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Articles

COLLECTIVE VIOLENCE AND INDIVIDUAL PUNISHMENT: THE CRIMINALITY OF MASS ATROCITY

Mark A. Drumbl[*]

INTRODUCTION

This Article examines the internationalization of law and order discourse and its application to individual perpetrators of organic violence. The analysis begins with a question: what punishment befits someone who murders, or is responsible for the murders, of hundreds, thousands, or tens

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of thousands? It ends with the somewhat unsettling proposition that a reconceptualization of prevailing legal theory, policy, and practice is in order for such punishment to be truly purposive.

The prevailing paradigm views mass atrocity as something greater than the sum of its parts, namely each of its ordinary constituent murders.[1] Under this paradigm, mass violence is constructed as something extraordinarily transgressive of universal norms. Transgressions of this ilk call out for investigation, prosecution, and punishment leading, perhaps ineluctably, to the emergence of a relatively new branch of law—the law of atrocity. Acts of atrocity are characterized as crimes against the world community or, more emotively, as offenses against us all. These include categories of criminality such as crimes against humanity,[2] genocide,[3] war crimes,[4] and, to some extent, large-scale terrorism.[5] Since these assaults are constructed

[1] For scholarship that characterizes mass atrocity as "radical evil," see HANNAH ARENDT, THE HUMAN CONDITION 241 (1958); CARLOS SANTIAGO NINO, RADICAL EVIL ON TRIAL vii, ix (1996).

[2] Crimes against humanity include a number of acts (such as murder, enslavement, extermination, deportation, persecution, rape, torture, sexual slavery, enforced prostitution, and forced pregnancy or other form of sexual violence of comparable gravity) "when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack." *See* Rome Statute of the International Criminal Court art. 7, U.N. Doc. A/CONF.183/9, *adopted* July 17, 1998, *as corrected* Jan. 16, 2002, *at* http://www.un.org/law/icc/statute/romefra.htm [hereinafter Rome Statute].

[3] KENNETH J. CAMPBELL, GENOCIDE AND THE GLOBAL VILLAGE 28 (2001) (citing U.N. Secretary General Annan as stating that "the crime of genocide against one people truly is an assault on us all"). Genocide means a number of acts (including killing and causing serious bodily or mental harm) committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such. Rome Statute, *supra* note 2, art. 6. The *dolus specialis* of genocide distinguishes it from crimes against humanity.

[4] Breaches of international humanitarian law (the law of war) fall within the purview of international criminal law through their characterization as war crimes. Ruti Teitel, *Humanity's Law: Rule of Law for the New Global Politics*, 35 CORNELL INT'L L.J. 355, 356, 363 (2002) (documenting the criminalization of violations of international humanitarian law and the dramatic expansion of legal machinery, institutions, and processes in the international sphere). Basically, war crimes are activities that fall outside of the ordinary scope of activities undertaken by soldiers during armed conflict. Whereas killing the enemy is part of the ordinary activity of a soldier, willful murder of civilians, torture, or inhumane treatment is not. Launching attacks that are disproportionate, that fail to discriminate between military or civilian targets, or that are not necessary to secure a military advantage also may constitute war crimes. War crimes cover two sorts of activities: crimes committed in international armed conflict and violations of the laws and customs of war, a residual category applicable to internal armed conflicts. Rome Statute, *supra* note 2, art. 8.

[5] Terrorism against peacekeeping or humanitarian assistance missions has been characterized as a war crime. *See* S.C. Res. 1402, U.N. SCOR, 58th Sess., 4814th mtg., U.N. Doc. S/Res/1502 (2003). In the wake of the September 11 attacks, the Security Council unequivocally condemned "all acts . . . of terrorism as criminal." S.C. Res. 1377, U.N. SCOR, 56th Sess., 4413th mtg. at 2, U.N. Doc. S/Res/1377 (2001). Some scholars have characterized the September 11 attacks as crimes against humanity. Antonio Cassese, *Terrorism Is Also Disrupting Some Crucial Legal Categories of International Law*, 12 EUR. J. INT'L L. 993, 994 (2001); Nico J. Shrijver, *Responding to International Terrorism: Moving the Frontiers of International Law for "Enduring Freedom"?*, 48 NETH. INT'L L. REV. 271, 289 (2001). The Security Council also recognized such attacks as "attacks" against which the use of force in self-defense was appropriate. S.C. Res. 1373, U.N. SCOR, 56th Sess., 4385th mtg. at 1, U.N. Doc. S/Res/1373 (2001). The September 11 attacks thus have been attributed a dual nature, that of crime and act of war,

as being of concern to humanity as a whole, international institutions putatively representative of the global community become appropriate conduits to dispense justice and inflict punishment.[6] These international institutions therefore drift into what Michel Foucault called the "political economy" of punishment.[7] This political economy bureaucratizes and normalizes punishment, thereby inserting it deeply into the now-globalized social body.[8] Although Foucault's discussion is limited to punishment by the state, I would apply his heuristic to the new and additional layers of bureaucratization contemplated by the emerging punitive arm of the *supra*-state of international organization.

Despite the extraordinary nature of this criminality, its modality of punishment, theory of sentencing, and process of determining guilt or innocence each remains disappointingly ordinary. The dominant discourse determines accountability through third-party trial adjudication premised on

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to which the U.S. has responded through the use of both force and criminal punishment (exercised through ordinary civilian courts and also military commissions). The Rome Statute of the International Criminal Court does not create jurisdiction to prosecute terrorism.

[6] HANNAH ARENDT, EICHMANN IN JERUSALEM 254, 269 (1965). International crimes (and international criminal law) differ from transnational crimes (and transnational criminal law). International criminal law *stricto sensu* is "the law applicable in an international criminal court having general jurisdiction to try those who commit acts which international law proscribes and which it provides should be punished." Edward Wise, *Codification: Perspectives and Approaches*, *in* 1 INTERNATIONAL CRIMINAL LAW: CRIMES 283, 285 (Cherif Bassiouni ed., 2d. ed. 1999). The "core" international crimes are genocide, crimes against humanity, war crimes, and—to some degree—aggression. Neil Boister, *Transnational Criminal Law?*, 14 EUR. J. INT'L L. 953, 962 n.39 (2003). Transnational crimes are crimes that are set out in treaties and other sources of international law as crimes for which suspects are to be prosecuted only through domestic penal mechanisms in the courts of the state where they are captured or are to be extradited to the courts of a state that will in fact prosecute. As an ideal-type, transnational criminal law does not create individual penal responsibility under international law. Instead, "[it] is an indirect system of interstate obligations generating national penal laws." *Id.* at 962. Transnational crimes can be distinguished from purely national crimes insofar as purely national crimes "are criminalized solely at the election of the state and are not initiated through international treaty." *Id.* at 963. Transnational crimes include drug-trafficking, hijacking, counterfeiting, and certain prohibited financial activities. These categories are not impermeable: Particular transnational crimes may become international crimes should international lawmakers agree that this reclassification serves the important purpose of addressing threats to the international order. Terrorism, in particular large-scale terrorist attacks, represents a crime that may be moving from the transnational to the international although, at present, its proscription still operates heavily at the transnational level. *See supra* note 5. International crimes constitute the type of criminality of greatest concern to this Article. This does not imply that transnational criminal law should eschew theoretical development. Rather, it is to suggest that this exercise transcends the immediate purposes of this Article.

[7] MICHEL FOUCAULT, DISCIPLINE AND PUNISH 81 (Alan Sheridan trans., 1979). For a thoughtful application of Foucault's work to the context of large-scale terrorism, see Christopher L. Blakesley, *Ruminations on Terrorism & Anti-terrorism Law and Literature*, 57 U. MIAMI L. REV. 1041, 1068–69 (2003).

[8] Foucault, *supra* note 7, at 82 (identifying as the primary objectives of Enlightenment legal reform in penal practice: "to make of the punishment and repression of illegalities a regular function, coextensive with society; not to punish less, but to punish better; to punish with more universality and necessity; to insert the power to punish more deeply into the social body").

liberalism's construction of the individual as the central unit of action.[9] This means that a number of selected guilty individuals squarely are to be blamed for systemic levels of violence. Punishment, too, is uninspiring. It overwhelmingly takes the form of incarceration in accordance with the classic penitentiary model.[10] The "enemy of all of humankind"[11] is punished no differently than a car thief, armed robber, or cop killer.

A paradox emerges. Legal scholars have demarcated normative differences between extraordinary crimes against the world community and ordinary crimes against the local community. These scholars, however, largely are content to subject both to the same process. Although there has been a proliferation of new international legal institutions to adjudge mass violence—for example, the International Criminal Court (ICC, 2002),[12] ad hoc tribunals for Rwanda (International Criminal Tribunal for Rwanda, ICTR, 1994)[13] and the former Yugoslavia (International Criminal Tribunal for the former Yugoslavia, ICTY, 1993),[14] special courts (such as in Sierra Leone, 2000),[15] and hybrid[16] panels or chambers (Kosovo, 2000,[17] East Timor,

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[9] *See* George P. Fletcher, *Collective Guilt and Collective Punishment*, 5 THEORETICAL INQUIRIES LAW 163, 163 (2004) (discussing cultures of group consciousness).

[10] *See infra* text accompanying notes 54–79.

[11] David Luban, *A Theory of Crimes Against Humanity*, 29 YALE J. INT'L L. 85, 90 (2004).

[12] The ICC, which entered into force on July 1, 2002, was created by the Rome Statute of the International Criminal Court. *See* Rome Statute, *supra* note 2. It is a permanent institution mandated to investigate and prosecute the most serious crimes of international concern, namely genocide, crimes against humanity, and war crimes. *Id.* arts. 1, 4–8. At the time of writing, over ninety-four nations have become parties to the Rome Statute. *See* U.N. Treaty Collection, Ratification Status, *at* http://untreaty.un.org/ENGLISH/bible/englishinternetbible/partI/chapterXVIII/treaty10.asp (last visited June 28, 2004). One hundred thirty-nine nations have signed the Rome Statute. *Id.*

[13] The ICTR was established as an ad hoc institution by the Security Council. *See* Statute of the ICTR, U.N. SCOR, 49th Sess., 3453d mtg. at 15, U.N. Doc. S/Res/955 (1994) [hereinafter Statute of the ICTR]. The ICTR investigates and prosecutes persons responsible for genocide and other serious violations of international humanitarian law committed in the territory of Rwanda and Rwandan citizens responsible for genocide and other such violations committed in the territory of neighboring states, between January 1, 1994 and December 31, 1994. *Id.* para. 1. In 1994, an extremist government headed by members of the Hutu ethnic group fostered a populist genocide that resulted in the murder of 500,000 to 800,000 members of the Tutsi ethnic group.

[14] The ICTY was established as an ad hoc institution by the Security Council. *See* Statute of the ICTY, S.C. Res. 827, U.N. SCOR, 48th Sess., 3217th mtg. at 29, U.N. Doc. S/Res/827 (1993) [hereinafter Statute of the ICTY]. The ICTY investigates and prosecutes persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991. *Id.* para. 1. These conflicts involved internecine fighting among Serbs, Croats, Bosnian Muslims, and Kosovo Albanians. In total, approximately 250,000 individuals have been murdered in this fighting. Mark A. Drumbl & Kenneth S. Gallant, *Sentencing Policies and Practices in the International Criminal Tribunals*, 15 FED. SENTENCING REP. 140, 140 (2002).

[15] The Sierra Leone Special Court was established jointly by the government of Sierra Leone and the United Nations to prosecute those who bear the greatest responsibility for serious violations of international humanitarian law and Sierra Leonean law committed in the territory of Sierra Leone since November 30, 1996. *See* Statute of the Special Court for Sierra Leone art. 1, *available at* http://www.sc-sl.org/scsl-statute.html (last visited Jan. 28, 2004); S.C. Res. 1315 U.N. SCOR, 55th Sess., 4186th mtg. at 1, U.N. Doc. S/Res/1315 (2000) [hereinafter Sierra Leone Statute]. The Sierra Leone Special Court is

2000,[18] and under negotiation for Cambodia, 2003)[19]—these institutions are

not formally affiliated with the U.N., although it was established by a treaty between the U.N. and Sierra Leone. The Special Court opened on March 10, 2004. *Sierra Leone War Crimes Court to Open March 10*, VANGUARD (LAGOS), Feb. 27, 2004, *available at* http://www.xasa.es/grupos/soc/article/88069/soc.culture.cambodia. The violence in Sierra Leone arose from internecine conflicts between government and rebel forces during the 1990s. Much of the violence was committed by and directed at juveniles.

[16] Hybrid models divide judicial responsibilities between the U.N. and the concerned state. Strictly speaking, they therefore are internationalized legal institutions instead of purely international legal institutions. That said, hybrid institutions do apply international criminal law and form part of the machinery of international criminal justice. Accordingly, I consider them appropriate subject matter for this Article.

[17] Special hybrid panels within the Kosovo legal system implicate international judges and prosecutors. *See* United Nations Interim Administration Mission in Kosovo, Reg. 2000/64 (Dec. 15, 2000). These special panels (also called "Regulation 64 panels") adjudicate violations of domestic criminal law that took place from May 1998 to June 1999 in the course of the armed conflict then ongoing in Kosovo between Kosovo separatists and the forces of the Federal Republic of Yugoslavia, but they do not have exclusive jurisdiction over such crimes. *Organization for Security and Cooperation in Europe Mission in Kosovo*, *in* KOSOVO'S WAR CRIMES TRIALS: A REVIEW 9 (Sept. 2002) (on file with author) [hereinafter KOSOVO'S WAR CRIMES TRIALS]. Many of the crimes within the jurisdiction of the panels are international crimes that have been enacted in domestic law. These include genocide, crimes against humanity, and war crimes. International judges or prosecutors can be assigned to these panels upon request by prosecutors, the accused, or defense counsel in order to ensure judicial impartiality or the proper administration of justice. *Id.* at 11. Since the promulgation of Regulation 2000/64, cases involving international crimes have been argued mostly by international prosecutors in courts composed mostly of international judges. *Id.* That said, the ICTY has primary jurisdiction over serious international crimes committed in Kosovo, although it has indicated it would leave some room for the Kosovo panels to exercise jurisdiction. GEERT-JAN ALEXANDER KNOOPS, AN INTRODUCTION TO THE LAW OF INTERNATIONAL CRIMINAL TRIBUNALS 16–17 (M. Cherif Bassiouni ed., 2003).

[18] In 1999, militia forces supported by the Indonesian army massacred over one thousand East Timorese civilians and engaged in a widespread campaign of deportation, property destruction, and sexual violence. *See* Mark A. Drumbl, *Law and Justice*, *in* A GLOBAL AGENDA: ISSUES BEFORE THE 57TH GENERAL ASSEMBLY OF THE UNITED NATIONS 254 (Diana Ayton-Shenker ed., 2002). Much, but not all, of this violence was a response to a plebiscite in East Timor in favor of the region's independence from Indonesia. *Id.* Following the violence, the Indonesian administration of East Timor collapsed. *Id.* East Timor's eventual transition to independence on May 20, 2002, was facilitated by the United Nations Transitional Administration in East Timor ("UNTAET"). *Id.* at 254–55; Suzanne Katzenstein, *Hybrid Tribunals: Searching for Justice in East Timor*, 16 HARV. HUM. RTS. J. 245, 249 (2003). Courts have been organized in East Timor with the assistance of UNTAET. *On the Organization of Courts in East Timor*, U.N. Transnational Administration in East Timor, U.N. Doc. UNTAET/REG/2000/11 (Mar. 6, 2000), *available at* http://www.un.org/peace/etimor/untaetR/Reg11.pdf, *amended by* U.N. Doc. UNTAET Regulation 2001/25 (Sept. 14, 2001), *available at* http://www.un.org/peace/etimor/untaetR/2001-25.pdf. These include District Courts and a Court of Appeals. *Id.* art. 4. One District Court, located in Dili, has two Special Panels for Serious Crimes with exclusive jurisdiction over "serious criminal offenses," namely genocide, war crimes, crimes against humanity, murder, sexual offenses, and torture committed between January 1 and October 25, 1999. *Id.* art. 10; *On the Establishment of Panels with Exclusive Jurisdiction over Serious Criminal Offences*, U.N. Transnational Administration in East Timor § 1.3, U.N. Doc. UNTAET/REG/2000/15 (June 6, 2000), *at* http://www.un.org/peace/etimor/ untaetR/Reg0015E.pdf [hereinafter UNTAET Regulation 15]; Katzenstein, *supra*, at 251. The East Timor hybrid panels therefore prosecute both core international crimes and ordinary domestic crimes. The applicable law is both international criminal law and national criminal law. UNTAET Regulation 15, §§ 4–9. However, the substantive international crimes "are adopted almost verbatim from the Rome

quite homogenous in terms of how they deal with offenders.[20] In fact, and to varying degrees *inter se*, they largely cannibalize methods of prosecution and punishment dominant within those states that dominate the international political order.[21] Consequently, the new "constitutional moment" in international law that thoughtful scholars such as Leila Sadat posit emerges from

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Statute of the International Criminal Court . . . ." KNOOPS, *supra* note 17, at 14. Judges are of mixed national and international provenance. UNTAET Regulation 15, § 22.

[19] *Khmer Rouge Trials, Annex Draft Agreement Between the United Nations and the Royal Government of Cambodia*, G.A. Res. 57/223, U.N. Doc. A/RES/57/223 (May 22, 2003) [hereinafter U.N.-Cambodia Draft Agreement]; Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea, *available at* http://www.derechos.org/human-rights/seasia/doc/krlaw.html (last visited Jan. 28, 2004) [hereinafter U.N.-Cambodia Law]. From 1975 to 1979, the Khmer Rouge massacred approximately 1.7 million Cambodians. Drumbl, *supra* note 18, at 252. The Cambodia-U.N. agreement contemplates the formation of extraordinary legal chambers in the Cambodian judicial system responsible for the prosecution of Khmer Rouge leaders and others most responsible for serious violations of Cambodian penal law, international humanitarian law and custom (including genocide), and international conventions recognized by Cambodia committed during the period April 17, 1975 to January 6, 1979. U.N.-Cambodia Draft Agreement, *supra*, art. 1; *see also* U.N.-Cambodia Law, *supra*, art. 1; *UN and Cambodia Sign Court Deal*, BBC NEWS, June 6, 2003, *at* http://news.bbc.co.uk/2/hi/asia-pacific/2968080.stm. It is unclear if and when these extraordinary chambers actually will begin to hear cases.

[20] The normative preference for criminal process as a response to mass violence also has percolated to the national level, where some national courts are exercising universal jurisdiction to prosecute crimes committed extraterritorially. *See, e.g.*, The Cairo-Arusha Principles on Universal Jurisdiction in Respect of Gross Human Rights Offences: An African Perspective (Oct. 21, 2002) (on file with author) (providing that states have a responsibility and duty to prosecute, extradite, or transfer for trial persons suspected or accused of gross human rights violations under international law and that this is not relieved by the use of truth and reconciliation commissions); Stef Vandeginste, *Victims of Genocide, Crimes Against Humanity, and War Crimes in Rwanda: The Legal and Institutional Framework of Their Right to Reparation*, *in* POLITICS AND THE PAST 249, 266–69 (John Torpey ed., 2003) (discussing extraterritorial litigation involving Rwanda). Belgian courts had been active in criminal prosecutions for extraterritorial human rights abuses under universal jurisdiction. The scope of the Belgian domestic law successfully was challenged before the International Court of Justice ("ICJ"). Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of Congo v. Belg.), 2002 I.C.J. 121 (Feb. 14). The ICJ decision invalidated a Belgian arrest warrant issued against a Congolese minister. That said, the ICJ did not repudiate the underlying universal jurisdiction, but quashed the warrant on the basis of ministerial immunity. A new law enacted in the Netherlands allows prosecutors to bring cases of genocide, crimes against humanity, or war crimes even if committed in other countries so long as the accused is in the Netherlands: the first case to proceed under this law involves Sébastian Nzapali, a former Congolese colonel. *Dutch Hold Congo War Crimes Trial*, BBC NEWS, Jan. 7, 2004, *at* http://news.bbc.co.uk/1/hi/world/europe/3374913.stm.

[21] *See generally* M. CHERIF BASSIOUNI, INTRODUCTION TO INTERNATIONAL CRIMINAL LAW 11, 588 (2003) (arguing that the goals of international criminal law are an extension of the goals of national criminal law and that international criminal law lacks its own juridical method); ANTONIO CASSESE, INTERNATIONAL CRIMINAL LAW 18 (2003) (stating that "international criminal law results from the gradual *transposition* on to the international level of rules and legal constructs proper to national criminal law or national trial proceedings"); Tom J. Farer, *Restraining the Barbarians: Can International Criminal Law Help?*, 22 HUM. RTS. Q. 90, 91 (2001) (casting the purpose of penal sanctions in cases of international crimes as "largely coextensive" with the purpose of penal sanctions in national legal orders).

these new institutions, in particular the ICC, may be more a matter of brick-and-mortar design than of theoretical conceptualization.[22]

There is, of course, vivid debate regarding the suitability of dominant methods of punishment in the ordinary domestic context. Many proponents of these international institutions downplay this debate, preferring instead to transplant these contested methods to the context of mass atrocity. So, too, do those who promulgate national institutions, such as the Special Tribunal for Iraq, to prosecute systemic human rights abusers.[23] In the end, the architecture of the special field of mass violence is little more than an expropriation of domestic methodologies—or, in the language of international lawyers, municipal criminal law[24]—already assailed for their suitability to ordinary individual crime and all the more ill-fitting for cases of extraordinary international crime.

Although few, if any, legal scholars believe criminal trials should be the only or entire response to mass atrocity, many ascribe considerable

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[22] LEILA NADYA SADAT, THE INTERNATIONAL CRIMINAL COURT AND THE TRANSFORMATION OF INTERNATIONAL LAW: JUSTICE FOR THE NEW MILLENNIUM 1 (2002).

[23] *See* Statute of the Iraqi Special Tribunal arts. 10, 11, 12, 13 (Dec. 10, 2003) (on file with author) (providing jurisdiction for genocide and defining crimes against humanity and war crimes). On July 1, 2004, twelve individuals, including Saddam Hussein, appeared before the Tribunal to hear preliminary charges. *See* John F. Burns & Ian Fisher, *Court Hands Legal Custody of Saddam Hussein to Iraq*, N.Y. TIMES, July 1, 2004. Trials will not begin for some time, insofar as rules of evidence are still being drafted, evidence collected, and a witness protection program established. *See* Somini Sengupta & John F. Burns, *Much at Stake in an Iraq Trial*, N.Y. TIMES, July 1, 2004. Moreover, the Tribunal remains subject to political controversy. John F. Burns & Dexter Filkins, *Iraqis Battle over Control of Panel to Try Hussein*, N.Y. TIMES, Sept. 24, 2004. Tribunal officials and judges will be Iraqis, although assistance will be provided by foreign legal experts and the Statute itself was drafted by the United States. Associated Press, *Iraq to Create War Crimes Tribunal in Coming Days*, USA TODAY, Dec. 5, 2003, *available at* http://www.usatoday.com/news/world/iraq/2003-12-05-iraq-tribunal_x.htm. The Tribunal shall have primacy over all other Iraqi courts with respect to crimes against humanity, war crimes, and genocide. Statute of the Iraqi Special Tribunal, *supra*, art. 29(b). Sentences shall be carried out by the legal system of Iraq in accordance with its laws and the quantum of sentence is determined in accordance with the penalties imposed by Iraqi law. *Id.* arts. 24, 27. Sentences for crimes that do not have a counterpart under Iraqi law shall be determined by "taking into account such factors as the gravity of the crime, the individual circumstances of the convicted person and relevant international precedents." *Id.* art. 24(e). Beyond this very general language, the Statute does not provide a separate sentencing rationale geared to punishing the crimes as international crimes, although this may be developed over time in the Tribunal's Rules of Procedure and Evidence. *Id.* art. 16. I do not consider the Iraqi Special Tribunal to be a hybrid national/international institution. That said, it is important to recognize that international crimes substantively can be integrated into domestic criminal law and prosecuted in domestic courts when such courts exercise territorial, national, or universal jurisdiction. For discussion of universal jurisdiction, see *supra* note 20. Scholars may consider examining the sentencing rationales utilized by national courts to punish those convicted of international crimes. This endeavor lies beyond the scope of this Article.

[24] Municipal law refers to rules prescribed by the supreme power in a state. For the ease of reference of a broader audience, in this Article I will use the terms domestic law and national law instead of municipal law.

transformative potential to such trials.[25] This potential echoes in other scholarly constituencies ranging from historians to moral philosophers.[26] The community of international human rights activists supports the expansion of the international criminal justice paradigm and, according to William Schabas, thereby has "adjusted its historic predisposition for the rights of the defense and the protection of prisoners to a more prosecution-based orientation."[27] This community is particularly disposed to triumphantly view the imperative to adjudicate international crimes and the concomitant proliferation of criminal justice institutions as self-evident causes for celebration.

Scholars, advocates, and activists specializing in international criminality certainly are influenced by the general attitudes of the wider epistemic community of international lawyers. In this regard, Benedict Kingsbury perceives "an article of faith among most international lawyers that the growing availability and use of international tribunals advances the rule of law in international relations."[28] Rosa Brooks candidly remarks that enthusiasm for rule of law promotion has become a "mantra."[29] Ruti Teitel concludes that the meaning of rule of law is becoming "more and more coincident with international criminal justice."[30]

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[25] JACKSON NYAMUYA MAOGOTO, WAR CRIMES AND REALPOLITIK 8 (2004) ("[I]nternational tribunals . . . have become the international community's primary response to humanitarian crises . . . ."); Payam Akhavan, *The International Criminal Court in Context: Mediating the Global and Local in the Age of Accountability*, 97 AM. J. INT'L L. 712, 712 (2003) (noting that the "euphoria" surrounding the ICC's establishment creates a "sympathetic posture" that "obscures a more critical discourse on the efficacy of managing massive atrocities in distant lands within the rarified confines of international legal process"); Jan Klabbers, *Just Revenge? The Deterrence Argument in International Criminal Law*, 12 FINNISH Y.B. INT'L L. 249, 250 (Martti Koskenniemi ed., 2001) (noting that "we have all fallen under the spell of international criminal law and the beauty of bringing an end to the culture of impunity").

[26] LAWRENCE DOUGLAS, THE MEMORY OF JUDGMENT: MAKING LAW AND HISTORY IN THE TRIALS OF THE HOLOCAUST (2001) (insisting that the legal response to crimes as extraordinary as the Holocaust must take the form of a show trial which can serve both the interest of justice as conventionally conceived and also a broader didactic purpose serving the interests of history and memory); John M. Czarnetzky & Ronald J. Rychlak, *An Empire of Law? Legalism and the International Criminal Court*, 79 NOTRE DAME L. REV. 55, 62 (2003) (noting that "faith in the ICC" is "held quite strongly in Western intellectual circles"); Brad Roth, Comments at the Symposium on International Criminal Justice, Wayne State University School of Law (Oct. 27, 2003) (notes on file with author).

[27] William Schabas, *Sentencing by International Tribunals: A Human Rights Approach*, 7 DUKE J. COMP. & INT'L L. 461, 515 (1997); *see also* Stuart Beresford, *Unshackling the Paper Tiger—the Sentencing Practices of the Ad Hoc International Criminal Tribunals for the Former Yugoslavia and Rwanda*, 1 INT'L CRIM. L. REV. 89 (2001) ("It is paradoxical, therefore, that while they were once the champion of prisoners' rights, the human rights community is now at the forefront and in many cases the instigator of the international community's desire to punish.").

[28] Benedict Kingsbury, Foreword, *Is the Proliferation of International Courts and Tribunals a Systemic Problem?*, 31 N.Y.U. J. INT'L L. & POL. 679, 688 (1999).

[29] Rosa Ehrenreich Brooks, *The New Imperialism: Violence, Norms, and the "Rule of Law"*, 101 MICH. L. REV. 2275, 2283 (2003).

[30] Teitel, *supra* note 4, at 368.

Political actors, such as states and international organizations (for example, the United Nations), stand behind international criminal justice institutions.[31] Foreign policy decisionmakers, non-governmental organizers, and international development financiers mostly are quite supportive as well. Even the U.S. government is seduced by the allure of prosecution, punishment, and incarceration for individual perpetrators of mass atrocity. U.S. opposition to the ICC does not focus on the appropriateness of its paradigm, but, rather, on the independence of the institution and the prospect that U.S. soldiers, officials, or top leaders may become its targets.[32] In fact, the U.S. has supported international criminal tribunals from Nuremberg in 1945 to the ICTR and ICTY today.[33]

In short, faith on the part of so many activists, scholars, states, and policymakers in the potential of international criminal justice has spawned one of the more extensive waves of institution-building in modern international relations. I argue that this faith flows from a perplexing fusion of exuberance and undertheorizing. Although there is much to celebrate in holding systematic human rights abusers accountable for their actions, an iconoclastic preference for the criminal law may not always be the best way to promote accountability in all afflicted places and spaces. In fact, my interviews of perpetrators and survivors in Rwanda[34] and experiences with

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[31] *See* Establishment of an International Criminal Court, *at* http://www.un.org/law/icc/general/overview.htm (last visited Sept. 13, 2003).

