnik* Appeal Judgment para. 775; ICTR, *Kayishema and Ruzindana* Trial Sentence, para. 2; ICTY, *Deronjić* Sentencing Appeal Judgment, para. 136.

<sup>69</sup> ICTY, *Babić* Sentencing Judgment, para. 46 (‘The loss of freedom, which is the form of punishment imposed by the Tribunal, provides the context for the convicted person’s reflection on the wrongfulness of his acts and may give rise to an awareness of the harm and suffering these acts have caused to others. This process contributes to the reintegration of the convicted person into society. [...] [W]hen an accused pleads guilty, he takes an important step in this process.’); ICTY, *Obrenović* Sentencing Judgment, para. 53 (‘punishment must strive to attain a further goal: rehabilitation. [...] Criminal proceedings are only the starting point; the process continues upon the return of a convicted person to society and makes an active contribution towards reconciliation. [...] [R]ehabilitation may be particularly relevant in this case, given the particular circumstances of the accused.’); ICTY, *Češić* Sentencing Judgement, paras. 27 (rehabilitation is ‘the need to take into account the rehabilitative potential of a convicted person; this will often go hands in hands with the process of reintegrating the convicted person into the society’) and 28 (‘when an accused pleads guilty, he or she takes an important step in the rehabilitation and reintegration processes.’); ICTY, *Jokić* Sentencing Judgement, paras. 35-36. Cf. ICTR, *Kambanda* Judgment and Sentence (no reference to rehabilitation despite guilty plea); ICTR, *Serushago* Sentence, para. 19 (rehabilitation mentioned as part of the discussion on mitigating circumstances but not as a punishment goal).

<sup>70</sup> ICTY, *Obrenović* Sentencing Judgment, paras. 142-146. Cf. ICTY, Judgement on Sentencing Appeal of 8 March 2006 (AC), *Momir Nikolić*, IT-02-60/1-A, para. 46.

<sup>71</sup> ICTY, *Erdemović* I sentencing judgment, para. 66 (‘the concern for [rehabilitation] must be subordinate to that of an attempt to stigmatise the most serious violations of international humanitarian law, and in particular an attempt to preclude their reoccurrence.’); ICTY, *Delalić et al.* Appeal Judgement, para. 806 (‘although both national jurisdictions and certain international and regional human rights instruments provide that rehabilitation should be one of the primary concerns for a court in sentencing, this cannot play a predominant role in the decision-making process of a Trial Chamber of the Tribunal.’); ICTY, *Stakić* Appeal Judgment, para. 402 (‘Other factors, such as rehabilitation, should be considered but should not be given undue weight’); ICTY, *Karadžić* Trial Judgment, para. 6025; ICTY, *Šainović et al.* Trial Judgement, para. 1146; ICTY, *Kordić and Čerkez* Appeal Judgment, para. 1079 (‘In the light of the gravity of many of the crimes under the International Tribunal’s

This survey brings to light a few standard, yet noteworthy, elements in the ad hoc Tribunals' treatment of punishment rationales. First, there is a noticeable variance of views and language on the normative content and significance of various justifications, and a certain sense of evolution in approach. This evolution, however, hardly fits in the neat pattern of linear development from the earlier to the later cases. There are no evident regularities, for example an ever-broadening recognition of punishment aims or the increasing detail, depth, and precision of penological analyses. The factors responsible for the variation appear to be each chamber's drafting preferences and 'path dependence' conditioned by the precedential authority of past rulings, especially those of the Appeals Chamber.<sup>72</sup> While said variations tend to confirm observations about the 'disarray' in the ad hoc Tribunals' sentencing case law,<sup>73</sup> the extent of that disarray should not be overstated considering the totality of sentencing jurisprudence. Given the sheer amount of judgments rendered over more than two decades by the ad hoc Tribunals, a glass-half-full view is warranted. The ICTY and ICTR penological ruminations are fairly consistent, or at least not as wildly inconsistent as one might be led to think.

Second, the Tribunals' penal philosophy rests on two pillars of uneven importance: domestic criminal law doctrine and the goals set for international criminal justice institutions. The Courts are indebted to the former for the classification, basic definitions, and underlying principles of the punishment rationales while the latter coloured the content of those goals and ideas about their relative importance. As shown above, the Tribunals' exegesis of retributivism, deterrence, and expressivism did not fall neatly along the lines of familiar domestic doctrines. Expressivism was occasionally 'massaged' into retribution or deterrence or both while its autonomy was recognized at different times under the labels of stigmatisation, reprobation, affirmative deterrence, and promotion of rule of law. There is little evidence of systemic thinking about the appropriateness of analogizing with domestic punishment rationales, or what their transposition to the international criminal law sphere might do to their relative weight. The interrogation of the domestic analogy did not go much further than vague allusions to the serious nature of crimes justifying the increased importance of retribution and deterrence and the reduced value of rehabilitation, and the imagery of legal order shattered by atrocities and a long history of violations of international humanitarian law.

As part of the second, somewhat thinner, pillar of institutional goals, chambers bolstered their intuitive and unquestioning adoption of teleological *rationes* mimicking the domestic

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jurisdiction, the weight of rehabilitative considerations may be limited in some cases'); ICTY, *Deronjić* Sentencing Appeal Judgement, para. 136.

<sup>72</sup> ICTY, *Aleksovski* Appeal Judgment, paras. 107 and 113-114.

