

Article

Harsh Justice for International Crimes?

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I.	INTRODUCTION.....	1
II.	SENTENCE SEVERITY IN INTERNATIONAL LAW AND PRACTICE.....	4
	A. Comparative Sentence Severity in National Systems	5
	B. International Sentencing Law and Practice	7
III.	THE CALL FOR HARSH JUSTICE	10
	A. Retributive Arguments.....	10
	B. Utilitarian Arguments	14
	C. Utility of Desert	16
IV.	DON'T TRUST YOUR INTUITIONS: RHETORIC, NARRATIVE, AND THE RISK OF OVERPUNISHING FOR INTERNATIONAL CRIMES	17
	A. Gravity Rhetoric.....	18
	B. Narratives	21
V.	DEVELOPING INTERNATIONAL SENTENCE SEVERITY NORMS.....	24
	A. Why International Norms?.....	24
	B. The Relevance of International Human Rights	28
	C. Responding to Objections.....	32
VI.	CONCLUSION	34

I. INTRODUCTION

As the International Criminal Court (ICC) begins to sentence defendants, it faces the difficult task of determining how much punishment is appropriate for war crimes, crimes against humanity, and genocide. The importance of the ICC's early sentencing decisions extends well beyond the individuals sentenced and the victims who suffer from their crimes. These decisions will shape punishment norms at the ICC, influence the development of such norms at other international courts, and may even affect sentencing norms in some national systems, particularly those adjudicating international crimes.

The task of developing international sentencing norms is daunting because such norms vary dramatically across national systems. In some countries,

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such as the United States, lengthy prison sentences are common, even for relatively minor offenses, and conditions of incarceration tend to be severe. In other parts of the world, sentences are substantially shorter and prison conditions are much less harsh. In such systems, for instance, prisoners are offered educational opportunities and skills training, rather than being asked to perform menial labor.

Given the disparities in national sentencing norms, it should come as no surprise that international courts have engaged in inconsistent sentencing practices. Some such courts have imposed reasonably short terms of incarceration, even for crimes against humanity, while others have handed down heavy sentences for similar crimes. Moreover, the conditions in which international defendants serve their sentences vary considerably. International courts do not have their own prison facilities but instead send defendants to the national prisons of volunteer countries with incarceration conditions that span the severity spectrum.

Despite these wide variations in sentencing norms and practices, the commentary on the appropriate severity of international punishment is surprisingly uniform: with few exceptions, commentators call for harsh justice.¹ The harshness the commentators advocate usually comes in the form of lengthy terms of incarceration, but at least one commentator also argues that prison conditions must be uncomfortable for international criminals.² To justify the call to harshness, commentators tend to invoke the seriousness of international crimes in conjunction with the commentator's preferred punishment philosophy. Thus, retributivists argue that in light of the seriousness of international crimes, harsh punishment is necessary to give offenders their "just deserts." Meanwhile, utilitarians assert that for such serious crimes, only harsh punishment will promote desired social goods, in particular crime prevention.

This Article's primary goal is to refute the call for harsh international justice. Contrary to the claims of harsh justice proponents, no punishment theory dictates a particular level of punishment severity for international crimes. Although the major punishment theories have been debated internationally for centuries, no theory has developed that can explain how much punishment is deserved for genocide or is required to deter crimes against humanity.

Moreover, the often-heard assertion that international crimes are so serious as to require harsh punishment, whether on retributive or consequential grounds, is misleading. While many international crimes are certainly very se-

1. See, e.g., Jens David Ohlin, *Towards a Unique Theory of International Criminal Sentencing*, in INTERNATIONAL CRIMINAL PROCEDURE: TOWARDS A COHERENT BODY OF LAW 381, 390 (Goran Sluiter & Sergey Vasiliev eds., 2009) [hereinafter Ohlin, *Towards a Unique Theory*]; Jose E. Alvarez, *Crimes of States/Crimes of Hate: Lessons from Rwanda*, 24 YALE J. INT'L L. 365, 418 (1999); Shahram Dana, *The Limits of Judicial Idealism: Should the International Criminal Court Engage with Consequentialist Aspirations?*, 3 PENN ST. J.L. & INT'L AFF. 1 (forthcoming 2014); Mark B. Harmon & Fergal Gaynor, *The Sentencing Practice of International Criminal Tribunals: Ordinary Sentences for Extraordinary Crimes*, 5 J. INT'L CRIM. JUST. 683, 711 (2007). The most notable exception is William Schabas. See William A. Schabas, *Sentencing by International Tribunals: A Human Rights Approach*, 7 DUKE J. COMP. & INT'L L. 461 (1997) [hereinafter Schabas, *Sentencing*].

2. See Ohlin, *Towards a Unique Theory*, *supra* note 1, at 387.

rious, as I have demonstrated elsewhere, the subject matter of international criminal law is expanding to include increasingly less serious crimes and less culpable defendants.³ The gravity rhetoric that pervades the regime thus threatens injustice at the sentencing stage for at least some defendants.

Similarly, the narratives that characterize international justice efforts also enhance the risk of overpunishing perpetrators of international crimes. To galvanize international action, politicians and statesmen often paint one side of a morally complex conflict as evil, its leaders as monsters. That side becomes the enemy of the international community and the other its friend, or at least its ally. Such narratives, along with gravity rhetoric, render appeals to intuition particularly problematic as a basis for determining appropriate punishment severity for international crimes. They enhance the risk that judges will impose more punishment than they would consider appropriate if the reality of the crimes were not clouded by rhetoric or narrative. It is therefore critical for international courts to develop sentencing norms to guide their decisions.

