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# Reparation for The Irreparable: Is Punishing International Crimes a Universalist Hoax?

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# REPARATION FOR THE IRREPARABLE: IS PUNISHING INTERNATIONAL CRIMES A UNIVERSALIST HOAX?

**A Thesis Submitted by**

**Kholoud Hafez Hassan**

**To the Department of Law**

**Spring 2023**

**in partial fulfillment of the requirements for**
**the LL.M. Degree in International and Comparative Law**

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DEDICATION

This thesis dissertation is dedicated to my late parents

Inas Riyad

and

Hafez Mohamed Hassan

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# REPARATION FOR THE IRREPARABLE: IS PUNISHING INTERNATIONAL CRIMES A UNIVERSALIST HOAX?

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## ABSTRACT

This thesis challenges the conventional discourse on international punishment that emphasizes the development of a single, unified system of international criminal justice. Instead, it advocates for a pluralistic approach that recognizes the fragmented nature of international punishment, which involves various actors, including permanent courts, special tribunals, internationalized tribunals, and domestic courts exercising universal jurisdiction. The *sui generis* nature of international crimes demands a comprehensive approach to punishment that considers multiple perspectives and norms of diverse actors involved. Rejecting the notion of universalism in determining punishment rationales and promoting accounts of sentencing consistency, the author asserts that a global framework can accommodate diverse values, norms, and legal systems that can coexist and interact with each other. The study emphasizes the importance of considering local contexts and cultural norms when applying international criminal law to ensure a more nuanced approach that better reflects the complexities of international punishment. The thesis acknowledges the obstacles in integrating local norms into the fragmented structure of international criminal law, but recognizes the importance of establishing a method to incorporate domestic norms in choosing penal responses to mass atrocities. The co-existence of different mechanisms for international punishment would provide a more diverse range of sentencing practices that reflect the different values and norms of the international community. The thesis concludes that understanding international punishment in universalist terms is a hoax as the concept fails to fully capture the intricacies and actualities of international punishment.

KEY WORDS: Purpose of Punishment; International Criminal Law; International Sentencing; Universalism; Pluralism; Core Crimes; Consistency; Fragmentation.

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# I. Introduction

"The purpose of the trial is to render justice, and nothing else … to weigh the charges brought against the accused, to render judgment, and to mete out due punishment."[1] This is how Hannah Arendt viewed the punishment of Eichmann, a Nazi leader who played a central role in implementing the "final solution" against Jews. When Eichmann was hanged, Arendt said she was "glad they hanged Eichmann. Not that it mattered. But they would have made themselves utterly ridiculous … if they had not pushed the thing to its only logical conclusion."[2] Rightly so, Arendt did not attempt to interpret punishing Eichmann's crimes in terms of any philosophy of punishment, but rather kept it to its essence: the punishment box needed to be checked.

The concept of sentencing individuals for committing international crimes particularly evolved after World War II. Criminalizing individual conduct was first invoked by the Nuremberg and Tokyo Tribunals. The Allied Powers created the Nuremberg Trial by virtue of the 1945 London Agreement to prosecute European Axis War Criminals. The Allied Powers, and in particular the U.S.,[3] developed a policy that post-war international tribunals in Europe and in the Far East "would focus on securing, above all, a ruling on individual criminal liability for crimes against peace: planning, preparing, initiating, and waging aggressive war, or participating in the conspiracy to accomplish actions thereof."[4] The Nuremberg tribunal indicted a total of 24 Nazi officials,[5] while the Tokyo tribunal indicted 28 Japanese military and civilian leaders,[6] both on accounts of crimes against peace, war crimes, crimes against humanity and complicity in their commission.[7]

[1] HANNAH ARENDT, EICHMANN IN JERUSALEM: A REPORT ON THE BANALITY OF EVIL (2006).
[2] HANNAH ARENDT ET AL., BETWEEN FRIENDS: THE CORRESPONDENCE OF HANNAH ARENDT AND MARY MCCARTHY, 1949-1975 at 176 (1st ed. 1995).
[3] TELFORD TAYLOR, THE ANATOMY OF THE NUREMBERG TRIALS: A PERSONAL MEMOIR (1st pbk. ed ed. 1992).
[4] BEYOND VICTOR'S JUSTICE? THE TOKYO WAR CRIMES TRIAL REVISITED, (Toshiyuki Tanaka, Timothy L. H. McCormack, & Gerry J. Simpson eds., 2011).
[5] David M. Crowe, THE TOKYO AND NUREMBERG INTERNATIONAL MILITARY TRIBUNAL TRIALS: A COMPARATIVE STUDY in THE TOKYO TRIBUNAL: PERSPECTIVES ON LAW, HISTORY AND MEMORY, (Viviane E. Dittrich et al. eds., 2020).
[6] *Id.* at 61.
[7] Henry L. Stimson, *The Nuremberg Trial: Landmark in Law*, 25 FOREIGN AFFAIRS 179 (1947), https://www.jstor.org/stable/10.2307/20030031?origin=crossref (last visited Mar 3, 2022).

Efforts were quickly made to generalize the Nuremberg "law of a moment" and turn it into the "moment of the law."[8] The law of Nuremberg was recognized as customary international law soon after the United Nations General Assembly ("**UNGA**") adopted Resolutions No. 3(I)[9] and 95(I)[10] in 1946. A Committee tasked with the codification of international law was established "to treat as a matter of primary importance plans for the formation, in the context of a general codification of offences against the peace and security of mankind, or of an International Criminal Code, of the principles recognized in the Charter of the Nuremberg Tribunal and in the judgment of the Tribunal."[11] Four years later, the International Law commission adopted the Nuremberg Principles. Drawn from the Charter and judgement, the Nuremberg Principles *inter alia* emphasized individual criminal responsibility under international law, affirmed that the three indictable crimes by the Nuremberg Tribunal (war crimes, crimes against peace and crimes against humanity) as well as complicity were crimes under international law.[12]

After Nuremberg and Tokyo trials, the world remained with no appetite for punishing international crimes for nearly 50 years, coinciding with the Cold War era. Between post-WWII trials and the establishment of the ad hoc tribunals of the ICTY and ICTR, case law establishing individual criminal responsibility for mass atrocities was rather rare. The trial Adolf Eichmann in Israel, Klaus Barbie in France, and Imre Finta in Canada represent the three most significant efforts by domestic courts prosecuting those accused of committing heinous international crimes based on individual criminal responsibility.[13] After this gap, the ICTY and ICTR were established by virtue of UN Security Council resolutions in 1993[14] and 1994[15] under Chapter VI of the UN charter to "put an end" to serious crimes including genocide and crimes against humanity and to "take effective measures to bring to justice the

[8] Sévane Garibian, *Crimes against humanity and international legality in legal theory after Nuremberg*, 9 JOURNAL OF GENOCIDE RESEARCH 93–111 at 102 (2007), http://www.tandfonline.com/doi/abs/10.1080/14623520601163020 (last visited Mar 3, 2022).
[9] G.A. Res. 3(I), U.N. Doc. A/RES/3(I) (February 13, 1946).
[10] G.A. Res. 95(I), U.N. Doc. A/RES/95 (December 11, 1946).
[11] *Id*.
[12] Principles of International Law Recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal (1950), https://legal.un.org/ilc/texts/instruments/english/draft_articles/7_1_1950.pdf
[13] ROUTLEDGE HANDBOOK OF INTERNATIONAL CRIMINAL LAW, (William Schabas & Nadia Bernaz eds., 2011).
[14] S.C. Res. 827, U.N. SCOR, 48th Year, 3217th mtg. at 1, ¶ 2, U.N. Doc. S/RES/827 (1993).
[15] S.C. Res. 955, U.N. SCOR, 49th Year, 3453d mtg. at 1, U.N. Doc. S/RES/955 (1994).

persons who are responsible for them". During their mandate, the ICTY indicted 161 and sentenced 91 individuals,[16] and the ICTR indicted 93 and sentenced 62 individuals[17].

The ICTY and the ICTR played a major role in creating the climate necessary to establish a new species of "internationalized" or "hybrid" tribunals for atrocities committed in Sierra Leon, Cambodia and Lebanon and "special panels" for Kosovo and East Timor. Calls were quickly made for an international criminal court that applies established norms "consistently" to all violators, in efforts to avoid the pitfalls of ad-hoc tribunals.[18] In 1998, the International Criminal Court (ICC) was established to prosecute individuals who commit the "most serious crimes of international concern."[19]

International sentencing emerged mainly as a response to international crimes and was, and continue to be, shaped by different historical, legal and political contexts. The Nuremberg Principles would later be reaffirmed in the ICTY and ICTR decisions[20] as well as in the Rome Statute.[21] However, sentencing argumentation of both Nuremberg and Tokyo trials were "basic,"[22] offering little guidance on specific sentencing policies. Consequently, and in light of broad sentencing instructions, the ICTY and ICTR judges were vested with large discretionary powers in determining sentences. This has resulted in comprehensive and more sophisticated jurisprudential accounts on international sentencing that dominated academic debates and paved the way for the ICC's sentencing practice. Although the Rome Statute would offer a more elaborate sentencing framework, by including short and illustrative factors to guide the court in determining sentences,[23] a defined sentencing policy, informed by an express purpose of punishing international crimes, remained absent in positive law and in practice.

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[16] International Criminal Tribunal for the Former Yugoslavia, Key figures of the Cases, https://www.icty.org/en/cases/key-figures-cases.

[17] International Criminal Tribunal for Rwanda, Key figures of the Cases, https://www.icty.org/en/cases/key-figures-cases

[18] M. CHERIF BASSIOUNI, INTRODUCTION TO INTERNATIONAL CRIMINAL LAW at 635 (2012), http://ebookcentral.proquest.com/lib/aucegypt/detail.action?docID=1081568.

[19] *Id.* at 654

[20] Prosecutor v. Tadić, Case No. IT-94-1-T, Opinion and Judgement, ¶¶623, 666 (May 7, 1997), https://www.icty.org/x/cases/tadic/tjug/en/tad-tsj70507JT2-e.pdf.

[21] G. Werle, *Individual Criminal Responsibility in Article 25 ICC Statute*, 5 JOURNAL OF INTERNATIONAL CRIMINAL JUSTICE 953–975 at 953 (2007).

[22] B. Hola, A. Smeulers & C. Bijleveld, *International Sentencing Facts and Figures: Sentencing Practice at the ICTY and ICTR*, 9 JOURNAL OF INTERNATIONAL CRIMINAL JUSTICE 411–439 at 412 (2011).

[23] ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT, (Internationaler Strafgerichtshof ed., 2011).

Inquiries into the consistency of international sentencing attracted scholarly debates, whether on policy level 'consistency of approach' or in practice 'consistency of outcome'. Early scholars criticised international sentencing for being inconsistent[24] and unpredictable,[25] and maintained that "the sentencing story differs across international tribunals"[26] in what was labelled as "a game of Russian Roulette"[27] and a system of "lottery."[28] In their critic, some scholars focused on one[29] or two[30] of the ad-hoc tribunals, while others focused on sentencing practice across various tribunals and courts.[31] In response, some academics have opted to find a pattern of consistency in international sentencing practice through empirical studies,[32] arguing that, despite the lack of international sentencing guidelines, sentencing practice can be expected to a considerable extent.[33] The vast majority of these empirical studies either focused on the two ad-hoc tribunals or just one of them. To the best of my knowledge, no empirical study was carried out across different international and internationalized tribunals, rendering a global empirical finding on sentencing consistency moot.

Regardless of the academic disagreement over the level of international sentencing consistency, scholars on both sides of the debate make a common presumption that

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[24] MARK A. DRUMBL, ATROCITY, PUNISHMENT, AND INTERNATIONAL LAW (2007); Shahram Dana, *Revisiting the Blaškić Sentence: Some Reflections on the Sentencing Jurisprudence of the ICTY*, 4 INTERNATIONAL CRIMINAL LAW REVIEW 321–348 (2004); Mirko Bagaric & John Morss, *International Sentencing Law: In Search of a Justification and Coherent Framework*, 6 INT CRIM LAW REV 191–255 (2006); Jennifer J. Clark, *Zero to life: sentencing appeals at the international criminal tribunals for the former Yugoslavia and Rwanda*, 96 THE GEORGETOWN LAW JOURNAL 1685 (2008); Jessica Leinwand, *Punishing horrific crime: reconciling international prosecution with national sentencing practices*, 40 COLUMBIA HUMAN RIGHTS LAW REVIEW 799 (2009); Pascale Chifflet & Gideon Boas, *Sentencing Coherence in International Criminal Law: The Cases of Biljana Plavšić and Miroslav Bralo*, 23 CRIMINAL LAW FORUM 135–159 (2012); Ralph Henham, *Some Issues for Sentencing in the International Criminal Court*, 52 THE INTERNATIONAL AND COMPARATIVE LAW QUARTERLY 81–114 (2003); Ines Monica Weinberg De Roca & Christopher M. Rassi, *Sentencing and incarceration in the ad hoc tribunals*, 44 STANFORD JOURNAL OF INTERNATIONAL LAW 1 (2008).

[25] STEPHEN M. SAYERS, *Defence Perspectives on Sentencing Practice in the International Criminal Tribunal for the Former Yugoslavia*, 16 LEIDEN JOURNAL OF INTERNATIONAL LAW 751–776 at 776 (2003).

[26] Chifflet and Boas, *supra* note 24.

[27] OLAOLUWA OLUSANYA, SENTENCING WAR CRIMES AND CRIMES AGAINST HUMANITY UNDER THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA at 139 (2005).

[28] *Id.*

[29] Dana, *supra* note 24; OLUSANYA, *supra* note 27; Chifflet and Boas, *supra* note 24; SAYERS, *supra* note 25.

[30] Clark, *supra* note 24; De Roca and Rassi, *supra* note 24.

[31] DRUMBL, *supra* note 24; Bagaric and Morss, *supra* note 24; Leinwand, *supra* note 24; Henham, *supra* note 24.

[32] JAMES MEERNIK & KIMI KING, *The Sentencing Determinants of the International Criminal Tribunal for the Former Yugoslavia: An Empirical and Doctrinal Analysis*, 16 LEIDEN JOURNAL OF INTERNATIONAL LAW 717 (2003), https://go.exlibris.link/tqXljHPX; Uwe Ewald, *"Predictably Irrational" – International Sentencing and its Discourse against the Backdrop of Preliminary Empirical Findings on ICTY Sentencing Practices*, 10 INT CRIM LAW REV 365 (2010), https://brill.com/view/journals/icla/10/3/article-p365_4.xml (last visited Mar 9, 2022); Barbora Hola, *B Hola: International Sentencing - "A Game of Russian Roulette" or Consistent Practice - A PhD Dissertation* (2012), http://rgdoi.net/10.13140/RG.2.2.35847.09127 (last visited Mar 9, 2022).

[33] Hola, *supra* note 32.

international sentencing should ideally be consistent and predictable. In light of this normative assumption, scholars sought to understand sentencing practice, through various means, particularly by promoting specific theories of punishment, i.e., deterrence,[34] retribution[35] and rehabilitation[36]; emphasizing the expressive value of international sentencing[37]; advocating for a harsher[38] or lenient[39] sentencing schemes; suggesting an appellate review[40]; or recommending sentencing guidelines, whether rigid[41] or flexible[42].

This thesis argues that the universalist conception upon which punishing international crimes is premised is implausible in understanding why and how we must respond to mass atrocities. It first deconstructs International Criminal Law ("ICL") to its basic elements, namely, the purpose of punishment, "why punish?" and the method of punishing, "how punish?". Then, it probes into one of the most universalist academic accounts, namely, sentencing consistency and coherence. My research extends claims of consistency to the question of "why punish" by using Mark Drumbl's theory of cosmopolitan pluralism and fragmentation. It then concludes by reframing the academic understanding of uniformity and consistency in international criminal punishment.