<sup>73</sup> Holá, 'Consistency and Pluralism of International Sentencing', 195; Drumbl, *Atrocity, Punishment and International Law*, 65.

ones, by demonstrating their provenance in the broader mandates and socio-political objectives pursued by the establishment of the Tribunals. This led to a partial conflation of distinct sets of objectives associated with different tiers of the international criminal law teleology (for example, deterrence as the objective of establishing courts *v.* deterrence as the punishment goal). This made it easy to assume a causal link between the two non-equivalent objectives, such as that punishment *per se* promotes peace-building and reconciliation – in itself a far-fetched and empirically dubious assertion.<sup>74</sup> More generally, one is left to wonder what the teleological considerations of the Tribunals' mandate-sponsors add to the validity of traditional punishment aims, and how institutional mandates inform the content of, and prioritisation among, the different rationales.

Third, the practical import of penal objectives in sentencing determinations is another murky area. In the Tribunals' judgments, the discussion of the goals of punishment is placed at the top of the sections devoted to the determination of appropriate sentence (or the appeals therefrom). Judges occasionally proclaimed that punishment goals serve as a framework or 'matrix' when determining the appropriate sentence.<sup>75</sup> But except for a few guilty plea cases alluding to rehabilitation more than once, those rationales were typically *not* revisited again when reviewing sentencing factors and determining the penalty.<sup>76</sup> The individual or combined effect of penal rationales on the application of sentencing principles and on the weight accorded to various aggravating and mitigating circumstances are far from self-evident. It is uncertain what guidance, if any, judges draw from the aims of punishment in the exercise of their broad sentencing discretion, and how a greater, equal, or no emphasis on retribution, deterrence, or reprobation ultimately informed the sentence *calculi*.<sup>77</sup>

Instead, the penalties were calculated primarily by weighing the gravity of the crimes and individual circumstances going to mitigation or aggravation. National sentencing practice was taken into account, and a horizontal comparison across cases could be made to prevent disparity in giving effect to the principle of consistency commanding that comparable crimes be

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<sup>74</sup> See also Bagaric and Morss, 'International Sentencing Law', 208.

<sup>75</sup> ICTY, *Tadić* II Sentencing Judgment, para. 9; ICTY, *Kordić and Čerkez* Appeal Judgment, paras. 1083 ('All the above mentioned sentencing purposes constitute the matrix in which the proportionate sentence is meted out, based on the sentencing factors as provided for in Article 24 of the Statute and Rule 101 of the Rules.').

<sup>76</sup> Similarly, Holá, 'Consistency and Pluralism of International Sentencing', 195 (sentencing goals are often listed 'with no further discussion of what those objectives entail and how they should influence sentence determination in individual cases' and 'affect neither the structure of the further sentencing argumentation nor the factors the judges emphasize when meting out sentences.').

<sup>77</sup> See also Holá, 'Sentencing of International Crimes at the ICTY and ICTR', 6 (unclear 'how exactly individual sentencing aims inform sentence determination').

punished alike if relevant circumstances are substantially similar.<sup>78</sup> Although previous sentencing practice was not binding, it served as a guiding factor with its practical utility arguably being more tangible than that of abstract sentencing goals.<sup>79</sup> The sentence determination method was more casuistic and analogical than deductive. The little concrete value of abstract punishment rationales is amply demonstrated by the fact that the ICTY and ICTR were not handicapped in any way when sentencing convicts without prior consideration of the aims of punishment in some cases.<sup>80</sup>

### 3. Hybrid Courts: SCSL and ECCC

The sentencing practice of select internationalized tribunals – the Special Court for Sierra Leone (SCSL) and the Khmer Rouge Tribunal (ECCC) – warrants a brief review, if only to underscore that their penal approaches generally tracked that of the ad hoc Tribunals. The SCSL and ECCC sentencing judgments contain copious references to the ICTY and ICTR case law, which in the case of the SCSL has a statutory basis.<sup>81</sup>

The SCSL trial chambers recognized retribution, deterrence and rehabilitation as the main sentencing purposes,<sup>82</sup> with the former two assuming primacy.<sup>83</sup> The goal of rehabilitation, despite being a ‘relevant factor in sentencing’, was deemed to have a more limited weight in the context of international criminality than in domestic jurisdictions.<sup>84</sup> The SCSL justices admitted that these rationales were derived directly from the national domain,<sup>85</sup> and frequent references to domestic penal doctrine are evidence of that.<sup>86</sup> The broader societal objectives

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<sup>78</sup> ICTY, *Delalić et al.* Appeal Judgement, paras. 756-759 (on consistency in punishment as ‘[o]ne of the fundamental elements of any rational and fair system of criminal justice’ and ‘an important reflection of the notion of equal justice’ as the foundation of public confidence in courts).

<sup>79</sup> ICTY, *Furundžija* Appeal Judgement, para. 250 (‘A previous decision on sentence may indeed provide guidance if it relates to the same offence and was committed in substantially similar circumstances; otherwise, a Trial Chamber is limited only by the provisions of the Statute and the Rules.’); ICTY, *Šainović et al.* Trial Judgment, para. 1143.

<sup>80</sup> See judgments referenced in note 47.

<sup>81</sup> Art. 20(3) of the SCSL Statute directed the SCSL appeal judges to seek guidance from the ICTY and ICTR Appeals Chamber’s decisions. Moreover, the SCSL trial chambers were obliged to ‘have recourse to the practice regarding prison sentences’ in the ICTR and Sierra Leonean national courts when determining the terms of imprisonment: SCSL Statute, Art. 19(1).

<sup>82</sup> SCSL, Sentencing Judgement of 19 July 2007 (TC), *Brima et al. (AFRC)*, SCSL-04-16-T, para. 14 (referring to the ICTY and ICTR case law); SCSL, Judgment on the Sentencing of Moinina Fofana and Allieu Kondewa of 9 October 2007 (TC), *Fofana and Kondewa (CDF)*, SCSL-04-14-T, para. 26; SCSL, Sentencing Judgement of 8 April 2009 (TC), *Sesay et al. (RUF)*, SCSL-04-15-T, paras. 13-14; SCSL, Sentencing Judgement of 30 May 2012 (TC), *Taylor*, SCSL-03-01-T, paras. 13-15.