The second goal of this Article, therefore, is to suggest how international judges should begin to develop such norms. As a preliminary matter, international courts must identify the community to which their work is primarily addressed. This is critical because punishment severity is largely a matter of community norms rather than punishment theory. Some commentators have argued that international courts should apply the punishment norms of the national communities most affected by the crimes in question. This Article takes a different view, arguing that the work of international courts, especially the ICC, is addressed primarily to the global community and should therefore develop global norms of punishment severity.

Finally, the Article argues that in developing global norms of sentence severity, international courts should look to the human rights norms that informed their creation and should generally err on the side of leniency. While there are no generally accepted definitions of “leniency” or “harshness” in the sentencing context, this recommendation amounts to a call for international courts to continue to reject the death penalty, to avoid life sentences, to eschew lengthy prison sentences except in extreme cases, and to ensure humane conditions of incarceration. International courts should respect offenders’ human dignity and should aim to rehabilitate rather than simply to punish.

The ICC’s first sentence, now on appeal, arguably comports with this leniency recommendation. Thomas Lubanga was convicted of recruiting and using hundreds of children as soldiers in armed conflict.⁴ The Prosecutor, citing the gravity of the crimes, requested a thirty-year sentence,⁵ the maximum term of years permitted under the ICC Statute.⁶ Indeed, the Prosecutor asked the

3. Margaret M. deGuzman, *How Serious Are International Crimes? The Gravity Problem in International Criminal Law*, 51 COLUM. J. TRANSNAT’L L. 18, 36-40 (2012) [hereinafter deGuzman, *How Serious*].

4. Prosecutor v. Lubanga, Case No. ICC-01/04-01/06, Decision on Sentence Pursuant to Article 76 of the Statute (July 10, 2012), <http://www.icc-cpi.int/iccdocs/doc/doc1438370.pdf>.

5. *Id.* ¶ 92.

6. Rome Statute of the International Criminal Court art. 77.1(a), July 17, 1998, 2187

Court to adopt a presumptive baseline sentence of twenty-four years for all ICC crimes in light of their gravity.⁷ The Trial Chamber rejected these requests⁸ and sentenced Lubanga to fourteen years in prison.⁹ The Appeals Chamber, which is now reviewing the sentence, should likewise reject calls to inflict a harsher sentence on Lubanga.¹⁰

The Article's argument proceeds in four parts. First, the Article demonstrates the challenges international courts face in identifying appropriate sentencing norms by briefly describing the diversity of sentencing norms in national systems and the concomitant disparities in current international sentencing practice. Second, the Article critiques the various calls for harsh justice in the scholarly commentary, arguing that punishment severity relates less to theoretical commitments than to community norms. Third, the Article explains why the intuition that the gravity of international crimes mandates harsh punishment is a troubling basis for sentencing decisions in light of the distorting effects of international criminal law's gravity rhetoric and narratives. Finally, the Article sets forth the arguments for the development of international punishment severity norms rooted in human rights that counsel against harshness and favor erring on the side of leniency.

II. SENTENCE SEVERITY IN INTERNATIONAL LAW AND PRACTICE

In discussing "sentence severity," this Article focuses on the length of terms of incarceration, the availability of the death penalty, and conditions of incarceration. Sentences can be considered severe in other ways as well, including, for example, by inflicting corporal harms and intentional humiliation. However, for purposes of discussing the appropriate severity of international sentences, the more limited focus of this Article makes sense for two reasons. First, the punishment international courts inflict is limited to terms of incarceration and fines. Second, the arguments scholars have made in favor of harsh international punishment favor long terms of incarceration and difficult prison conditions.¹¹

As Section A demonstrates, national systems differ greatly in the sentences they impose and the conditions in which those sentences are served. This

U.N.T.S. 3 [hereinafter Rome Statute].

7. Prosecutor v. Lubanga, Case No. ICC-01/04-01/06, Decision on Sentence Pursuant to Article 76 of the Statute, ¶ 92.

8. *Id.* ¶ 93.

9. *Id.* ¶ 99.

10. Dana, *supra* note 1. The ICC Prosecutor has appealed the sentence. Prosecutor v. Lubanga, Case No. ICC-01/04-01/06, Prosecution's Notice of Appeal against Trial Chamber I's "Decision on Sentence pursuant to Article 76 of the Statute" (Oct. 3, 2012). Some victims and advocates have also expressed dissatisfaction with the sentence. See, e.g., Olivia Bueno, *14 Years: Too Much or Not Enough?*, LUBANGATRIAL.ORG (July 16, 2012), <http://www.lubangatrial.org/2012/07/16/14-years-too-much-or-not-enough/> (quoting victims who believe Lubanga's sentence was too lenient); *DR Congo Warlord Thomas Lubanga Sentenced to 14 Years*, BBC (July 10, 2012, 12:38 PM), <http://www.bbc.co.uk/news/world-africa-18779726> (providing, among others, the response of Mike Davis, from the human rights organization Global Witness, who said that "the sentencing of Lubanga was an 'important development' but that it sounded like 'a rather low sentence in relation to the crimes he committed'").