Chapter II of this thesis probes into the bigger question of "why punish international crimes?" by examining the operation of the traditional punishment theories and their applicability to

[34] Bagaric and Morss, *supra* note 25, at 253.
[35] Allison Marston Danner, *Constructing a Hierarchy of Crimes in International Criminal Law Sentencing*, 87 VIRGINIA LAW REVIEW 415 (2001), https://go.exlibris.link/x38vj3d7; S. Szoke-Burke, *Avoiding Belittlement of Human Suffering: A Retributivist Critique of ICTR Sentencing Practices*, 10 JOURNAL OF INTERNATIONAL CRIMINAL JUSTICE 561 (2012), https://academic.oup.com/jicj/article-lookup/doi/10.1093/jicj/mqs029 (last visited Mar 9, 2022).
[36] William A. Schabas, *Sentencing by international tribunals: a human rights approach*, 7 DUKE JOURNAL OF COMPARATIVE & INTERNATIONAL LAW 461 at 464 (1997).
[37] Robert D. Sloane, *The expressive capacity of international punishment: the limits of the national law analogy and the potential of international criminal law*, 43 STANFORD JOURNAL OF INTERNATIONAL LAW 39 (2007), https://go.exlibris.link/Qw4k1Gx4.
[38] Jens David Ohlin, *Towards a Unique Theory of International Criminal Sentencing*, 23 CORNELL LAW FACULTY PUBLICATIONS (2009), https://scholarship.law.cornell.edu/facpub/23; Bagaric and Morss, *supra* note 24; Szoke-Burke, *supra* note 35.
[39] Margaret M. deGuzman, *Harsh justice for international crimes?*, 39 THE YALE JOURNAL OF INTERNATIONAL LAW 1 (2014), https://go.exlibris.link/qmMks96X.
[40] Clark, *supra* note 24.
[41] Daniel B. Pickard, *Proposed sentencing guidelines for the international criminal court*, 20 LOYOLA OF LOS ANGELES INTERNATIONAL AND COMPARATIVE LAW JOURNAL 123 (1997), https://go.exlibris.link/b4jGwrbF; Beresford, *Unshackling the paper tiger - the sentencing practices of the ad hoc international criminal tribunals for the former Yugoslavia and Rwanda*, 1 INT CRIM LAW REV 33 (2001), https://brill.com/view/journals/icla/1/1-2/article-p33_3.xml (last visited Mar 9, 2022); Ohlin, *supra* note 38.
[42] Barbora Holá, *Consistency and Pluralism of International Sentencing*, *in* PLURALISM IN INTERNATIONAL CRIMINAL LAW 187–208 at 204-6 (Elies van Sliedregt & Sergey Vasiliev eds., 2014); SILVIA D'ASCOLI, SENTENCING IN INTERNATIONAL CRIMINAL LAW: THE UN AD HOC TRIBUNALS AND FUTURE PERSPECTIVES FOR THE ICC at 287-320 (2011).

international crimes, despite the latter's *sui generis* nature. It suggests that a universal *raison d'être* of international punishment is impossible to identify.

Chapter III looks at "how international crimes are sentenced?". In understanding the interplay between punishment and international sentencing, it asks whether traditional punishment justifications guide international sentencing in any meaningful way. It further investigates the normative position that international sentencing must be coherent.

Chapter IV argues that the quest for consistency in international punishment is a flawed universalist conception that is built on the assumption of an existing unified body of sentencing norms governed by a specific punishment goal or rationale. It reframes the academic understanding of uniformity and consistency in international criminal punishment.

## II. Why Punish? A Question of Justification.

To better understand the question at hand, it's essential to define ICL. According to Professor Robert Cryer, the meaning of "international criminal law" varies depending on how it is used, and there is no single, consistent definition. George Schwarzenberger identified six different meanings attributed to the term, all of which relate to international law and criminal law but do not refer to any existing body of international law that creates offenses for individuals. Schwarzenberger believed that international criminal law did not exist as a separate branch of international law. However, Cherif Bassiouni listed 25 categories of international crimes, which include crimes that affect a significant international interest or violate commonly shared values, among other things. Different meanings of international criminal law serve different purposes, and there is no definitive definition. [43]

On this premise and broadly speaking, ICL can be defined as comprising the body of rules and principles that regulate the conduct of individuals and entities engaged in serious crimes of concern to the international community as a whole, and which, if committed, give rise to individual criminal responsibility. Such crimes include genocide, crimes against humanity, war crimes, aggression, as well as other crimes of international concern, such as terrorism, piracy, trafficking in persons, and drug trafficking. International criminal law also encompasses the principles of individual criminal responsibility, including the concept of command responsibility, which holds military and political leaders responsible for crimes committed by their subordinates. The aim of international criminal law is to ensure accountability for those who commit the most serious international crimes and to ensure that victims receive justice.[44]

ICL has traditionally centered around prosecuting core crimes like genocide, crimes against humanity, war crimes, and aggression. However, it's important to note that other crimes, such as corruption, drug trafficking, trafficking in persons, and terrorism, are not necessarily less serious or impactful. The focus on core international crimes stems from a historical bias towards crimes committed during armed conflict, while crimes committed in peacetime are often overlooked. This bias has indeed led to the under-enforcement or under-prosecution of certain crimes, creating the perception that they are less serious. Ultimately, this could undermine the credibility and effectiveness of the international legal system. It's worth noting

[43] ROBERT CRYER, AN INTRODUCTION TO INTERNATIONAL CRIMINAL LAW AND PROCEDURE (2007)..
[44] *Id.*

that, due to practical limitations in scope, this thesis specifically refers to core crimes when using the term "international crimes."

Responding to mass atrocities and grave violation through punishment have undergone a process of normalization and acceptance. Ever since Nürnberg and Tokyo, significant efforts were made to improve the negative rhetoric of ICL being "the patchwork of political convenience, the arrogance of the military victory over defeat, and the ascendancy of American, Anglo-Saxon hegemony over the globe."[45] The ICTY annual report of 1994 has indeed emphasized that "unlike the Nürnberg and Tokyo Tribunals, the Tribunal is truly international"[46] and that it is "far from being a vehicle for revenge, it is a tool for promoting reconciliation and restoring true peace."[47] This insurrection quickly gained momentum by the establishment of the ICTR, internationalized special tribunals in Cambodia, East Timor and Sierra Leon, and was finally culminated in the establishment of the ICC.

These rapid developments, accompanied by a strong passionate commitment and faith in ICL,[48] and the legal bureaucracy attached to it, have created a sense of normality. Punishing individual conduct has become the default response to mass atrocities that even asking the question of why punish may seem counterintuitive.[49] This question is not an invitation to let perpetrators go free. It is rather an attempt to deconstructs the rationales championed by proponents of international punitive response to mass atrocities and presented as a one-size-fit-all solution.

As Tallgren points out, ICL uses the same methods of "proscription, determination of responsibility, intentional infliction of pain."[50] Elies van Sliedregt has coined the term "domestic analogy of transplant" to appraise the application of domestic theories of punishment to ICL.[51] Scholarship takes issue with the domestic analogy of transplant because

[45] Makau Mutua, *Never Again: Questioning the Yugoslav and Rwanda Tribunals*, 11 TEMP. INT'L & COMP. L.J. 167 (1997), https://digitalcommons.law.buffalo.edu/journal_articles/576.
[46] U.N. GAOR, 49th Sess., Agenda Item 152, paras 10, U.N. Doc. A/49/342-S/1994/1007 (1994).
[47] *Id.* at 16.
[48] David S. Koller, *The faith of the international criminal lawyer*, 40 NEW YORK UNIVERSITY JOURNAL OF INTERNATIONAL LAW & POLITICS 1019 at 1020 (2008), https://go.exlibris.link/pNcWDNSk.
[49] Sergey Vasiliev, *Punishment Rationales in International Criminal Jurisprudence: Two Readings of a Non-question*, *in* WHY PUNISH PERPETRATORS OF MASS ATROCITIES? 45 (Florian Jeßberger & Julia Geneuss eds., 1 ed. 2020), https://www.cambridge.org/core/product/identifier/9781108566360%23CN-bp-4/type/book_part (last visited Mar 31, 2022).
[50] I. Tallgren, *The Sensibility and Sense of International Criminal Law*, 13 EUROPEAN JOURNAL OF INTERNATIONAL LAW 561–595 at 565 (2002).
[51] Elies van Sliedregt, *Punishment and the Domestic Analogy: Why It Can and Cannot Work*, *in* WHY PUNISH PERPETRATORS OF MASS ATROCITIES? 81 (Florian Jeßberger & Julia Geneuss eds., 1 ed. 2020),

international criminal justice is not the same as any other domestic system.[52] Mark Drumbl, in his book Atrocity, Punishment and International Law, was critical of applying domestic criminal justice methods to international crimes. He highlighted the contradiction of international law-makers emphasizing the unique nature of international crimes, yet using domestic methods for punishment, determining guilt or innocence, and sentencing. In this light, I will first discuss the typology of international crimes, the elephant in the room that cannot be avoided when discussing punishing international crimes.

### A. Typology of International Crimes

International crimes and crimes committed within the national context do not pertain to the same criminal typology. This is largely attributed to the collective or group element which is *a sine qua non* in international crimes and the exception in domestic contexts.[53] Salone, being more reserved in his approach, believes that it is safe to describe international crimes in "some sense" as collective.[54] He believes that international crimes can be described as collective in three ways: collective perpetrators, collective victims and collective *mens rea*. First, scholars seem to agree that international crimes – in practice – involve collective perpetration.[55] Such crimes are usually carried by international criminals who either act on behalf of, or "in furtherance of a collective criminal project."[56] Second, clear examples of collective victims can be established in crimes of aggression and genocide where crimes are committed in context of large-scale wars in the former and against certain groups "in part or in whole" in the latter.[57] It is notable that, theoretically, other international crimes can be invoked for being committed against a single victim. This improbable scenario aside, courts have historically tried international crimes of wide-scale nature. This practice was reinforced

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https://www.cambridge.org/core/product/identifier/9781108566360%23CN-bp-5/type/book_part (last visited Apr 3, 2022).

[52] Tallgren, *supra* note 50.

[53] STATE CRIME IN THE GLOBAL AGE at 191 (William Chambliss, Raymond Michalowski, & Ronald Kramer eds., 0 ed. 2013), https://www.taylorfrancis.com/books/9781134025558 (last visited Oct 31, 2021).

[54] Sloane, *supra* note 37.

[55] S. Eldar, *Exploring international criminal law's reluctance to resort to modalities of group responsibility: Five challenges to international prosecutions and their impact on broader forms of responsibility*, 11 JOURNAL OF INTERNATIONAL CRIMINAL JUSTICE 331 (2013), https://go.exlibris.link/RtLZkWwm.

[56] NEHA JAIN, PERPETRATORS AND ACCESSORIES IN INTERNATIONAL CRIMINAL LAW: INDIVIDUAL MODES OF RESPONSIBILITY FOR COLLECTIVE CRIMES at 3 (2016), http://www.vlebooks.com/vleweb/product/openreader?id=none&isbn=9781782254096 (last visited Apr 4, 2022).

[57] MICHAEL BOHLANDER, GLOBALIZATION OF CRIMINAL JUSTICE (2010), https://www.taylorfrancis.com/books/9781315254081 (last visited Apr 4, 2022).

by the ICC Statute.[58] Third, *mens rea*, in ICL context is known to perform its role as the decisive factor in determining the guilt or innocence of the accused.[59] Collective intent, according to Salone, is a characteristic feature of international crimes, be it the knowledge requirement of a "wide-spread systemic attack against a civilian population" in crimes against humanity, the shared "specific" intent in genocide or the deliberate collective intent in waging aggressive wars.

The ICL and tribunals practice are modelled on individual criminal responsibility. Justifications invoked by the individualistic theories of punishment only offers partial explanation in relation to mass atrocities. Hence the debate on the collective nature of international crimes is of crucial importance.[60] As discussed above, international crimes are, in the vast majority of circumstances, collective in nature; they involve the "intermixing of many hands."[61] Academics and commentators concede that culpability for mass violence transcends the handful perpetrators that are brought to trials.[62] Instances of mass violence involve a broad range of perpetrators, ranging from high-ranking officials to the community members who have a stake in the outcome of the conflict. And although each perpetrator stands on a varying degree of blameworthiness, their collective participation is necessary for an atrocity to take place. The significance of this collective dimension is articulated by Chouliaras:

> Traditionally, criminal law theory has focused on the contribution of various individuals in the commission of a collective crime, differentiating between the forms of participation of each (physical perpetrator, instigator, immediate perpetrator, accomplice). However, the significance of the collective dimension has also [led] to the creation of special criminal types, where the object of punishment seem[s] to be the deliberate plotting of individuals to subvert the law, which is considered intrinsically heinous and a source of public alarm (e.g., the crime of conspiracy, the crime of formation of and participation in a criminal organization, etc.).[63]

From a phenomenological perspective, international crimes take place in complex settings. Reconciling the individual and the collective requires scrutiny of the multi-layered factors

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[58] Rome Statute, art. 8.

[59] MOHAMED ELEWA BADAR, THE CONCEPT OF MENS REA IN INTERNATIONAL CRIMINAL LAW: THE CASE FOR A UNIFIED APPROACH at 419 (2013).

[60] TOR KREVER, *International Criminal Law: An Ideology Critique*, 26 LEIDEN JOURNAL OF INTERNATIONAL LAW 701 (2013), https://go.exlibris.link/41MP7kBv.

[61] *Id.*

[62] *Id.*

[63] Athanasios Chouliaras, *Bridging the Gap between Criminological Theory and Penal Theory within the International Criminal Justice System*, 22 EUR J CRIME CRIM LAW JUSTICE 249 (2014), https://brill.com/view/journals/eccl/22/3/article-p249_3.xml (last visited Apr 4, 2022).

that not only affect individual choice but also inform the group's outcome, and consequently reflects the distinct nature of international crimes.

### 1. Macro-Level: The Broader Economic and Political Milieu

The macro level is concerned with the role of the broader economic and political milieu in catalysing mass atrocities.[64] The position of criminologists varies on the macro-level spectre. Pure structuralists argue that atrocities operate on the macro-level of groups and societies.[65] Extreme holists view atrocities as the aggregate product of the macro-level structure and therefore they exclude individual roles, save for their role in exercising positional power (collective power).[66] Lies in between the two, a group that acknowledges the role of individuals but argues that collective phenomena are not reducible to the individual.[67]

Macro-level analysis encompasses a wide range of factors including periods of social upheaval, specifics ideologies and strategic calculations of leaders.[68] The importance of the latter materializes when speaking of international crimes because if it was not for the involvement of leading state organizations or social organizations, large scale violence would less likely take place. Those leaders can be state-officials, military personnel, intelligence, political groups, paramilitaries or militias. Directed media and propaganda outlets also play a major role in facilitating the roles of these organizations.[69] In criminological theory, it is widely accepted that collective violence often occurs as a result of a system that either prompt it, legitimize it or allow it.[70] Above all, those actors that operate on policy level offer the frame according to which information are disseminated in special fields of knowledge where collective action is nurtured. Examples include the economic policies employed for

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[64] STATE CRIME IN THE GLOBAL AGE, *supra* note 53.
[65] EMILE DURKHEIM, STEVEN LUKES & EMILE DURKHEIM, THE RULES OF SOCIOLOGICAL METHOD: AND SELECTED TEXTS ON SOCIOLOGY AND ITS METHOD (Nachdr. ed. 2001); Judith R. Blau & Peter M. Blau, *The Cost of Inequality: Metropolitan Structure and Violent Crime*, 47 AMERICAN SOCIOLOGICAL REVIEW 114 (1982), http://www.jstor.org/stable/2095046?origin=crossref (last visited Nov 6, 2021).
[66] David Sciulli, *Donald Black's Positivism in Law and Social Control*, 20 LAW & SOCIAL INQUIRY 805–828 at 811-12 (1995), http://www.jstor.org.libproxy.aucegypt.edu:2048/stable/828806 (last visited Nov 5, 2021).
[67] R. Keith Sawyer, *Emergence in Sociology: Contemporary Philosophy of Mind and Some Implications for Sociological Theory*, 107 AMERICAN JOURNAL OF SOCIOLOGY 551 (2001), http://www.journals.uchicago.edu/doi/10.1086/338780 (last visited Nov 6, 2021).
[68] SCOTT STRAUS, THE ORDER OF GENOCIDE: RACE, POWER, AND WAR IN RWANDA (2013), http://ebookcentral.proquest.com/lib/aucegypt/detail.action?docID=3138422.
[69] PREDRAG DOJCINOVIC, PROPAGANDA AND INTERNATIONAL CRIMINAL LAW: FROM COGNITION TO CRIMINALITY. (2021).
[70] John Hagan, *Toward a Structural Criminology: Method and Theory in Criminological Research*, 12 ANNUAL REVIEW OF SOCIOLOGY 431 (1986), http://www.jstor.org.libproxy.aucegypt.edu:2048/stable/2083210 (last visited Nov 5, 2021).

land competition in Darfur,[71] elitist influence on conflict in the Central African Republic,[72] state-led ideology in Nazi Germany,[73] and media policies in Rwanda[74]. That said, macro analysis takes into account factors that far exceed immediate state policies including the type of political system or regime in place,[75] global and post-colonialist economies,[76] construction of genocidal ideologies,[77] the phycological construction of others or what is dubbed as "us versus them thinking."[78]

The role of the individual is not the specific focus of macro-level theories but their relationship to the authority is relevant. In context of mass atrocities, individuals have to make a choice to either stick to "their" group or deviate.[79] The individual relationship vis-à-vis their group will be specifically analysed at the meso-level. For the purpose of this current macro-analysis, it is important to take into consideration that individual decisions are usually heavily influenced by the wider policy and *de facto* authority. So, what makes ordinary individuals who would obey the law in regular circumstances, engage in mass atrocities? There is no simple or direct answer to this question, but there are several indicators that criminologists have factored in to understand how individual behaviour is influenced by the wider social construct as well as policy level.

