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# Introduction: The Need for a Robust and Consistent Theory of International Punishment

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## I WHY THE 'WHY PUNISH' QUESTION?

Ever since the trial against the major war criminals of World War II before the International Military Tribunal at Nuremberg, the institution of punishment has beenan integral part of the international legal system. Nowadays, a large number of perpetrators and accomplices of crimes under international law – i.e. genocide, crimes against humanity and war crimes – are being sent to jail by international judges. But why and to what aim do we punish individuals for their involvement in mass atrocities? How can we justify punishment by international criminal courts and tribunals vis-à-vis the affected individual? More generally: What are the (realistic) objectives of international criminal law?

The question of meaning and purpose of criminal punishment has been and still is widely discussed in the domestic context. As a result, a differentiated range of theories of domestic punishment exists. In international criminal law, however, despite a number of important writings (listed in the select bibliography), the academic debate on justifications for and purposes of punishment is only beginning. Similarly, in their judgments, international criminal courts and tribunals generallly avoid taking a firm stance on the meaning and purpose of punishment. As a result, the issue is still underexplored and a consistent and robust theory of international punishment has yet to be developed. This lack of research is all the more surprising, given that the debate on theories of punishment in international criminal law is by no means a purely academic exercise, but has various practical consequences. First of all, it touches upon the legitimacy of international criminal law as such. In addition, the question of purposes of punishment is of concrete practical importance and concerns, inter alia, the prosecutor's selection of situations to investigate and cases to prosecute, the decision on the charges and the sentencing decision.

The obvious starting point of the discussion on the purposes of international punishment are the traditional punishment theories – retribution, deterrence, prevention and expressivism – known from the domestic context (the 'domestic analogy' approach). However, given the distinct quality and dimension of the core international crimes, it is questionable whether and to what degree traditional theories of punishment can be transferred to the international level. Crimes under international law form part of macrocriminality, which differs from 'ordinary' criminality, i.e., crimes committed in a domestic context, in many ways. In particular, in contrast to 'ordinary' crimes, crimes under international law cannot be regarded as isolated events, but are typically committed in the context of an overall disturbed society. The crimes are part of collective action; both the perpetrators and victims of crimes, under international law, can generally be characterized by their group membership. In addition, on the part of the perpetrators, different hierarchical levels must be distinguished, for example the 'bureaucratic masterminds' or 'armchair perpetrators' – the 'big fish' – on the one hand and their followers as the direct perpetrators – the 'small fish' – on the other. When developing a rationale for international punishment, these peculiarities, inter alia, must carefully be identified, and the traditional theories must be adapted and modified.

In the present volume, authors inquire into the meaning and purpose of international punishment. While one of the aims of this volume is to contribute to the development of a consistent and robust theory of international criminal punishment, a second, not less important objective is to link the theoretical discussion of purposes of punishment in international criminal law to their practical consequences. Therefore, throughout the volume a major focus is on the practical consequences of the different theoretical approaches, in particular for the activities of the International Criminal Court (ICC).

## II STRUCTURE

The volume starts off with an introductory contribution by the former President of the ICC, Judge Silvia Fernández de Gurmendi. In her contribution she highlights the practical importance of theories of punishment in international criminal law in general and the work of the ICC in particular. She particularly discusses three goals of international criminal justice: conflict prevention, i.e., deterrence; reconciliation; and rehabilitation. Regarding the former, much like Frank Neubacher and Harmen van der Wilt in their respective contributions, she sees the impunity gap – which is due to the

nature of the crimes and the lack of universality of the ICC's jurisdiction – as the main obstacle to a potent deterrent effect ensuing. As regards the reconciliation, similar to Philipp Ambach in his chapter, she emphasizes the importance of 'ownership', accomplished by victims' participation, and, in this regard, the importance of outreach. Regarding reconciliation, she outlines the elements of restorative justice in the ICC Statute, and the problems connected to reparations and the limited scope of cases. Finally, as a third rationale for punishment, she discusses the rehabilitation of the convicted perpetrators.