11. See *infra* Part III.

diversity is reflected in the disparate sentencing practices of international courts discussed in Section B.

A. Comparative Sentence Severity in National Systems

Sentence severity norms vary considerably around the world. For instance, sentencing law and practice in the United States are widely considered harsh.¹² In the past several decades, the United States has experienced a “push for a tough retributivism” that has resulted in longer terms of incarceration.¹³ A notorious example are the “three strikes” laws that mandate life sentences for repeat offenders, and apply even to nonviolent offenses.¹⁴ Sentences in the United States are approximately five to ten times longer than those imposed in France for similar crimes.¹⁵ Early release for good behavior is restricted.¹⁶ Unlike much of the rest of the world, the United States continues to apply the death penalty. Prison conditions in the United States are also notoriously tough, with rampant violence and overcrowding.¹⁷ Solitary confinement is widespread.¹⁸ Treatment for addictions, as well as medical and psychological conditions, is limited.¹⁹ Opportunities for self-improvement are rare.²⁰

Other countries that are known for inflicting harsh punishment include China and North Korea, where punishments often include hard labor, and the death penalty is applied frequently.²¹ Some countries in the Middle East, for

12. See, e.g., JAMES Q. WHITMAN, *HARSH JUSTICE: CRIMINAL PUNISHMENT AND THE WIDENING DIVIDE BETWEEN AMERICA AND EUROPE* 4, 46 (2005); see also Michael Tonry, *Preface, in THE HANDBOOK OF CRIME AND PUNISHMENT v, v* (Michael Tonry ed., 1998) (stating that punishment in the United States today is “vastly harsher than in any other country to which the United States would normally be compared”).

13. WHITMAN, *supra* note 12, at 56.

14. *Id.*; Connie de la Vega et al., *Cruel and Unusual: U.S. Sentencing Practices in a Global Context*, U.S.F SCH. L., CENTER FOR L. & GLOBAL JUST. 32-34 (May 2012), <http://www.usfca.edu/law/docs/criminalsentencing>.

15. WHITMAN, *supra* note 12, at 57.

16. See, e.g., 18 U.S.C. § 3624(b)(1) (2006) (allowing early release credits of only up to fifty-four days per year served, upon “exemplary compliance with institutional disciplinary regulations”).

17. See, e.g., *Brown v. Plata*, 131 S. Ct. 1910, 1923, 1927 (2011) (taking note of the considerable strain that severe overcrowding in California’s prison system has placed on prison resources as well as its tendency to promote prison violence); *The Expanding Federal Prison Population*, SENT’G PROJECT 2 (Mar. 2012), http://www.sentencingproject.org/doc/publications/inc_FederalPrisonFactsheet_March2012.pdf (noting that federal prisons are operating at thirty-five percent above capacity, resulting in double and triple-bunking, and the utilization of “non-housing areas for sleeping quarters”).

18. *New Amnesty International Report Assails California’s Use of Solitary Confinement*, SENT’G L. & POL’Y (Sept. 27, 2012, 9:18 AM), http://sentencing.typepad.com/sentencing_law_and_policy/2012/09/new-amnesty-international-report-assails-californias-use-of-solitary-confinement.html.

19. Nora V. Demleitner, *New Voices on the War on Drugs: “Collateral Damage”: No Re-Entry for Drug Offenders*, 47 VILL. L. REV. 1027, 1054 n.139 (2002) (noting that “[o]nly 13% of the seventy to eighty-five percent of state prisoners who need treatment for substance abuse receive it while imprisoned”); Keramet Reiter, Comment, *Experimentation on Prisoners: Persistent Dilemmas in Rights and Regulations*, 97 CALIF. L. REV. 501, 538 (2009) (explaining a number of factors that have decreased access to healthcare for the U.S. prison population); *Ill-Equipped: U.S. Prisons and Offenders with Mental Illness*, HUM. RTS. WATCH (2003), <http://www.hrw.org/reports/2003/usa1003/usa1003.pdf>.

20. See, e.g., Eva S. Nilsen, *Decency, Dignity, and Desert: Restoring Ideals of Humane Punishment to Constitutional Discourse*, 41 U.C. DAVIS L. REV. 111, 135-36 (2007) (stating that the “gutting” of rehabilitation programs in the U.S. prison system “perpetuates the disadvantages of incarcerated person”).

21. CLIFF ROBERSON & DILIP K. DAS, *AN INTRODUCTION TO COMPARATIVE LEGAL MODELS*

example Iran and Saudi Arabia, are known for inflicting harsh and often deadly punishments, including stoning.²² In many African countries, conditions of incarceration are very difficult.²³

At the other end of the spectrum are many countries in Europe and Latin America where the death penalty is prohibited, terms of imprisonment are much shorter, and conditions of incarceration are substantially more humane.²⁴ In many European countries the maximum terms of incarceration are ten to fifteen years.²⁵ Scandinavian prisons are particularly well known for their humane conditions, including opportunities for education and other forms of self-improvement.²⁶

A recent example illustrates the differences among norms. A Norwegian court sentenced Anders Breivik to twenty-one years in prison for killing seventy-seven people, a crime that the prosecution had considered charging as a