Smeulers and Grünfeld analyse at length the role of socialization in catalysing mass atrocities and in turning ordinary people into perpetrators. They argue that "notwithstanding

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[71] GÉRARD PRUNIER, DARFUR: A 21ST CENTURY GENOCIDE (Third ed. 2008), https://go.exlibris.link/ZyTdTQZ7.
[72] ANDREAS MEHLER, *Reshaping Political Space?*, (2009), http://www.jstor.org/stable/resrep07501 (last visited Apr 3, 2022).
[73] Morris Edward Opler, *The Bio-Social Basis of Thought in the Third Reich*, 10 AMERICAN SOCIOLOGICAL REVIEW 776 (1945), http://www.jstor.org/stable/2085848?origin=crossref (last visited Apr 4, 2022).
[74] JASON McCOY, *MAKING VIOLENCE ORDINARY: RADIO, MUSIC AND THE RWANDAN GENOCIDE*, 8 AFRICAN MUSIC 85 (2009), http://www.jstor.org/stable/20788929 (last visited Apr 3, 2022).
[75] Maureen S. Hiebert, *Theorizing Destruction: Reflections on the State of Comparative Genocide Theory*, 3 GENOCIDE STUDIES AND PREVENTION 309 (2008), https://utpjournals.press/doi/10.3138/gsp.3.3.309 (last visited Nov 29, 2021).
[76] Gregg Barak, *Christopher W. Mullins, Dawn L. Rothe: Blood, Power, and Bedlam: Violations of International Criminal Law in Post-colonial Africa: Peter Lang, USA, 2008, 230 pp*, 17 CRIT CRIM 75 (2009), http://link.springer.com/10.1007/s10612-008-9071-7 (last visited Nov 29, 2021).
[77] Mark Anthony Geraghty, *Gacaca, Genocide, Genocide Ideology: The Violent Aftermaths of Transitional Justice in the New Rwanda*, 62 COMPARATIVE STUDIES IN SOCIETY AND HISTORY 588–618 (2020), https://go.exlibris.link/8zJMQYtd.
[78] James E. Waller, *The Ordinariness of Extraordinary Evil: the Making of Perpetrators of Genocide and Mass Killing*, *in* ORDINARY PEOPLE AS MASS MURDERERS 145–164 at 154 (Olaf Jensen & Claus-Christian W. Szejnmann eds., 2008), http://link.springer.com/10.1057/9780230583566_7 (last visited Nov 29, 2021).
[79] Herbert Hirsch, *How Can We Commit the Unthinkable? Genocide: The Human Cancer. By Israel W. Charny. (Boulder, Colo.: Westview Press, 1982. Pp. xvi + 430. $25.50.)*, 78 AMERICAN POLITICAL SCIENCE REVIEW 1165 (1984), https://www.cambridge.org/core/article/how-can-we-commit-the-unthinkable-genocide-the-human-cancer-by-israel-w-charny-boulder-colo-westview-press-1982-pp-xvi-430-2550/1F57D77D26C6C13589CAB914A6A50E2B.

identifiable radical elites many perpetrators are just ordinary people who have been transformed into perpetrators in a socialization process."[80] The autobiographies and testimonies of perpetrators, who used to be "ordinary people" before Nazi Germany, has shown a reality that was different to the realities of those who controlled the decision-making process. Those people who tagged along in silence, had to adapt to the social events around them as well as give meaning to their own roles. A separate reality was created where genocidal acts were psychologically rationalized, human suffering (injury) was denied,[81] and the focus shifted to the organizational and technical aspects of extermination.[82] Similar research done on Rwanda, Argentina, Cambodia, South Africa and other countries that witnessed mass atrocities shows that crimes committed by ordinary people, people like "you and me" were a result of a socialization and normalization processes.[83]

In these contexts, extraordinary circumstances become the new "ordinary" or the new "normal". Research suggests that perpetrators, save those who occupy high-level and lower rank positions in the policy making, commit crimes of obedience as opposed to acts of deviance.[84] Obedience during extraordinary circumstances is suggested by way of analogy to obedience in the ordinary circumstances. It presupposes that people tend to obey authority that seems legitimate. Mann, in explaining how ordinary German populations have come to participate in mass atrocities, concluded that "[t]hose further up the hierarchy were almost always more fervent Nazis than those lower down. They ordered their subordinates to murder, and orders are not easy to disobey."[85] Other scholars suggest that obedience does not necessarily entail responding to direct orders. In their views, obedience is conditioned by the contexts in which authority supports and legitimizes committing mass atrocities. In a comprehensive study done on the 1994 Rwandan mass atrocities, Scott Straus findings tell us that both direct and indirect obedience can exist hand-in-hand. In attempts to unravel the logic of genocide, Straus interviews on obedience to authority concludes that:

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[80] ALETTE SMEULERS & FRED GRÜNFELD, INTERNATIONAL CRIMES AND OTHER GROSS HUMAN RIGHTS VIOLATIONS: A MULTI- AND INTERDISCIPLINARY TEXTBOOK at 301 (2011), http://ebookcentral.proquest.com/lib/aucegypt/detail.action?docID=737774.

[81] Gresham M. Sykes & David Matza, *Techniques of Neutralization: A Theory of Delinquency*, 22 AMERICAN SOCIOLOGICAL REVIEW 664 (1957), http://www.jstor.org/stable/2089195?origin=crossref (last visited Nov 6, 2021).

[82] SMEULERS AND GRÜNFELD, *supra* note 94, at 297.

[83] *Id.* at 301.

[84] SUPRANATIONAL CRIMINOLOGY: TOWARDS A CRIMINOLOGY OF INTERNATIONAL CRIMES at 233-265 (Alette Smeulers & Roelof Haveman eds., 2008).

[85] Michael Mann, *Were the Perpetrators of Genocide "Ordinary Men" or "Real Nazis"? Results from Fifteen Hundred Biographies*, 14 HOLOCAUST GENOCIDE STUDIES 331–366 at 359 (2000), https://academic.oup.com/hgs/article-lookup/doi/10.1093/hgs/14.3.331 (last visited Nov 12, 2021).

> The key theme is that Tutsis had become "enemies" after the president's assassination and in the context of war. Again, we see the importance of Habyarimana's death. As one respondent said, "The president who maintained peace had just died, so it was said that the enemy was the Tutsi." But these excerpts in particular also show the way in which killing Tutsis became what respondents believed authorities expected of them. Sometimes the communication was direct: in the last two excerpts, a soldier and a group of attackers respectively ordered the respondents to participate in the genocide. But in some of the other excerpts, we see how there was a common perception that killing Tutsis had become the "law" or an activity sanctioned by the authorities.[86]

Theories that centrally focus on obedience bring to mind the Milgram experiment.[87] This experiment was designed to observe the extent to which people were ready to commit acts that may violate their conscience in obedience to an authoritative figure. The authority figure, a scientist, started the experiment by asserting to the participants that it is "absolutely essential" for them to continue and that they had "no other choice, [they] must go on." The participants were basically asked to inflict gradual pain to a person for every wrong answer they would give to the participant's question, without knowing that the setup was fake. Sixty-five percent of the participants administered the final lethal shock although there were no threats of sanction in case they wanted to withdraw.[88] Experiments as such confirm that an authority can bring some people to commit crimes they wouldn't have otherwise committed in regular circumstances. However, they do not explain how the choice and reason of each individual varies; some people indeed resist participating in mass atrocities.[89] Individual motives are therefore further assessed in relation to the collective and individual frameworks.

### 2. Meso-Level: The Organization and In-Group Pressure

Sociological scholarship regards organizations not only as central to everyday affairs,[90] but also as real social actors. Chouliaras attributes the centrality and importance of organizations in everyday life to three main reasons. First, organizations last over time by far exceeding a natural person's life span. Second, organizations are capable of developing norms and procedures that inform individual behaviour and actions. Third, organizations set attainable and achievable goals.[91] For Chouliaras, organizations "constitute complex, formalized, and centralized settings for the exercise of power according to organizational outputs and for the

[86] STRAUS, *supra* note 68.
[87] Milgram Experiment. Milgram experiment, 50 years on - Yale Daily News
[88] Id.
[89] Waller, *supra* note 78.
[90] JAMES S. COLEMAN, THE ASYMMETRIC SOCIETY (1st ed. 1982), https://go.exlibris.link/llQBfkpD.
[91] Schabas, *supra* note 40, at 197.

achievement of organizational goals ensuring that individuals conform to their requirements and not vice versa."[92]

Authorization, motivation, ideologies, political and economic opportunities that surface on macro level also persist on the level of organization. Further to these factors, one of the most critical features of crime at the organization and group level is the diffusion of responsibility and deindividuation.[93] According to Waller, group identification, one of three key foundations of the construction of social cruelty, besides professional socialization and binding factors of the group, is nurtured in social contexts that promote diffusion of responsibility.[94] In his views, social cruelty enables perpetrators to maintain and cope with their cruel actions.[95] As Deegan, a Koevoet member during the Apartheid regime in South Africa testified: "I was quite shattered, but of course being amongst that kind of group and the peer pressure, you can't let your guard slip or show squeamishness. You just had to grin and bear it."[96]

Diffusion of responsibility and deindividuation are achieved at the meso-level through both bureaucratic organization and "routinisation of bureaucratic sub-routines."[97] Division of labour within organizations as such not only help in concealing the identity of the perpetrators, but manages the killing operations more efficiently.[98] The routinization of criminal activity has two consequences: first, it minimizes instances of moral questioning; and second, it distances the perpetrators from the consequences of their own actions as they tend to focus on the mechanics of the job rather than its meaning.[99] As Waller puts it, as perpetrators shift their focus from morality to the efficiency of getting the job done, they start perceiving themselves as "performers of a role – as participants in, not originators of, evil."[100] Rothe and Mullins frame diffusion of liability at the individual-level.[101] However, routinization, like other factors, seem to operate on both, the meso and individual level.[102]

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[92] *Id.*
[93] ERVIN STAUB, THE ROOTS OF EVIL: THE ORIGINS OF GENOCIDE AND OTHER GROUP VIOLENCE (17th printing ed. 2006).
[94] Waller, *supra* note 92, at 157.
[95] *Id.*
[96] DON FOSTER, PAUL HAUPT & MARÉSA DE BEER, THE THEATRE OF VIOLENCE: NARRATIVES OF PROTAGONISTS IN THE SOUTH AFRICAN CONFLICT 131 (2005), http://hdl.handle.net/11427/7661.
[97] Waller, *supra* note 92, at 159.
[98] *Id.*
[99] Herbert G. Kelman, *Violence without Moral Restraint: Reflections on the Dehumanization of Victims and Victimizers*, 29 JOURNAL OF SOCIAL ISSUES 25–61 at 52 (1973).
[100] Waller, *supra* note 92, at 159.
[101] SUPRANATIONAL CRIMINOLOGY, *supra* note 98, at 135-158.
[102] Kelman, *supra* note 113, at 47.

Waller argues that group identification "carries with it a repression of conscience where 'outside' values are excluded and locally generated values dominate."[103] In his testimony, Hoess, a camp commander at Auschwitz, says, "I myself dared not admit to such doubt. In order to make my subordinates carry on with their task, it was psychologically essential that I myself appear convinced of the necessity for this gruesome harsh order."[104] Group identification however is not limited to those who have a specifically assigned roles within a specific organization, its pressures "to conform" extend to cover those who identify with or belong to a specific group, i.e., nationality and ethnicity. Straus research findings on the Rwandan genocide suggest that the most violent perpetrators cited "war-related motives (including revenge for the president's assassination)" while the least violent perpetrators cited "in-group pressure" and were motivated by "fear of in-group punishment."[105] Leaders surveyed by Scott have also admitted to pressuring others to participate.[106] During the conflict, a Hutu group attacked a Hutu *conseiller* for not participating in the extermination spree.[107] Straus cites testimonies that confirm how individual actions were informed by in-group threats and coercion. A Rwandan Lutheran minister who was interviewed in 1994 said that "everyone had to participate" and that "everyone had to walk with the club" to prove that they weren't RPF. A teacher confirmed that people had to move with the killers in order not to be killed.[108] It is worth mentioning that a number of the interviewees said that refusing to kill was possible if "you were not afraid" but still cited in-group pressure and threats of being killed. Refusing was not for free. It came with a cost of handing over Tutsis or escaping after bribing the attackers.[109]

### 3. Micro-Level: Individual Motives

Factors at both the macro and meso levels influence perpetrators' actions. However, these factors do not preclude the existence of wide range of individual motives. Smeulers offers a "typology of perpetrators" based on their motives by distinguishing the following types: criminal masterminds, the profiteers and careerists; the devoted warriors and professionals; the fanatics, sadists and criminals; the followers and conformists and the compromised

[103] Waller, *supra* note 92, at 159.
[104] RUDOLF HÖSS, COMMANDANT OF AUSCHWITZ: THE AUTOBIOGRAPHY OF RUDOLF HOESS (2000).
[105] STRAUS, *supra* note 82, at 141.
[106] *Id.*
[107] *Id.* at n.12
[108] *Id.* at 144, n.16
[109] *Id.* at 145-148

perpetrators.[110] While understanding individual motives can be an interesting avenue for criminologists, they remain largely constrained by the social structures, authorization, routinization and group affiliation as discussed at length above. Individual motives do not always inform the social roles in setups in which mass atrocities take place. Yet, punishment is primarily aimed at individual responsibility. Werle echoes the dominant ICL ideology, when he says that "the collective nature of crimes under international law does not absolve us of the need to determine individual responsibility."[111]

Although reframing international crimes as non-exceptional and viewing them through the same lens applied to traditional crimes can revolutionize how ICL is viewed and strengthen the principle of legality, this falls outside the scope of this Thesis. Therefore, this thesis, relies on the mainstream academic approach viewing international crimes as extraordinary, to argue that, despite the very specific nature of international crimes and their embeddedness in a multi-layered complex structure, the readily accepted goals justifying punishing domestic crimes are typically invoked and accepted to justify international punishment.

### B. The Transplant of Traditional Criminological Theories to ICL

> The International Tribunal's objective as seen by the Security Council – i.e. general prevention (or deterrence), reprobation, retribution (or just desert) as well as collective reconciliation – fits into the Security Council's broader aim of maintaining peace and security in the former Yugoslavia.[112]

The international criminal justice system relies mainly on two traditional criminological theories of punishment, namely, retribution and deterrence.[113] In short, the retributive approach traditionally justifies punishment on the premise that offenders deserve to be punished (the backward approach). Deterrence, being consequential in nature, strives to create a safer world by preventing the commission of crimes (the forward approach). Besides those

[110] SUPRANATIONAL CRIMINOLOGY, *supra* note 98, at 318 - 324.
[111] Werle, *supra* note 25, at 953.
[112] Prosecutor v. Erdemovic, Case No. IT-96-22-T, Sentencing Judgement (Int'l Crim. Trib. for the Former Yugoslavia Nov. 29, 1996).
[113] Prosecutor v. Anto Furundzija (Trial Judgement), IT-95-17/1-T, International Criminal Tribunal for the former Yugoslavia (ICTY), 10 December 1998 ¶288 ["It is the mandate and the duty of the International Tribunal, in contributing to reconciliation, to deter such crimes and to combat impunity. It is not only right that *punitur quia peccatur* (the individual must be punished because he broke the law) but also *punitur ne peccatur* (he must be punished so that he and others will no longer break the law). The Trial Chamber accepts that two important functions of the punishment are retribution and deterrence"]; DRUMBL, *supra* note 24; van Sliedregt, *supra* note 51; Tallgren, *supra* note 50; Leinwand, *supra* note 24; Sloane, *supra* note 37.

two identifiable objectives in case law and scholarship,[114] collective reconciliation and rehabilitation are often reiterated in caselaw but mainly remain penumbral. Collective reconciliation is not accorded much weight for the practical challenges it poses, i.e., the impossibility of measuring how much reconciliation criminal trials can achieve.[115] In Bemba, the Trial Chamber found that rehabilitation "should not be given undue weight."[116] Therefore, I mainly focus on the theoretical framework of retribution and deterrence and appraise their transplant to international punishment in light of the typology of international crimes.

