

INTERNATIONAL CRIMINAL LAW FOR RETRIBUTIVISTS

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Responding to the proliferation of international criminal tribunals during the last two decades, scholars have engaged in a rich debate about the normative foundations of international criminal law (“ICL”). The retributive theory of punishment—which justifies punishment based on the culpability of the accused, rather than by reference to its social benefits—has met with significant skepticism in these discussions. Some have argued that unique features of international criminal justice—for example, the extreme selectivity of punishment or the lack of certain social or political preconditions—are a poor match for retributive theory. Others have ignored retributivism altogether, or afforded the theory only passing mention.

This Article counters the anti-retributive strain by arguing that retributivism can indeed provide a meaningful framework for understanding ICL. First, I argue that in most respects retributive theory is no less plausible in the international setting than it is in the domestic setting. Understanding what claims retributive thinking might have upon ICL requires one to distinguish claims regarding the general justification required to defend punishment as a social practice—the core concern of retributive theory—from the more specific questions of institutional design—such as whether and when to create an international criminal tribunal, and how to set enforcement priorities—that are most pertinent to ICL scholars. I argue that, once these distinctions are sorted out, the anti-retributivist strain in ICL scholarship

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does little to engage retributivism's core claim that desert is necessary to morally justified punishment and provides an inherently good (if not exclusive) reason to punish irrespective of potential social benefits.

I also argue that retributivism is more compatible than commonly supposed with current thinking about international criminal justice. The theory permits various models for engaging the compromises of real world institutions. It provides a powerful lens for understanding the design of ICL institutions such as the International Criminal Court ("ICC"), and it is also compatible with dominant approaches to institutional decisions such as case selection and sentencing. Perhaps counter-intuitively, retributivism can also supply a framework for sometimes favoring alternatives to the traditional criminal prosecutions pursued by international courts, or even for opposing ICL altogether.

Finally, I argue that choice of punishment philosophy has less practical significance for ICL than theorists often assume. In particular, I argue that the choice between retributivism and other competing theories does little to resolve important policy dilemmas dividing theorists of ICL, including whether prosecution should sometimes be abandoned for amnesty or other alternatives. This point supports a broader argument that ICL is simultaneously overdetermined and underdetermined by traditional punishment theory: While the core of ICL is consistent with multiple theories of punishment, these theories provide only limited practical guidance on the most divisive questions.

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TABLE OF CONTENTS

1.	INTRODUCTION.....	972
2.	RETRIBUTIVISM AND ITS ALTERNATIVES	978
	2.1. <i>Retributive Justice as Harsh Justice</i>	981
	2.2. <i>The Utility of Desert</i>	985
	2.3. <i>Selective Punishment</i>	987
3.	POLITICAL RETRIBUTIVISM.....	990
	3.1. <i>The Political Legitimacy of International Tribunals</i>	991
	3.2. <i>The Fair Play Model of Contractarian Justice</i>	994
4.	INSTITUTIONAL RETRIBUTIVISM	998
	4.1. <i>Minimalism</i>	998
	4.2. <i>A Duty to Punish</i>	1001
	4.2.1. <i>Absolutism</i>	1002
	4.2.2. <i>Agent-Relativism</i>	1003
	4.3. <i>Consequentialist Retributivism</i>	1007
	4.3.1. <i>ICL and Maximizing Retribution</i>	1009
	4.3.2. <i>The Challenge of Alternative Justice</i>	1012
	4.3.3. <i>Consequentialist Retributivism and Other Values</i> ...	1016
	4.4. <i>Threshold Retributivism</i>	1019
5.	RETRIBUTIVISM AS A GOOD REASON TO PUNISH	
	INTERNATIONAL CRIMES	1021
	5.1. <i>The Morality of Punishment</i>	1024
	5.2. <i>Retributivism and the Structure of ICL</i>	1028
6.	THE LIMITS OF PUNISHMENT THEORY	1032
	6.1. <i>Crimes</i>	1033
	6.2. <i>Design and Alternatives to Prosecution</i>	1036
	6.3. <i>Case Selection</i>	1038
	6.4. <i>Sentencing</i>	1041
7.	CONCLUSION	1043

1. INTRODUCTION

What is the point of international criminal justice? So asks Mirjan Damaška in an article whose title aptly summarizes a significant strain of international legal scholarship over the last two decades.¹ Responding to the unprecedented proliferation of international criminal tribunals during this time, scholars have engaged in a rich debate about the normative foundations of international criminal law (“ICL”). The retributive theory of punishment—which justifies punishment based on the culpability of the accused rather than by reference to its social benefits—has faced significant skepticism in these discussions.²

Although theorists differ in their particular responses to retributivism, two general strains are apparent. The first is a tendency to treat retributivism as a theory that is uniquely problematic in the international setting. Robert Sloane, for instance, has pointed to fundamental differences between the domestic and international political orders that, in his view, diminish retributivism’s ability to guide international criminal justice: “Retribution . . . emerges as a problematic justification for ICL punishment,” he argues, “in large part because it presupposes both a coherent community and a relatively stable sociopolitical or legal order characterized by shared values. The circumstances that enable widespread violations of international humanitarian law and human rights atrocities generally involve the breakdown of precisely that order.”³ Other scholars have argued that the selectivity in punishment for mass atrocity prevents ICL from serving a retributive function. For Mark Drumbl, “[t]he retributive function is hobbled by the fact that only some extreme evil gets punished, whereas much escapes its grasp, often for political

¹ Mirjan R. Damaška, *What is the Point of International Criminal Justice?* 83 CHI-KENT L. REV. 329 (2008).

² See, e.g., Margaret M. deGuzman, *Choosing to Prosecute: Expressive Selection at the International Criminal Court*, 33 MICH. J. INT’L L. 265, 302 (2012) (“Most scholars who have considered the question, however, reject retribution as a justification for ICC adjudication, or at least they express skepticism about the Court’s ability to serve retributive ends.”); David S. Koller, *The Faith of the International Criminal Lawyer*, 40 N.Y.U. J. INT’L L. & POL. 1019, 1025-26 (2008) (“[A]rguments from retribution have made little headway in international criminal law and were sharply criticized even before the first international tribunal was established at Nuremberg.”)

³ Robert D. Sloane, *The Expressive Capacity of International Punishment*, 43 STAN. J. INT’L L. 39, 81 (2007).

reasons anathema to Kantian deontology.”⁴ Arguing along similar lines, Diane Marie Amann observes that “[a]s a result of selectivity and randomness, just deserts have been meted out inconsistently, in very few conflicts, and on only a few defendants. These factors thus have disserved the goal of retribution.”⁵

These critiques withhold judgment regarding the role of retributivism with respect to ordinary domestic crimes. Rather, they focus on features of the international setting that allegedly render retributivism uniquely inappropriate to ICL. The purported failure of retributive considerations to justify and guide the contemporary practice of ICL supports broader arguments that ICL must resort to a unique approach to punishment, one that is distinct from the traditional punishment theories invoked in the domestic setting.⁶

The second strain is that retributive theory itself receives relatively sparse attention. The literature contains many, often passing statements about retributivism’s failures at the international level, but these accounts generally do not offer a well-developed account of how a system of retributive justice is supposed to function. Some accounts ignore retributivism altogether, and either assume or take for granted that the purpose of ICL is to achieve beneficial social outcomes.⁷ Indeed, it is surprising, given the attention devoted to international criminal legal theory over the last two decades, that the field is lacking in systematic applications of retributive theory to the international

⁴ MARK A. DRUMBL, ATROCITY, PUNISHMENT, AND INTERNATIONAL LAW 151 (“The retributive function is hobbled by the fact that only some extreme evil gets punished, whereas much escapes its grasp, often for political reasons anathema to Kantian deontology.”).

⁵ Diane Marie Amann, *Group Mentality, Expressivism, and Genocide*, 2 INT’L CRIM. L. REV. 93, 117 (2002) (footnote omitted).

⁶ Sloane and Amann favor expressive approaches to international criminal justice. See generally Sloane, *supra* note 3; Amann, *supra* note 5. Drumbl advocates what he terms a “cosmopolitan pluralist” approach that emphasizes domestic alternatives to conventional criminal trials. DRUMBL, *supra* note 4, at 195.

⁷ See, e.g., Andrew K. Woods, *Moral Judgments & International Crimes: The Disutility of Desert*, 52 V.J. INT’L L. 633 (2011) (discussing the widespread disregard for retributivism on the international law level); Damaška, *supra* note 1 (“[A] rigorous system for the rule of law cannot at present be established.”). I have also made this assumption in a previous work. See Alexander K.A. Greenawalt, *Justice Without Politics? Prosecutorial Discretion and the International Criminal Court*, 39 N.Y.U. J. INT’L L. & POL. 583, 601-04 (2007) (focusing on crime prevention as the rationale for establishing the International Criminal Court).

setting.⁸ This is true even of scholars who have endorsed retributivism to a greater or lesser degree. Scholars in this group either limit their analysis to a particular setting—such as sentencing⁹—or they merely identify retributive considerations—without further analysis—as one of several rationales for international criminal justice.¹⁰

This omission is unfortunate, because the question of how retributivism might guide a system of criminal justice is more complex than might be supposed, and receives no uniform answer even among criminal law theorists focused primarily on domestic institutions. A retributivist justifies punishment by reference to the culpability of the accused. That much is straightforward. But, even without considering the special features of the international setting, this basic formulation leaves much unanswered, both about the basic concept of retributivism, and about the theory's

⁸ A notable exception is Adil Haque's elaboration of a relational theory, which outlines a political theory of retributivist international criminal justice. See Adil Ahmad Haque, *Group Violence and Group Vengeance: Toward a Retributivist Theory of International Criminal Law*, 9 BUFF. CRIM. L. REV. 272 (2005).

⁹ See, e.g., Jens Ohlin, *Towards a Unique Theory of International Sentencing*, in INTERNATIONAL CRIMINAL PROCEDURE: TOWARDS A COHERENT BODY OF LAW (Goran Sluiter & Sergey Vasiliev eds., 2009); Allison Marston Danner, *Constructing a Hierarchy of Crimes in International Criminal Law Sentencing*, 87 VA. L. REV. 415 (2001); Ralph Henham, *Developing Contextualized Rationales for Sentencing in International Criminal Trials*, 5 J. INT'L CRIM. JUST. 757, 757-58 (2007). International criminal tribunals have also emphasized that retribution is an important goal of sentencing. See, e.g., Prosecutor v. Delalic, Case No. IT-96-21/A, Judgment, ¶ 806 (Int'l Crim. Trib. for the Former Yugoslavia Feb. 20, 2001) (stating that "that two of the main purposes of sentencing for these crimes are deterrence and retribution"). See also Koller, *supra* note 2, at 1026-27 ("Arguments from the retributive need for punishment may continue to be adduced in certain specific areas, such as in justifying sentences (here again, partly as a result of the lack of a sufficient theory).").

¹⁰ See, e.g., David Luban, *Fairness to Rightness: Jurisdiction, Legality and the Legitimacy of International Criminal Law*, in THE PHILOSOPHY OF INTERNATIONAL LAW 576 (Samantha Besson & John Tasioulas eds., 2010) (noting in passing that "[s]tandard justifications (retribution, general and special deterrence, incapacitation, rehabilitation) all raise familiar and difficult justificatory problems, which are no less acute in ICL than they are in domestic legal systems," before arguing that "the most promising justification for international tribunals is their role in *norm projection*." (emphasis in original); GERHARD WERLE, PRINCIPLES OF INTERNATIONAL CRIMINAL LAW 30 (2005) (noting in passing that "[a]lso, the idea of retribution undeniably has its place."); Payam Akhavan, *Beyond Impunity: Can International Criminal Justice Prevent Future Atrocities*, 95 AM. J. INT'L L. 7, 10 (2001) (maintaining that "[b]eyond retribution and the moral impulse to vindicate humanitarian norms, individual accountability for massive crimes is an essential part of a preventive strategy and, thus, a realistic foundation for a lasting peace.").

implications for the design and operation of real world justice institutions. Indeed, a common critique of retributive theory is that it is an incomplete theory of punishment, one that fails to supply legislators, investigators, prosecutors, and judges with comprehensive guidance as they pursue justice in a world of imperfect knowledge and scarce resources.¹¹

Retributivism's response to this challenge has decisive significance for the role that the theory can play in ICL. If it is the case that retributivism simply does not speak to real world enforcement challenges, then of course, retributivism will not inform many of the problems of deepest interest to international criminal lawyers. Making this point requires no special insights about ICL. The failure is merely a reflection of a general limitation in the theory, one equally applicable in the domestic context. If, on the other hand, retributivism can accommodate the real world constraints and competing values that inevitably accompany the realization of criminal justice, then it is worth considering whether and how these accommodations translate to the international setting.

Targeting a gap in the literature, this Article undertakes a closer consideration of retributivism's relevance to ICL. I do not here advance a comprehensive defense of retributivism as the exclusive or optimal theory of either criminal law in general or ICL in particular. Indeed, my primary agenda is not to defend an international criminal retributivism against skeptics, but to undertake the necessary preliminary step of exploring what it means to be a retributivist about ICL in the first instance. Nevertheless, I also believe there is more to be said about retributivism's contribution to ICL than the literature has thus far explored, and that retributivism plays a greater justifying role than is sometimes supposed. To that end, I advance several claims.

First, I argue that in most respects retributive theory is no less plausible in the international setting than it is in the domestic setting. Understanding what claims retributive thinking might

¹¹ See LOUIS KAPLOW & STEVEN SHAVELL, *FAIRNESS VERSUS WELFARE* 308-11 (2002) (detailing the limitations of the retributive theory); Michael T. Cahill, *Retributive Justice in the Real World*, 85 WASH. UNIV. L. REV. 815, 818 (2007) (“[R]etributivism, which adopts a backward-looking perspective focusing on the moral duty to punish past wrongdoing, is a justificatory theory, but seemingly not a prescriptive one. It offers retribution as a justifying ideal but does not explain how legal institutions are supposed to make retribution real.”).

have upon ICL demands that one distinguish claims regarding the general justification required to defend punishment as a social practice—the core concern of retributive theory—from the more specific questions of institutional design—such as whether and when to create an international criminal tribunal, and how to set enforcement priorities—that are most pertinent to ICL scholars. I argue that, once these distinctions are sorted out, the anti-retributivist strain in ICL scholarship does little to engage retributivism's core claim that desert is necessary to morally justified punishment and provides an inherently good (if not exclusive) reason to punish irrespective of potential social benefits. Both claims, for instance, are compatible with the conditions of social instability and selective punishment that typify ICL prosecutions.

I also argue that retributivism is more compatible than commonly supposed with current thinking about international criminal justice. Retributivism provides a useful lens for understanding the design of ICL institutions such as the International Criminal Court ("ICC"), and it is compatible with prevailing views on institutional decisions such as case selection and sentencing. Perhaps counter-intuitively, the theory can also supply a framework for favoring alternatives to the traditional criminal prosecutions pursued by international courts, or even for opposing ICL altogether.

These observations are subject, moreover, to the qualification that one must adhere to a version of the theory that is sufficiently adaptable to accommodate real world constraints. The plausibility of a retributivist ICL, in other words, depends on the adoption of a retributivism that is itself plausible, one that looks to the desert of the accused as a limitation on justified punishment and as an intrinsic reason to punish, while also acknowledging both the compromises inherent in implementing a system of criminal justice and the sometimes overriding claims of other, non-retributive values.

Finally, I argue that choice of punishment philosophy has less practical significance for ICL than might be assumed. In particular I argue that the choice between retributivism and other competing theories does little to resolve important policy dilemmas dividing theorists of ICL, including whether prosecution should sometimes be abandoned for amnesty or other alternatives. This point supports a broader argument that ICL is simultaneously overdetermined and underdetermined by traditional punishment

theories: While the core of ICL is consistent with multiple justifications for punishment, these approaches provide only limited practical guidance on the most divisive questions.

My argument proceeds in five parts. Part 2 focuses on the distinction between retributive and non-retributive approaches to punishment. Relying on a basic, but incomplete, account of retributivism, it reveals how approaches to ICL commonly associated with retributivism are in fact either utilitarian in nature or fail to engage the core claims of retributive justifications. This Part focuses in particular distinguishing retributivism from approaches that emphasize the social benefits of desert-based punishment and on critiques of selectivity in ICL.

Part 3 focuses briefly on the political theory of ICL, and explores ways to defend an international retributivism against contractarian arguments that highlight the significant differences between the political background of domestic and international justice respectively.

Part 4 focuses on a problem that has occupied the work of some criminal law theorists but has thus far failed to attract significant attention among international scholars: The challenge involved in translating retributive principles into a blueprint for real-world justice institutions. This Part first explores the tensions between a minimalist version of retributivism which does little practical work, and the problems presented by a deontological understanding of criminal justice which appears either to impose an impossible, absolute duty to punish, or, by virtue of limitations on the duty's reach, fails to constrain many of the most important questions surrounding the establishment and enforcement of ICL. This Part then examines the implications for ICL of two approaches, both figuring in the work of Michael Moore, that offer some accommodation between retributive goals, on the one hand, and the competing values and constraints that accompany the work of criminal justice institutions. The first of these, consequentialist retributivism, treats retributive justice as a good to be maximized and balanced against other equivalent goods. The second, threshold deontology, provides an exception to retributive obligations when overwhelming non-retributive considerations so demand. These more flexible understandings of retributivism offer greater plausibility as justifications for ICL, but this plausibility comes at the price of significant indeterminacy, revealing that retributive arguments are available both to proponents of international prosecutorial efforts and to advocates of alternative,

quasi-punitive or non-punitive approaches. Because both understandings also acknowledge non-retributive values, they undermine Moore's suggestion that retributivism is a complete theory of punishment that operates to the exclusion of non-retributive justifications.

Part 5 identifies and qualifiedly defends a function of retributivism that I label "good reason retributivism." As the competing retributive theories all reveal, the most that retributivism can provide is a powerful, but non-exclusive, reason to punish. According to this value pluralist understanding, the wrongdoing of the offender provides a *prima facie* argument in favor of punishment. This understanding also acknowledges, however, that desert does not provide an exclusive reason to punish, and that both policy makers and participants in the justice system may balance retributive values against non-retributive values. While this approach shares the indeterminacy of all attempts to accommodate retributivism to real world constraints, I indicate several reasons why good reason retributivism has normative force for ICL and provides a useful descriptive framework for understanding the existing ICL regime.

Part 6, finally, strikes a note of caution regarding the significance of punishment theory for the questions most debated by ICL scholars. Focusing on four specific contexts—the reach of substantive ICL, the debate over amnesty, case selection, and sentencing—it argues that consensus positions are defensible through multiple approaches to punishment while other questions will remain divisive irrespective of whether there is general agreement regarding the appropriate punishment philosophy.

2. RETRIBUTIVISM AND ITS ALTERNATIVES

Retributivism is the approach to criminal law that justifies punishment based on the desert of the offender. It is in this way distinct from utilitarian justifications that emphasize the positive social consequences of punishment, such as crime prevention. This brief summary provides a basic, uncontested account of retributivism, one that is familiar to theorists of criminal law,¹² and

¹² See Mitchell Berman, *Two Types of Retributivism*, in *THE PHILOSOPHICAL FOUNDATIONS OF CRIMINAL LAW* (R.A. Duff & Stuart Green eds., 2011) ("Over the ensuing years . . . a consensus has arisen. As CL Ten put it in a much read book, 'Contemporary retributivists treat the notion of desert as central to the retributivist theory, punishment being justified in terms of the desert of the

also to ICL scholarship.¹³ As I shall elaborate, this statement is also incomplete in important ways. For instance, it does not explain how a retributivist should resolve the tradeoffs that inevitably accompany the real world implementation of criminal justice. It does not identify the weight to be given retributivism in the face of other competing interests. Nor does it explain how much of the criminal justice system should be guided by retributive thinking. For example, if retributivism provides a guiding philosophy for judges, can it do likewise for prosecutors, as well as for legislators and police officers?¹⁴ Applying retributivism to such questions requires one to choose a distinct version of retributivism, or to supplement retributive thinking with consideration of other values.

Nevertheless, even this basic, incomplete account of retributivism is instructive for appraising the role of punishment theory in ICL. For one, this basic account provides a means of distinguishing retributive from non-retributive theories. The best-known competitors to retributivism are utilitarian approaches focused on crime prevention through deterrence, incapacitation, denunciation, and rehabilitation.¹⁵ One may also add to this list of utilitarian rationales expressive approaches to criminal law, which have featured prominently in ICL scholarship, although the classification of these approaches depends in part on what work the expressive capacity of criminal law is meant to do.¹⁶

offender.”) (quoting CL TEN, CRIME, GUILT, AND PUNISHMENT 46 (1987)). Berman notes that retributivists’ accounts differ as to whether it is criminal punishment itself, or merely suffering, that is merited by desert. The distinction is important because, in the latter scenario, further explanation is required for why the state should establish institutions to mete out deserved suffering. *Id.*

¹³ See, e.g., deGuzman, *supra* note 2, at 301 (“Although retributive theories take a variety of forms, all retributivists share the belief that desert justifies the infliction of punishment and mandates its quantity.”).