OF CRIMINAL JUSTICE 200-02 (2008); Margaret K. Lewis, *Leniency and Severity in China's Death Penalty Debate*, 24 COLUM. J. ASIAN L. 303, 304 (2011); Blaine Harden, *N. Korea's Hard-Labor Camps: On the Diplomatic Back Burner*, WASH. POST, July 20, 2009, http://articles.washingtonpost.com/2009-07-20/world/36925508_1_camp-guard-hard-labor-political-prisoners (describing the daily lives of North Korean political prisoners, "[e]ating a diet of mostly corn and salt, they lose their teeth, their gums turn black . . . [m]ost work 12- to 15-hour days"); Stephen Haggard & Marcus Noland, *Repression and Punishment in North Korea: Survey Evidence of Prison Camp Experiences 3* (E.W. Ctr. Working Papers, Politics, Governance & Sec. Series, Working Paper No. 20, 2009), available at <http://www.eastwestcenter.org/sites/default/files/private/pswp020.pdf> (describing prison experiences ranging from witnessing forced starvation to beatings and torture).

22. Michael J. Dennis, *Human Rights in 2002: The Annual Sessions of the UN Commission on Human Rights and the Economic and Social Council*, 97 AM. J. INT'L L. 364, 382 (2003); *Five Reasons Why Saudi Arabia Must Urgently Abolish the Death Penalty*, AMNESTY INT'L (Mar. 5, 2013), <http://www.amnesty.org/en/news/five-reasons-why-saudi-arabia-must-urgently-abolish-death-penalty-2013-03-05>; Ryan Grenoble, *Ali Al-Khawahir, Saudi Man, Sentenced to be Paralyzed in 'Eye for an Eye' Justice*, HUFFINGTON POST (Apr. 4, 2013, 9:03 AM), http://www.huffingtonpost.com/2013/04/03/ali-al-khawahir-paralyzed-saudi-arabia_n_3009500.html.

23. See, e.g., *Benin: Prison Conditions Violate Human Rights*, IRIN (July 30, 2008), <http://www.irinnews.org/report/79523/benin-prison-conditions-violate-human-rights> (describing "deplorable" conditions in Benin's prisons, including overcrowding, unjustified detention, lack of trained prison personnel, and inadequate food); *Country Reports on Human Rights Practices for 2011: Tanzania*, U.S. DEP'T STATE 4-7 (May 24, 2012), <http://www.state.gov/documents/organization/186460.pdf>; Amanda Dissel, *Prison Conditions in Africa*, CENTER FOR STUDY VIOLENCE & RECONCILIATION (Sept. 2001), <http://ppja.org/regional-information/africa/Prison%20Conditions%20Africa.pdf> (describing overcrowding and lack of basic resources such as food and bedding in prisons in Kenya and Uganda).

24. See generally Michael Tonry, *Punishment Policies and Patterns in Western Countries*, in SENTENCING AND SANCTIONS IN WESTERN COUNTRIES 3, 4-5 (Michael Tonry & Richard S. Frase eds., 2001) [hereinafter Tonry, *Punishment Policies*] (contrasting the United States with "the rest of the Western world, which has renounced the death penalty and where prison sentences longer than a few years are uncommon"); Tapio Lappi-Seppälä, *Trust, Welfare, and Political Culture: Explaining Differences in National Penal Policies*, 37 CRIME & JUST. 313, 321 (2008) (pointing out that imprisonment is the most severe sanction available in the industrialized world, except in the United States); John Van Kesteren, *Public Attitudes and Sentencing Policies Across the World*, 15 EUR. J. CRIM. POL'Y RES. 25, 42-43 (2009) (explaining that in a study comparing homicide rates as an indicator of overall crime with imprisonment rates, Ecuador and Colombia were shown to have relatively high crime but low imprisonment, suggesting "milder sentencing tariffs"; by comparison, the United States and Singapore were shown to have relatively low rates of crime, but high rates of imprisonment); de la Vega, *supra* note 14, at 29-31 (2012) (finding that Latin America as a region has a lower rate of life without parole sentences than the world average).

25. See Tonry, *Punishment Policies*, *supra* note 24, at 25.

26. See, e.g., Tapio Lappi-Seppälä, *Penal Policy in Scandinavia*, 36 CRIME & JUST. 217, 218 (2007) (discussing the overall leniency in punishment in the Scandinavian countries). See generally John Pratt, *Scandinavian Exceptionalism in an Era of Penal Excess: Part I: The Nature and Roots of Scandinavian Exceptionalism*, 48 BRIT. J. CRIMINOLOGY 119 (2008).

crime against humanity.²⁷ If Breivik behaves well in prison, he may well be released early.²⁸ Norwegians, including families of the victims, generally expressed satisfaction with this sentence.²⁹ In contrast, some commentators in the United States derided the sentence as preposterously low.³⁰

Such divergence in sentence severity norms exists with regard to international crimes as well as “ordinary” crimes. For instance, genocide resulting in death yields the death penalty or life imprisonment in Russia but only eight to twenty-five years’ incarceration in Argentina.³¹ Genocide not resulting in death is punished by five to fifteen years in prison in Germany and the death penalty in Nigeria.³²

These examples provide a flavor of the wide range of sentence severity norms around the world. In light of this diversity, it is not surprising that, as the following Section demonstrates, international courts have yet to establish consistent norms of sentence severity.