<sup>83</sup> *RUF* sentencing judgment, para. 13; Judgment, *Fofana and Kondewa (CDF)*, SCSL-04-14-A, AC, SCSL, 28 May 2008, para. 532; *Taylor* sentencing judgment, para. 13.

<sup>84</sup> SCSL, *CDF* Sentencing Judgment, para. 28; SCSL, *RUF* Sentencing Judgment, para. 16; SCSL, *Taylor* Sentencing Judgment, para. 15.

<sup>85</sup> SCSL, *RUF* Sentencing Judgment, para. 12.

<sup>86</sup> SCSL, *CDF* Sentencing Judgment, para. 27 (adopting the definition of retribution as stated by Lamer J of the Supreme Court of Canada).

pursued through the establishment of the SCSL mentioned in the UN Security Council Resolution 1315 (2000) – ending impunity and contributing to the process of national reconciliation and to the restoration and maintenance of peace – were also deemed relevant when meting out punishments.<sup>87</sup>

Like the ICTY and ICTR, the SCSL dissociated retribution from the desire for revenge and saw it as the way of ‘expressing the outrage of the national and international community’ at the crimes that must reflect a fair and balanced approach to punishment and translate in an individualized and proportionate penalty.<sup>88</sup> The SCSL trial chambers also emphasized that penalties must be such as to deter others from committing similar crimes in the future and to prevent criminal conduct by the convicted person, including by incapacitating or restraining him.<sup>89</sup> In endorsing some of the ad hoc Tribunals’ statements, the expressivism-based goals of promoting legal awareness and ensuring the universal acceptance of international criminal law proscriptions, were at times presented as aspects of either retributivism or deterrence.<sup>90</sup> Following the lead of the Appeals Chamber in the *CDF* case, the autonomous objective of denouncing the crimes in question as unacceptable (‘reflect[ing] revulsion of the international community’) emerged as paramount in later jurisprudence.<sup>91</sup> Like at the ad hoc Tribunals, the sentencing objectives did not make repeated appearance in judgments’ sections determining individual sentences. Despite rhetorical assurances that sentence calculation takes into account ‘all of the factors that are likely to contribute to achievement of these objectives’,<sup>92</sup> the practical effects of penal teleology on sentence calculations were anything but clear cut.

Turning to the ECCC, its sentencing regime ‘in the books’ is highly indeterminate. The ECCC Agreement and Law merely provide for the minimum (five years’ imprisonment) and maximum penalty (life imprisonment) and are silent on the issues of sentencing objectives, principles, and factors.<sup>93</sup> Accordingly, the ECCC chambers had to seek guidance in the inter-

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<sup>87</sup> SCSL, *CDF* Sentencing Judgment, para. 29; SCSL, *Taylor* Sentencing Judgment, para. 12.

<sup>88</sup> SCSL, *AFRC* Sentencing Judgment, para. 15; SCSL, *CDF* Sentencing Judgment, paras. 26 and 31; SCSL, *RUF* Sentencing Judgment, para. 13; SCSL, *Taylor* Sentencing Judgment, para. 13.

<sup>89</sup> SCSL, *AFRC* Sentencing Judgment, para. 16; SCSL, *CDF* Sentencing Judgment, para. 26; SCSL, *RUF* Sentencing Judgment, para. 13; SCSL, *Taylor* Sentencing Judgment, para. 14.

<sup>90</sup> SCSL, *CDF* Sentencing Judgment, para. 30.

<sup>91</sup> SCSL, *CDF* Appeal Judgment, para. 565; see also paras. 561 (‘In exercising its sentencing discretion, the Appeals Chamber re-emphasizes that it is an international court with responsibility to protect and promote the norms and values of the international community.’) and 564 (‘What should be one of the paramount considerations in the sentencing of an accused person convicted of crimes against humanity and war crimes is the revulsion of mankind, represented by the international community, to the crime and not the tolerance by a local community of the crime.’). See SCSL, *RUF* Sentencing Judgment, para. 15; SCSL, *Taylor* Sentencing Judgment, paras. 14 and 16.

<sup>92</sup> SCSL, *Taylor* Sentencing Judgment, para. 17.

<sup>93</sup> ECCC Agreement, Art. 10; ECCC Law, Art 38-39new. See also ECCC, Judgement of 26 July 2010 (TC), *Kaing Guek Eav (Duch)*, 001/18-07-2007/ECCC/TC, para. 575 and 577 (noting that the legal instruments ‘do not

national and Cambodian legal frameworks and in sentencing practice in comparable cases before international courts.<sup>94</sup> The ECCC penological analyses have indeed relied heavily upon the sentencing jurisprudence of the ad hoc Tribunals.