### 1. Retribution

Traditional retributive theories can be traced back to the ancient *lex talionis* doctrine found in biblical law as well as the early Roman and Babylonian legal discourses. [117] This doctrine not only describes an act of regulated retributive justice, but also establishes a sense of proportionality between the offence and punishment.[118] The basic rationale of retributive justice is that wrongdoers are ought to be punished because they deserve suffering in return of the harm that they have inflicted. In this context, punishment is aimed at restoring the moral order that the wrongful act has breached. Immanuel Kant's views on the consequences of breaching such *moral order*[119] is best portrayed by his claim that a society, ready to abandon an island, is ought to execute its last murderer lying in prison. Such execution is not only for every individual to realize "the desert of his deed," but also to shake the "blood guiltiness" from people's hands, whom, otherwise, will be regarded as participants in the murder.[120] Kant seems to argue for a *duty* to punish and not merely a *right* to punish. Hegel, too,[121] views punishment as the necessary logical complement to a crime committed by a

[114] KAI AMBOS, TREATISE ON INTERNATIONAL CRIMINAL LAW (First edition ed. 2013); PROSECUTOR V. KATANGA, *supra* note 23 ¶38; PROSECUTOR V. MAHDI, *supra* note 23, ¶66.
[115] DRUMBL, *supra* note 28, at 150.
[116] Prosecutor v. Bemba, Case No. ICC-01/05-01/08-3399, Judgement and Sentence (2016), https://www.icc-cpi.int/courtrecords/cr2016_04476.pdf.
[117] Lex Talionis, http://www.degruyter.com/view/EBR/MainLemma_9756 (last visited Oct 21, 2021).
[118] MARCUS TULLIUS CICERO, CICERO: *ON THE COMMONWEALTH AND ON THE LAWS* (James E. G. Zetzel ed., 1 ed. 1999), https://www.cambridge.org/core/product/identifier/9780511803635/type/book (last visited Oct 21, 2021).
[119] Kant's dictates of retribution for breaching moral law are distinguishable from dictates of deterrence for breaching juridical law which may or may not be rational. For full debate on the Kantian theory of punishment (or the lack of uniform theory). *See* Thom Brooks, *Corlett on Kant, Hegel, and Retribution*, 76 PHILOSOPHY 561 (2001), http://www.jstor.org.libproxy.aucegypt.edu:2048/stable/3751906 (last visited Oct 22, 2021).
[120] Immanuel Kant, The Philosophy of Law, translated from the German by W. Hastie, Edinburgh at 198 (1887).
[121] *See* GEORG WILHELM FRIEDRICH HEGEL & S. W DYDE, PHILOSOPHY OF RIGHT [§100, Remarks] (2005) in which Hegel mirrors Kant's idea that wrongdoers are ought to be punished by universal law, but also provides that the actual form of punishing the wrongdoer is not strictly retributivist ["the action of a criminal] is the action of a rational being and this implies that it is something universal and that by doing it the criminal has laid down a law which he has explicitly recognized in his action and under which in consequence he should be brought as

rational being.[122] Hegel rejects the pure retributive account by denouncing the "like for the like" and shifts the emphasis on the implicit character or "value" of both the crime and its negation, i.e., punishment.[123]

The mainstream dominant contemporary retributive accounts, like their traditional counterpart, claim that punishment is only justified "because and only because offenders deserve it. Moral responsibility ('desert') in such view is not only necessary for justified punishment, it is also sufficient."[124] Consequently, a society not only has the right to punish, but the duty to punish.[125] This approach views punishment as the intuitive moral response to crime.[126] Other less dominant accounts on the retributive spectrum argue that "desert" has limiting effects, meaning that it only limits the maximum of a given sentence.[127] Settles between the former positive and latter negative theories, a self-called "moderate approach" which argues that "just desert", being necessary and sufficient for punishment, it does not mandate punishment.[128]

In context of ICL, the inherent selective nature of punishing international crimes impairs any meaningful application of retributive purposes. Evidently, selectivity remains a feature of any criminal justice system due to the practical inability to prosecute every single offense.[129] However, selectivity poses larger challenges for ICL,[130] a system that is entrenched in global politics, power and patronage. Selectivity becomes particularly problematic when political considerations influence the decision of whom gets prosecuted.[131] Ultimately, the ad-hoc tribunals were set up at a time where other number of conflicts have warranted the same

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under his right … apart from these considerations, the form in which the righting of wrong exists in the state, namely punishment, is not its only form."]

[122] *Id*.

[123] Id. §101

[124] MICHAEL S. MOORE, PLACING BLAME at 91 (2010), https://oxford.universitypressscholarship.com/view/10.1093/acprof:oso/9780199599493.001.0001/acprof-9780199599493 (last visited Oct 22, 2021).

[125] *Id.*

[126] *Id.* 145-50.

[127] R. A. DUFF, PUNISHMENT, COMMUNICATION, AND COMMUNITY AT 11 (2000), http://ebookcentral.proquest.com/lib/aucegypt/detail.action?docID=430801.

[128] LARRY ALEXANDER, KIMBERLY KESSLER FERZAN & STEPHEN J. MORSE, CRIME AND CULPABILITY: A THEORY OF CRIMINAL LAW at 7 (2009).

[129] Kai Ambos, 'Comparative Summary of the National Reports', in Louise Arbour, Albin Eser, Kai Ambos, and Andrew Saunders (eds.), *The Prosecutor of a Permanent International Criminal Court* at 525 (Freiburg, Freiburg im Breisgau, 2000).

[130] ROBERT CRYER, PROSECUTING INTERNATIONAL CRIMES: SELECTIVITY AND THE INTERNATIONAL CRIMINAL LAW REGIME (1 ed. 2005), https://www.cambridge.org/core/product/identifier/9780511494161/type/book (last visited Oct 8, 2021).

[131] M. Cherif Bassiouni, *From Versailles to Rwanda in seventy-five years: the need to establish a permanent international criminal court*, 10 HARVARD HUMAN RIGHTS JOURNAL 11 (1997), https://go.exlibris.link/Z7PdY1Wt.

treatment in Chechnya, Tibet, or Kashmir, but none of them were formally prosecuted.[132] The prosecutorial decisions of the ad-hoc tribunals remained largely selective, whether for reasons of state (un)cooperation, the utility of convicting low ranking officials, politically convenient time-frames, financial constraints, or limited resources.[133] An ICC decision to prosecute a situation remains influenced by concerns of political standing, funding and support.[134] The powers vested in the ICC's Office of Prosecutor also open the door for selective prosecution of potentially accused persons. This power of selective enforcement leads to a situation where culpable individuals are not held accountable, whether because a situation of mass atrocity would completely skip the court's radar or because only a handful of perpetrators, would be held accountable.

Further challenges are posed by the multiple communities that ICL purports to serve. The concept of retributive justice is understood as a value that is pertinent to a single polity or coherent community. In international context, ICL has an inherent function to reconcile the interests of multiple literal and figurative communities. However, international tribunals, set up by a treaty or SC resolution, often lack the legitimate connection to the local communities at stake. They promote international rather than domestic social and legal norms and are hardly considered as legitimate proxies for the penal interests of the actual victims.[135]

Over and above, the extraordinary nature of crimes committed in contexts of mass atrocities posits challenges to the retributive test of proportionality. In international jurisprudence, a sentence "must reflect the predominant standard of proportionality between the gravity of the offence and the degree of responsibility of the offender".[136] In realizing this, tribunals have considered aggravating and mitigating factors when examining crimes. Both the ICTY and ICTR governing statutes[137] as well as the Rome Statute[138] require the balancing of the gravity of the offence with the personal circumstances of the convicted person. In doing so, the tribunals have assessed myriad of factors including the conduct of the accused, the degree of participation (direct or indirect), the extent of participation (principal or accessorial), the

[132] Mark A. Drumbl, *Collective violence and individual punishment: criminality of mass atrocity*, 99 NORTHWESTERN UNIVERSITY LAW REVIEW 539 at 81 (2005), https://go.exlibris.link/pSXS22CC.
[133] DRUMBL, *supra* note 28, at 151.
[134] DRUMBL, *supra* note 28, at 152.
[135] Sloane, *supra* note 41, at 41.
[136] Prosecutor v Jean-Paul Akayesu, ICTR-96-4-T, Sentencing and Judgement (Int'l Crim. Trib. for Rwanda Oct. 2, 1998) ¶7.
[137] UN Security Council, Statute of the International Criminal Tribunal for the Former Yugoslavia (as amended on 17 May 2002), 25 May 1993 ¶24(2); UN Security Council, Statute of the International Criminal Tribunal for Rwanda (as last amended on 13 October 2006), 8 November 1994 ¶23(2).
[138] ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT, *supra* note 27, ¶77.

degree of intent, the extent of damage caused to the victims and, mental capacity, expression of remorse, and cooperation with the prosecution.[139]

Neubacher rightly asserts that the length of some sentences can "only be understood against the background of retributive theories."[140] Essentially, retribution is based on the premise that wrongdoers deserve a proportionate punishment, containing a dominant element of condemnation to the wrongful acts. However, this proposition neglects the larger question of what is a proportional punishment for mass atrocities? Ultimately there is no "just" sanction for a crime that is so grave in their magnitude like genocide. The collective nature of mass perpetration obscures any quests for finding the guilt and rendering proportional sanction. As Arendt eloquently puts it "[w]hen all are guilty, no one is; confessions of collective guilt are the best safeguard against the discovery of culprits, and the very magnitude of the crime the best excuse for doing nothing."[141] Drumbl voices concerns over "true proportionate sentences" for they might involve "torture or reciprocal group eliminationism".[142] The fact that international punishment does not come close to being proportional to the gravity of mass atrocities alone put the credibility of retributive rationales of punishing those horrific crimes into question.

Moreso, the circumstances surrounding commission of mass atrocities tend to cloud our intuitions about 'desert'. Tallgren correctly asks, what punishment can be meted out for Dražen Erdemović, a soldier who chose to participate in the killing of hundreds of Muslim civilians in fear for his life.[143] The complex structures in which those crimes take place, the normalization of evil, the in-group pressure and participation under duress or fear for one's life complicate findings of desert. It follows that retribution fails to justify punishing

[139] [See, e.g., Todorović, Judgement, IT-95-9/I-S, ¶¶ 49–96; Prosecutor v. Ruggiu, Judgement and Sentence, ICTR-97-32-I, ¶52 (ICTR Trial Chamber 2000); Prosecutor v. Musema, Judgement and Sentence, ICTR-96-13-A, ¶ 1008 (ICTR Trial Chamber 2000); Prosecutor v. Jelisić, Judgement, IT-95-10-T, ¶ 134 (ICTY Trial Chamber 1999); Prosecutor v. Tadić, Sentencing Judgement, IT-94-1-T, ¶¶ 56–72 (ICTY Trial Chamber 1997); Robert D. Sloane, Sentencing for the 'Crime of Crimes': The Evolving 'Common Law' of Sentencing, 5 J. Int'l Crim. Just. 713, 724–32 (2007).

[140] Frank Neubacher, *Criminology of International Crimes*, *in* WHY PUNISH PERPETRATORS OF MASS ATROCITIES? 25 (Florian Jeßberger & Julia Geneuss eds., 1 ed. 2020), https://www.cambridge.org/core/product/identifier/9781108566360%23CN-bp-3/type/book_part (last visited Apr 19, 2022).

[141] HANNAH ARENDT, CRISES OF THE REPUBLIC: LYING IN POLITICS, CIVIL DISOBEDIENCE ON VIOLENCE, THOUGHTS ON POLITICS, AND REVOLUTION at 162 ([1st]. ed. 1972).

[142] DRUMBL, *supra* note 28, at 157.

[143] Tallgren, *supra* note 56, at 82.

international crimes. At best, it offers an explanation of a normative belief that certain wrongdoings must trigger punitive response.[144]

### 2. Deterrence

Deterrence has historically been, and continues to play, a key role in the consequentialist theories and utilitarian accounts. Bentham argues that punishment has a primary goal of achieving the good to the exclusion of the mischief and inflicting punishment should deter future mischiefs.[145] Beccaria justifies punishment for its deterrent function. In his view, punishment is not aimed at tormenting or undoing past crime, it is rather concerned with deterring future injury to society.[146] Deterrence is categorized into general and specific deterrence.

Specific deterrence is concerned with deterring the offender from repeating the same acts again. For the Utilitarian, recidivism warrants a more severe punishment because the initial penalty has not served its supposedly deterrent purpose.[147] ICL jurisprudence recognizes specific deterrence as a rationale for international punishment.[148] Despite evidence suggesting that punishment is generally ineffective in reducing recidivism,[149] specific deterrence may be a (theoretically) justified purpose of punishment in national contexts. However, as Dingwall and Hillier put it, "[w]hilst those convicted [of international crimes] often received comparatively short custodial terms, they would be unlikely in a position where they could commit a similar offence in future,"[150] as opposed to their national counterparts.