B. *International Sentencing Law and Practice*

No international court since the International Military Tribunals at Nuremberg and Tokyo has been permitted to inflict the death penalty.³³ Additionally, at the ICC, the maximum term of incarceration is thirty years, except in cases of extreme gravity.³⁴ Beyond these restrictions, international judges have wide latitude to determine the severity of the sentences they inflict.³⁵ The

27. Eva Arevuo, *Why Norway’s Terrorist May Only Be Sentenced to 21 Years*, ARTICLE 3 (July 26, 2011), <http://www.article-3.com/why-norway%E2%80%99s-terrorist-may-only-be-sentenced-to-21-years-92640>; Hadar Aviram, *Breivik Sentenced to 21 Years: Norwegian Justice*, CAL. CORRECTIONAL CRISIS (Aug. 24, 2012, 2:21 PM), <http://californiacorrectionscrisis.blogspot.com/2012/08/breivik-sentenced-to-21-years-norwegian.html>.

28. *Why Norway’s Worst Mass Killer Will Be Given a Jail Sentence of Only 21 Years . . . and Could Be on Weekend Parole in Seven*, DAILY MAIL: MAIL ONLINE (July 25, 2011), <http://www.dailymail.co.uk/news/article-2018378/Norway-Massacre-Anders-Behring-Breivik-21-years-jail-most.html>.

29. *Anders Behring Breivik: Norway Court Finds Him Sane*, BBC NEWS: EUR. (Aug. 24, 2012), <http://www.bbc.co.uk/news/world-europe-19365616>; Mark Lewis & Sarah Lyall, *Norway Mass Killer Gets the Maximum: 21 Years*, N.Y. TIMES, Aug. 24, 2012, <http://www.nytimes.com/2012/08/25/world/europe/anders-behring-breivik-murder-trial.html>.

30. *See, e.g., Norwegian Killer of 77 Gets 21 Years*, RIGHT HANDED COWBOY (Aug. 25, 2012), <http://www.texasbrady.com/archives/2292> (calling, in the words of an American blogger, “the most ridiculous [sic] sentence I have ever heard of”); Jeanne Sager, *Mass Murderer Anders Breivik’s Insanely Short Prison ‘Sentence’ Puts No Value on Life*, STIR (Aug. 24, 2012, 10:09 AM), http://thestir.cafemom.com/in_the_news/142485/mass_murderer_anders_breiviks_insanely (claiming the sentence is “insanely short” and sends the message that “life in Norway isn’t worth the time it takes to create it”).

31. Daniel B. Pickard, *Proposed Sentencing Guidelines for the International Criminal Court*, 20 LOY. L.A. INT’L & COMP. L. REV. 123, 143-44 (1997).

32. *Id.* at 148.

33. *See, e.g., S.C. Res. 827*, U.N. SCOR, 48th Sess., 3217th mtg., Annex, art. 24(1), 24(3), U.N. Doc. S/Res/827 (1993) [hereinafter ICTY Statute] (limiting punishment to imprisonment and forfeiture of illegally obtained property); *see also, e.g., Rome Statute*, *supra* note 6, at art. 77(1)-(2) (limiting punishment to imprisonment and fines).

34. Rome Statute, *supra* note 6, at art. 77(1).

35. For example, the statutes of the International Criminal Tribunal for Rwanda and the International Criminal Tribunal for the Former Yugoslavia state simply: “The penalty imposed by the Trial Chamber shall be limited to imprisonment.” S.C. Res. 955, U.N. SCOR, 49th Sess., 3453d mtg., Annex,

judges have exercised that discretion in ways that have produced a range of sentences across the tribunals.

As noted above, the ICC's first sentence is at least arguably on the mild side—a fourteen-year term of incarceration for the widespread recruitment and use of child soldiers.³⁶ The International Criminal Tribunal for Former Yugoslavia (ICTY) has also tended to impose fairly mild sentences, with an average of fewer than sixteen years in prison.³⁷ Taking into account the nature of the crimes, most of which involve large-scale violence by political and military leaders, such sentences align more closely with European severity norms than with those of other states, such as the United States or China.

The International Criminal Tribunal for Rwanda (ICTR) has imposed somewhat longer prison sentences, with an average of more than twenty-two years.³⁸ The ICTR has also imposed twenty-one life sentences compared to the ICTY's four.³⁹ Prison sentences at the Special Court for Sierra Leone (SCSL) have also been relatively high, averaging thirty-eight years and including sentences as long as fifty-two years.⁴⁰

The severity of international punishment also varies considerably due to inconsistent practices regarding early release. International court statutes generally permit offenders to be released well before the end of their sentences.⁴¹ However, at the *ad hoc* tribunals, early release may only be granted if the offender is eligible under the law of the state where the offender is incarcerated.⁴² This leads to significant variation in the severity of sentences because states have vastly different norms regarding early release.⁴³ The ICC Statute corrects this problem, reserving early release decisions to the exclusive discretion of the Court.⁴⁴ Indeed, the Statute requires judges to consider release after offenders have served two-thirds of their sentences.⁴⁵

Finally, because international courts send convicted persons to various states to serve their sentences, imprisonment conditions vary greatly. Currently,

art. 23(1), U.N. Doc. S/RES/955 (1994) [hereinafter ICTR Statute]; ICTY Statute, *supra* note 33, at art. 24(1). Similarly, the Statute of the Special Court for Sierra Leone states that punishment should be “imprisonment for a specified number of years.” Statute of the Special Court for Sierra Leone art. 19(1), Jan. 16, 2002, 2178 U.N.T.S. 145 [hereinafter SCSL Statute].

