CHAPTER I

SENTENCING IN ICL: IN SEARCH FOR CONSISTENCY


1. The Characteristics of Rationales of Sentencing in ICL

1.1. What are Rationales of Sentencing?

Legal punishment means imposing something negative or unpleasant – the sanction – on an individual in response to disobedience or behaviour deemed wrong by principles set by law. Sentencing is the system of criminal law through which individuals responsible for having disobeyed or having otherwise violated a legal norm are punished. Hence, sentencing law is the branch of criminal law that

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1 Sanction is defined as ‘that part of a law which is designed to secure enforcement by imposing a penalty for its violation’ in West’s Law and Commercial Dictionary (Zanichelli-West, 2006) (hereinafter West’s Law and Commercial Dictionary) 1328.


(i) identifies rationales of punishment and (ii) defines the types of penalties that are appropriate against the offence committed. The first limb of such definition concerns the so-called penological justifications of sentencing, whereas the second refers to the criteria according to which sentences are determined in concreto; these latter are usually referred to in the literature as ‘sentencing determinants’ and this book embraces this terminology. Determinants are in other words those factors that allow the penalty to be individualized according to the features of the criminal behaviour, the individual circumstances of the reus and the procedural circumstances of the case. The research conducted in this book deals with the first limb of the provided definition of sentencing law in the context of ICL: i.e. the rationales underpinning the infliction of penalties by ICTs against individuals who are found responsible of an underlying conduct of any of the crimes falling in their ratiōne materiae jurisdiction.

This book focuses its investigation on sentencing rationales for two interconnected reasons. First, because a comprehensive study on rationales is still lacking today – notwithstanding the identification of rationales is not a mere intellectual exercise: the quantum of punishment varies depending on the rationales chosen, since these latter differently emphasise the severity of the penalty and the principle of proportionality. Whereas several works have been published on sentencing determinants, only few authors specifically considered the issue of rationales. Although this book prefers to refer to rationales of sentencing, it shall be noted that international jurisprudence uses as synonymous the terms purpose, aim, objective, function, policy and justification of sentencing. See Kunarac et al Case (Judgment) ICTY-96-23 & ICTY-96-23-1 (22 February 2001) 836.

A penalty is defined as ‘an elastic term with many different shades of meaning; it involves idea of punishment, corporeal or pecuniary, or civil or criminal, although its meaning is generally confined to pecuniary punishment’ in West’s Law and Commercial Dictionary 1160. Hence the present work, majorly employs the term sanction.


ales – albeit pleading for more research. Questions concerning rationales within a given criminal justice system in fact are preliminary to any other analysis regarding sentencing law. Rationales are able to disclose the program of criminal policy underpinned by the system itself and contribute to its legitimization. They unveil its essence.

The second reason for studying sentencing rationales is that the international criminal judiciary has still not found a coherent sentencing policy. Although sentencing by ICTs is ‘the culmination of the efforts of the international community


in general … to provide justice for the victims …, the accused, and the world that is watching’, 10 sentencing rationales in ICL have not yet received the same interest they attracted at the national level. In municipal systems, sentencing rationales have been investigated by scholars, national legislative assemblies and jurisprudence since the time of the publication of Cesare Beccaria Dei delitti e delle pene; 11 and since then lawyers are used to deal with oceans of ink split in the attempt to define and shape philosophical parameters and criteria for sentencing. The question ‘why we punish’ is one of the most asked by lawyers of all times and legal cultures. The same however did not happen in the realm of ICL. Generally speaking in fact, doctrine agrees that international sentencing law is still today an underdeveloped branch of ICL; 12 it moreover only recently attracted consideration from scholars, 13 legal practitioners 14 and civil society. 15

10 James Meernik and Kimi L King ‘The Effectiveness of International Law and the ICTY: Preliminary Results of an Empirical Study’ 717.


12 Daniel B Pickard ‘Proposed Sentencing Guidelines for the International Criminal Court’ 124, states that ‘[t]here is an area of intimately connected with the international tribunal that current literature has neglected … [L]egal literature fails to address sentencing guidelines under which the ICC would operate.’ In the same vein Robert Sloane ‘Sentencing’ in Antonio Cassese (ed) The Oxford Companion of International Criminal Justice (OUP 2009) 509, affirms that ‘[p]erhaps because of the intuitive sense that no sentence, even death, can truly “fit” unconscionable crimes like genocide, ICL had until recently paid scarce attention to sentencing’.