¹⁴ See *infra* Part 4.

¹⁵ See, e.g., Michael S. Moore, *A Taxonomy of Purposes of Punishment*, in FOUNDATIONS OF CRIMINAL LAW 60-61 (Leo Katz, Michael S. Moore & Stephen J. Morse eds., 1999) (discussing the theories of “incapacitation, special deterrence, general deterrence, denunciation, rehabilitation, and retribution”).

¹⁶ Expressive rationales that highlight the ability of criminal punishment to prevent crime, or realize other extrinsic social benefits are utilitarian in nature. For examples, see Luban, *supra* note 10; Amann, *supra* note 5; and Sloane, *supra* note 3. If an expressive goal of punishment is to cultivate societal support for desert-based punishment itself, then that type of expressive rationale may be integrated into the variant of retributivism known as consequentialist retributivism. See *infra* note 136 and accompanying text. To the extent that

Of these, the deterrence rationale has featured especially prominently in the sentencing jurisprudence of international tribunals,¹⁷ although it has garnered substantial skepticism among scholars.¹⁸ But advocates of international criminal tribunals have put forward other, more complex and ambitious preventative goals. A commonly stated aspiration is that the prosecution of high level-offenders can have transformative social effects in affected societies. By revealing the truth about atrocities, satisfying victim demands for justice, and emphasizing individual over collective responsibility, the hope is that tribunals will help break cycles of violence, delegitimize criminal regimes, and promote transitions to peaceful liberal societies rooted in the rule of law.¹⁹ Advocates of ICL have also emphasized the expressive potential of trials. As David Luban puts it, “the most promising justification for international criminal tribunals is their role in *norm projection*:

expression merely forms part of the definition of punishment—in the sense that criminal punishment by definition expresses condemnation for wrongdoing whereas other harsh measures do not—then the expressive function belongs to all approaches to punishment, including retribution. See LEO ZAIBERT, PUNISHMENT AND RETRIBUTION 45 (2006) (noting that authors of expressive or communicational theories of punishment “frequently . . . equivocate as to whether the moral censure or condemnation is part of the definition of punishment or part of what justifies it”).

¹⁷ See, e.g., Prosecutor v. Delalic, *supra* note 9, ¶ 806 (stating that “two of the main purposes of sentencing for these crimes are deterrence and retribution.”). Some ICTY sentencing judgments have been less accepting of retributive rationales. See Ohlin, *supra* note 9, at 384 n.56 (surveying ICTY sentencing judgments).

¹⁸ See, e.g., Greenawalt, *supra* note 7, at 605-07 (discussing problems of inter-State cooperation and state sovereignty which confound the goals of deterrence); Julian Ku & Jide Nzelibe, *Do International Criminal Tribunals Deter or Exacerbate Humanitarian Atrocities?*, 84 WASH. U. L. REV. 777 (2006) (questioning the value of applying deterrence theory in atrocity prevention); Sloane, *supra* note 3, at 74 (maintaining that some criminals weigh the costs and benefits in self-interested and idiosyncratic ways frustrating the goals of deterrence); David Wippman, *Atrocities, Deterrence and the Limits of International Justice*, 23 FORDHAM INT’L L.J. 473 (1999) (denouncing deterrence as “at best plausible but [a] largely untested assumption”).

¹⁹ See, e.g., Jose E. Alvarez, *Rush to Closure: Lessons of the Tadic Judgment*, 96 MICH. L. REV. 2031, 2031-32 (1998) (distilling the “goals most frequently articulated by the diplomats who established these tribunals and the relevant epistemic community of international lawyers,” including these goals: to “channel victims’ thirst for revenge toward peaceful dispute resolution, tell the truth about what occurred, thereby preserving an accurate historical account of barbarism that would help prevent its recurrence, [and] perhaps most importantly, restore the lost civility of torn societies to achieve national reconciliation”).

trials are expressive acts broadcasting the news that mass atrocities are, in fact, heinous crimes and not merely politics by other means."²⁰

The distinction between retributive and non-retributive rationales is sometimes a source of confusion, and the categorization of justifications has been a distinct focus of criminal law scholarship, with several important essays dating from the 1970s and 1980s when criminal theory experienced its well-documented retributivist revival.²¹ Michael Moore has provided perhaps the most exhaustive catalog, identifying seven different views that "are often paraded as retributivist, but in fact are not."²² As I outline below, several of these rationales surface in debates about ICL.

2.1. *Retributive Justice as Harsh Justice*

Moore first rebuts the misconception that retributivism is "identified with a particular measure of punishment such as *lex talionis*, an eye for an eye, or with a kind of punishment such as the death penalty."²³ Whereas retributivists are "commonly committed to the principle that punishment must be graded in proportion to desert . . . they are not committed to any particular penalty scheme nor any particular penalty as being deserved."²⁴

This distinction is important for contemporary debates about ICL sentencing practices, which have focused on the perceived

²⁰ Luban, *supra* note 10, at 576. See also Amman, *supra* note 5, at 118 (explaining that "[l]aw reflects a society's values, what it esteems, what it abhors." (footnote omitted)); deGuzman, *supra* note 2, at 270 (arguing that the Court's case selection should aim primarily to maximize the Court's expressive impact); Sloane, *supra* note 3, at 83 ("Emphasizing the expressive function of punishment in the context of ICL would enable tribunals to begin to address proportionality in a non-arbitrary way.").

²¹ See Russell L. Christopher, *Detering Retributivism: The Injustice of Just Punishment*, 96 NW. U. L. REV. 843, 845-46 (2002) (collecting respective references to retributivism's "revival," "resurgence," "renaissance," and "rise" during this period).

²² MICHAEL S. MOORE, *PLACING BLAME: A THEORY OF THE CRIMINAL LAW* 88 (1997) ("Retributivism differs from a variety of views that are often paraded as retributivist, but that in fact are not.").

²³ *Id.* *Lex talionis* does figure in Kant's account of punishment. IMMANUEL KANT, *METAPHYSICAL ELEMENTS OF JUSTICE: PART I OF THE METAPHYSICS OF MORALS* 231-32 (John Ladd ed., 2d ed. 1999) (1797).

²⁴ *Id.*

leniency of international sentencing.²⁵ For Mark Drumbl, this leniency “weakens retribution’s credibility as a penological goal for international criminal law.”²⁶ Embracing a similar assumption, Jens Ohlin advances a retributivist approach to international sentencing which distinguishes between two variants of sentencing proportionality, an ordinal proportionality or “defendant-relative” concept that assigns higher sentences to more culpable defendants and lower sentences to less culpable defendants, and a cardinal proportionality or “offence gravity” concept that requires the punishment to “match the gravity of the offense.”²⁷ Ohlin notes that an over-emphasis on defendant-relative gravity by international tribunals will undermine offense-gravity proportionality by imposing lenient sentences on serious offenders of mass atrocities who happen to have committed marginally less grave offenses than other, even more culpable offenders.²⁸

²⁵ See DRUMBL, *supra* note 4, at 156 (“If retribution truly were to reflect the gravity of extraordinary international criminality, death might even fall short”); Ohlin, *supra* note 9, at 373 (“When compared against sentences handed down in the United States for regular crimes, the sentences of international criminal tribunals are typically far lower, even though the crimes at these tribunals are far greater in both moral depravity and legal significance.”); Kevin Jon Heller, *A Sentence-Based Theory of Complementarity*, 53 HARV. INT’L L.J. 85, 118-22 (summarizing the comparative leniency of ICTY and ICTR sentences for international offenses involving murder, torture, and rape to average sentences in many countries for murder, torture, and rape).

²⁶ See, e.g., DRUMBL, *supra* note 4, at 156 (“In sum: for those who commit the most egregious crimes of concern to the international community as a whole, sanctions tend to range from less severe to as severe as the punishments for ordinary murder in many countries. But extraordinary international crimes are supposedly graver than serious ordinary common crimes. The fact that punishment does not match this enhanced gravity weakens retribution credibility as a penological goal for international crimes.”).

²⁷ Ohlin, *supra* note 9, at 398. On ordinal versus cardinal proportionality, see generally, Andrew Von Hirsch, *Proportionality in the Philosophy of Punishment*, in 16 CRIME AND JUSTICE 55, 75-79 (Michael Tonry ed., 1992).

²⁸ Ohlin, *supra* note 9, at 399 (arguing that, for serious international crimes, “defendant-relative proportionality and offence-gravity proportionality are actually at cross purposes, in that fidelity to defendant-relative proportionality may lead a court to lower the sentence of a defendant to such a degree that it violates the intuitive directives of offence-gravity proportionality.”). See also Koller, *supra* note 2, at 1026 (“[A]rguments from retribution face further hurdles in the context of international criminal law. As a practical matter, penal sanctions of any form are comparatively trivial as retribution for the crimes addressed by international criminal law, such as genocide or other instances of mass atrocity. If a domestic court sends the murderer of one person to prison for life or even executes him, what punishment is appropriate for the mass murderer of thousands?”).

There is much in Ohlin's approach that I agree with, although his appeal to offense gravity proportionality begs the question of how one determines, in some objective sense, which punishment matches any particular offense. Perhaps Ohlin's distinction has more practical impact if one recharacterizes it in terms of two types of ordinal proportionality: a narrower concept that compares defendants only to other defendants appearing before the same international criminal tribunal (or maybe to other international criminal defendants as a class), and a broader concept that compares ICL defendants to the broader class of ordinary criminal defendants.²⁹ If, for example, domestic mass murderers are generally accorded life sentences, then under the broader proportionality framework, it makes no sense, absent other intervening considerations, to give an equally or more culpable international defendant less than life merely because that international defendant has an even guiltier co-defendant.

If it is indeed the case that a narrow concept of defendant-relative proportionality has led international tribunals to impose sentences that are excessively low in comparison to what a broader proportionality metric would require, then a broader proportionality concept that looks to domestic practices can inform a retributivist critique of international sentencing practice.³⁰ Although this critique will happen to argue in favor of higher

²⁹ This broader proportionality concept is at the heart of Drumbl's critique, which notes that sanctions for international offenses "tend to range from less severe to as severe as the punishments for ordinary murder in many countries," even though "extraordinary international crimes are supposedly graver than international offenses." See DRUMBL, *supra* note 4, at 157. I have elsewhere expressed a related concern about treating international offenders as a closed universe for purposes of determining sentences. See Alexander K.A. Greenawalt, *The Pluralism of International Criminal Law*, 86 IND. L.J. 1063, 1125 n.281 (2011).

³⁰ Notably, the statutes of several international criminal tribunals expressly authorize judges to take account of local sentencing practices. See Statute of the International Criminal Tribunal for Rwanda, art. 23, available at <http://www.unictt.org> ("In determining the terms of imprisonment, the Trial Chambers shall have recourse to the general practice regarding prison sentences in the courts of Rwanda."); Updated Statute of the International Criminal Tribunal for the Former Yugoslavia, art. 24, available at <http://www.icty.org> ("In determining the terms of imprisonment, the Trial Chambers shall have recourse to the general practice regarding prison sentences in the courts of the former Yugoslavia."); Statute of the Special Court for Sierra Leone, art. 19, available at <http://www.sc-sl.org> ("In determining the terms of imprisonment, the Trial Chamber shall, as appropriate, have recourse to the practice regarding prison sentences in the International Criminal Tribunal for Rwanda and the national courts of Sierra Leone.").

sentences, its underlying logic is agnostic about what sentences are appropriate at the domestic level. There is nothing intrinsic to retributive theory that dictates whether, as a general matter, sentences should be harsher or more lenient.³¹ For instance, when Anders Behring Breivik received a 21-year sentence for murdering 77 people, he received the highest sentence permissible under Norwegian law.³² A society like Norway may legislate a maximum sentence of 21 years for even the worst offenses but rely on retributive reasoning when distributing punishments within the permitted range.

It also bears observing that retributive thinking restrains utilitarian impulses toward harshness. U.S. theorists, for instance, have invoked retributive theory to decry a variety of practices—including mandatory minimum sentences, three-strikes-and-your-out-laws, dangerous offender and sexual predator laws, and the punishment of strict liability offenses, on the ground that these practices impose suffering not justified by the desert of the accused.³³ The typical focus of international trials on political leaders charged with crimes of great societal impact carries with it its own pressures. For example, interests of social harmony might favor the imposition of harsh punishment on a political leader widely perceived to have directed mass atrocities, yet retributive principles will resist this result to the extent it is not justified by the established desert of the accused.³⁴

³¹ This is not to say that principles of justice do not impose any absolute limits on the practice of punishment. For instance, most would agree it is unjust to impose a lengthy prison sentence for a mere speeding violation, and that some forms of punishment (for instance, torture) are unjustifiable no matter how serious the offense. Whether such constraints are intrinsic to retributive theory itself or instead belong to some other principle of justice is a question outside the scope of this Article.

³² Mark Lewis & Sarah Lyall, *Norway Killer Gets the Maximum: 21 Years*, N.Y. TIMES, Aug. 24, 2012, at A3.

³³ Michael Tonry, *Can Twenty-first Century Punishment Policies Be Justified in Principle?*, in RETRIBUTIVISM HAS A PAST: HAS IT A FUTURE? 3 (Michael Tonry ed., 2011).

³⁴ The international tribunal practice has recognized this restraining feature of retributivism. See, e.g., *Prosecutor v. Kordic & Cerkez*, Case No. IT-95-14/2-A, Judgment, ¶ 806 (Int'l Crim. Trib. for the Former Yugoslavia Dec. 17, 2004), at 1075 (“[U]nlike vengeance, retribution incorporates a principle of restraint; retribution requires the imposition of a just and appropriate punishment, and nothing more”) (quoting *R. v. M.* (C.A.) [1996] 1 S.C.R. 500, ¶ 80) (emphasis in original).

2.2. *The Utility of Desert*

Another common tendency is to label as retributive approaches that promote desert-based punishment for instrumental reasons. Yet as Moore elaborates, retributivism is distinct from the views that punishment satisfies the thirst for vengeance of victims, or of society as a whole; that punishment prevents vengeful victims from taking the law into their own hands; and that punishment provides the vehicle by which society denounces wrongdoing.³⁵

This dual use of the retributivist label exists even among scholars who acknowledge the operative distinction. For example, a recent article by Andrew K. Woods opens with the statement that “[T]he international criminal regime is deeply retributive.”³⁶ Yet the remainder of the article makes clear that Woods is not concerned at all with retributive justifications for ICL. In describing the ICL regime as retributive, Woods appears primarily to mean that this regime is punitive in nature, emphasizes incarceration as a response to individual criminal responsibility, and gives short shrift to alternative non-punitive or quasi-punitive measures.³⁷ The rationale for international criminal justice that Woods identifies and critiques is one focused on the “utility of desert,” the idea that desert-based punishment serves a positive social function by satisfying public demands for retribution.³⁸ As Woods acknowledges, this is a utilitarian approach to punishment, and he is “solely concerned here with evaluating the claim that the regime’s current retributive stance will produce favorable consequences.”³⁹ Thus, his analysis focuses exclusively on the possible social benefits of different responses to international crimes, and gives no attention to what demands, if any, retributivism itself rightfully has for ICL.⁴⁰

³⁵ *Id.* at 88-90. See also John Cottingham, *Varieties of Retribution*, 29 PHIL. Q. 116 (1979) (covering similar ground and reaching several of the same conclusions).

³⁶ Woods, *supra* note 7, at 634.

³⁷ Whether Woods is correct even on this point is disputable and depends in part on how one defines the “international criminal law regime.” See *infra* notes 200-09 and accompanying text.

³⁸ See Paul H. Robinson & John M. Darley, *The Utility of Desert*, 91 NW. U. L. REV. 453 (1996-1997).

³⁹ Woods, *supra* note 7, at 634 n.1.

⁴⁰ A similar limitation partly underlies Robert Sloane’s analysis of retributivism, which he rejects in favor of an expressive theory of international sentencing. See Sloane, *supra* note 3. Of the two variants of retributivism he identifies, one is a legal-anthropological model and proceeds from the observation

Similarly, Ohlin identifies a Rorschach-like quality according to which “punishment in international criminal law is at once retributivist and consequentialist, but at two different levels.”⁴¹ On the one hand, there is the “the basic fact that the guilty deserve to be punished,” and on the other hand, there is the fact that “the victims of various conflicts – say the Kurds in Iraq, the Kosovars in Yugoslavia, the Tutsi in Rwanda – may *feel* that the guilty deserve to be punished.”⁴² This subjective feeling animates a utilitarian rationale focused on international peace and security: “the point of international criminal tribunals is, in many cases, to convince victims to put down their arms and forgo reprisal attacks, and to submit their grievances to the rule of law.”⁴³ Nevertheless, observes Ohlin, “at the level of the victims, the justification is retributive.”⁴⁴

Ohlin’s characterization provides a useful reminder that different justifications for punishment may operate simultaneously for different stakeholders. Political decision-makers may establish an international criminal tribunal as part of a plan to advance international peace and security, and others – including victims – may welcome that decision on purely retributive grounds. But I do not see, as Ohlin would have it, how the convergence of these rationales establishes a unique theory of ICL that acknowledges “the true and ineluctable retributive nature of the criminal process.”⁴⁵ Instead, the idea that desert-based punishment has social utility – common to utility-of-desert approaches at both the international and domestic levels – remains a utilitarian rationale, albeit one resting on the assumption that ordinary people accept retributive theory. This rationale operates independently from the

that “acts of retaliatory violence, if left unchecked, threaten to destroy the social bonds of the community.” *Id.* at 78. Thus, punishment “is the means by which the state terminates the otherwise escalating cycles of retaliatory violence within its community.” *Id.* As Sloane acknowledges, this theory, “strictly speaking, should be regarded as a kind of utilitarianism.” *Id.*

⁴¹ Ohlin, *supra* note 9, at 390.

⁴² *Id.* at 389.

⁴³ *Id.* Indeed, as Ohlin notes, “This dynamic is central to international criminal justice, especially since both the creation of the ICTY and the ICTR, as well as binding ICC referrals from the Security Council, are based on the Security Council’s Chapter VII authority to take measures to restore international peace and security.” *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.* at 392.

retributive claim that desert is an intrinsic reason to punish.

2.3. *Selective Punishment*

Some critiques of retributivism at the international level have drawn a connection between retributive theory and the regularity of punishment. Diane Amann notes that “[a]s a result of selectivity and randomness, just deserts have been meted out inconsistently, in very few conflicts, and on only a few defendants,” and argues that “[t]hese factors thus have disserved the goal of retribution.”⁴⁶ For Mark Drumbl, “the operation of international criminal law occasions a retributive shortfall in that too few people or entities receive just deserts while many powerful states and organizations are absolved of responsibility.”⁴⁷ As a result, “[t]he retributive function is hobbled by the fact that only some extreme evil gets punished, whereas much escapes its grasp, often for political reasons anathema to Kantian deontology.”⁴⁸ As both authors acknowledge, this shortfall has multiple causes and takes different forms. States are often unwilling to prosecute international offenses. When they do, or when international tribunals intervene, the overwhelming scope of mass atrocities combined with the limited resources and capacity of prosecuting institutions often ensures that only a tiny fraction of international criminal offenders will face prosecution.⁴⁹ Decisions to establish international criminal tribunals have themselves proceeded on a selective, ad hoc basis, reflecting, in Amann’s view, “a random confluence of political concerns.”⁵⁰ Moreover, the case selection of international criminal tribunals has consistently faced various accusations—some more persuasive than others—of political bias.⁵¹

⁴⁶ Amann, *supra* note 5, at 117.

⁴⁷ DRUMBL, *supra* note 4, at 153.

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ Amann, *supra* note 5, at 116.

⁵¹ The post-World War II IMTs focused exclusively on crimes perpetrated by members of the Axis powers, leading to accusations of “victor’s justice.” See, e.g., TELFORD TAYLOR, *THE ANATOMY OF THE NUREMBERG TRIALS: A PERSONAL MEMOIR* 641 (1992) (noting this accusation). The ICTR has received similar criticism for ignoring crimes committed by the Rwandan Patriotic Front (“RPF”), the predecessor of Rwanda’s current government. See Kenneth Roth, *ICTR: Address Crimes Committed by RPF, A Letter to the ICTR Prosecutor*, HUMAN RIGHTS WATCH (Dec. 11, 2008), available at <http://www.hrw.org/en/news/2008/12/11/ict-address-crimes-committed-rpf> (arguing that “[a] failure to [prosecute RPF crimes]

Both Amman and Drumbl invoke this selectivity to support non-retributive approaches to ICL. For Amman, the lesson is that international criminal tribunals should pursue expressive goals, issuing judgments that are attuned to the complex social meaning of criminal justice and that “foster[] acceptance and understanding of proscriptive norms.”⁵² For Drumbl, the retributive shortfall provides one of several reasons for international tribunals to defer to local solutions, including alternate, non-conventional methods of addressing past atrocity.⁵³

As regards the policy implications of selective punishment, I am sympathetic to both arguments,⁵⁴ but I am less certain that the problem of selectivity represents either a failure of retributive theory, or some inherent incompatibility between ICL and retributivism. Indeed, the problem of selectivity has most obvious relevance for utilitarian approaches to criminal law.⁵⁵ As both authors note, selectivity can undermine the goal of deterrence whose efficacy depends on the perceived likelihood of punishment for wrongdoing.⁵⁶ Similarly, under a utility-of-desert rationale,

would taint the perception of the Tribunal’s impartiality in carrying out its mandate and thereby undermine its legitimacy in the eyes of future generations”). Despite prosecuting offenses committed by all sides to the former Yugoslav conflicts, the ICTY has faced accusations of anti-Serb bias among Serbs. *See, e.g., Attitudes Towards War Crimes Issues, ICTY and the National Judiciary*, Ipsos Strategic Marketing, OSCE (Oct. 2011), available at <http://www.osce.org/serbia/90422> (indicating through a public opinion survey, *inter alia*, that 40% of Serbian respondents believe that the primary purpose of the ICTY is “to put the blame for war sufferings on Serbs,” that 49% of respondents believe that Serbia should not cooperate with the ICTY, that only 16% believe Serbia should cooperate in order “to achieve justice,” and that 73% believe the ICTY has a “different attitude toward individuals indicted for war crimes depending on their ethnicity”). The ICC, moreover, continues to face accusations of anti-African bias resulting from the fact that all its cases and investigations have dealt with crimes committed in Africa. *See, e.g., Katrina Manson & Addis Ababa, AU Chief Accuses International Criminal Court of Chasing Africans*, FIN. TIMES, May 27, 2013.