Both of the ECCC trial judgments rendered to date in Cases 001 and 002/01, foreground expressivist and retributivist philosophy.<sup>95</sup> The *Duch* trial judgment did not specifically consider deterrence. In increasing Duch's sentence from 35 years to life imprisonment, the Supreme Court Chamber underscored the importance of this rationale, next to retribution, considering the gravity of crimes.<sup>96</sup> Case 002/01 trial judgment mentioned deterrence, 'both to the accused and more generally'.<sup>97</sup> Rehabilitation was not mentioned as a punishment objective but as a mitigating circumstance of limited weight.<sup>98</sup>

With respect to expressivism-based justifications, the ECCC Trial Chamber reaffirmed that by 'reducing crimes of considerable enormity into individualised sentences', it sought to reassure the victims and broader public that 'the law is effectively implemented and enforced' and 'to convey the message that globally-accepted laws and rules have to be obeyed by all, irrespective of status or rank'.<sup>99</sup> Replicating the ICTY and ICTR discourse on retribution, the ECCC held that an 'obvious function' of a sentence is to punish, not to exact revenge. Hence, punishment must satisfy the requirements of equality before the law, proportionality and individualisation in reflecting 'the culpability of the accused based on an objective, reasoned and measured analysis both of his or her conduct and its consequential harm' – the principles also reflected in Cambodian law.<sup>100</sup>

Overall, the ECCC sentencing discussions replicate the arguments and follow paths treaded by other courts. The Tribunal did not care to reflect on whether its unique circumstances, not least the passage of almost four decades since the crimes took place and the senior age

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indicate whether sentencing before the ECCC is governed by international or Cambodian legal rules, or some combination of each' and ruling out 'the direct application of Cambodian sentencing provisions').

<sup>94</sup> ECCCC, *Duch* Trial Judgment, para 578; ECCC, Appeal Judgement of 3 February 2012 (SCC), *Kaing Guek Eav (Duch)*, 001/18-07-2007-ECCC/SC, para. 374; ECCC, Case 002/01 Judgement of 7 August 2014 (TC), *Nuon Chea and Khieu Samphan*, 002/19-09-2007/ECCC/TC, para. 1066.

<sup>95</sup> At the time of revising this Chapter before publication, the ECCC is yet to issue the full written judgment in Case 002/02 whereby it sentenced Nuon Chea and Khieu Samphan to another term of life imprisonment. The available summary of the judgment does not mention the goals of punishment as part of the sentencing *desiderata*, over and above the considerations relating to 'the gravity of the crimes, including their scale and brutality as well as the number and vulnerability of victims ... as well as relevant aggravating and mitigating circumstances.' ECCC, Summary of Judgement of 16 November 2018 (TC), *Nuon Chea and Khieu Samphan*, 002/19-09-2007/ECCC/TC, para. 71.

<sup>96</sup> ECCC, *Duch* Appeal Judgment, paras. 380 and 382.

<sup>97</sup> ECCC, Case 002/01 Trial Judgement, para. 1067.

<sup>98</sup> ECCC, *Duch* Trial Judgment, para 611; ECCC, *Duch* Appeal Judgment, para. 370.

<sup>99</sup> ECCC, *Duch* Trial Judgment, para 579; ECCC, Case 002/01 Trial Judgement, para. 1067.

<sup>100</sup> ECCC, *Duch* Trial Judgment, paras. 780-781; ECCC, Case 002/01 Judgement, para. 1067.

and physical condition of the convicts, could or should affect the relative relevance of goals such as denunciation, rehabilitation, and deterrence.

#### 4. *International Criminal Court*

The ICC legal framework departs from the ad hoc Tribunals' legal regimes in several important respects. It limits the definite term of imprisonment to 30 years and allows for supplementary penalties (fines and forfeiture of ill-gotten gains).<sup>101</sup> It also provides for the far more detailed guidance for determination of sentences,<sup>102</sup> including specification of mitigating and aggravating circumstances and a non-exhaustive list of additional factors to be taken into account, over and above the gravity of the crime and individual circumstances of the convict.<sup>103</sup> Indeed, this amounts to a 'comprehensive scheme for the determination and imposition of a sentence',<sup>104</sup> particularly compared to the skeletal sentencing regimes elsewhere. The ICC's sentencing practice thus far spans five 'Article 76 decisions' four of which concern core crimes and one offences against administration of justice (Article 70). As a matter of design, all judgments include pronouncements on punishment rationales.

Since Articles 77-78 of the Statute are silent on the issue, the chambers have uniformly drawn penal objectives from the Preamble. It states that 'the most serious crimes of concern to the international community as a whole must not go unpunished', and that the states parties are '[d]etermined to put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention'.<sup>105</sup> Trial Chambers have construed this language as giving rise to the dual rationale, or the primary objectives, of retribution and deterrence.<sup>106</sup> The *Lubanga* Trial Chamber paid limited attention to the punishment rationales, whilst the *Katanga* and *Bemba* Chambers' analyses went further. The *Katanga* Chamber held that the sentence must respond to 'the legitimate need for truth and justice voiced by the victims and their family members' and thus play a two-fold role: (i) punitive, as 'the expression of society's condem-

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<sup>101</sup> ICC Statute, Art. 77.

<sup>102</sup> ICC Statute, Art. 78(1) and ICC RPE, Rule 145.

<sup>103</sup> ICC RPE, Rule 145(1)(c) and (2). For the sentencing procedure at the ICC, see the contribution by Gerhard Werle and Aziz Epik in this Volume.

<sup>104</sup> ICC, Judgment on the appeals of the Prosecutor and Mr Thomas Lubanga Dyilo against the 'Decision on Sentence pursuant to Article 76 of the Statute' of 1 December 2014 (AC), *Lubanga*, ICC-01/04-01/06-3122, para. 32.

<sup>105</sup> ICC Statute, Preamble, paras. 4-5.