15 Ralph Zacklin ‘The Failings of ad hoc International Tribunals’ (2004) 2 Journal of International Criminal Justice 541; Refik Hodzi ‘Leaving the Legacy of Mass Atrocities, Victims’ Perspective on
The accusation of underdevelopment originates from the identification of two main features that typify international sentencing law: the absence of clear positive guidelines and the consequent discretion of judges in determining the sentences. Scholars seem to agree that these peculiarities produced a distortive effect on sentencing outcomes – i.e. the quantum of penalties allocated in single cases – which are commonly blamed as inconsistent. It is frequently assumed that the reasons according to which the international sentencing system is so characterized are principally historical. The *sui generis* development of ICL and the impact of the Cold War on its growth is evoked to explain the mentioned underdevelopment; it is usually portrayed that as a consequence of years of virtual absence of any study regarding ICL, when the ad hoc Tribunals were established there was an overwhelming and urgent need to focus on the substantive part of ICL and on international criminal procedure, rather than on its general part – which resulted to be backward, a system *in fieri*.\(^{16}\) On a theoretical level, it has been held that the absence of an articulated sentencing system can be ascribed to the abhorrent nature of crimes under international law and their ‘intuitive-moralistic answers, making debate about the rationales … seem pejoratively academic.’ \(^{17}\)

The following pages aim at describing the two mentioned accusations moved against international sentencing law and their effects on sentencing outcomes, and at explaining the reasons according to which a comprehensive study and understanding of sentencing rationales might be the tool through which sorting out the confusion surrounding sentencing in ICL.

### 1.2. No Positive Guidelines and Unfettered Judicial Discretion

As anticipated, all ICTs share two common features that are frequently portrayed as the causes that make their sentencing systems deficient. The first characteristic is represented by the paucity of sentencing guidelines included in their Statutes. As a matter of fact indeed, positive ICL instruments say very little about


sentencing – and nothing at all about sentencing rationales. In general terms, commentators agree in underlying the absence of ‘detailed sentencing principles’ in ICL. 18 The Nuremberg, Tokyo and successor trials held in the aftermath of the World War II ‘left few sentencing guidelines’, 19 whereas the Statutes of ad hoc Tribunals have been defined laconic 20 and providing for loose guidelines. 21 As far as the ICC Statute and connected instruments are concerned, commentators believe that they conjunctively provide a more articulated sentencing framework, although the approach adopted by the drafters ‘was to a large extent also characterized by flexibility and few sentencing guidelines.’ 22 Again, no mentioning of penological justifications of sentencing.

As a result, ICTs’ judges are assigned a high degree of discretion – which the ad hoc Tribunals’ judges themselves have used to define ‘unfettered’. 23 This is the


20 According to Marc Drumbl, Atrocity, Punishment and International Law 50 ‘for the most part, the textual bases for punishment provided by the positive law instruments of the ICTR and ICTY are thin’. According to Robert Kolb, Droit International Pénal (Bruylant 2008) 345 ‘les peines n’ont pas beaucoup attire l’attention des rédacteurs des texts constitutifs … Pour ce qui est des tribunaux ad hoc, les textes sont très peu prolixes et les juges ont du creer de dro’. See also Ralph Henham, Punishment and Process in International Trials (Ashgate 2005) 123.


22 Bruce Broomhall ‘Part 7: Penalties’ 5. See also Cherif M Bassiouni, ‘Penalties and Sanctions’ in Cherif M Bassiouni (ed.), International Criminal Law (vol 3, 3rd edn, Martinus Nijhoff Publishers 2008) 610, according to whom the Statutes of all ICTs ‘are unsatisfactory as to the provisions concerning penalties. First, because they fail to refer to specific penalties and how they are to be determined; second, because they do not identify criteria for aggravating and mitigating factors’.

23 See among others Erdemović Case (Sentencing Judgment) ICTY-96-22 (29 November 1996) 43, where the judges noted regarding statutory provisions on sentencing determination that ‘the
second and probably most prominent characteristics of ICL sentencing. It shall be noted that judicial discretion in sentencing is not a \textit{mala in se}: it would indeed be unfair to provide for a sentencing system that does not allow judges to tailor the penalties they inflict according to the circumstances of each case.  