⁵² Amann, *supra* note 5, at 133.

⁵³ DRUMBL, *supra* note 4, at 149, 181.

⁵⁴ *See generally* Greenawalt, *supra* note 7.

⁵⁵ This was a point emphasized by early utilitarian thinker, Cesare Beccaria, who argued that the prevailing punishment practices of his day lacked sufficient certainty to ensure effective deterrence. *See* Cesare Beccaria, *Of Crimes and Punishment*, in ALESSANDRO MANZONI, *THE COLUMN OF INFAMY* 11 (Kenlem Foster & Jane Grigson trans., 1964) (1764). *See also* Noam Wiener, *Theories of Punishment in the Practice of International Criminal Tribunals* 31-34 (unpublished Ph.D. dissertation) (on file with author).

⁵⁶ *See* Amann, *supra* note 5, at 23 (arguing that “Both [retributive and deterrent] objectives depend on enforcement, and for many decades after

punishment might fail to quench the public thirst for vengeance if provided in insufficient quantity. Both these considerations can provide powerful arguments in favor of expressive strategies or alternatives to international criminal prosecution.

Nevertheless, the implications of a shortfall for retributivism itself are less clear. In the first place, the fact that a great majority of the guilty escape punishment, does not by itself clarify which rationale guides the punishment of those who are prosecuted. If the guilty are punished because of their desert, then retributivism continues to supply a plausible account of international criminal justice, at least with respect to those suspects.⁵⁷

In addition, as Drumbl acknowledges, selectivity is also a pervasive feature of domestic criminal justice.⁵⁸ The mere fact that international justice reflects greater—even substantially greater—⁵⁹ selectivity than domestic justice does not *ipso facto* defeat the retributive rationale for punishment, unless one can first establish that retributivism imposes some threshold of selectivity beyond which it becomes inapplicable. Moore, for one, has denied that any such requirement inheres in retributivism itself, and includes the principle of equality in his list of non-retributive ideas. As he observes, the principle of formal justice, dictating that “if we punish anyone, we must do so equally,” addresses a different issue than does retributivism’s attempt to explain “[w]hy we should punish anyone.”⁶⁰

Nuremberg, the international community did not enforce international criminal law. Although that has changed, contemporary enforcement is limited by two factors often lumped together as “selectivity”); Drumbl, *supra* note 4, at 151 (“[S]electivity poses a greater challenge to international criminal law than it does to national criminal law”) (footnote omitted).

⁵⁷ See DRUMBL, *supra* note 4, at 150 (“Retribution is the dominant stated objective for punishment of atrocity perpetrators at the national and international levels.”); deGuzman, *supra* note 2, at 303 (“Even national systems do not punish all wrongdoers, but retribution can justify the punishment they do inflict. In the same way, retribution provides some justification for ICC adjudication even if the ICC cannot inflict retribution on all those who deserve it and the punishments it awards do not always appear satisfactory in terms of proportionality.”).

⁵⁸ DRUMBL, *supra* note 4, at 151.

⁵⁹ See deGuzman, *supra* note 2, at 269 (“Given the massive numbers of cases national courts prosecute, only very exceptionally will a selection decision spark challenges to the legitimacy of the entire criminal justice system. . . . In contrast, since the ICC is limited to prosecuting a handful of cases out of thousands of potential cases, each selection attracts substantial attention.”).

⁶⁰ MOORE, *supra* note 22, at 90. Of course, one may be a “retributivist who also subscribes to the principle of formal justice.” *Id.*

None of this is to say, however, that the problem of selectivity—in all its guises—is irrelevant to a retributivist's views on ICL. But the more pertinent question is not whether retributivism is compatible with conditions of selectivity, but instead how commitments to retributive justice are best reconciled with an international criminal justice system that, like all criminal justice systems, is necessarily selective. This is a question that I consider in greater detail below, and I argue that there is greater flexibility to retributive theory than might be supposed. Indeed, as I shall elaborate, both Amman's and Drumbl's specific policy prescriptions may be recharacterized as options within a generally retributive approach to ICL.

3. POLITICAL RETRIBUTIVISM

A different sort of challenge to international criminal retributivism has to do with the political theory of international justice. One major variant of retributive theory roots the justification of punishment in social contract theory, and thus rests on certain presuppositions about the nature of the political community that administers criminal justice. This contractarian approach dates to Immanuel Kant—widely considered the father of retributive theory—who justified the state's coercive authority as deriving from the moral imperative to punish violations of the freedoms guaranteed by the social contract implicitly accepted by rights bearing citizens of the state.⁶¹ Justifications of this nature present a challenge for international criminal tribunals, which are creatures of the international community and operate at the supranational level, sometimes without the consent of the state most closely connected to the crimes in question. In addition, the contexts of mass criminality that typically inspire international prosecution tend to rupture the political community in ways not accomplished by ordinary domestic crimes.

Anthony Duff and Robert Sloane have both seized upon these

⁶¹ See generally IMMANUEL KANT, METAPHYSICAL ELEMENTS OF JUSTICE: PART I OF THE METAPHYSICS OF MORALS (John Ladd trans., 2d ed. 1999) (1797) (elaborating Kant's views on punishment). This, at least, is the theory commonly associated with Kant. Some of his writings indicate a more utilitarian approach to punishment. See Jeffrie G. Murphy, *Does Kant Have a Theory of Punishment?*, 87 COLUM. L. REV. 512-18 (1987) (identifying utilitarian strains in Kant's writings on criminal justice). For a summary of contractarian approaches to criminal law, see GUYORA BINDER, OXFORD INTRODUCTIONS TO US LAW: CRIMINAL LAW (forthcoming 2015).

unique features of the international regime to question whether retributive justifications for ICL can survive the transition from the national to the international stage. Although their arguments overlap to some degree they remain distinct and require separate consideration.

3.1. *The Political Legitimacy of International Tribunals*

For Duff, the central problem is the lack of legitimacy on the part of the international courts that sometimes try ICL offenses. He argues that “defendants are answerable to their fellow citizens (in whose names the courts act) for public wrongs that they commit, in virtue of their shared membership of the political community.”⁶² “The criminal trial,” he continues, “is the forum in which we formally call each other to account, as citizens, for such wrongs.”⁶³ It is this shared political community that provides a theory of jurisdiction, explaining why English courts may prosecute English thieves, but why “the theft committed by a Polish citizen against a fellow Pole in Poland is not morally, as it is not legally, within the jurisdiction of English courts.”⁶⁴

The trouble with international criminal trials, on Duff’s account, is that the international community is not itself a political community that benefits from the same type of shared citizenship, and thus it is not clear in many cases that international courts are any better situated to conduct trials than is Duff’s hypothetical English court that asserts jurisdiction over Polish citizens in Poland. Although Duff observes that an international court like the ICC might claim a surrogate role—“acting on behalf of the political communities which [national] courts fail to represent as they should”—he reasons that this explanation still leaves unanswered the question of “by what right can [the ICC] claim to act in [the political community’s] name?”⁶⁵ Duff does

⁶² Anthony Duff, *Authority and Responsibility in International Criminal Law*, in *THE PHILOSOPHY OF INTERNATIONAL LAW* 589, 595 (Samantha Besson & John Tasioulas eds., 2010).

⁶³ *Id.*

⁶⁴ *Id.* Notably Duff does not explore the implications of his theory for more complex transnational scenarios, such as when a Polish citizen robs an English citizen in New York City.

⁶⁵ *Id.* at 599. Duff also notes a separate problem concerning the possible nature of the community on whose behalf the ICC acts: “just when the arguments for international jurisdiction seem strongest, there might be doubt about whether there exists a political community to which the perpetrator could answer.” *Id.*

acknowledge that one might answer this question by recognizing humanity as a normative community that does not rise to the level of a political community, and he indicates that international criminal trials ultimately rely on this aspiration. He then concludes somewhat ambiguously by emphasizing that “when we think about just what that aspiration involves, we must realize how morally demanding it is.”⁶⁶

A full assessment of these arguments is beyond the scope of this Article and, I believe, unnecessary to its central claims. For my purposes, several points deserve mention. First, Duff’s challenge is a broad one leveled against ICL as a whole, and not merely against retributivist accounts of ICL. Indeed, his account implicitly calls into question much broader developments in international law, such as the rise of human rights law, which is premised on the idea that the international community as a whole has a stake in how individual states treat their own citizens, and may legitimately demand respect for universal human rights, as well as remedies for their breach at both the international and domestic levels. It also calls into question the institutional mechanisms underlying ICL—such as consent-based treaties and U.N. Security Council enforcement—by which states limit their sovereignty more broadly.⁶⁷ If one endorses this broad attack on the international

For instance, “crimes against humanity could surely involve such systematic, successful attacks that there really is no basis left on which to identify a political community to which their perpetrators ought to answer.” *Id.* (internal quotation marks omitted). Notwithstanding this observation, Duff appears unwilling to conclude that the legal consequence of such a campaign should be freedom from prosecution by any court whatsoever and he concludes, without elaboration, that “such perpetrators should not escape being called to account.” *Id.* Duff’s hesitation on this point raises a broader question about how thick a concept of political community his theory requires. Regardless, the idea that even such perpetrators should be prosecuted would seem to cut strongly in favor of legitimating international trials that do so, either based on a more expansive political retributivism or by appealing to pre-political moral retributivism.

⁶⁶ *Id.* at 604.

⁶⁷ The U.N. Security Council established both the ICTY and ICTR pursuant to its authority to safeguard international peace and security under Chapter VII of the U.N. Charter. See S.C. Res. 827, ¶ 2, U.N. Doc. S/RES/827 (May 25, 1993) (establishing the ICTY); S.C. Res. 955, ¶ 1, U.N. Doc. S/RES/955 (Nov. 8, 1994) (establishing the ICTR). The ICC is a treaty-based institution whose jurisdiction is limited to crimes committed on the territory of or by a citizen of a state party, the only exception being if the U.N. Security Council has acted under Chapter VII of the U.N. Charter to refer a situation to the Court. See Rome Statute of the International Criminal Court, *opened for signature* July 17, 1998, 2187 U.N.T.S. 90, arts. 12-13 [hereinafter Rome Statute]. So-called hybrid tribunals operate with the

legal system, it is no answer to shift from retributive justifications to utilitarian ones. As such, the argument does little to address the principal claims of this Article, which presuppose the baseline legitimacy of the international legal order, such as it is, and focus on the comparative contribution of retributive thinking for ICL as opposed to other approaches to punishment.⁶⁸

Second, if one accepts—as I and many others do—that a sufficient sense of common humanity does permit the international community to vindicate certain universal human rights, including, in appropriate circumstances, by holding criminal trials of individuals accused of specified international offenses, then contractarian retributivism will not operate to preclude ICL, although it will provide guidance regarding its appropriate reach. Adil Haque, for example, has advanced a “relational” theory of ICL, focused on cases “[w]hen the state is either a tool of group conflict or a passive observer to such conflict,” and it accordingly “fails to discharge its role as a neutral source of retributive justice with the ability to prevent cycles of group retaliation for past violence.”⁶⁹ This approach relies on precisely the type of claim to a common moral community that gives Duff pause. It embraces the “sociological premise” that the post-World War II world is one “in which the moral status of individuals is seen to rest not on religion, nationality, or other social group membership, but on a common humanity,” and, hence, “that just as the state supplanted the clan as the foundational moral community, the state has been supplanted in turn.”⁷⁰ Other justifications of ICL track similar

consent of the state to whose territory the tribunal’s jurisdiction is limited. *See* Agreement Between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone, Jan. 16, 2002, 2178 U.N.T.S. 137; Agreement Between the United Nations and the Royal Government of Cambodia Concerning the Prosecution Under Cambodian Law of Crimes Committed During the Period of Democratic Kampuchea, June 6, 2003, 2329 U.N.T.S. 117; Agreement Between the United Nations and the Lebanese Republic on the Establishment of a Special Tribunal for Lebanon, S.C. Res. 1757, Annex, U.N. Doc. S/RES/1757 (May 30, 2007).

⁶⁸ If anything, Duff’s critique reinforces my broader claim that a range of attitudes about international criminal law are consistent with retributive commitments. A retributivist who accepts Duff’s account of political legitimacy will oppose many international criminal trials even in cases where such prosecutions are the only feasible means of achieving retribution for grave wrongdoing.

⁶⁹ Haque, *supra* note 8, at 296.

⁷⁰ *Id.* at 296-97.

lines, emphasizing both a sense of common humanity, and a view that international institutions may appropriately intervene in cases of structural failure, where states have failed in their primary obligation to protect their populations.⁷¹

Third, the implications of Duff's critique are less clear for retributive accounts, such as Michael Moore's, that emphasize the pre-political moral intuition that punishing grave wrongdoing is intrinsically the right thing to do.⁷² Whether pre-political moral intuitions of this sort are sufficient to anchor a coherent approach to punishment is a disputed matter.⁷³ Nevertheless, the strong moral intuition that those who commit mass atrocities should be punished is at least arguably a relevant, if not exclusive, factor in shoring up the legitimacy of international prosecutorial efforts. At minimum, one can invoke this intuition as evidence that a sufficient sense of common humanity does indeed exist to support a retributivist model along the lines that Haque has proposed.

3.2. *The Fair Play Model of Contractarian Justice*

Sloane's critique focuses specifically on Herbert Morris's "fair play" or "benefits and burdens" model of criminal justice, which is perhaps the most prominent modern adaptation of Kantian punishment theory.⁷⁴ This contractarian model posits that one who violates rules designed to benefit the community acquires an unfair advantage: the violator enjoys the benefits protections afforded to all subjects of the legal system while also "renouncing

⁷¹ For a survey of the literature, see Kai Ambos, *Punishment Without a Sovereign? The Ius Puniendi Issue of International Criminal Law: A First Contribution Towards a Consistent Theory of International Criminal Law*, OXFORD J. LEGAL STUD. (2013). Ambos traces this approach back to Kant himself. See *id.* at 314 ("A supranational *ius puniendi* can be inferred from a combination of the incipient stages of *supranationality* of a valued-based world order and the concept of a world society composed of world citizens whose law—the 'world citizen law' (*Weltbürgerrecht*)—is derived from universal, indivisible and interculturably recognized human rights predicated upon a Kantian concept of human dignity.").

⁷² See generally MOORE, *supra* note 22.

⁷³ See, e.g., Dan Markel, *Retributive Justice and the Demands of Democratic Citizenship*, 1 VA. J. CRIM. L. 1, 22 (2012) ("My sense is that these capsule summaries, especially with their attending emphases on moral desert, are incapable of serving as a persuasive account that could justify *state* punishment from a retributive perspective.").

⁷⁴ Herbert Morris, *Persons and Punishment*, 52 THE MONIST 4, 475 (1968); Sloane, *supra* note 3, at 80.

what others have assumed, the burdens of self-restraint.”⁷⁵ The purpose of punishment, therefore, is to “[restore] the equilibrium of benefits and burdens by taking from the individual what he owes, that is, exacting a debt.”⁷⁶

Unlike Duff, Sloane does not question the political legitimacy of international criminal tribunals *per se*, but he argues that the types of mass atrocity crimes that typically give rise to international criminal prosecutions are themselves a poor fit for the fair play model. He urges that “it would be bizarre to conceptualize the *génocidaire* as a freerider on the hypothetical social contract of others not to destroy national, ethnic, racial, or religious groups, or to regard a serious human rights abuser as arrogating to himself a benefit that others voluntarily relinquished in their common interest,”⁷⁷ and also that “conceptualizing the war criminal or *génocidaire* as a deviant from social norms may make little sense where the criminal conduct would be more accurately described as conforming to a norm that prevails within the criminal’s literal community, be it national, ethnic, racial, or martial.”⁷⁸ Sloane further underlines that the state is often complicit in international crimes, and thus does not act as “the societal entity ensuring a just distribution of benefits and burdens, but on the contrary, as a prime force disrupting that distribution.”⁷⁹

Sloane’s critique is a nuanced and targeted one. His analysis does not lead him to reject ICL as a whole, but instead to favor, an alternate, expressivist, justification for international criminal tribunals.⁸⁰ His focus on Morris’ particular approach, moreover,

⁷⁵ Morris, *supra* note 74, at 478; Sloane, *supra* note 3, at 80 (quoting Morris). Others have endorsed this approach as well. See generally Wojciech Sadurski, *Theory of Punishment, Social Justice, and Liberal Neutrality*, in PUNISHMENT (Anthony Duff ed., 1993); GEORGE SHER, DESERT (1989).

⁷⁶ Morris, *supra* note 74, at 478; Sloane, *supra* note 3, at 80 (quoting Morris).

⁷⁷ Sloane, *supra* note 3, at 80.

⁷⁸ *Id.*

⁷⁹ *Id.* at 81.

⁸⁰ Indeed, there is some debate about whether the fair play model is in fact retributive. Scholars, such as Michael Moore and John Cottingham, have embraced it as such, albeit with some qualification on the latter’s part. See MOORE, *supra* note 22, at 107 (“It is true that if Morris succeeds he will have shown the *intrinsic* goodness of retribution—that is, that retribution is good in-and-of itself, and not because it is *instrumental* to the attainment of something else that is good”) (emphasis in original); Cottingham, *supra* note 35, at 243, 236 (noting that “the immediate focus . . . [of the fair play model] thus centers not on the offender but on the law-abiding citizen,” yet maintaining the model is indirectly

leaves open the possibility that other variants of retributive theory could survive his critique. Nonetheless, I am not convinced that the problems he identifies with the fair play account are unique to ICL, or that the conditions he identifies are quite so irreconcilable with the model.

In the first place, one could characterize certain episodes of mass atrocity in ways that better fit the theory. For example, a head of state who consolidates political power by directing a genocide against a minority population has gained a tangible advantage from his crimes that will be counteracted to some degree by incarceration. That the leader has acted with the overwhelming support of the non-victim population may not be fatal to the theory if one agrees that the leader has violated a norm that objectively benefits society (for example, the norm privileging a tolerant multi-cultural society over a genocidal homogenous society), even if most members of the community, as a subjective matter, do not endorse the norm as applied to the particular case in question. Indeed, a portion of the leader's culpability may lie in the very fact that he has injured society by cultivating a climate in which genocide has become socially acceptable. So framed, this scenario of social instability can still speak of unfair advantage and community harm brought about by the norm violation.

retributivist on the ground that "the means actually chosen for upholding fairness is to make the offender 'pay' for the unfair advantage," and further that the fair play model has "the best chance of providing a non-utilitarian rationale for the practice of punishment"). Others, such as Leo Zaibert and George Sher, are not so sure. By depicting punishment as the payment of a debt to society, the fair play model mirrors utilitarian approaches by emphasizing the social benefits of punishment. It is in this way difficult to square Morris's concern for "maintaining and restoring a fair distribution of benefits and burdens" with a view that it is the desert of the criminal rather than the achievement of social benefits that justifies punishment. Morris, *supra* note 74, at 483. Leo Zaibert, PUNISHMENT AND RETRIBUTION 119 (2005) ("I find it difficult to accept that Morris' fair play version of retributivism is not, in the final analysis, concerned with consequences, just like any form of consequentialism. Morris after all admits, repeatedly, that the justification of punishment is 'related to maintaining and restoring a fair distribution of benefits and burdens [in society].' But the maintenance of this fair distribution of benefits and burdens in society strikes me as a consequence, or a 'good end,' of punishment in precisely the sense that Moore wishes to deny it is."); SHER, *supra* note 75, at 75 (observing that Morris "construes punishment's aim as controlling behavior" and that the fair play model therefore has "a strongly consequentialist element"). Note also that even John Cottingham, who describes the fair play model as indirectly retributivist, is ambivalent in his conclusion, observing that "if this approach is to be characterized as 'retributivist,' enormous caution is needed." See Cottingham, *supra* note 35, at 121.