<sup>106</sup> ICC, Decision on Sentence pursuant to Article 76 of the Statute of 10 July 2012 (TC), *Lubanga*, ICC-01/04-01/06-2901, para. 16; ICC, Decision on Sentence pursuant to article 76 of the Statute of 23 May 2014 (TC), *Katanga*, ICC-01/04-01/07-3484-tENG, para. 37 ('the sentence should act as a deterrent'); ICC, Decision on Sentence pursuant to Article 76 of the Statute of 21 June 2016 (TC), *Bemba*, ICC-01/05-01/08-3399, para. 10 ('the Preamble establishes retribution and deterrence as the primary objectives of punishment at the ICC. '); ICC, Judgment and Sentence of 27 September 2016 (TC), *Al Mahdi*, ICC-01/12-01/15-171, para. 66. See also *Bemba II* Article 76 decision, para. 19.



nation of the criminal act and of the person who committed it' and 'a way of acknowledging the harm and suffering caused to the victims' that would restrain any desire to exact vengeance; and (ii) deterrent, aiming to 'deflect those planning to commit similar crimes from their purpose'.<sup>107</sup> In the view of the *Katanga* Chamber, the severity of the sentence is less important than its inevitability. The subsequent sentencing decisions in *Bemba*, *Al Mahdi*, and *Bemba II* defined retribution and deterrence in comparable terms.<sup>108</sup>

Characteristically, and in line with the ad hoc Tribunals' discourse, the *Katanga*, *Bemba*, and *Al Mahdi* Chambers drew a connection between sentencing and desired socio-political effects of the ICC's operation. The sentence should reflect, they stated, 'the degree of culpability while contributing to the restoration of peace and reconciliation in the communities concerned'.<sup>109</sup> Chambers also held that the sentence may additionally facilitate the reintegration of the person into society, but that this cannot be regarded as a primordial goal since the sentence on its own cannot ensure social reintegration.<sup>110</sup> The latter point is indisputable but, following the same logic, the objectives such as contribution to peace and reconciliation and general deterrence should not enjoy emphasis either: an individual sentence alone cannot bring about said positive societal outcomes. Regardless, the *Katanga* Chamber ultimately did accord some weight to mitigating factors, namely Germain Katanga's young age at the time of the crime, and his family, which the judges regarded 'likely to make rehabilitation and reintegration easier'.<sup>111</sup> Similarly, the Trial Chamber took Al Mahdi's admission of guilt and cooperation with the prosecution as an indication that he would 'likely successfully reintegrate into society', thus according a limited weight to this circumstance.<sup>112</sup>

One incongruity in the ICC sentencing jurisprudence to date relates to the treatment of punishment objectives in the context of sentencing for Article 70 offences. The *Bemba II* Chamber held the 'primary purpose' of retribution and deterrence to be applicable to sentencing under Article 70, since that provision 'seeks to protect the integrity of the proceedings before the Court by penalising the behaviour of persons that impedes the discovery of the

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<sup>107</sup> ICC, *Katanga* Article 76 decision, para. 38.

<sup>108</sup> ICC, *Bemba* Article 76 decision, para. 11; ICC, *Al Mahdi* judgment and sentence, para. 67; ICC, *Bemba II* Article 76 decision, para. 19 (on deterrence: 'a sentence should be adequate to discourage a convicted person from recidivism (specific deterrence) as well as to ensure that those who would consider committing similar offences will be dissuaded from doing so (general deterrence)').

<sup>109</sup> ICC, *Katanga* Article 76 Decision, para. 38; ICC, *Bemba* Article 76 Decision, para. 11; ICC, *Al Mahdi* Judgment and Sentence, para. 67.

<sup>110</sup> ICC, *Katanga* Article 76 Decision, para. 38; ICC, *Bemba* Article 76 Decision, para. 11 ('Rehabilitation is also a relevant purpose [but it] should not be given undue weight.');

<sup>111</sup> ICC, *Al Mahdi* Judgment and Sentence, para. 67. See also ICC, Decision on Sentence pursuant to Article 76 of the Statute of 22 March 2017 (TC), *Bemba et al. (Bemba II)*, ICC-01/05-01/13-2123-Corr 22-03-2017, para. 205.

<sup>112</sup> ICC, *Katanga* Article 76 Decision, paras. 38 and 144.

<sup>112</sup> ICC, *Al Mahdi* Judgment and Sentence, para. 97.

truth, the victims' right to justice and, generally, the Court's ability to fulfil its mandate'.<sup>113</sup> The logic behind this transposition of sentencing rationales for Article 70 offences from the Preamble of the Statute, which only refers to the core crimes, is questionable, and so is the automatic equation of punishment justifications for both categories of offences. It is problematic that the Chamber did not care to properly consider other goals in this distinct legal policy context. The autonomous objective of expressing condemnation of the obstruction of ICC justice appears no less valid than deterrence or retribution. Nor is there an apparent reason to tacitly discard the objective of rehabilitation.<sup>114</sup> This objective tends – rightly or wrongly – to be attributed reduced weight in the sentencing for core crimes. If the nature of the crime is accepted as the ground for downgrading this rationale, one cannot assume its total irrelevance as a justification of punishment for criminal interference with the administration of justice. Unless the individual circumstances of the offender indicate otherwise, he should in principle be regarded as being susceptible to re-education, able to redeem himself, and capable of successful reintegration in the society.

### *5. Contours of Judicial Discourse*

This broad-brush view of the tribunals' sentencing *acquis* provides insights into their punishment philosophy. The way teleological reflections are presented in the judgments, and their subsequent (non-)use in sentencing determinations, throws light on the motives for the courts to engage in this discussion. This helps distinguish the actual reasons for punishment from the reasons for which courts *say* they punish. But first, it is worthwhile noting some of the characteristic features of judicial treatment of punishment justifications in different jurisdictions.