36. Prosecutor v. Lubanga, Case No. ICC-01/04-01/06, Decision on Sentence Pursuant to Article 76 of the Statute, ¶ 107.

37. SILVIA D'ASCOLI, SENTENCING IN INTERNATIONAL CRIMINAL LAW: THE APPROACH OF THE TWO AD HOC TRIBUNALS AND FUTURE PERSPECTIVES FOR THE INTERNATIONAL CRIMINAL COURT 215-16 (2011); Alette Smeulers, Barbra Hola & Tom van den Berg, *Sixty-Five Years of International Criminal Justice: The Facts and Figures*, 13 INT'L CRIM. L. REV. 7, 22 (2013) (placing the average determinate sentence length for the ICTY at 15.9 years).

38. Smeulers et al., *supra* note 37, at 24.

39. *Id.* at 23.

40. *Id.* at 23.

41. SCSL Statute, *supra* note 35 at art. 23; Rome Statute, *supra* note 6, at art. 110; ICTR Statute, *supra* note 35, at art. 27; ICTY Statute, *supra* note 33, at art. 28.

42. ICTR Statute, *supra* note 35, at art. 27; ICTY Statute, *supra* note 33, at art. 28.

43. Benjamin Watson, *Equal Treatment for Genocidaires: Sentence Enforcement at the ICTY and ICTR*, HUM. RTS. BRIEF: CENTER FOR HUM. RTS. & HUMANITARIAN L. (Aug. 25, 2012), <http://hrbrief.org/2012/08/equal-treatment-for-genocidaires-sentence-enforcement-at-the-icty-and-ictcr>.

44. Rome Statute, *supra* note 6, at art. 110(2).

45. Rome Statute, *supra* note 6, at art. 110(3).

international offenders are serving sentences in places as diverse as Mali, where conditions of incarceration are extremely tough,⁴⁶ and Sweden, where they are significantly more humane.⁴⁷

In sum, the severity of international sentences varies greatly both within and among the courts. Some of the discrepancy may be attributed to the relative seriousness of the crimes the tribunals adjudicate.⁴⁸ For example, the ICTR has focused largely on prosecuting the crime of genocide, which is widely considered the most serious international crime,⁴⁹ while the ICTY and SCSL have adjudicated primarily crimes against humanity and war crimes.⁵⁰ Another factor might be the physical locations of the tribunals, with the ICTY in Europe following European norms and the other two adhering to African sentencing norms, which tend to be more severe.⁵¹ Although the tribunals are international in their compositions, they address situations in particular states. The judges therefore likely feel beholden to some extent to the community norms in those states. Indeed, the statutes of the ICTY and ICTR require those courts to “have recourse to” the sentencing practices of former Yugoslavia and Rwanda, respectively.⁵²

While some of these factors may provide partial explanations for the variations, as many commentators have noted, the inconsistency and lack of clarity in international sentencing decisions make it very difficult to determine what is

46. See generally E.V.O. DANKWA, AFRICAN COMMISSION ON HUMAN AND PEOPLE'S RIGHTS, MALI PRISONS REVISITED: REPORT ON A VISIT, 27 NOVEMBER-8 DECEMBER 1998 (1999); Press Release, International Criminal Tribunal for Rwanda, More ICTR Convicts Transferred to Mali and Benin to Serve Their Sentences (July 3, 2012), available at <http://www.unictr.org/tabid/155/Default.aspx?id=1301>.

47. See Hanns von Hofer & Ryan Marvin, *Sweden*, in IMPRISONMENT TODAY AND TOMORROW: INTERNATIONAL PERSPECTIVES ON PRISONERS' RIGHTS AND PRISON CONDITIONS 634, 636-37 (Dirk van Zyl Smit & Frieder Dünkel eds., 2d ed. 2001) (describing prison conditions in Sweden); Lizette Alvarez, *Escapes Lead Sweden to Rethink Liberal Prison System*, NY TIMES, Mar. 20, 2005, <http://www.nytimes.com/2005/03/20/international/europe/20stockholm.html> (pointing out that Sweden, like much of Scandinavia, prides itself on the humane treatment of prisoners, and provides amenities such as routine conjugal visits, unlocked cell doors, and television sets in every cell).

48. D'ASCOLI, *supra* note 37, at 218-20; see also James Meernik & Kimi King, *The Sentencing Determinants of the International Criminal Tribunal for the Former Yugoslavia: An Empirical and Doctrinal Analysis*, 16 LEIDEN J. INT'L L. 717, 735 tbl.1 (2003) (noting that of thirty-five convictions, only one was for genocide; the rest were for war crimes and crimes against humanity).

49. Although this view is pervasive in the general public, there is some authority in international criminal law for the proposition that no hierarchy of international crimes exists. See, e.g., *Prosecutor v. Tadic*, Case No. IT-94-1-A & IT-94-1-A bis, Judgment in Sentencing Appeals, ¶ 69 (Jan. 26, 2000).

50. See Barbora Holá, Catrien Bijleveld & Alette Smeulers, *Consistency of International Sentencing: ICTY and ICTR Case Study*, 9 EUR. J. CRIMINOLOGY 539, 549 (2012).