Of course, to adapt the theory in this way requires some conceptual choices. It involves appealing to the objective interests of a society that is itself somewhat notional, rather than to the subjectively perceived interests of its individual members who may no longer consider themselves part of a common society. This adaptation only goes so far. As Duff observes, “crimes against humanity could surely involve such systematic, successful attacks that there really is no basis left on which to identify a political community,” yet he also concludes that “such perpetrators should not escape being called to account.”⁸¹

The more fundamental issue, in my view, is that the fair play model is not that compelling to begin with, even without considering the special circumstances of ICL. As J.L. Mackie has argued, “The trouble with this approach . . . is that it has little relation to most cases of punishment,” because it implies that punishment must be proportional to the advantage gained by the criminal, rather than to the wrongness of his act.⁸² As Mackie notes, the theory suggests that “if a businessman has secured a contract worth \$100,000, but has exceeded the speed limit in order to get to the relevant appointment on time, he should presumably be fined \$100,000, whereas a fine of \$1 would be enough for someone who murders a blind cripple to rob him of \$1.”⁸³ On this account, the trouble with the fair play approach is that it emphasizes “the advantage that may have been gained by the criminal in some sort of social competition, whereas the point of punishment surely lies not in this but in wrongness of his act and the harm that he has done or tried to do.”⁸⁴ Similarly, a retributivist theory of ICL will also do better to focus on the wrongness of ICL offenses and to invoke the shared moral status of a common humanity as the fundamental justification for the

⁸¹ Duff, *supra* note 62, at 600.

⁸² J.L. Mackie, *Retributivism: A Test Case for Ethical Objectivity*, in *PHILOSOPHY OF LAW* 680 (Joel Feinberg & Hyman Gross eds., 4th ed. 1991).

⁸³ *Id.* One might counter that Mackie has mischaracterized the relevant benefits. For instance, perhaps the benefit claimed by the driver is merely the ability to drive faster (and with greater risk to others) than permitted, whereas the murder’s advantage is that the dead victim cannot prevent the theft. I am grateful to Noam Wiener for these examples.

⁸⁴ *Id.* See also Duff, *supra* note 62, at 600 (“[A] rapist should be condemned and punished not for the social volatility or loss of trust that he caused, nor for the unfair advantage that he supposedly took over those who restrain their criminal impulses, but for the wrong that he did to the person whom he raped.”).

establishment of these offenses and their related international institutions.

4. INSTITUTIONAL RETRIBUTIVISM

The basic definition I have outlined provides a means of distinguishing retributive justifications from consequentialist ones. And as I have just described, common criticisms of retributivism in the international literature fail to demonstrate why desert based reasoning is any less compatible with international prosecutions than it is with domestic prosecutions. Nevertheless, this basic account of retributivism also remains incomplete in significant ways. In particular, it does not specify the weight that desert plays in punishment decisions. Does desert justify punishment in the minimalist sense of being merely necessary to punishment, or does it provide a sufficient, perhaps exclusive reason to punish? Depending on how one answers this question, retributivism is vulnerable to the critique—far more devastating than the objections leveled by international scholars—that the theory is of almost no use to decision makers charged with the establishment, design, support, and administration of real world justice institutions, be it at the domestic or international level. To obtain a more complete picture of how a retributivist might view ICL, one must go beyond the accounts of retributivism found in the ICL literature.

This Part examines the international institutional implications of five retributivist models. As the diverse conclusions reached under these models reveal, there is no single retributive theory of criminal justice institutions, and thus there can be no single retributive approach to ICL. Nevertheless, two basic trends are apparent. First, the understandings of retributivism that are most plausible for domestic law are likewise the most plausible for international law. Accordingly, the international setting does not pose any unique obstacles for retributive theory. Second, retributivist theory is compatible with a substantially larger range of opinion about international criminal justice efforts than might be supposed.

4.1. Minimalism

I first consider the minimalist version of retributivism, according to which blameworthiness is merely a necessary condition of punishment. This type of retributivism has been

variously referred to as “weak retributivism,”⁸⁵ “negative retributivism,”⁸⁶ or “side constrained”⁸⁷ retributivism because it does not provide an affirmative rationale for punishment. Instead, it merely prohibits the punishment of the innocent, and as a corollary, the imposition of punishment beyond what is justified by the offender’s desert. A related, slightly stronger version, maintains that wrongdoing permits, but does not demand, punishment.⁸⁸

The minimalist model’s implications for real world criminal justice would appear to be quite limited, because no one seriously argues that it is justifiable to deliberately punish the innocent. Nevertheless, as I have already noted, the culpability principle provides a powerful critique of practices that punish the guilty in excess of what they deserve.⁸⁹

ICL, by contrast, presents in many ways a more obvious fit for retributivist approaches. Prosecutions focus on especially grave instances of violent crimes such as murder, torture, and rape that are paradigmatic *malum in se* offenses.⁹⁰ There is broad agreement, moreover, that convictions and sentences must rest on considerations of individual blameworthiness.⁹¹ This commitment can provoke disagreement in particular contexts. A major challenge for ICL concerns how to assign individual responsibility in cases of mass criminality involving varying degrees of participation by countless participants. Particular debate has focused on the doctrine of joint criminal enterprise whose outer

⁸⁵ HLA HART, PUNISHMENT AND RESPONSIBILITY 3 (2d ed. 2008).

⁸⁶ Jeffrie G. Murphy, *Retributivism and the State’s Interest in Punishment*, in CRIMINAL JUSTICE NOMOS XXVII 159 (Jr. Pennock & J.W. Chapman eds., 1985).

⁸⁷ R.A. DUFF, PUNISHMENT, COMMUNICATION, AND COMMUNITY 11 (2003).

⁸⁸ See Mackie, *supra* note 82, at 680.

⁸⁹ See *supra* note 33 and accompanying text.

⁹⁰ For example, the ICC’s jurisdiction is limited to genocide, crimes against humanity, and war crimes. Rome Statute, *supra* note 67, at arts. 5-8.

⁹¹ See, e.g., KAI AMBOS, 1 TREATISE ON INTERNATIONAL CRIMINAL LAW: FOUNDATIONS AND GENERAL PART 2011 (2013) (“In general, international criminal tribunals have recognized since Nuremberg that criminal responsibility presupposes criminal guilt or culpability.”); Prosecutor v. Tadić, Case No. IT-94-1-A, Judgment, ¶ 186 (Int’l Crim. Trib. for the Former Yugoslavia July 15, 1999) (“The basic assumption must be that in international law as much as in national systems, the foundation of criminal responsibility is the principle of personal culpability: nobody may be held criminally responsible for acts or transactions in which he has not personally engaged or in some other way participated (*nulla poena sine culpa*).”).

reaches, as developed by the International Criminal Tribunal for the former Yugoslavia ("ICTY"), permit the conviction of relatively minor participants in criminal enterprises for the foreseeable offenses of others committed outside the common plan.⁹² There is also debate concerning standards for superior responsibility, which can hold military commanders responsible for the offenses of subordinates that the commander negligently failed to prevent.⁹³ These debates, however, are more about the reach of the culpability principle than about its desirability. In other words, they reflect different understandings of criminal culpability rather than a disagreement over whether culpability is necessary to punishment.

These retributive features of ICL only go so far, however. A purely negative retributivism imposes important limitations on the criminal justice system, but it does not provide a rationale for punishment. It cannot explain why punishment is ever desirable, much less provide practical guidance on far more specific questions such as when it is desirable to establish an international criminal tribunal and what crimes that tribunal should prosecute. Necessarily, the minimalist model relies on non-retributive

⁹² The ICTY Appeals Chamber first announced this doctrine in the *Tadić* case. See Prosecutor v. Tadić, Case No. IT-94-1-A, Judgment (Int'l Crim. Trib. for the Former Yugoslavia July 15, 1999). Pursuant to this mode of participation, an accused is held criminally responsible for an international crime based on his or her participation, with the requisite *mens rea*, in a common plan among a plurality of persons to commit the crime. See *id.* ¶¶ 227-28. Most controversially, the Court held that participants in a JCE are also liable for crimes outside the common plan committed by other members of the group so long as the commission of the offense was foreseeable and the accused knowingly took the risk of its occurrence. *Id.* ¶ 228. On the controversy surrounding the ICTY's development of JCE, see generally MARK OSIEL, MAKING SENSE OF MASS ATROCITY 48-90 (2009); Allison Marston Danner & Jenny S. Martinez, *Guilty Associations: Joint Criminal Enterprise, Command Responsibility, and the Development of International Criminal Law*, 93 CAL. L. REV. 75 (2005); Verena Haan, *The Development of the Concept of Joint Criminal Enterprise at the International Criminal Tribunal for the Former Yugoslavia*, 5 INT'L CRIM. L. REV. 167 (2005); Jens David Ohlin, *Joint Criminal Confusion*, 12 NEW CRIM. L. REV. 406 (2009); Jens David Ohlin, *Three Conceptual Problems with the Doctrine of Joint Criminal Enterprise*, 5 J. INT'L CRIM. JUST. 69 (2007); Darryl Robinson, *The Identity Crisis of International Criminal Law*, 21 LEIDEN J. INT'L L. 925 (2008).

⁹³ See, e.g., Mirjan Damaška, *The Shadow Side of Command Responsibility*, 49 AM. J. COMP. L. 455, 493 (2001) (explaining that, while negligence in preventing criminal acts of one's subordinates can invoke superior responsibility, it is unclear whether there can be superior liability for the failure to punish); Danner & Martinez, *supra* note 92, at 129 (highlighting the confusion superior responsibility causes).

reasoning to guide these and other questions.

Moreover, this is not an account of retributivism that many self-professed retributivists embrace as adequate.⁹⁴ Michael Moore, the best-known modern proponent of a maximalist retributivism, has rejected the idea that a justification for punishment may be constructed on the combination of retributivism and utilitarian rationales such as crime prevention. “Retributivism has no room for such other reasons,” he argues.⁹⁵ That punishment might prevent crime is merely “a happy surplus for the retributivist, but no part of the justification for punishing.”⁹⁶ On this account, retributivism provides a sufficient, and not merely a necessary condition of punishment.⁹⁷ Moreover, the “moral responsibility also gives society the *duty* to punish,” whereby “[r]etributivism . . . is only a theory of justice, such that, if it is true, we have an obligation to set up institutions so that retribution is achieved.”⁹⁸

In the remainder of this Part, I consider the possibilities and implications for ICL of a more robust retributivism, one that, following along the lines identified by Moore, provides firmer guidance in the establishment and administration of justice institutions than does the minimalist version of retributivism.

4.2. *A Duty to Punish*

The version of retributivism that Moore himself embraces is deontological: it posits an *a priori* moral duty to punish the deserving. Moore describes this duty as “agent relative” in that it

⁹⁴ See Cahill, *supra* note 11, at 826 (“Retributivist literature is rife with references to the principle of desert-based punishment as a moral duty and to the corresponding claim that the retributive principle does not merely authorize punishment but affirmatively calls for its imposition on those who deserve it.”); see also *id.* at 826 nn.33-35 (citing Hegel, Kant, and more recent theorists for this view of retributivism); Douglas N. Husak, *Why Punish the Deserving*, 26 *Noûs* 4, 447-64, 453 n.11 (1992) (“Some philosophers distinguish *positive retributivism*, according to which criminality is sufficient to justify punishment, from *negative retributivism*, according to which criminality is necessary to justify punishment. Others define retributivism so that the latter is not a form of retributivism at all.”).

⁹⁵ MOORE, *supra* note 22, at 88-89.

⁹⁶ *Id.* at 89.

⁹⁷ See *id.* at 88 (“The distinctive aspect of retributivism is that the moral desert of an offender is a *sufficient* reason to punish him or her; the principle Quinton advocates makes such moral desert merely a *necessary* condition of punishment.”).

⁹⁸ *Id.* at 91.

“regards the act of punishing the guilty as categorically demanded on each occasion, considered separately.”⁹⁹

What does this duty demand, and how, precisely, does one honor the obligation “to set up institutions so that retribution is achieved?”

4.2.1. *Absolutism*

Michael Cahill observes that one possible interpretation of this duty is absolutist, placing all individual actors in the justice system under an obligation to avoid all failures of desert.¹⁰⁰ This absolutist approach “creates a clear affirmative goal for the application of the retributive principle: punish everybody who deserves it, to the full extent of their desert.”¹⁰¹ But the problem, immediately apparent, is that the duty imposes an impossible goal.¹⁰² Moreover, argues Cahill, the absolutist version of retributivism provides no means of setting priorities concerning which crimes to punish, because the obligation to prosecute a pickpocket is just as absolute as the obligation to prosecute a mass murderer. The result in the real world is a “practical fiasco.”¹⁰³

Applied to ICL, this fiasco borders on incoherence. The kind of absolutist model that Cahill describes is incapable of setting priorities between crimes is likewise incapable of providing the sort of jurisdictional theory underlying ICL, which by its nature rests on a division of labor between domestic and international authority. If retributivist obligations can be globalized, and do not presuppose obligations specific to a particular political community, then every state might be obligated to punish all offenses committed anywhere in the world. Perhaps, as Cahill suggests, the absolutist model might favor a counterintuitive policy of prosecuting those who can be caught and prosecuted most easily,

⁹⁹ *Id.* at 156. See also Cahill, *supra* note 11, at 826 (“Retributivist literature is rife with references to the principle of desert-based punishment as a moral duty and to the corresponding claim that the retributive principle does not merely authorize punishment but affirmatively calls for its imposition on those who deserve it.”).

¹⁰⁰ Cahill, *supra* note 11, at 826.

¹⁰¹ *Id.* at 828.

¹⁰² *Id.* (“In practice . . . limitations of resources, evidence, and knowledge make this goal impossible to achieve. Even if we wanted to punish every wrongdoer or offender, we could not find them all or muster sufficient proof of their crimes.”).

¹⁰³ *Id.* at 857.

irrespective of the gravity of their offenses.¹⁰⁴ In that case, the model would disfavor ICL in favor of domestic efforts to punish perpetrators of small-scale ordinary offenses.

This insight is of little consequence, however, because it does nothing to defuse the general impracticality of the absolutist model at whatever level of government one applies it. Indeed, this absolutist model is not one that has any identifiable champions. It serves instead as a heuristic, one that challenges the coherence of retributivism, much in the way that the specter of punishing the innocent challenges the adequacy of utilitarian approaches.

4.2.2. Agent-Relativism

One response among deontologists to the practical limitations of real world justice is to emphasize that the duty to punish is an agent-relative one that is only violated by an intentional or knowing failure to punish a culpable individual.¹⁰⁵ This qualification opens up various possibilities whereby certain failures to punish are not governed by the duty, and certain government functions lie outside the retributive obligation. For example, Moore argues that a judge imposing a sentence is bound by retributive duties, but a legislature that diverts funds away from the justice system to health care is not.¹⁰⁶ Offenders will escape justice on account of the legislature's actions, but the legislative decision does not, under this variant, reflect an intentional failure to punish the deserving.¹⁰⁷ As Cahill explores,

¹⁰⁴ *Id.* at 849.

[T]he absolutist model's enforcement scheme would probably concentrate its focus on the per-offender cost of apprehension. The severity of the crime in question should not enter the calculus, for in the absolutist account, the duty to punish wrongdoing is categorical and therefore applies to all offenses, great and small. Facing constraints on its ability to punish *all* deserving offenders, the model's second-best alternative would be to satisfy the duty to punish in as many cases as possible—that is, to maximize the number of deserving offenders receiving punishment. *Id.*

¹⁰⁵ MOORE, *supra* note 22, at 158 (“Agent-relative moral norms bind us absolutely only with respect to evils we either intend or (on some versions) knowingly visit on specified individuals.”).

¹⁰⁶ Michael S. Moore, *Four Reflections on Law and Morality*, 48 WM. & MARY L. REV. 1523, 1552 n.79 (2007).

¹⁰⁷ In Kantian terms, the legislature would at most be subject to an imperfect duty to pursue criminal justice, a duty that, like the obligation to help the poor and pursue other good ends, is enforceable and does not require the performance

versions of deontological punishment theory, including some mixed theories of criminal law, also allow for more utilitarian thinking on the part of police officers and prosecutors, avoiding the logistical fiasco of absolute retributivism.¹⁰⁸ These limitations, of course, reflect a substantial qualification of Moore's claims that "[r]etributivism has no room for . . . other reasons"¹⁰⁹ and that society has an "obligation to set up institutions so that retribution is achieved."¹¹⁰

How might this limited duty translate to the international setting? In the first place, this retributivism does not supply a theory of jurisdiction to advocate the establishment of ICL and its associated institutions. If retributivist obligations do not guide legislative resource allocations, then the deontologist cannot explain why a society should affirmatively choose to expend resources on the establishment of special international criminal tribunals charged with prosecuting specialized international offenses. The same, of course, might be said of domestic courts, in the sense that a legislature might in theory decline to allocate any funds whatsoever toward criminal justice. But this prospect is not just a fanciful hypothetical for international criminal tribunals, which have not existed for most of human history, and operate now as fragile institutions, with limited budgets and limited enforcement capability, and with inordinate resources expended on the trial of a small handful of offenders.

The deontological approach offers the most concrete guidance to judges who, with institutions already in place, and prosecutorial charging decisions already made, are tasked with reaching verdicts and imposing sentences. A retributivist will demand that desert-based reasoning guide these decisions. Yet even here, the duty to punish is vulnerable to frustration by limitations that are legislative in character. Prosecutions at the ICC, for example, are subject to various jurisdictional and admissibility requirements. Suspects can only be charged with a limited set of crimes and only

of any specific act. See IMMANUEL KANT, *GROUNDWORK OF THE METAPHYSICS OF MORALS* (1785), reprinted in *PRACTICAL PHILOSOPHY, THE CAMBRIDGE EDITION OF THE WORKS OF IMMANUEL KANT* 75 (Mary J. Gregor trans., 2005); Wiener, *supra* note 55, at 180-81.

¹⁰⁸ Cahill, *supra* note 11, at 836-40.

¹⁰⁹ MOORE, *supra* note 22, at 88-89.

¹¹⁰ *Id.* at 91.

under certain circumstances.¹¹¹ The Preamble to the Rome Statute, indicates that the Court's jurisdiction is limited to the "most serious crimes of concern to the international community as a whole."¹¹² An otherwise admissible case must be dismissed, for example, if it lacks "sufficient gravity."¹¹³ Accordingly, ICC judges remain under an obligation to dismiss cases that fail these statutory criteria even if doing so will allow the suspect to escape justice. To the extent that much or all of legislative decision-making is not subject to retributive duties, those establishing the rules *ex ante* may impose legal obligations requiring judges, when confronted with particular cases, to commit *prima facie* violations of their retributive duties.

A starker example presents itself in Rwanda's efforts to address the genocide committed against its Tutsi population in 1994. Faced with many tens of thousands more suspects in pre-trial detention than its overburdened court system could possibly try in a manner consistent with basic due process protections,¹¹⁴ Rwanda established a mandatory plea bargaining scheme according to which suspects who confessed became entitled to reduced sentences imposed by informal village tribunals known as *Gacaca*

¹¹¹ Rome Statute, *supra* note 67.

¹¹² *Id.* at pmb1.

¹¹³ *Id.* at art. 17.

¹¹⁴ A 2011 Human Rights Watch Report summarizes the situation as follows:

Tens of thousands of suspects were arrested after the genocide, often on the basis of a single unsubstantiated accusation of participation in the genocide. The number of detainees grew rapidly and quickly overwhelmed the prison system. By October 1994, an estimated 58,000 persons were detained in prison space intended for 12,000, and by 1998, the number of prisoners had reached around 130,000. Extreme overcrowding and lack of sanitation, food, and medical care created conditions that were universally acknowledged to be inhumane and which claimed thousands of lives. Many persons were held for years without charge and without their cases being investigated.

HUMAN RIGHTS WATCH, JUSTICE COMPROMISED: THE LEGACY OF RWANDA'S COMMUNITY-BASED GACACA COURTS (2011), *available at* http://www.hrw.org/sites/default/files/reports/rwanda0511webwcover_0.pdf.

"In December 1996 the government began to prosecute genocide suspects in conventional courts. By early 1998, only 1,292 persons had been judged and relatively few people had confessed to their crimes. The authorities realized that, at this rate, it would take decades to prosecute the large number of detainees." *Id.* at 13-14. The report also notes that Rwandan authorities "turned down proposals for foreign judges and other legal personnel to work alongside Rwandan judicial officials to help speed up the process." *Id.* at 14.

courts.¹¹⁵ For many participants, the *Gacaca* trials resulted in no additional jail time beyond that already served in pre-trial detention.¹¹⁶

How should a deontologist assess Rwanda's response to mass atrocity? A judge who intentionally sentences murderers to terms far below that which the legal system generally demands would appear to violate her duty to punish. Yet, if legislative actions remain outside the duty, then the *Gacaca* system provides an effective end run around this restraint. Judges accused of violating their duty to punish may blame the legislature for failing to supply them with the necessary legal authority. The legislature, in turn, may point to the absence of any duty to act otherwise. In this way, the *Gacaca* trials proceed without any violation of the agent-relative obligation imposed by the deontological model of retributivism.