[32] Rupert Cornwell, *US Will Deny Aid to Countries that Refuse Court Immunity Deals*, INDEPENDENT UK, Nov. 4, 2003 (reporting official statements made by U.S. Undersecretary of State John Bolton).

[33] *Hearing Before the House Comm. on Int'l Relations*, 107th Cong. (Feb. 28, 2002) ("The United States remains proud of its leadership in supporting the two *ad hoc* tribunals and will continue to do so in the future.") (statement of Pierre Prosper, U.S. Ambassador at Large for War Crime Issues); GARY JONATHAN BASS, STAY THE HAND OF VENGEANCE: THE POLITICS OF WAR CRIMES TRIBUNALS 24 (2000) (discussing U.S. involvement in promoting due process for Nazi war criminals); Juan E. Mendez, *Human Rights Policy in the Age of Terrorism*, 46 ST. LOUIS U. L.J. 377, 388 (2002) (reporting that the ICTY and ICTR "enjoyed decisive support—of a bipartisan nature—from the United States"). This does not deny that, at present, the U.N. is pressuring the ad hoc tribunals to complete their work by 2008. S.C. Res. 1503, U.N. SCOR, 58th Sess., 4817th mtg., U.N. Doc. S/Res/1503 (2003); Nancy Amoury Combs, *International Decisions*, 97 AM. J. INT'L L. 923, 935 (2003). The U.S. expresses only qualified support for prosecution and punishment in response to large-scale terrorism. It does not support international criminal prosecutions. Enthusiasm for domestic criminal prosecutions is limited. The preferred policy option is that terrorist attacks merit military responses instead of civilian legal responses, which explains the recourse to the use of force, long-term incapacitation, and military commissions. Although U.S. responses to terrorism may foreshadow growing reserve on its part regarding the merits of criminal punishment as a response to mass violence, the U.S. remains quite supportive of the role of criminal process and punishment in Iraq's political transition. *See* Statute of the Iraqi Special Tribunal, *supra* note 23. Moreover, intervention by the U.S. Supreme Court now compels the U.S. government to justify before a neutral decisionmaker the detention of those terrorist suspects declared to be unlawful combatants, albeit not under criminal law doctrines of probable cause. *See* Rasul v. Bush, No. 03-334, slip op. (U.S. June 28, 2004); Hamdi v. Rumsfeld, No. 03-334, slip. op. (U.S. June 28, 2004).

[34] Mark A. Drumbl, *Punishment, Postgenocide: From Guilt to Shame to Civis in Rwanda*, 75 N.Y.U. L. REV. 1221, 1290–92 (2000).

victims of internecine violence in Afghanistan[35] suggest that the structural simplicity avidly pursued by the prevailing paradigm of prosecution and punishment may squeeze out the complexity and dissensus central to meaningful processes of justice and reconciliation.[36]

To be sure, some constituencies express considerable reserve regarding the merits of international criminal adjudication. International relations theorists of the realist school provide a probative example. According to the realist conception, law should do no more than promote cooperation when states find this to be in their best interests. Law certainly should not redistribute power. Nor should it attempt to impose moral limits on politics: for realists such as Carl Schmitt such an imposition only makes politics crueler.[37] Other realists specifically criticize international criminal process (along with international law generally)—in the words of George Kennan, the "legalistic approach to international affairs"—because this approach "ignores in general the international significance of political problems and the deeper sources of international instability."[38] Others, such as Henry Kissinger, fret that an "unprecedented movement has emerged to submit international politics to judicial procedures . . . [which] risk[s] substituting the tyranny of judges for that of governments."[39] My sense, however, is that this scholarship is driven more by ideology than by empiricism. In the end, it is as blindly unnuturing as the celebration of international criminal justice institutions is blindly nurturing.

My goal in writing this Article is to strike new ground and offer a critical perspective rooted in criminology,[40] victimology[41] and, especially, penology[42] that supports accountability for massive human rights abusers but underscores that the structure of extant methods may limit legitimacy[43] and effectiveness. In this regard, I underscore the fact that interpretations of justice are often multi-layered and, for many people, take root in national and local contexts. Accordingly, at a minimum, some space should be retained in this accountability process for alternative (and perhaps competing)

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35 Mark A. Drumbl, *Victimhood in Our Neighborhood: Terrorist Crime, Taliban Guilt, and the Asymmetries of the International Legal Order*, 81 N.C. L. REV. 1, 75–92, n.30 (2002) [hereinafter Drumbl, *Victimhood*]; Mark A. Drumbl, *Rights, Culture, and Crime: The Role of Rule of Law for the Women of Afghanistan*, 42 COLUM. J. TRANSNAT'L L. 349 (2004) [hereinafter Drumbl, *Role of Rule of Law*].

36 *See infra* Parts IV and V (discussing benefits that arise when justice emerges locally through a bottom-up process that may involve heated discussion and public contestation).

37 CARL SCHMITT, THE CONCEPT OF THE POLITICAL (George Schwab trans., 1996).

38 GEORGE F. KENNAN, AMERICAN DIPLOMACY 99 (1951); *see also id.* at 95 (arguing the "most serious fault" of U.S. foreign policy to be "a legalistic-moralistic approach to international problems").

39 Henry A. Kissinger, *The Pitfalls of Universal Jurisdiction*, FOREIGN AFF., July/Aug. 2001, at 86.

40 Criminology is the study of crime, criminals, and criminal behavior.

41 Victimology is the study of crime victims.

42 Penology is the study of punishment and prisoners.

43 I define legitimacy as the condition that arises when authority is exercised in a manner seen as justified.

mechanisms, such as those that draw from local custom, national practices, or indigenous legal process. That said, I do not call for a retreat to national institutions. In many places, national dispute resolution entities, especially courts, are viewed with tremendous skepticism as they often serve as tools of social control in repressive regimes. Similarly, certain local dispute resolution entities may institutionalize the power of unaccountable local elites. It may therefore become necessary to differentiate between manipulated constructions of the national or local, on the one hand, and the representative or indigenous, on the other. International criminal law interventions would do well to engage with those practices that actually reflect the customs, procedures, and mores of those individuals affected by violence (as perpetrators and victims). At the same time, these interventions could help reform those institutions, including national courts, which hitherto may have served narrow elite interests.

Part I of this Article summarizes how and why international criminal justice institutions punish offenders. I review the positive law of these institutions, their jurisprudence on sentencing, and the quantum of sentences that have been awarded. This review modestly responds to the paucity of evaluative research regarding the sentencing practices of international tribunals. Although there is some indication that international criminal law institutions are beginning to consider more sophisticated approaches to sentencing, including frameworks of reference to standardize the allocation of punishment, the practice of these institutions remains confusing, inconsistent, and unsystematized. From a positive law perspective, the sanction imposed on offenders still may be little more than an afterthought to the closure purportedly obtained by the conviction.[44]

Part II posits that international criminal justice has taken some innovative steps in constructing its own criminology, in particular its development (and application) of theories of liability for collective violence based upon joint criminal enterprise, command responsibility, and conspiracy.[45] However, I argue that international criminal law lacks its own penology. This creates the unfortunate need for it hungrily—yet arbitrarily—to borrow the penological rationales of domestic criminal law.[46] This appropriation is vexing for the simple reason that the perpetrator of mass atrocity fundamentally differs from the perpetrator of ordinary crime. The fulcrum of this difference is that, whereas ordinary crime tends to be deviant in the times and

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[44] A telling example is that the leading treatises on international criminal law devote limited space to punishment and sentencing. *See, e.g.*, BASSIOUNI, *supra* note 21 (devoting eighteen pages out of a total of 740); CASSESE, *supra* note 21 (devoting three pages out of a total of 458).

[45] International criminal justice also has developed its own rules of procedure, although these track the experiences of national legal systems.

[46] For a discussion of purposes of sentencing in the United States, see *United States v. Bergman*, 416 F. Supp. 496 (S.D.N.Y. 1976).

places it is committed,[47] the extraordinary acts of individual criminality that collectively lead to mass atrocity are not so deviant. In fact, these acts of individual criminality may support a social norm even though they transgress a *jus cogens* norm.[48] Although this deep complicity cascade does not diminish the brutality or exculpate the aggressor, it does problematize concepts such as bystander innocence, collective responsibility, victim reintegration, reconciliation, recidivism, and the moral legitimacy of pronouncements of wrongdoing by international tribunals when the international community itself is perceived as having failed to prevent the wrongdoing.

In Part III, I review three theoretical justifications—retribution, deterrence, and expressivism—that have been proffered for international penality. I suggest that each of these justifications is compromised by the intractable selectivity, pervasive discretion, and excruciating political contingency of the process of international criminal law. Although all domestic criminal law bureaucracies are susceptible to contingent enforcement, the susceptibility of the international criminal law bureaucracy is materially greater. Choices of which atrocity to judicialize and which individuals to prosecute are so deeply politicized that it is problematic to pretend that they are in any way neutral or impartial, two characteristics often attributed to and propounded by law. In addition to this critique, Part III delineates other shortcomings in the use of retributive, deterrent, and expressive theories to justify the punishment of those who violate international criminal law.

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[47] Many scholars contest the suitability of dominant criminal law methodologies, including deviance theory, to ordinary crimes. *See, e.g.*, Robert M. Bohm, *Crime, Criminals and Crime Control Policy Myths*, *in* JUSTICE CRIME AND ETHICS 327, 331 (Michael C. Braswell et al. eds., 1998) (questioning the deviance of ordinary criminal activity based on evidence that "90% of Americans have committed some crime for which they could be incarcerated"). There also are more specific contestations that I view as considerably more probative. For example, certain domestic crimes, including gang activity and organized crime, may occur in social conditions that bear some resemblance to social conditions in the conflict societies that are the subject matter of this Article. This criminal behavior often tracks informal codes or social group norms, thereby calling into question its deviant nature. Consequently, in certain instances the distinction between ordinary crime punishable under municipal law and extraordinary crime punishable under international law is not absolutely sharp. My point, however, is that, to a significant extent, deviance theory can operate as a *grundnorm* for criminal sanction in ordinary spaces and places. Those areas of domestic activity in which deviance is difficult to conceptualize deserve independent theoretical construction in a manner similar to that proposed by this Article for international crimes. On another note, legal philosophers have questioned the penological purposes of domestic criminal law and the ability of domestic criminal law to attain the rationales it claims for itself. *See, e.g.*, JAMES GILLIGAN, VIOLENCE 94–96 (1996) (arguing that rational self-interest models that underlie deterrence theory are based on ignorance of what violent people really are like); H.L.A. Hart, *Prolegomenon to the Principles of Punishment*, in H.L.A. HART, PUNISHMENT AND RESPONSIBILITY: ESSAYS IN THE PHILOSOPHY OF LAW 1–27 (1968) (doubting the validity of deterrence in domestic contexts to ordinary common criminals). *But see* RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 242–43 (5th ed. 1998) (concluding that a person commits a crime because the expected benefits of the crime to him exceed the expected costs).

[48] International law defines a *jus cogens* norm as a customary rule applicable to all states from which no derogation is possible.

Part IV further explores the inherent politicization of the judicialization of mass violence. Here I demonstrate how the transplantation of the domestic criminal heuristic to the international context globalizes Western legal systems. This is somewhat pernicious insofar as these Western justice modalities are presented as value-neutral and universal. A closer examination, however, reveals that these modalities, although globalized, are not universal. They are in fact deeply culturally contingent.[49] The implementation of international criminal law therefore risks a democratic deficit insofar as it excludes the local, which is somewhat ironic since the excluded local often represents the precise population that was traumatized by the criminality. This blocks victims from asserting control over their own victimization. Moreover, since the excluded local primarily is non-Western, the implementation of international criminal law simply may replicate patterns of political dominance that characterize the international socio-legal order generally.

Part V posits that the cultural basis of the modalities of international criminal law means that their application to diverse spaces and places may externalize justice from the communities implicated in the conflict. Although institutions of international criminal punishment profess their punishment to be of enhanced moral legitimacy because of the international nature of the punishing institution, the experiences of post-conflict societies reveal a more complex picture.

By way of conclusion, I hope to harness these concerns to catalyze scholars to structure an independent criminology, penology, and victimology for mass atrocity. Moreover, I hope to make a case for scholars to contemplate communitarian, distributive, and cross-cultural approaches in the process of edifying these *sui generis* rationales. What I propose is not uncontroversial. These approaches imply some degree of group responsibility and collective sanction. In the end, though, I hope to provide the beginnings of a moral justification for collective sanction in response to collective violence. The root of this justification is that collective sanction incentivizes group members to monitor and marginalize the conduct of conflict entrepreneurs.

I. THE PUNITIVE ARM OF INTERNATIONAL CRIMINAL LAW INSTITUTIONS

For the most part, the textual bases for punishment provided by the positive law instruments of the ICTR and ICTY (also referred to herein as the ad hoc tribunals) are thin.[50] The constitutive documents of the Special

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[49] *See also* DAVID CHUTER, WAR CRIMES: CONFRONTING ATROCITY IN THE MODERN WORLD 94 (2003) ("[I]nternational criminal law's vocabulary and concepts are not neutral. They are culturally specific, constructed and manipulated by a very small number of countries . . . .").

[50] For a summary of the jurisdiction and background to each of the adjudicative institutions discussed in this Part, see *supra* notes 12–19.

Court for Sierra Leone, the extraordinary chambers for Cambodia, and hybrid tribunals in East Timor and Kosovo also are laconic when it comes to sentencing. The positive law of the ICC is richer. Those institutions that have actually incarcerated offenders—in particular, the ICTY, ICTR, and East Timor panels—have addressed sentencing in their jurisprudence.

All of these institutions have innovated insofar as there is little historical precedent from which to draw. For example, the Nuremberg Tribunal judges had nearly absolute discretion in the sentencing process. Article 27 of the Nuremberg Charter gave the Tribunal "the right to impose . . . on conviction . . . death or such other punishment as shall be determined . . . to be just."[51] The sentencing provision of the Charter of the Tokyo Tribunal reads identically.[52] Although the Nuremberg Tribunal issued twelve death sentences, its discussion of sentencing issues and rationales was perfunctory.[53]

A. Positive Law Frameworks and Rules

The ICTY and ICTR Trial Chambers impose sentences and penalties following the conviction of the accused. Punishment initially was delivered after a separate sentencing hearing. This bifurcated structure has given way to a preference to issue sentence immediately following judgment.[54] Sentences of the Trial Chambers can be appealed to the Appeals Chamber. The Appeals Chamber will interfere with Trial Chambers' sentences if there is proof of discernible error in the quantification of sentence or if convictions are overturned or added.[55] Article 24(1) of the ICTY Statute limits penalties

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[51] Charter of the International Military Tribunal, 59 Stat. 1544, 82 U.N.T.S. 279, art. 27 (1945).

[52] Beresford, *supra* note 27, at 37.

[53] *Id.* at 36. *See also generally* Drumbl & Gallant, *supra* note 14, at 140 ("The military tribunals established at Nuremberg and Tokyo following World War II did not elucidate sentencing guidelines.").

[54] Beresford, *supra* note 27, at 51. This approach redounds in civil law jurisdictions, in which sentencing is addressed by counsel in closing arguments and pronounced during the guilty verdict. Drumbl & Gallant, *supra* note 14, at 142. That said, a separate sentencing hearing is held if the accused has entered a guilty plea. At this hearing, the parties may submit any relevant information that may assist the Trial Chamber in determining an appropriate sentence. ICTY R.P. & EVID. 100(A), *available at* http://www.un.org/icty/legaldoc/index.htm (last visited Nov. 3, 2004) [hereinafter ICTY R.P. & EVID.]; *On Transitional Rules of Criminal Procedure*, UNTAET Reg. 2000/30 ss.29A, (Sept. 25, 2000), *as amended by* UNTAET Regulation 2001/25 (Sept. 14, 2001) [hereinafter UNTAET Regulation 30 as amended]; SPEC. CT. SIERRA LEONE R.P. & EVID. 100, *available at* http://www.sc-sl.org/scsl-procedure.html (last visited Jan. 28, 2004). However, the ICC and the Special Court for Sierra Leone appear in all situations to favor a separate sentencing hearing. Rome Statute, *supra* note 2, art. 76; SPEC. CT. SIERRA LEONE R.P. & EVID. 100(B), *supra*.

[55] Prosecutor v. Tadić, Case No. IT-94-1-A, para. 22 (I.C.T.Y. App. Chamber Jan. 26, 2000) (upholding sentence because Appeals Chamber found no discernible error); Prosecutor v. Blaškić, Case No. IT-95-14-A, para. 680 (I.C.T.Y. App. Chamber July 29, 2004) (noting that the Appeals Chamber has stated that a revision of a sentence on appeal can be justified due to discernible error in sentencing discretion or if the Appeals Chamber has overturned convictions). Sentences can be pardoned or commuted. Statute of the ICTR, *supra* note 13, art. 27; Statute of the ICTY, *supra* note 14, art. 28; Sierra Leone Statute, *supra* note 15, art. 23.

to imprisonment and stipulates that, in the determination of the terms of imprisonment, the ICTY shall have recourse to the general practice regarding prison sentences in the courts of the former Yugoslavia. Article 23(1) of the ICTR Statute reads identically, except that it refers to the courts of Rwanda instead of the courts of the former Yugoslavia. There is no minimum sentence. The only statutory guidance the ICTY and ICTR receive in formulating sentence is to take into account "the gravity of the offence and the individual circumstances of the convicted person."[56]

The ICTR and ICTY Rules of Procedure and Evidence supplement these very broad sentencing provisions. The Rules stipulate that an individual may be incarcerated for a term up to life.[57] They mandate the Trial Chambers to take into account mitigating and aggravating circumstances in determining sentences. With one exception (substantial cooperation by the offender), the Rules do not illustrate mitigating or aggravating circumstances. In cases where an accused is convicted of multiple charges, the ICTY Rules give the Trial Chambers the option to impose either a single sentence reflecting the totality of the criminal conduct or a sentence in respect of each conviction with a declaration regarding whether these sentences are to be served consecutively or concurrently.[58] In terms of the type of information to consider in fashioning a sentence suitable for a particular offender, ICTY and ICTR judges are given "unfettered discretion to evaluate the facts and attendant circumstances."[59]

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[56] Statute of the ICTY, *supra* note 14, art. 24(2); Statute of the ICTR, *supra* note 13, art. 23(2). This language is frequently repeated among international criminal law institutions. For example, the ICC essentially has received the same guidance. *See* Rome Statute, *supra* note 2, art. 78(1) ("In determining the sentence, the Court shall, in accordance with the Rules of Procedure and Evidence, take into account such factors as the gravity of the crime and the individual circumstances of the convicted person."). Interestingly, and in a somewhat different vein, the sentencing mandate of the Special Tribunal for Iraq also is analogous. *See* Statute of the Iraqi Special Tribunal, *supra* note 23, art. 24(e) (providing that sentences for crimes that do not have a counterpart under Iraqi law shall be determined by "taking into account such factors as the gravity of the crime, the individual circumstances of the convicted person and relevant international precedents").

[57] ICTY R.P. & EVID. 101(A), *supra* note 54, *available at* http://www.ictr.org/ENGLISH/rules/index.htm (last visited Nov. 3, 2004) [hereinafter ICTR R.P. & EVID.].

[58] ICTY R.P. & EVID. 87(C), *supra* note 54; *see also* Prosecutor v. Delalić, Case No. IT-96-21, para. 771 (I.C.T.Y. App. Chamber Feb. 20, 2001) (discussing the discretion of the trial chamber to impose consecutive or concurrent sentences). The recent practice has been to pass a single composite sentence. Beresford, *supra* note 27, at 83. This has given rise to some controversy regarding what types of convictions are impermissibly cumulative. Prosecutor v. Blaškić, Case No. IT-95-14-A, paras. 721–22 (I.C.T.Y. App. Chamber July 29, 2004). The ICTR Rules mandate the Trial Chambers to specify whether multiple sentences are to be served consecutively or concurrently. ICTR R.P. & EVID. 101(C), *supra* note 57.

[59] Prosecutor v. Kambanda, Case No. ICTR-97-23-S, para. 30 (I.C.T.R. Trial Chamber Sept. 4, 1998); *see also* ICTY R.P. & EVID. 85(A)(vi), *supra* note 54 (providing that the parties are permitted to produce any relevant information that may assist the Trial Chamber in determining an appropriate sentence).

The ICC can sentence an offender to up to thirty years' imprisonment, with a possibility of "life imprisonment when justified by the extreme gravity of the crime and the individual circumstances of the convicted person."[60] The ICC's positive law—namely, the Rome Statute and the ICC Rules of Procedure and Evidence—jointly provide somewhat more guidance regarding sentencing than the positive law of the ad hoc tribunals. In particular, the ICC Rules of Procedure and Evidence list aggravating and mitigating factors.[61] These mirror the factors that animate sentencing for ordinary domestic crimes and, as I discuss in Part I.C, replicate many of the factors developed by international judges in the jurisprudence of the ICTY, ICTR, and East Timor panels. These factors include the nature of the harm caused, degree of intent, personal characteristics and prior criminal record of the convicted person, any demonstrated cooperation,[62] and the mental capacity of the convict.[63] No ordering principle is provided as to the relative weight to attribute to any of these factors. Nor is there any explicit guidance as to the weight to accord to a factor in sentencing when that same factor already may have been considered in establishing the mental element of the substantive offense.[64] Consequently, the quantification of sentence in individual cases still is effectively left to the exercise of judicial discretion in a manner similar to the ICTY and ICTR. Nor does the ICC's positive law provide significant guidance regarding the purposes of sentencing.[65]

The positive law of the Sierra Leone Special Court resembles that of the ICTR. In fact, the Special Court is required to consult ICTR sentencing practices.[66] The generalized treatment of aggravating and mitigating circumstances is quite similar.[67] There are two important differences, how-

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[60] Rome Statute, *supra* note 2, art. 77(1); *see also id.* art. 78(3) ("When a person has been convicted of more than one crime, the Court shall pronounce a sentence for each crime and a joint sentence specifying the total period of imprisonment. This period shall be no less than the highest individual sentence pronounced and shall not exceed 30 years imprisonment or a sentence of life imprisonment . . . .").

[61] ICC R.P. & EVID. 145, *available at* http://www.icc-cpi.int/library/basicdocuments/rules(e).pdf (last visited Nov. 3, 2004) [hereinafter ICC R.P. & EVID.].

[62] Cooperation is particularly favored, insofar as it also constitutes a ground upon which the ICC judges can reduce the length of a sentence previously issued. Rome Statute, *supra* note 2, art. 110.

[63] For the full list of factors, see ICC R.P. & EVID. 145, *supra* note 61.

[64] The following factors come to mind: "degree of intent," ICC R.P. & EVID. 145(1)(c), and "commission of the crime for any motive involving discrimination," ICC R.P. & EVID. 145(2)(b)(v). The ICTY has considered this overlap in the context of intent; the ICTR and ICTY in the context of command responsibility. *Infra* notes 116, 188.

[65] Ralph Henham, *Theorising the Penality of Sentencing in International Criminal Trials*, *in* THEORETICAL CRIMINOLOGY (forthcoming 2005) (manuscript at 10, on file with author). The preamble to the Rome Statute refers to deterrence and retribution, and obliquely to restoration, but does not suggest how these could or why these should be operationalized in the application of punishment. *See* Rome Statute, *supra* note 2, pmbl.

[66] Sierra Leone Statute, *supra* note 15, art. 19(1). The Rules of Procedure and Evidence of the ICTR apply *mutatis mutandis* to the conduct of proceedings before the Special Court for Sierra Leone. *Id.* art. 14(1).

[67] SPEC. CT. SIERRA LEONE R.P. & EVID. 101, *supra* note 54.

ever: First, there are no life sentences and, second, juvenile offenders (between fifteen and eighteen years of age) are treated with considerable clemency.[68] The agreements between the U.N. and Cambodia regarding extraordinary chambers in Cambodia are virtually silent on penalty and the determination of sentence although they appear to provide a minimum sentence of five years' imprisonment.[69] The Kosovo panels do not receive independent guidance for sentencing international crimes beyond that provided in the criminal law of the Federal Republic of Yugoslavia.

The panels of the East Timor tribunal with exclusive jurisdiction over international crimes can punish through a fixed term of imprisonment, which is capped at twenty-five years for a single crime.[70] The East Timor judges receive a mandate very similar to those of the ICTY, ICTR, and ICC: namely to take into account the gravity of the offense and the individual circumstances of the convicted person in fashioning a sentence.[71] Another similarity to the ad hocs is that the East Timor panels are to have recourse to the general practice regarding prison sentences in the courts of East Timor and under international tribunals.[72] As is the case with other international criminal law institutions, plea bargains are permitted.[73]

In addition to imprisonment, the positive law of some of these adjudicatory institutions suggests the pursuit of accountability through the return of illegally obtained property or even fines.[74] These forms of accountability

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[68] Sierra Leone Statute, *supra* note 15, arts. 17, 19(1).

[69] There is only one reference to penalty or sentence in the U.N.-Cambodia Draft Agreement. U.N.-Cambodia Draft Agreement, *supra* note 19, art. 10 (providing that the maximum penalty shall be life imprisonment.). The U.N.-Cambodia Law provides somewhat greater reference to punishment, stipulating that all penalties shall be limited to life imprisonment, that individuals shall be sentenced to a minimum of five years, and that property acquired unlawfully can be confiscated and returned to the state. U.N.-Cambodia Law, *supra* note 19, arts. 38–39.

[70] UNTAET Regulation 15, *supra* note 18, § 10.1. In one case total sentences of thirty-three years and four months were awarded on a theory of conjunction of various convictions. Prosecutor v. Marqués, Case No. 09/2000, paras. 1117, 1126 (Dili Dist. Ct. Serious Crimes Spec. Panel Dec. 11, 2001).

[71] UNTAET Regulation 15, *supra* note 18, § 10.2. "With a few minor exceptions, Regulation 2000/15 adopted the law of the International Criminal Court." Katzenstein, *supra* note 18, at 251.

[72] The Rules of the East Timor hybrid tribunals provide a cursory overview of sentencing, permitting imprisonment or fines and allowing for conditional release after conviction. UNTAET Regulation 30 as amended, *supra* note 54, §§ 42–43; *see also id.* § 45 (permitting differentiated treatment of minors).

[73] *Id.* § 29A. For more information on plea bargaining in other institutions, see *infra* notes 121, 293–300.

[74] Statute of the ICTR, *supra* note 13, art. 23(3); Statute of the ICTY, *supra* note 14, art. 24(3) ("In addition to imprisonment, the Trial Chambers may order the return of any property and proceeds acquired by criminal conduct, including by means of duress, to their rightful owners."); Rome Statute, *supra* note 2, arts. 75 (providing for restitution, compensation, rehabilitation), 77(2) (empowering the ICC to order a fine and to order forfeiture of assets derived directly or indirectly from the crime, in addition to ordering imprisonment); ICC R.P. & EVID.146–147, *supra* note 61 (providing details regarding the imposition of a fine and orders of forfeiture); ICTR R.P. & EVID. 106, *supra* note 57 (referring to the national legal system of Rwanda as the vehicle through which a victim may bring an action for compensation); SPEC. CT. SIERRA LEONE R.P. & EVID. 104–105, *supra* note 54 (referencing forfeiture of prop-

operate on a subaltern basis to punishment by imprisonment. International criminal and human rights law mention them exceptionally and, in the words of one observer, they face a "rather uncertain future."[75] Restitution has never been awarded in any of the sentences of the ICTY, ICTR, or East Timor panels.[76] The ICC may prove to be more welcoming of these restitutionary approaches.[77] Here, fines and forfeitures collected from convicted offenders are to be placed in a trust fund established for the benefit of victims and their families.[78] It is unclear how the capitalization of the trust fund will operate in practice. The East Timor hybrid system also envisions the creation of a fund for similar purposes.[79]

B. Sentencing Practice

Together the ICTR and ICTY have issued nearly seventy sentences. Some of these remain subject to appeal. The practice of these tribunals therefore operationalizes a considerable part of the punitive function of international criminal law. The jurisprudence of the ad hocs undoubtedly will guide the ICC and other institutions, such as the Special Court for Sierra Leone[80] and the Cambodia extraordinary chambers, when these institutions begin to issue sentences. More immediately, the practice of the ad hocs has influenced the East Timor panels in the nearly fifty sentences they have thus far meted out.[81] The Kosovo hybrid panels also have issued a number of sentences. There is, however, considerable reticence on the part of the

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erty of those convicted and the possibility of compensation to victims); UNTAET Regulation 30 as amended, *supra* note 54, §§ 42.3, 50 (permitting confiscation and return of objects seized during the proceeding and creating a civil cause of action for alleged victims to claim compensation); UNTAET Regulation 15, *supra* note 18, § 10.1(c) (permitting as a penalty a forfeiture of proceeds, property, and assets derived directly or indirectly from the crime); Charter of the International Military Tribunal, *supra* note 51, art. 28 (allowing the Tribunal to deprive any convicted person of any stolen property); Beresford, *supra* note 27, at 36 n.11 (noting that the Nuremberg Tribunal did not avail itself of its authority to return stolen property).