24 Municipal criminal justice systems of civil law countries avoid this by establishing a base rate, or maximum and minimum penalties within which judges can discretio\n\n
nally move in allocating punishment; and often directly dictate at the highest normative level (e.g. within Constitutions) the justifications for such an allocation of punishment. Common law countries either establish sentencing guidelines, or are directed by precedents. ICTs’ Statutes, however, do not embrace any of these schemes. They are silent on sentencing rationales and vest judges with the highest degree of discretion in determining the sentences, as the criteria they provide for are insufficient to create an effective and complete sentencing system. ICTs’ judges have interpreted such silence as statutorily assigning them the mentioned ‘unfettered’ discretion. If left to the unfettered discretion of Chambers, however, the choice of one or another sentencing rationale causes deep variations depending on judges’ moral philosophy, personal beliefs, legal cultures, sentiments towards the accused and the victims, convictions concerning the role of ICL enforcement mechanisms and intimate emotions. As evident, the risk that sentencing outcomes are perceived as unfair is very high.

1.3. Inconsistency in Sentencing, Absence of Justifications and Lack of Transparency

The direct effect of the absence of clear positive guidelines and of the discretion enjoyed by judges in meting out sentences, is represented according to some doctrine by an alleged inconsistency of penalties meted out by ICTs.  

25 The term inconsistency is used by Alan Tieger ‘Remorse and Mitigation in the International Criminal Tribunal for the Former Yugoslavia’; Marc Drumbl, \textit{Atrocity, Punishment and International Law}; Jennifer J Clark ‘Zero to Life: Sentencing Appeals at the International Criminal Tribunals for the Former Yugoslavia and Rwanda’; Ines Weinberg De Roca and Christopher M Rassi ‘Sentencing and Incarceration in the ad hoc Tribunals’; Barbara Hola, ‘Sentencing in International Crimes at the ICTY and ICTR’.
sentencing – it is claimed – is evidenced by disparities in sentencing outcomes between similar cases both before the very same jurisdiction, and before different jurisdictions emanating from the same authority. Such situation triggers, it is furthermore claimed, (i) doubts regarding the international criminal justice system legitimacy and adherence to the principles of legality, fairness, equality and rationality of trials; (ii) scarce confidence among victims; and (iii) counterproductive...

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26 In general terms see Stephen M Sayers ‘Defence Perspectives on Sentencing Practice in the International Criminal Tribunal for the Former Yugoslavia’ 753.

27 According to the ICTY Appeals Chamber ‘a sentence should not be capricious or excessive, and that, in principle, it may be thought to be capricious or excessive if it is out of reasonable proportion with a line of sentences passed in similar circumstances for the same offences. Where there is such disparity, the Appeals Chamber may infer that there was disregard of the standard criteria by which sentence should be assessed, as prescribed by the Statute and set out in the Rules’. Jelisić Case (Appeals Judgment) ICTY-95-10-A (5 July 2001) 96; see also James Meermik and Kimi L King ‘The Effectiveness of International Law and the ICTY: Preliminary Results of an Empirical Study’ 343-372; Uwe Ewald ‘“Predictably Irrational”: International Sentencing and its Discourse against the Backdrop of Preliminary Empirical Findings on ICTY Sentencing Practice’ 365; Jens D Ohlin ‘Proportional Sentences at the ICTY’ in Bert Swart, Goran Sluiter and Alexander Zahar (eds) The Legacy of International Criminal Tribunal for the Former Yugoslavia (OUP 2011); Robert Sloane ‘Sentencing for the Crime of Crimes, The Evolving ‘Common Law’ of Sentencing before the International Criminal Tribunal for Rwanda’ 713.

28 An excellent quantitative analysis of penalties imposed by ICTY and ICTR has been conducted by Silvia D’Ascoli, Sentencing in International Criminal Law: The UN Ad Hoc Tribunals and Future Perspectives for the ICC 274 ff. Such analysis reveals incontrovertible inconsistencies with regard to the harshness of penalties meted out by the two ad hoc Tribunals, the Rwandan one inflicting lengthier penalties against the same (i) type of crime, (ii) mode of liability, (iii) type of participation. See also Ines M Weinberg De Roca and Christopher M Rassi ‘Sentencing and Incarceration in the ad hoc Tribunals’ 1; Jennifer J Clark, ‘Zero to Life: Sentencing Appeals at the International Criminal Tribunals for the Former Yugoslavia and Rwanda’ 1685.