First, all of the courts have uniformly and without reservation imported domestic rationales into their sentencing case law, as part of the criminal law doctrine, without ever seriously questioning their suitability in the international criminal law context. Not much has been made of the extraordinary nature of core crimes, other than their exceptional gravity underscoring the special importance of retribution and deterrence, and making rehabilitation the least weighty of the goals. The focus on the extreme gravity of the crimes, combined with intermittent enforcement of international law in the past, resulted in a rather subtle foregrounding of the objectives such as the expression of the international community's condem-

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<sup>113</sup> ICC, *Bemba II* Article 76 Judgment, para. 19.

<sup>114</sup> The Appeals Chamber did not find, however, that the Trial Chamber entirely disregarded the rehabilitation goal since it did refer to the Main Case judgment and other cases in which reference was made to that objective: ICC, *Bemba II* Sentencing Appeal Judgment, para. 205. This is puzzling as the *Bemba II* Trial Chamber did not mention rehabilitation, much less considered it in the context of the case.

nation of the crimes and reinforcement of the culture of respect for the rule of law. However, such acknowledgments have not been particularly pronounced or systematic. Expressivism has often been presented as an aspect of either retribution or deterrence, thereby stretching and distorting the traditional understanding of those rationales without further argument.

Second, the tribunals sought to alleviate the conceptual discomfort arising from the direct transposition of domestic rationales into their penal realm. They attempted to bolster the validity of those rationales by grounding them in the intentions of their architects and by linking them to the socio-political objectives of international criminal justice. The judges often pointed to the alignment between the punishment goals and their own institutional mandates of fighting impunity, mass atrocity prevention, justice for the victims, and reconciliation. But it was never clear what substantive influence those objectives have on the scope and interpretation of traditional sentencing purposes, and how the former inform the balancing and prioritisation amongst them. This linkage between the aims of setting up courts and the punishment rationales muddled together the analogous yet qualitatively distinct sets of objectives situated on the different planes of international criminal law teleology, leading to occasional attribution to criminal punishment of objectives it is neither meant nor necessarily suitable to serve directly, such as reconciliation and peace-making. The presumed causality between the institutional and the penal objectives, to the effect that punishment is meant to automatically promote atrocity prevention, reconciliation, and peace, is an article of faith that is empirically impeachable.

Third, when it comes to the hierarchy of objectives, the sentencing jurisprudence has mostly placed the deterrent and the retributive rationales on an equal footing. Attempts to rank one higher than the other did not survive appeal. Rehabilitation was consistently rated as less important. However, in a handful of cases, which were disposed of consensually, this goal came to bear upon sentencing determinations; not directly but rather through a consideration of mitigating factors. Curiously, deterrence and retribution were invariably seen as concomitant and complementary justifications, rather than as competing objectives and philosophies.<sup>115</sup> Despite the existence of hybrid theories in the domestic field, most accounts care to keep deterrent and retributive justifications apart. International sentencing jurisprudence, however, routinely views retributivism and consequentialism as two sides of the same coin and occasionally fuses them into a single master rationale. Thus, the *Katanga* Chamber referred to the two-

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<sup>115</sup> See also Bagaric and Morss, 'International Sentencing Law', 208 ('an unhappy mix of different theories of punishment (utilitarian and retributive) and [...] no attempt to rank the corresponding, often competing, goals stemming from the respective theories.')

fold (retributive and deterrent) role of a sentence and the *Bemba II* Chamber labeled them as one ‘purpose’ in the singular.

Fourth, the practical value of punishment teleology is uncertain and difficult to gauge. The apparent effect the goals of punishment, individually or in combination, have had on the sentencing *calculi* in specific cases is limited because they provide judges only with highly abstract and inconclusive guidance for meting out individual punishments. The punishment rationales indirectly inform the sentencing methodology through the imposition of general principles; in particular, the retributivist framework commands a mandatory focus on proportionality and individualisation. Sentences are calculated based on gravity of the crime along with any aggravating or mitigating circumstances, possibly adjusted in light of the national sentencing practice and/or sentences meted out in similar cases by international tribunals. The sentencing approach is casuistic as chambers consult and compare cases from different tribunals to punish comparable crimes alike in avoidance of disparity. The judges are adamant that other courts’ sentencing practice is not binding and its persuasive value is limited due to differences between sentencing provisions.<sup>116</sup> Even so, the actual effects of such practice are more tangible than that of penal teleology. Hence the more predominant sentencing method is analogy, not deduction from the abstract penal rationales.

The fifth observation goes to the form which the discussion of punishment purposes takes in sentencing judgments. The prevalent majority of rulings contain such a discussion, but the purposes of punishment are typically given short shrift. The analysis is mostly perfunctory and *pro forma*, as if the chambers felt compelled to include it only to comply with some drafting conventions, ‘ticking the box’ and moving on to the more important determinants, without the teleological reflections being truly material. More than any other, perhaps, this area of jurisprudence is a reign of unanimity, with little to no (appellate) litigation and debate among judges, chambers, and tribunals. The degree of repetition and copy-paste is striking. Identical language migrates from one judgment to another. The same mantras and tired formulas are used over and over again, possibly with a few, if any, cosmetic modifications owed to each bench’s stylistic preferences. It strains reality to contend there has been an evolution of judicial philosophy of international punishment ‘from Nuremberg to The Hague’ and beyond. The only sign of progression from Nuremberg to modern courts is the now-established practice of stating rationales expressly. But otherwise the judges are comfortable rehashing the same lan-

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<sup>116</sup> E.g. ICC, *Lubanga* Sentencing Appeal Judgment, paras. 76-77; ICC, *Al Mahdi* Judgment and Sentence, para. 107.

guage used by their predecessors and preaching the old dogmas in reaffirming the validity of the stated punishment goals through hypnotic repetition.