75 Vandeginste, *supra* note 20, at 250.

76 *Id.* at 253 (noting that the ICTR has not made use of its authority to order restitution in any of the judgments it has issued).

77 *See, e.g.*, E-mail correspondence from Roger Clark, Professor, Rutgers Law School, to Mark Drumbl, Professor, Washington and Lee University School of Law (Feb. 17, 2004) (on file with author) (discussing references to victims throughout the Rome Statute).

78 Rome Statute, *supra* note 2, art. 79. For more information on the Trust Fund, see *International Criminal Court: Victims Trust Fund*, *at* http://www.icc-cpi.int/php/show.php?id=victimstrustfund (last visited Jan. 29, 2004).

79 UNTAET Regulation 15, *supra* note 18, § 25.

80 The Sierra Leone Special Court has indicted eleven individuals on charges of war crimes, crimes against humanity, and other serious violations of international humanitarian law. *Special Court for Sierra Leone*, *available at* http://www.sc-sl.org/frontpage.html (last visited Aug. 6, 2004).

81 The East Timor panels have on occasion invoked the jurisprudence of the ad hocs. Prosecutor v. Marqués, Case No. 09/2000, para. 28 (Dili Dist. Ct. Serious Crimes Spec. Panel Dec. 11, 2001) ("The Elements of the Crime provided by the Preparatory Committee need to be considered along with the jurisprudence of the ad hoc tribunals.").

judges—even the international judges—in Kosovo to refer to the work of other international criminal law institutions.[82]

At the ICTR, of the twenty individuals who have been convicted at the time of writing, eleven have been sentenced to life imprisonment (in certain cases, to multiple life sentences), one to thirty-five years, one to thirty years, one to twenty-seven years, three to twenty-five years, and the remainder to terms ranging from ten to fifteen years.[83] The ICTY has issued one life sentence, which is currently under appeal.[84] Its thirty final sentences[85] range from terms of imprisonment of forty years to three years. The mean sentence is 13.9 years and the median sentence is twelve years.[86] Six convicts have been granted early release. The ICTY Trial Chambers' heaviest term sentences, forty-six years to General Krstić and forty-five years to General Blaškić, had been reduced by the Appeals Chamber to thirty-five and nine years, respectively.[87] Other heavy term sentences remain under appeal.[88] Even if the Appeals Chamber were to affirm each of these sentences, the result would slightly narrow but would do little to eliminate the disparity between ICTY and ICTR sentencing practices. All ICTR and ICTY convicts serve their sentences in facilities in those states that have expressed a willingness to accept them.[89]

The East Timor panels empowered to adjudicate international crimes have issued a broad range of sentences: from three to sixteen years for the domestic crimes within their jurisdiction and from three to 33 1/3 years for the international crimes within their jurisdiction. The average sentences issued by the East Timor panels are 8.4 years for ordinary crimes and 14.2 years for international crimes, although a large number of these remain sub-

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[82] KOSOVO'S WAR CRIMES TRIALS, *supra* note 17, at 46–47, 52. This data is current only to the end of June 2002, at which point seventeen cases had been initiated. *Id.* at 12.

[83] Data compiled from The United Nations, *Status of ICTR Detainees*, *available at* www.ictr.org/ENGLISH/factsheets/ICTRDetainee.htm (last visited July 19, 2004). There have been three acquittals, two of which remain under appeal.

[84] Prosecutor v. Stakić, Case No. IT-97-24-T (I.C.T.Y. Trial Chamber July 31, 2003).

[85] Current as of August 2004.

[86] Data compiled from The United Nations, *Fact Sheet on ICTY Proceedings*, *available at* http://www.un.org/icty/cases/factsheets/procfact-e.htm (Aug. 5, 2004). The average length of sentences is lower than it was in 2002. Drumbl & Gallant, *supra* note 14, at 142 (reporting data as of July 29, 2002 of a mean sentence of the ICTY of fifteen years and a median sentence of sixteen years).

[87] Prosecutor v. Krstić, Case No. IT-98-33-A (I.C.T.Y. App. Chamber Apr. 19, 2004) (reducing sentence on the grounds that Krstić's responsibility for the Srebrenica genocide was more properly characterized as aiding and abetting rather than a co-perpetrator in a joint criminal enterprise); Prosecutor v. Blaškić, Case No. IT-95-14-A (I.C.T.Y. App. Chamber July 29, 2004) (reducing sentence and granting Blaškić early release in light of its quashing most of the convictions owing to its finding that liability based command responsibility had not been established).

[88] These include twenty-seven years to Momir Nikolić, and twenty-five years each to Zoran Zigić and Dario Kordić.

[89] Statute of the ICTY, *supra* note 14, art. 27; Statute of the ICTR, *supra* note 13, art. 26. These states include Mali, Germany, Finland, Spain, Austria, and Norway. Drumbl & Gallant, *supra* note 14, at 141.

ject to appeal.[90] This represents a drop from the average of 9.2 years for ordinary crimes and 16.9 years for international crimes present in September 2003. The data from the Kosovo courts indicates an average sentence of thirteen years for ordinary crimes and 15.8 years for those international crimes prescribed by the Federal Republic of Yugoslavia and Kosovo criminal codes.[91] A number of the Kosovo sentences have been quashed and some cases currently are being reheard.[92]

The "unfettered discretion"[93] to sentence delegated to international judges inexorably leads to a broad range of actual sentences.[94] International judges are comfortable with this power notwithstanding the concomitant lack of consistency in sentencing and threat to the *nulla poena sine lege* principle. In *Delalić* (*Čelebići*), the ICTY Appeals Chamber nodded approvingly to the "considerable amount of discretion" to fashion a sentence, commenting that this discretion stems from the "over-riding obligation to individualise a penalty to fit the individual circumstances of the accused

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[90] Data is current to May 4, 2004 and is compiled from yearly case information at http://www.jsmp.minihub.org/courtmonitoring/spsccaseinformation2002.htm (last visited Nov. 3, 2004). A number of important trials recently have concluded and verdicts are pending. The national crimes within the jurisdiction of the East Timor panels are those punishable under East Timorese, Indonesian, or Portuguese law. In calculating the average sentence for national crimes, I excluded one sentence of eleven months for ordinary criminal negligence and one sentence of one year for ordinary murder (crimes against humanity charge dropped) for a minor owing to the unusual nature of these convictions.

[91] I excluded one case involving a minor convicted of an ordinary domestic crime; the minor was diverted to a juvenile correctional facility for re-education for a term of one to five years. The average for international crimes would be slightly lowered by four sentences (seventeen, thirteen, ten, and five years) issued by an international judge in November 2003 against four Kosovo Albanians upon convictions for war crimes. OSCE Case Report, Prosecutor v. Gashi (Nov. 11, 2003) (*Llapi case*) (document on file with author).

[92] KOSOVO'S WAR CRIMES TRIALS, *supra* note 17, at 12–28 (data current to June 2002). The Kosovo data is not terribly probative and, as a result, I will not give it much weight. Many of the cases are subject to appeal. There also have been a large number of acquittals (mostly because of a practice by international prosecutors to overcharge international crimes). A number of detainees also have escaped during or pending trial. For a detailed discussion of the structural difficulties faced by hybrid institutions in Kosovo, see OSCE MISSION IN KOSOVO, DEP'T OF HUMAN RIGHTS & RULE OF LAW, KOSOVO: A REVIEW OF THE CRIMINAL JUSTICE SYSTEM 31–41 (Sept. 1, 2000–Feb. 28, 2001).

[93] Prosecutor v. Rutaganda, Case No. ICTR-96-3, para. 458 (I.C.T.R. Trial Chamber Dec. 6, 1999), *aff'd*, Case No. ICTR-96-3-A (I.C.T.R. App. Chamber May 26, 2003).

[94] *See also* CASSESE, *supra* note 21, at 157; Henham, *supra* note 65, at 20 (calling the discretion available to international sentencers as "largely unfettered"). Judges have been willing to utilize their "unfettered discretion" to go beyond the content of the positive law. Prosecutor v. Kayishema, Case No. ICTR-95-1-T, para. 4 (I.C.T.R. Trial Chamber, May 21, 1999) (sentencing order). For an exhortation for the development of guidelines to standardize the sentences meted out by international tribunals, see Beresford, *supra* note 27, at 82. To be sure, sentencers in domestic jurisdictions also have discretion to sentence. Certain positive law instruments, however, narrow this discretion. In the case of the United States, see Federal Sentencing Guidelines, 28 U.S.C. §§ 991–998 (2000); MARVIN FRANKEL, CRIMINAL SENTENCES: LAW WITHOUT ORDER 17–23 (1973); Stephen Breyer, *The Federal Sentencing Guidelines and the Key Compromises upon Which They Rest*, 17 HOFSTRA L. REV. 1 (1988). The ICTY Appeals Chamber has emphasized the inappropriateness of setting down a definitive list of sentencing guidelines. Prosecutor v. Krstić, Case No. IT-98-33-A, para. 242 (I.C.T.Y. App. Chamber, Apr. 19, 2004).

and the gravity of the crime."[95] Recognition of judicial discretion in the fixing of sentences remains a firm point of reference in the ICTY's jurisprudence.[96] Although discretion may be desirable in certain situations, the benefits of individualized sentencing dissipate when there is no coherent framework in which to predictably consider the factors germane to sentencing.

C. Penological Justifications

Given the broad discretion to sentence, there is a need to inquire whether the exercise of this discretion is in any way patterned or predictable. In other words, why do international criminal tribunals punish more severely in some cases and less so in others? The positive law documents essentially are silent as to the penological purpose of the sentences imposed. However, the jurisprudence is considerably more responsive.

The two most prominent punishment rationales are retribution and general deterrence.[97] Retribution posits that the infliction of punishment rectifies the moral balance insofar as punishment is what the perpetrator deserves. For the retributivist, punishment is to be proportionate to the nature

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[95] Prosecutor v. Delalić, Case No. IT-96-21-A, paras. 717–718 (I.C.T.Y. App. Chamber Feb. 20, 2001); *see also* Prosecutor v. Krstić, Case No. IT-98-33-A, para. 242 (I.C.T.Y. App. Chamber Apr. 19, 2004) ("[T]he imposition of a sentence is a discretionary decision.").

[96] Prosecutor v. Stakić, Case No. IT-97-24-T, para. 884 (I.C.T.Y. Trial Chamber July 31, 2003).

[97] Prosecutor v. Simić, Case No. IT-95-9, para. 1059 (I.C.T.Y. Trial Chamber Oct. 17, 2003) ("The jurisprudence of the Tribunal [ICTY] emphasizes deterrence and retribution as the main general sentencing factors."); Prosecutor v. Stakić, Case No. IT-97-24-T, para. 900 (I.C.T.Y. Trial Chamber July 31, 2003) (stating that "it is universally accepted and reflected in judgments [of the ICTY and ICTR] that deterrence and retribution are general factors to be taken into account in when imposing sentence"); Prosecutor v. Rutaganda, Case No. ICTR-96-3, para. 456 (I.C.T.R. Trial Chamber Dec. 6, 1999) ("[I]t is clear that the penalties imposed on accused persons found guilty by the Tribunal must be directed, on the one hand, at retribution of the said accused, who must see their crimes punished, and over and above that, on the other hand, at deterrence, namely to dissuade forever, others who may be tempted in the future to perpetrate such atrocities by showing them that the international community shall not tolerate the serious violations of international humanitarian law and human rights."); Prosecutor v. Marqués, Case No. 09/2000, para. 979 (Dili Dist. Ct. Serious Crimes Spec. Panel Dec. 11, 2001) ("The penalties imposed on accused persons found guilty by the Panel are intended, on the one hand, as retribution against the said accused, whose crimes must be seen to be punished (*punitur quia peccatur*). They are also intended to act as deterrence; namely, to dissuade forever, others who may be tempted in the future to perpetrate such atrocities by showing them that the international community shall not tolerate such serious violations of law and human rights (*punitur ne peccetur*."). For further treatment of deterrence and retribution as the two major motivations behind sentencing perpetrators of mass atrocity, see Prosecutor v. Serushago, Case No. ICTR-98-39-S, para. 20 (I.C.T.R. Trial Chamber Feb. 5, 1999); Prosecutor v. Kambanda, Case No. ICTR-97-23-S, para. 28 (I.C.T.R Trial Chamber Sept. 4, 1998); Prosecutor v. Furundžija, Case No. IT-95-17/1-T, para. 288 (I.C.T.Y Trial Chamber Dec. 10, 1998); Prosecutor v. Todorović, Case No. IT-95-9/1-S, paras. 28–29 (I.C.T.Y. Trial Chamber July 31, 2001); Prosecutor v. Krnojelac, Case No. IT-97-25, para. 508 (I.C.T.Y. Trial Chamber Mar. 15, 2002); Prosecutor v. Mateus Tilman, Case No. 08/2000, para. 68 (Dili Dist. Ct. Serious Crimes Spec. Panel Aug. 24, 2001).

and extent of the crime.[98] General deterrence, on the other hand, suggests that the purpose of prosecuting and punishing those who commit mass atrocity is to dissuade others from doing so in the future.[99] From a deterrence perspective, punishment is inflicted not because the offender deserves it, but because of the utilitarian and consequentialist effect of that punishment; namely, reducing recidivism. Whereas consequentialist and utilitarian rationales are forward-looking, retributive rationales are backward-looking. There are other consequentialist rationales. These include rehabilitation, incapacitation, and reconciliation. The place of these within the practice of international sentencing, although expanding, remains marginal.[100]

Whereas retribution had been a major motivating factor at Nuremberg[101] and animated the initial jurisprudence of the ad hoc tribunals, the general deterrence motivation has acquired some traction.[102] However, considerable indeterminacy and confusion persist. The ad hoc tribunals vacillate when it comes to prioritizing the weight to accord to retribution and deterrence in sentencing. For example, over the past five years the ICTY has issued judgments that cite retribution and general deterrence as "equally

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[98] Prosecutor v. Akayesu, Case No. ICTR-96-4-S, para. 40 (I.C.T.R. Trial Chamber Oct. 2, 1998) ("[A] sentence must reflect the predominant standard of proportionality between the gravity of the offence and the degree of responsibility of the offender.").

[99] Specific deterrence implies that punishing the offender will deter that offender from re-offending in the future. For the most part, international criminal tribunals do not ascribe much importance to this sentencing rationale. *See*, *e.g.*, Prosecutor v. Kunarac, Case No. IT-96-23-T, para. 840 (I.C.T.Y. Trial Chamber Feb. 22, 2001) (holding that "the likelihood of persons convicted here ever again being faced with an opportunity to commit war crimes, crimes against humanity, genocide or grave breaches is so remote as to render its consideration in this way unreasonable and unfair"); Prosecutor v. Niyitegeka, Case No. ICTR-96-14-T, para. 484 (I.C.T.R. Trial Chamber May 16, 2003) ("[S]pecific emphasis is placed on general deterrence . . . ."), *aff'd*, Case No. ICTR-96-14-A (I.C.T.R. App. Chamber July 9, 2004). However, the international tribunals are inconsistent regarding even this somewhat settled point. *See, e.g.*, Prosecutor v. Mrdja, Case No. IT-02-59-S, para. 16 (I.C.T.Y. Trial Chamber Mar. 31, 2004) (holding that the main deterrent effect sought is to turn the perpetrator away from future wrongdoing); Prosecutor v. Babić, Case No. IT-03-72-S, para. 45 (I.C.T.Y. Trial Chamber June 29, 2004) (holding that specific deterrence is the main effect of punishment, although there also is a general deterrence effect).

[100] *See* Prosecutor v. Delalić, Case No. IT-96-21-A (I.C.T.Y. App. Chamber Feb. 20, 2001). For a discussion of the ICTY's reserve regarding rehabilitation notwithstanding the importance of rehabilitation within the corpus of international human rights law, see Schabas, *supra* note 27, at 504. The ICTY mentioned rehabilitation as a "third" goal of sentencing in the *Nikolić* sentencing judgment, issued on December 2, 2003. Prosecutor v. Nikolić, Case No. IT-02-60/1-S, paras. 85, 93 (I.C.T.Y. Trial Chamber Dec. 2, 2003). However, rehabilitation did not figure in the quantification of sentence. Although reconciliation and peace surface in some of the judgments of the ad hocs, there has been no attempt to creatively integrate these concerns with sentence.

[101] Beresford, *supra* note 27, at 41. Unlike the Nuremberg Tribunal, no extant international criminal law institution can issue a death sentence. The Special Court for Iraq, a national court designed with the assistance of the U.S. as an occupying power, can award the death penalty.

[102] Klabbers, *supra* note 25, at 251 (citing the deterrence argument as perhaps the main reason underlying the creation of the ICC).

important,"[103] judgments that cite retribution as the "primary objective" and deterrence as a "further hope," warning deterrence "should not be given undue prominence,"[104] and judgments that flatly state "deterrence probably is the most important factor in the assessment of appropriate sentences."[105]

Retributive concerns also appear to be challenged by expressive rationales, which emerge as a third justification. These rationales posit that one of the purposes of punishment is to express the importance of law and to embed the normative value of law within the community. For example, in *Aleksovski*, the ICTY opined that a sentence should "make plain . . . that the international community [is] not ready to tolerate serious violations of international humanitarian law and human rights."[106] Expressivism's focus is on strengthening the rule of law through punishment, as opposed to punishing simply because the perpetrator deserves it or to deter future crimes.

That said, in practice international criminal law still evidences a preference for retributive motivations.[107] The occasional favorable pronouncement by the ad hoc tribunals (which, by the way, do not emerge in the decisions of the East Timor panels) regarding the merits of deterrence do not carry through to the actual indicators used to quantify sentences. Retributive concerns dominate the factors international criminal law institutions view as "aggravating" or "mitigating" in the imposition of sentence. These factors mostly attach to the extent of the wrongdoer's culpability, blameworthiness, immorality, and desert. In fact, when counsel for one defendant urged the ICTY Appeals Chamber to reconsider a Trial Chamber sentence based on a "trend in international law" away from retribution, the Appeals Chamber sharply disagreed.[108] The Appeals Chamber found this "alleged" trend to be unsubstantiated and instead underscored the importance of retribution as a general sentencing factor.[109]

Although the positive law of the ad hoc tribunals provides only one illustration of a mitigating or aggravating circumstance,[110] the jurisprudence

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[103] Prosecutor v. Stakić, Case No. IT-97-24-T, para. 900 (I.C.T.Y. Trial Chamber July 31, 2003).

[104] Prosecutor v. Nikolić, Case No. IT-02-60/1-S, paras. 59, 90 (I.C.T.Y. Trial Chamber Dec. 2, 2003).

[105] Prosecutor v. Delalić, Case No. IT-96-21-T, para. 1234 (I.C.T.Y. Trial Chamber Nov. 16, 1998).

[106] Prosecutor v. Aleksovski, Case No. IT-95-14/1-A, para. 185 (I.C.T.Y. App. Chamber Mar. 24, 2000). In one case, the principle of retribution was linked to the expression of the outrage of the international community. Prosecutor v. Simić, Case No. IT-95-9, para. 1059 (I.C.T.Y. Trial Chamber Oct. 17, 2003). This is an interesting development on the part of the ad hoc tribunals, although it is unclear whether this linkage will continue over time.

[107] Bassiouni, *supra* note 21, at 681, 689; Ralph Henham, *The Philosophical Foundations of International Sentencing*, 1 J. INT'L CRIM. JUSTICE 64, 69, 72 (2003).

[108] Prosecutor v. Kunarac, Case No. IT 96-23/1-A, para. 385 (I.C.T.Y. App. Chamber June 12, 2002).

[109] *Id.*

[110] ICTY R.P. & EVID. 101(B)(i), (ii), *supra* note 54 (identifying "substantial cooperation with the Prosecutor by the convicted person before or after conviction" as a mitigating factor).

develops many more.[111] The most important aggravating factors are: the gravity and egregiousness of the crimes;[112] the breadth of the crimes and the suffering inflicted on victims;[113] the youth of the victims;[114] the nature of the perpetrator's involvement (active role, principal perpetrator, secondary/indirect involvement);[115] premeditation and discriminatory intent;[116] position as a superior;[117] and behavior of the accused during trial.[118] Aggravating factors must be proven beyond a reasonable doubt in order to affect sentence.[119] The ICTY has clearly stated that an aggravating factor only can increase the sentence if that factor did not form an element of the actual of-

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[111] Although not formally bound by *stare decisis*, the judges of the ad hocs frequently refer to prior decisions. In the sentencing context, however, this does not lead to predictable judicial outputs.

[112] *See, e.g.*, Prosecutor v. Simić, Case No. IT-95-9, para. 1062 (I.C.T.Y. Trial Chamber Oct. 17, 2003) (stating that the gravity of the crimes is the primary consideration in imposing sentence); Prosecutor v. Nahimana, Case No. ICTR-99-52-T, para. 1102 (I.C.T.R. Trial Chamber Dec. 3, 2003) (suggesting that the Trial Chamber was motivated by the cruelty of the crimes); Prosecutor v. Obrenović, Case No. IT-02-60/2-S, para. 62 (I.C.T.Y Trial Chamber Dec. 10, 2003) ("[T]he gravity of the offense is the 'litmus test' in the determination of an appropriate sentence."); Prosecutor v. Kayishema, Case No. ICTR-95-1-T, para. 18 (I.C.T.R. Trial Chamber May 21, 1999) (acknowledging the influence of the vicious nature of the murders on sentencing decisions); Prosecutor v. Jelisić, Case No. IT-95-10-T, para. 130 (I.C.T.Y. Trial Chamber Dec. 14, 1999) (acknowledging the influence of the repugnant, bestial, and sadistic nature of the offender's behavior on the court's decision).

[113] Prosecutor v. Erdemović, Case No. IT-96-22-T, para. 85 (I.C.T.Y. Trial Chamber Nov. 29, 1996) (first sentencing judgment).

[114] Prosecutor v. Kunarac, Case No. IT-96-23/1-A, para. 381 (I.C.T.Y. App. Chamber June 12, 2002).

[115] Prosecutor v. Stakić, Case No. IT-97-24-T, para. 906 (I.C.T.Y Trial Chamber July 31, 2003) (discussing the accused's "unique pivotal role in co-ordinating the persecutory campaign"); Prosecutor v. Rutaganda, Case No. ICTR-96-3, para. 470 (I.C.T.R. Trial Chamber Dec. 6, 1999), *aff'd*, Case No. ICTR-96-3-A (I.C.T.R. App. Chamber May 26, 2003) (affirming sentence of life imprisonment); Prosecutor v. Ntagerura, Case No. ICTR-99-46-T, para. 813 (I.C.T.R. Trial Chamber Feb. 25, 2004) (systematizing ICTR sentencing patterns of fifteen years to life for principal perpetrators, and lower sentences for secondary or indirect forms of participation); Prosecutor v. Krstić, Case No. IT-98-33-A, paras. 266–68 (I.C.T.Y. App. Chamber Apr. 19, 2004); Prosecutor v. Vasiljević, Case No. IT-98-32-A, para. 182 (I.C.T.Y. App. Chamber Feb. 25, 2004) ("[A]iding and abetting is a form of responsibility which generally warrants a lower sentence than is appropriate to responsibility as a co-perpetrator.").

[116] When discriminatory intent forms part of the requisite elements for proof of the crimes charged, it will not be considered separately as an aggravating factor in sentencing. Prosecutor v. Simić, Case No. IT-95-9, para. 1063 (I.C.T.Y. Trial Chamber Oct. 17, 2003); Prosecutor v. Vasiljević, Case No. IT-98-32-A, paras. 171–172 (I.C.T.Y. App. Chamber Feb. 25, 2004); Prosecutor v. Blaškić, Case No. IT-95-14-A, para. 683 (I.C.T.Y. App. Chamber July 29, 2004).

[117] Prosecutor v. Kamuhanda, Case No. ICTR-95-54A-T, para. 764 (I.C.T.R. Trial Chamber Jan. 22, 2004). *But see* Prosecutor v. Krstić, Case No. IT-98-33-T, para. 709 (I.C.T.Y Trial Chamber Aug. 2, 2001) ("[The] current case law of the Tribunal [ICTY] does not evidence a discernible pattern of the Tribunal imposing sentences on subordinates that differ greatly from those imposed on their superiors.") (conclusion left undisturbed on appeal).

[118] Prosecutor v. Kayishema, Case No. ICTR-95-1-T, para. 17 (I.C.T.R. Trial Chamber May 21, 1999) (sentence influenced by the fact defendant Ruzindana repeatedly smiled and laughed as genocide survivors testified against him).

[119] Prosecutor v. Simić, Case No. IT-95-9, para. 1064 (I.C.T.Y. Trial Chamber Oct. 17, 2003); Prosecutor v. Stakić, Case No. IT-97-24-T, para. 912 (I.C.T.Y Trial Chamber July 31, 2003).

fense.[120] Mitigating factors include: whether and when the accused pled guilty;[121] substantial cooperation on the part of the offender;[122] remorse;[123] the youth[124] or advanced age[125] of the offender; the extent to which the offender was subject to duress or coercion;[126] the "good character" of the offender;[127] the chaos of constant armed conflict;[128] and any human rights

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[120] Prosecutor v. Blaškić, Case No. IT-95-14-A, para. 693 (I.C.T.Y. App. Chamber July 29, 2004).

[121] Prosecutor v. Kambanda, Case No. ICTR-97-23-S, para. 54 (I.C.T.R. Trial Chamber Sept. 4, 1998) (noting that a guilty plea should trigger a reduced sentence since victims no longer have to undergo the trauma of trial); Prosecutor v. Ruggiu, ICTR-97-32-I, para. 53 (I.C.T.R. Trial Chamber June 1, 2000) (noting that guilty pleas expedite proceedings and save resources); Prosecutor v. Sikirica, Case No. IT-95-8-S, para. 148 (I.C.T.Y. Trial Chamber Nov. 13, 2001) (citing a guilty plea as the "primary factor" to be considered in mitigation of the defendant's sentence); Prosecutor v. Plavšić, Case No. IT-00-39&40/1-S, para. 110 (I.C.T.Y. Trial Chamber Feb. 27, 2003). Although the ad hoc tribunals began their operations by viewing plea bargains with disfavor, this approach changed over time. MICHAEL SCHARF, BALKAN JUSTICE 67 (1997); Combs, *supra* note 33, at 934. Rule amendments eventually were adopted that permitted plea bargaining. *See* ICTY R.P. & EVID. 62bis, 62ter, *supra* note 54 (permitting both guilty pleas and plea agreements, although plea agreements have been preferred in practice); ICTR R.P. & EVID. 62, *supra* note 57. Plea bargaining has become became quite *de rigueur* at the ICTY, although less prevalent at the ICTR and East Timorese panels. Marlise Simons, *Plea Deals Being Used to Clear Balkans War Tribunal's Docket*, N.Y. TIMES, Nov. 18, 2003. That said, and perhaps in response to this practice of liberal recourse to plea bargaining, the ICTY very recently has expressed the need for some caution in approving plea bargains. Prosecutor v. Nikolić, Case No. IT-02-60/1-S, para. 73 (I.C.T.Y. Trial Chamber Dec. 2, 2003). The ICC permits proceedings on an admission of guilt. Rome Statute, *supra* note 2, arts. 65–66. Notwithstanding the apparent difference between plea bargaining and admitting guilt, it is reasonable to expect that ICC judges will treat an admission of guilt as a mitigating factor in a manner similar to that espoused by ICTR and ICTY judges.

[122] ICTY R.P. & EVID. 101(B)(ii), *supra* note 54; Prosecutor v. Todorović, Case No. IT-95-9/1-S, paras. 83–88 (I.C.T.Y. Trial Chamber July 31, 2001). Voluntary surrender also has been held to constitute a mitigating factor. Prosecutor v. Kupreškić, Case No. IT-95-16-A, para. 430 (I.T.C.Y. App. Chamber Oct. 23, 2001).

[123] Prosecutor v. Ruggiu, ICTR-97-32-I, para. 69 (I.C.T.R. Trial Chamber June 1, 2000); Prosecutor v. Sikirica, Case No. IT-95-8-S, paras. 152, 194, 230 (I.C.T.Y. Trial Chamber Nov. 13, 2001); Prosecutor v. Todorović, Case No. IT-95-9/1-S, paras. 89–92 (I.C.T.Y. Trial Chamber July 31, 2001); Prosecutor v. Blaškić, Case No. IT-95-14-A, para. 705 (I.C.T.Y. App. Chamber July 29, 2004); Prosecutor v. Milan Simić, Case No. IT-95-9/2-S, para. 94 (I.C.T.Y Trial Chamber Oct. 17, 2002).