General deterrence posits that punishing an offender would deter other individuals from committing the same crime in the future by posing a threat of being caught and punished. This is a direct consequence of legal punishment.[151]This type of deterrence is essentially

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[144] Kumar Amarasekara & Mirko Bagaric, *The errors of retributivism*, 24 MELBOURNE UNIVERSITY LAW REVIEW 124–189 at 159 (2000).
[145] JEREMY BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION, Ch. 13, section 3 (1999), http://ebookcentral.proquest.com/lib/aucegypt/detail.action?docID=3117711.
[146] Cesare Bonesana Beccaria, *An Essay on Crimes and Punishments*. Philadelphia: William P. Farrand and Co., Ch. 12 (1809)
[147] Kent Greenawalt, *Punishment*, 74 THE JOURNAL OF CRIMINAL LAW AND CRIMINOLOGY (1973-) 343 (1983), https://www.jstor.org/stable/1143080?origin=crossref (last visited Oct 19, 2021). at 352.
[148] ICC, Decision of 21 June 2016 (TC), Bemba, ICC-01/05-01/08-3399, para. 11.
[149] PAULA SMITH ET AL., THE EFFECTS OF PRISON SENTENCES AND INTERMEDIATE SANCTIONS ON RECIDIVISM: GENERAL EFFECTS AND INDIVIDUAL DIFFERENCES (2002).
[150] Gavin Dingwall & Tim Hillier, *The Banality of Punishment: Context Specificity and Justifying Punishment of Extraordinary Crimes*, 6 THE INTERNATIONAL JOURNAL OF PUNISHMENT AND SENTENCING 6–18 at 8 (2010).
[151] Hyeran Jo & Beth A. Simmons, *Can the International Criminal Court Deter Atrocity?*, 70 INTERNATIONAL ORGANIZATION 443 (2016), https://go.exlibris.link/hyFhFjDl.

based on the notion that a perpetrator is a rational actor who balances out rewards (whether personal or political) and costs before offending.[152] In Kambanda case, the ICTR Trial Chamber when meting out punishment for Rwanda's Prime Minister, a key figure in inciting the Interahamwe, said the penalties imposed must be directed at, *inter alia*, "dissuading for good those who will attempt in future to perpetrate such atrocities".[153] However, punishment can only affect the behavior of leaders who are considering engaging in criminal policies if they are making a cost-benefit analysis.[154]

It is also argued that the specific nature of international crimes suggests another "social" or "expressive" dimension to deterrence. According to Jo and Simmons, "[s]ocial deterrence is a consequence of the broader social milieu in which actors operate: it occurs when potential perpetrators calculate the informal consequences of lawbreaking".[155] On this premise, and subject to certain categories of *mens rea*, the deterrent effect varies depending on the degree of accountability of the offender, rendering state actors more deterrable than non-state actors.[156]

A more subtle consequence of associating punishment with a criminalized act is claimed to constrain the behaviour of wrongdoer even if they are confident that they will not get caught.[157] A study on the deterrent effects of law on street offenders has identified a major flaw in traditional understandings of deterrence. Specifically, in both definition and measurement, researchers have tended to assume that deterrence is a binary condition, where an offender either commits or does not commit a crime. However, the threat of legal punishment may impact how a crime is committed, resulting in situational deterrence. For example, in a residential burglary, an offender will spend less time in a residence if they fear getting caught and will limit the places they search and items they take. Although the crime has not been fully prevented, the overall impact is lessened. Similarly, international criminal

[152] Ronald L. Akers, *Rational Choice, Deterrence, and Social Learning Theory in Criminology: The Path Not Taken*, 81 THE JOURNAL OF CRIMINAL LAW & CRIMINOLOGY 653 (1990), https://go.exlibris.link/Vknq7N5t.
[153] Prosecutor v. Kambanda, Judgement and Sentence, ICTR 97-23-S, ¶ 28 (ICTR Trial Chamber, 4 September 1998)
[154] Payam Akhavan, *Beyond Impunity: Can International Criminal Justice Prevent Future Atrocities?*, 95 THE AMERICAN JOURNAL OF INTERNATIONAL LAW 7 (2001), https://go.exlibris.link/LRWWWcJP.
[155] Jo and Simmons, *supra* note 151.
[156] *Id.* at 462.
[157] Kent Greenawalt, *Punishment*, 74 THE JOURNAL OF CRIMINAL LAW AND CRIMINOLOGY at 351 (1973-) 343 (1983), https://www.jstor.org/stable/1143080?origin=crossref (last visited Oct 19, 2021).

justice could have a similar effect on violators in conflict situations. Violations may be less frequent or less severe in nature or take on a new characteristic.[158]

Despite this, the link between international prosecutions in general and deterring future atrocities has been an untested assumption for many years, [159] with only a few studies on the deterrent effects of the ICC.[160]

At the shortcomings of retribution and deterrence in justifying international crimes as standalone criminological theories, alternative justifications were sought. Scholars, have justified international punishment for the expressive purpose it serves in strengthening the rule of law among the general public. Drumbl argues that "[e]xpressivism also transcends retribution and deterrence in claiming as a central goal the crafting of historical narratives, their authentication as truths, and their pedagogical dissemination to the public."[161]

Schabas has gone further to argue that mere condemnation of the anti-social behavior suffices, and that "the thirst for justice may be better satisfied by society's condemnation of anti-social behaviour than by the actual punishment of the offenders." He adds that "what is desired is a judgment, a declaration by society, and the identification and stigmatization of the perpetrator. This alone is often sufficient redress. What is actually done to the offender as a result of conviction may be far less important."[162]Realizing the power of a penalty's expressive function, the Trial Chamber in *Furundžija* emphasized that "penalties are made more onerous by its international stature, moral authority and impact upon world public opinion". [163]

It is notable that, irrespective of the punishment rationale utilized by tribunals and debated by international scholars, these rationales are often presented as a one-size-fit-all justifications in treating complex international crimes. It also falsely presumes that there it is predetermined among all victim communities, regardless of the complex processes, cultural specificities,

[158] Richard Wright. 'Searching a house: Deterrence and the Undeterred Residential Burglar,'" in Mark Pogrebin (ed.) About Criminals: A View of the Offender's World (Newbury Park, CA, Sage, 2004).
[159] David Wippman, *Atrocities, Deterrence, and the Limits of International Justice*, 23 Fordham Int'l L.J. 473 (1999).
[160] Jo and Simmons, *supra* note 151.
[161] DRUMBL, *supra* note 28, at 173.
[162] William A. Schabas, Sentencing by International Tribunals: A Human Rights Approach, 7 *Duke Journal of Comparative & International Law* 461-518 at 505 (1997)
[163] Prosecutor v. Anto Furundzija (Trial Judgement), IT-95-17/1-T, International Criminal Tribunal for the former Yugoslavia (ICTY), 10 December 1998 ¶ 290.

legal norms, alternative reconciliation routes, and the interests of local communities that can override those presumed purposes of punishment as discussed at length in chapter IV.

In addition, and where punitive response requires justifications, otherwise it becomes mere cruelty, the traditional criminological theories were readily accepted and transplanted into the international sphere, and promoted by the tribunals, on the untested assumption that these rationales guide a unified criminal justice system.

## III. How Punish? The Inherent Pluralistic Nature of International Sentencing

As meticulously put by Kent Greenwalt "[i]n a rational system of penal law, a close connection will exist between accepted theories of punishment and both the boundaries of the substantive criminal law and the procedures by which criminal guilt is determined. The justifications obviously touch on sentencing policies and the sorts of activities that should be made criminal, but they are much more pervasive."[164]

The question of whether the traditional criminological theories for punishment affect the actual determination of sentences in international sentencing does not have a clear answer. When looking at the initial sentencing decisions of the ICC, there is no evidence that the stated purposes of punishment actually inform the specific sentence given. The decisions do not show how the chosen purposes of punishment relate to the length of the sentence or how focusing on one purpose over another may lead to different sentencing outcomes. The purposes of punishment are only mentioned at the beginning of the decisions, usually in connection to the relevant principles and legal framework, but are not further discussed when determining the sentence. This suggests that the purposes of punishment do not have a significant impact on the sentences imposed. In the jurisprudence of the ad hoc Tribunals, it is also observed that tribunals either do not elaborate on the purposes of punishment or do not explain the impact of the chosen sentencing objectives on the penalty imposed.[165] On this basis, this chapter probes into the factors that guide international sentencing by shedding the light on international sentencing practice.

### A. Sentencing Law and Practice of the International Courts and Tribunals.

This part will offer a brief overview of the body of law constituting international sentencing. Generally, the statutes of tribunals sentencing international crimes share great similarities in granting judges wide discretionary powers and prescribing imprisonment as either the sole or primary form of punishment.[166] Most statutes provide or forfeiture of assets and proceeds

[164] Kent Greenawalt, *Punishment*, 74 The Journal of Criminal Law and Criminology 343 - 362 at 360 (1983).
[165] Silvia D'Ascoli, *Theories of Punishment at The Hague: A Comment on the Contributions by Alex Whiting, Harmen van der Wilt and Gerhard Werle and Aziz Epik*, *in* WHY PUNISH PERPETRATORS OF MASS ATROCITIES?: PURPOSES OF PUNISHMENT IN INTERNATIONAL CRIMINAL LAW 353 (Florian Jeßberger & Julia Geneuss eds., 2020), https://www.cambridge.org/core/books/why-punish-perpetrators-of-mass-atrocities/theories-of-punishment-at-the-hague/A7E0E127AF10B1D237CBFAA67D23D9B5.
[166] *Supra note* 14, ¶24(3); *Supra note* 15, ¶23(3), U.N. Doc. S/RES/955 (1994); Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea, Oct. 27, 2004, ECCC Doc. No. NSIRKMJI004/006 ¶38 ; UNTAET Regulation 2000/15

acquired by criminal conduct. In addition, the Rome Statute and the East Timor permit the imposition of fines.

For example, the statutes of the ICTY, ICTR, SCSL, STL and the Tribunal for East Timor, direct trial chambers to take into account factors such as the severity of the crime and the individual circumstances of the convicted person.[167] However, they do not provide much guidance on how these factors should be considered, other than instructing the trial chambers to consider, first, various aggravating and mitigating factors and, second, the sentencing practices of domestic courts in the country where the crimes occurred. In response to the first instruction, the trial chambers created a long list of aggravating and mitigating factors that they commonly used in their sentencing decisions. In response to the second instruction, the trial chambers did not take any action. In its first case, the ICTY determined that it was required to consider the sentencing practices of the courts of the former Yugoslavia but was not bound by them. The ICTR reached the same conclusion.[168] and academics have gone as far as to argue that the wording of the SCSL and STL statutes makes clear that the tribunals were not necessarily bound by Sierra Leon and Lebanese laws.[169] Academics further agree that, the tribunals, for various reasons, have largely disregarded the sentencing practices of domestic courts in their own sentencing decisions.[170]

As for the ICC, discussions on sentencing and punishing international crimes can be found in the drafting history of the ICC statute. Evidence on a broad agreement to respect the principle of legality *nulla poena sine lege*[171] by defining the prescribed penalties as precisely as possible can be found in the ICC Preparatory Committee Report.[172] Numerous states supported specific penalty range for each crime with a maximum and minimum years while others called for a more flexible approach that would grant the court broader discretion in

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on the Establishment of Panels with Exclusive Jurisdiction over Serious Criminal Offences, UNTAET/REG/2000/15, 6 June 2000, ¶10.1; Statute of the Special Court for Sierra Leone, Mar. 8, 2002, U.N. Doc. S/20021246, App. 11 Attachment, ¶19(1); Statute of the Special Tribunal for Lebanon, May 30, 2007, S.C. Res. 1757, U.N. Doc. SIRES/I 757, ¶ 24(1); ROME STATUTE, *supra* note 27, ¶77.

[167] *Ibid*.

[168] Prosecutor v. Akayesu, Case No. ICTR-96-4-T, Sentence, ¶ 14 (Oct. 2, 1998); Prosecutor v. Kambanda, Case No. ICTR-97-23-S, Judgment and Sentence, ¶ 23 (Sept. 4, 1998); Prosecutor v. Serushago, Case No. ICTR-98-39-A, Judgment, 30 (Apr. 6, 2000)

[169] Shahram Dana, The Sentencing Legacy of the Special Court for Sierra Leone, 42 Ga. J. Int'l & Comp. L. 615 at 658-59 (2014).

[170] Holá, *supra* note 46 at 193; AMBOS, *supra* note 116, at 282; Marisa R. Bassett, Defending International Sentencing: Past Criticism to the Promise of the ICC, 16 No. 2 HUM. RTS. BRIEF 22 at 23 (2009).

[171] Report of the Preparatory Committee on the Establishment of an International Criminal Court, UN GAOR 51st Sess, Supp no 10 (A/51/22), vol 1 at PP. 108, 198 and 304.

[172] *Id*. at PP. 304.

determining the appropriate sentence.[173] As a compromise, the adopted version of the statute followed sentencing provisions that are similar to the ad-hoc tribunals, but included a short and illustrative factors to guide the court in determining sentences. Other factors that distinguish the ICC from other international tribunals primarily include a slight constraint on the court's judicial discretion by capping the sentence at 30 years, and most notably the lack of requirement to recourse to domestic sentencing law or principles.[174]

As an example, the initial draft of the International Criminal Court's statute, created by the International Law Commission, had given the ICC permission to take into account the domestic punishments of the defendant's country or the state where the crime occurred when determining its own sentences.[175] During the drafting phase of the Rome Statute, some countries advocated for domestic sentencing laws to play a more significant role, mainly as a way to include the death penalty in the ICC's range of punishments. For example, a proposal put forth by a number of Middle Eastern countries would have allowed the ICC to enforce "one or more of the penalties provided for by the national law of the State in which the crime was committed."[176] Ultimately, these suggestions were turned down. Those against them argued that relying on domestic sentencing laws "would permit the Court to apply different systems of penalties and would result in a discriminatory system of punishments."[177]

Driven by fears over inconsistencies and unfairness that could arise from the lack of any meaningful constraints to judges' discretion in the international sentencing provisions, early litigants encouraged the trial chambers to restrain their discretion by either establishing a ranking system for crimes based on severity or devising sentencing directives that could assist the tribunals in maintaining consistency while sentencing.[178] Both suggestions were declined. Notably, in its earlier cases, the ICTY held that crimes against humanity were more

[173] *Id*.

[174] Article 21 of the Rome Statute discusses the "applicable law," and recognizes the jurisdiction of the state's law, it does not explicitly address the issue of sentencing. It only suggests using domestic law only as a final recourse.

[175] Report of the International Law Commission to the General Assembly, 49 U.N. GAOR Supp. No. 10, at 60, U.N. Doc. A/49/10 (1994), reprinted in [1994] 2 Y.B. Int'l L. Comm'n I, U.N. Doc. A/CN.4/SER.A/1994/Add.1.

[176] THE INTERNATIONAL CRIMINAL COURT: THE MAKING OF THE ROME STATUTE--ISSUES, NEGOTIATIONS, RESULTS, at 334 n.44 (Roy S. K. Lee, Project on International Courts and Tribunals, & United Nations Institute for Training and Research eds., 1999).

[177] *Id* at 319, 334.

[178] Prosecutor v. Furundžija, Case No. IT-95-17/1 A, Judgment, 217, 224 (Int'l Crim. Trib. for the Former Yugoslavia July 21, 2000).

serious than war crimes,[179] however, no hierarchy was eventually created, as the tribunal has eventually decided that "there is in law no distinction between the seriousness of a crime against humanity and that of a war crime."[180] The ICTR Chambers have also referred to genocide as the "crime of crimes" and emphasized that it is considered to be more serious than other international crimes,[181] but subsequent cases maintained that "there is no hierarchy of crimes […] and that all of the crimes specified therein are 'serious violations of international humanitarian law,' capable of attracting the same sentence".[182] In the same vein, the Trial Chamber of the ICTY was initially keen on adopting "a gradation of sentences" based on the severity of the crime and the extent of the accused's liability,[183] but the Appeal Chamber later decided against establishing sentencing guidelines.[184]

Vesting judges with unfettered discretion had two major impacts on international sentencing. On one hand, it allowed judges to individualize sentences by taking into account myriad of mitigating and aggravating factors. On the other hand, wide sentencing discretion has led to variations among sentences not only within the same court,[185] but also across various courts. As an example, the ICTR gave out more life sentences[186] than the ICTY,[187] at least in the

179 See Prosecutor v. TadiC, Case No. IT-94-1-T, Sentencing Judgment, ¶ 73 (Int'l Crim. Trib. for the Former Yugoslavia July 14, 1997); Prosecutor v. Erdemovi6, Case No. IT-96-22, Judgment, ¶¶25-27 (Int'l Crim. Trib. for the Former Yugoslavia Oct. 7, 1997).

180 See Furundlija Judgment, *supra note* 175, ¶¶ 240-43; Judgements arriving at the conclusion that there is no hierarchy include Prosecutor v. Tadic, Case No. IT-94-1A, Judgment in Sentencing Appeals, ¶ 69 (Int'l Crim. Trib. for the Former Yugoslavia Jan. 26, 2000); Prosecutor v. Strugar, Case No. IT-01-42-T, Judgment, 459 (Int'l Crim. Trib. for the Former Yugoslavia Jan. 31, 2005); Prosecutor v. Stakic, Case No. IT-97-24-A, Judgment, ¶ 375 (Int'l Crim. Trib. for the Former Yugoslavia Mar. 22, 2006).

181 Prosecutor v. Kambanda, Case No. ICTR 97-23-S, Judgment and Sentence, ¶14 (Sept. 4, 1998); Prosecutor v. Serushago, Case No. ICTR 98-39-S, Sentence, ¶15 (Feb. 5, 1999).

182 Prosecutor v. Kayishema Case No. ICTR-95-IA, ¶367 (June 1, 2001).

183 Prosecutor v. Aleksovski, Case No. IT-95-14, Judgment, T 243 (Int'l Crim. Trib. for the Former Yugoslavia June 25, 1999)

184 See Furundlija Judgment, *supra note* 175, ¶ 238.

185 Chifflet and Boas, *supra* note 28, at 154.

186 *Prosecutor v Jean-Paul Akayesu* (Appeal Judgment), ICTR-96-4-A, International Criminal Tribunal for Rwanda (ICTR), 1 June 2001; Jean Kambanda v. Prosecutor (Appeal Judgement), ICTR 97-23-A, International Criminal Tribunal for Rwanda (ICTR), 19 October 2000; *Prosecutor v Clément Kayishema and Obed Ruzindana* (Appeal Judgement), ICTR-95-1-A, International Criminal Tribunal for Rwanda (ICTR), 1 June 2001; *Alfred Musema v Prosecutor* (Appeal Judgement), ICTR-96-13-A, International Criminal Tribunal for Rwanda (ICTR), 16 November 2001; *Georges Anderson Nderubumwe Rutaganda v Prosecutor* (Appeal Judgement), ICTR-96-3-A, International Criminal Tribunal for Rwanda (ICTR), 26 May 2003.