### **III. What Courts Do: Beneath the Surface of Judicial Penology**

What should be made of the courts' engagement with punishment teleology and its usage in sentencing? Do the persistent and formulaic assurances that perpetrators of international crimes are punished for the sake of retribution and deterrence constitute a meaningful answer to the 'why punish' question? One should be cautious to take the judicial narrative at face value. The declared reasons for submitting perpetrators to punishment might not be the actual or all reasons the courts have in mind when doing so. This Section looks at the judicial discourse through the binary lens of the two readings of the question highlighted above. As noted, the first reading (*why* punish?) enquires what theory or theories may account for the act of punishment the need for which is a given, whilst the second (*why punish?*) interrogates the very idea of punishment as a mandatory consequence of individual guilt.

#### *1. Sentencing Performativity: Expressivism as Meta-Justification*

To recap, on the first rendition of the question, the tribunals have consistently fallen back on an array of retributive and consequentialist justifications, treating them as complementary. Episodically the judges construed the orthodox rationales broadly in a way subsuming expressivist justifications, and cited further goals ('affirmative deterrence') whose relationship with the former rationales was uncertain. While the abundance of penal objectives acknowledged in the jurisprudence could be taken as a solid foundation for international punishment, this is not necessarily the case. In their penal imaginations, the tribunals have been unwilling to arbitrate between potentially incompatible philosophies, preferring instead to have their cake and eat it too. Despite occasional flirtation with goals other than retribution and deterrence, jurisprudence contributes little by way of original thought to international penology and sentencing. Standard turns of speech are used by different chambers and tribunals in conveying unimpeachable truths about the meaning and importance of traditional objectives. This gives an impression that, in the courts' collective view, there is not much more to be said about philosophy of international punishment. Judges certainly do not treat '*why* punish?' as a question calling for genuine inquiry but rather as a mandatory occasion to press upon their audiences the messages of retribution and deterrence as the normative pillars of international criminal justice.

The rhetoric in sentencing rulings exposes the normative positions championed by the judges, but it hardly works as a credible descriptive account of what the tribunals actually do when meting out punishment. Deterrence and retribution are the main reasons the courts *say* they punish for but are not necessarily the primary reasons for which they *do so* and which can explain fully the act of punishment. The penological discourse is illuminating in less evident ways. The standard restatements of retributive and deterrent purposes suggest that a certain performativity is at work. This impression is further strengthened if one considers the unabashed rehearsal of the same language from one judgment to another, especially in the apparent absence of any practical utility. Ceremonial and self-referential restatements of retributivism and deterrence accompanying each act of punishment, are speech acts whereby judges deliberately perform and perpetuate the criminal law dogmas – that punishment must be imposed because it is deserved by a guilty wrongdoing, and because this is the (only) way to deter the recurrence of such crimes in the future.

This performativity of judicial discourse accreting around the punishment ritual lends support to expressivism as the primary purpose and meta-justification of penalty.<sup>117</sup> Considering the form judicial discourse has taken, expressivism can best explain what international criminal jurisdictions are doing when they punish. By elaborating on the penal objectives in sentencing judgments, courts seek to reproduce and reinforce the normative belief system upon which the enterprise of international criminal prosecutions rests, and to propagate its commandments. Punishment is inflicted, first and foremost, for the sake of this effort to educate the convict, other potential offenders, their communities, and the audiences at large about the unacceptability of violating the international criminal law norms. The act is motivated by the need to teach a lesson in retribution and deterrence, thereby reinstating faith in the rule of law and the authority and enforceability of the norms. In other words, the courts seek ‘to demonstrate that the status and its claim of law are superior to the criminal who claims the power to do wrong’.<sup>118</sup> Judges in fact have limited means of knowing and showing whether the penalty fits the bill of gravity and ‘just deserts’, much less whether it would serve effectively as a specific or general deterrent. By way of describing what courts do, as opposed to what they proclaim normatively, the standard penal objectives are secondary to didacticism. Retribution and deterrence are the substance of the didactic message, but that message itself is the actual

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<sup>117</sup> For influential accounts in domestic criminal law theory, see J. Feinberg, ‘The Expressive Function of Punishment’ in J. Feinberg, *Doing and Deserving: Essays in the Theory of Responsibility* (Princeton, NJ: Princeton University Press, 1974); A. Duff, *Punishment, Communication, and Community* (Oxford: Oxford University Press, 2001).

<sup>118</sup> G. Fletcher, *The Grammar of Criminal Law: American, Comparative, and International* (Oxford: Oxford University Press, 2007), 223.

motive of punishment, or its meta-justification. That the very point of conveying the message is didactic explains a curious position expressivism holds in the jurisprudence, its simultaneous ubiquity and out-of-placeness. It makes sense then that this objective is a constant leitmotif in the judicial constructions and deployment of other, nominal ‘primary’ rationales.

## *2. Disciplinary Identity and Discursive Constraints*

The second reading of the question (‘why *punish*’?) is an upheaval in the idea of international criminal punishment. This issue is settled by default and irreversibly once a political decision is reached to unleash a *criminal* justice institution as a way to deal with a crisis in which crimes have been committed, as opposed to dispatching a truth and reconciliation commission or inquiry, grass-roots justice mechanism, or a mass claims process. As it is beyond judicial purview to comment on the expediency of that decision, it is natural that international criminal jurisprudence has remained blind to non-penal alternatives. The tribunals have been able neither to acknowledge ‘why *punish*?’ as a genuine question, nor to attempt to answer it in earnest. Their identity as the creatures of the liberal criminal law would be compromised if this were any different.