The volume is divided into three thematic parts. The first part – *Setting the Framework: Criminological, Historical and Domestic Perspectives* – prepares the ground for the ensuing theoretical and practical debate on rationales of punishment in international criminal law. Frank Neubacher looks at theories of punishment in international criminal law from a criminologist's perspective. He addresses three interconnected issues: the purpose of punishment; the explanation of international crimes; and sentencing. As regards the former, he is a strong advocate of a combination of different preventive theories as rationale for (international) punishment, but adds elements of restorative justice. Regarding the explanation of international crimes, he distinguishes three levels: the macro-, meso- and micro-level, connected to the system, the group, and the individual, respectively. Andreas Werkmeister in his contribution takes up on this differentiation and develops a preventive theory of punishment specifically designed for the meso-level. For Neubacher it is most important to emphasize that collective violence, in which international crimes are being committed, is a situational process. He explains that when it comes to mass atrocities the perpetrator's behaviour is illegal, but socially not deviant – Klaus Günther draws on this insight in his contribution when he develops a theory of 'civic courage'. Finally, as regards the reaction to international crimes, Neubacher explains that for a deterrent effect to ensue, the certainty of punishment is decisive, not the severity. Regarding the sentencing decisions, he sees a disregard of the individual perpetrator's circumstances and proposes a more nuanced model of liability (and, thus, culpability) which takes into account the hierarchical position of the perpetrators as well as his or her discretional power.

Sergey Vasiliev undertakes a thorough analysis of international criminal tribunals' statements on theories of punishment. For the theoretical underpinning of the analysis, he divides the 'why punish' question into two parts. Firstly, why *punishment*? – a non-question that cannot be answered from within by international criminal courts and tribunals. However, from the outside there seems to be a growing criticism regarding the narrow notion of

punitive justice. The second part of the 'why punish' question, the *why* do we punish?, is the one addressed by the contributions in this volume. Vasiliev concludes that courts' statements display 'ritualism' and 'monotony', and that due to their 'hypnotic repetition' are of limited practical value. While deterrence and retribution can be identified as the main objectives referred to by judges, the underlying principles and rationales are taken from domestic criminal law doctrine, without ever questioning their suitability in the context of international criminal law. The contents of these goals and objectives are, however, coloured with a reference to the goals set for the establishment of international criminal justice institutions as such. As a result of his analysis, Vasiliev comes to the conclusion that the few statements on theories of punishment by international courts and tribunals are a mere speech act, 'by which courts preach to international criminal law's founding articles of faith'. They say that they punish for retribution and deterrence, but in reality the main purpse of punishment is related to expressivism and didactics. In his view, which seems to be shared by Elies van Sliedregt in her contribution, expressivism emerged as a kind of 'ultimate catch-all objective' and 'meta justification' for punishment, in order to reproduce and reinforce the normative belief system upon which the enterprise of international criminal prosecution rests.

Next, Elies van Sliedregt discusses the 'domestic analogy' and analyzes the differences and similarities between domestic, i.e. 'ordinary', and international criminal justice. First, she distinguishes what she calls the domestic analogy 'proper' and the domestic analogy 'of transplants'. While the former relates to international law and concerns the question of building a world order analogous to the domestic order and includes the question of the authority to punish, the latter refers to criminal law and the (unreflected) application of domestic concepts and theories on the international level. Focusing on the domestic analogy of transplants, she continues to extrapolate the *sui generis* nature of international criminal law, which she discusses in relation to the nature of international crimes, the perpetrators of international crimes and the punishing community. Van Sliedregt determines that today there is a move towards a communicative theory of international punishment, as well as an emphasis on reconciliation and reparations, and makes an argument for a stronger integration of rehabilitation, post-trial justice and reintegration into the international criminal justice system. In addition, she criticizes that in international criminal law there is no consideration for other forms of sanctions aside from incarceration – an issue that is also mentioned by Sergey Vasiliev.

Kai Ambos takes up the question of the domestic analogy 'proper' and raises the question of whether a right to punish can exist without a state, and answers it in the affirmative. When it comes to what Elies van Sliedregt would call the domestic analogy 'of transplants', he is less sceptical: In his view, international criminal law can very well borrow and import concepts from domestic law, albeit it should not be done too schematically and there might be some limits. As regards sentencing, Ambos emphasizes the important of concrete sentencing factors and a transparent sentencing procedure, but in his view theories of punishment have no influence on the outcome. Gerhard Werle and Aziz Epik seem to disagree with this in their contribution.