29 According to Ines M Weinberg De Roca and Christopher M Rassi ‘Sentencing and Incarceration in the ad hoc Tribunals’ 5 ‘consistency in sentencing and detention practices has thus far eluded the list of accomplishment of both [ad hoc] tribunals’. Ibid 7 ‘[i]t is a widely accepted human rights principle that consistency in punishment is necessary for the proper operation of the criminal justice system’. See also Shaharam Dana ‘Genocide, Reconciliation and Sentencing in the Jurisprudence of the ICTY’ in Ralph Henham and Paul Behrens (eds) The Criminal Law of Genocide (Aaghate 2007) (hereinafter Shaharam Dana ‘Genocide, Reconciliation and Sentencing in the Jurisprudence of the ICTY’ 264, according to whom the ‘failure to prioritize the various objectives and to distinguish the primary rationales underlying international sentencing from secondary objectives, has precipitated and identity crisis in international punishment’. In the same vein Luigi Cornacchia, Funzione della pena nello Statuto della Corte Penale Internazionale (Giuffrè 2009).

effects on affected civil societies. Indeed, as held by the ICTY Appeals Chamber ‘[o]ne of the fundamental elements in any rational and fair system of criminal justice is consistency in punishment. This is an important reflection of the notion of equal justice.’

It does however not fall within the scope of this book to analyse the alleged inconsistency concerning sentencing outcomes; excellent works have been published aiming at assessing the truthfulness of the claim of inconsistency of the sentencing outcomes of ICTs; on the contrary, the analysis here conducted focuses on the parallel claim of inconsistency exclusively moved against sentencing rationales. It will be sometimes impossible to disentangle the examination of sentencing rationales and determinants, as judgments often treat the two together; but still the claim of rationales’ inconsistency deserves to be analysed aside for ‘[t]he determination of a “fair” sentence, that is to say a sentence consonant with the interest of justice, depends on the objectives sought.’

International sentencing rationales have been labelled as inconsistent in three sets of cases. The first one is represented by the practice of those sentencing decisions that do not provide for any justification at all for the punishment inflicted. As pointed out by Nietzsche, punishment is inconsistent by definition if provided with no function or purpose whatsoever.

Second, doctrine found sentencing decisions inconsistent when judges pro-
nouncing them have pointed to a plethora of rationales irreconcilable among themselves, and also when sentencing decisions emanating from the same jurisdiction upheld conflicting rationales. As self-evident, this second type of inconsistency can be witnessed only with regard to the ad hoc Tribunals, as no sufficient sentencing practice has been so far produced by the ICC to allow a quantitative evaluation of it. Concerning the ICTY specifically, it has been argued that ‘international judges picked and choose … an ideology to follow in a particular case that serves the desired result they have in mind for that case.’ 37 Chapter III investigates specifically whether the allegation that the case-law of, in particular, ad hoc Tribunals fall within this type of inconsistency can be upheld.

Third, doctrine affirmed that inconsistency also concerns the relationship between the rationales professed and the choice of sentencing determinants or the sentence meted out. In other terms, a sentencing decision is inconsistent when it does not explain the link between the choice of, for instance, retribution as the main rationale and the quantum of penalty inflicted in concreto or, to put it differently, when it does not explain the relationship between rationales and the principle of proportionality. Rather than talking about inconsistency here, I would rather refer to the lack of transparency which virtually characterizes all sentencing portion of ICTs’ judgments. 38 Such lack of transparency coincides with the absence of any explanation of the legal logic according to which a given amount of sentence is in concreto meted out vis-à-vis the rationales chosen. ICTs’ judgments are indeed generally lacking when it comes to give appropriate explanation to the link between proclaimed sentencing rationales and determinants, and the quantum of sentence eventually allocated on the defendant. If one reads the sentencing decision in the Lubanga case, for instance, she or he will find that a large portion of the judgment elaborates on the gravity of the crime committed by the accused and the harm caused to the victims – but then no explanation is provided as to the decision to sentence him to 14 years of imprisonment. The reader will certainly find her or himself in a state of uncertainty and confusion.