[124] Prosecutor v. Jelisić, Case No. IT-95-10-A, paras. 129–131 (I.C.T.Y. App. Chamber July 5, 2001); Prosecutor v. Delalić, Case No. IT-96-21-A, para. 1194 (I.C.T.Y. App. Chamber Feb. 20, 2001).

[125] Prosecutor v. Plavšić, Case No. IT-00-39&40/1-S, paras. 10, 110 (I.C.T.Y. Trial Chamber Feb. 27, 2003).

[126] Prosecutor v. Krstić, Case No. IT-98-33-T, para. 711 (I.C.T.Y. Trial Chamber Aug. 2, 2001) ("[R]eluctant participation in the crimes may in some instances be considered as a mitigating circumstance . . . ."); Prosecutor v. Erdemović, Case No. IT-96-22-Tbis, para. 17 (I.C.T.Y. Trial Chamber Mar. 5, 1998) (second sentencing judgment). "Diminished mental responsibility" also has been considered in this regard as a mitigating factor. Prosecutor v. Delalić, Case No. IT-96-21-A, paras. 590, 841 (I.C.T.Y. App. Chamber Feb. 20, 2001).

[127] Prosecutor v. Krnojelac, Case No. IT-97-25-T, para. 519 (I.C.T.Y. Trial Chamber Mar. 15, 2002); *see also id.* para. 518 (citing acts of assistance to victims as a mitigating factor).

[128] Prosecutor v. Delalić, Case No. IT-96-21-T, paras. 1283–1284 (I.C.T.Y. Trial Chamber Nov. 16, 1998).

violation suffered by the offender during pre-trial or trial proceedings.[129] Mitigating factors require proof only on a balance of probabilities.[130]

The East Timor panels claim similar aggravating and mitigating factors in the exercise of their discretion to punish. A review of the East Timor jurisprudence reveals considerable attention paid to gravity[131] and superior responsibility[132] as aggravating factors, and pleading guilty,[133] remorse,[134] youth,[135] position as a subordinate,[136] coercive environment,[137] and personal

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[129] Prosecutor v. Nahimana, Case No. ICTR-99-52-T, para. 1107 (I.C.T.R. Trial Chamber Dec. 3, 2003). Although the sentencing judges remarked that a life sentence was appropriate for Barayagwiza, they reduced his sentence because of the extensive delays that had arisen in the process of bringing him to trial. *Id.* paras. 1106–1107. Barayagwiza, one of the founders of the national Rwandan broadcasting network which disseminated propaganda and other incitements to genocide, was sentenced to thirty-five years of imprisonment. *Id.*; *see also* Prosecutor v. Semanza, Case No. ICTR-97-20-T, paras. 557, 580 (I.C.T.R. Trial Chamber May 15, 2003) (convicting defendant of complicity to commit genocide and aiding and abetting crimes against humanity and sentencing him to twenty-five years of imprisonment, but reducing the sentence by six months owing to rights violations in the pre-trial phase).

[130] Prosecutor v. Simić, Case No. IT-95-9-T, para.1065 (I.C.T.Y. Trial Chamber Oct. 17, 2003); Prosecutor v. Sikirica, Case No. IT-95-8-S, para. 110 (I.C.T.Y. Trial Chamber Nov. 13, 2001). *But see* Prosecutor v. Musema, Case No. ICTR-96-13-T, para. 396 (I.C.T.R. App. Chamber Nov. 16, 2001) (holding that the weight to be accorded mitigating circumstances lies within the discretion of the Trial Chamber). It is unclear whether any burden as to mitigating factors can be placed on the accused under the ICC. *See* Rome Statute, *supra* note 2, art. 67(1)(i).

[131] Prosecutor v. Fernandez, Case No. 02.C.G.2000, para. 6 (Dili Dist. Ct. Serious Crimes Spec. Panel Mar. 1, 2000) ("When killed [the victim] had his hands tied behind his back, was sitting on a chair, defenseless, bleeding and suffering from serious maltreatment and injuries. He should have inspired pity not violence."); Prosecutor v. da Costa, Case No. 07/2000, para. 84 (Dili Dist. Ct. Serious Crimes Spec. Panel Oct. 11, 2001) (discussing the sadistic and inhumane way in which the victim was killed); Prosecutor v. Marqués, Case No. 9-PID.C.G/2000, paras. 348–50 (Dili Dist. Ct. Serious Crimes Spec. Panel Dec. 11, 2001) (identifying the "horrifying manner" of the violence against a "defenseless person" as an aggravating factor in a case involving crimes against humanity).

[132] Prosecutor v. Franca da Silva, Case No. 04a/2001, para. 152 (Dili Dist. Ct. Serious Crimes Spec. Panel Dec. 5, 2001); Prosecutor v. Marqués, Case No. 9/2000, para. 352 (Dili Dist. Ct. Serious Crimes Spec. Panel Dec. 11, 2001) ("The performance of a role as one of the leaders in arresting the victim in order to be tortured and killed.").

[133] Prosecutor v. Fernandez, Case No. 01/00.C.G.2000, para. 20 (Dili Dist. Ct. Serious Crimes Spec. Panel Jan. 25, 2000), *aff'd*, Case No. N. 2001/12 (Ct. Crim. App. July 29, 2001); Prosecutor v. Franca da Silva, Case No. 04a/2001, para. 144 (Dili Dist. Ct. Serious Crimes Spec. Panel Dec. 5, 2001); Prosecutor v. Atolan, Case No. 3/2003, para. 33 (Dili Dist. Ct. Serious Crimes Spec. Panel June 9, 2003).

[134] Prosecutor v. Franca da Silva, Case No. 04a/2001, para. 147 (Dili Dist. Ct. Serious Crimes Spec. Panel Dec. 5, 2001).

[135] Prosecutor v. Fernandez, Case No. 01/00.C.G.2000, para. 20(c) (Dili Dist. Ct. Serious Crimes Spec. Panel Jan. 25, 2000); *see also id.* para. 20(a) (referencing cooperation, aiding in the administration of justice, and full disclosure as other mitigating factors).

[136] *See* Prosecutor v. Leki, Case No. 05/2000, para. 65 (Dili Dist. Ct. Serious Crimes Spec. Panel June 11, 2001).

[137] *See* Prosecutor v. Franca da Silva, Case No. 04a/2001, para. 145 (Dili Dist. Ct. Serious Crimes Spec. Panel Dec. 5, 2001).

or family circumstance[138] as mitigating factors. A peculiar pattern of sentencing at the East Timor panels involves judges referring to mitigating factors such as youth, family circumstances, and subordinate position; and then, without providing any explanation, discounting these factors with a mechanical recitation of the following proviso: "this may be said of many accused persons and cannot be given any significant weight in a case of this gravity."[139]

In the case of the East Timor panels, national sentencing guidelines explicitly influence the work of the judges in punishing international crimes;[140] in the case of the Kosovo panels, domestic law appears to fully contour the process although there is little evidence of a patterned exercise of sentencing discretion. Furthermore, the East Timor panels, which have dual jurisdiction, do not differentiate among the criteria used or the theory of punishment espoused when it comes to sentencing ordinary crimes or sentencing international crimes. That said, the overall ratio of their sentences for domestic crimes to international crimes is 1:1.69.[141] As for the Kosovo panels, the data is insufficient to ground a firm prediction, but it appears that the slight difference between the severity of sentence for international crimes and domestic crimes evidences that, in terms of quantification of sentence, punishment for international crimes merits only a slightly higher retributive value than punishment for domestic offenses.[142]

By and large, the sentencing factors considered by international tribunals in punishing international crimes animate sentencing practices in the domestic criminal law of many states. The only exception is the discounting of a sentence owing to the chaos that may ensue from endemic armed conflict.[143] However, this is "not a decisive factor."[144] It was in fact explic-

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[138] Prosecutor v. Soares Carmona, Case No. 03.C.G.2000, para. 49 (Dili Dist. Ct. Serious Crimes Spec. Panel Apr. 19, 2001) (citing as a mitigating factor the offender's belief in black magic, which motivated a revenge killing); Prosecutor v. Franca da Silva, Case No. 04a/2001, para. 147 (Dili Dist. Ct. Serious Crimes Spec. Panel Dec. 5, 2001).

[139] Prosecutor v. Fernandez, Case No. 01/00.C.G.2000, para. 20(c) (Dili Dist. Ct. Serious Crimes Spec. Panel Jan. 25, 2000); *see also* Prosecutor v. Fernandez, Case No. 02.C.G.2000, para. 9 (Dili Dist. Ct. Serious Crimes Spec. Panel Mar. 1, 2000); Prosecutor v. Goncalves Leto Bere, Case No. 10/2000, paras. 57–59 (Dili Dist. Ct. Serious Crimes Spec. Panel May 15, 2001).

[140] *See, e.g.*, Prosecutor v. dos Santos, Case No. 16/2001, para. 75 (East Timor Ct. App. July 15, 2003) (holding that the criteria for determining a sentence for genocide derive from the ordinary sentencing provisions of the Portuguese Penal Code). *But see* Prosecutor v. Marqués, Case No. 09/2000, para. 447 (Dili Dist. Ct. Serious Crimes Spec. Panel Dec. 11, 2001) (holding, in a manner similar to the ICTY, that "the sentencing practices in the courts of East Timor may be used for guidance, but [they are] not binding").

[141] *See supra* note 90.

[142] *See supra* notes 91–92.

[143] Prosecutor v. Fernandez, Case No. 02.C.G.2000, paras. 7–8 (Dili Dist. Ct. Serious Crimes Spec. Panel Mar. 1, 2000); Prosecutor v. Franca da Silva, Case No. 04a/2001, para. 146 (Dili Dist. Ct. Serious Crimes Spec. Panel Dec. 5, 2001).

[144] Beresford, *supra* note 27, at 79.

itly condemned by the ICTY in the *Blaškić* decision[145] and does not appear to have affected the quantification of sentence in the East Timor panels. Accordingly, the provenance of theory and the operationalization of penality in international criminal law derive heavily from domestic criminal law.

This empirical review also reveals a significant level of confusion and inconsistency in the rationales of why international criminal institutions punish individuals, although the *praxis* of the ICTR, ICTY, and East Timor panels suggests that retributive motivations have the greatest currency.[146] Notwithstanding the emergence of a fledgling jurisprudence that might help systematize sentences, judges still remain unsure and to some extent divided about the purpose of the punishments they hand out.[147] Judges can access a wide range of evidence in establishing sentence, but there is no cogent framework or heuristic to standardize the weight to attribute to each of the many pieces of evidence available for consideration. A disarticulation thus emerges between the avowed goals of sentencing and the outputs of the sentencing process. In the end, the abundance of discretion feeds this disarticulation instead of cabining it.[148] The benefits of individualized sentences are jeopardized when there is no rubric to ensure consistent application of standard criteria among individual defendants.

II. DEVIANCE AND THE ORGANIC WHOLE

When deconstructed, the discipline of international criminal justice lacks independent theoretical foundations. The structure, modalities, rules, and methodologies of international criminal process and punishment largely constitute an extension of the structure, modalities, rules, and methodolo-

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[145] Prosecutor v. Blaškić, Case No. IT-95-14-A, para. 711 (I.C.T.Y. App. Chamber July 29, 2004). The reasoning of the ICTY Appeals Chamber is worth reproducing in full:

> [A] finding that a 'chaotic' context might be considered as a mitigating factor in circumstances of combat operations risks mitigating the criminal conduct of all personnel in a war zone. Conflict is by its very nature chaotic, and it is incumbent on the participants to reduce that chaos and to respect international humanitarian law. While the circumstances in Central Bosnia in 1993 were chaotic, the Appeals chamber [sic] sees neither merit nor logic in recognising the mere context of war itself as a factor to be considered in the mitigation of the criminal conduct of its participants.

Id.

[146] Beresford, *supra* note 27, at 33.

[147] *See also* Prosecutor v. Kamuhanda, Case No. ICTR-95-54A-T, para. 765 (I.C.T.R. Trial Chamber Jan. 22, 2004); Prosecutor v. Delalić, Case No. IT-96-21-A, para. 758 (I.C.T.Y. App. Chamber Feb. 20, 2001) (noting that a pattern of sentences does not exist as yet); Brooks, *supra* note 29, at 2281 (concluding that the Kosovo panels are unable to offer consistent and independent rulings).

[148] Since the Appeals Chambers formally only will intervene in cases of discernible error, the discretion accorded the Trial Chambers can be considerable. *See* Prosecutor v. Kambanda, Case No. ICTR-97-23-T, para. 124 (I.C.T.R. App. Chamber Oct. 19, 2000) (holding that the weight to be attached to mitigating circumstances is a matter of discretion to be reviewable only in cases of abuse of discretion, namely where a sentence is issued that lies outside the discretionary framework provided by the Statute and the Rules). That said, in practice the Appeals Chamber has proven to be somewhat more interventionist. Moreover, if it quashes a conviction based on an error of fact or law, it will adjust the sentence accordingly.

gies of ordinary criminal process and punishment.[149] To be fair, there is nothing terribly surprising about this transplanted identity. After all, international criminal law is a nascent field constituted essentially in reaction to cataclysmic events.[150] Moreover, most of the individuals building international criminal law hail from the epistemic community of domestic criminal lawyers. Even though experiences in domestic criminal law systems are not easily transferable to international legal institutions, it is somehow easier in times of urgency for these individuals to transfer pre-existing doctrinal frameworks rather than develop new ones.[151] However, the entry into force of the permanent ICC underscores the need to carefully assess the suitability of this borrowed, underachieved identity and to question whether international criminal law now can do better.

Difficulties mar the transplantation of domestic criminal law to the international context. Whereas for the most part ordinary crime deviates from generally accepted social norms in the place and at the time it was committed, extraordinary crime has an organic and group component that makes it not so obviously deviant in place and time (although it certainly deviates from *jus cogens* norms and basic conceptions of human decency). To be sure, some of the behavior that is criminalized in national contexts may not be viewed as deviant by all people. For example, domestic crime such as gang activity, drug offenses, hate crimes, certain white collar crimes, and organized crime may arise from adhesion to a certain code or norm within a particular community. My purpose here is not to revisit the suitability of deviance theory to ground all criminal sanction in domestic contexts. Rather, it is to suggest that violent acts such as murder, torture, infliction of physical harm, and sexual assault deviate materially more from social norms operative in ordinary times in ordinary places than they do from social norms in places afflicted by the breakdown and mobilization that are conditions precedent to mass atrocity. In those few areas of domestic activity where individual deviance may be obfuscated by group ordering, I certainly would welcome criminological, preventative, and penological developments that recognize the influence of the group as a social agent and the structural nature of criminogenic conditions.

Perpetrators of serious international crimes generally belong to a collective that shares a mythology of ethnic, national, racial, or religious supe-

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[149] Otto Triffterer, a leading architect of the international criminal justice paradigm, "poses the question of the transferability of criminal law concepts to the international sphere, but avoids giving an answer by turning the question around: 'Why not?'." Andreas L. Paulus, *Legalist Groundwork for the International Criminal Court: Commentaries on the Statute of the International Criminal Court*, 14 EUR. J. INT'L L. 843, 859 (2003) (citing Otto Triffterer, *Preliminary Remarks: The permanent* [sic] *International Criminal Court—Ideal and Reality*, *in* COMMENTARY ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT 17 (Otto Triffterer ed., 1999)).

[150] BASSIOUNI, *supra* note 21, at 583.

[151] *Id.* at 585.

riority, perhaps even infallibility.[152] In fact, in certain circumstances, those who commit extraordinary international crimes are the ones conforming to social norms whereas those who refuse to commit the crimes choose to act deviantly.[153] How does one justify as criminal law something obeyed only by exceptional individuals?[154]

My concern is not a programmatic one that pertains to legal defenses. Accordingly, I am not making an argument for *ex post facto* or *nullum crimen sine proevia lege* defenses. The question of retroactivity—namely, whether persons can be convicted of acts that were perfectly legal under national laws in place at the time—has been elegantly addressed elsewhere.[155] Nor is the purpose here to expand exculpations such as "following orders" or duress with a view to facilitating the acquittal of individual defendants. Although I accept that mass atrocity is manifestly illegal,[156] I argue that its collective nature problematizes concepts such as bystander innocence, public responsibility, victim reintegration, reconciliation, recidivism, and the moral legitimacy of pronouncements of wrongdoing by international tribunals when the international community itself is perceived as having failed to prevent (or, at least, to attenuate) the wrongdoing. Ignoring or denying the uniqueness of the criminality of mass atrocity inhibits the development of effective methods to promote accountability for mass criminals. Jan Klabbers is right to inquire: "How useful is it to think of human rights violators as common criminals?"[157]

Richard Goldstone—reflecting a widely held position—suggests that leaders and those in superior positions in the chain of command are, owing to their positive governance obligations, more deserving of prosecution and weightier punishment for their involvement in mass atrocity.[158] Although this conceptualization has not spared lower-level thugs from prosecution in

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[152] Immi Tallgren, *The Sensibility and Sense of International Criminal Law*, 13 EUR. J. INT'L L. 561, 573 (2002).

[153] *Id.* at 575.

[154] *Id.* at 573.

[155] *See, e.g.*, Peter E. Quint, *The Border Guard Trials and the East German Past—Seven Arguments*, 48 AM. J. COMP. L. 541 (2000) (analyzing whether the principle that a person may not be convicted of a criminal offense unless that offense was established by law at the time the act was committed ought to apply to the East German border guards who used deadly force to prevent citizens of East Germany from escaping into West Germany).

[156] UNIVERSAL DECLARATION OF HUMAN RIGHTS art. 11(2) (adopted and proclaimed by General Assembly resolution 217 A (III) Dec. 10, 1948), *available at* http://www.un.org/Overview/rights.html (providing that the non-retroactivity principle shall not "prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by the community of nations.").

[157] Klabbers, *supra* note 25, at 253; *see also* Steven Ratner, *The Schizophrenias of International Criminal Law*, 33 TEXAS INT'L L.J. 237, 251 (1998) ("[T]he mechanical transfer of domestic criminal law principles to the international context . . . is fraught with dangers.").

[158] Richard J. Goldstone, *The International Tribunal for the Former Yugoslavia: A Case Study in Security Council Action*, 6 DUKE J. COMP. & INT'L L. 5, 7 (1995).

international criminal institutions, it has tilted the balance of prosecutorial efforts toward those in higher-ranking positions. This prosecutorial focus squares with the reality that leaders create the social norms that trap others as captive participants. In this regard, leaders become conflict entrepreneurs who benefit from violence and strategically normalize what they know to be deviant. As such, sanctioning their behavior may conform to a criminology and penology that censures deviance. That said, international criminal tribunals have not staked out a consistent penological position when it comes to sentencing leaders as opposed to subordinates. In fact, an ICTY Trial Chamber noted that the case law "does not evidence a discernible pattern of . . . imposing sentences on subordinates that differ greatly from those imposed on their superiors."[159]

Independent of the problem of inconsistency within international criminal law institutions, Goldstone's argument, however reasonable, fails to address a number of central concerns. Atrocity would not reach truly epidemic levels but for the vigorous participation of the masses. To be sure, there are cases in which atrocity is perpetrated top-down, through occasional and targeted covert state operations, such as in Chile. In these cases, leaders may be punished for deviant behavior since they themselves recognized that what they were doing was wrong and that is why they kept it secret, to some extent at least. There are other cases that move along the continuum. For example, megalomaniacal leaders may encourage and reward violence initiated through party bureaucracies involving broad networks of agents, informants, and sycophants. This apparently was the case in Saddam Hussein's Iraq.[160] But there are other cases where conflict entrepreneurs publicly exhorted violence and substantial numbers of ordinary people ordinarily disconnected from the political process actively committed the acts in question with the acquiescence or complicity of many more individuals.

I have written elsewhere that Rwanda presents a compelling case study of this unsettling phenomenon.[161] Rwanda disturbingly demonstrates David Luban's perception that "getting people to murder and torment their neighbors is not hard; in some ways, it turns out to be ridiculously easy."[162] In this vein, Luís Salas writes that "[t]he manner in which [Rwandans] were killed, and the pleasure that attackers derived from inflicting the greatest pain, is shocking to even the most experienced investigators."[163] The Rwan-

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[159] Prosecutor v. Krstić, Case No. IT-98-33-T, para. 709 (I.C.T.Y. Trial Chamber Aug. 2, 2001) (conclusion left undisturbed on appeal); *see also* discussion *infra* note 233 (discussing sentence of eleven years for Bosnian Serb leader Biljana Plavšić).

[160] *Special Report: Establishing the Rule of Law in Iraq*, U.S. INST. OF PEACE 8 (Apr. 2003).

[161] Drumbl, *supra* note 34, at 1245–52.

[162] David Luban, *Intervention and Civilization: Some Unhappy Lessons of the Kosovo War*, *in* GLOBAL JUSTICE AND TRANSNATIONAL POLITICS 107 (Pablo De Greiff & Ciaran Cronin eds., 2002).

[163] Luís Salas, *Reconstruction of Public Security and Justice in Post Conflict Societies: The Rwandan Experience*, 26 INT'L J. COMP. & APPLIED CRIM. J. 165, 175 (2002). "Many of the victims died be-

dan genocide was characterized by broad-based involvement and popular support.[164] The violence did not arise from spontaneous tribalism.[165] Rather, the pre-existing normative structure was suspended and replaced with the normalization of ethnic elimination. Killing became a civic duty: neighbors killed neighbors they had known since childhood and with whom they previously had lived in harmony. In Rwanda, genocide was a social project: as José Alvarez observes, a crime of hate more than a crime of state.[166] To speak of individual *mens rea* in such contexts is a bit facile.[167] Clearly, Jean Kambanda—the Prime Minister of Rwanda during the genocide—was responsible for genocide, but he did not singularly cause it. Instead, the causes are diverse, and touch upon individual actors, low and high in the command chain, along with a myriad of economic, political, historical, and transnational factors. This suggests that international criminal law's formal predicate of avoiding collective guilt may need to be revisited,[168] or at least the orthodoxy of that predicate rethought, and broader "ecological" approaches to the violence acknowledged.[169] In essence, international tribunals punish individuals for actions often committed on behalf of the state.[170] International law thereby replaces its traditional subject, the state, with a non-traditional subject, the individual, notwithstanding the fact

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cause their bodies were so badly torn after repeated rapes in which sharpened sticks, gun barrels or boiling water often replaced penises. . . . Others died because their attackers tried to gouge out their genitalia or otherwise sexually mutilate them with machetes after raping them." *Id.*

164 MAHMOOD MAMDANI, WHEN VICTIMS BECOME KILLERS 18 (2001); *see also* AMY CHUA, WORLD ON FIRE 170 (2004) ("[A] majority of the Rwandan people supported, in deed personally conducted, the unspeakable atrocities.").

165 This is a common, but inaccurate and stereotypical, caricature of the violence in Rwanda.

166 José E. Alvarez, *Crimes of States/Crimes of Hate: Lessons from Rwanda*, 24 YALE J. INT'L L. 365 (1999).

167 LEGALISM: LAW, MORALS, AND POLITICAL TRIALS 172 (Judith Shklar ed., rev. ed. 1986).

168 *See* Prosecutor v. Dragan Nikolić, Case No. IT-94-2-S, para. 60 (I.C.T.Y. Trial Chamber Dec. 18, 2003) (elucidating this formal predicate within the context of sentencing).

169 *See* Laurel E. Fletcher & Harvey M. Weinstein, *Violence and Social Repair: Rethinking the Contribution of Justice to Reconciliation*, 24 HUM. RTS. Q. 573, 580, 601 (2002).

170 This, in turn, may suggest that the notion of state crimes within the law of state responsibility—quite controversial among many members of the International Law Commission—may not be entirely wrongheaded in its creation of what some derisively call "collective guilt." MAMDANI, *supra* note 164, at 17–18 (challenging the prevailing orthodoxy of international criminal justice that collective guilt is to be eschewed); *see also* NORMAN CIGAR & PAUL WILLIAMS, INDICTMENT AT THE HAGUE: THE MILOŠEVIĆ REGIME AND THE CRIMES OF THE BALKAN WAR 30 n.7 (2002) ("The need to establish individual responsibility in order to avoid conclusions of collective guilt has been highlighted by both the United Nations Secretary-General and the [ICTY] Chief Prosecutor."). For a discussion of the destatalization of mass violence even though mass violence often is carried out on behalf of the state as its agent, see Pierre-Marie Dupuy, *A General Stocktaking of the Connections Between the Multilateral Dimension of Obligations and Codification of the Law of Responsibility*, 13 EUR. J. INT'L L. 1053, 1060 n.22 (2002).

that the abject criminality of mass violence often is committed at the behest of or in furtherance of the state.[171]

The group element to certain international crimes, especially genocide and certain crimes against humanity (such as persecution or extermination), is central to the offense. Perpetrators commit violence on behalf of a group. Victims are chosen solely because of their membership in a group.[172] When the Nazis targeted Jews, they did so to eliminate Jews. When Al-Qaeda targeted Westerners on September 11th, they did not do so with any regard to the behavior of the individuals who were killed, but rather only because such individuals were Western—in particular, American. The Khmer Rouge murdered the Cambodian professional classes just because they were professionals who were believed to present a group threat to the veneration of peasant life. No attempt was made to select victims based on verifiable individual threats they posed to individual members of aggressor groups. In each case, the crimes in question constituted system criminality in which victims were not selected because of individual fault, but merely because of their actual or perceived membership in a despised group. Although the degree of collectivization (whether among aggressors, bystanders, or victims) will differ in each case of mass atrocity, this type of violence never fully disengages from the collective.

Drawing from their field work in Bosnia, legal scholars Laurel Fletcher and Harvey Weinstein identify a "communal engagement with mass violence" that, in their estimation, criminal trials leave unaddressed.[173] Citing the research of noted social scientists and psychologists, Fletcher and Weinstein propose that individuals may not always have control over their actions in the context of collective events, particularly cataclysmic events.[174] Participants may be captives of social norms; at a minimum, they certainly are captivated by those norms. The breadth of these norms may be such that the violence itself, as Hannah Arendt provocatively noted, may be nothing more than banal in the time and place where it is committed.[175] Paradoxically, persons with a weakened sense of individual responsibility and independence commit crimes that international criminal justice institutions call more serious than ordinary domestic crimes.[176] This seems to fly

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[171] ERIC D. WEITZ, A CENTURY OF GENOCIDE: UTOPIAS OF RACE AND NATION (2003) (arguing that genocide is organized by states but is operationalized only with widespread popular participation).

[172] Cherif Bassiouni, *The Protection of "Collective Victims" in International Law*, *in* INTERNATIONAL PROTECTION OF VICTIMS 183 (Cherif Bassiouni ed., 1988) (describing victims of mass atrocity as groups or groupings of individuals linked by special bonds, considerations, factors or circumstances which, for these very reasons, make them the target of victimization).

[173] Fletcher & Weinstein, *supra* note 169, at 605.

[174] *Id.* at 607–10.

[175] Arendt, *supra* note 6, at 252.

[176] An East Timor panel recognized this nuance but then sentenced the individual perpetrator (a head of a militia contingent) to seven years of imprisonment for abduction and murder as a crime against

in the face of the criminology of ordinary crime that international criminal law adopts as a self-rationalization, insofar as culpability in ordinary crime derives from the extent of the perpetrator's voluntary independent participation in the crime. These contradictions might well explain why, despite the rhetoric, actual punishments levied out by international tribunals for serious international crimes are of comparable severity to (and often are more lenient than) those used to sanction ordinary crime in national criminal systems.[177]

Collective violence cannot be rigorously analyzed without considering the effects of the collective on the individual.[178] That said, this collective aspect creates some discomfort. This discomfort is manifest in international criminal law's eschewing of collective guilt and solemn focus on the guilt of a few individuals.[179] International criminal law thereby adopts what George Fletcher calls the "liberal idea that the only true units of action in the world are individuals, not groups."[180]

Fletcher and Weinstein maintain that the liberal idea elides its own effects. Most important among these is the fact that "individualized guilt may contribute to a myth of collective innocence."[181] Fletcher and Weinstein's concern is not new. It taps into a current animating psychoanalytic theory. In this regard, the work of Karl Jaspers springs to mind.[182] Jaspers discusses a number of levels of guilt, including the criminal, the moral, and the metaphysical.[183] The criminally guilty are those who gave orders or executed crimes.[184] The morally guilty are those who "conveniently closed their eyes to events, or permitted themselves to be intoxicated, seduced or bought with

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humanity. Prosecutor v. Agustinho Atolan, Case No. 3/2003, para. 23 (Dili Dist. Ct. Serious Crimes Spec. Panel June 9, 2003).

177 *See infra* Part III.