Referring to the title of the first part of this volume – 'Setting the Framework' – Immi Tallgren explains that there is not one framework in which the 'why punish' question can be asked. Instead, different frames are required to draw attention to the plurality of perspectives that could be taken on international punishment. Thus, in her comments, Tallgren pictures the landscape in which 'why punish' is asked and thereby sheds light on the contexts of that context of knowledge, its production, reproduction and subjectivities. While sketching out these frames – the frame of law, the frame of criminology, the moral frame, the frame of 'fantasmatic logic' and the frame of politics – Tallgren makes visible the outside of the chapters 'setting the framework' and discusses what aspects of the 'why punish' question are missing in this volume, and whose voice is excluded from our debate.

Jochen Bung raises doubts as to the distinctiveness of international criminal law. In his view, there is no need for specific theories of punishment in international criminal law or to develop specific criminological theories addressing international crimes. In his view, we can draw on what we know from the domestic context. While he agrees that there still is guessing and shadowboxing when it comes to the 'why punish' question in international criminal law, he notices that this is equally true when it comes to domestic theories of punishment. What is special though is that international criminal law emerged challenging the classic rules of state sovereignty and non-intervention. For him, this is where the discussion should start, and instead of asking 'why punish', we should raise questions such as: Will international criminal law vanish again? Should we hope it will vanish again? Has it helped to establish a collective memory which will prevent us from experiencing future mass atrocities? Is international criminal law a matter for experts and specialists? Is it sufficiently democratic? Is it a sufficiently universal affair? Or is it just another colonial strategy? Can it get less selective? And: Is international criminal law capable of self-criticism?

The second part of the volume – *Rationales for Punishment in International Criminal Law: Theoretical Perspectives* – turns to the different theoretical approaches regarding the aims and justifications of punishment – retribution, deterrence, prevention, expressivism – and examines their sustainability regarding the international criminal law context.

Jakob v.H. Holtermann addresses the question of whether or not we have reason to believe that the ICC can deter potential perpetrators of international crimes, in particular the crime of aggression and taking the Danish and British involvement in the Iraq War as an example, and he believes we have good reason to do so. As a 'normativist' he criticizes the critics of deterrence, and their, in his view, too demanding burden of proof regarding a deterrent effect: It is not about conclusive evidence, but about levels of probability. And just like in domestic criminal law, we have reason to believe that the threat of international punishment has a deterrent effect. The domestic analogy – of transplants, in Elies van Sliedregt's words – does not break down, despite the differences between domestic, i.e. 'ordinary' and international crimes. In Holtermann's view these differences should not be exaggerated, and, like Bung, he argues that the main difference lies in the absence on the international level of anything resembling a state's monopoly of force. In the end, he argues that the ICC is one preventive measure among others, like a slice of Swiss cheese, i.e. with holes, or one component of a 'broad spectrum' drug, and that taken together – with other slices of Swiss cheese, or other components of a 'broad spectrum' drug – these measures cause a deterrent effect.

In contrast to Holtermann, Mordechai Kremnitzer emphasizes retribution as a rationale of punishment for international crimes, opposing the claim that it should be dismissed or marginalized. While not rejecting deterrence, he brings forward a number of reasons why the retributivist rationale is important. First, for Kremnitzer only punishment based on retribution is morally justified and, in particular from the offender's human dignity, legitimate. Second, retribution helps to secure the principle of proportionality in sentencing in international criminal law and in this way counter the dangerous trend of overpunishing the 'small fish' – in particular 'victimizers-victims', i.e. 'Kapos' or child soldiers, a topic he takes up from Mark Drumbl – while underpunishing the big ones. In this regard, Kremnitzer develops the 'theoretical move' that retributive justice should be implemented by the 'principle of conservation of criminal energy': the 'small fish's' reduced guilt serves as aggravating circumstance to the deeds of the 'big fish'. As a result, the 'big fish' should be in the focus of any prosecutorial strategy of international criminal tribunals, and the problem of (vertical) selectivity due to limited state cooperation should be overcome by (fair) trials in absentia.

Daniela Demko develops the basic features of a comprehensive expressive theory of punishment for international crimes. She highlights the communicative significance of two functions of international punishment: the trust in norm validity and the assignment of responsibility. While focusing on the communicative aspects of international punishment, she also shows how retributive and preventive theories and the specific purposes of punishment in international criminal law – the protection of victims and the rejection of a collective guilt thesis – can be integrated into an expressive theory of international punishment. In addition, Demko identifies the protection of the truth, the protection of victims and the rejection of a collective guilt thesis as criminal purposes specific to international criminal law, and integrates them into the statement of content of international punishment.