1.4. Why is a System of Sentencing Rationales Needed?

As aforementioned, the conundrum of rationales’ inconsistency originates from the absence of positive indications and from the unfettered discretion enjoyed by ICTs’ judges. Against such obfuscation, this book seeks – through an exploratory


38 Of the same opinion Barbara Hola ‘Sentencing in International Crimes at the ICTY and ICTR’ 4.
research aim – to clarify international sentencing rationales. Three reasons motivate the decision to focus on these latter. First since punishment, although it can be defined without referring to any rationale, it cannot be justified without such reference. Whereas indeed the definition of punishment is and must be kept value-neutral, the practice of punishment, on the contrary, must be justified in terms of different considerations – e.g. values, social or community goals – for it to be legitimate. Second, an investigation of sentencing rationales seems at present the only practicable way to address the issue of consistency in sentencing generally; the early practice of the ICC demonstrates indeed that, although the ICC St. and its connected instruments are more sophisticated than their predecessors in terms of sentencing determinants, still sentencing outcomes appear prima facie unjustified and unexplained. It might then be that the only means to start developing a coherent sentencing framework is to decide why ICTs are punishing in the first place, and then determine the sentence in concreto. Third, for the dogmatic impact the identification of rationales is capable to have on the international criminal justice system in terms of its legitimization.

In this latter respect, it might be affirmed that this book does not seriously consider the intrinsic risk of ‘ex post facto rationalizations’ of sentencing rationales; it is however a matter of fact that the responsibility to address the issue of sentencing in international criminal trials has been and is ‘put on the shoulders of the judges’ for the refusal of ICTs’ drafters to establish a set of sentencing tariffs or offer sentencing guidelines. In this respect Bassiouni believes that the international criminal justice system does not result from legal planning, but progresses through ‘non-orderly processes in which fortuitous events and practical exigencies will incrementally enhance the goals intended to be attained.’ Nevertheless, it is here held that the significance of punishment and the reasons for imposing penalties cannot be left to anarchic developments, as these are germane to any sentencing system as a whole. Reflection on sentencing rationales must precede any study on sentencing determinants, since the identification and consequent specific weight assigned to the latter depends upon the identification of the former. Furthermore, a system of criminal law cannot be said to adhere to the nulla poena sine lege principle if, in order to allocate the quantum of penalty in concrete cases, judges are not provided with criteria according to which apply determinants and

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39 Ralph Henham ‘The Philosophical Foundations of International Sentencing’ 64.
with the goals the penalty imposed shall aim at. In fact, although the current status of the *nulla poena* principle in ICL as a ‘fundamental but imprecise principle’ admits a flexible interpretation of its *lex certa* corollary not to require the establishment of fixed tariffs, it can be doubted whether ICTs’ Statutes comply with the said principle when they do not include principled guidelines – to the extent that ‘determining the sentence of offenders remains a profoundly subjective process, with considerable variation in the relative harshness or clemency of the term depending upon the vision of individual judges’. In other words, the establishment of sentencing determinants absent any principled framing assigning them a penological meaning is worthless. Consistency of sentencing outcomes – which directly derive from the implementation of determinants – can only be gained through consistency of approaches. In this respect, Haveman wrote that ‘[g]oals steer the criminal justice system … Goals influence the magnitude of sentences … It is therefore necessary to discuss the goals of punishing, being the core feature of a criminal approach.’

The failure to have positively identified rationales undermines in turn the inter-

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42 Adriano Martini ’Il principio nulla poena sine lege e la determinazione delle penne’ in Antonio Cassese, Mario Chiavario and Giovannangelo De Francesco (eds) *Problemi attuali della giustizia penale internazionale* (Giappichelli 2005) 224.


national criminal justice system legitimacy,\(^\text{48}\) which already suffers externally as it is being perceived as an instrument of international realpolitik. Nevertheless, it can find its internal legitimacy through the fairness of procedures applied and punishment inflicted.\(^\text{49}\) As long as punishment will be allocated according to vague and often conflicting rationales which vary on a case by case basis, the principle of fair trial will be continuously undermined. A trial cannot indeed be objected if conducted fairly, nor can the accused, the victims, the public and politics delegitimize it. On the contrary, current outcomes of international trials are accused of unfairness by both perpetrators – when too harsh – and victims – when too lenient – because of the impossibility to foresee the quantum of sentence abstractly applicable. It cannot be denied that ICTs judges have so far failed in identifying the sources of sentencing rationales, extended enormously the category beyond any legal boundary, professed disparate rationales often conflicting with each other without defining them,\(^\text{50}\) proved unsuccessful in linking purported rationales to the quantum of penalty eventually inflicted, and fell short in respecting human rights standards. This trend has a secondary consequence, namely the risk of failing to connect and reconcile international criminal trials with alternative mechanisms of transitional justice and crimes under international law prevention.