51. Compare Marie Gottschalk, *Dismantling the Carceral State: The Future of Penal Policy Reform*, 84 TEX. L. REV. 1693, 1731-32 (2006) (explaining that the death penalty and life without parole are too harsh for most European countries), with John D. Bessler, *Revisiting Beccaria's Vision: The Enlightenment, America's Death Penalty, and the Abolition Movement*, 4 NW. J. L. SOC. POL'Y 195, 252 n.407 (2009) (noting that the death penalty is still used in Africa and that some African countries even employ it for sexual offences).

52. ICTR Statute, *supra* note 35, at art. 23(1); ICTY Statute, *supra* note 33, at art. 24(1). The SCSL statute permits reference not only to the sentencing norms of Sierra Leone, but also to the sentencing practices of the ICTR. SCSL Statute, *supra* note 35, at art. 19(1). See Jens David Ohlin, *Proportional Sentences at the ICTY*, in THE LEGACY OF THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA 322, 323 (Bert Swart et al. eds., 2011) [hereinafter Ohlin, *Proportional Sentences*].

driving sentence severity at these courts.⁵³ What is clear is that uniform norms of international sentence severity have yet to emerge.

III. THE CALL FOR HARSH JUSTICE

Virtually all scholars who have advanced normative arguments regarding sentence severity at international courts invoke one or more punishment theories to urge such courts to impose harsher sentences. In particular, a number of retributivists argue that international crimes are so serious that only harsh punishment adequately reflects the offenders' desert. A smaller number of scholars argue that harsh punishment is necessary to accomplish utilitarian objectives such as crime prevention and reconciliation. Finally, some scholars combine the two arguments, asserting both that perpetrators of international crimes deserve harsh punishment and that such punishment is necessary to achieve crime prevention. This Part sets forth these arguments and explains why each theory fails to support the push for harsh international punishment. It shows that, although the theories have been the subjects of worldwide debate for centuries, none has yet been able to justify particular amounts of punishment for international crimes.

A. Retributive Arguments

The most vocal advocates of harshness in international punishment invoke retributive theories. Retributive proportionality theory holds that punishment should be calibrated to the perpetrator's desert. Desert is a function of the harm the offender caused and the offender's culpability for that harm.⁵⁴ For retributivists, the more serious the crime in terms of harm and culpability, the more punishment is deserved.⁵⁵

Retributivists have debated whether desert justifies punishment in a cardinal or ordinal sense.⁵⁶ That is, whether desert tells us precisely what amount of punishment is appropriate for an offender or merely places the offender in appropriate relationship to other offenders on the punishment scale. If desert is

53. See, e.g., Allison Marston Danner, *Constructing a Hierarchy of Crimes in International Criminal Law Sentencing*, 87 VA. L. REV. 415, 441 (2001) (claiming that the tribunals' inconsistent sentencing practices "reinforce the views of critics who view the enforcement of international criminal law as fatally arbitrary"); Ralph Henham, *Developing Contextualized Rationales for Sentencing in International Criminal Trials*, 5 J. INT'L CRIM. JUST. 757, 760-61 (2007).

54. Richard S. Frase, *Excessive Prison Sentences, Punishment Goals, and the Eighth Amendment: "Proportionality" Relative to What?*, 89 MINN. L. REV. 571, 622 (2005) [hereinafter Frase, *Excessive*].

55. Aaron J. Rappaport, *Rationalizing the Commission: The Philosophical Premises of the U.S. Sentencing Guidelines*, 52 EMORY L.J. 557, 568 n.31 (2003). Retributive theories place different amounts of weight on harm and culpability in measuring desert. See Adil Ahmad Haque, *Retributivism: The Right and the Good*, 32 L. & PHIL. 59, 61 (2013).

56. See Paul Robinson, *A Sentencing System for the 21st Century?*, 66 TEX. L. REV. 1 (1987); Andrew von Hirsch, *Proportionality in the Philosophy of Punishment*, 16 CRIME & JUST. 55, 79-83 (1992) [hereinafter von Hirsch, *Proportionality*]. The United States Supreme Court has employed both relative and absolute conceptions of retributive culpability in its sentencing jurisprudence. See Joseph L. Hoffmann, *On the Perils of Line-Drawing: Juveniles and the Death Penalty*, 40 HASTINGS L.J. 229 (1989) (discussing the use of cardinal and ordinal concepts by the Supreme Court).

merely an ordinal concept, some other norm is needed to anchor the punishment scale. The anchoring norms, rather than desert, determine whether punishment is overall harsh or mild in a given system.

Early retributivists believed that desert could answer the question of how much punishment is appropriate in a cardinal sense. They emphasized harm and argued that proportionate punishment requires inflicting the same harm on the offender that he or she inflicted on the victim. This notion of “*lex talionis*” is reflected in the biblical mandate of “an eye for an eye,”⁵⁷ as well as similar statements in the Qur’an.⁵⁸ Immanuel Kant, the secular philosopher most famous for endorsing retributive proportionality, hewed to the religious tradition of measuring desert in cardinal terms.⁵⁹ For Kant, appropriate punishments could be identified without reference to an anchored punishment scale.