187 *Prosecutor v. Milomir Stakic* (Appeal Judgement), IT-97-24-A, International Criminal Tribunal for the former Yugoslavia (ICTY), 22 March 2006 [dismissed trial chamber sentence of life imprisonment and turned it into a 40-year sentence]; Prosecutor v. Stanilav Galic (Appeal Judgement), IT-98-29-A, International Criminal Tribunal for the former Yugoslavia (ICTY), 30 November 2006 [affirmed life sentence]; Prosecutor v. Lukić and Lukić, Judgment (Appeals Chamber) IT-98-32/1-A, International Criminal Tribunal for the former Yugoslavia (ICTY) 4 December 2012 [affirmed life sentence]; *Prosecutor v. Vujadin Popovic (Judgment)*, IT-05-88-T, International Criminal Tribunal for the former Yugoslavia (ICTY), 10 June 2010, [affirmed life sentence for Popović and Beara]

early stages of their operations. As indicated in the introduction, while some scholars have criticized the inconsistencies in sentencing among international criminal courts, others have used empirical studies to argue for general patterns of consistency in international sentencing.

For instance, a study by Silvia D'Ascoli that compared sentences issued by the ICTY and the ICTR found a consistent pattern in terms of sentence length and the impact of mitigating and aggravating factors on meting sentences.[188] Similarly, Barbra Hola's research found that the sentencing practices of ad-hoc tribunals are as consistent as those of domestic courts. However, both D'Ascoli's and Hola's research acknowledge that there may be factors that produce slightly skewed results or impose limitations on their findings.[189] Furthermore, there are no comprehensive empirical studies that have compared the sentences of all international tribunals, including the Special Panels in East Timor which tended to be more lenient than those of ad-hoc tribunals, or the SCSL which appeared to impose harsher sentences. This lack of a global comparison makes it difficult to fully understand the level of consistency in sentencing among all international criminal courts.[190]

The focus of this thesis is not on whether international or internationalized court sentence consistently with each other, but rather on the fact that there is a general agreement among scholars that consistency in sentencing should be upheld across different international courts.[191] This viewpoint is widely accepted and often assumed without being explicitly stated or defended. The international tribunals also seem to agree, as they reference each other's precedents in making their own sentencing decisions. The next section will examine the reasons why scholars advocate for consistency in sentencing across international courts and whether this expectation is justified, despite the very specific nature of international crimes, and absent any clear punishment justification.

### B. A Unified Criminal Justice System?

Expectations of uniform and consistent sentencing in ICL carries the assumption that international and internationalized courts form part of a uniform criminal justice system.

[188] D'ASCOLI, *supra* note 46 at 260.
[189] Holá, Bijleveld, and Smeulers, *supra* note 194, at 549.
[190] Dan Murphy Special to The Christian Science Monitor, *Conviction in East Timor falls short of calls for justice The first case connected to violence after the 1999 vote shows the challenges for international courts: ALL Edition*, THE CHRISTIAN SCIENCE MONITOR (1983), 2001 ["But no one in East Timor, thirsty for justice after a 24-year occupation, is satisfied with the result. "We reject this verdict," said Catalina Pereira, the victim's daughter, outside the courthouse. "So many men were slaughtered, and this is it?"]
[191] *Supra notes* 24-33.

Although this assumption has a great deal of surface appeal, it lacks any empirical basis. A simple scrutiny to the creation, structure and goals that international tribunals were established for, reveals that there is no "international criminal justice system" in a legal sense, just a figurative sense at best.

Largely, ICTY and the ICTR formed part of the same criminal justice system. Both tribunals were established by virtue of Security Council resolutions in close succession, initially shared the same prosecutor,[192] continued to have the same appeals chambers until their closure in 2016 and 2015 respectively,[193] and largely followed the same procedural rules.[194] But when atrocities took place in Cambodia, East Timor and Sierra Leon, the SC did not accede to requests asking for the creation of additional ad-hoc courts.[195] If these requests had been fulfilled, it could have been argued that the planned courts, along with the ICTY and the ICTR, were part of the same system of criminal justice.

Internationalised tribunals for Cambodia, East Timor and Sierra Leon were established through agreements between the UN and the respective governments. Although these specialized tribunals were established through the same formal mechanism, they had different processes, owing to the varying levels of involvement and consent from the respective governments. For example, Sierra Leone willingly cooperated with the UN to create the SCSL,[196] while Cambodia had a more contentious relationship with the UN and had many demands that were eventually met to create a court that is distinct from other international courts.[197] The Tribunal for Lebanon was also established through a different process, as Lebanon initially requested the UN to establish an international tribunal,[198] but later the

[192] ICTR Statute, art. 15(3).
[193] Id. art. 14.
[194] International Criminal Tribunal for the former Yugoslavia, Rules of Procedure and Evidence, U.N. Doc. IT/32/Rev.7 (1996), entered into force 14 March 1994, amendments adopted 8 January 1996; International Criminal Tribunal for Rwanda, Rules of Procedure and Evidence, U.N. Doc. ITR/3/REV.1 (1995), entered into force 29 June 1995.
[195] Report of the Group of Experts for Cambodia established pursuant to General Assembly resolution 52/135 ¶¶ 139 – 184; David Scheffer, Excerpts from All the Missing Souls: A Personal History of the War Crimes Tribunals, 9 Eyes on the ICC 1 at 322 (2012); United Nations Security Council, Letter dated 9 August 2000 from the Permanent Representative of Sierra Leone to the United Nations addressed to the President of the Security Council, S/2000/786, 10 August 2000, Annex.
[196] The Establishment of the Special Court for Sierra Leone, *in* THE LEGAL LEGACY OF THE SPECIAL COURT FOR SIERRA LEONE 41 (Charles C. Jalloh ed., 2020).
[197] Diane Orentlicher, *Worth the effort'?: Assessing the Khmer Rouge tribunal*, 18 JOURNAL OF INTERNATIONAL CRIMINAL JUSTICE 615 at 621-5 (2020).
[198] Letter from the Chargé d'affaires a.i. of the Permanent Mission of Lebanon to the United Nations, to the Secretary-General, United Nations Security Council, U.N. Doc. S/2005/783 (Dec. 13, 2005),

Lebanese government withdrew their support and never signed the bilateral agreement prepared by the UN.[199] Thereafter, and amid the political stalemate, supporters within the Lebanese government, who had majority in the legislature, asked the UN Secretary-General for help in bringing the tribunal into operation.[200] As a result, the Security Council passed resolution 1757 (2007) which sidestepped the domestic constitution and implemented the bilateral agreement and proposed STL Statute through Chapter VII.[201] This move raised concerns about the resolution's unprecedented interference in Lebanon's domestic affairs and legislative autonomy.[202] Additionally, ICC was created through multi-year, multilateral negotiations, which resulted in a treaty ratified by 123 states,[203] whereas the UN created the Special Panels for Serious Crimes in East Timor (SPSC)[204] and the International Judges and Prosecutors Programme in Kosovo (IJPP) unilaterally[205].

The courts in question were established through different processes, however, all of them, except the ICC, had substantial intervention from the UN. Despite this common thread, the courts differ in many crucial ways, which makes the UN's involvement insufficient to consider them as part of one unified criminal justice system.For instance, ICC, ICTY, and ICTR were fully international without domestic elements, had jurisdiction only over international crimes, were located far from the location of the crimes, and their staff were appointed by international bodies.[206] Hybrid or "internationalized" courts like the SCSL, ECC, STL and Special Panels had varying domestic elements. For example, the SCSL is a sui generis court of mixed jurisdictions. Unlike ad hoc tribunals, it was not part of the UN system and unlike the ECC, it was not part of a domestic legal system.[207] The SCSL enjoyed both

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http://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3CF6E4FF96FF9%7D/Lebanon%20S2005783.pdf

[199] S.C. Res. 1757.

[200] Jamal Saidi, Lebanon's Siniora Asks U.N to Set Up Hariri Court, REUTERS, May 14, 2007.

[201] STL Statute.

[202] Press Release, Security Council, Security Council Authorizes Establishment of Special Tribunal to Try Suspects in Assassination of Rafiq Hariri, U.N. Press Release SC/9029 (May 30, 2007)

[203] https://asp.icc-cpi.int/states-parties

[204] UN Security Council, Security Council resolution 1244 (1999) [on the deployment of international civil and security presences in Kosovo], 10 June 1999, S/RES/1244 (1999).

[205] John Cerone & Clive Baldwin, *Explaining and Evaluating the UNMIK Court System*, *in* INTERNATIONALIZED CRIMINAL COURTS 41 (Cesare P.R. Romano, André Nollkaemper, & Jann K. Kleffner eds., 1 ed. 2004), https://academic.oup.com/book/11857/chapter/160974508 (last visited Jan 28, 2023).

[206] David Turns, *"INTERNATIONALIZED" ORAD HOCJUSTICE FOR INTERNATIONAL CRIMINAL LAW IN A TIME OF TRANSITION: THE CASES OF EAST TIMOR, KOSOVO, SIERRA LEONE AND CAMBODIA*, 6 AUSTRIAN REVIEW OF INTERNATIONAL AND EUROPEAN LAW ONLINE 123 at 128 - 133 (2003), https://brill.com/view/journals/ario/6/1/article-p123_.xml.

[207] JESSICA LINCOLN, TRANSITIONAL JUSTICE, PEACE AND ACCOUNTABILITY: OUTREACH AND THE ROLE OF INTERNATIONAL COURTS AFTER CONFLICT at 54 (2011), http://ebookcentral.proquest.com/lib/aucegypt/detail.action?docID=672437.

concurrent jurisdiction and primacy over national courts that were unable to prosecute crimes mandated to the SCSL.[208] It was located in Sierra Leon; however, it mainly comprised of international judges and had an international Prosecutor as well as an international Registrar.[209] The SCL had never prosecuted domestic crimes although it was authorized to do so.[210] On the other side of the spectrum, the ECC Agreement was signed after 10 years of negotiations. During this period, the Cambodian government fought fiercely against creating an internationalized tribunal, and eventually ECC was created, as what Bates coined as "a domestic court with international assistance."[211] The procedures of the ECC comprised mainly of Cambodian judges,[212] its procedures were based on Cambodian law,[213] and defendants were mainly charged with Cambodian crimes[214]. STL, SPSC, and IJPP fall somewhere between those two ends of the spectrum.[215]

Furthermore, each international and internationalized tribunal has its own unique set of rules and procedures, funding sources, scope of jurisdiction, and duration. For instance, ad-hoc tribunals and the SCSL primarily used common law and adversarial procedures, before later incorporating non-adversarial elements.[216] The ECC, in prosecuting crimes, deployed its own civil law, non-adversarial system.[217] The procedures used by the STL are a blend of the inquisitorial system, the main foundation of Lebanese criminal law, and elements of the adversarial system.[218] Similarly, the ICC employs a hybrid civil/common law system.[219] The SCSL was financed through voluntary contributions from Member States of the UN, unlike the ICTY and the ICTR which were funded through the regular UN budget.[220] The ECCC had a "mixed" funding method, where both the government of Cambodia and the UN share the expenses of setting up and running the tribunal.[221] Most of the funding for the IJPP came

[208] Turns, *supra* note 209.
[209] SARAH WILLIAMS, HYBRID AND INTERNATIONALISED CRIMINAL TRIBUNALS: SELECTED JURISDICTIONAL ISSUES at 70 (2012).
[210] Masaya Uchino, *Prosecuting Heads of State: Evolving Questions of Venue - Where, How, and Why Note*, 34 HASTINGS INT'L & COMP. L. REV. 341 at 360 (2011) https://heinonline.org/HOL/P?h=hein.journals/hasint34&i=356.
[211] Alex Bates, Transitional Justice in Cambodia: Analytical Report, Atlas Project ¶¶ 38 (2010).
[212] *Id.* ¶¶ 3.
[213] *Id.* ¶¶ 80.
[214] *Id.* ¶¶ 36.
[215] WILLIAMS, *supra* note 207, at 84-7, 95-8.
[216] Kai Ambos, *International criminal procedure: "adversarial", "inquisitorial" or mixed?*, 3 INTERNATIONAL CRIMINAL LAW REVIEW 1 at 5 (2003).
[217] Bates, *supra note* 209, at 36.
[218] WILLIAMS, *supra* note 207, at 78.
[219] Ambos, *supra* note 219.
[220] WILLIAMS, *supra* note 207, at 69.
[221] *Id.* at 132.

from the United Nations Interim Administration Mission in Kosovo (UNMIK) peacekeeping budget, which was approved by the UNGA and financed through assessed contributions.[222]

Additionally, the magnitude of the crimes that these courts were established to prosecute, vary greatly, with some, such as the ICTY and the ICTR, established to prosecute those involved genocide and crimes against humanity that killed hundreds of thousands of people,[223] and others, such as the STL, was established to prosecute those involved in a single terrorist attack that killed the Lebanese Prime Minister, Rafik Hariri alongside 21 others.[224] Even when tribunals were established to prosecute crimes of relatively same magnitude, the mandates and limitations led to divergent outcomes. For example, the ICTY indicted 161 offenders, while the SCSL was required to limit its prosecutions to only those who "bear the greatest responsibility".[225] As a result, the SCSL indicted 13 individuals.[226] Similarly, the ECC was establish to prosecute the senior leaders of the Khmer Rouge for the 'genocide and crimes against humanity' committed from 1975–79,[227] and indicted 5 individuals. The ICC differs from other tribunals in that it is set up to prosecute international crimes that have yet to occur and will remain in existence indefinitely, in contrast to other tribunals which were established to prosecute specific crimes that have already happened and had a limited time - frame to complete its work.

In summary, modern international criminal tribunals have many fundamental differences such as their creation, functions, prosecution, procedures, mandates and abilities. These differences contribute to the diversity of international criminal law and are recognized by scholars within the pluralism debate. However, despite this recognition, sentencing scholarship often still expects consistency across these different tribunals.

### C. The Normative Appeal of Sentencing Consistency

What seems to be holding ICL together and explaining its expansion is the common desire of the global community of nations, although with different levels of dedication, to make sure

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[222] *Id.* at 87.
[223] ICTY figures found at: https://www.irmct.org/specials/srebrenica20/; ICTR figures found at: https://unictr.irmct.org/en/news/20th-commemoration-rwandan-genocide-remarks-mr-samuel-akorimo-head-mict-registry-arusha-branch
[224] The Special Tribunal for Lebanon, the Victims at https://www.stl-tsl.org/en/the-cases/stl-11-01/the-victims
[225] UN Security Council, *Statute of the Special Court for Sierra Leone*, 16 January 2002, available at: https://www.refworld.org/docid/3dda29f94.html
[226] The Special Court for Sierra Leon, figures available at: http://www.rscsl.org/
[227] WILLIAMS, *supra* note 207, at 122.

there is effective and equitable prosecution of international crimes;[228] with the view to put an end to these crimes.[229]

While there are some notable similarities between modern international and internationalized criminal tribunals, the idea of a truly unitary system remains an open question. The establishment of multiple tribunals in a relatively short span of time and the presence of personnel who serve in more than one tribunal,[230] can create an impression of a unified system. Additionally, the citation of precedents, although sparingly and selectively,[231] across tribunals can reinforce this perception. However, each tribunal operates independently, with its own jurisdiction, rules, and procedures, making a truly integrated and unified system a challenging goal to achieve.

The perception of a unified international criminal justice system is misleading and only reflects the recent interest of the international community in using criminal law to address human rights violations on a large scale. The establishment of international criminal courts is a manifestation of this interest, coupled by the faith of international lawyers, but it is only a part of a broader effort to increase accountability for mass atrocities. Other aspects of this effort include the use of universal jurisdiction by domestic courts to prosecute international crimes and the emphasis placed on domestic criminal proceedings by human rights courts. Although courts exercising universal jurisdiction share the same goal, they are not part of a single criminal justice system. The overlap of personnel and sharing of precedents among these courts can be attributed to the relatively new field of prosecuting international crimes, where those with expertise are in high demand, and the precedents set by existing bodies are persuasive to new ones. This overlap does not imply a deeper institutional connection between these tribunals. The personnel overlap and shared precedents are better explained by the novelty of the field, and no one would consider a domestic court to be part of the international criminal justice system or expect its sentences to align with those of international courts.