178 This is particularly the case for individuals lower down in the chain of command or outside of that chain entirely.

179 Some of these individuals may be selected because of their leadership in the violence, but this is not always the case. For example, the ICTY's first conviction involved Dražen Erdemović, a lowly soldier of the Bosnian Serb army. Combs, *supra* note 33, at 929 n.1. Another early conviction involved Duško Tadić, an essentially indistinguishable thuggish foot-soldier. Cherie Booth, *Prospects and Issues for the International Criminal Court*, *in* FROM NUREMBERG TO THE HAGUE 181 (Philippe Sands ed., 2003). Discussing Tadić, Diane Marie Amann notes that the ICTY "devoted years to his case, while indicted Serbs of high rank roamed free." Diane Marie Amann, *Assessing International Criminal Adjudication of Human Rights Atrocities*, THIRD WORLD LEGAL STUDIES—2000–2003 at 169, 173 (2003). Lower level offenders have been prosecuted by international tribunals for strategic reasons such as convenience, ability to implicate others, or simply the often random availability of (or access to) inculpating evidence.

180 Fletcher, *supra* note 9, at 163.

181 Fletcher and Weinstein, *supra* note 169, at 580.

182 KARL JASPERS, THE QUESTION OF GERMAN GUILT (E.B. Ashton trans., 1978) (1947).

183 *Id.* at 31–32.

184 LYN S. GRAYBILL, TRUTH & RECONCILIATION IN SOUTH AFRICA 113 (2002) (discussing the work of Jaspers).

personal advantages, or who obeyed from fear."[185] The metaphysically guilty are those who fail to do whatever they can to prevent the commission of the crime.[186] Trials do not involve the morally or metaphysically guilty. Nor should they, as it is doubtful that individual criminal punishment ought to attach to all those individuals. Yet this does not mean that such individuals are blameless, or that they ought to be considered as blameless, or that they are entitled to the law's intervening in a manner that pronounces their innocence. Trying the most notorious should not ineluctably lead to absolving the rest.[187]

The collective nature of mass violence prompted some independent criminological development in the jurisprudence of the international tribunals. For example, the ad hoc tribunals have availed themselves of theories of liability that contemplate group dynamics. These include command responsibility.[188] What is more, the ICTY has favored joint criminal enterprise[189] and secondary liability theories such as aiding and abetting

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[185] *Id.*

[186] Luban, *supra* note 162, at 96–97.

[187] Fletcher and Weinstein found that "in periods of collective violence, the focus on individual crimes has been used by many to claim collective innocence." *See* Fletcher & Weinstein, *supra* note 169, at 604.

[188] Statute of the ICTY, *supra* note 14, art. 7(3); Statute of the ICTR, *supra* note 13, art. 6(3); Prosecutor v. Musema, Case No. ICTR-96-13-T, para. 396 (I.C.T.R. App. Chamber Nov. 16, 2001) (convicting director of a tea factory of genocide); *see also* Rome Statute, *supra* note 2, art. 28(a)(i) (basing command responsibility on, *inter alia*, a finding that the "military commander or person either knew or, owing to the circumstances at the time, should have known that the forces were committing or about to commit such crimes."), art. 28(b)(i) (envisioning a higher threshold for superior-subordinate relationships outside the military context, according to which responsibility ensures where the superior either knew or consciously disregarded information which clearly indicated that the subordinate was committing or about to commit the crimes). At the ad hoc tribunals, application of command responsibility theories at times has led to acquittals. *See, e.g.*, Prosecutor v. Delalić, Case No. IT-96-21-A, paras. 268, 293, 313–14 (I.C.T.Y. App. Chamber Feb. 20, 2001) (affirming acquittals of Zejnil Delalić and Hazim Delić, but also confirming conviction of Zdravko Mucić of sexual assaults through a command responsibility theory); Prosecutor v. Blaškić, Case No. IT-95-14-A, para. 41 (I.T.C.Y. App. Chamber July 29, 2004) (underscoring carefully that the knowledge of any kind of risk does not suffice for the imposition of culpability under a command responsibility theory). The ICTR has found that the extent of an offender's command or superior responsibility can additionally serve as an aggravating factor in sentencing. Prosecutor v. Serushago, Case No. ICTR-98-39-S, para. 29 (I.C.T.R. Trial Chamber Feb. 5, 1999). The ICTY has held this factor may not be considered for this additional purpose. Prosecutor v. Obrenović, Case No. IT-02-60/2-S, para. 99 (I.C.T.Y. Trial Chamber Dec. 10, 2003) ("[I]t would be inappropriate to use the same conduct to both establish liability and to establish an aggravating circumstance in this case."). There thus appears to be conflict between the ICTY and ICTR regarding the role of command responsibility as an aggravating factor in sentencing in a case where a conviction has been procured on the basis of command responsibility. Obversely, the extent to which an offender was subject to another's authority can serve as a mitigating factor in sentencing.

[189] Prosecutor v. Obrenović, Case No. IT-02-60/2-S, para. 39 (I.C.T.Y. Trial Chamber Dec. 10, 2003). A joint criminal enterprise is an understanding or arrangement amounting to an agreement between two or more persons that they will commit a crime; the understanding or arrangement need not be express, and its existence may be inferred from all the circumstances; it need not have been reached at any time before the crime is committed. Prosecutor v. Krnojelac, IT-97-25-T, para. 80 (I.C.T.Y. Trial

genocide.[190] The ICTR has considered the collective element to be germane to certain crimes of primary responsibility, such as conspiracy,[191] complicity,[192] and direct and public incitement to commit genocide,[193] and also secondary theories (such as aiding and abetting genocide).[194] All of these liability theories, which involve a vicarious element that diverges somewhat from traditional principles of municipal criminal law, tempt the ad hoc tribunals for a number of reasons. These include political pressures to obtain convictions, difficulties in establishing precise facts and evidentiary linkages, the forensic challenges presented by mass graves, the complex se-

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Chamber Mar. 15, 2002) (conclusion left undisturbed on appeal). The circumstances in which two or more persons are participating together in the commission of a particular crime may themselves establish an unspoken understanding or arrangement formed between them then and there to commit that crime. *Id.* Joint criminal enterprise requires proof that the defendant shared with other co-perpetrators the intent required for that crime. As for the determination of intent, see Prosecutor v. Tadić, Case No. IT-94-1-A, para. 220 (I.C.T.Y. App. Chamber July 15, 1999) (holding that intent in joint criminal enterprise can be shown directly or as a matter of inference from the nature of the accused's authority within the organizational hierarchy). It is unclear whether prosecutors at the ICC will rely on joint criminal enterprise, although the Rome Statute "common purpose" provision opens the door to entertaining a theory of liability based upon joint criminal enterprise. *See* Rome Statute, *supra* note 2, art. 25.

[190] Prosecutor v. Krstić, Case No. IT-98-33-A (I.C.T.Y. App. Chamber Apr. 19, 2004) (distinguishing between joint criminal enterprise and aiding and abetting and substituting on the facts a conviction of aiding and abetting for one based on perpetration of a joint criminal enterprise); Prosecutor v. Blaškić, Case No. IT-95-14-A, para. 48 (I.T.C.Y. App. Chamber July 29, 2004) ("[O]ne of the requirements of the *actus reus* of aiding and abetting is that the support of the aider and abettor has a substantial effect upon the perpetration of the crime.").

[191] Statute of the ICTR, *supra* note 13, art. 2(3)(b); Statute of the ICTY, *supra* note 14, art. 4(3)(b); Prosecutor v. Niyitegeka, Case No. ICTR-96-14-A (I.C.T.R. App. Chamber July 9, 2004) (convicting defendant on a number of charges, including conspiracy to commit genocide, and sentencing him to life imprisonment). The Rome Statute does not clearly grant the ICC authority to prosecute conspiracy or make use of conspiracy as an alternate theory to aiding or abetting to link a particular actor with the substantive offense. The fact that conspiracy has seen limited use in the jurisprudence of international criminal law is not unsurprising, given the alien nature of conspiracy to the civil law tradition. Moreover, conspiracy played a controversial and ineffective role in the Nuremberg trials. Richard Overy, *The Nuremberg Trials: International Law in the Making*, *in* FROM NUREMBERG TO THE HAGUE, *supra* note 179, at 28. That said, some scholars claim that conspiracy could serve a wider role in the implementation of international criminal justice. Richard P. Barrett & Laura E. Little, *Lessons of Yugoslav Rape Trials: A Role for Conspiracy Law in International Tribunals*, 88 MINN. L. REV. 30, 67 (2003). The ICTR is moving in this direction, as the conviction of Eliezer Niyitegeka on May 15, 2003 by the ICTR Trial Chambers (subsequently affirmed in its entirely on appeal) was the first conviction for conspiracy to commit genocide. *See* Press Release, I.C.T.R., Rwanda Tribunal Delivers Two Judgments Today, ICTR/INFO-0-2-344.en (May 15, 2003); *see also* Prosecutor v. Nahimana, Case No. ICTR-99-52-T, paras. 1043–1048 (I.C.T.R. Trial Chamber Dec. 3, 2003) (concluding that conspiracy requires the existence of an agreement, but this need not be formal or express and can be inferred from circumstantial evidence; a conspiracy to commit genocide could be comprised of individuals acting in an institutional capacity even in the absence of personal links with each other).

[192] Prosecutor v. Semanza, Case No. ICTR-97-20-T (I.C.T.R. Trial Chamber May 15, 2003) (convicting defendant of complicity to commit genocide and crimes against humanity and sentencing him to twenty-five years of imprisonment).

[193] Prosecutor v. Nahimana, Case No. ICTR-99-52-T (I.C.T.R. Trial Chamber Dec. 3, 2003).

[194] Prosecutor v. Ndindabahizi, Case No. ICTR-2001-71-I (I.C.T.R. Trial Chamber July 15, 2004).

quencing of administrative directives that order massacre, and the need to protect the rights of victims and witnesses. International criminal justice institutions also have modified evidentiary rules—initially drawn from national legal systems—to suit these to the exigent peculiarities of mass violence, although this is more a process of tweaking the familiar than formulating something new.[195] That said, these developments portend that international criminal law has the potential to become increasingly sophisticated and independent over time, although broader ascription of vicarious liability within the traditional framework of individual culpability has proven increasingly controversial.[196]

Allison Marston Danner and Jenny Martinez express concern over the avidity with which the ad hoc tribunals adopt collective theories of liability, in particular the ICTY's use of joint criminal enterprise.[197] One of their principal concerns stems from the fact that some national courts and lawmakers are actively incorporating joint criminal enterprise into domestic law.[198] Although international tribunals may have innovated somewhat in terms of theories of liability, they have not innovated in terms of rationales or purposes of punishment. This explains why it is so easy for national courts to borrow back from the jurisprudence of international tribunals (even in inappropriate contexts). Danner and Martinez are wise to point out the problematic potential of this cross-pollination. After all, "[t]he attenuated connections between perpetrators and crimes that may seem tolerable in an international forum, where evidence is particularly difficult to secure and where a primary goal is preventing impunity for human rights violations, seem less acceptable when used to target more traditional criminals."[199] If international criminal law were to develop its own rationales as to why it punishes, it would be easier to cabin (or at least contextualize) whatever independent jurisprudential developments it effects.

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195 BASSIOUNI, *supra* note 21, at 626–27.

196 Even the ICTY has acknowledged this controversy, prodding it to backtrack somewhat—but not disengage—from vicarious liability in its most recent jurisprudence. *See, e.g.*, Prosecutor v. Blaškić, Case No. IT-95-14-A, paras. 41, 42, 62, 166 (I.C.T.Y. App. Chamber July 29, 2004) (emphasizing the need for the Prosecutor to prove subjective awareness or, at a minimum, recklessness on the part of the accused in order to secure a conviction based on command responsibility or ordering); Prosecutor v. Brdjanin, Case No. IT-99-36-T (I.C.T.Y. Trial Chamber Sept. 1, 2004) (finding joint criminal enterprise to be an inappropriate mode of liability when the case has an extraordinarily broad nature and the accused is physically and structurally remote from the commission of the crimes).

197 Allison Marston Danner & Jenny S. Martinez, *Guilty Associations: Joint Criminal Enterprise, Command Responsibility, and the Development of International Criminal Law*, 93 CAL. L. REV. (forthcoming 2005) (draft manuscript on file with author, previously entitled *Beyond Legal Culture: Fault Lines and Liability Theories in the Jurisprudence of International Criminal Law*).

198 *Id.* at 88–93 (citing as examples regulations passed in the U.S. for military commissions and judicial approaches undertaken in recent litigation under the Alien Tort Claims Act and Torture Victim Protection Act).

199 *Id.* at 4.

In sum, the international community is prosecuting crimes of mass violence without first having developed a thorough criminology of mass violence, a penology for perpetrators, or a victimology for those aggrieved.[200] The dominant discourse simply assumes that isolated incarceration of certain individuals—at times leaders, but not always—for defined periods of time, which is the preference of domestic criminal law, is an appropriate punishment for those who inflict mass suffering and death.[201] This assumption is so ingrained that there was a dearth of substantive debate on the subject of sentencing at the Rome Conference that led to the ICC. The only exception was a heated discussion of the legality under international law of the death penalty.[202] But the appropriateness of distant incarceration and isolation of the perpetrator from the roiled society should not be taken as axiomatic. This question is independent from the question of whether adversarial trials are appropriate modalities for the determination of responsibility for mass violence. It may well be that the traditional criminal trial could be made more responsive to the complexities of mass atrocity simply by contemplating more creative and victim-centered penalties.

Alternately, there may be cause for a more radical restructuring. I am not prepared in this regard to go as far as George Fletcher, who posits that collective guilt is a "plausible . . . and sometimes healthy response to collective wrongdoing."[203] Rather, I argue that there is a middle ground between collective guilt and collective innocence. I call this middle ground collective responsibility.[204] Punishment deriving from individual guilt—incarceration—may not be suitable or feasible for collective responsibility.[205] But this does not mean that collective responsibility is incapable of sanction. Trials focus on guilt, innocence, blame, and desert. Law and politics, however, offer other mechanisms to collectivize accountability on all members of perpetrator groups for the benefit of all members of victim groups. These include disgorging the benefits of group violence, compelling community service, redistributing wealth, lustration, subjecting conflict groups to international administration, and traditional forms of state respon-

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200 Ralph Henham, *Some Issues for Sentencing in the International Criminal Court*, 52 INT'L & COMP. L.Q. 81, 82, 85, 87 (2003); Henham, *supra* note 107, at 69; *see also* Tallgren, *supra* note 152, at 571.

201 Philip Allot puts it well: "Feeble old men and their seedy subordinates shuffle into the courtroom, shrunken figures bearing no physical relationship to the physical scale of suffering for which they are responsible." PHILIP ALLOT, THE HEALTH OF NATIONS 67 (2002).

202 Henham, *supra* note 200, at 85.

203 Fletcher, *supra* note 9, at 163, 168, 169, 173–74 (discussing the biblical reference in Genesis in which ten of Joseph's brothers come to the collective conclusion that they are guilty for having ignored their brother's cries of pain); *see also* George P. Fletcher, *The Storrs Lectures: Liberals and Romantics at War: The Problem of Collective Guilt*, 111 YALE L.J. 1499 (2002) (arguing that collective guilt has a sound grounding in Western culture).

204 For more discussion, see Mark A. Drumbl, *Pluralizing International Criminal Justice*, 103 MICH. L. REV. (forthcoming 2005) (review essay).

205 State criminal responsibility is controversial and impractical.

sibility such as embargoes and trade restrictions. These types of sanctions also might serve a preventative role. Social norm theorists posit that group sanctions work insofar as group members are in an advantageous position to identify and monitor the behavior of conflict entrepreneurs and control their own responses to this behavior.[206] Since the criminal law does not reach acquiescent group members, they have little incentive to cabin the behavior of conflict entrepreneurs or their reactions thereto. Group members therefore become unaccountable beneficiaries of the violence instead of potential gatekeepers.

International lawyers would do well to actively engage with methodologies that coax the collective to assume responsibility for organic behavior. In addition to very preliminary suggestions regarding the practical application of collective sanction, what I offer here are the beginnings of a moral justification for collective sanction as a response to collective violence.

III. QUEST FOR PURPOSE

Assuredly, the international criminal justice paradigm evokes a number of justificatory rationales for individualized guilt. As set out in Part I of this Article, the two most prominent rationales are retribution and deterrence. This creates some tautness insofar as the goals of deterrence (namely, a criminal justice system that punishes to prevent future crime) may well conflict with those of retribution (a criminal justice system that punishes because the criminal deserves it). Perhaps because of this tension, the two rationales are coextensive but are not coequal insofar as there has thus far been a preference for retributive motivations.[207] That said, the influence of retribution increasingly is challenged by deterrence and expressivism, although these have yet to figure materially in the quantification of sentences.

A. Retribution

For Immanuel Kant, retribution meant that criminals should be punished because they deserve it: punishment, in fact, is a categorical imperative.[208] Hannah Arendt extended Kant's view of the moral value of punishment to the context of mass atrocity. For Arendt, mass atrocity calls out for punishment because deontologically it constitutes "radical evil."[209] Under this lens, the ad hoc tribunals and the ICC become "legitimated by the assumed moral right to inflict retributive punishment on those convicted of gross violations of international . . . law,"[210] even though they are created

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206 Daryl J. Levinson, *Collective Sanctions*, 56 STAN. L. REV. 345, 348 (2003).

207 *See supra* note 107.

208 IMMANUEL KANT, THE METAPHYSICAL ELEMENTS OF JUSTICE (John Lord trans., 1965).

209 ARENDT, *supra* note 1, at 241; *see also* BASSIOUNI, *supra* note 21, at 681.

210 Henham, *supra* note 107, at 74.

and staffed by persons having nothing to do with the afflicted society. This punishment, in turn, allows two distinct groups to express outrage: the international community and the actual individual survivors. The perceived need for two distinct—and not necessarily allied—entities to articulate outrage suggests the complex victimology of international criminal law.

In practice, though, the international criminal justice paradigm cannot fully claim retribution as a theoretical grounding. This is so for a number of reasons. Although international criminal law punishes a select few of those who commit the most egregious crimes of concern to the international community at large, its sanctions tend to range from less severe to as severe as the punishments for ordinary murder in many countries.[211] Accordingly, the retribution exacted for one ordinary intentional murder may be no more than that exacted for dozens of extraordinary intentional murders. There is something puzzling about this. Moreover, although the retributive value of international proceedings is supposed to be greater than that of national proceedings,[212] the sentences of the international tribunals are generally not more severe than the sentences that would be meted out in those territorial jurisdictions that have prescribed extraordinary crimes within their domestic law. For example, in *Sikirica*, a case decided in November 2003, the ICTY noted that in the former Yugoslavia the extraordinary crime of persecution would have attracted a sentence of between five and twenty years imprisonment.[213] In that case, the ICTY convicted the three defendants of persecution and sentenced them to terms of fifteen, five, and three years. In the *Simić* case, also decided in 2003, the ICTY recognized identical domestic punishments for persecution and sentenced the three defendants to terms of seventeen, eight, and six years.[214] In two other convictions for persecution as a crime against humanity issued in December 2003, the ICTY took a somewhat different approach. It held that the analogous domestic sentences in Bosnia and Herzegovina and Serbia were twenty to forty years and life imprisonment, respectively, and that under the Criminal Code of the former

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[211] Prosecutor v. Deronjić, Case No. IT-02-61-S, para. 177 (I.C.T.Y. Trial Chamber Mar. 30, 2004) (noting that "in most countries a single act of aggravated murder [n.b. murder committed by participation in shooting and/or motivated by ethnic bias] attracts life imprisonment or the death penalty"); Beresford, *supra* note 27, at 90. Germany, which is among those countries with the shortest sentences, allows a maximum of fifteen years. *See German Court Overturns Sept. 11 Conviction*, WASH. POST, Mar. 4, 2004, at A16.

[212] Prosecutor v. Furundžija, Case No. IT-95-17/1-T, para. 290 (I.C.T.Y. Trial Chamber Dec. 10, 1998) ("It is the infallibility of punishment . . . which is the tool for retribution, stigmatization and deterrence. This is particularly the case for the International Tribunal: penalties are made more onerous by its international stature, moral authority and impact upon world public opinion . . . .").

[213] Prosecutor v. Sikirica, Case No. IT-95-8-S, para. 116 (I.C.T.Y. Trial Chamber Nov. 13, 2001).

[214] Prosecutor v. Simić, Case No. IT-95-9, para. 1062 (I.C.T.Y. Trial Chamber Oct. 17, 2003). At the ICTY, only a few defendants have received sentences significantly higher than what is permissible under the penal code of the Socialist Federal Republic of Yugoslavia. Beresford, *supra* note 27, at 49; Prosecutor v. Kunarac, Case No. IT-96-23/1-A, para. 349 (I.C.T.Y App. Chamber June 12, 2002). A number of these sentences remain subject to appeal.

Yugoslavia such conduct would have been eligible for the death penalty or long-term imprisonment following the abolition of the death penalty.[215] By sentencing these two perpetrators to terms of imprisonment of seventeen and twenty-seven years, the ICTY continues to cloud the purportedly enhanced retributive value of its punishments.[216]

Since the Rwandan criminal law still permits the death penalty, all the defendants found guilty by the ICTR (mostly senior officials) in fact receive sentences lower than those which they likely would receive under Rwandan law.[217] On a related note, many perpetrators of violence in Rwanda are HIV-positive. So too are many of the victims, who often were deliberately infected. At the ICTR, prisoners who are HIV-positive receive an excellent level of health care and access to medication that few, if any, of the victims can claim.[218] Prosecuting and punishing these perpetrators is supposed to voice retribution. Yet, punishment actually keeps perpetrators alive to enjoy a quality of life that exceeds that of victims and might well exceed that which they would claim were they not to be "punished" at all. The retributive value of this punishment appears muddied, at best.[219]

The international institution apparently most supportive of greater retribution for international crimes than for domestic crimes is in East Timor. Here, overall sentences for international crimes are nearly twice as long as those for domestic crimes. However, data from the East Timor panels is subject to three important caveats. First, the average sentence for interna-

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[215] Prosecutor v. Obrenović, Case No. IT-02-60/2-S, paras. 58, 60, 156 (I.C.T.Y. Trial Chamber Dec. 10, 2003); Prosecutor v. Nikolić, Case No. IT-02-60/1-S, paras. 98, 100, 183 (I.C.T.Y. Trial Chamber Dec. 2, 2003); *see also* Prosecutor v. Mrdja, Case No. IT-02-59-S, paras. 121, 122, 129 (I.C.T.Y. Trial Chamber Mar. 31, 2004) (sentencing defendant to seventeen years of imprisonment when a national court would have been able to impose a term of twenty years).

[216] Prosecutor v. Obrenović, Case No. IT-02-60/2-S, paras. 58, 60, 156 (I.C.T.Y. Trial Chamber Dec. 10, 2003); Prosecutor v. Nikolić, Case No. IT-02-60/1-S, paras. 98, 100, 183 (I.C.T.Y. Trial Chamber Dec. 2, 2003).

[217] In April 1998, twenty-two Rwandans convicted of genocide by the national courts were executed. The Rwandan national courts continue to issue death sentences for genocide in about twenty percent of cases, although no additional executions have been carried out. Jeremy Sarkin, *The Tension Between Justice and Reconciliation in Rwanda: Politics, Human Rights, Due Process and the Role of the Gacaca Courts in Dealing with the Genocide*, 45 J. AFR. LAW 143, 157 (2001). The criminal code of the former Yugoslavia had permitted the imposition of the death penalty for genocide or war crimes. Prosecutor v. Stakić, Case No. IT-97-24-T, para. 889 (I.C.T.Y. Trial Chamber, July 31, 2003); Prosecutor v. Krstić, Case No. IT-98-33-T, para. 697 (I.C.T.Y. Trial Chamber Aug. 2, 2001). However, the Council of Europe requires all countries seeking membership in the Council to place a moratorium on the death penalty. Prosecutor v. Stakić, Case No. IT-97-24-T, para. 890 (I.C.T.Y. Trial Chamber, July 31, 2003). Accordingly, the death penalty can no longer be imposed in the states of the former Yugoslavia. *Id.*

[218] CHUTER, *supra* note 49, at 222.

[219] There is a similar concern regarding the retributive value of the pain and punishment inflicted by the ICTY. In the recent plea bargain sentence of Biljana Plavšić, "victims reacted with predictable outrage" at the fact that "Plavšić was sent to serve her term in a posh Swedish prison that reportedly provides prisoners with use of a sauna, solarium, massage room, and horse-riding paddock, among other amenities." *See* Combs, *supra* note 33, at 936.

tional crimes is 14.2 years, which is not much longer than the penalty for one intentional homicide in the domestic law of many states. This statistic conforms to the mean sentence issued by the ICTY, which suggests that the ratio disparity between sentences for national and international crimes in East Timor actually derives from a practice of lightly punishing ordinary national crimes. Second, the most severe sentences, namely three sentences of thirty-three years and four months, deviate considerably from the median sentence and thereby artificially boost the mean. These sentences arose from convictions issued in 2001 for a variety of crimes against humanity that were conjoined for the purposes of penalty. Third, the trend in East Timor is toward more lenient sentences. The mean sentence for serious international crimes issued since September 2003 is ten years, which is only slightly higher than the mean sentence for ordinary national crimes. These three caveats indicate difficulty in locating greater retribution for international crimes in the actual judicial output of the East Timor panels. As for the Kosovo panels, the predictive value of the data is low, but it appears that the slight difference between the severity of sentence for international crimes and domestic crimes—together with the application of domestic sentencing law to both contexts—suggests the absence of a penology for international crimes and evidences that, in terms of quantification of sentence, punishment for international crimes reflects only a slightly higher retributive value than punishment for domestic offenses.

The Rome Statute limits ICC prison sentences to thirty years or, extraordinarily, to life imprisonment "when justified by the extreme gravity of the crime and the individual circumstances of the convicted person."[220] This, too, is puzzling insofar as the ICC only should be trying extremely grave crimes anyway. Moreover, this gives rise to the disquieting reality that when international criminal justice institutions assess sentences proportional to the crimes,[221] they really are forced to assess which perpetrator of mass violence is more deserving of greater punishment even though all are among the most serious criminals of concern to the international community at large. Instead of engaging in what may be a legalistic exercise in ordinal hair-splitting necessary to support a retributive logic, international lawyers might open a forthright debate whether Adolf Eichmann is more worthy of punishment than Pol Pot, or Pol Pot more deserving of greater pain than Foday Sankoh.

At a certain point the massive nature of a crime makes retribution redundant insofar as human rights standards do not permit perpetrators of mass violence to face punishment that much exceeds that meted out for an

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[220] Rome Statute, *supra* note 2, art. 77(1).

[221] Prosecutor v. Nahimana, Case No. ICTR-99-52-T, para. 1097 (ICTR Trial Chamber Dec. 3, 2003).

ordinarily individuated case of violence in many places.[222] Thus, if punishment is inflicted to indicate some measure of society's outrage, then the fact there is little difference between the punishment meted out to the ordinary and to the extraordinary criminal suggests the penury of the retributive function of international criminal law. Frankly, if international criminal law were to fulfill its retributive aspirations it would likely impair other normative aspirations, in particular those adumbrated by international human rights law, and thereby upset the balance in the process of rectifying the balance.

The retributive function also is assailed by the empirical reality that only some radical evil gets punished, whereas much escapes its grasp, often for political reasons anathema to Kantian deontology. Assuredly, I recognize that criminal law always is contingent on politics, thereby creating a perplexing relationship between culpability and equality. Discretion underpins the operation of law even in a robustly ordered and purportedly egalitarian domestic polity. That said, the contingency of international criminal law is particularly acute. For the moment, selectivity poses a far greater challenge to international criminal law than to national criminal law. The nub of the challenge is the reality that only a few conflicts ever become judicialized.[223] There is no principled moral basis for judicializing conflicts in Bosnia, but not in Chechnya, Tibet, or Kashmir. Moreover, even in those places where atrocity is criminalized, the scope of the criminal law attaches to a tiny set of perpetrators.[224] Sometimes, as is the case with the ICTR and the East Timor panels, the jurisdiction of the tribunal is deliberately limited to an artificial and politically convenient time-frame.[225] Large numbers of killers and killings are therefore left unexamined.

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[222] Drumbl & Gallant, *supra* note 14, at 140, 143 ("[S]ome of the sentences are mild compared to punishments given for serious offenses in many national courts.").

[223] Diane Marie Amann, *Group Mentality, Expressivism, and Genocide*, 2:2 INT'L CRIM. L. REV. 93, 116 (2002) ("A random confluence of political concerns produced *ad hoc* tribunals for just two out of a number of conflicts that warranted such treatment.").

[224] Press Release, International Criminal Tribunal for the Former Yugoslavia, Address by Carla Del Ponte, Prosecutor of the International Criminal Tribunal for the Former Yugoslavia to the United Nations Security Council (Nov. 27, 2001), *at* http://www.un.org/icty/latest/index.htm (reporting that the ICTY Prosecutor has been forced to select cases from many thousands of significant targets).

[225] Alvarez, *supra* note 166, at 397–99; Katzenstein, *supra* note 18, at 274. Katzenstein offers the following explanation for the truncated temporal jurisdiction of the East Timor panels: "Limiting the investigations exclusively to referendum-related violence of 1999, despite a mandate that provides for jurisdiction over acts committed during a much broader time frame, was not simply a decision based upon resource constraints. Rather, it was also motivated by a concern that a more expansive inquiry could lead to the indictment of U.S. officials who countenanced the Indonesian invasion and helped to equip and train the Indonesian military both prior to and throughout the occupation." Katzenstein, *supra* note 18, at 274.