In his comprehensive comment on the contributions by Holtermann, Demko and Kremnitzer, Mark Drumbl engages with their respective pleas for a predominance of deterrence, expressivism and retribution. In reference to Kremnitzer's contribution on retribution, he doubts that 'victimizers-victims' deserve punishment. They might deserve something else, but something that is not delivered in a criminal courtroom. While he is sympathetic to the expressivist theory and the communicative function of punishment, as developed by Demko, he doubts that a court room is the best place to host those conversations. He worries that the medium – the court – becomes the message. Similarly, he doubts that the courtroom is the best place to tell the truth. The criminal trial illuminates selectively, not comprehensively. It communicates an incomplete truth that does not shed light on the bystanders and complicity side-standers. Finally, with regard to Holtermann, Drumbl – as one of the critics of deterrence that Holtermann criticizes – remains unconvinced that international punishment has a deterrent effect. For him, deterrence can at best be believed through a combination of anecdote, superimposition and faith. However, he concedes that deterrence might work when it comes to the crimes of aggression and maybe war crimes because they indeed involve more rational actors. While here the ICC could work as a slice of Swiss cheese, one must admit that the ICC is not a big fish court. In the end, his comment is a compelling argument to look beyond criminal law and to move away from courtrooms and jailhouses. Taking up Vasiliev's distinction between the *why* and the *punish* parts of the 'why punish' question, Drumbl has doubts that international punishment is the answer to mass atrocities.

Similar to Demko, also Klaus Günther takes an expressivist approach of international criminal law and considers the contents of the message communicated with international punishment. In his outline of the communicative

structure of criminal law in general, he considers the different stages of the communicative sequence and, at the same time, elaborates on the different messages sent at each stage to the offender, the victims and the society. He then asks the question of whether these messages can be transferred from the domestic to the international level, i.e., the domestic analogy of transplants. While a transfer is possible, Günther argues that some modifications are necessary in particular regarding the normative community as addressees. Günther explains that due to the dual status of each individual – as a member of the 'international community' and as a member of the domestic normative community, addressees of international criminal norms at the same time are also always bound by domestic laws. This dual status requires a 'critical reflective attitude' with regard to the human rights legitimacy of the domestic law. And in case of a – direct or indirect – norm collision between domestic law and international law, international criminal law delivers the message to disobey the demands of the domestic system: What is required from the addressee of international criminal law norms is civic courage and the willingness to non-conformist behaviour.

In the remaining two contributions of the second part, the authors develop a specific human-rights centred theory of international punishment. However, while Andreas Werkmeister develops a human-rights based *justification* for punishment, Jens David Ohlin develops from human rights an *obligation* to punish perpetrators of international crimes owed to the victims.

Andreas Werkmeister develops a combined meso preventive theory of international punishment. The underlying perspective of his theory is the legitimacy vis-a-vis the individual and the concept of human dignity is the foundational core. As a result, he highlights the limiting principles of punishment inherent to any punishment theory irrespective of its main purpose. After discussing problems with retribution and expressivism, he argues that a combination of different preventive theories provides for a suitable model for the justification of international punishment. Similarly to Frank Neubacher, Werkmeister differentiates also between macro-, meso- and micro-levels, and makes an argument for targeted meso prevention. This way, the offender is punished to deter others, but is addressed as a member of a case-specific transnational group. In this way, Werkmeister develops a new form of prevention between special and general prevention.

Jens David Ohlin, on the other hand, develops from human rights what he calls a theory of 'expressive retributivism' for international crimes (and other severe human rights violations). Relying on the jurisprudence of the European Court of Human Rights he argues for a state's duty to punish international crimes, a duty that is owed to the victims and based on human rights.

Somehow provocatively, he states that in the context of international criminal law, even mercy is a human rights violation. Ohlin connects his theory of 'expressive retributivism' to the anti-impunity discourse in international criminal law, and argues that, if states do not comply with their duty to punish international crimes, the ICC can step in. The victims' human right to see their perpetrators punished also explains their role and significance in international criminal procedure.