An alternative view of international courts is as separate entities established to fill the gap left by domestic courts when they are unable or unwilling to prosecute international crimes. The

[228] CRYER, *supra* note 43, at 28-46.
[229] *Supra note* 14, ¶ 2; *Supra note* 15.
[230] Cristian DeFrancia, *Due Process in International Criminal Courts: Why Procedure Matters*, 87 VIRGINIA LAW REVIEW 1381 at 1388 (2001).
[231] Aldo Zammit Borda, *Precedent in International Criminal Courts and Tribunals*, 2 CAMBRIDGE J. INT'L & COMP. L. 287 at 296 (2013).

ICC, for example, only assumes jurisdiction when states with jurisdiction are unable or unwilling to do so.[232] The jurisdiction of some ad hoc tribunals is not limited in this way, but they were created because there was a lack of willing or able domestic courts to prosecute crimes in their respective areas. Although many atrocities go unpunished, the inability or unwillingness of domestic courts to prosecute is a necessary condition for the creation of an international court. When states are capable and willing to handle their own domestic crimes, the international community does not intervene by creating an international court. Even promises of domestic prosecution, even if they are not credible, can discourage the international community from establishing an international court.

Chapter IV will undertake an evaluation of the argument that is widely prevalent in international criminal law scholarship concerning the issue of sentencing practices. The crux of this argument posits that international criminal courts should consistently adhere to established sentencing practices, and that this consistency should be the normative standard. While some scholars contend that such consistency is already being maintained, others disagree and posit that it remains elusive. Nevertheless, there is widespread consensus among scholars that consistency should be the ideal goal. This thesis argues that this expectation of consistency is based on an assumption that the international criminal courts are part of a unified international criminal justice system, which is not accurate as explained at length. The international criminal courts are not part of a common justice system, but rather they are substitutes for domestic criminal courts. As a result, there is no reason to expect consistency in sentencing between international criminal tribunals, just as there is no expectation of consistency in sentencing between domestic courts of different jurisdictions.

The untested assumption of consistency in ICL is not supported by the fact that international criminal courts are better understood as substitutes for domestic courts. The analogy to other international processes, such as European Court of Human Rights (ECHR) and the Inter-American Court of Human Rights, supports this conclusion. Despite similarities between the Conventions establishing the respective courts[233] the ECHR and the Inter-American Court are not expected to issue similar remedies for similar violations. This is due to their affiliation with

[232] Olympia Bekou & Robert Cryer, *The International Criminal Court and Universal Jurisdiction: A Close Encounter?*, 56 THE INTERNATIONAL AND COMPARATIVE LAW QUARTERLY 49 at 50 (2007).
[233] Council of Europe, *European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14*, 4 November 1950, ETS 5, available at: https://www.refworld.org/docid/3ae6b3b04.html; Organization of American States (OAS), *American Convention on Human Rights, "Pact of San Jose", Costa Rica*, 22 November 1969, available at: https://www.refworld.org/docid/3ae6b36510.html

separate regional systems that have diverse histories, challenges, and barriers. Therefore, it is commonly understood that these two human rights courts are not components of a unified, international human rights system, and as such, they are not anticipated to exhibit consistent practices.

A comparable instance of inconsistency in international criminal trials can be observed in the Nuremberg trials conducted by the Allied powers after World War II. The establishment of Control Council Law No. 10 authorized the Allied countries occupying Germany, at that time, to prosecute individuals accused of committing international crimes during the war, with the expectation that each trial would adhere to the same legal standards.[234] Consequently, high-ranking Nazi officials were prosecuted within the respective zones by the American, British, French, and Soviet authorities. Despite being conducted under the same law, marked disparities, including sentencing, were observed between these trials. The criticism of inconsistent sentencing for trials conducted by the same occupying power has been raised; however, there were no expectations for consistency across trials conducted by different occupying powers. This can be attributed to the perception of the Allied tribunals as separate and autonomous entities, rather than forming part of a cohesive criminal justice system.

In summary, this section has expounded on the proposition that international criminal courts should be regarded not as constituent parts of a unified criminal justice system, but rather as distinct entities established to prosecute international crimes when domestic courts are unavailable. Consequently, there is no justifiable basis to anticipate consistency in sentencing practices across different international courts. Each court is, therefore, at liberty to develop its own distinct set of sentencing practices.

## IV. Punishing International Crimes: Reframing Claims of Uniformity and Consistency

### A. The Raison d'Être of Punishing International Crimes: Thinking Grassroots-up.

In the field of ICL, most academic discussions about maintaining uniformity and consistency tend to concentrate on the aspect of sentencing consistency. This singular focus overlooks the

[234] NEIL BOISTER & ROBERT CRYER, THE TOKYO INTERNATIONAL MILITARY TRIBUNAL - A REAPPRAISAL (2008).

larger debate on the purpose of punishment in international crimes. The academic accounts scrutinizing the commonly accepted approach of searching for a uniform theory of punishment is rather rare. To the best of my knowledge, only one scholar has attempted to advance a pluralistic theory of punishment in ICL. This scholar is Mark Drumbl, who has made significant contributions to this subject. This section draws upon Alexander Greenawalt's comprehensive pluralistic analysis of the sources of ICL and Drumbl's theory of "cosmopolitan pluralism" to challenge the "internationalism" that is commonly invoked in discussions about punishing international crimes.

In the grand scheme of responding to mass atrocities, prosecution does not seem to be the sole reaction desired by victims and their communities. The results of a population-based survey on war-victimization in Bosnia showed that while prosecution is considered important by over two-thirds of the respondents, the two most frequently chosen means of ensuring accountability were the return of property and confessions. The respondents also expressed a need for compensation and acknowledgement of the truth about the past, including the fate of missing loved ones and the reasons for harm inflicted.[235]

But even when prosecution is at stake, the victim communities' perceptions on "why punish" differs significantly. The Max Planck Institute conducted a study that found that there are diverse perspectives among victims of international crimes about the goals of prosecution and the appropriate sanctions to be used. These views vary greatly among different victim communities in the context of eleven conflicts.[236]

This research relies on Greenwalt's proposal that ICL should be guided by local concepts of justice, informed by the values and norms of the communities affected by the crimes in question. This approach would ensure that justice is done in a manner that is culturally sensitive, politically legitimate, and domestically enforceable.[237]

Greenwalt's perspective is rooted in the idea that criminal law is an expression of the values and norms of a particular community. Criminal law reflects the community's moral and political judgment about what conduct is unacceptable and deserving of punishment. When

[235] Stephan Parmentier, Marta Valinas & Elmar Weitekamp, *How to Repair the Harm after Violent Conflict in Bosnia - Results of a Population-Based Survey Part A*, 27 NETH. Q. HUM. RTS. 27 (2009), https://heinonline.org/HOL/P?h=hein.journals/nethqur42&i=27.

[236] ERNESTO KIZA, CORENE RATHGEBER & HOLGER-C. ROHNE, VICTIMS OF WAR: AN EMPIRICAL STUDY ON WAR-VICTIMIZATION AND VICTIMS' ATTITUDES TOWARDS ADDRESSING ATROCITIES at 112 (2006).

[237] Alexander K. A. Greenwalt, *The pluralism of international criminal law*, 86 INDIANA LAW JOURNAL (BLOOMINGTON) 1063 (2011).

an international tribunal applies a uniform theory of criminal responsibility, it risks imposing a set of values and norms that are not representative of the communities affected by the crimes. This can lead to a sense of injustice and a lack of legitimacy for the criminal justice system.[238]

### 1. Pluralism

Greenwalt's argument is supported by a growing body of literature that calls for greater consideration of local perspectives. For example, scholars such as Margaret deGuzman have argued that international criminal tribunals should be guided by local concepts of justice, informed by the norms and values of the communities affected by the crimes in question, but maintained the need for global sentencing norms.[239] Scholars such as Mark Drumbl have called for greater recognition of the role that local norms and values play in shaping the experience of victims and in determining what constitutes justice.[240]

By applying pluralistic concepts to ICL, Mark Drumbl suggests a new approach to punishment called "cosmopolitan pluralism" which is grounded in universal values but allows for diversity in enforcement.[241] This approach recognizes that while extreme evil, such as genocide and discrimination-based crimes against humanity, are universal evils that must be condemned, the process of condemning these crimes and the institutions involved can vary.

Cosmopolitan pluralism is a framework that is influenced by cosmopolitan theory, which argues that all human beings belong to a single moral community and the values intrinsic to this community can vary. This perspective acknowledges the presence of multiple affiliations and overlapping associations in human identity and acknowledges that certain aspects of human existence possess transnational commonalities. However, it also recognizes that other dimensions of the human experience are better expressed and comprehended within the confines of the local context.[242]

The cosmopolitan pluralist approach aims to reconcile the universal and particular by allowing for diverse procedures for universal wrongdoing, as long as these procedures align with the basic principle of accountability for extreme evil. This approach recognizes that each

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[238] *Id.*
[239] deGuzman, *supra* note 39.
[240] DRUMBL, *supra* note 24.
[241] *Id.* at 19-21.
[242] https://law2.wlu.edu/faculty/facultydocuments/drumblm/foundationlecture.pdf

occurrence of discrimination-based atrocity is unique and can be sanctioned in a manner that reflects the specific social geography of the atrocity.[243]

This approach revamps the mainstream scholarship dealing with the rationales behind punishing international crimes by moving the emphasis away from a single, all-encompassing punishment theory and instead considering the specific legal concepts and desires of the impacted communities. The plea made by Drumbl for the application of local concepts of law highlights the importance of ensuring that justice is done in accordance with the values and beliefs of the victim communities.

While cosmopolitan pluralism seeks to balance the need for a harmonized and uniform core of substantive ICL with the recognition of local legal traditions and values, it faces significant practical hurdles. Most notably, is that it may be perceived as vague or difficult to implement in practice for being too abstract and for violating the principle of legality.

Primarily, Cosmopolitan Pluralism appears to be in tension with the principle of legality, also known as *nullum crimen sine lege*, which holds that individuals cannot be held criminally liable for conduct that is not clearly prohibited by law. In practice, the principle of legality means that international criminal tribunals must interpret and apply the law strictly, and they must avoid expanding the scope of criminal liability beyond what is clearly defined by law. The principle also requires that laws be written with sufficient clarity and specificity to ensure that individuals have fair notice of what is illegal. This includes providing clear definitions of crimes and their elements, as well as clear guidelines for sentencing. Furthermore, the principle of legality mandates that laws cannot be applied retroactively to actions that were legal at the time they were committed, as this would violate the principle of legal certainty. Drumbl's proposal to incorporate local norms into ICL may result in uncertainty and ambiguity about what conduct is prohibited, which may lead to arbitrary and selective enforcement of the law.

Drumbl's theory also raises practical difficulties in relation to determining which local legal concepts should be given priority in the punishment of international crimes, and which universal values must guide the diversified enforcement. There is also the question of who gets to decide which local norms to apply. The idea that ICL should be based on local norms implies that some norms will be favored over others, which raises concerns about who has the power to decide which norms are adopted and which are not. This raises the potential for

[243] *Id*.

power imbalances and conflicts of interest, and it is not clear how these issues would be resolved.

Furthermore, Cosmopolitan Pluralism may be viewed as a fantasy because the incorporation of local norms into international criminal law may not be feasible without the support of states, the main subjects of international law. This raises questions about how this theory could be implemented in practice, especially that it does not take into account the economy of punishment. It is not enough to incorporate local norms into international criminal law without considering how punishment will be enforced and administered.

Lastly, there is no clear mechanism for the enforcement of international criminal law under Drumbl's theory. While he proposes the use of local courts, it is not clear how these courts would enforce international criminal law given the absence of a centralized enforcement mechanism. This raises concerns about the effectiveness of Drumbl's proposed system in deterring and punishing international crimes. Overall, while Drumbl's theory of cosmopolitan pluralism has some appeal, it faces significant challenges in terms of legality, the decision-making process, ownership, feasibility, the economy of punishment, and enforcement.

Other scholars advocate for a hybrid approach. Elies van Sliedregt advocates for the importance of a "general part" in ICL, as she believes that a uniform or harmonized core of substantive international criminal law is necessary. She disagrees with the idea of fully-fledged legal pluralism and instead asserts that accepting pluralism at the national level should not prevent the pursuit of harmony at the international level. Van Sliedregt recognizes that substantive ICL currently lacks a comprehensive framework and common terminology, but she believes that the creation of an international general part will improve the sophistication of the field. According to van Sliedregt, there are specific liability theories that have been established as true, unique international liabilities, such as joint criminal enterprise or co-perpetration. These theories can be applied at the national level while still incorporating local laws, such as complicity liability, defenses, and sentencing. She believes that the development of an international general part would greatly enhance the sophistication of substantive international criminal law, by drawing on the well-established principles of traditional domestic criminal law. To accomplish this, van Sliedregt believes in taking a harmonizing approach, acknowledging differences and working to minimize them, in order to develop an international theory of attribution, and until there is a harmonized general part of

international criminal law, national judges and lawmakers should stick to national law when it comes to attributing liability. [244]

However, the idea of developing a comprehensive "general part" in ICL should be approached with caution. The pursuit of harmonization should not be the sole determining factor in the growth and development of a substantive international criminal law. Instead, recognition and embrace of the reality of legal pluralism should be given due consideration. Local courts can indeed benefit from the wealth of established legal concepts that exist in the international sphere, but these concepts should not be limited to a uniform framework, rather they should co-exist within a diverse and pluralistic legal landscape.

In conclusion, as long as we label ICL as a "body of law" and opt to identify it in terms of the means and approaches used to describe national criminal law systems, rethinking the role of pluralism in ICL offers a new and innovative perspective on the purpose of punishment and sentencing in international criminal law. It endeavours to strike a balance between the commonly accepted moral conviction that perpetrators of serious crimes must not be granted impunity, with the need to consider local perspectives, thereby avoiding a one-size-fits-all approach to punishment in ICL. Rather than applying ideological labels, this research employs the fundamental principles of diversity and inclusivity to argue against the imposition of a universal theory of attribution and criminal responsibility, which may not align with the cultural and societal norms of the affected communities. By factoring in the local concepts of law, the judicial system can ensure that the justice delivered is culturally appropriate and reflects the values and beliefs of the affected communities. However, this research acknowledges that while both universalist and pluralist approaches provide valuable insights into the challenges of punishment and sentencing in ICL, they have limitations in understanding ICL as a legal system in the traditional sense that local criminal law operate.

### 2. Fragmentation

Fragmentation in ICL refers to the situation where multiple legal systems and institutions are involved in the prosecution and punishment of international crimes. This often leads to

[244] Elies Van Sliedregt, International Criminal Law and Legal Pluralism: Straddling Cosmopolitan Aims and Distributed Enforcement. In: THE OXFORD HANDBOOK OF GLOBAL LEGAL PLURALISM, (Paul Schiff Berman ed., 2020).

different interpretations and applications of the same legal concepts and principles, creating a fragmented system that is inconsistent and complex.[245]

The reality of fragmentation in ICL has been a subject of much debate and criticism in recent years. Critics argue that the existence of multiple international and national judicial systems, with varying interpretations and enforcement of international criminal law, undermines the legitimacy, consistency and effectiveness of the international justice system.[246] However, this thesis argues that fragmentation, far from being a problem, is a necessary complexity that provides a framework for discussions on international punishment.

As indicated in Chapter II, punishment in international criminal law has two broad purposes: retribution and prevention. Retributive punishment is designed to hold the offender accountable for their actions, and to restore the moral balance that was disrupted by the commission of the crime. Preventive punishment aims to prevent the offender from committing similar crimes in the future, and to deter others from engaging in criminal behaviour. The pursuit of these objectives has been complicated by the lack of harmonization in international criminal law, which has led to a diversity of legal concepts and norms, and differing interpretations of key concepts such as guilt and sentence.