One might counter, however, that the *Gacaca* trials present a case where even the legislative action is subject to retributive obligations. This is not, after all, a mere failure to fund. The legislature has instead taken the affirmative measure of creating an alternative system of justice, one established *ex post* in response to known crimes committed by a known set of perpetrators. This distinction is plausible, but it rests on an action/inaction distinction that has its own difficulties. The most serious is that it fails to provide an attractive explanation of how Rwanda should go about addressing the underlying dilemma that inspired its unique legislative response to genocide. The counterintuitive implication is that the retributivist will tolerate impunity for the vast majority of perpetrators as the best non-duty-violating option. The legislature may simply fail to act, maintaining a status-quo in which the court system is unable to provide most suspects with trials that comport with due process.

Apart from the question of legislative responsibilities, there remains the problem of how the deontological understanding guides the actions of other officials, such as investigators and prosecutors. Either they are also exempt from any obligation to punish offenders, and free to set enforcement priorities and pursue case selection on utilitarian grounds—in which case the retributive rationale translates only into a very limited judicial doctrine—or,

¹¹⁵ See *id.* at 19-20 (summarizing legislative background of Rwanda's *Gacaca* trials); *id.* at 73-80 (summarizing sentencing provisions).

¹¹⁶ See generally Greenawalt, *supra* note 7, 624-25.

retributivism remains subject to the same critique as under the absolutist model; namely, that it imposes an impossible duty.¹¹⁷

4.3. Consequentialist Retributivism

In addition to defending a deontological retributivism, Moore has identified another variant of retributivism that he describes as “consequentialist retributivism.”¹¹⁸ Notably, Moore himself does not endorse this rationale. According to Cahill, consequentialist retributivism lacks avowed adherents, but it nevertheless “appears to accord with the most natural, intuitive response to the problem of how retributive justice would or should work in practice.”¹¹⁹

This variant treats retribution as a good, such that the role of the justice system is to maximize the aggregate amount of deserved punishment. According to Moore, this approach remains “distinctly retributivist” because it embraces “the view that the guilty receiving their just deserts is an intrinsic good.”¹²⁰ This good, therefore, “is not an instrumental good,” such that it views deserved punishment as a means to achieve some other goal like crime prevention. As presented by Moore, consequentialist retributivism is entirely distinct from deontological retributivism. Nevertheless one might attempt to integrate the two approaches by deploying consequentialist retributivism as a mechanism for setting priorities among competing punishment obligations.¹²¹

Either way, Moore does not elaborate on the working of this approach in much detail, but he does provide some clues when he explains how consequentialist retributivism resolves two problems often leveled against deontological retributivism. First, it answers the critique advanced by David Dolinko (unfounded, in Moore’s view) that a deontological retributivist is unable to support actual institutions of punishment which, by their nature, will sometimes make mistakes and punish the innocent.¹²² A consequentialist

¹¹⁷ Cahill, *supra* note 11, at 836.

¹¹⁸ MOORE, *supra* note 22, at 157-58.

¹¹⁹ Cahill, *supra* note 11, at 861.

¹²⁰ MOORE, *supra* note 22, at 157.

¹²¹ For instance, Noam Wiener arrives at a similar result as consequentialist retributivism in arguing that “prosecutorial discretion ought to be applied from a deontological perspective, which regards the gravity of the crimes perpetrated and the responsibility of the perpetrator as the prime criteria for case selection.” Wiener, *supra* note 55, at 89.

¹²² David Dolinko, *Three Mistakes of Retributivism*, 39 UCLA L. REV. 1623

retributivist, according to Moore, “need not maximize the punishment of the guilty to the exclusion of other, equally valuable states of affairs, such as the non-punishment of the innocent. Such a retributivist may easily maximize *both* that those deserving punishment receive it *and* that those not deserving of punishment not receive it.”¹²³ Second, the consequentialist is able to justify decisions (which Moore sees as more problematic for deontologists like himself) to “refuse to punish some guilty persons in order to be able to punish other, more seriously guilty persons.”¹²⁴ The consequentialist retributivist can accommodate such decisions because “no matter how good it is that the guilty receive their deserts, more of that good is to be preferred to less of it.”¹²⁵

The consequentialist retributivist, in sum, has two building blocks at her disposal with which to accommodate the real-world constraints that accompany actual institutions of criminal justice. She may balance retributive goods against other intrinsic goods, and she may set priorities to maximize retributive justice, even when doing so involves an intentional refusal to punish someone who is deserving. As is readily apparent, these building blocks have significant purchase for institutional decision-making. They allow us to make sense of strategies such as plea-bargaining, and of decisions to grant witnesses immunity in exchange for testimony against their co-conspirators. They provide an agenda for legislative priorities and prosecutorial discretion that favors the prosecution of more serious offenses over less serious ones, and that, all else being equal, privileges the disbursement of justice to greater numbers of offenders rather than to fewer numbers. Finally, they allow actors in the justice system to take cognizance of (at least some) goods other than retributive justice.

Consequentialist retributivism also has substantial purchase as a theory of ICL. I will sketch out this theory in three parts. First I consider the implications of consequentialist retributivism for ICL under the (admittedly artificial) assumption that retribution is the only relevant good to be maximized. I argue that even under this highly constrained assumption, consequentialist retributivism has significant normative and explanatory power as a theory of

(1992).

¹²³ MOORE, *supra* note 22, at 157.

¹²⁴ *Id.* at 156.

¹²⁵ *Id.* at 157.

substantive international criminal institutions. Second, and perhaps counter-intuitively, I argue that even this artificially focused version of the theory fails to provide a conclusive justification for the establishment of international criminal tribunals or to resolve debates regarding the justifiability of amnesties or other alternatives to conventional prosecutions. Third, I consider how the model is both enhanced and complicated by the embrace of other, non-retributive goods.

4.3.1. ICL and Maximizing Retribution

An initial problem in developing a retributive account of ICL is that the normative theory of ICL addresses different questions than those typically asked by retributive theorists. As a *prima facie* matter, retributivism's claim that desert justifies punishment does not provide answers to the types of institutional and jurisdictional questions central to ICL. The consequentialist retributivist, however, has recourse to an institutional theory dictating that instruments of justice should be organized so as to maximize retribution in the aggregate. Accordingly, the promulgation of international criminal laws and the establishment of international criminal tribunals are desirable when these measures will maximize aggregate retribution in ways better achievable than through other measures.

This basic proposition resonates with standard accounts of ICL as a law focused on crimes that are extraordinarily grave and are uniquely resistant to redress through conventional processes of state punishment.¹²⁶ At the level of substantive law, this view of ICL reveals itself most clearly in the definition of crimes against humanity, which has evolved to prohibit certain grave offenses committed as part of a "widespread or systematic attack against

¹²⁶ For approaches to international criminal law or specific international crimes that incorporate these elements in one form or another, see, e.g., LARRY MAY, *CRIMES AGAINST HUMANITY* 63-79 (2004); WERLE, *supra* note 10, at 94 (noting that crimes prosecuted by international tribunals reflect a "context of organized violence"); Haque, *supra* note 8. Elsewhere, I have elaborated on an "enforcement theory" of ICL according to which "ICL is concerned with offenses whose very commission is associated with failures of domestic sovereignty, either because of state inability to prosecute or because of illegitimate state reluctance to prosecute. The very commission of an ICL offense, therefore, justifies heightened concerns that the standard bases of domestic jurisdiction are inadequate and that additional international bases of jurisdiction are appropriate." Greenawalt, *supra* note 29, at 1096.

any civilian population.”¹²⁷ These are the types of mass atrocities that are resistant to domestic enforcement because they are typically committed either with the collusion of a state, or under circumstances rendering the state unable to effectively bring the perpetrators to justice. International prosecutions of genocide and war crimes—the other “core” international offenses most frequently prosecuted at the international level—also typically involve contexts of systemic criminality.¹²⁸

At the procedural level, one sees a similar concept in operation in the admissibility requirements of the ICC, which impose both a standalone gravity requirement for all prosecutable offenses, and a complementarity requirement, mandating deference to domestic courts when a state with jurisdiction is genuinely investigating or prosecuting a particular case.¹²⁹

The consequentialist retributivist can explain this aspect of ICL in terms of a division of labor between domestic and international courts. For many reasons, domestic courts are better suited to prosecute most crimes. This is true as an economic matter, it is true as a logistical matter, and, given the democratic deficit inherent in international institutions,¹³⁰ it is true as a matter of comparative political legitimacy. In special cases, however, the domestic court system will predictably prove inadequate, and ICL can help bring retributive justice that is otherwise unachievable.

¹²⁷ Rome Statute, *supra* note 67, at art. 7.

¹²⁸ The definition of genocide does not explicitly require collective or systematic criminality, but the crime’s focus on preventing the destruction of entire groups necessarily associates the crime with collective criminality. *See, e.g.,* BETH VAN SCHAACK & RONALD C. SLYE, INTERNATIONAL CRIMINAL LAW AND ITS ENFORCEMENT: CASES AND MATERIALS 440 (2007) (noting that a single person “would rarely be capable of destroying an entire group, or even a significant part of a group,” and querying whether “such an individual [should] still be found guilty of genocide, even where his intended outcome was impossible to achieve”). War crimes take place in the context of collective violence represented by a state of armed conflict. Although they need not be systematic, the Rome Statute reflects the international prosecutorial trend when it claims jurisdiction over war crimes “in particular when committed as part of a plan or policy or as part of a large-scale commission of such crimes.” Rome Statute, *supra* note 67, at art. 8(1).

¹²⁹ *See* Rome Statute, *supra* note 67, at art. 17. Although complementarity as a formal legal requirement is unique to the statute of the ICC, the principle remains relevant to other institutional contexts. For example, the UN Security Council is unlikely to establish an ad hoc international criminal tribunal, as it did with the ICTY and the ICTR, if it believes that a domestic court is equally up to the task. In these contexts, the complementarity principle implicitly guides the exercise of the Council’s political discretion.

¹³⁰ *See supra* Part 3.

ICL can have this effect in multiple ways. It establishes a supra-national criminal prohibition that negates the legal effect of a state's efforts to exonerate the guilty. A crime's international status has the additional consequence of permitting prosecution by a specialized international criminal tribunal, or by a domestic court that, while lacking a traditional basis of criminal jurisdiction over the offense, recognizes universal jurisdiction over a limited set of international offenses.¹³¹

For the consequentialist retributivist, ICL's focus on especially grave offenses further reflects the limited capacity of international courts to provide an effective substitute for domestic justice. Given the extraordinary expense and effort involved in establishing and maintaining specialized international tribunals, and the at-best limited willingness of states to fund and support such efforts, international prosecutions are rightly focused on only the most egregious offenses whose prosecution will produce the largest quantum of retributive justice.

Yet, even for these gravest offenses, the most successful international tribunals have succeeded at prosecuting only a tiny fraction of the guilty. Because the quantum of retribution achieved matters to the consequentialist retributivist, this justification of ICL is vulnerable to a critique about selectivity along the lines advanced by Amann and Drumbl.¹³² Under this version of the critique, the problem is not that retributivism is inherently incompatible with selective punishment, but that the resources and energy devoted to international prosecutions would be better diverted to other retributive projects—such as the prosecution of ordinary crimes in domestic courts. In this way, consequential retributivist thinking can supply an argument against ICL.

On the other hand, as sketched by Moore, the consequentialist retributivist is concerned not with the number of perpetrators convicted *per se*, but with the aggregate amount of justice dispensed: the model justifies letting lesser offenders go free in order to secure the conviction of more serious offenders.¹³³ The conviction of a genocidal mastermind, therefore, should count more than the conviction of an ordinary murderer. Such

¹³¹ See generally UNIVERSAL JURISDICTION: NATIONAL COURTS AND THE PROSECUTION OF SERIOUS CRIMES UNDER INTERNATIONAL LAW (Stephen Macedo ed., 2004).

¹³² See *supra* Part 2.3.

¹³³ See *supra* note 124 and accompanying text.

comparisons are necessarily rough, but surely it is relevant, for example, that the tiny country of Rwanda lost several times more lives to murder during the few months of the state-orchestrated 1994 genocide than the United States has lost to murder during the last several decades.¹³⁴ A situation like Rwanda's arguably justifies the commitment of substantial resources to target a small, but highly culpable fraction of the accused; for example, the senior leadership.

The consequentialist retributivist model can also factor in the potential of international tribunals to facilitate retributive justice at the domestic level. For instance, international criminal trials may serve as instruments of transitional justice, supporting an ongoing political transition in a post-conflict society towards rule-of-law values that will facilitate domestic prosecutions. Under the right circumstances, an international trial might do so in a very concrete manner by incapacitating culpable political leaders who pose a threat to the transition.¹³⁵ Consequentialist retributivism also has the ability to incorporate expressive accounts according to which international trials promote norm internalization both in specially affected societies and on a global level.¹³⁶ Although there are many non-retributive benefits associated with a post-conflict state undertaking a successful transition to a more stable society, and with promoting global respect for the rule of law, these achievements also contribute to the consequentialist retributivist calculus to the extent that norm internalization facilitates domestic efforts to achieve retributive justice.

4.3.2. *The Challenge of Alternative Justice*

Consequentialist retributivism, as I have described it, provides a vocabulary for defending a system of ICL, one focused on the prosecution of especially grave offenses that are resistant to

¹³⁴ Estimates of the number killed in Rwanda in 1994 range from 800,000 to one million. The U.S. Department of Justice reports that "[t]he number of homicides reached an all-time high of 24,703 homicides in 1991 then fell rapidly to 15,522 homicides by 1999," after which "the number of homicides remained relatively constant." Alexia Cooper & Erica L. Smith, *Homicide Trends in the United States, 1980-2008, Annual Rates for 2009 and 2010*, U.S. DEP'T JUST. (Nov. 2011), available at <http://www.bjs.gov/content/pub/pdf/htus8008.pdf>.

¹³⁵ For an argument along these lines in the context of the former Yugoslavia, see Alexander K.A. Greenawalt, *Milosevic and the Justice of Peace*, in *THE MILOSEVIC TRIAL: AN AUTOPSY* (Timothy William Waters ed., 2013).

¹³⁶ See *supra* note 20 and accompanying text.

prosecution through the standard exercise of domestic jurisdiction. Perhaps, counter-intuitively, it is also compatible with other responses to mass atrocity, ones sometimes seen to conflict with the ambitions of ICL.

I have already mentioned the example of Rwanda's *Gacaca* trials, which offered greatly reduced sentences—often no more than community service—to those who confessed to participation in the genocide.¹³⁷ One can defend this arrangement on non-retributive grounds, for example by arguing that alternate justice mechanisms such as these are better calibrated to promote reconciliation and social stability in the wake of mass atrocities than are conventional trials.¹³⁸ But accounts of the *Gacaca* trials commonly track consequentialist retributivist lines: although they provided a diminished form of retribution, the *Gacaca* proceedings nevertheless ensured a greater quantum of retributive justice for a larger class of offenders than would otherwise have been possible given the infeasibility of providing every suspect with a full and fair trial in Rwanda's beleaguered court system.¹³⁹

In Rwanda, at least, these alternative proceedings took place in parallel with more conventional prosecutions, reflecting a tiered approach according to which the International Criminal Tribunal for Rwanda ("ICTR") and the Rwandan courts prosecuted a select group of high-level offenders, and the *Gacaca* trials processed a

¹³⁷ See *supra* notes 114-16 and accompanying text.

¹³⁸ See *Report on the Reflection Meetings Held in the Office of the President of the Republic from May 1998 to March 1999*, GOV'T RWANDA, 55-56 (1999), <http://repositories.lib.utexas.edu/bitstream/handle/2152/4907/2378.pdf?sequence=1> (summarizing discussions of Rwandan government commission and reporting, *inter alia*, arguments in favor of *Gacaca* courts to address Rwanda's genocide on the grounds that: "The new *Gacaca* . . . would . . . give the power to the people," that "new justice can reestablish the unity of Rwandans based on everybody's participation," that "[t]he new *Gacaca* will also help Rwandans to believe and even actively participate in justice," and that "[t]he people are not considering Government justice as theirs").

¹³⁹ See, e.g., Shannon E. Powers, *Rwanda's Gacaca Courts: Implications for International Criminal Law and Transitional Justice*, 15 ASIL INSIGHTS 17 (June 23, 2011), available at <http://www.asil.org/insights/volume/15/issue/17/rwanda-s-gacaca-courts-implications-international-criminal-law-and> ("Retributive justice emphasizes holding individuals accountable for their actions through commensurate punishment. On the one hand, *Gacaca* has been credited with the swift delivery of results that could not possibly have been achieved by the ICTR or the national courts. This is significant because overcrowding in Rwandan prisons had rendered conditions intolerable, and delayed trials also raise significant human rights concerns. Tellingly, despite criticisms of the *Gacaca*, virtually no feasible alternatives have been suggested." (footnotes omitted)).

larger group of mostly lower-level suspects.¹⁴⁰ Consequentialist retributive rationales are also available to even less traditional approaches, such as the Truth and Reconciliation Commission (“TRC”) by which South Africa offered individualized amnesties to perpetrators of apartheid-era political crimes who offered full, public confessions of their wrongdoing.¹⁴¹

In defending the TRC’s work from charges that it encouraged impunity, the Commission’s chair, Archbishop Desmond Tutu, characterized the amnesty process in part in punitive terms:

The amnesty applicant has to admit responsibility for the act for which amnesty is being sought, thus dealing with the matter of impunity. Furthermore, apart from the most exceptional circumstances, the application is dealt with in a public hearing. The applicant must therefore make his admissions in the full glare of publicity. Let us imagine what this means. Often this is the first time that an applicant’s family and community learn that an apparently decent man was, for instance, a callous torturer or a member of a ruthless death squad that assassinated many opponents of the previous regime. There is, therefore, a price to be paid. Public disclosure results in public shaming, and sometimes a marriage may be a sad casualty as well.¹⁴²

Dan Markel has advanced a deontological understanding of retributivism that he claims is satisfied by South Africa’s individualized amnesty.¹⁴³ According to this “confrontational” retributivism, the state satisfies its moral duty “by ensuring a connection ‘designed to bring home to the offender the nature of

¹⁴⁰ For a summary of ICTR judgments, see American University Washington College of Law War Crimes Research Office, *ICTR Judgment Summaries*, http://www.wcl.american.edu/warcrimes/ictr_judgements.cfm. Rwandan law provides that the most serious “category 1” offenders are subject to the most severe penalties. See HUMAN RIGHTS WATCH, *JUSTICE COMPROMISED*, *supra* note 114, at 18. These cases were originally tried in the regular Rwandan court system. *Id.* at 18-19. In 2008, the Rwanda Parliament passed a law transferring all but the highest-level category 1 suspects to the *Gacaca* courts. *Id.* at 112-13.

¹⁴¹ See generally THE TRUTH AND RECONCILIATION COMMISSION, *THE TRUTH AND RECONCILIATION COMMISSION OF SOUTH AFRICA REPORT, VOL. 1 (1998)* [hereinafter TRC FINAL REPORT], available at <http://www.justice.gov.za/trc/report/>.

¹⁴² *Id.* at 8-9.

¹⁴³ Dan Markel, *The Justice of Amnesty? Towards A Theory of Retributivism in Recovering States*, 49 U. TORONTO L.J. 398 (1999).

his criminal act,” and in which, so long as it acts impartially, “[t]he state . . . can determine how that connection is made.”¹⁴⁴

Markel defends the TRC process as a proportional response to wrongdoing that, in recovering states like South Africa, can fully satisfy a state’s retributive obligations.¹⁴⁵ Consequentialist retributivism, by contrast, permits a defense of individualized amnesty as an insufficiently proportionate, compromised form of justice that nevertheless represents a reasonable effort to maximize retribution in imperfect conditions.¹⁴⁶ South Africa’s experience provides at least two building blocks for this argument, both highlighted by Tutu. First, the prosecution of apartheid-era crimes was only possible as the result of a negotiated settlement that conditioned the political transition on an amnesty deal. According to Tutu, “[t]here is no doubt that members of the security establishment would have scuppered the negotiated settlement had they thought they were going to run the gauntlet of trials for their involvement in past violations for a political transition.”¹⁴⁷

¹⁴⁴ *Id.* at 432.

¹⁴⁵ *Id.* at 434 (arguing that “proportionality must be understood, not strictly with reference to the gravity of the crime instigating the encounter with the state, but rather, to the confidence that the state has in knowing the perpetrator’s recognition of his defeat, which implies the knowledge of the wrongfulness of his unrestrained will”). *Id.* at 436-40 (arguing that the TRC’s amnesty procedures are consistent with the author’s account of retribution).