The ICTY and ICTR prosecutors have considerable discretion to investigate.[226] Cases may be selected or rejected for reasons that have little to do with culpability. Carla Del Ponte, formerly the Chief Prosecutor of both the ICTR and ICTY, fell into disfavor with the Rwandan government owing to her desire to investigate war crimes allegedly committed by the RPA (the Tutsi armed forces) shortly after they defeated the armed forces of the genocidal Hutu regime. This disfavor induced international pressure which, in turn, resulted in a decision by the U.N. Security Council not to renew her mandate as ICTR Chief Prosecutor.[227] On the other hand, the fear that Serbs perceive the ICTY as a political court has prompted Prosecutor Del Ponte to choose cases in which Croats and Bosnian Muslims are defendants. The end result is: cases turned away because of politics and cases initiated because of politics, instead of cases initiated or turned away because of the substantive violations of international law that they present.

Although the broad discretion accorded sentencers in international criminal institutions creates flexibility and the opportunity to individualize punishment, it also can lead to indeterminacy.[228] There is, in fact, considerable variability in terms of the length of sentences meted out to similarly situated defendants.[229] Sentences vary considerably not only within but also among the various tribunals. For example, ICTR sentences are lengthier than ICTY sentences.[230] In order for the retributive function to explain this

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[226] Hector Olásolo, *The Prosecutor of the ICC Before the Initiation of Investigations: A Quasi-Judicial or a Political Body*, 3 INT'L CRIM. L. REV. 87, 125, 130 (2003).

[227] S.C. Res. 1503, U.N. SCOR, 58th Sess., 4817th mtg., U.N. Doc. S/Res/1503 (2003). Del Ponte remains as ICTY Chief Prosecutor.

[228] *See supra* Part I.

[229] Prosecutor v. Krstić, Case No. IT-98-33-A, paras. 248, 250 (I.C.T.Y. App. Chamber Apr. 19, 2004) (holding that sentencing practices in cases involving similar circumstances are but one factor the Trial Chamber must consider when exercising its discretion to impose an appropriate sentence); KNOOPS, *supra* note 17, at 117 (citing ICTY pronouncements that it is "not bound to impose the same sentence merely because the facts of two or more cases are comparable"); Drumbl & Gallant, *supra* note 14, at 143 (with specific reference to convictions for crimes against humanity).

[230] *See supra* text accompanying notes 83–88. The statutes of the ICTY and ICTR empower the sentencer to take account of the sentencing practices of the FRY or Rwanda respectively. *See supra* text accompanying notes 55–56. That said, the ICTY and ICTR have been reticent to give these national sentencing practices much weight. Prosecutor v. Kunarac, Case Nos. IT-96-23 & IT-96-23/1-A, paras. 349, 377 (I.C.T.Y App. Chamber, June 12, 2002); Prosecutor v Delalić, Case No. IT-96-21, para. 818 (I.C.T.Y. App. Chamber Feb. 20, 2001); Prosecutor v. Stakić, Case No. IT-97-24-T, para. 887 (I.C.T.Y. Trial Chamber July 31, 2003) (noting that national sentencing practice "will . . . be considered, although in itself is not binding"); Beresford, *supra* note 27, at 48. In fact, the ICTY recently held that national sentencing practices are "purely indicative." Prosecutor v. Mrdja, Case No. IT-02-59-S, paras. 121, 122, 129 (I.C.T.Y. Trial Chamber Mar. 31, 2004). The sentencing practices of the Rwandan national courts are harsher than those of the FRY. Notwithstanding the dismissiveness of the ad hocs, this fact may to some extent account for why ICTR sentences are more onerous. There are other plausible explanations, as well. One of these is that most of the convictions at the ICTR have been for genocide, whereas those at the ICTY have been for crimes against humanity and war crimes. Given genocide's status as the "crime of crimes," the retributive rationale favored by the international tribunals might suggest that sentences for genocide should be more severe than those for other crimes within the purview of interna-

disparity, it would have to assume that the gravity of the Rwandan violence exceeds that of the former Yugoslavia. Similar assumptions arise from the fact that the East Timorese sentences are heavier than those of the ICTY but lighter than those of the ICTR.

Moreover, political pressures faced by the ICTY to clear its docket by 2008 are prompting heady recourse to plea bargaining, which creates a situation where those currently convicted through a plea receive sentences much shorter than those who had previously been found guilty after a trial.[231] It also results in certain charges being dropped as part of the plea negotiations, thereby frustrating victims, sowing arbitrariness, and weakening legitimacy.[232] Plea bargains compete with the notion that perpetrators deserve to be punished. An institutional policy that punishes perpetrators to different degrees based on extraneous contingencies may fracture the deontological basis of retribution. For example, perpetrators having information on others are given a better bargain than those with nothing to offer. A perpetrator involved in a joint criminal enterprise with high-level accused will benefit the most from the discount regardless of the egregiousness of the crimes committed, the perpetrator's ability to encourage recidivism among others, or the expressive value of stigmatizing that perpetrator through public denunciation. Assuredly, these disparities also are found in domestic criminal law, in particular regarding the sentencing of drug offenders and criminal syndicates, and have prompted a broad array of critical commentary and concern.

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tional criminal justice institutions. *See* WILLIAM SCHABAS, GENOCIDE IN INTERNATIONAL LAW 9 (2000). However, this rationalization has not been explicitly accepted by any international tribunal. Drumbl & Gallant, *supra* note 14, at 142–43. In any event, the sentence finalized (at the time of writing) by the ICTY in its one genocide conviction (on a theory of aiding and abetting) amounted to thirty-five years, whereas the ICTR repeatedly issues life sentences for genocide (at times even multiple life sentences), albeit to individuals convicted as direct perpetrators. The incorporation of local law into international sentencing practices is an important goal. However, as presently contemplated by the ICTY and ICTR Statutes and the constitutive document of the East Timor panels, any extant process of incorporation (only of national law) seems to undermine the consistency of international criminal law without providing the real benefits of local and contextual involvement.

[231] Combs, *supra* note 33, at 935; *see also* Simons, *supra* note 121, at A1 (reporting that under pressure from the United Nations Security Council to speed up its work, the ICTY has begun rushing through its backlog of cases by using a plea bargaining strategy). As for the ICTR, all of its lowest sentences have involved convictions secured through guilty pleas. The East Timor panels also encourage plea bargaining. Prosecutor v. Fernandez, Case No. 01/00.C.G.2000, para. 20 (Dili Dist. Ct. Serious Crimes Spec. Panel Jan. 25, 2000), *aff'd*, Case No. 2001/12 (Ct. Crim. App. July 29, 2001). According to the East Timor panels, plea bargaining aides in the administration of justice. Prosecutor v. Franca da Silva, Case No. 04a/2001, para. 145 (Dili Dist. Ct. Serious Crimes Spec. Panel Dec. 5, 2001). In terms of quantification of sentence, those who plead guilty in East Timor receive a significant discount. In fact, the East Timor panels have shown a "markedly lenient approach" to those who plead guilty, entitling these individuals to a material reduction of the sentence that would otherwise be imposed (cutting around half of the sentence). Prosecutor v. Atolan, Case No. 3/2003, para. 29 (Dili Dist. Ct. Serious Crimes Spec. Panel June 9, 2003). For this panel, remorse "is . . . of minor importance[,] . . . what matters is the practical . . . cooperation with the Prosecution." *Id.* para. 32.

[232] Simons, *supra* note 121, at A1.

There is little retributive rhyme or reason to the sentences issued by the ICTY following plea bargains. Let us consider the following examples. On the one hand, Biljana Plavšić, a top Bosnian Serb leader (known as the Serbian Iron Lady) responsible for planning some of the gravest atrocities in Bosnia (forced expulsion of hundreds of thousands of non-Serbs, destruction of 850 non-Serb villages, killings of many thousands of individuals, widespread sexual assault, and inhumane destruction),[233] was sentenced to eleven years. On the other hand, rebel Croatian Serb leader Milan Babić, much further down on the leadership hierarchy—and who agreed to testify against Slobodan Milošević—received a sentence of thirteen years for his role in a campaign to expel non-Serbs.[234] Plavšić's sentence is only four years longer than that imposed on Miodrag Jokić, who pleaded guilty to a number of war crimes charges related to the shelling of Dubrovnik: the charges related to the destruction of cultural property and the deaths of two civilians and the wounding of three others.[235] Whereas Darko Mrdja was sentenced to seventeen years for pleading guilty to direct involvement in the shooting of 200 persons (only twelve of whom survived),[236] Ranko Češić, a Bosnian Serb police reservist, was sentenced to eighteen years for pleading guilty to beating to death ten prisoners and sexually assaulting two others.[237] The Češić sentence also should be juxtaposed against the ten-year sentence meted out to Miroslav Deronjić, an influential civilian leader who substantially participated in a joint criminal enterprise that ordered the razing of the village of Glogova, in which sixty-four Bosnian Muslim civilians were killed and many more forcibly displaced.[238]

Although the ad hoc tribunals have begun to voice some reserve regarding the general suitability of plea bargaining to international crimes and the legitimacy of some individual plea agreements, they have accepted most plea agreements that have come before them.[239] After all the work that went

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[233] Prosecutor v. Plavšić, Case No. IT-00-39&40/1-S, paras. 16, 42 (I.C.T.Y. Trial Chamber Feb. 27, 2003).

[234] Prosecutor v. Babić, Case No. IT-03-72-S, para. 102 (I.C.T.Y. Trial Chamber June 29, 2004).

[235] Prosecutor v. Jokić, Case No. IT-01-42/1-S, para. 8 (I.C.T.Y. Trial Chamber Mar. 18, 2004).

[236] Prosecutor v. Mrdja, Case No. IT-02-59-S, para. 129 (I.C.T.Y. Trial Chamber Mar. 31, 2004).

[237] Prosecutor v. Češić, Case No. IT-95-10/1-S, paras. 3, 13, 111 (I.C.T.Y. Trial Chamber Mar. 11, 2004).

[238] Prosecutor v. Deronjić, Case No. IT-02-61-S, paras. 44, 97–98, 277, 280 (I.C.T.Y. Trial Chamber Mar. 30, 2004).

[239] In *Deronjić*, the Trial Chamber ruminated about the suitability of plea bargains for situations of mass atrocity—noting even that in most municipal jurisdictions plea bargains were disfavored for very serious crimes—but ultimately affirmed the plea bargain as well as the light sentence recommended by the Prosecutor. Prosecutor v. Deronjić, Case No. IT-02-61-S, paras. 135, 230, 280 (I.C.T.Y. Trial Chamber Mar. 30, 2004). The Trial Chamber is not formally bound by a sentence recommendation in a plea agreement. In the *Nikolić* case, the ICTY Trial Chamber chose to disregard the sentence range recommended by the Prosecutor as part of the plea bargain and imposed a term of imprisonment seven years longer than the outer range of the Prosecutor's recommendation. Prosecutor v. Nikolić, Case No. IT-02-60/1-S, paras. 19, 54, 73, 183 (I.C.T.Y. Trial Chamber Dec. 2, 2003). The ICTY has not estab-

into establishing the ICTY, the fact that bureaucratic constraints and managerial dictates now determine the fate of many alleged mass murderers weakens the retributive authority of the institution.[240] At a minimum, "if the relationship between law and moral action is conceptualized as transformative . . . [then] . . . certain issues relating to guilty pleas bear closer examination."[241] In particular, if one of the purposes of retribution might be for individual victims to see punishment inflicted on the criminal, victims should play a role in determining whether or not a plea should be accepted and on what terms.[242]

Politicization certainly will affect the ICC, as well. For the most part, the ICC operates independently of the Security Council and places considerable investigatory and prosecutorial power within the office of a single individual; namely its Prosecutor, Luis Moreno-Ocampo.[243] To be sure, the ICC Pre-trial Chamber plays an important confirmatory role in cases where the Prosecutor elects to investigate.[244] But the Prosecutor may decline to exercise his jurisdiction to investigate even in cases where he believes that a crime within the jurisdiction of the ICC has occurred.[245] In effect, the ICC Statute "is almost totally silent with respect to the larger policy questions about which potential accused should be pursued by the Prosecutor."[246] There is limited judicial oversight of prosecutorial decisions not to investigate.[247]

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lished a framework for when it should disregard the Prosecutor's recommendation, citing only its power to do so. This adds another level of indeterminate discretion upon the sentencing process.

240 Prosecutor v. Sikirica, Case No. IT-95-8-S, para. 149 (I.C.T.Y. Trial Chamber Nov. 13, 2001) (noting that a guilty plea saves the international tribunal the time and effort of a lengthy investigation and trial). The ICTY has held that guilty pleas are important insofar as they may protect victims from having to testify. *See* Prosecutor v. Todorović, Case No. IT-95-9/1-S, para. 80 (I.C.T.Y. Trial Chamber July 31, 2001). This, of course, obfuscates the fact that, for some victims, testifying may have significant expressive value.

241 Henham, *supra* note 65, at 16.

242 The ICC Rules permit some victim involvement in the evaluation of an admission of guilt. *See* ICC R.P. & EVID. 139, *supra* note 61.

243 Allison Marston Danner, *Enhancing the Legitimacy and Accountability of Prosecutorial Discretion at the International Criminal Court*, 97 AM. J. INT'L L. 510, 510 (2003).

244 The Pre-Trial Chamber also undertakes other activities, such as issuing arrest warrants and summonses, determining interim release, confirming charges, providing for the protection and privacy of victims and witnesses, and preserving evidence. Rome Statute, *supra* note 2, arts. 57–61. The Prosecutor's decision to open an investigation is final and not subject to any judicial review. *Id.* arts. 18(1)–(4).

245 *Id.* art. 52(2)(c).

246 Danner, *supra* note 243, at 521; Olásolo, *supra* note 226, at 105.

247 The Prosecutor's decision not to open an investigation is reviewable by the Pre-Trial Chamber at the request of the Security Council (a non-binding review) or *proprio motu* if this decision is exclusively based on the political discretion conferred on the Prosecutor by the Rome Statute (a binding review). Rome Statute, *supra* note 2, arts. 53(1)(c), 53(3)(a), 53(3)(b); Olásolo, *supra* note 226, at 101–02. There is no judicial review of a Prosecutor's decision not to request authorization to open an investigation when the informant is neither the Security Council nor a state party. Olásolo, *supra* note 226, at 142. Furthermore, the Prosecutor also plays a key role in the operationalization of the complementarity principle of the ICC. Rome Statute, *supra* note 2, art. 17. This operative principle stipulates that the

Moreover, regardless of institutional oversight of prosecutorial discretion to investigate, it is impossible to squeeze out the political contingency of criminal liability in the *praxis* of the ICC.[248] There will likely be a large disparity between the cases the ICC could potentially prosecute and those that it will effectively prosecute.[249] The reality that an ICC Prosecutor with limited resources will face "competing situations of crisis" means that only some crises will be selected for investigation and prosecution.[250] There is limited guidance in the Rome Statute as to how comparatively to evaluate crisis situations; in fact, the Rome Statute empowers the Prosecutor to assess whether an investigation would operate in the "interests of justice," a nebulous term that is left undefined.[251]

Frankly, in order for the ICC as an institution to maintain resource support, it is incentivized to investigate wrongdoers in politically powerless places.[252] This risks reducing the permanent ICC to an ad hoc institution contingent on international political consensus. Is it unsurprising that the ICC's initial investigations and prosecutions involve endemic atrocity in the Democratic Republic of the Congo and Uganda?[253] There is little chance

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ICC only can admit a case when a state is unwilling or unable genuinely to investigate or prosecute. *Id.* The Prosecutor's approval of the legitimacy of national investigations or prosecutions is subject only to a non-binding review by the ICC Pre-trial Chamber. Rome Statute, *supra* note 2, art. 53(3)(a); Olásolo, *supra* note 226, at 98. The Prosecutor's powers regarding admissibility are "extraordinary" insofar as their exercise "may lead to the annulment of decisions adopted by the Supreme or Constitutional Courts of the States concerned." Olásolo, *supra* note 226, at 135.

248 Olásolo reports that even when there is judicial review by the ICC of Prosecutorial discretion, this "simply passes to these judicial bodies the political discretion originally conferred upon the Prosecutor." Olásolo, *supra* note 226, at 142.

249 Mégret estimates that the ICC will be able to prosecute a dozen cases a year on average at most. Frédéric Mégret, *Three Dangers for the International Criminal Court: A Critical Look at a Consensual Project*, XII FINNISH Y.B. INT'L L. 193, 213 (2001).

250 Olásolo, *supra* note 226, at 107–08.

251 Rome Statute, *supra* note 2, art. 53(2)(c); *see also* Olásolo, *supra* note 226, at 111, 141 (arguing that the lack of a definition of "interests of justice" gives the Prosecutor the broadest possible scope of political discretion to decide whether or not to prosecute).

252 CHUTER, *supra* note 49, at 132.

253 Press Release, Int'l Crim. Ct. (Prosecutor) Press Release No. pids.009.2003-en (July 16, 2003) (Ituri case). Up to 4.7 million people have been killed in internecine fighting in the Democratic Republic of Congo ("DRC"). Jan Goodwin, *Silence=Rape*, NATION, Mar. 8, 2004, at 18. I do not wish to obfuscate the shocking magnitude and sheer barbarity of these crimes, nor the DRC government's encouragement of the ICC investigation. *See Mutilation Horror in DR Congo*, BBC NEWS (Feb. 24, 2004), *at* http://news.bbc.co.uk/2/hi/africa/3516481.stm. Rather, what I suggest is that a confluence of factors—the massiveness of the violence and the low political costs incurred by investigating atrocity in the DRC—enable the ICC to exercise jurisdiction in this case. On another note, Uganda earlier referred to the ICC the violence committed by the Lord's Resistance Army, a rebel group. Int'l Crim. Ct., *President of Uganda Refers Situation Concerning the Lord's Resistance Army to the ICC*, Jan. 29, 2004, *available at* http://www.icc-cpi.int/newspoint/articles/29.html. The ICC has announced it will investigate this violence and an investigatory team arrived in August 2004. *See ICC to Investigate Uganda Massacre*, NEWS INTERACTIVE (Feb. 25, 2004), *available at* http://www.news.com.au/common/story_page/0,4057,8775230%255E1702,00.html; UN IRIN, *ICC*

the ICC will investigate claims of war crimes in Afghanistan or torture in Iraq allegedly committed, for example, by Australian or British troops.[254] A decision whether or not to investigate or prosecute will be as contoured by concerns over how that decision will affect the ICC's political standing, funding, and support among states as it will by the seriousness of those allegations. This ambiguity reveals the relationship between hegemony and the purported equality of states that, in turn, weakens the retributive value of punishment.[255] Furthermore, it is foreseeable that prosecutorial discretion will be exercised in favor of those cases in which there is a better chance of securing convictions owing to variables that have nothing to do with the gravity of the crime, such as the cooperation of states and the availability of incriminating evidence. Therefore, despite contrary claims by international criminal law institutions, retribution is neither an accurate descriptive explanation of international punishment nor a realistic aspiration.

ICC Prosecutor Moreno-Ocampo, to his credit, has expressed interest in examining the broader context in which mass violence occurs, in particular links to international economic forces, the diamond trade, and corporate behavior. Whether this expression of interest becomes operationalized in

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Team Arrives to Prepare LRA Probe (Aug. 27. 2004), *available at* http://allafrica.com/stories/200408260139.html.

[254] In 1999, upon request by a group of law professors, the ICTY Prosecutor initiated an investigation into allegations that crimes within the jurisdiction of the ICTY had been committed by NATO forces during the air campaign in Kosovo. *See* Kissinger, *supra* note 39, at 93. The ICTY Prosecutor declined to indict any individual in regard to these allegations. *Id.* The Prosecutor issued reasons why she elected to decline to exercise her prosecutorial discretion regarding these allegations. These included a perceived difficulty in pinpointing individual responsibility and collecting evidence. *Id.* at 93–94.

[255] The legalization of U.S. exemption from the ICC also corrodes the uniformity of international criminal law and its retributive value. To be sure, this is not a problem created by the ICC. Rather, the U.S. government believes that U.S. national interests are best served by preventing the ICC from being able to assert jurisdiction over a U.S. soldier or leader. This belief has been given operational effect (and perhaps legal officialization) through bilateral immunity agreements and Security Council resolutions. For discussion of bilateral immunity agreements, see Marlise Simons, *An Argentine Prosecutor Turns Focus to New War Crimes Court*, N.Y. TIMES, Sept. 20, 2003. In bilateral immunity agreements, which according to the U.S. are contemplated by article 98 of the Rome Statute, a state agrees to exempt any U.S. citizen arrested in its territory from being turned over to or prosecuted at the ICC. At times, the U.S. has threatened to withhold economic or military aid to the state unless it agrees to the immunity agreement. As of mid-2004, ninety such agreements have been signed. The United States also twice requested—and obtained—from the United Nations Security Council a resolution that the ICC not commence any prosecution directed at any acts or omissions relating to U.N-established or authorized operations involving persons from a state that is not a party to the ICC. S.C. Res. 1422, U.N. SCOR, 57th Sess., 4572d mtg, U.N. Doc. S/Res/1422 (2002), *renewed as* S.C. Res. 1487, U.N. SCOR, 58th Sess., 4772d mtg, U.N. Doc. S/Res/1487 (2003). The United States had stated that it would withhold its support of peacekeeping missions unless the Security Council agreed to the exemption. The United States, apparently lacking the political backing by Security Council members in light of the prisoner abuse revelations at Abu Ghraib prison in Baghdad, withdrew a request for a third such resolution in the summer of 2004. Robin Wright, *U.S. Immunity in Iraq Will Go Beyond June 30*, WASH. POST, June 24, 2004, at A01. Given the number of bilateral immunity agreements that have been signed, however, the Security Council exemptions dwindle in value.

the *praxis* of the ICC given the political pressures to which it will be subject is another matter. That said, this would be a salutary development. If the ICC only blames a handful of people for violence perpetrated by masses of people, it will propagate a myth that, although assuaging and convenient, essentially is a fallacy. This myth, implemented through judicial reductionism, absolves the role of international agencies, transnational economic dynamics, and the foreign policies of influential states in creating environments conducive to violence. In this sense, the retributive justification is unclear "beyond exhortations that the selected punishment is a necessary response on the part of the civilized world to gross violations of international humanitarian law."[256] This is problematic insofar as it erases any involvement of the "civilized" world, whether actual or historical, in the violations. It may be terribly convenient to place blame for mass violence on selected evildoers, instead of offering a fuller explication of the myriad political, economic, historical, and colonial factors that facilitate the violence.[257] But in the end this offers little more than a very partial print of justice. After all, Milošević, Hussein, and Pol Pot are products of deeply globalized forces, including acts and omissions of international agents. Many Rwandans perceive that genocide could have been prevented were the U.N. to have militarily intervened in Rwanda instead of dithering. For these Rwandans, retribution means having their day in court with the U.N. The ICTY Prosecutor has refused to investigate whether the inaction of U.N. officials and Dutch peacekeepers contributed to the Srebrenica massacre.[258]

When international criminal law leaves these acts and omissions untouched, it fails to apportion blame in a manner representative of responsibility. Rather, blame is placed squarely on the final stage of the continuum of violence, namely those most evidently responsible. In the end, retribution fails: too few people or entities receive just deserts while many powerful states and organizations automatically are absolved of any responsibility. Although it may seem counterintuitive, restorative justice modalities may in fact augment overall retribution because they may capture a far greater number of individuals and organizations in the accountability process.

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256 Henham, *supra* note 107, at 72.

257 MARK J. OSIEL, MASS ATROCITY, ORDINARY EVIL, AND HANNAH ARENDT 157 (2001); *see also* CHUA, *supra* note 164, at 9, 124 (arguing that the simultaneous global spread of democracy and markets is a major aggravating cause of ethnic violence, in particular in countries with a market-dominant ethnic minority and a poor majority of a different ethnic group).

258 Marie-Bénédicte Dembour & Emily Haslam, *Silencing Hearings? Victim-Witnesses at War Crimes Trials*, 15 EUR. J. INT'L L. 151, 170 (2004).

B. Consequentialism, in Particular Deterrence

The deterrence rationale posits that accountability for the crimes of the past deters the commission of similar crimes in the future.[259] Such deterrence may be specific to individual abusers, but also general. The purpose is not to punish because punishment is deserved; rather, the purpose is to punish because punishment builds a safer world. In this sense, deterrence theories draw from utilitarian and consequential concerns that view law as fulfilling a social engineering function. As the ICTR intoned in the *Rutaganda* decision, punishment "dissuade[s] for ever[] others who may be tempted in the future to perpetrate such atrocities by showing them that the international community shall not tolerate the serious violations of international humanitarian law and human rights."[260]

To be sure, not all social engineering approaches to the criminal law view deterrence as the primary goal. Other approaches propound the belief that punishment protects society by incapacitating criminals or rehabilitating them.[261] Neither of these has been given much currency by international criminal tribunals.[262] Social reconstruction and reconciliation form another consequentialist purpose: punishing perpetrators may promote democratization, forgiveness, peace, and stability. Punishment may allow what Mark Osiel calls the "thinking citizen" to flourish: the "thinking citizen" being the most effective bulwark against future atrocity.[263] Reconciliation has been given some operationalization, albeit very limited, in the sentencing practice of the ad hoc tribunals.[264] The East Timor panels have been more forthcoming in their understanding that prosecution and punishment aspire to promote national reconciliation, but do not explain how this affects or should affect the determination of sentence.[265]

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259 *See, e.g.*, SCHABAS, *supra* note 27, at 515.

260 Prosecutor v. Rutaganda, Case No. ICTR-96-3-T, para. 456 (I.C.T.R. Trial Chamber Dec. 6, 1999), *aff'd*, Case No. ICTR-96-3-A (ICTR App. Chamber May 26, 2003).

261 Beresford, *supra* note 27, at 44–45; Paul Butler, Foreword, *Terrorism and Utilitarianism: Lessons from, and for, Criminal Law*, 93 J. CRIM. L. & CRIMINOLOGY 1, 8 (2003); Lloyd L. Weinreb, *Desert, Punishment, and Criminal Responsibility*, 49 LAW & CONTEMP. PROBS. 47, 79 (1986).

262 *See, e.g.*, Prosecutor v. Delalić, Case No. IT-96-21, para. 806 (I.C.T.Y. App. Chamber Feb. 20, 2001) (holding that offender rehabilitation should be considered as a relevant factor but not one that should be given undue weight); Prosecutor v. Kunarac, Case No. IT-96-23, para. 843 (I.C.T.Y. Trial Chamber Feb. 22, 2001) (holding that the use of preventive detention as a general sentencing factor is not fair or reasonable). However, in the *Stakić* case, the ICTY Trial Chamber, citing German developments in "modern criminal law," suggested that general deterrence could be linked to "reintegrating potential perpetrators into the global society." Prosecutor v. Stakić, Case No. IT-97-24-T, para. 902 (I.C.T.Y. Trial Chamber July 31, 2003). This is a somewhat novel claim which, if it acquired traction in subsequent cases, could generate a new rationale for punishment.

263 *See* OSIEL, *supra* note 257, at 150.

264 Prosecutor v. Kamuhanda, Case No. ICTR-95-54A-T, para. 754 (I.C.T.R. Trial Chamber Jan. 22, 2004).

265 Prosecutor v. Leki, Case No. 05/2000, at 11 (Dili Dist. Ct. Serious Crimes Spec. Panel June 11, 2001).

Selectivity and indeterminacy are especially corrosive to the deterrent value of prosecution and punishment. Criminologists long have posited that it is the chance of getting caught rather than the severity of the sanction that affects behavior.[266] "Getting caught" is particularly problematic in the context of international crimes—much more so than in the domestic context. After all, international tribunals do not have their own police force or agents of enforcement. Consequently, they experience considerable difficulty in actually obtaining custody over some accused individuals and are unable to do so without the cooperation of national authorities.[267] I do not deny that the chances of "getting caught" for committing egregious violations of human rights—certainly for heads of state and superior officers—are higher today than they were prior to the institutionalization of the international criminal justice paradigm. Rather, I suggest that, although the prospect of getting caught is greater than it once was, it still remains tiny.[268]

Moreover, and more profoundly, deterrence is based on the essentially unproven assumption of perpetrator rationality in the chaos of massive violence, incendiary propaganda, and upended social order.[269] However implausible it may seem, the assumption of rational choice undergirds the deterrence aspect of international criminal justice.[270] Mégret opines that: "It beggars belief to suggest that the average crazed nationalist purifier or

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266 JOHN BRAITHWAITE, CRIME, SHAME AND REINTEGRATION 69 (1989); CHUTER, *supra* note 49, at 271.