2. Theories of Punishment in ICL

A cursory review of ICTs’ judgments reveals that an overabundance of rationales of sentencing have been invoked by judges in meting out sentences; and that


\(^{50}\) Ralph Henham ‘Developing Contextualized Rationales for Sentencing in International Criminal Trials’ 758-759, according to whom ‘[r]etributivism and, to a lesser extent, deterrence have repeatedly been affirmed as the primary objectives for punishment at the international level. However, evidence persists of widespread confusion and obfuscation on the part of the ad hoc tribunals regarding the possible scope and meaning to be accorded to these, and other penal justifications in the practice of sentencing’. 
both utilitarian and retributive theories have been advanced. Judgments refer indeed variably to general deterrence, special deterrence, incapacitation and rehabilitation; and also to retribution and protection of society. Moreover, ICTs’ sentencing decisions also refer to general affirmative prevention, communication, keeping an historical record, restoration of the peace and reconciliation. Although not many authors entertained themselves with the dilemma of selecting rationales of sentencing for international criminal trials, those that had done so alternatively supported all sentencing theories. Similarly to the judiciary therefore, also doctrine has not consistently embraced any theory of punishment for ICL. Furthermore, authors disagree as to whether and to what extent municipal sentencing rationales can be transplanted into ICL. The only issue on which all seem to agree is that international criminal justice should restrain its aims and avoid excessive and false expectations.

For the sake of clarity, the following paragraphs analyse the different arguments put forward by doctrine according to the classical bipartite scheme which differentiates between forward and backward-looking justifications of sentencing; this is however only a means to portray the topology of solutions so far proposed: I do indeed concede that a plausible solution to the sentencing dilemma in ICL may lay in the middle, or that different theories of punishment can overlap in concrete cases. 51 Furthermore, also the case for restorative justice is analysed.

2.1. Backward-Looking Theories of Punishment

2.1.1. Backward-Looking Theories in General

Backward-looking theories of punishment find their root in deontological retribution. The classical retributive theory of punishment is grounded on two postulates – i.e. that crime is a moral wrong that confers upon the society a duty to punish the perpetrator; and that punishment is per se a moral good – and on one epistemological claim: namely, a reasonable certainty regarding the kind and amount of punishment the perpetrator deserves. 52 According to pure retributivists, punishment shall never be imposed to achieve a social objective; it is imposed by the society only to satisfy its demand for justice and to prevent those seeking personal revenge. An alternative view looks at punishment as a form of expiation. Both per-


spectives focus on the perpetrator of the offence, who is not seen as an instrument for improving the society, but as the creator of her or his actions. Guilt is therefore the only necessary and sufficient reason for inflicting punishment. The well known problem with retributivism is that it anchors punishment to the proportionality principle (punishment must be proportional to the gravity of the offence), but it has not yet found a way to construct such relationship in a non-arbitrary manner. Pure retributivists believe that the proportional relationship between the crime and the punishment should be seen from a cardinal angle: desert would precisely explicate the amount of punishment proportionate to the crime committed.

This viewpoint fails however against the incommensurability of punishment. It is indeed usually maintained that a sentencing system that only incorporates pure retribution as a rationale would automatically fail as no punishment can be justified by this aim alone. The deontological understanding of punishment was therefore abandoned at the end of the XIX century, to be then revived and re-theorised during the last three decades of the XX century under the nomen ‘positive retributivism’ or just desert. The formulation of a new retributivist theory originates from the acknowledgment that punishment meets some limits: it cannot be inhumane or degrading; it cannot infringe the fair trial rights of the accused; and its severity must accord with the relative severity of the committed crime, although the minimalist principle shall always be respected. According to Rawls, deserved punishment emerges therefore as a result of a ‘pure procedural justice’; an independent criterion for desert based on intuition is illusory, and the deserved punishment is that founded on a sentencing schedule provided by law.

Two are the main questions which positive retributivists tried to answer. First, the question of why a perpetrator of a crime should deserve to suffer. Second, how

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53 Immanuel Kant, *Groundwork of the Metaphysics of Morals* (Harper and Row, 1964) 96, affirms that ‘[a]ct in such a way that you always treat humanity … never simply as a means, but always at the same time as an end’.