¹⁴⁶ Wiener argues that amnesties are impermissible because they treat people as means to an end rather than as ends in and of themselves, thereby violating Kant’s categorical imperative. *See* Wiener, *supra* note 55, at 178. This argument indicates a possible limit to my suggestion that consequential retributivism can also supply criteria for choosing among competing deontological obligations. *See supra* note 121 and accompanying text. Nevertheless, it is not clear to me that this conclusion about amnesties necessarily flows from Kantian deontology. Although amnesties can serve social purposes, a decision simply to leave a suspect at liberty does not affirmatively use someone in the way that society does, for example, when it incarcerates a perpetrator in order to promote deterrence. Likewise, even if de jure amnesties themselves violate moral duties, one might still distinguish simple exercises of prosecutorial discretion, such as when an international prosecutor declines to press charges against a suspect who has benefitted from a domestic amnesty, from actions that affirmatively shield a suspect from prosecution, such as when an international court declares a domestic amnesty to be valid and legally binding.

¹⁴⁷ TRC FINAL REPORT, *supra* note 141, ¶ 22. Admittedly, this argument is somewhat vulnerable to the critique that it appeals to the non-retributive value of war avoidance, as South Africa could have endured a civil war without making any commitment to amnesty. A consequentialist retributivist may counter, however, that in that circumstance, the chance of achieving any retribution would

Second, and as with Rwanda some years later, the “country simply could not afford the resources in time, money and personnel” involved in conventional prosecutions, and “the route of trials would have stretched an already hard-pressed judicial system beyond reasonable limits.”¹⁴⁸ Whether or not one accepts the factual predicates of these arguments in the particular case of South Africa, these are precisely the types of arguments that would lead a consequentialist retributivist, given the right set of circumstances, to endorse particularized amnesty as the means best suited to achieve the maximum retributive justice feasible.

Unlike the deontological model, moreover, consequentialist retributivism supplies no definitive stopping point to this reasoning. For example, even a general amnesty measure—one that exempts a class of individuals from prosecution without providing individualized hearings and determinations—could still be said to provide a measure of retributive justice to the extent it is accompanied by official statements condemning the wrongdoers as a class, and perhaps also by factual findings that identify some individual offenders. Measures like these may fail Markel’s deontological account,¹⁴⁹ but a consequentialist retributivist could still defend this diluted justice as the best achievable under the circumstances. Indeed, a consequentialist retributivist could endorse complete impunity on the ground that resources and efforts are best preserved for other offenders whose prosecution does not face these obstacles.

4.3.3. *Consequentialist Retributivism and Other Values*

Thus far, my exploration of consequentialist retributivism has focused on only one value, that of maximizing retributive justice. Even within this narrow framework, I have argued that this retributivism can justify a surprising variety of responses to serious international offenses. It supplies a framework for understanding

have been far less certain.

¹⁴⁸ TRC FINAL REPORT, *supra* note 141, at 5.

¹⁴⁹ See Markel, *supra* note 73, at 441 (arguing that the confrontational account “affirmatively rules out any attempt to leave room for ‘political mercy’ in the form of a blanket amnesty in recovering states, or otherwise”). Markel does allow, however, that cases of supreme emergency can override retributive obligations. *Id.* at 25 (noting “the challenges to retributive punishment in cases of supreme emergency” and stating that “we need to consider more seriously how to identify instances of emergency, such that even the confrontational conception of retributive justice really should lose to threats to social peace”).

and justifying ICL, but it also supplies a vocabulary for those who argue, in particular cases, that conventional prosecutions should be set aside for the more lenient treatment provided by various forms of alternative justice, such as Rwanda's Gacaca trials and South Africa's TRC.

Of course, the assumption that retributive justice is the only operative value is an artificial one, as it ignores the other priorities, such as funding health care and providing for a national defense, that must compete with criminal justice for resources. Consequentialist retributivism, according to Moore, can acknowledge non-retributive values, and it "need not maximize the punishment of the guilty to the exclusion of other, equally valuable states of affairs."¹⁵⁰ Moore, however, devotes little attention to identifying these states of affairs or explaining how they interact with retributive values.

Perhaps the easiest case is when non-retributive goals complement retributive goals. In establishing the TRC, argues Tutu, South Africa did more than supply a measure of punishment: "Had the miracle of the negotiated settlement not occurred," he argues, "we would have been overwhelmed by the bloodbath that virtually everyone predicted as the inevitable ending for South Africa."¹⁵¹ The TRC also aspired to promote future reconciliation through "restorative justice which is concerned not so much with punishment as with correcting imbalances, restoring broken relationships—with healing, harmony and reconciliation."¹⁵² If South Africa can avoid bloodshed and promote future harmony with a particular institutional response to wrongdoing, then it should choose that response over other responses that do not promote these or comparable goals, at least to the extent that no aggregate loss of retributive justice is entailed. In some contexts, such as when the U.N. Security Council invokes Chapter VII of the U.N. Charter to establish an international criminal tribunal or refer a situation to the ICC, the advancement of non-retributive goals is a *de jure* requirement.¹⁵³

¹⁵⁰ MOORE, *supra* note 22, at 157.

¹⁵¹ TRC FINAL REPORT, *supra* note 141, at 5.

¹⁵² TRC FINAL REPORT, *supra* note 141, at 9 (noting also that "amnesty cannot be viewed as justice if we think of justice only as retributive and punitive in nature").

¹⁵³ Ohlin, *supra* note 9, at 391 (arguing that certain consequentialist dynamics

The more difficult question is how to resolve conflicts between retributive justice and other values. Moore expressly contemplates that consequentialist retributivism will sometimes favor non-retributive values over retributive values. He mentions, in particular, the value of not prosecuting the innocent.¹⁵⁴ Beyond that, little is clear. One problem concerns the types of values that belong in the calculus. The non-prosecution of the innocent, at least, is a value particular to criminal justice, one that has a similar moral and formal quality to the value of punishing the guilty. But there is no obvious reason why the consequentialist retributivist should not open the doors to any number of non-retributive goods, such as the desire to prevent crime, avoid bloodshed, and promote societal reconciliation. For a legislature that must set priorities and allocate scarce resources, consideration of values such as these is unavoidable.¹⁵⁵

The second problem concerns the weight of competing values. When Moore contemplates balancing deserved punishment against, "other, equally valuable states of affairs," the value he mentions – that of protecting the innocent – is one generally ranked higher than punishing the guilty.¹⁵⁶ That is evident, for example, in the fact that many legal systems require the establishment of guilt beyond a reasonable doubt, rather than applying, say, a "more probable than not" standard.¹⁵⁷ Once values such as peace-

are "central to international criminal justice, especially since both the creation of the ICTY and the ICTR, as well as binding ICC referrals from the Security Council, are based on the Security Council's Chapter VII authority to take measures to restore international peace and security. In this manner, then, criminal law intersects with international law, insofar as the criminal justice system for individuals is used as a way to help promote international peace and collective security.").

¹⁵⁴ MOORE, *supra* note 22, at 157.

¹⁵⁵ The international context also raises special problems regarding the attachments that bind particular political communities. One can agree, for example, that ICL is legitimated by the moral community of humanity as a whole, while nevertheless accepting that political communities owe special obligations to their own members that privilege the pursuit of local justice over global justice.

¹⁵⁶ MOORE, *supra* note 22, at 157.

¹⁵⁷ See, e.g., *In Re Winship*, 397 U.S. 358, 363-64 (1970) ("The requirement of proof beyond a reasonable doubt has this vital role in our criminal procedure for cogent reasons. The accused, during a criminal prosecution, has at stake interest of immense importance, both because of the possibility that he may lose his liberty upon conviction and because of the certainty that he would be stigmatized by the conviction. Accordingly, a society that values the good name and freedom of every individual should not condemn a man for commission of a crime when

making, social reconciliation, and crime prevention come into the picture as independent values that may be weighed alongside retributive goals, consequentialist retributivism becomes vulnerable to the critique that is not much of a retributivism at all, as it provides decision-makers with a menu of non-retributive values from which to draw, and does so without providing any guidance for resolving conflicts between these values.

4.4. *Threshold Retributivism*

Moore himself endorses a different way of explaining why one should “refuse to punish some guilty persons in order to be able to punish other, more seriously guilty persons.”¹⁵⁸ His “threshold deontology” maintains that there are limits to the weight of retributivist obligations, and thus that violations of agent-relative moral duties are permissible when necessary to prevent “extraordinary harms.”¹⁵⁹ Moore elaborates that “[a]s the consequences get more and more severe, the consequentialist principle becomes of greater weight as applied to this situation, until at some point (the threshold) the consequentialist principle outweighs competing principles of morality.”¹⁶⁰ Prior to reaching the threshold, consequences determine the rightness of actions only so long as no violations of moral duties are involved. After the threshold is passed, however—an event that Moore analogizes to water spilling over a dam¹⁶¹—the avoidance of negative consequences can justify violating moral duties.

Moore’s best-known articulation of this concept involves torture, which he argues may be justified against terrorists when necessary to obtain “sufficiently good consequences,” and against the innocent only to avoid “the most horrendous of consequences.”¹⁶² However, he also applies this approach to punishment, explaining that one should forego the punishment of

there is reasonable doubt about his guilt.”). *See also id.* at 372 (“I view the requirement of proof beyond a reasonable doubt in a criminal case as bottomed on a fundamental value determination of our society that it is far worse to convict an innocent man than to let a guilty man go free.”) (Harlan, J. concurring).

¹⁵⁸ MOORE, *supra* note 22, at 156.

¹⁵⁹ *Id.* at 719.

¹⁶⁰ *Id.* at 723.

¹⁶¹ *Id.* (“An analogy may help here: imagine water slowly rising behind a dam until it eventually spills over.”).

¹⁶² *Id.* at 724.

a less serious offender when necessary to “punish some very deserving criminal(s).”¹⁶³

How does this approach play out in the context of ICL? One might argue that the high-stakes contexts of transitional justice often accompanying international prosecutions dictate that all or most of ICL lies beyond the threshold. If so, threshold deontology does not provide a theory of how retributivism may be operationalized at the international level so much as a theory of why retributivism is irrelevant to ICL. After all, the future well-being of a society devastated by mass atrocities—and at risk, perhaps, to be so devastated again—is a matter of such importance that retributive values would seem to pale in comparison. Accordingly, one could argue that decisions about whether and how to pursue international criminal justice should be guided entirely by utilitarian considerations.

The picture is not quite so straightforward, however. Although Moore’s analogy to a dam overflowing seems to suggest a dramatic divide between pre- and post-threshold thinking, the division appears to apply on a decision-by-decision basis. To take Moore’s example of society foregoing the prosecution of one offender in order to secure the conviction of a much more culpable offender,¹⁶⁴ threshold deontology in this instance operates only to justify the particular choice between offenders. Absent other overriding considerations, the example does not suggest that the actual prosecution of the higher level offender should itself deviate from retributive principles, for example when it comes to sentencing. So too, at the international level, a threshold deontologist will presumably continue to advocate as much retributive justice as is feasible under circumstances that require some deviation from retributive obligations.

If so, threshold deontology ends up at a similar place as consequentialist retributivism, with retributive and non-retributive considerations operating together, and it shares a similar adaptability and indeterminacy.¹⁶⁵ The primary distinction is that in providing an exception to deontological obligations, it does nothing to address the more general problem concerning which

¹⁶³ *Id.* at 158.

¹⁶⁴ *See supra* note 158 and accompanying text.

¹⁶⁵ This will be particularly true if, as seems logical, consequentialist retributivism is itself one of the principles that comes into play once the threshold has been passed.

types of decisions are bound by the duty to punish in the first place. As such, it is not obvious that threshold deontology speaks to as broad a range of institutional decisions – including whether to establish international tribunals in the first instance – as does consequentialist retributivism.

Moore's threshold deontology has also drawn criticism for imposing an arbitrary line of demarcation.¹⁶⁶ If important non-retributive considerations can justifiably inform punishment decisions, why must they wait until the threshold has passed? Moreover, Moore may be wrong in his apparent assumption that the threshold he identifies is met only in extraordinary situations. As Douglas Husak has observed, "it is inevitable that the practice of punishment will suffer from (at least) each of the following three deficiencies: It will be tremendously expensive, subject to grave error, and susceptible to enormous abuse."¹⁶⁷ Given that "the drawbacks of punishment can be described as outweighing the value of punishing the deserving,"¹⁶⁸ the very establishment of a criminal justice system arguably presents the kind of extraordinary harm that, under Moore's view, requires resort to non-retributive justifications.¹⁶⁹

5. RETRIBUTIVISM AS A GOOD REASON TO PUNISH INTERNATIONAL CRIMES

As I have just explored, different understandings of retributivism converge upon certain common implications for the implementation of criminal justice. Retributivism imposes important negative constraints on the administration of criminal justice, and can guide the criminal law in other ways, but it cannot provide a complete theory of punishment, as some accommodation of other values is necessary for retributivism to survive in the real world. The most that retributivism can do is supply a powerful, non-exclusive, reason to punish, one that must be weighed alongside other reasons favoring and disfavoring punishment. These other reasons include the demands of liberal values (such as

¹⁶⁶ Larry Alexander, *Deontology at the Threshold*, 37 SAN DIEGO L. REV. 893, 905-07 (2000) (arguing that threshold retributivism is arbitrary not merely because it involves matters degree but, more problematically, because it involves the weighing of incommensurables).

¹⁶⁷ Husak, *supra* note 94, at 450.

¹⁶⁸ *Id.* at 451-52.

¹⁶⁹ *Id.*

due process rights and other protections against convicting the innocent), as well as utilitarian considerations such as crime prevention, rehabilitation and incapacitation.

I will refer to this function of retributivism as “good reason retributivism.”¹⁷⁰ On this understanding, retributivism does not supply an independently sufficient reason to punish, but it supplies a stronger justification than either the purely negative retributivism dictating that culpability is merely necessary to punishment or the permissive version dictating that culpability allows punishment.¹⁷¹ It is also distinct from the mixed theories of punishment that erect a fixed division of labor between retributive and non-retributive considerations, the best known of these being H.L.A. Hart’s contention that utilitarianism should establish the “general justifying aim” of punishment whereas retribution guides the “distribution” of punishment.¹⁷² Nor, unlike Hart’s view, is this type of retributivism vulnerable to the critique that it is, at root, a utilitarian theory through and through because its putative retributivism is in fact subservient to an overarching utilitarianism. While good reason retributivism does not claim that “[r]etributivism has no room for . . . other reasons,”¹⁷³ and is thus an entirely sufficient theory of punishment, it nevertheless offers an understanding of retributivism that is internally independent of other rationales. In other words, the conclusion that culpability provides an intrinsically good reason to punish does not derive its force from non-retributive considerations.

In describing good reason retributivism as a type of retributivism, I do not attempt to carve out a unique justification for punishment that is distinct from those I have surveyed. Rather, my aim is to say something about how retributivism can function as an applied principle of criminal justice, whatever its theoretical underpinnings. For example, this understanding of retributivism

¹⁷⁰ I borrow here from Leo Zaibert, who writes that “[r]etributivism is always, in every context, at least a good reason for punishing.” ZAIBERT, *supra* note 16, at 201-02.

¹⁷¹ See *supra* Part 2.1.

¹⁷² H.L.A. Hart, PUNISHMENT AND RESPONSIBILITY: ESSAYS IN THE PHILOSOPHY OF LAW 9 (2d ed. 2008) (noting that “it is perfectly consistent to assert *both* that the General Justifying Aim of the practice of punishment is its beneficial consequences *and* that the pursuit of this General Aim should be qualified or restricted out of deference to principles Distribution which require that punishment should only be of an offender for an offence”).

¹⁷³ See Moore, *supra* note 22, at 88-89.

flows directly from the consequentialist retributivist view that retributive goods must be balanced against other goods. It likewise flows from a deontological position that acknowledges limits to the scope and weight of retributive duties.

Good reason retributivism also leaves room for differing views regarding the relative force of retributive considerations for particular institutional decisions. Moore's threshold deontology contemplates that utilitarian factors will trump retributive duties only in extraordinary cases.¹⁷⁴ Husak, by contrast, attributes a weaker force to these duties, arguing that the justification for punishment always requires non-retributive reasons because, "At most, the obligation of the state to punish is contingent on 'other things being equal'—which surely they are not."¹⁷⁵ Leo Zaibert offers an intermediate formulation according to which "punishing the deserving is *prima facie* the right thing to do,"¹⁷⁶ but in which this presumption favoring punishment is always subject to being outweighed by the force of other values.¹⁷⁷

A retributivism so defined unavoidably introduces indeterminacy, some of which I have already explored. Nevertheless, as I argue in this Part, the idea that desert supplies a *prima facie* reason to punish is one that has powerful normative force for ICL, and that, even if unacknowledged, resonates with much contemporary thinking about the field. It provides a framework for understanding the design of international criminal justice institutions such as the ICC, and a basis for shoring up the legitimacy of international justice efforts in the face of what are often uncertain social consequences.

¹⁷⁴ See *supra* notes 158–163 and accompanying text.

¹⁷⁵ Husak, *supra* note 94, at 453.

¹⁷⁶ ZAIBERT, *supra* note 16, at 215.

¹⁷⁷ Zaibert defends this approach to retributivism based on the same types of intuitive examples that Moore draws from. Just as intuition may tell us that punishing the deserving is intrinsically good irrespective of whether it yields additional good consequences, so may it lead a punisher—whether a parent reprimanding a child or a judge convicting a criminal—to simultaneously weigh both retributive and non-retributive considerations. While there is "no principled way of ranking these different factors in a systematic, general way," nevertheless "[i]n some cases," argues Zaibert, "some . . . factors will have preeminence and in other cases other factors." *Id.* at 214. Other criminal law scholars have also taken a pluralistic approach to punishment theory, endorsing a retributivism that operates alongside other punishment rationales. See Michael Cahill, *Punishment Pluralism*, in *RETRIBUTIVISM: ESSAYS ON THEORY AND POLICY* (Mark D. White ed., 2011).

5.1. *The Morality of Punishment*

At its core, a retributive account gives voice to the moral dimension of ICL, to the idea that horrific acts of mass violence deserve punishment in ways that are not reducible to anticipated social benefits. I have already indicated reasons why this impulse cannot itself be sufficient to ground international criminal justice institutions in a world of limited resources, limited capacity, and competing values. But the mere insufficiency of this impulse does not deprive it of normative force.

To illustrate the point, consider Andrew Woods' use of the famous trolley problem to support his skepticism of an ICL rooted in the utility of desert.¹⁷⁸ Faced with the scenario of an-out-control trolley set to strike and kill five workers, respondents overwhelmingly accept the permissibility of taking action to divert the train to a different track where it will instead strike and kill just one worker.¹⁷⁹ But respondents overwhelmingly have the opposite reaction to a variant of the scenario in which the only way to save the five lives is to shove an extraordinarily heavy person off the front of the trolley in order to brake the vehicle.¹⁸⁰ Summarizing research conducted by Joshua D. Greene, Woods notes that "people tend toward consequentialism when emotions are not involved, but when emotions run high (as when people imagine themselves pushing someone to their death), they rely on a moral heuristic ("Do no harm")."¹⁸¹ Given the high emotions that typically accompany international crimes, he concludes that "[t]he risk that strong moral intuitions may guide decisionmakers to outcomes that do not maximize utility may be particularly pronounced at the international level."¹⁸²

That is one way to characterize the distinction between these two scenarios. Another is to say that the reactions affirm a deeply seeded, non-instrumental norm against killing for which the first

¹⁷⁸ See Woods, *supra* note 7, at 667-68 (suggesting that people tend toward consequentialism when emotions are "not involved", but when "emotions run high", people rely on a "moral heuristic"). See also Judith Jarvis Thompson, *The Trolley Problem*, 94 YALE L.J. 1395, 1404-06 (1985) (describing the "trolley problem").

¹⁷⁹ Joshua D. Greene, *The Secret Joke of Kant's Soul*, 3 MORAL PSYCHOL. 35, 24 (2007); Thompson, *supra* note 178, at 1395.

¹⁸⁰ Greene, *supra* note 179, at 24; Thompson, *supra* note 178, at 1409.

¹⁸¹ See Woods, *supra* note 7, at 667-68 (summarizing Greene, *supra* note 179).

¹⁸² *Id.*

trolley scenario carves out a very limited exception for harm-reducing actions that merely redirect a pre-existing threat not created by the one who diverts the trolley.¹⁸³ To be clear, Woods' own purpose in invoking the trolley case is not to engage a broader debate between utilitarianism and deontology, but instead to critique the utility-of-desert justification for ICL by demonstrating that the kinds of moral intuitions that undergird desert-based thinking may not always produce the optimal social consequences that the utility-of-desert theory itself seeks.¹⁸⁴ More broadly, however, Woods' analysis raises the question of whether it is even worthwhile to pursue an account of ICL (or of criminal law more broadly) that relies exclusively on utilitarian reasoning without affording retributive considerations a role. This question arises directly for Woods because, although he expressly brackets actual retributive theory as being outside the scope of his analysis,¹⁸⁵ this exclusion does not prevent him from exploring concrete policy suggestions favoring non-punitive alternatives to international criminal justice.¹⁸⁶

If one accepts, as retributivists do, that there is intrinsic good to punishing perpetrators of horrific offenses, and perhaps a moral obligation to do so, then good reason retributivism can offer a corrective to utilitarian theories by acknowledging a non-consequentialist moral dimension to punishment. That this consideration must coexist uneasily and indeterminately with non-retributive considerations necessarily limits its normative power,

¹⁸³ This is Judith Jarvis Thompson's explanation in her seminal article on the trolley problem. See Thompson, *supra* note 178, at 112 (positing a "distributive exemption" that is "very conservative" and "permits intervention into the world to get an object that already threatens death to those many to instead threaten death to these few, but only by acts that are not themselves gross impingements on the few. That is, the intervener must not use means that infringe stringent rights of the few in order to get his distributive intention carried out.").