267 For example, at the ICTY twenty-one of approximately eighty indictees remain as fugitives. Some have been at large for several years. *See Fact Sheet on ICTY Proceedings*, *at* http://www.un.org/icty/cases/factsheets/procfact-e.htm (last visited Aug. 7, 2004).

268 BASS, *supra* note 33, at 300; *see also* Olásolo, *supra* note 226, at 144 ("[I]t is difficult to negate that the alarming lack of criminal prosecutions for genocide, crimes against humanity and war crimes has created a common feeling that perpetrators can easily get away with their crimes."). One counterpoint is that the reason the chances of getting caught are small is because there are few international criminal justice institutions. In response, see Mégret, *supra* note 249, at 202 ("One 'clever' methodological way of avoiding the problem often used by defenders of deterrence theory is to argue that if deterrence has not worked so far it is because international criminal law has not been enforced systematically enough. Hence a failure to demonstrate what should be an *a priori* condition to invest in international criminal justice ends up transformed into an argument in favour of creating more international criminal tribunals.").

269 MARTHA MINOW, BETWEEN VENGEANCE AND FORGIVENESS 50 (1998); SHKLAR, *supra* note 167, at 187 (wondering "whether international criminal law can fulfill in any degree the great function of criminal law—the deterrence of potential criminals."); Beresford, *supra* note 27, at 43; Henham, *supra* note 105, at 78; Christopher Rudolph, *Constructing an Atrocities Regime: The Politics of War Crimes Tribunals*, 55 INT'L ORG. 655, 683–84 (2001); Tallgren, *supra* note 152, at 561; David Wippmann, *Atrocities, Deterrence, and the Limits of International Justice*, 23 FORDHAM INT'L L.J. 473, 474 (1999).

270 For a brisk rendition of the assumption, see Payam Akhaven, *Beyond Impunity: Can International Criminal Justice Prevent Future Atrocities?*, 95 AM. J. INT'L L. 7, 8 (2001) (arguing that prosecution "sends a message that the cost of ethnic hatred and violence as an instrument of power increasingly outweighs its benefits").

abused child soldier . . . will be deterred by the prospect of facing trial."[271] In the specific case of terrorism, will a suicide-bomber be deterred by fear of punishment in the event of capture? Does the existence of a permanent ICC necessarily mean that those imbued in political paranoia will see their actions as legally or morally wrong? Do genocidal fanatics make cost-benefit analyses prior to initiating violence? Do ordinary people swept up in supremacist euphoria have the moral resources to make dispassionate decisions?

Nor is it evident that the risk of punishment will deter people from engaging in violent behavior that they, at the time, believe is morally justifiable and perhaps even necessary, if not downright gratifying.[272] There are sites of human activity where violence can be deeply compelling. Assuming arguendo that rational choice was possible in the cataclysm of mass violence, for some people the value of killing or dying for a cause actually exceeds the value of living peacefully without the prospect of punishment.

Selectivity also operates at a more pernicious level insofar as only a handful of individuals ever bear the guilt. It is often—but certainly not always—the case that these individuals are conflict entrepreneurs. However, it is unclear how this criminal justice approach can deter other conditions precedent to mass violence, namely the silence of the majority, the acquiescence of the bystander, and the complicity of those neighbors who avert their gaze. Since such behavior never is implicated by a system based on criminalization, any such system might do little to deter these essential prerequisites to mass violence. Although the trial may represent closure, this closure may be chimeric. The smoke and mirrors of closure may divert attention from broader-based reconstruction efforts or lure us into overlooking that criminal trials cannot address many of the root causes of systemic violence. On the other hand, a broader-based approach rooted in sanctions for collective responsibility may reduce the appeal of passively acquiescing and, thereby, turn some erstwhile bystanders into gatekeepers.

International criminal process proclaims other consequentialist motivations. Reconciliation is one such motivation. Supposedly neutral international criminal process may, however, trigger important political effects that may imbue it with the taint of "victor's justice" and, thereby, thwart reconciliation. Political science research[273] suggests that lasting social order in societies roiled by civil conflict is restored by a "forgiveness process characterized by truth telling, redefinition of the identity of the former belliger-

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[271] Mégret, *supra* note 267, at 203. Mégret adds that this assumption is "a typical case of liberalism's hegemonious tendency of constructing the other in its own self-image, preferably along the lines of some reductionist form of economic rational choice theory." *Id.*

[272] MICHAEL IGNATIEFF, THE LESSER EVIL 121 (2004).

[273] WILLIAM J. LONG & PETER BRECKE, WAR AND RECONCILIATION (2003) (offering case studies on Colombia, North Yemen, Chad, Argentina, Uruguay, Chile, El Salvador, Mozambique, South Africa, and Honduras).

ents, partial justice, and a call for a new relationship."[274] Assuredly, criminal trials may form an element of one of these goals, namely partial justice.[275] However, they may in certain cases inhibit some of the other goals, such as truth-telling,[276] and may consolidate instead of dissipate belligerent group identity.[277] Too unyielding an emphasis on criminal process can undermine transitional societies. Commentators have opined that demands to extradite suspects to the ICTY may have prolonged the conflict in the Balkans, aggravated political instability within successor states in the region, and prematurely undermined local courts.[278]

C. Expressivism

Expressivist theories "look not so much at whether a law deters or whether a law punishes, but at the message we get from a law."[279] The expressivist constructs law as reflecting "a society's values, what it esteems, what it abhors."[280] Law creates norms, condemns breaches of those norms, and gives voice to changes within norms. Diane Marie Amann writes that expressivist theories may be useful explanatory devices for the *logos* of international criminal justice.[281] She traces the expressive component of the Nuremberg proceedings and the occasional expressive flavor in the judgments of the ad hoc tribunals.[282]

Punishment, too, has expressive value. It may feed the legitimacy and purpose of international law itself: as the Nuremberg judges insisted, "only by punishing individuals who commit [crimes against international law] can the provisions of international law be enforced."[283] The expressive value of punishment also operates on a broader level. David Garland posits that punishment "communicates meaning . . . about power, authority, legitimacy, normality, morality, personhood, social relations, and a host of other

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274 *Id.* at 3.

275 *Id.* at 71.

276 CHUTER, *supra* note 49, at 225; Carrie Gustafson, *International Criminal Courts: Some Dissident Views on the Continuation of War by Penal Means*, 21 HOUS. J. INT'L L. 52, 76 (1998).

277 Drumbl, *supra* note 34, at 1308.

278 Nils Christie, *Answers to Atrocities: Restorative Justice as an Answer to Extreme Situations*, *in* VICTIM POLICIES AND CRIMINAL JUSTICE ON THE ROAD TO RESTORATIVE JUSTICE 387 (E. Fattah & S. Parmentier eds., 2001); Jack Snyder & Leslie Vinjamuri, *Trials and Errors: Principles and Pragmatism in Strategies of International Justice*, INT'L SECURITY, Winter 2003/2004, at 5, 12, 23; Steven Erlanger, *Did Serbia's Leader Do the West's Bidding Too Well?*, N.Y. TIMES, Mar. 16, 2003, at section 4, page 4.

279 Diane Marie Amann, *Message as Medium in Sierra Leone*, 7 ILSA J. INT'L & COMP. L. 237, 238 (2001).

280 Amann, *Group Mentality*, *supra* note 223, at 118, 120.

281 *Id.* at 121–24.

282 *Id.*

283 International Military Tribunal (Nuremberg), Judgment and Sentences (Oct. 1, 1946), *reprinted in* 41 AM. J. INT'L L. 172, 221 (1947).

tangential matters."[284] There is an assumption, which at first blush seems perfectly plausible, that the punishment inflicted by an international tribunal operating prominently on the global agenda at the cusp of history has enhanced expressive value in asserting the importance of law and the stigmatization of the offender who transgresses that law.

However, as with deterrence and retribution, the expressive value of law and punishment is weakened by selectivity and indeterminacy in the operationalization of law and punishment, as well as the political contingency of the entire enterprise. Ronald Dworkin wisely observed that "the determinacy, integrity, coherence, and 'wholeness' of law are central to its moral standing."[285] Selectivity undermines each of these attributes and thereby weakens law's moral expression and social constructivist aspirations. Expressive value is further assailed—as I explore in Part V below—by the reality that this value often is externalized from afflicted local communities owing to the distance and mistrust evident between such communities and the machinery of international criminal justice.

In addition to expressing the importance of law, legal process also may narrate history and thereby express shared understandings of the provenance, nature, and effects of mass violence. This process has been referred to by international tribunals as "discovering the truth" and is itself tied to a number of other goals, including the consequentialist goal of national reconciliation.[286]

Whether (and, if so, when) adversarial or inquisitorial trials narrate historical truths that in turn have expressive legitimacy remains a contested question. On the one hand, Lawrence Douglas posits that trials in response to extraordinary crimes such as the Holocaust can serve a broader didactic purpose that meets the interests of history and memory.[287] On the other hand, there are those who evince skepticism regarding the truths that emerge from the trial process. Justice Albie Sachs, for example, posits a typology of four truths: microscopic truth, logical truth, experiential truth, and dialogic truth.[288] According to Sachs, courts create microscopic and

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[284] DAVID GARLAND, PUNISHMENT AND MODERN SOCIETY: A STUDY IN SOCIAL THEORY 252 (1990); *see also* Blakesley, *supra* note 7, at 1066–80 (discussing connections between punishment and power, and discretion and power).

[285] Robin West, *Taking Moral Argument Seriously*, 74 CHI.-KENT L. REV. 499, 500 (1999) (interpreting Dworkin).

[286] Antonio Cassese, *Reflections on International Criminal Justice*, 61 MOD. L. REV. 1, 1 (1998); Henham, *supra* note 65, at 14.

[287] DOUGLAS, *supra* note 26. For example, calling the massacres that took place in Rwanda in 1994 and Srebrenica in 1995 genocides serves the purpose of indelibly officializing this violence as the "crime of all crimes." *See* SCHABAS, *supra* note 230, at 9. The ICTY Appeals Chamber has engaged in such a declaratory process with an explicit view to memorializing the Srebrenica violence as genocide. Prosecutor v. Krstić, Case No. IT-98-33-A, para. 34 (I.C.T.Y. App. Chamber Apr. 19, 2004).

[288] Albie Sachs, Lecture at Columbia University School of Law (Apr. 13, 1999), *cited in* Drumbl, *supra* note 34, at 1283 (notes on file with author).

logical truths, which are exacted on a "beyond a reasonable doubt" standard derived from a sequential proof of facts.[289] Experiential and dialogic truths are different. They emerge phenomenologically when people come forward and tell their stories.[290] Restorative mechanisms—whether in the form of truth commissions or traditional dispute resolution—may constitute comfortable sites for such storytelling. These sites unpack subjectivities and difference.[291] However, through a process of accretion over time, these expressions of experience create an overarching historical narrative that can displace pre-existing narratives that may have normalized or legitimized the violence. For Sachs, courts do not encourage experiential or dialogic truths.[292] Therefore, what for Douglas is a didactic process of memory is for Sachs a retraumatizing process of microscopic dissection.

A more subtle question is whether plea bargains can attain this truth-telling objective. The international criminal tribunals believe this to be the case, and have cited this factor as an important justification in the institutionalization of plea bargaining.[293] Fundamentally, this exchange between perpetrator and prosecutor can involve three levels of discount. First, there is a reduction in the severity of sentence for the charges to which the offender pleads guilty. Second, the offender discounts the public process of the trial and generally pleads guilty only to the bare factual allegations in an indictment, instead of contending with the gruesome, detailed evidence admitted in trial and necessary to convict on those allegations. Third, the offender may bargain for the prosecutor to drop a number of charges.[294] For example, in the Plavšić plea bargain affirmed by the ICTY, Plavšić pleaded guilty to one count of persecution as a crime against humanity and the

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289 *Id.*

290 *Id.*

291 DOROTHY SMITH, *Telling the Truth After Postmodernism*, *in* WRITING THE SOCIAL: CRITIQUE, THEORY, AND INVESTIGATIONS 128 (1999).

292 Sachs, *supra* note 288.

293 *See, e.g.*, Prosecutor v. Sikirica, Case No. IT-95-8-S, para. 149 (I.C.T.Y. Trial Chamber Nov. 13, 2001) ("[A] guilty plea contributes directly to one of the fundamental objectives of the international tribunal: namely, its truth-finding function."); Prosecutor v. Todorović, Case No. IT-95-9/1-S, para. 81 (I.C.T.Y. Trial Chamber July 31, 2001) (stating that "a guilty plea is always important for the purpose of establishing the truth in relation to a crime"). The ICTY Prosecutor is particularly enthusiastic about the effect of guilty pleas on the establishment of truth. Combs, *supra* note 33, at 931. *But see also* Prosecutor v. Deronjić, Case No. IT-02-61-S, para. 135 (I.C.T.Y. Trial Chamber Mar. 30, 2004) (coming to a contradictory position by holding that it "is not the final arbiter of historical facts," as that "is for historians").

294 *See, e.g.*, Prosecutor v. Mrdja, Case No. IT-02-59-S, paras. 4–5 (I.C.T.Y. Trial Chamber Mar. 31, 2004) (dropping charge of crime against humanity as part of the plea bargain); Prosecutor v. Deronjić, Case No. IT-02-61-S, paras. 14, 18 (I.C.T.Y. Trial Chamber Mar. 30, 2004) (reducing the six counts in original indictment to one charge in plea agreement); Prosecutor v. Nikolić, Case No. IT-02-60/1-S, para. 13 (I.C.T.Y. Trial Chamber Dec. 2, 2003) (dropping the genocide charges as a result of the Prosecution's plea bargain). Croatian Serb Milan Babić also pleaded guilty to one count of persecution as a crime against humanity in exchange for the Prosecutor agreeing to drop four other charges. *Babic Admits Persecuting Croats*, BBC NEWS, Jan. 27, 2004, *at* http://news.bbc.co.uk/2/hi/europe/3433721.stm.

Prosecutor dropped the remaining seven charges, including two counts of genocide and complicity in genocide.[295] The plea bargain therefore pushes certain allegations off the agenda. This precludes the truth of those allegations from ever being unearthed. The victims of those alleged crimes are thus in a sense erased. This was the case in the Deronjić plea bargain, which established the truth only regarding the tragedy that encompassed one village on one particular day, thereby burying several other potential truths—namely accusations involving other spaces and places in Bosnia.[296]

In the case of high-level accused, where the exacting nature of criminal law requires the leader to be traced to the body interred in the mass grave, plea bargains may offer a partial print of the truth whose value exceeds that of the acquittal that might result when the Prosecutor is unable to meet the high threshold of proof required for microscopic and logical truths. However, the record is mixed as to the public response when perpetrators of mass atrocity plead guilty.[297] That said, offenders who plead guilty often admit wrongdoing, apologize, express remorse, acknowledge victims as people rather than enemies, and provide details regarding the crimes that were committed. These offenders may even implicate others, although this is not always the case. For example, Plavšić has refused to involve anyone else in the violence or testify in any other cases.[298] She took responsibility for her own actions, but stated that this responsibility was hers "alone" and was not to be "extend[ed] to other leaders who have a right to defend themselves."[299] The bargained-for testimony of another defendant who pleaded guilty, Momir Nikolić, was subsequently found by the ICTY to be evasive and lacking in veracity.[300] Contrition may prove to be more forthcoming under the ICC, which speaks not of guilty pleas, but, rather, of proceedings on an admission of guilt. This is as of yet untested.

In sum, trials represent a game of chicken. The accused have the incentive to deny involvement and demonize victims. With this as a baseline, certain perpetrators stake out the power to negotiate deals that may be lacking not only in expressive value, but also in retributive and deterrent value.

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295 Combs, *supra* note 33, at 931. Plavšić received a sentence of eleven years' imprisonment. Prosecutor v. Plavšić, Case No. IT-00-39&40/1-S, para. 132 (I.C.T.Y. Trial Chamber Feb. 27, 2003).

296 Prosecutor v. Deronjić, Case No. IT-02-61-S, para. 4 (I.C.T.Y. Trial Chamber Mar. 30, 2004) (Schomburg, J., dissenting).

297 *See* Combs, *supra* note 33, at 936 (discussing public responses to the Plavšić guilty plea in Serb, Croat, and Bosnian Muslim communities); *see also id.* ("[T]ruth telling is one thing; deal cutting is another . . . .").

298 *Id.* at 934.

299 *Id.* (citing reports).

300 Prosecutor v. Nikolić, Case No. IT-02-60/1-S, para. 156 (I.C.T.Y. Trial Chamber Dec. 2, 2003); *see also* Prosecutor v. Krstić, Case No. IT-98-33-A, para. 94 (I.C.T.Y. App. Chamber Apr. 19, 2004) (hesitating to rely independently on testimony from Deronjić, another defendant who plea bargained, in the proceedings against Krstić owing to discrepancies in Deronjić's testimony and the ambiguity surrounding some the statements he made).

Accordingly, if the incentive structure were altered in a manner tailored to the unique criminality of mass atrocity, then perhaps apologies instead of plea bargains would be more forthcoming. At this early juncture in its development, it certainly is not too late for international criminal law to creatively strive to punish with a view to promoting a variety of expressive goals.

IV. STATE POWER, DEMOCRACY, AND VICTIMIZED COMMUNITIES

Rama Mani remarks that international justice evidences a predominance of Western-generated theories and an absence of non-Western philosophical discourse.[301] This leads to "a troubling imbalance or 'injustice' in the study of justice," insofar as "international lawyers . . . have largely referred to and replicated their own legal systems, rather than catered to and built on local realities and needs."[302] This replication, in turn, risks a troubling democratic deficit in extant international criminal law institutions, particularly since many of these are geared to investigating and criminalizing atrocity in non-Western nations. Instead of building accountability and restoration from the bottom-up through involvement of indigenous laws, customs, personalities, politics, and practices, international criminal law interventions tend to drop from the top-down. This unidirectionalism is most poignant in the statutes of the ad hoc tribunals, which grant these tribunals primacy over all other courts in the exercise of their activities.[303]

International criminal law interventions therefore represent new grist for the mill of those who posit the anti-democratic nature of international law generally. Jed Rubenfeld, for example, remarks that international efforts toward transitional justice, which often include scripting constitutional and foundational documents, proceed in top-down fashion.[304] Rubenfeld identifies "international constitutionalism" as a viewpoint from which "it's not particularly important for a constitution to be the product of a national participatory political process."[305] Rather, the goal is to implement an agenda agreed to by the international human rights community. Although "[n]ational ratification of a new constitution might be instrumentally valuable, . . . having a committee of expert foreign jurists draw up a constitution would be perfectly satisfactory in principle."[306] In fact, according to

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301 RAMA MANI, BEYOND RETRIBUTION: SEEKING JUSTICE IN THE SHADOWS OF WAR 47–48 (2002).

302 *Id.* at 48, 81. Most international lawyers are Westerners or are members of Western-trained transnational elites.

303 Statute of the ICTR, *supra* note 13, art. 8(2); Statute of the ICTY, *supra* note 14, art. 9(2). Primacy also is a feature of the Special Court for Sierra Leone. *See* Sierra Leone Statute, *supra* note 15, art. 8(2).

304 Rubenfeld, *The Two World Orders*, WILSON Q. 22 (Autumn 2003).

305 *Id.* at 26–27.

306 *Id.* at 27.

Rubenfeld, "interpretation by a body of international jurists is . . . not only satisfactory but *superior* to local interpretation, which invariably involves constitutional law in partisan and ideological political disputes."[307]

I would argue that the operationalization of international criminal law proceeds analogously, albeit certainly not in as cynical a manner as Rubenfeld's generalization would have it. There is a similar derision for messy local politics and a similar reification of supposedly transcendental international criminal law and the expert community that administers that law. One consequence of the normalization of Western modalities through universal legalism is the exclusion of indigenous and *in situ* modalities of justice that diverge from Western norms. This leads to a paradox: the society reeling from violence becomes disenfranchised from the redressing of that violence which, instead, becomes a task suited to the technocratic savvy of the epistemic community of international lawyers. Assuredly, many of these societies may never have experienced democracy nor may they foresee realistic short-term prospects for democratization. These, however, surely are not valid reasons to further add to popular disenfranchisement in these same places.

To be sure, the bald assertions of primacy made by Security Council fiat in the ICTR and ICTY have thawed in other international criminal institutions. This goes some way to mitigate concerns over local disenfranchisement. Perhaps the greatest potential for co-constitutive local engagement lies in institutions such as hybrid panels, such as those that have been created in East Timor and Kosovo, notwithstanding the many other challenges these institutions face.[308] As for the ICC, it makes two significant improvements over the ad hoc tribunals on the democratic deficit question. First, the ICC is an institution created by international treaty. Accordingly, participation in the ICC depends on the consent of states. It therefore seems reasonable to contend that those states who consent to the ICC indicate through that consent their support of the modalities of justice pursued by the ICC. Second, the ICC only will admit a case once it deems that the complementarity principle has been satisfied. According to this

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[307] *Id.*

[308] *See, e.g.*, Brooks, *supra* note 29, at 2296 (discussing obstacles for the Kosovo hybrid panels); Katzenstein, *supra* note 18, at 246, 253 (noting that some of the initial problems at the hybrid tribunals include inefficiency, incorrect application of international law, failure to apply international law, minimization of local participation, insufficient capacity-building, and failure to uphold due process standards); Suzannah Linton, *Rising from the Ashes: The Creation of a Viable Criminal Justice System in East Timor*, 25 MELB. U. L. REV. 122, 176 (2001) (reporting shortcomings in the management of the hybrid tribunals). Whereas the budget for the East Timor panels was U.S. $6.3 million in 2001, the ICTR and ICTY budgets for 2002–2003 were U.S. $178 million and U.S. $223 million respectively. Katzenstein, *supra* note 18, at 258.

principle, the ICC only will assume jurisdiction when a state is unable or unwilling genuinely to investigate or prosecute.[309]

These improvements, however, do not fully redress the democratic deficit nor effectively include the local in the machinery of international criminal justice. States do not always reflect society. The process by which many states (particularly illiberal states) consent is far from democratic insofar as there may be little to no bottom-up participation or debate during the ratification process. States consent to international treaties for a variety of reasons, some of which have little to do with the actual content of those treaties. These include considerations such as maintaining standing in the international community, pursuing the appearance of legitimacy, and bowing to pressure from donor states. Nor does the assumption that states faithfully reflect society expiate democratic concerns. For example, the operation of the ICC, including the development of its rules, occurs by consensus without the need for the actual individuated agreement of the state in which the ICC exercises jurisdiction. The ICC has independent law-making capacity through whose exercise it becomes more than the agent or delegee of the consenting state. This means that, "in any particular prosecution, the ICC may be applying rules and law that were decided upon by a majority [of states], over the dissenting vote of the state on whose territory the particular crimes occurred."[310] The ICC is not mandated to take into account local or national sentencing practices.[311] In addition, the ICC may exercise jurisdiction over nationals of states who do not consent to be bound by the jurisdiction of the ICC.[312]

The operation of complementarity may comfortably ensconce ICC process and punishment preferences across the board. In this vein, it is important to underscore that the decision whether the state is willing or genuinely able to investigate, prosecute, or punish lies with the ICC. A decision to admit a case can therefore be taken over the objections of the state with the closest nexus to the violence. Accordingly, national courts in post-

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[309] Rome Statute, *supra* note 2, art. 17(1)(a) (limiting the jurisdiction of the ICC only to situations where a state with jurisdiction is unable or unwilling genuinely to investigate or prosecute); *see also id.* art. 17(1)(b) (making a matter admissible before the ICC if the state has investigated and the state has decided not to prosecute the person concerned if the decision reflects an unwillingness or inability genuinely to prosecute); *id.* art. 20(3) (circumscribing the *ne bis in idem* principle when it comes to an individual tried by another court for allegations falling within the jurisdictional scope of the ICC). For a discussion of how the principle of complementarity intrinsic to the ICC may dissuade states from deploying restorative justice mechanisms such as truth commissions, see John T. Holmes, *The Principle of Complementarity*, *in* THE INTERNATIONAL CRIMINAL COURT: THE MAKING OF THE ROME STATUTE 77 (Roy S. Lee ed., 1999); Jennifer Llewelyn, *A Comment on the Complementary Jurisdiction of the International Criminal Court: Adding Insult to Injury in Transitional Contexts*, 24 DALHOUSIE L.J. 192 (2001).

[310] Madeline Morris, *The Disturbing Democratic Defect of the International Criminal Court*, XII FINNISH Y.B. INT'L L. 109, 112 (2001).

[311] CASSESE, *supra* note 21, at 158.

[312] Morris, *supra* note 310, at 113.

conflict societies now are encouraged to adopt prosecutions and procedures that look much like those at the ICC in order to minimize the risk of ceding jurisdiction to the ICC. In this vein, complementarity may encourage heterogeneity in terms of the number of institutions adjudicating international crimes, but homogeneity in terms of the process they follow and the punishment they mete out. In the end, the content of local practices may be excluded regardless of the legitimacy with which these practices may be perceived. Since the preferred practice is that which dominates in Western societies, excluded local practices overwhelmingly will be those present in non-Western societies. Moreover, since the political realities of international criminal law institutions suggest that the focus of their efforts will be—at least initially—directed to redressing systemic criminality in non-Western spaces, the end result is the exclusion of the local in those places whose atrocity is most likely to be criminalized.

Assuredly, "Western" legal process is not monolithic. Elemental comparative law analysis suggests that the Western legal family divides among common law (Anglo-American) and civil law (Continental) branches.[313] This analysis also enunciates some differences between the branches.[314] Anglo-American common law approaches have exerted considerable influence in the structure and functioning of the ICTY and ICTR.[315] Specific examples include: recourse to precedent and inductive reasoning in formulating judicial opinions; extensive cross-examination within an essentially adversarial process;[316] the availability of plea bargaining; the absence of an investigating magistrate; the active role of defense counsel and of *amici*; and the provenance and legal education of staff appointees. However, civil law methods are increasingly influential insofar as there has been a gradual incorporation of the civil law inquisitorial model into the process of the ad hocs and, more foundationally, in the structure of the ICC.[317]

These differences, nonetheless, are ones of degree, not of kind. The entire package of international criminal justice remains a reflection of the hegemonic values of Western punitive criminal justice, including a focus

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313 RENÉ DAVID & JOHN E.C. BRIERLEY, MAJOR LEGAL SYSTEMS IN THE WORLD TODAY (1985).

314 CASSESE, *supra* note 21, at 365–88.

315 *Id.* at 384; KNOOPS, *supra* note 17, at 6. To be sure, there is considerable heterogeneity within Anglo-American common law approaches. For example, whereas in Canada prosecutorial appeals are permitted, these are unconstitutional in the U.S. International criminal process permits prosecutorial appeals. In a similar vein, most common law countries give juries a tightly circumscribed role or no role at all. Therefore, the fact that the ad hoc tribunals have no juries could be viewed as somewhat consonant with the national systems of most common law countries.

316 Daryl A. Mundis, *Recent Book on International Law: Book Review*, 97 AM. J. INT'L L. 1012, 1013 (2003) (reviewing RICHARD MAY & MARIEKE WIERDA, INTERNATIONAL CRIMINAL EVIDENCE (2002)).

317 Specific examples include: (1) the structure of the sentencing hearings, which are added onto the main proceeding, as is the case in civil law jurisdictions, and not part of a separate sentencing hearing, which is the case in common law jurisdictions; and (2) evidentiary rules in which evidence, such as hearsay, is broadly admitted but then accorded little weight if found to be unreliable.

primarily on retribution and secondarily on deterrence instead of other potential goals such as restoration, reintegration, or atonement. In sum: While international criminal justice institutions have, to some extent, reconciled adversarial and inquisitorial methodologies (and thereby delineated a somewhat novel harmonized procedure), this reconciliation is a political settlement among powerful international actors. It is not a genuine communitarian amalgam that accommodates the disempowered victims of mass violence—largely from non-Western audiences—lacking a voice in international relations. In this vein, international criminal law's democratic deficit may be exacerbated by an experiential deficit. A not-so-insignificant number of the architects of international criminal law—and international human rights law generally—are strangers to repression insofar as they have never experienced a human rights abuse nor lived in the disintegrated societies that remain the focus of international criminal law. These individuals may therefore be isolated from "real life as it is lived in countries where these abuses take place."[318]

In the end, the international community is flexing an increased willingness to subject the conduct of human rights abusers to legal process. That said, this process remains narrow in scope and targeted largely to criminal punishment imposed by Western-driven modalities preferential to retribution. It is not a broader process comfortable with restorative initiatives, indigenous values,[319] amnesties, reintegrative shaming, the needs of victims, restitution,[320] collective or foreign responsibilities, distributive justice, and pointed questions regarding the structural nature of violence in the international system. International criminal law symbolically, perhaps even theatrically, pursues some individuals—explicitly cast as evildoers—in some places. In so doing, international criminal law punishes these evildoers and thereby removes them from sight or smell.[321] Law is applied to cleanse, purify and, perhaps, even salve. This application, however, conveniently or unwittingly swaddles the myriad structural factors that permitted that evildoer to perpetrate evil on such a large scale to the point that those factors become masked. This results in the punishment of certain individuals but does not lead to the reform of criminogenic conditions. Scholars of interna-

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318 CHUTER, *supra* note 49, at 119; *see also id.* at 120 ("There is, moreover, a conceptual and personal gulf between even the most empathic Westerner and the kind of person whom they meet in situations of conflict and incipient authority.").