The criminal law paradigm comes in a package with a fixed system of convictions about the relevance of punishment objectives and with curtailed imaginations and limited instrumentalities. The available penalties and penitentiary arrangements are interwoven with the disciplinary DNA of the criminal law. A challenge to the idea of punishment as an inescapable consequence of a criminal act is an attack on the basic idea of criminal law, which cannot be interrogated ‘from within’ the system. Therefore, demands for a more open-minded and creative or inquisitive approach on the part of the tribunals are bound to fall on deaf ears. The judges can only treat the second reading of ‘why *punish*?’ as a non-question; it is not answerable from within the punitive paradigm to which the courts are confined. Judges are there to preach, not to apostatize. The judicial function is to reassert the inflexible preference for punishment over alternatives as per the legalist script, and thus sentencing jurisprudence brings into sharper relief the rigid contours of international criminal law’s identity. As an enterprise and a discipline, it operates under methodological constraints which curb its receptivity to counterarguments from ‘outside the box’ challenging the axioms at the heart of the belief system it embodies. The validity of retribution and deterrence is the unassailable truth, not a dis-

cussion point or a claim in need of defence. This remains so even in the face of hard data suggesting that criminal punishment falls short in delivering on the goals it is meant to pursue.

The fact-driven contestations of the tribunals' penal ideology are exemplary of the growing tension between the 'normative' and the more recent 'empirical' strands in the discipline vying for control over its methodological apparatus. The dynamics between the two strands are permeated by mutual neglect and irrelevance. The 'empirical turn' in international criminal law has the potential of generating evidence that can refute or confirm its normative certitudes, not least the adequacy of goal-setting or real-life effects in terms of prevention, reconciliation, and peace. The tribunals' perfunctory and reiterative affirmations of sentencing rationales ring hollow to sceptics questioning whether punishment is the sole justified response. Such assurances can also be dismissed as self-serving: judges indulge in self-legitimation. While sceptics demand empirical proof for the deterrence claim or adduce countervailing evidence themselves, what they are railing against are quasi-religious beliefs immune to hard data. The degree to which the believers in the 'normative camp' are willing and able to engage with empirical arguments is negligible.

The point that criminal law is a normative enterprise is sometimes lost on the empiricists. In its ideological framework, punishment goals do not have to be empirically-grounded and achievable to retain validity – and this often holds as a justification of international criminal justice more broadly. Whenever arguments are made and evidence is adduced that goals are ill-chosen and means to achieve them ill-suited (punishment does not deter, reconcile, promote peace, or graft the rule-of-law culture), this is an attack at the article of faith that for 'normativists' is beyond question and beyond proof. They will resist or ignore findings going against the tide of their convictions. Even the opportunistic acceptance of empirical evidence in line with those convictions is but a form of ideological and cognitive resistance and does not displace the assumptions. Evidence confirming the deterrent effect would be taken as a concession that the faith in deterrence was correct all along, without making that faith itself dependent on any evidence.

As the adherents of both camps are likely to stick to their guns, it would greatly benefit the conversation if they were to be more aware of each other's ideological premises and methodological blind spots. Otherwise, they are bound to continue talking at cross purposes.

#### **IV. Conclusion**

This Chapter has explored how international criminal judges have engaged with the question of why those responsible for international crimes should be submitted to punishment. Without



intending to produce a coherent normative theory of punishment for international criminal law – the project for another day –, the objective was merely observational and analytical: first, drawing the contours of penological discourse the tribunals have conducted as part of their collective endeavour to justify the penalties and, second, making sense of the reasons why that discourse shaped up being what it is. The examination of the jurisprudence proceeded with a keen eye to the two readings of the main question: the one attentive to the stated justifications for punishment and the other interrogating the choice of punishment over alternatives.

With regard to the former query, the courts have repeatedly reaffirmed the validity of traditional punishment rationales, while also emphasizing their harmony with the goals of fighting impunity, preventing international crimes, delivering justice for the victims, etc. More than anything, the judicial restatements of penal goals are performative utterances whereby the tribunals seek to re-enact the dogmas of criminal law: the inherent morality of punishment as a reaction to criminal wrongdoing and inexorable deterrent effects of penalties. The principal reasons articulated by the judges for punishing the perpetrators of international crimes, are not necessarily all there is to the act of punishment. Deliberate performativity of judicial affirmations of penal objectives, seen in light of their negligible practical import for the sentencing *calculi* in individual cases, suggests that for the courts expressivism is the primary *raison d'être* of penalties and a meta-justification of the act of punishment. Abstract penal goal provide highly inconclusive guidance for meting out individual punishments. Sentences are neither deduced from, nor informed by, those goals directly. Instead, sentencing determinations present exercises in casuistry, which is not to say they are arbitrary or incongruous considering the veritable undercover effort to harmonize the approach and keep penalties fairly consistent across comparable cases.

The second reading of the question presents a trickier challenge to international criminal justice mounted in the (hypothetical) presence of other avenues ranging wildly from summary executions to forgiveness. ‘Why *punish?*’ is not answerable from within the paradigm of criminal law, as it is tantamount to asking ‘why *criminal law?*’ Understandably, this is not a quandary international tribunals could tackle head on, as that would have required them to inquire into the political expedience – rather than legality – of their own existence. Criminal justice is a take-it-or-leave-it deal. The centrality of punishment as a response to criminal wrongdoing cannot be meaningfully interrogated from within. The judicial rhetoric proclaiming unqualified preference for punishment over alternatives fully accords with the belief system of international criminal law, although it is bound to disappoint the critics which insist on

a more evidence-sensitive approach. This contention highlights the methodological constraints inherent in international criminal law as a normative project. For believers, any empirical proof refuting (or even supporting) the idea that by punishing individuals, international criminal tribunals *can* and *do* deter crimes, reconcile communities and pacify states, goes to the question they are not asking and do not regard as being of any consequence.