¹⁸⁴ See Woods, *supra* note 7, at 669 (noting that "[t]he risk that strong moral intuitions may guide decision-makers to outcomes that do not maximize utility may be particularly pronounced at the international level . . .").

¹⁸⁵ *Id.* at 634 n.2 ("I do not seek to spark a debate about the merits of retributivism vis-à-vis consequentialism. Instead, I am concerned solely here with evaluating the claim that the regime's current retributive stance will produce favorable consequences.").

¹⁸⁶ *Id.* at 674-81. Woods does caution that these suggestions "are not included here as fully developed policy prescriptions, and in fact there may be good normative reasons for not adopting some of them; that analysis is outside the scope of this Article." *Id.* at 674. One such "good normative reason" may be that provided by the retributive theory.

but this weakness is also counterbalanced by the fact that the contemporary practice of ICL often operates under conditions of significant uncertainty regarding contributions to social utility. Accordingly, even a weak retributivism operating akin to a rebuttable presumption can play an important tie-breaking role.

Take, for example, the International Criminal Tribunal for the former Yugoslavia, established by the UN Security Council in 1993 as a measure to restore international peace and security.¹⁸⁷ The idea that the ICTY could promote peace by deterring crimes in the conflict ongoing at the time is one that has justifiably attracted skepticism,¹⁸⁸ and indeed, many scholars reject deterrence as a viable goal of ICL more generally.¹⁸⁹ Hope that prosecutions would promote ethnic reconciliation have yielded to skepticism, as that goal has proven elusive and surveys indicate that many in the Balkans take a dim view of the ICTY's work and continue to deny the atrocities that have been the focus of the Court's work.

At the same time, the former Yugoslavia has avoided a return to war during the major years of the Tribunal's operation, and several of its successor states have embarked on a moderating course toward European integration.¹⁹⁰ There is a case to be made

¹⁸⁷ S.C. Res. 827, U.N. SCOR, 48th Sess., Res. & Dec., U.N. Doc. S/INF/49, at 93 (1993) (acting under Chapter VII of the UN Charter to establish the ICTY). The Council expresses in particular the belief that "the establishment of an international tribunal and the prosecution of persons responsible for the above-mentioned violations of international humanitarian law will contribute to ensuring that such violations are halted and effectively redressed." *Id.*

¹⁸⁸ See Damaška, *supra* note 1, at 339 ("In the adolescence of ad hoc tribunals, the cardinal importance of general deterrence was frequently invoked. The exaltation of this goal flowed from the hope that the mere threat of punishment would produce a moderating effect on the brutalities of conflicts. But as the threat failed to prevent horrendous atrocities, initial optimism surrounding this objective failed."). One might speculate, though, that the ICTY's existence played a deterrent role in Macedonia, which saw some hostilities in 2001 but arrived at a peaceful resolution that avoided the catastrophic violence experiences in other former Yugoslav republics. See Lauren Comiteau, *Bosnia Twenty Years On - Part 2: ICTY Failure to Deter?*, RADIO NETH. WORLDWIDE (Apr. 10, 2012, 2:24 PM), <http://www.rnw.nl/international-justice/article/bosnia-twenty-years-part-2-icty-failure-deter> (quoting former ICTY employee Refik Hodzic as saying, "I believe the Tribunal has served as a deterrent in Macedonia, during the conflict there in 2001 . . ."). The 2001 hostilities produced one conviction at the ICTY. See Prosecutor v. Boškovski & Tarulovski, Case No. IT-04-82-A, Judgment (Int'l Crim. Trib. for the Former Yugoslavia July 15, 1999) (upholding conviction of Tarulovski for war crimes and acquittal of Boškovski).

¹⁸⁹ See *supra* note 18.

¹⁹⁰ Croatia joined the European Union in July 2013. See Dan Bilefsky, *Joyous Croatia Joins Europe Amid a Crisis*, N.Y. TIMES, July 1, 2013, at A4. The incentive of

that the ICTY aided this transition, for example by facilitating the incapacitation (through both incarceration and self-imposed exile) of extremist leaders during this period.¹⁹¹ It is also noteworthy that the period of the ICTY's trial of Slobodan Milošević, when Serbia's former dictator scored high marks with the Serbian public for his performance on the defense stand (an apparent sign of tribunal inefficacy) also coincided with a period of increasing moderation in Serbian politics that saw repeated electoral defeats for Milošević's former party (a possible sign of tribunal efficacy).¹⁹²

The truth, however, is that it is difficult, if not impossible, to reach precise conclusions about the ICTY's efficacy. That is because a punishment theory aimed at advancing broad societal change does not easily lend itself to the kind of empirical verification necessary to validate the theory. One simply cannot say how things would look in former Yugoslavia today had the ICTY never existed. Moreover, the tribunal's apparent successes benefitted from developments—including support from international forces stationed in Bosnia and a popular revolution in Serbia—that were outside the control of the ICTY and were not foreseeable at the time the Security Council established the Court.¹⁹³

Other examples involve similar uncertainty. For instance, it is today very uncertain whether the ICC's arrest warrants against Ugandan rebel leader Joseph Kony and Sudanese President Omar al-Bashir will ever produce a trial and, if they do, what impact the trials will have in Uganda and Sudan respectively.¹⁹⁴ This uncertainty is troublesome for utilitarian approaches to ICL which

possible EU membership is credited with facilitating a landmark power-sharing agreement between Serbia and Kosovo concluded last April. See Dan Bilefsky, *Serbia and Kosovo Reach Agreement on Power Sharing*, N.Y. TIMES, Apr. 19, 2013, at A9.

¹⁹¹ See generally Greenawalt, *supra* note 135; see also Luban, *supra* note 10, at 575 (“[I]ncapacitating toxic political leaders—a Goering, a Milosevic, a Charles Taylor—can be absolutely crucial.”).

¹⁹² See generally Florian Bieber, *The Show and the Trial: The Political Death of Milošević*, in *THE MILOŠEVIĆ TRIAL: AN AUTOPSY* (Timothy William Waters ed., 2013).

¹⁹³ See generally Greenawalt, *supra* note 135.

¹⁹⁴ See Coalition for the International Criminal Court, *Cases and Situations: Darfur*, <http://www.iccnw.org/?mod=darfur>; Coalition for the International Criminal Court, *Cases and Situations: Northern Uganda*, <http://www.iccnw.org/?mod=uganda> (explaining the ICC investigations into the situations in Darfur and Uganda).

are concerned exclusively with the social consequences of punishment. A good reason retributivist, by contrast, has an easier time defending a broadly aspirational model of ICL because uncertain social aspirations are supplemented by the intrinsic good of punishing the guilty, a good which itself provides a *prima facie* reason to proceed. Indeed, under these circumstances, the morality of punishing the guilty can provide an independent source of legitimacy for international criminal tribunals, one that arms courts with a shield—a partial one at least—against pressures to produce demonstrable societal benefits in circumstances that are often resistant to empirical verification.

4.2. *Retributivism and the Structure of ICL*

I have just explored ways in which good-reason retributivism may provide a meaningful and normatively attractive rationale for ICL. As a descriptive matter, this understanding of retributivism also supplies a useful lens for understanding the existing discourse and structure of ICL.

At a rudimentary, if not especially meaningful, level, one can identify this understanding of retributivism in the commonly invoked aspiration “to put an end to impunity,” which appears in the statute of the ICC among other places¹⁹⁵ and also in the common identification of retribution as one among several goals.¹⁹⁶ It also lends coherence to the fact that retributivist thinking appears to dominate some institutional decisions more than others. For instance, it helps explain what Jens Ohlin describes as the “Rorschach test” quality of international justice according to which policymakers establishing international tribunals rely heavily on utilitarian thinking, but retributive considerations inform the determination of individual sentences.¹⁹⁷

One explanation of this disparity is that utilitarian impulses aimed at satisfying victim demands for retribution guide the entire enterprise. Another explanation, however, the one offered by good

¹⁹⁵ Rome Statute, *supra* note 67, at pmb1.

¹⁹⁶ See *supra* note 10 and accompanying text.

¹⁹⁷ Ohlin, *supra* note 9, at 392.

When one evaluates the practice of institutions, one considers the fate of collectives and the consequentialist goals of peace and security take centre focus, but when one evaluates the sentences of particular individuals, then one focuses more tightly on retributive concerns: the offender, his crime, and the moral gravity of the offence. *Id.*

reason retributivism, is that retributive and non-retributive considerations operate in tandem to address both types of questions, with the relative force of these considerations depending on the type of institutional decision in question. A decision to establish an international criminal tribunal to address a particular episode of mass atrocity is one that, by its nature, invites significant non-retributive thinking because retributive theory is ill equipped to determine the necessary resource allocations, and the high-stakes contexts of societal transition that often accompany international prosecutions focus particular attention on the implications of trials for international peace and security.¹⁹⁸ The intrinsic good of deserved punishment remains a relevant factor, but it does not provide an exclusive criterion for decision. Sentencing, by contrast, is the type of decision for which retributivism provides more concrete guidance, and for which considerations of peace and security, by contrast, are less likely to override individual punitive judgments. Perhaps this is because these judgments involve a degree of specificity that does not directly implicate peace and security, or as Ohlin argues, because desert-based sentences best advance tribunals' policy goals, thus producing a correspondence between retributive and non-retributive aims.¹⁹⁹

The idea that culpability provides a *prima facie*, but not exclusive, reason to punishment also illuminates the particular structure and context of the ICC, which is unique among international criminal tribunals in that it is a permanent treaty-based court with broad geographic reach. It is tempting to conclude, as Woods does, that the ICC is emblematic of an "international criminal regime [that] is largely limited to backward-looking sanctions, the only form of accountability compatible with retributivism."²⁰⁰ This statement is true in the sense that the ICC, like other tribunals, imposes punishment on those suspects it convicts. Whether the international criminal regime is "limited to backward-looking sanctions," depends in large part on how one defines the international criminal regime. With the ICC thus far only targeting a handful of suspects for each

¹⁹⁸ See *supra* Part 4.

¹⁹⁹ Ohlin, *supra* note 9, at 390-91.

²⁰⁰ Woods, *supra* note 7, at 640.

situation it has investigated²⁰¹—and lacking the resources to do much more—the fact remains that the overwhelming majority of those responsible for mass atrocities will never face prosecution by international criminal tribunals.

I have identified different reasons, some involving forward-looking aspirations, why a state might in good faith wish or need to limit its legal response to mass atrocity.²⁰² A system of ICL that insists on prosecuting only the most culpable high-level perpetrators remains compatible, whether by happenstance or design, with the view that states should be afforded substantial discretion over how to balance forward and backward-looking considerations in their handling of most perpetrators.

One important way in which the ICC does reflect a strong commitment to punitive justice is the unprecedented discretion that the Court's statute gives to legal professionals over the direction of the Court's mission. Unlike ad hoc tribunals, which emerge out of policy decisions by the UN Security Council or individual state governments to focus prosecutions on particular situations of mass atrocity, the ICC leaves it in many cases to prosecutorial and judicial actors to determine when situations involving alleged international crimes merit the Court's attention. So long as the crimes in question are committed on the territory of or by a citizen of a state party to the ICC, the drafting history and relevant treaty language reflect a determination that these judgments focus primarily on formal, culpability-based criteria, rather than the types of broad-based policy judgments one might expect from a political actor like the Security Council.²⁰³ Accordingly, the Rome Statute reflects a strong presumption that prosecution should follow the commission of international crimes, even if those efforts are necessarily targeted against a select handful of perpetrators.

This presumption in favor of prosecution, however, is not absolute, as the Rome Statute leaves significant room for the Court's prosecutor and judges to consider non-retributive rationales. For instance, the Prosecutor, subject to judicial review, may determine that proceeding with an otherwise admissible case

²⁰¹ *Situations and Cases*, INTERNATIONAL CRIMINAL COURT, http://www.icc-cpi.int/en_menus/icc/situations%20and%20cases/Pages/situations%20and%20cases.aspx.

²⁰² See *supra* Part 4.

²⁰³ See Greenawalt, *supra* note 7, at 590-98.

is not “in the interests of justice.”²⁰⁴ Also, the Court’s complementarity framework requires the Court to defer to the genuine investigations and prosecutions conducted by states with jurisdiction over offenders otherwise sought by the Court.²⁰⁵ Attention has focused on whether these provisions may in some circumstances require or permit deference to alternative justice mechanisms such as South Africa’s individualized amnesty process.²⁰⁶ Moreover, the UN Security Council retains authority to defer ICC proceedings for one year at a time, when it deems it to be in the interest of international peace and security to do so.²⁰⁷

Finally, at a less formal but nevertheless critical level, the ICC remains a weak institution, dependent upon states both to supply its limited funding and to apprehend and surrender fugitive suspects to the Court. As such, the threat of non-cooperation imposes a significant restraint on the Court’s authority to act on retributive impulses that are not shared by the states whose cooperation is essential.²⁰⁸ Non-cooperation, of course, is a blunt tool, and in many cases—for example, when the non-cooperating authorities are themselves behind the crimes in question—such non-cooperation will elicit rightful condemnation, and the Court’s

²⁰⁴ Rome Statute, *supra* note 67, at art. 53.

²⁰⁵ *Id.* at art. 17.

²⁰⁶ See generally Alexander K.A. Greenawalt, *Complementarity in Crisis: Uganda, Alternative Justice, and the International Criminal Court*, 50 VA. J. INT’L L. 107 (2009); Michael P. Scharf, *The Amnesty Exception to the Jurisdiction of the International Criminal Court*, 32 CORNELL INT’L L.J. 507 (1999); Carsten Stahn, *Complementarity, Amnesties and Alternative Forms of Justice: Some Interpretive Guidelines for the International Criminal Court*, 3 J. INT’L CRIM. JUST. 695 (2005).

²⁰⁷ Rome Statute, *supra* note 67, at art. 16.

²⁰⁸ The ICC has faced particular resistance from many African states in its efforts to arrest Sudan’s President Omar Al-Bashir on charges of genocide, crimes against humanity and war crimes. The African Union has repeatedly criticized the arrest warrants, resolving that “AU Member States shall not cooperate . . . [in] the arrest and surrender of President Omar El Bashir of The Sudan.” Assembly of the African Union, Assembly/AU/Dec.391-415(XVIII), ¶ 3 (Jan. 30, 2012). A number of African members of the ICC have received Bashir on state visits without moving to arrest or extradite him. See Prosecutor v. Omar Hassan Ahmad Al Bashir, Case No. ICC-02/05-01/09, Decision Pursuant to Article 87(7) of the Rome Statute on the Refusal of the Republic of Chad to Comply with the Cooperation Requests Issued by the Court with Respect to the Arrest and Surrender of Omar Hassan Ahmad Al Bashir (Dec. 13, 2011); Prosecutor v. Omar Hassan Ahmad Al Bashir, Case No. ICC-02/05-01/09, Decision Pursuant to Article 87(7) of the Rome Statute on the Failure by the Republic of Malawi to Comply with the Cooperation Requests Issued by the Court with Respect to the Arrest and Surrender of Omar Hassan Ahmad Al Bashir (Dec. 12, 2011).

moral authority to demand retributive justice will survive undiminished. However, non-cooperation can also provide an important check on the Court's ability to proceed in more difficult cases, in which the Court's efforts to secure justice find themselves in tension with powerful non-retributive considerations. This risk, combined with the general need to conserve resources, provides a powerful incentive for the Court to focus its efforts on the cases that are least likely to present compelling non-retributive arguments for non-prosecution.

In sum, although the ICC is a court that dispenses retributive justice, the question of how it contributes to a broader international criminal regime is complex. Good reason retributivism provides a rich way of framing this complexity. In important ways, the Rome Statute endorses the view that culpability is a *prima facie* reason to punish. At the same time, mechanisms and restraints both within and outside the treaty make it possible to check that impulse when overriding non-retributive considerations so dictate.

6. THE LIMITS OF PUNISHMENT THEORY

I now briefly consider the practical implications of retributivism in comparison to other approaches to ICL. Despite significant theoretical differences among the various rationales for punishment, I suspect that debates over punishment theory have less practical significance for the field than might be supposed. On the one hand, the current evolution of ICL reflects certain core areas of agreement that are backed by persuasive arguments under multiple approaches to punishment. In this way, the core of international criminal law is overdetermined by punishment theory. On the other hand, with respect to many of the most difficult questions confronting international criminal law, the dominant theories do not speak with sufficient specificity to provide fixed answers. This indeterminacy has multiple causes. In the case of retributivism, I have already argued that alternate conceptions of retributivism can point in different directions and that retributive theory alone does not supply a complete theory of punishment. Instead, real-world implementation efforts require retributive considerations to be balanced against non-retributive considerations. This balancing is inherently indeterminate, and can support a range of policy positions.

Utilitarian approaches, by contrast, do in theory provide a

complete theory of punishment.²⁰⁹ As Cahill explains, Utilitarianism, which bases punishment on the forward-looking goal of preventing future crime, is not only a *justificatory* theory explaining why criminal punishment should exist, but also a *prescriptive* theory explaining how punishment institutions should work. The utilitarian agenda encompasses both the purposes and the practices of the criminal justice system, seeking in all cases and at all stages of the process to minimize or prevent social harms (in the most cost-effective way).²¹⁰

As such, this agenda provides a criterion—crime prevention—for the selection and ordering of various approaches to punishment—such as deterrence, incapacitation, the utility of desert, the realization of expressive values, and so forth. More broadly, it also provides a criterion—utility maximization—to guide legislative choices between criminal justice initiatives and other priorities.

Of course, the realization of this agenda requires agreement on how to define and measure utility, as well as adequate information regarding the likely consequences of social policy choices. In a world of evaluative disagreement and imperfect information, it is far more challenging in practice to identify the demands of utilitarianism on many issues, including the contested questions of international criminal law that I consider here.²¹¹

A comprehensive consideration of how the competing punishment rationales might inform international criminal justice is beyond the scope of this Article. Instead, I will focus on few key policy questions, and suggest some general reasons for skepticism that punishment theory will play a decisive role in their resolution.

6.1. Crimes

Contemporary ICL focuses principally on offenses of genocide, crimes against humanity, and war crimes that are both extraordinarily grave, and typically take place in the context of

²⁰⁹ See Cahill, *supra* note 11, at 817 (“In a meaningful way, utilitarianism provides a complete theory of criminal justice, while retributivism apparently does not.”).

²¹⁰ *Id.* at 818.

²¹¹ See, e.g., Damaška, *supra* note 1, at 343-42 (“[N]o metric is available to establish a rigid set of priorities for the goals of adjudication: they are simply too disparate to be ranked against a common measure.”).

organized violence that is resistant to enforcement at the national level.²¹² A consensus that these core crimes should be a focus of ICL is unlikely to hinge on one's general philosophy of punishment. The basic building blocks of this consensus lie in a comparative assessment of domestic and international institutions. Given the functional and political considerations that make the criminal law (whatever its underlying goals) almost exclusively the province of domestic institutions, the role of ICL is predictably concerned with systematic atrocities for which domestic institutions are less reliable.²¹³ The focus on crimes of special gravity, moreover, flows both from a retributive emphasis of individual culpability and with a utilitarian concern for preventing great societal harms. As a *prima facie* matter, these are the types of crimes retributivists will most want to punish, and that utilitarians (whether relying on deterrence, incapacitation, expressive norm projection, the utility of desert, or some other rationale) will most wish to prevent.

At the same time, this basic account of ICL fails to provide clear guidance on current debates regarding the outer limits of ICL. One question concerns the reach of existing international offenses, all of which have seen significant historical evolution. For instance, an ICC Pre-Trial Chamber considering Kenya's post-election violence found itself split over the breadth of crimes against humanity, whose elements under the Rome Statute require that these crimes involve participation in a "widespread or systematic attack directed against any civilian population" where the attack "is pursuant to or in furtherance of a State or organizational policy to commit such attack."²¹⁴ A two-judge majority affirmed the Court's jurisdiction and eventually confirmed charges against four suspects, reasoning in relevant part that the acts of non-state violence alleged exhibited sufficient organization to meet the statutory definition.²¹⁵ A dissenting judge argued, by contrast, that

²¹² See *supra* note 126 and accompanying text.

²¹³ See *supra* Part 4.

²¹⁴ Rome Statute, *supra* note 67, at art. 7.