319 *See* Leopold von Carlowitz, *Crossing the Boundary from the International to the Domestic Legal Realm: UNMIK Lawmaking and Property Rights in Kosovo*, 10 GLOBAL GOVERNANCE 307, 319 (2004).

320 The ICC does take some steps toward restitution and victim participation. *See supra* note 74. However, the limitation of seizure only to individual assets will mean that there may not be sufficient capital actually to restore people and property. It is unclear whether the Trust Fund shall be capitalized beyond these appropriations, and, if so, to what extent. Accordingly, there is cause for concern regarding whether this remedy ever shall form part of the law-in-practice of the ICC.

321 OSIEL, *supra* note 257, at 157.

tional crime have not yet satisfactorily examined the relationship between these conditions and the long-term peaceful resolution of disputes within and between afflicted societies. If the criminal justice approach becomes presumptive, it may discourage—or even quash—the development of alternate approaches to accountability. This is troubling, insofar as these alternate approaches may convey greater meaning to individual lives, offer more searching explanations for mass violence, serve a monitoring function on group (and institutional) action and, thereby, play more of a preventative role.

Rwanda exemplifies this phenomenon. The Rwandan government has sought—with halting success—to institute traditional community dispute resolution—called *gacaca*—to hold accountable and reintegrate tens of thousands of individuals charged with genocide-related offenses.[322] *Gacaca* has been criticized by international activists for lacking in due process.[323] However, this criticism is somewhat abstract insofar as the West in particular, and the international community in general, has done little to assist the domestic Rwandan judicial infrastructure, preferring instead to spend significant sums on the ICTR (it costs roughly $25 million dollars to secure a single conviction at the ICTR).[324] Within Rwanda, *gacaca* may constitute the only realistic method to allocate some responsibility, promote reintegration, embed local conceptions of justice, activate confessions, and distribute reparations.[325] To be sure, *gacaca* also has engendered heated criticism by victims' groups.[326] My point here is not to shield *gacaca* from such criticism but, rather, to flag the decontextualized nature of much of the Western "rule of law" critique.

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[322] The Rwandan government has passed legislation to establish *gacaca* tribunals. It has designated approximately 30,000 detainees (many of whom have confessed to lower-level involvement in the genocide) to participate in the initial *gacaca* proceedings. These proceedings routinely have been delayed, and remain in pre-trial stages. Hirondelle News Agency, *Gacaca Tribunals Officially Launched in Rwanda* (June 24, 2004) (on file with author); UN Integrated Regional Information Networks, *Government Extends Deadline as Tens of Thousands Confess to Genocide Crimes*, *at* http://allafrica.com/stories/200403180004.html (last visited Mar. 31, 2004).

[323] For a broader discussion, see Erin Daly, *Between Punitive and Reconstructive Justice: The Gacaca Courts in Rwanda*, 34 N.Y.U. J. INT'L L. & POL. 355 (2002); Drumbl, *supra* note 34, at 1263–67. One unforeseen consequence of *gacaca* is that those who have participated and confessed have implicated thousands of individuals who have not yet been charged, thereby increasing the scope of accountability (and also the caseload).

[324] *See* Gerald Gahima, Prosecutor-General of Rwanda, Address at the Biennial Conference of the International Association of Genocide Scholars at the National University of Ireland (June 2003) (notes and comments on file with author).

[325] The Rwandan government is endeavoring to provide for reparations at the national level; it has received very limited assistance from international agencies or the ICTR. Vandeginste, *supra* note 20, at 253, 254, 258–62. In fact, the government of Rwanda wanted the ICTR to consider allowing civil claimants to be involved in the trials and to have the power to award damages when it was found to be appropriate, but this did not bear fruition. *Id.* at 254.

[326] Concerns include witness protection, impartiality of proceedings, nature of punishment, getting witnesses to testify in public without fear of reprisal, and the retraumatization of victims.

International criminal law institutions may, as currently conceptualized, elide the local and therefore impose order from the top instead of democratically cultivating order from below. This is not to say that the project of international criminal law is incurably undemocratic or immutably illegitimate. Nor am I saying that this top-down imposition is limited to criminal law institutions: internationalist *diktat* can plague restorative initiatives as well and, arguably, has animated the implementation of a truth commission for Bosnia.[327] It goes without saying that international institutions cannot for the moment rely on the primary basis by which legitimacy is earned, namely by means of democratic elections. However, by more avidly encouraging the development of democratic process and welcoming diverse local modalities of accountability, international criminal law institutions could play a greater role in catalyzing transformative justice.

V. EXTERNALIZATION OF JUSTICE

Disconnects arise when the pursuit of accountability arises through a process that is distant from or alien to local populations. In such a situation, justice is externalized. When justice is externalized from the afflicted societies for which it is intended, it then becomes more difficult for any of the proclaimed goals of prosecuting and punishing human rights abusers—whether denouncing radical evil, expressing rule of law, voicing retribution, or preventing recidivism—to take hold.

Externalization issues quickly arose once the ICTR and ICTY began their process and issued judgments. The curative powers of these tribunals came under fire when disconnects emerged between their work and the societies whose health they were to nurture. These disconnects reveal the unpleasant reality that the alleged legitimacy of international institutions is not always apparent to local populations. In fact, there are times and places where "inferior" local institutions should not automatically be trumped by "superior" international ones.

The point here is not to glorify all national or local institutions. In many places, national dispute resolution institutions, especially courts, are viewed with tremendous skepticism as they often serve as instruments of social control in authoritarian regimes.[328] Accordingly, the argument that such institutions would arrive at the truth seems naïve. That said, this does not mean that in all cases putatively neutral international institutions necessarily arrive at the truth either. For example, Chuter concludes that "it is asking a great deal of people [in the former Yugoslavia] to credit that a

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[327] *See* Julie Mertus, Comments on Reconstructing PostConflict Societies at the International Studies Association Annual Meeting in Montréal (Mar. 17, 2004) (notes on file with author) (noting that a truth and reconciliation commission was presented as an option but Bosnians perceived it as an outside order).

[328] *See, e.g.*, BASSIOUNI, *supra* note 21, at 554 (discussing profound public distrust for the judicial system in Kosovo owing to Serbian sanctioned discrimination).

court largely set up, funded, and staffed by Western powers that have intervened militarily in the Balkans can ever deliver verdicts that represent the truth or even would seek to do that."[329]

Cultural relativism should not impede the establishment of a system-wide norm that holds accountable those individuals who perpetrate acts of great wickedness. There is no culture that views the infliction of such acts as tolerable. Nor do human beings want to be victimized by the wicked or the evil. That said, the process by which accountability is operationalized should not remain static. When the meaning of international judgments becomes externalized from afflicted communities, the process of judging then becomes little more than a symbol or rite, perhaps undertaken for the cathartic benefit of the international community rather than for the reconstruction of the traumatized society.[330] What is more, "[i]f ideas and institutions about as fundamental and personal a value as justice are imposed from the outside without an internal resonance, they may flounder, notwithstanding their assertions of universality."[331] Postgenocide Rwanda attests to the costs occasioned by externalized justice, as well as how easy it is for the process of externalization to be set in motion. Rwandans largely remain ignorant of, ambivalent to, or at times estranged from the ICTR.[332] By and large, from the perspective of Rwandans, ICTR trials are inaccessible, frustrating, have minimal impact on victims' lives, and process only a handful of defendants. Moreover, Rwandans do not see how the international community, which idly sat by during the genocide,[333] now has the moral legitimacy to punish individual Rwandans as perpetrators.

Just because an institution is international does not mean *ipso facto* that it is better or more legitimate in local eyes. An international institution such as the ICTR may in fact constitute "a rather distant reality,"[334] espe-

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329 CHUTER, *supra* note 49, at 231.

330 Tallgren, *supra* note 152, at 561, 593 (challenging the animus behind international criminal justice as "a religious exercise of hope" that "just feels rights" whose purpose is a "soothing strategy" so that the international community can "measure the immeasurable").

331 MANI, *supra* note 301, at 49.

332 *Id.* at 99; Peter Uvin & Charles Mironko, *Western and Local Approaches to Justice in Rwanda*, 9 GLOBAL GOVERNANCE 219, 223 (2003); *see also* Timothy Longman, *The Domestic Impact of the International Criminal Tribunal for Rwanda*, *in* INTERNATIONAL WAR CRIMES TRIALS: MAKING A DIFFERENCE? 33–41 (S. Ratner & J. Bischoff eds., 2004) (noting widespread ignorance of the work of the ICTR among Rwandans but finding that those aware of the work of the ICTR had a more positive perception of the ICTR than did those unaware of the ICTR's work). Rwanda initially voted against the creation of the ICTR, in part because of the Security Council's decision to site the tribunal outside of Rwanda. *See* Alvarez, *supra* note 166, at 393. The Rwandan government had expressed a preference for trials in Rwanda.

333 SAMANTHA POWER, "A PROBLEM FROM HELL": AMERICA AND THE AGE OF GENOCIDE 364–85 (2002). A further source of friction between Rwanda and the international community is the position of the Rwandan government that at least 300 ringleaders of the genocide live in the United States, Europe, and in other African countries. Emily Wax & Nancy Trejos, *Ten Years Later, Rwanda Mourns*, WASH. POST, Apr. 8, 2004, at A1.

334 John Torpey, *Introduction*, *in* POLITICS AND THE PAST 22 (John Torpey ed., 2003).

cially when its punitive norms diverge from those of the afflicted community. Proponents of international institutions—including their staffs—may find this nuance difficult to accept. For example, the ICTY boldly stated in the *Furundžija* sentencing decision that "[i]t is the infallibility of punishment . . . which is the tool for retribution, stigmatization and deterrence. This is particularly the case for the International Tribunal: penalties are made more onerous by its international stature, moral authority and impact upon world opinion . . . ."[335] Although having the ability to punish is central to the authoritativeness of an institution, it does not follow that the power to punish accords legitimacy to an institution from the perspective of those it governs. In fact, a thoughtful analysis reveals that the victim communities which international criminal tribunals are intended to serve may view sanction as *less* onerous *because* of the international provenance of the tribunals. Some local communities may be indifferent to world opinion regarding the punishment of human rights abusers. It often is the case that these abusers previously had been coddled or even supported by world opinion, which only became denunciatory after the fact. Examples include Rwanda, Cambodia, and Afghanistan. To varying extents, in each of these places Western support for atrocious regimes ensconced such regimes in power only to see them subsequently terrorize local and, in some cases, Western populations. In other cases, certain local constituencies may prefer international legal institutions over corrupted local ones.[336] At the end of the day, the reality on the ground is complex and it is not satisfactory simply to assume the enhanced legitimacy of international institutions.

Moreover, the depoliticized legalist language of "right" and "wrong" may not reflect the heavily political nature of mass violence or the necessarily political task of transcending it. When legalism depoliticizes law, it avoids engaging with the reality, as was the case in Nazi Germany, that law can coexist with and in fact promote atrocity. Given that law in conflict societies is often inextricable from violence, it seems quite ambitious to think that law in post-conflict societies suddenly could rise above and bridge deep fissures. Yet, according to Mégret, there is "a flow of rhetoric endowing the ICC with almost mythical powers," in particular the management of international affairs through criminal law.[337] Payam Akhavan is wise to note that "the antiseptic strictures and internal finality of the legal process make it a particularly tempting instrument for creating a false sense of closure within a self-absorbed utopia."[338] There may well be cause to doubt

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[335] Prosecutor v. Furundžija, Case No. IT-95-17/1-T, para. 290 (I.C.T.Y. Trial Chamber Dec. 10, 1998). One leading scholar finds the *Furundžija* Trial Chamber correct to underscore the particular stigma attaching to punishment by an international tribunal. CASSESE, *supra* note 21, at 428 n.29.

[336] Chandra Lekha Sriram, *Globalising Justice: From Universal Jurisdiction to Mixed Tribunals*, 22 NETH. Q. HUM. RTS. 7, 22 (2004) (reporting calls among certain East Timorese for international tribunals to take over prosecutions in East Timor).

[337] Mégret, *supra* note 249, at 201.

[338] Akhaven, *supra* note 25, at 721.

whether the ethnic neutrality of judges and prosecutors, one of the pillars of international justice, could secure justice for communities targeted precisely because of their ethnic partiality. Referencing an interlocutory decision by the ICTY in the *Tadić* case, Ruti Teitel argues that the legalist argument that the use of the criminal law can depoliticize ethnicity is flawed "insofar as the offenses that are often at issue, such as massive persecution, tend to involve systemic policy [and] a mix of individual and collective responsibility."[339] In the end, the use of the criminal law to struggle toward this mirage may have the converse effect: namely to further politicize, if not ethnicize, the dominant discourse. By way of example, the East Timor Special Panel engendered considerable politicization when it issued an arrest warrant for Indonesia's former military leader, General Wiranto; this has led to political feuding among Timorese governing officials and between some of these officials and civil society.[340]

No matter how strenuously the ICC draws on the virtues of law—such as impartiality, truth, independence, and finality—the fact remains that the issues it adjudicates, and the choice of which atrocities it judicializes, are deeply political. The political nature of its work cannot be glossed over simply by repeating claims that it is an apolitical institution. For Richard Pildes, these claims are dangerous insofar as the ICC "transfer[s] control of the resolution of such issues away from politically accountable actors to less accountable, judicial ones."[341] Political "creep" is endemic to the ICC, no matter how hard it tries to scrub away the stain of politics. Pildes further remarks that:

> [T]he effort to create free-floating legal institutions, in which no governing actors can be held accountable for the inevitable discretionary judgments that they must, with great consequence, make, seeks to free international legal institutions from connections to democratic accountability in a more dramatic way than even the independent courts of democratic states. We should think carefully about the likely consequences of pursuing such a unique elimination of democratic politics from a connection to legal judgments on what are, inevitably, matters with ineliminable dimensions of political judgment at stake.[342]

Pildes somewhat exaggerates the unaccountability of international judicial actors. He also neglects the unaccountability of many political actors. Moreover, although undue faith in law may trigger negative consequences, an absence of law (or of respect for law) may trigger far graver consequences and, thereby occasion a greater evil. All this said, Pildes's candor regarding the role of politics in international law certainly opens new debates. One constructive response to Pildes is for international lawyers to

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339 Teitel, *supra* note 4, at 379.

340 *Arrest Warrant Issued for General Wiranto*, GLOBE & MAIL, May 10, 2004, *at* ; *Lay off Wiranto, Gusmao Tells Law Man*, SYDNEY MORNING HERALD, May 24, 2004, at 9.

341 Richard H. Pildes, *The Dark Side of Legalism*, 44 VA. J. INT'L L. 145, 159 (2003).

342 *Id.* at 161.

include local political actors—at least accountable political actors—within this institutional push. Rather than deny political "creep," international justice institutions would do well to incorporate the inevitability of local politics into the processes by which they hold accountable those who commit individual acts of collective violence and into the reasons why they initiate such processes.[343] Taking local community standards into account pertains to each of the retributivist, expressive, and consequential goals of punishment.

In recent years, efforts have been undertaken to involve local interests in pre-existing international institutions.[344] By way of example, the ICTY and ICTR Prosecutors are requesting that cases be transferred to national courts, which include (but are not limited to) courts of the states of the former Yugoslavia and Rwanda.[345] Although it remains unclear when and how this might come to pass, a movement seems afoot to divert certain defendants to national legal process. Despite the fact that there may be occasion to believe that some good may come out of these transfers, they pose a double-edged sword. A number of criteria have been developed to determine who exactly will be transferred. Included among these criteria is availability of evidence of the defendant's culpability.[346] This means that it will

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[343] MINOW, *supra* note 269, at 133–35 (discussing a number of examples, including South Africa).

[344] Both the ICTR and the ICTY are working on joint ventures with national and regional courts, although these have not yet reached the implementation stage. For a discussion of developments at the ICTY, see Press Release, ICTY, Joint Preliminary Conclusions of OHR and ICTY Experts Conference on Scope of BiH War Crimes Prosecutions (Jan. 15, 2003). Donor countries have pledged to create a war crimes court in Sarajevo, Bosnia, geared to alleviating the burden on the ICTY by taking over pending low level cases. *Bosnia Gets War Crimes Court*, BBC NEWS (Oct. 31, 2003), *at* http://news.bbc.co.uk/2/hi/europe/3229263.stm. This court is slated to open by the end of 2004. *Id.* It will operate within the Bosnian justice system but will have international judges and prosecutors. *Id.* In this regard, the Bosnia court bears some resemblance to the Kosovo hybrid panels. Moreover, the ICTY has initiated an Outreach Program to improve its relationships with local communities. *See* Gabrielle Kirk McDonald, *Assessing the Impact of the International Criminal Tribunal for the Former Yugoslavia*, *in* INTERNATIONAL WAR CRIMES TRIALS: MAKING A DIFFERENCE, *supra* note 332, at 18–22. The ICTR also has made moves to increase its profile in Rwanda, facilitate the gathering of evidence from Rwandan witnesses, and transfer some cases involving lower-rank persons to national jurisdictions. *See* Press Release, ICTR, President and Prosecutor Update Security Council on Completion Strategy (July 6, 2004); *Rwandan TV Trials Planned*, BBC NEWS (October 30, 2003), *at* http://news.bbc.co.uk/1/hi/world/africa/3228307.stm. On a broader policy basis, the U.N. Secretary-General has expressed a desire for transitional justice initiatives to "eschew one-size-fits-all formulas and the importation of foreign models" but then in the same document paradoxically urges the ratification of the ICC which risks, albeit less blatantly than the ad hocs, these very results. Rule of Law, Transitional Justice, Conflict and Post-Conflict Societies, Report by the Secretary-General, U.N. Doc. S/2004/616 (Aug. 3, 2004) (on file with author).

[345] Institute for War and Peace Reporting, Tribunal Update (Sept. 9, 2004), *at* http://www.iwpr.net/index.pl?tribunal_index.html; *Completion Strategy of the International Criminal Tribunal for Rwanda*, para. 7, U.N. Doc. S/2004/341 (2004) (on file with author) (reporting that the ICTR Prosecutor has identified forty-one suspects who could be tried in national jurisdictions).

[346] U.N. SCOR, *Completion Strategy of the International Criminal Tribunal for Rwanda*, para. 7, U.N. Doc. S/2004/341 (2004) (on file with author) [hereinafter U.N. SCOR, *Completion Strategy*]; Hi-

probably be the weaker cases that end up being transferred. Moreover, there is no guarantee that cases will be transferred back to the courts of the states of the former Yugoslavia or Rwanda, thereby contributing to the externalization of justice by having matters adjudicated by national courts with little, if any, connection to the atrocity. Also, a perplexing situation arises where defendants may have spent ten years in international custody only to be unceremoniously dumped back into national proceedings in part because those defendants are no longer sufficiently important to the international tribunals or because those same tribunals now are facing financial pressures. All this is further evidence of the contingency of criminal liability in international institutions. What is more, it appears that transfers will not be possible unless national courts agree to eschew the death penalty, thereby creating a retributive imbalance insofar as domestic Rwandan law allows for the death penalty for serious crimes, including genocide.[347] This means that those defendants—the most serious suspects—that have been in custody at the ICTR are exempt from Rwandan law as applicable to all other Rwandans. By determining how the Rwandan national courts can punish, the ICTR continues to lord over them from afar.

There also has been some movement toward diversifying the legal responses to mass atrocity. In this vein, the newer hybrid institutions encourage some integrative pluralism. That said, it is important to remain cautious about the performance of hybrid institutions; furthermore, it is unclear how hybrid approaches will fare in the age of the permanent ICC. In any event, hybrid developments still push for the primacy of the adversarial criminal justice paradigm. In this sense, they assume the transformative value of neutral and purportedly depoliticized international criminal process. Unwavering faith, immodesty, or *braggadocio* toward this transformative potential may induce us to shirk the hard work and considerable engagement on a myriad of political, social, and economic fronts that constitute the cornerstones of tangible transformative justice.

Moreover, as I have argued should be the case in Afghanistan,[348] international criminal law interventions would do well to democratize communities by encouraging self-expression and the inclusion of all members of those communities in the processes by which community norms are edified. Many local customs to which international law understandably expresses considerable reticence are in fact promulgated by elites unrepresentative of local populations or religious leaders unrepresentative of the members of religious communities.[349] By fostering access to the construction of represen-

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rondelle News Agency, *Removal of Death Penalty in Rwanda to Apply to ICTR Cases Only* (Aug. 19, 2004), *available at* http://allafrica.com/stories/200408270152.html.

347 U.N. SCOR, *Completion Strategy*, *supra* note 346, paras. 38–39.

348 Drumbl, *Role of Rule of Law*, *supra* note 35.

349 *Id.* (positing the Pashtunwali as an example of problematic local law made through exclusionary and patriarchal means; the Pashtunwali operates as local law in many parts of Afghanistan and redresses

tative local norms instead of binarily opposing extant local norms to international standards and then imposing those international standards, international legal intercessions can help overcome the democratic deficit.

CONCLUSION

This Article demands much from international criminal law. Indeed, the demands may well be exorbitant. After all, it is understandable why international criminal law truly does not have its own sense of why it punishes. This law is relatively young. It is in a nascent stage. What is more, those defining the field still largely represent what Andreas Paulus calls the "generation of the 'founders,'"[350] although, to be sure, newer voices are emerging with the encouragement of the founders. That said, as Paulus sees it, the founders are justifiably "proud of their achievements, and it is not so much their job to ask the difficult questions."[351] For the moment, much of the founders and their project remain in what Akhavan calls a "honeymoon phase."[352]

But it does not follow that international criminal law should shirk the construction of a doctrinal method or starve the development of a penological purpose that truly is its own. To fail to do so would consign international criminal law to a perpetual stage of adolescence or, in the much more eloquent words of Cherif Bassiouni, to no more than "Potemkin justice."[353] The goal of the internationalist should not be to protect fledgling international institutions out of a sense of bureaucratic territoriality or loyalty to international governance. Rather, the goal should be to improve extant institutions so that they can make international law all the more relevant for those reconstructing their lives in the wake of mass atrocity. This would allow the "constitutional moment" that Sadat ascribes to international criminal law in this day and age to be all the more transformative.[354]

Nor does it follow that the institutions dispensing individual criminal punishment should eschew contemplating how they interface with other institutions enforcing international obligations, remedies, and sanctions. For example, there is overlap between the work of the International Court of Justice ("ICJ") and the ICTY.[355] A number of civil lawsuits among states

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human rights abuses when the family of the aggressor restores the family of the victim through the transfer of money, livestock or, preferentially, young girls or women).

350 Paulus, *supra* note 149, at 859.

351 *Id.*

352 Akhavan, *supra* note 25, at 720.

353 BASSIOUNI, *supra* note 21, at 703.

354 SADAT, *supra* note 22, at 1.

355 There also is overlap in the work of the ICJ and the ICC regarding atrocity in the Congo. The Democratic Republic of Congo has filed a claim against Rwanda for activity that could form part of the subject-matter of the ICC's investigations into atrocity in Eastern Congo. Press Release, I.C.J., The Democratic Republic of the Congo Initiates Proceedings Against Rwanda Citing Massive Human Rights Violations by Rwanda on Congolese Territory (May 28, 2002).

have been filed with the ICJ, *inter alia* for declaratory relief and reparations arising out of alleged violations of the Genocide Convention committed on the territory of the former Yugoslavia.[356] Thus far, the ICJ has not pronounced on the merits of these specific cases as they have been mired in jurisdictional and preliminary challenges. But, eventually, the ICJ will come to issue judgment. When it does, the question might well arise whether it should consider or be bound by the ICTY's finding that genocide took place against Bosnian Muslims in Srebrenica in 1995.[357]

The use of the ICJ invokes broader issues of state responsibility and reparative liability. I am among those who believe that there is a place for diverse remedies for egregious human rights violations. However, sclerosis may arise when these diverse remedies remain uncoordinated. This lack of coordination presently creates a dilemma for the FRY (now renamed Serbia and Montenegro (SM)). On the one hand, the international community suggests that establishing the individual criminal guilt of a handful of people—including Slobodan Milošević—is necessary for SM to move forward. On the other hand, there is a risk that the ICJ could avail itself of the ICTY's findings of individual genocidal intent to establish legal elements of damage claims, which, in turn, means collective liability for all SM citizens. As a result, the uncoordinated nature of the international legal system discourages cooperation by SM. There is therefore a need to integrate broader levels of responsibility within an international criminal law paradigm so as to avoid institutional conflict and mixed messages.

A sustained process of critique and renewal may provide international criminal punishment with its own conceptual and philosophical foundations, instead of its current grounding on borrowed stilts. This process must balance two positions. First, the belief that accountability for egregious human rights abuses is a terribly important goal and that law has a role in

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[356] Bosnia and Herzegovina filed such a claim against the FRY (now SM) in 1993. *See* Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Yugo.), 1993 I.C.J. 3 (Apr. 8). SM filed a counter-claim in 1997, in which it requested the ICJ adjudge that Bosnia and Herzegovina was responsible for the genocide of Serbs, but withdrew this counterclaim on September 10, 2001. *See* Order, Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Yugo.) 2001 I.C.J. 91 (Sept. 10), *at* http://www.icj-cij.org/icjwww/ipresscom/ipress2001/ipresscom2001-22_bhy_20010913.htm. Croatia filed a claim in 1999 alleging that SM remains liable for infringements of the Genocide Convention by virtue of the activities of FRY armed forces and paramilitary detachments on the territory of Croatia from 1991 to 1995. *See* Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croat. v. Yugo.) 1999 I.C.J. 118 (July 2). SM had filed suit regarding alleged violations of international law triggered by the allegedly unlawful use of force by a number of NATO countries involved in the "humanitarian armed intervention" bombings of the FRY in 1999. *See* Press Release, I.C.J., Legality of the Use of Force (Mar. 22, 2002) *at* http://www.icj-cij.org/icjwww/ipresscom/ipress2002/ipresscom2002-10_yugo_20020322.htm. The ICJ dismissed claims against Spain and the U.S. on the basis that it manifestly lacked jurisdiction. *See id.* It subsequently dismissed the rest of the claims on the basis that SM lacked standing to sue.

[357] *See* Prosecutor v. Krstić, Case No. IT-98-33-A, paras. 33–35 (I.C.T.Y. App. Chamber Apr. 19, 2004).

promoting accountability. Second, the need for intellectual honesty that admits that egregious international crimes are not the same as ordinary crimes. Although there is little evidence to suggest that perpetrators of ordinary domestic crimes will be deterred by the threat of punishment, there is even less evidence—arguably, none—that punishment (or the threat thereof) deters perpetrators of mass atrocity. Furthermore, the punishment and stigma inflicted by international institutions for international criminality often is more modest than the punishment inflicted by many domestic institutions for those same international crimes if codified within domestic law or, even, for serious offenses punishable exclusively under ordinary criminal law. This reality problematizes the purportedly enhanced retributive aspirations of international punishment. Moreover, the sheer size of mass crime makes retribution redundant insofar as human rights standards do not permit perpetrators of mass violence to face punishment that much exceeds that meted out for an individuated case of ordinary violence in many places. Among those sentenced for international crimes, there is considerable inconsistency—both cardinally and ordinally—in terms of the sentences passed. Although there is some indication that the sentencing jurisprudence of international criminal justice institutions is deepening in depth and rigor, it still remains confusing, unoriginal, unpredictable, and without the ordering benefits of a viable heuristic.

One of my goals in writing this Article is to flag the need to enhance evaluative research on international sentencing. There is little empirical work regarding whether what international tribunals doctrinally say they are doing actually has a consistent and predictable effect on the quantum of sentence. This Article hopes to take one small step to respond to this lacuna. In this regard, it aspires to delineate a research agenda and, accordingly, begin a conversation rather than seal a conclusion. An important starting point is to recognize the disjunction that exists between the purported goals of sentencing for international crimes and the effect of those sentences that have been meted out.

I propose as one subtext to this research agenda that international criminal law and punishment contemplate communitarian underpinnings, in which international norms become sedimentarily integrated into communities in a manner that takes into account cultural needs instead of imposing cultural values. This may allow international criminal justice to be more than just a byproduct of state power. By embracing the indigenous and the diverse, and welcoming the practices of the often marginalized localities where mass violence occurs, international criminal law can transcend state power. Without such a vision, international criminal law may simply speak the language of and serve self-referential globalitarian interests. Worse still, it may promote the interests of international elites over those of disenfranchised victims. The punishment inflicted by international institutions would then accomplish precisely what Foucault most feared, namely gener-

ating power for the powerful,[358] while, I would add, bleaching the role of the powerful in the crimes committed. The reality that new international criminal institutions exercise authority over some individual criminals does not mean that they automatically spur the development of salutary social norms.

[358] FOUCAULT, *supra* note 7, at 81–82.