54 Who, according to Herbert Morris ‘Persons and Punishment’ in Joel Feinberg and Hyman Gross (ed) *Philosophy of Law* (1980) (hereinafter Herbert Morris ‘Persons and Punishment’) 582, even has a right to punishment which ‘derives from a fundamental human right to be treated as a person’.


the proportional relationship between the crime and the gravity of the offence should work in practice.

Concerning the first question, at least three answers have been put forward; the first one is incorporated in the so-called ‘fair advantage theory’: the criminal behavior allows the perpetrator to take an unfair advantage over the law-abiding, and punishment would remove it. The second claims that crime deserves punishment as it makes our emotional responses to it – e.g. guilty or resentment – appropriate and satisfied by or expressed through the punishment itself. The third answer is that punishment entails an expressive character. The expressive theory which thereby originates affirms that the punishment is a societal tool to communicate disapproval or denounce reprobation and re-affirm the norm violated by the offence. The expressive theory was embraced by both deontological and utilitarian thinkers. Conventionally, this book uses the term “expressivism” when generally referring to both deontological and utilitarian expressive theories of punishment; it employs the term “communication” when specifically referring to deontological expressivism; and the term “general affirmative prevention” when especially referring to utilitarian expressivism. This latter theory will be analysed in the following paragraph. As to communication, it shall be underlined that the main difference between it and retribution, is that this former does not only care about the moral culpability of the perpetrator, but includes some typical utilitarian benefits which would flow from the infliction of punishment. Communication however departs from both retribution and deterrence as its fundamental aim is to ‘show law-abiding society not only that the criminal law system works, but that the society itself works’; in other words, it does not only focus on the culpability of the wrongdoer (as retribution) nor it is only interested in having a safer society by impacting on actual or potential criminals (as deterrence); it also wants to reassure the law-abiding society that the criminal law system it created works.

61 The father of the expressive theory is usually said to be Durkheim. See among others Emile Durkheim, On the Division of Labour in Society (1953) 108-109.
communication therefore does not merely aim to make the society safer, but also to satisfy it that a just scheme of criminal justice exists. For Feinberg, the censure expressed by punishment conveys to the victims the message that the society recognizes that the rights they are entitled to have been violated. For Duff, censure is also aimed at the perpetrator as a moral agent in order to prevent future criminal behavior and to communicate her or him the society’s disapproval of her or his action. Expressivism may be therefore contemporaneously backward and forward looking: it is indeed ‘focused on society’s attitude (after the crime has been committed – hence, in the future) as it looks back on the crime (in the past)’.66

Regarding the second question, positive retributivists believe that desert can justify punishment in an ordinal sense: its function is to place the crime committed in relationship with other crimes committed, and locate it on a punishment scale.67

2.1.2. Backward-Looking Theories in ICL

Retribution has enjoyed wide fortune among ICL commentators, who are divided among those who appeal for a cardinal understanding of proportionality and those who look at proportionality from an ordinal point of view. The first group of scholars sees retribution as the only valid rationale for ICL and has vocally criticized the ICTY for a seemingly ordinal approach to sentencing which would have caused unreasonable leniency.68 One scholar claimed that ICTs would only rely upon an European approach to sentencing – an approach that focuses primarily on the rehabilitation and reintegration of the offender in the society, and deterrence. According to this theory however, none of these rationales would make sense in ICL, since ‘the choice is to either recognize the uniquely retributive goal of these prosecutions or to simply let the criminals go free’.69 The reason for that, would lie in the acknowledgment that, although international criminal justice would be justified in consequentialist terms, ‘[a]t the most foundational level, the warrant for punishing international crimes is retributivist – the perpetrators de-

64 Joel Feinberg, Doing and Deserving 95-118.
67 Andrew von Hirsch ‘Proportionality in the Philosophy of Punishment’ 81-82.
serve to be punished’. In this line of thought, the ‘defendant-relative proportionality’ (n.d.r. ordinal proportionality) should be substituted with an ‘offence-gravity proportionality’, since by ‘[l]owering [the perpetrators’] sentences in order to make it proportional with other, more culpable defendants, only runs the risk that the sentence will not adequately reflect the moral desert of the offender’. In order to resolve the proportionality dilemma inherent in any retributive theory of sentencing, an international sentencing commission should be established and assigned with the task of establishing ‘persuasive’ – not mandatory – sentencing guidelines modeled on the USA Sentencing Guidelines, which should include specific guidelines for each underlying conduct and a hierarchy of crimes under international law. This retributive argument led its supporters to advocate for long sentences served in uncomfortable conditions, and even for the death penalty for those found guilty of genocide. Apart from HR-based arguments that can be moved against this theory, it also failed to explain how ‘offence-gravity proportionality’ should work in practice and relied upon a USA-driven solution to the sentencing problem, which cannot be upheld for it represents, from an international law viewpoint, the approach to sentencing of a single legal order.