This thesis suggests that fragmentation is advantageous for the development of different approaches to punishment, which can be tailored to the specific needs of different societies and legal systems. For example, some legal systems may place a greater emphasis on retributive punishment, while others may place greater emphasis on prevention, such as rehabilitation or restorative justice. This allows for a diversity of approaches to punishment, which can ensure that the system remains relevant and responsive to the needs of the affected societies, and that it is capable of meeting the objectives of punishment. By considering the

[245] For further discussion on Fragmentation, see, Fragmentation of international law: difficulties arising from the diversification and expansion of international law, Analytical study, prepared by the Study Group of the International Law Commission (A/CN.4/L.682 and Corr.1), 13 April 2006; Martti Koskenniemi & Päivi Leino, *Fragmentation of International Law? Postmodern Anxieties*, 15 Leiden journal of international law 553 (2002); Gerhard Hafner, Pros and cons ensuing from fragmentation of international law, 25 Michigan journal of international law 849 (2004); Andreas Fischer-Lescano, Gunther Teubner & Michelle Everson, Regime-collisions: the vain search for legal unity in the fragmentation of global law, 25 Michigan journal of international law 999 (2004); Eyal Benvenisti & George W. Downs, The empire's new clothes: Political economy and the fragmentation of international law, 60 Stanford law review 595 (2007); Pierre-Marie Dupuy, *The danger of fragmentation or unification of the international legal system and the International Court of Justice*, 31 New York University journal of international law & politics 791 (1999); W. A. Schabas, Synergy or fragmentation? International criminal law and the European Convention on Human Rights, 9 Journal of international criminal justice 609 (2011); Georges Abi-Saab, *Fragmentation or unification: some concluding remarks*, 31 NEW YORK UNIVERSITY JOURNAL OF INTERNATIONAL LAW & POLITICS 919 (1999).

[246] *Id*.

needs and perspectives of local communities, fragmented systems of international criminal justice can provide greater accountability and deter future acts of aggression in ways that are meaningful and effective for these communities.

In addition, the *sui generis* nature of international crimes requires a different approach to punishment, one that seeks to address the harm caused in a multi-layered complexity. Fragmentation and pluralism in ICL present a unique opportunity to balance the universal need for justice with local considerations. The existence of multiple actors, each with their own legal framework and principles, allows for a more nuanced and dynamic approach to the punishment of international crimes. By allowing local actors to draw on international norms and standards, while still taking into account their own cultural, legal and political perspectives, a more balanced and effective approach to punishment can be achieved away from the universal claims and rhetoric.

The fundamental principles of diversity also reflects the reality of the "international community", where a diverse range of actors with different perspectives and priorities must work together. By embracing diversity, it can be ensured that the punishment of international crimes is not dominated by a single theory of punishment, but rather informed by a variety of perspectives, resulting in a more inclusive and representative approach. The combination of fragmentation and abandoning universalism thus has the potential to enhance the legitimacy and effectiveness of a unique fragmented system, ensuring that the punishment of international crimes is aligned with the values and norms of the affected communities.

## B. Sentencing: The Long-Lost Inclusion of Local Norms

### 1. The Quest for Sentencing Consistency is Doomed to Fail

Sentencing consistency is a principle that is often perceived as important for ensuring fairness and impartiality in the administration of justice in international criminal law. The idea is that similar crimes should be punished in a consistent manner, regardless of the location, time, or individual circumstances of the offender. However, in light of the pluralistic nature of ICL and the *sui generis* nature of international crimes, it is important to recognize that the limitations of sentencing consistency as a basis for justice in ICL.

The contradictory stances of tribunals' decisions on fundamental issues in everyday international criminal justice, such as, for example, the definition of the constitutive elements of the mode of liability utilized in prosecuting international offenders, casted doubts on the

credibility of ICL. Scholars quickly tried to identify the root cause of these discrepancies. Some attributed these limitations to the unwritten and under-inclusive nature of ICL. Codification is viewed as a possible solution, and the role of judges is emphasized to ensure stability and certainty in the use and growth of ICL as part of their duty to carry out their judicial duties fairly and effectively, mainly by following established precedents.[247] Another method, led primarily by deGuzman, advocates for the establishment of "global sentencing norms."[248] What all these proposals share in common is that they strive to make sentencing more consistent.

deGuzman argues that the development of global sentencing norms is a crucial aspect of the advancement of human rights and the rule of law. She points out that the absence of a coherent and consistent approach to sentencing has led to a fragmented and inconsistent application of justice, which undermines the credibility of the justice system and the protection of human rights. deGuzman believes that the development of global sentencing norms is necessary to ensure that justice is administered fairly and consistently, regardless of where the crime is committed.[249]

In order to address this issue, deGuzman proposes the creation of a universal framework for sentencing, which would serve as a guideline for the administration of justice in all countries. This framework would take into account the unique circumstances of each case and provide a consistent approach to sentencing, while still allowing for some degree of flexibility. According to deGuzman, this framework would help to ensure that the administration of justice is consistent and that the rights of victims and accused are protected.[250] Paradoxically, she argues that the main goal of international criminal courts is to create a normative community, mainly through recognizing and implementing shared normative principles. She views the process of establishing a shared community of criminal law norms on a global scale as contributing to the strengthening of the international community.[251]

The above framework gives rise to multiple practical and methodological difficulties. The call for creating a normative sentencing framework, in efforts to build a normative community turns a blind eye to the complexities surrounding the commission of mass

[247] Andrea Carcano, *of fragmentation and precedents in international criminal law: possible lessons from recent jurisprudence on aiding and abetting liability*, 14 JOURNAL OF INTERNATIONAL CRIMINAL JUSTICE 771 at 774-5 (2016).
[248] deGuzman, *supra* note 39, at 26-27.
[249] *Id.*
[250] *Id.*
[251] *Id.*

atrocities discussed at length in Chapter II. It also fails to take into account that the reference to a single community in ICL discussions is, at best, figurative. question arises: How would creating a normative community in a figurative sense benefit real-world situation?

In criticizing Guzman's approach, Nancy Combs suggests that people generally have similar moral beliefs about serious crimes across cultures and nations, these beliefs can vary greatly when applied to real-world situations. For example, while people may agree in theory that murder should be punished severely, opinions may differ when it comes to a murder committed in self-defence or under peer pressure. This discrepancy becomes even more pronounced when the circumstances of the crime extend beyond typical domestic crimes, such as a civilian murder during armed conflict. There is no universal agreement on how to punish a murderer who is a soldier in an illegally launched conflict versus one who is defending against illegal aggression, or if the murder takes place in the context of widespread persecution. The fact that domestic criminal justice systems have such vastly different sentencing provisions suggests that the idea of creating universally shared global sentencing norms is highly unlikely.[252]

These different views are further complicated by the *Sui Generis* nature of international crimes. As discussed at length, mass atrocities are often regarded as distinct from other types of crimes and have unique elements that require a different approach to punishment. So far as international crimes as regarded as involving more seriousness and higher degree of internationality, they will remain punishable – not because of an original philosophy *per se*, but to check the boxes of ICL as *de facto* accepted. Hence, the development of global sentencing norms may not always take into account the unique and complex nature of international crimes. It also neglects the contextual factors that may impact the commission of international crimes, such as political and societal norms of different regions and communities. A framework as such would most likely be premised on western-style norms, ignoring the ways in which cultural differences may impact the behaviour and circumstances of the offender.

Consequently, and absent a unified criminal justice system as discussed in Chapter III, a diversity of approaches to sentencing, reflecting the differing perspectives and priorities of the various actors involved becomes crucial.

[252] Nancy Amoury Combs, *seeking inconsistency: advancing pluralism in international criminal sentencing*, 41 THE YALE JOURNAL OF INTERNATIONAL LAW 1 (2016).

## 2. Tailored Sentencing: The Role of Domestic Norms.

By building on Nancy Combs' project which calls for pluralizing international sentencing, I not only propose a different approach that relies on tailored sentencing taking into account local norms.

As indicated earlier, some scholars advocate for punishment to have a specific purpose, like deterrence or retribution, while others suggest using guidelines or hierarchies of crimes to improve the sentencing process. All of these proposals believe that the recommended approach should be applied universally to all international crimes. However, Combs points out that there is no proof that a uniform sentencing norm exists across all international courts.[253] Margaret deGuzman supports the development of global sentencing norms as a way to build a normative community,[254] while Alexander Greenawalt, in considering pluralism, believes that domestic law should take precedence in cases involving general questions of criminal law.[255] Combs aims to find a balance between these two perspectives by developing a middle path between Greenawalt's pluralist view and deGuzman's universalist viewpoint.[256]

Comb argues that it is unlikely that a uniform sentencing scheme applied to all international crimes would be suitable or optimal for all situations. The creation of a tailored sentencing regime for each court or situation is difficult, as a lot of relevant information may not be available or may create conflicting views. Despite this, she recognizes that the current provisions for sentencing at international courts, which allow judges to use discretion to tailor sentences to each case, provide a reasonable balance between the need for a uniform sentencing scheme and the need to consider local communities' sentencing norms. However, she believes that the current provisions are suboptimal as they fail to take into account the local communities' sentencing norms.[257]

In advocating for the need of local sentencing norms, Comb argues that these norms are important to international courts despite the fact that they may have been created with different goals and objectives. This is because local communities, who are a key constituency of international criminal courts, care deeply about the sentences given to convicted defendants. They are not concerned about the details of the international criminal law, but

[253] *Id* at 26.
[254] deGuzman, *supra* note 39, at 28.
[255] Greenwalt, *supra* note 230, at 1125.
[256] Combs, *supra* note 243, at 26.
[257] *Id at, 29-30.*

they do care about whether the defendants are convicted and what sentences they receive.[258] Comb notes that there have been instances where the sentences imposed by international courts were criticized for being either too lenient or too harsh in comparison to domestic norms. For example, some Bosnians considered the ICTY sentences unjustly lenient compared to domestic sentences, while Sierra Leoneans criticized the sentences imposed by the SCSL as too harsh.[259]

Comb acknowledges that her proposal to appeal to domestic sentencing laws in order to infuse international sentences with community norms might seem similar to existing provisions in international tribunals that instruct trial chambers to take into account the "general practice regarding prison sentences" in the domestic courts where the crimes took place. However, she notes that there are significant differences between her proposal and the existing provisions. She suggests that the motivations behind her proposal is different from the existing provisions. The early tribunals included the recourse-to-domestic-practices provisions because of concerns about violating the *nulla poena sine lege* principle (one cannot be punished for doing something that is not prohibited by law). However, Comb's proposal is motivated by a normative analysis that concluded that international sentencing laws should take into account a range of relevant facts and circumstances, and local community norms are one particularly important and relatively ascertainable factor that should be considered in every sentence.[260]

It is widely recognized that, "[i]nternational criminal justice is in its infancy and is not yet accepted as either useful or relevant by many, not just the defendants being tried. Powerful governments, distinguished scholars, and learned jurists have forcefully and persistently argued that international criminal justice is neither legitimate nor appropriate as a response to mass atrocities."[261] On this premise, this research agrees with Combs on the fact that international criminal justice divergence from local norms further contributes to the loss of credibility and relevance and harm the court's ability to achieve its goals, such as ending violence, putting an end to impunity, preventing collective blame, and promoting peace and reconciliation. To gain respect and legitimacy, international criminal justice must have sentencing laws that reflect local norms, at least to some extent. This research argues that the

[258] *Id at 31.*
[259] *Id* at 33.
[260] *Id.*
[261] Leila Nadya Sadat, *Can the ICTY Šainović and Perišić Cases Be Reconciled?*, 108 THE AMERICAN JOURNAL OF INTERNATIONAL LAW 475 at 483 (2014).

consideration of local community norms is crucial because it can enhance the perceived legitimacy of international criminal sentences and international criminal law more generally. However, the question remains, how can local norms be implemented in an envisaged pluralistic sphere of ICL which encompasses a permanent court, special and hybrid tribunals, and domestic courts that exercise universal jurisdiction?

Scholars have treated the integration of local norms differently, depending on which part of ICL is being examined. For example, Elies van Sliedregt argues that, until a harmonized "general part" of international criminal law is established, national judges and lawmakers should rely on national law when attributing liability. She believes that even when a court exercises universal jurisdiction, which allows it to prosecute individuals for international crimes regardless of their location or nationality, it is legitimate to apply the domestic law of the forum state.[262] On the other hand, Combs believes that domestic law should be considered at the stage when the international court's sentencing scheme is being drafted. This is because the influence of domestic law on the international court's sentencing provisions will be greater and more visible if it is used at the time of drafting, compared to when it is only taken into account in individual sentencing determinations. Combs favors using domestic law to inform the drafting of the international court's sentencing provisions, despite the possibility that the location of the atrocities may not be known with sufficient certainty at the time of referral.[263]

This thesis acknowledges the challenges in integrating local norms into the fragmented structure of ICL. It further recognizes that while it may be difficult to create a complete plan for integrating domestic norms into ICL, it is important to establish a method in principle for doing so. This method would be used when choosing penal responses to mass atrocities. So long as ICL is perceived as a criminal justice system in the sense that national criminal systems are understood, the imposition of universal punishment rationales and claims to sentencing consistency are likely to fail. This is because there is no universally accepted international criminal justice system, both legally and factually.

The absence of a universally accepted system means that the application of ICL can be subject to cultural, political, and ideological biases. In some cases, the application of ICL may be perceived as an imposition of Western values and norms, which can lead to a lack of buy-in from local populations. Therefore, the author argues that when applying ICL, it is

[262] Van Sliedregt, *supra* note 235.
[263] Combs, *supra* note 243 at, 40-2.

essential to take into account the local context and the specific cultural and societal norms that may be relevant to the case at hand. This requires a more nuanced approach to the application of ICL and a recognition that there is no one-size-fits-all solution.

## V. Conclusion

The current discourse on international punishment often focuses on the development and implementation of a single, unified system of international criminal justice. However, this perspective overlooks the reality of the fragmented nature of international punishment, which encompasses a variety of actors, including permanent courts, special tribunals, internationalized tribunals, and domestic courts exercising universal jurisdiction. This paper re-imagines international punishment through a pluralistic lens, advocating for the co-existence of this fragmented body of law.

The *sui generis* nature of international crimes highlights the importance of abandoning the universalist approach to international punishment. Unlike domestic crimes, international crimes are committed on a large scale and affect the international community as a whole. This unique aspect of international crimes calls for a comprehensive approach to punishment that takes into account the multiple perspectives and norms of the diverse actors involved.

Rather than relying on ideological labels, this research promotes the idea that diverse values, norms, and legal systems can co-exist and interact within a global framework. It further recognizes the complexities inherent in international crimes and acknowledges the need for multiple perspectives in addressing them. The underlying principles of fragmentation, the recognition of ICL as a fragmented body of law, reflects the diversity of approaches and solutions to the punishment of international crimes. A pluralistic perspective on international punishment, therefore, recognizes the importance of considering the unique context and circumstances surrounding each individual case and incorporating a range of punishment rationales in determining an appropriate sentence.

Rejecting universalism in international punishment also has significant implications for sentencing. Sentencing in international criminal justice can be seen as a crucial moment where the goals of punishment, specifically tailored to the victim communities, are reflected. While there are challenges to integrating local norms into ICL, it is important to establish a method in principle for doing so. The author emphasizes that the application of ICL should take into account the local context and cultural norms relevant to the case, rather than relying solely on universal punishment rationales and claims to sentencing consistency.

This thesis acknowledges the obstacles in formulating a complete plan to integrate local norms into the fragmented structure of ICL. Nevertheless, it recognizes the importance of establishing a method in principle to incorporate domestic norms, when choosing penal response to mass atrocities.

This study supports a pluralistic approach to punishment and acknowledges that ICL cannot be viewed as a homogeneous system of law. The complex nature of punishing international crimes cannot be fully understood within a single framework, and attempts to achieve coherence in sentencing have been ineffective. The co-existence of different mechanisms for international punishment, would provide a more nuanced and diverse range of sentencing practices that reflect the different values and norms of the international community.

In conclusion, this thesis contends that the attempt to apply universal punishment rationales and claims to sentencing consistency in ICL will be unsuccessful as long as ICL is perceived as a criminal justice system akin to national criminal systems. The primary reason for this failure is the lack of a universally acknowledged international criminal justice system, both legally and practically. Therefore, this thesis posits that the concept of understanding international punishment in universalist terms is a hoax, as universalism does not entirely account for the intricacies and actualities of international punishment.