²¹⁵ See Situation in the Republic of Kenya, Case No. ICC-01/09, Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in Kenya, ¶ 90 (Mar. 31, 2010), available at <http://www.icc-cpi.int/iccdocs/doc/doc854562.pdf> (Majority Opinion) ("Whereas some have argued that only State-like organizations may qualify, the Chamber opines that the formal nature of a group and the level of its organization should not be the defining criterion. Instead, as others have convincingly put

in cases of non-state crimes, the “organizational policy” requirement should be construed to involve the policies of a state-like entity.²¹⁶ The difference between these positions, not yet resolved by the ICC’s Appeals Chamber, has enormous implications for the reach of international criminal law into situations of non-state violence committed outside the context of armed conflict.

Related questions concern the recognition of new international offenses. Recent attention has focused on whether terrorism should be prosecuted as an international crime,²¹⁷ and debate has also focused on the proposed inclusion of drug smuggling, slavery, apartheid, human trafficking, and piracy.²¹⁸ The crime of aggression, prosecuted after World War II, but since abandoned by successor tribunals, has reignited controversy arising out of efforts to amend the Rome Statute to include the crime.²¹⁹ One might also observe that even “ordinary” crimes such as domestic violence are often resistant to effective prosecution at the domestic level.

Resolving these questions requires sorting through a host of

forward, a distinction should be drawn on whether a group has the capability to perform acts which infringe on basic human values.”).

²¹⁶ See *id.* ¶ 90 (Kaul, J., dissenting) (interpreting Rome Statute requirement that crimes against humanity are “pursuant to state or organizational policy” to require involvement of an “entity which may act like a State or has quasi-State abilities”).

²¹⁷ Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging, Case No. STL-11-01/I (U.N. Special Tribunal for Lebanon Feb. 16, 2011), available at <http://www.stl-tsl.org/en/the-cases/stl-11-01/main/filings/orders-and-decisions/appeals-chamber/f0936>.

²¹⁸ STEVEN R. RATNER, JASON S. ABRAMS & JAMES L. BISCHOFF, ACCOUNTABILITY FOR HUMAN RIGHTS ATROCITIES IN INTERNATIONAL LAW: BEYOND THE NUREMBERG LEGACY 22 (3d ed. 2009). Despite states’ exercise of universal jurisdiction over the crime of piracy, Antonio Cassese argues that piracy does not implicate a “community value,” and thus does not rise to the level of a true international crime. ANTONIO CASSESE, INTERNATIONAL CRIMINAL LAW 12 (2d ed. 2008).

²¹⁹ In June 2010, the ICC’s Assembly of States Parties approved amending the Rome Statute to extend the Court’s jurisdiction over the crime of aggression. The Crime of Aggression, Resolution RC/Res.6, I.C.C. Doc. RC/Res.6 (June 11, 2010), http://www.icc-cpi.int/iccdocs/asp_docs/Resolutions/RC-Res.6-ENG.pdf. The amendment will not take effect unless it is ratified by at least 30 parties, and receives the approval of at least two thirds of the Assembly of States Parties at the meeting to be held after January 1, 2017. See *id.*; Rome Statute, *supra* note 67, at art. 121(3). On the controversies surrounding the crime, see generally Sean D. Murphy, *The Crime of Aggression*, in THE OXFORD HANDBOOK ON THE USE OF FORCE (2013).

issues concerning the limits of international law and international institutions that are not reducible to one's preferred criminal theory, although different punishment justifications will suggest different limiting factors. A contractarian retributivist might highlight the fragile political legitimacy of international institutions,²²⁰ whereas utilitarians and consequentialist retributivists might argue that international courts should direct their limited resources to only the most serious crimes involving the greatest social harms and the greatest moral culpability. Theorists of all stripes must worry that an overly expansive international criminal law will prove self-defeating by meeting strong resistance from states and eroding the perceived legitimacy of international institutions.

These pragmatic considerations are especially significant for rationales that might otherwise favor a more expansive ICL.²²¹ For instance, one might identify great expressive value in expanding ICL to embrace ordinary offenses—such as domestic violence—that receive insufficient enforcement in many countries.²²² However, the fragility and weakness of international tribunals dealing with mass atrocity crimes argues in favor of relying on other institutions, such as human rights courts, to address states' obligations respecting the broader set of offenses that invoke international concern.

6.2. *Design and Alternatives to Prosecution*

I have explored how various understandings of retributive theory can embrace alternatives to international prosecution, such as the precedent set by South Africa's Truth Reconciliation Commission.²²³ A utilitarian unconcerned about the intrinsic moral worth of retribution will likewise have little trouble accepting that societal interests can justify non-punitive or quasi-

²²⁰ See *supra* Part 3.

²²¹ See, e.g., David Luban, *Response to Crimes Against Humanity: Beyond Moral Minimalism*, 20 *ETHICS & INT'L AFF.* 353, 356 (2006) ("On pragmatic grounds I agree that ICL should limit itself to serious crimes. Its institutions lack the capacity to prosecute even major atrocities, let alone a more ambitious docket. That is not a principled objection, however.").

²²² On the other hand, one might endorse the expressive value of highlighting only the absolute gravest offenses such as genocide and crimes against humanity. In this way, the demands of an expressive account depend very much on that which one wishes to express.

²²³ See *supra* Part 4.

punitive responses to mass atrocity. But the fact that multiple approaches to punishment converge on the theoretical desirability of alternative mechanisms does little to resolve the problems inherent in assessing the justifiability of particular alternatives in concrete situations.

A central complexity is that arguments favoring alternative processes tend to be context specific. It may well be that South Africa's response to apartheid was the best available option under the circumstances, but that response will not provide a one-size-fits-all solution for other situations involving very different historical and political contexts. Moreover, judgments about what type of response, if any, should be pursued in particular circumstances necessarily rely on imperfect information and are resistant to empirical verification.²²⁴

As a result, the underlying dilemmas of transitional justice present difficult questions of institutional design for an international system whose existence manifests a determination to limit state discretion over punishment matters. The establishment of the ICC reflected, in part, a dissatisfaction with the discretionary and politicized system of ad hoc tribunals, in which the underlying balancing is entrusted to the political actors who determine whether or not to establish a tribunal for a particular situation.²²⁵ But there are also complexities to having international prosecutorial and judicial officers decide these questions without the benefit of meaningful legal criteria or the kind of democratic accountability to affected societies that might otherwise justify the delegation of policymaking to legal officials. Accordingly, debate persists over how the ICC should approach arguments for deference to non-traditional proceedings.²²⁶

²²⁴ See *supra* notes 187-94 and accompanying text.

²²⁵ See Greenawalt, *supra* note 7, at 590-98 (summarizing the drafting debates and their resolution in the ICC).

²²⁶ For some suggested proposals for how the ICC should approach such questions, see, e.g., DRUMBL, *supra* note 4, at 187-91 (proposing that alternative justice mechanisms be evaluated for (1) good faith; (2) democratic legitimacy; (3) the characteristics of the violence the procedures seek to address, as well as the current political climate; (4) the avoidance of gratuitous or iterated punishment; (5) the effect of the procedures on the universal substance; and (6) the preclusion of the infliction of great evils on others); Linda M. Keller, *Achieving Peace with Justice: The International Criminal Court and Ugandan Alternative Justice Mechanisms*, 23 CONN. J. INT'L L. 209, 261-65 (2008) (arguing that alternative justice mechanisms merit deference by the ICC when they are necessary, legitimate, and advance international justice to the same degree that the exercise of ICC jurisdiction

The debate over alternative justice also raises tensions between the local and global ambitions of international criminal justice. For instance, a deterrence theorist might express concern that embracing an alternative justice mechanism, whatever the benefits to the local community, will dilute the ability of ICL to deter future crime in other regions. But this concern carries little weight if one believes that the deterrent effect of international justice is too weak to carry weight in the first instance, or that deterrence is more likely to work in a more specific, situation-by-situation manner. Likewise, an expressivist might be concerned that foregoing prosecution in one context inhibits the law's ability to send a global message about the wrongfulness of international crimes. Yet this argument begs the question of whether traditional prosecution is the only way to send this message, and whether that is the only message to send.

In raising these questions, I am not arguing that punishment theory is irrelevant to the problems of alternative justice. However, addressing these issues requires more specific arguments than can be provided merely by endorsing a general approach to punishment.

6.3. Case Selection

International criminal trials are characterized by extreme selectivity. Restrained by limited resources and limited enforcement ability, they have prosecuted only a small handful of participants in mass atrocities that often involve many thousands of perpetrators. The burden of undertaking more extensive trials is left to national authorities, who may or may not do so. A complete theory of international criminal law must come to terms with this selectivity and provide guidance to decision makers.

International practice has converged on the idea that international criminal tribunals should give priority to prosecuting the highest level perpetrators who bear the greatest criminal responsibility.²²⁷ This intuitive policy is readily defensible under multiple approaches to punishment. To the extent that retributivism can, in fact, guide questions of case selection—as for

would); Stahn, *supra* note 206. I have argued that the very delegation of these questions to the ICC raises problems of institutional legitimacy. See generally Greenawalt, *supra* note 7.

²²⁷ See Greenawalt, *supra* note 7, at 627-29 (surveying the historical practice of international criminal tribunals in focusing on high-level offenders).

example under the consequentialist retributivist model I have outlined – then it will favor targeting more blameworthy offenders over less blameworthy ones.²²⁸ For those focused on the utility of desert, the unique symbolic importance of leadership figures dictates that their prosecution will generally be a public priority, such that failure to prosecute those perceived to be the most responsible will be more detrimental than a failure to punish lower level perpetrators. Leadership figures are also a natural target for deterrence theorists: they are generally better situated to prevent crimes than are individual, low-level actors, and their smaller numbers make it more predictable that they will be targeted. Where there is a risk of continuing or future atrocities, incapacitation may be a plausible ambition for certain individual high level figures who are in a unique position to cause great harm. The generally greater culpability and unique symbolic status of high-level figures is also likely to imbue their prosecutions with greater expressive value.

But this general consensus only solves so much. There may be situations, for example, where a leadership figure's relatively low degree of criminal responsibility creates a tension between pursuing the highest level perpetrators and the most responsible perpetrators. In cases where crimes are committed by multiple sides to a conflict, there is value to prosecuting at least some offenders from all sides, even if the handful of worst offenders is clustered on one side of the conflict.²²⁹ Sometimes, also, there may be unique expressive value to highlighting certain types of offenses—for example, in order to call public attention to the prevalence of sexual crimes in war—even if, under the circumstance, doing so requires the prosecution of some lower-level offenders. In all these cases, moreover, there may be doubt about how precisely to weigh the gravity of a particular offender's criminal contribution.

A similar set of problems concern which general situations should be selected for prosecution in the first instance. In the case of ad hoc and hybrid tribunals, the political actors who set up the tribunals have already selected the situations. At the ICC, however, the Court's prosecutor is largely responsible for

²²⁸ See *supra* Part 4.3.1.

²²⁹ I have argued this point elsewhere. See Greenawalt, *supra* note 7, at 647–50.

determining where the Court will focus its investigations.²³⁰ As a general matter one can agree that the Court should focus on the situations of the highest gravity, but there may be reasons to deviate from purely gravity-based criteria, perhaps because, for any number of reasons, the Court's intervention is more likely to benefit one society more than another, because the Prosecutor wishes to call attention to a particular type of crime, or because one situation offers a higher probability of apprehending suspects than does another.

All of these examples raise the possibility of a conflict between desert-based considerations and other considerations and so would appear to create a wedge between many retributivists and utilitarians. However, the differences are not as straightforward as they might first appear. A consequentialist retributivist, for example, could justify an expressive project to highlight sex crimes at the international level on the grounds that doing so might lead national legal systems to take these offenses more seriously, even if, as I have hypothesized, doing so requires a focus on lower level offenders. Alternately, if prosecuting perpetrators on all sides of a conflict promotes the perceived legitimacy of a tribunal, a retributivist can endorse this approach on the ground that it will promote the rule of law in affected societies and thereby facilitate national prosecutions of additional offenders.

On the other hand, utilitarian approaches that deviate too much from retributive principles risk backfiring. One advantage of desert-based decision-making is that it upholds a conventional picture of prosecutors as legal actors who act based on neutral criteria. A prosecutor who relies excessively on non-retributive considerations risks being perceived as an overtly political actor, thereby undermining the perceived legitimacy of international proceedings. Moreover, it is far from clear that prosecutors are well positioned to predict the impact of their discretionary choices. To take just one example, the ICC's very first trial focused exclusively on war crimes charges related to the recruitment and use of child soldiers.²³¹ The expressive ambition apparent in the

²³⁰ So long as she is dealing with crimes within the Court's jurisdiction, the Prosecutor has the authority to refer situations to the Court involving crimes committed on the territory of or by a citizen of any state party to the Rome Statute. See Rome Statute, *supra* note 67, at art. 12.

²³¹ Prosecutor v. Dyilo, Judgment Pursuant to Article 74 of the Statute, Case No. ICC-01/04-01/06 (Mar. 14, 2012), available at www.icc-cpi.org

decision to shine a spotlight on these particular offenses found itself threatened by criticism that the prosecution had ignored the accused Thomas Lubanga Dyilo's apparent culpability for more serious crimes involving rape, murder, and torture.²³² Cases such as these certainly do not invalidate the relevance of expressive and other non-retributive considerations, but they do suggest that exercises of prosecutorial discretion that depart too far from retributive thinking risk being self-defeating.

6.4. Sentencing

My final example focuses on sentencing policy. International tribunal statutes have afforded relatively little attention to sentencing policy, and have left the determination of punishments primarily to the discretion of judges. There are powerful reasons

cpi.int/iccdocs/doc/doc1379838.pdf.

²³² See, e.g., deGuzman, *supra* note 2, at 273 (“[S]ome argue that the prosecutor was wrong to charge the Court’s first defendant, Thomas Lubanga, only with recruiting child soldiers when there was evidence that he was also responsible for crimes of sexual violence and other serious war crimes.”); Marlise Simons, *Congolese Rebel Convicted of Using Child Soldiers*, N.Y. TIMES, Mar. 15, 2012, at A12 (noting that the judgment against Lubanga “underscores some of the failings and limits of the prosecution’s approach. The rebels under Mr. Lubanga’s command were known to have pillaged, raped and killed many civilians in enemy villages, but prosecutors said when he was handed to The Hague in 2006 that the best evidence they had was about child recruiting”); William Schabas, *Lubanga Sentenced to Fourteen Years* (July 13, 2012), <http://humanrightsdoctorate.blogspot.com/2012/07/lubanga-sentence-to-fourteen-years.html> (“There is a widespread view circulating by which the Lubanga trial did not deal with the real issue, which is sexual assault.”). That prosecutors may have limited the charges principally for lack of sufficient evidence at the time the charges were brought does not alter the expressive ambitions manifest in the decision to choose this particular defendant for the ICC’s first trial. Marlise Simons, *Congolese Rebel Convicted of Using Child Soldiers*, N.Y. TIMES, Mar. 15, 2012, at A12. Notably, Lubanga was already in custody in the Democratic Republic of Congo (“DRC”) on charges of genocide, crimes against humanity, murder, illegal detention, and torture at the time that the ICC issued its arrest warrant, a fact suggesting that the Court should have deferred to the domestic proceedings under the Rome Statute’s Article 17 complementarity provision. See *Prosecutor v. Dyilo*, Case No. ICC-01/04-01/06, Decision Concerning Pre-Trial Chamber I’s Decision 10 February 2006 and the Incorporation of Documents into the Record of the Case against Mr. Thomas Lubanga Dyilo, ¶ 33 (Feb. 24, 2006), <http://www.icc-cpi.int/iccdocs/doc/doc236260.pdf>. Although the Pre-Trial Chamber determined that the DRC was willing and able to prosecute the accused, it nevertheless found the case admissible on the ground that the DRC proceedings involved different crimes than the ones before the ICC. *Id.* ¶¶ 34-33. Hence, the ICC proceedings had the effect of precluding Lubanga’s prosecution on more serious charges.

dictating that the most culpable offenders should be sentenced to substantial periods of incarceration commensurate with their desert. This policy comports with the retributive principles and also with rationales that emphasize the utility of desert. Robert Sloane has likewise argued that the expressive goals of international criminal law are best served by a proportional sentencing scheme.²³³ As Jens Ohlin has observed, moreover, rehabilitative rationales that sometimes favor lower sentences in the domestic context extend less easily to high-level ICL offenders who have committed especially grave offenses and are not likely to reform.²³⁴

Nevertheless, a general commitment to desert-based punishment only goes so far. As I have already explored, it supports a practice of ordinal proportionality—punishing more blameworthy offenders to longer sentences than less blameworthy offenders—but fails to resolve questions of cardinal proportionality that concern the general harshness of punishments across the scale.²³⁵ Moreover, the seemingly less controversial matter of ordinal proportionality raises unique complications for international criminal law. First, the implementation of ordinal proportionality requires agreement regarding the relevant population of offenders. A practice of proportionality that compares ICL offenses only to other ICL offenses will likely produce a broader range of sentences—and thus greater leniency at the lower end—than one that compares ICL offenses to ordinary domestic crimes.²³⁶

Of course, making comparisons between offenses can itself involve great complexity. The frequently collective nature of ICL offenses can make it difficult to evaluate the relative contributions of individuals to the larger crime. Debate has focused on whether there is a hierarchy of international offenses, and on how to define and rank the various modes of participation that criminal

²³³ See Sloane, *supra* note 3, at 81-85. See also Ohlin, *supra* note 9, at 386-87 (arguing that if “the whole point of [ICL] sentences is to express society’s condemnation of such horrendous activity[,] . . . then clearly we want to express that genocide and crimes against humanity are far greater crimes than single cases of murder.”).

²³⁴ See Ohlin, *supra* note 9, at 386-87.

²³⁵ See *supra* notes 29-32 and accompanying text.

²³⁶ See *id.*

culpability assumes.²³⁷ There is also the question of which additional mitigating or aggravating factors should inform culpability assessments. Notably, the context of organized mass violence—the very aggravating feature that defines ICL offenses—also arguably mitigates the culpability of some otherwise law abiding participants whose criminal guilt is in large part the result of an altered normative universe established by collectively sanctioned—sometimes state-ordered—violence.²³⁸ This relationship between the individual and the collective presents a defining challenge for ICL sentencing. Thus far, international sentencing has proceeded on an ad hoc basis without the benefit of formalized sentencing guidelines or shared understandings regarding how to compare international and domestic offenses.

7. CONCLUSION

A reader of international criminal scholarship might be forgiven for thinking that it's not possible to be a retributivist about international criminal law. Some ICL specialists have dismissed retributive approaches as uniquely incompatible with the specific context of international crime. Others have ignored their contribution entirely, or referenced them only in passing.

This Article responds to the anti-retributivist strain by providing a qualified defense of a retributivist ICL. In mounting this defense, I have not attempted to resolve longstanding debates over the general justification of punishment, or to argue for retributivism's general superiority over utilitarian rationales. Instead, I have sought to show how someone committed to

²³⁷ See Danner, *supra* note 9; *supra* note 92 and accompanying text.

²³⁸ RUTI TEITEL, *TRANSITIONAL JUSTICE* 50 (2000) (noting “the diminished sense of blameworthiness and related criminal responsibility associated with periods of nondemocratic rule”); Luban, *supra* note 10 (noting that “[t]he kinds of mass violence that ICL addresses take place within what participants regard as struggles to the death between groups, in which killing and humiliating the enemy likewise seems like a supremely meaningful form of violence”); W. Michael Reisman, *Legal Responses to Genocide and Other Massive Violations of Human Rights*, 59 *LAW & CONTEMP. PROBS.* 75, 77 (Autumn 1996).

In many of the most hideous international crimes, many of the individuals who are directly responsible operate within a cultural universe that inverts our morality and elevates their actions to the highest form of group, tribe, or national defense [T]he perpetrators may not have had the moral choice that is central to our notion of criminal responsibility. *Id.*

retributivist precepts can indeed make sense out of ICL, and do so in a way that takes complex account of ICL's distinguishing characteristics.

My account is qualified because it acknowledges that retributivism cannot provide a complete theory of ICL, but must instead co-exist with non-retributive rationales. This qualification, however, does not derive from any special feature of the international context. Instead it reflects the general limitations of retributivism as a real-world institutional theory.

I have also highlighted the flexibility of retributive thinking, the ways in which it can support a broader range of policy outcomes—both affirming and rejecting international criminal prosecutions—than might be expected. And I have indicated that many debates about international justice policy are unlikely to be resolved by the embrace of retributive principles.

One might object that these qualifications emphasize the irrelevance of retributivism, and thus prove the point I have tried in this Article to resist. But the concessions necessary to make retributivism plausible also allow one to appreciate the theory's comparative strengths: (1) Retributivism provides a compelling argument against punishing the innocent and punishing in excess of desert, and (2) it gives voice to the intuition that there is a moral case for punishing the worst atrocities that is not reducible to expected societal benefits.

Accounts will differ as to how much weight the latter, affirmative argument is owed in high-stakes contexts that often accompany ICL offenses. But even a tie-breaking role will be significant given the difficulties inherent in predicting the impact of criminal trials on complex historical events. And I suspect that this retributive impulse plays a greater role among supporters of international criminal institutions than is reflected by the common impulse to emphasize the benefits of prosecution. If I am correct in this suspicion, then perhaps this Article's principal contribution is to identify and explain the retributivist strain that already underlies much thinking about international criminal law.