Other authors proposed instead an ordinal-based theory of retributive proportionality; the most interesting theses in this regard are those grounded on the communication theory. According to one author for instance, communication would assert ‘morality by affirming norms and educating future generations’ on the intolerable nature of crimes under international law. Contrary to a cardinal understanding of proportionality, communication’s morality would be rooted in IHRL; the penalty, furthermore, would respond to the vast audience of international criminal trials (the accused, the victims, the affected community, the world that is watching). The proportionality dilemma is resolved by suggesting an enhancement of the cumulative harm-based sentencing practice. Accordingly, ICTs should mete out sentences comprising a symbolic penalty for each victim of the

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70 Ibid 392.
crime. 76 For instance, twenty sentences of life-imprisonment should be inflicted on a perpetrator who killed twenty individuals. The problem with such an approach is that virtually all those found guilty by ICTs would be convicted to de facto life imprisonment, as usually dozens are the victims of those crimes under international law which international prosecutors select for prosecution; the gravity threshold enshrined in article 53(1)(c) ICC St. is for instance specifically aimed to exclude the initiation of an investigation in connection with less serious incidents. The solution offered by similar theories seems therefore not to correspond to the aim professed, i.e. to have a communicative sentencing practice, but rather to pure consequentialist aspirations.

An authoritative advocate of communication is Sloane, who believes that any effort to cardinaly rationalize proportionality in ICL would be ‘doomed to futility’ as no punishment can cardinaly fit crimes under international law; 77 proportionality should be rather re-oriented ‘to the penal interests of the international community’. 78 According to Sloane, in order restructure ICTs’ sentencing systems, a flexible scheme to convey mitigating and aggravating circumstances should be adopted and ICTs should enhance their outreach activities. 79 The problem inherent in Sloane’s solution to the international sentencing inconsistency is that it does not go into the practicalities of how sentencing guidelines should be built and therefore, although particularly fascinating and theoretically convincing, his work is not decisive.

Detractors of retribution in ICL root their critique on a variety of elements. Some claim that ICTs’ foundation instruments would conflict with retribution, others use the traditional argument against retributive proportionality that a non-arbitrary scale among different crimes cannot be found. 80 Moreover, it is maintained that retribution would be untenable in ICL as it would presuppose a stable and coherent community and legal order ‘characterized by shared values’– which crimes under international law would precisely breakdown. 81 Also communication is criticized, as international punishment would not be capable to convey a message valid globally, because ICTs’ sentences speak to a too vast, too fragmented public in terms of social background and culture. According to Tallgren for in-

76 Ibid 579.
78 Ibid 84.
79 Ibid 89.
stance, different societies’ perceptions of the severity of punishment would interfere too profoundly with the clarity of the message conveyed by the sentence and for some of them could even have a counterproductive effect.  

2.2. Forward-Looking Theories of Punishment

2.2.1. Forward-Looking Theories in General

The first expression of forward-looking theories of punishment is represented by utilitarianism. Rooted in the writings of Beccaria and Bentham, utilitarianism justifies punishment vis-à-vis the rational utility of preventing crime. It currently encompasses deterrent (both general and special), general preventative, rehabilitative and incapacitative-based arguments of punishment.

Deterrence generally posits that humans are rational actors and adopt hedonistic decisions in terms of costs and benefits. The usual objections raised against deterrence concern whether it can justify punishment alone, or whether punishment is empirically really effective in preventing criminal behaviours. Some identified in deterrence (and, admittedly, utilitarian punishment in general) a paradox, i.e. that its supporters are forced to justify even manifestly unjust punishment if that is required to prevent crime. And indeed some sentencing practice – even of ICTs, as further analysed in the following Chapters – shows that harsh punishment has been imposed with a mere exemplary significance. Modern deterrence theorists answer to this critique by admitting that utilitarian punishment shall be subjected to some constraints, among others, the prohibition to punish the innocent.

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84 James Q Wilson, Thinking about Crime (rev edn, Basic Book 1983).