The aim of the third part of the book –*Consequences for the Practice of the International Criminal Court* – is to closely link the theoretical discussion to practical consequences. The theoretical approaches to international punishment are applied to and tested on specific issues from the practice of the ICC, e.g. the selection of situations and cases by the ICC's Office of the Prosecutor and the sentencing decision. In addition, the question is discussed how the selective and asymmetrical enforcement of international criminal law can be reconciled with the different rationales for punishment.

While Sergey Vasiliev in his contribution analyzed, inter alia, statements on theories of punishment that can be found in sentencing decisions of the ICC, Alex Whiting undertakes a similar exercise and thoroughly analyzes the submissions by the ICC Office of the Prosecutor and statements made by the Prosecution. He explains the different approaches of the first and the second Prosecutor: The first embraced a theory of 'disruption and specific deterrence', seeking to intervene in real time to stop ongoing crimes with the Court being a force for diplomacy and peace. The second Prosecutor, on the other hand, focuses on the judicial tasks of the Court, chooses fewer cases, acts slowly and carefully. This way, the Court moved towards an expressive theory of punishment, where investigations and cases are a way of expressing, shaping and enforcing norms. In the end, Whiting concludes that at the ICC's Office of the Prosecutor theory does not dictate practice – it is the other way round: The Office's strategy is reactive to and constrained by the dependency on state cooperation and the limits of the ICC's authority. Only within those constraints can theories of punishment play a role: 'robust theories of punishment are a luxory of actors with power'.

Similar to Alex Whiting, Harmen van der Wilt explains the ICC's and the Rome Statute's 'design selectivity', i.e. the ICC's legal, structural and political limitations as well as its inherent selectivity when selecting 'situations' and 'cases'. He analyzes how the problem of selectivity in international criminal law, i.e. the systematical exemption of entire categories of perpetrators from accountability, creates tensions with traditional theories of punishment. In emphasizing the shift from punishment to trial, he argues that international criminal law's inherent selectivity can best be processed by expressivism.

However, contemporary international criminal law, he concludes, conveys the 'perverse message' that 'criminal responsibility depends on the party or nation one belongs to and the side on which one fights'. For the future, he calls for an approach of 'dauntless perseverance'.

Gerhard Werle and Aziz Epik discuss the impact of theories of punishment on the sentencing decisions of the ICC. In their view, the question of 'why punish' has – and should have – an impact on the 'how' of punishment, i.e. on the sentencing process and its outcome. After a careful analysis of the ICC's sentencing decisions they come to the conclusion that a consistent approach with regard to the sentencing objectives can be detected, but that judges do not elaborate on how these objectives influence and guide the sentencing decisions. In the following, the authors outline a coherent sentencing model that takes into account theories of punishment and the objectives of sentencing. As its most important requirement is to ensure proportionality, Werle and Epik discuss the factors that should be taken into account in determining the gravity of the crime and the culpability of the offender. Within the proportionality framework, in order to ensure special deterrence and rehabilitation, the individual circumstances of the offender can also be taken into account. Expressivism and general deterrence, however, do not play a role.

Silvia D'Ascoli discusses some issues that were addressed in the contributions of Whiting, van der Wilt, and Werle and Epik. She agrees that the objectives and purposes of punishment guiding the sentencing process should be predetermined by the relevant system and not decided by the judges on a case-by-case basis, and is disappointed how little the ICC jurisprudence on sentencing has so far contributed to the development of rationales for international punishment. Similarly, in her view it is a missed opportunity that no clear sentencing guidelines have been determined at the ICC (as was the case at the ad hoc Tribunals), including any expressed weight, from the purposes of punishment. She recalls that the initial Prosecution's proposition of '80 per cent baseline' of the statutory maximum as a starting point to determine sentences was dismissed by the Trial Chamber – and after that the Prosecution did not propose any other approach or solution.

Finally, Philipp Ambach focuses on the victims of crimes under international law. While Jens David Ohlin developed a theory of victim-related *retributive* justice, Ambach's approach is victim-related *restorative* justice. Similar to the introductory contribution by Silvia Fernández de Gurmendi, Ambach explains that victims' participation in international criminal law proceedings lead to an enhanced ownership that moves away from punitive aspects. As a consequence, outreach is of major importance and selectivity is problematic. In sum, and rather in contrast to (or in addition to) Ohlin,