Modern retributive theorists, however, have largely abandoned the claim that desert is a principle of cardinal proportionality. Indeed, many retributivists believe that crime and punishment are essentially incommensurable.⁶⁰ As a result, retributive proportionality has largely been reduced to an ordinal concept.⁶¹ Some retributive scholars, including, most prominently, Andrew von Hirsch, seek to identify moral principles of harm and culpability to drive the ordinal ranking of crimes.⁶² Others, in particular Paul Robinson, argue that people share intuitions regarding the relative seriousness of crimes, which supply the relevant ranking criteria.⁶³

Regardless of their approach to ordinal ranking, however, most retributiv-

57. The Biblical maxim of *lex talionis* reads: “If any harm follows, then you shall give life for life, eye for eye, tooth for tooth, hand for hand, foot for foot, burn for burn, wound for wound, stripe for stripe.” *Exodus* 21:23-21:25.

58. Qur’an 5:45.

59. See IMMANUEL KANT, *THE METAPHYSICS OF MORALS* 105 (Mary Gregor ed. & trans., Cambridge Univ. Press 1996) (1797).

60. See Michael Tonry, *Individualizing Punishments*, in *PRINCIPLED SENTENCING: READINGS ON THEORY AND POLICY* 354, 356 (Andrew Ashworth, Andrew von Hirsch & Julian V. Roberts eds., 2009) (stating that while “rigid retributivists” advocate cardinal proportionality, “subtler retributivists . . . admit that in the abstract we can never agree on the single ideally appropriate punishment for any crime”). Even under *lex talionis*, cardinal proportionality is difficult for many crimes. For example, an accidental killing might require punishment short of death. H.L.A. Hart and Oliver Wendell Holmes struggled with proportionality due to the incomparability of crime and punishment. See Youngjae Lee, *Why Proportionality Matters*, 160 U. PA. L. REV. 1835, 1844 (2012).

61. Nonetheless, efforts to identify a cardinal basis for deserved punishment are ongoing. For instance, Richard Lippke, after noting that retributivists seem to “despair” of anchoring the punishment scale, has recently proposed what he terms the “commensurate harms principle.” Richard L. Lippke, *Anchoring the Sentencing Scale: A Modest Proposal*, 16 *THEORETICAL CRIMINOLOGY* 463, 465 (2012). This principle seeks to justify punishment by calibrating it to the standard harms the offender’s crime inflicts on victims as opposed to the harms actually inflicted. *Id.* at 465-66. As Professor Lippke admits, the theory is an incomplete solution in that it fails to take account of the offender’s culpability. *Id.* at 466.

62. See von Hirsch, *Proportionality*, *supra* note 56, 81-82 (laying out these moral justifications).

63. Paul H. Robinson & John M. Darley, *Intuitions of Justice: Implications for Criminal Law and Justice Policy*, 81 S. CAL. L. REV. 1, 1 (2007); Paul H. Robinson & Robert Kurzban, *Concordance and Conflict in Intuitions of Justice*, 91 MINN. L. REV. 1829, 1892 (2007); Paul H. Robinson, Robert Kurzban & Owen D. Jones, *The Origins of Shared Intuitions of Justice*, 60 VAND. L. REV. 1633, 1687 (2007). *But see* Donald Braman, Dan M. Kahan & David A. Hoffman, *Some Realism about Punishment Naturalism*, 77 U. CHI. L. REV. 1531 (2010) (challenging the idea of shared intuitions of deserved punishment).

ists rely on community norms to anchor the punishment scale.⁶⁴ While desert determines the appropriate amount of punishment for each crime in relation to other crimes, community norms govern whether punishments are mild, moderate, or severe.

Retributive international criminal law scholars, on the other hand, seem largely to eschew community norms as a basis for anchoring punishment and rely instead on a cardinal notion of desert.⁶⁵ Jens Ohlin is the most vocal advocate of a cardinally retributive approach to international sentencing.⁶⁶ Professor Ohlin views retribution as the only legitimate goal of international punishment: "Given that the usual consequentialist rationales for punishment do not apply with enough force in cases of genocide and crimes against humanity, the choice is either to recognize the uniquely retributive goal of those prosecutions or to simply let the criminals go free."⁶⁷ According to Professor Ohlin, desert can and should be measured in cardinal terms rather than merely as a matter of relative ordering.⁶⁸ In fact, he criticizes the ICTY for improperly focusing on ordinal proportionality.⁶⁹ When ICTY sentencing decisions invoke retribution to justify sentences, they tend to do so by attempting to place defendants in the proper hierarchy of punishment based on relative desert. Professor Ohlin argues that this approach has resulted in inappropriately low sentences.⁷⁰

Professor Ohlin's cardinal approach to proportionality leads him to argue

64. See, e.g., Paul H. Robinson, *Competing Conceptions of Modern Desert: Vengeful, Deontological, and Empirical*, 67 CAMBRIDGE L.J. 145, 162 (2008) [hereinafter Robinson, *Competing Conceptions*]; von Hirsch, *Proportionality*, *supra* note 56, at 77 (describing the anchoring points of the punishment scale as a "convention").

65. An exception is Robert Sloane who argues for an ordinally retributive approach to proportionality to effectuate expressive goals. Robert D. Sloane, *The Expressive Capacity of International Punishment: The Limits of the National Law Analogy and the Potential of International Criminal Law*, 43 STAN. J. INT'L L. 39, 83 (2007).

66. Professor Ohlin has written four pieces of scholarship advocating a retributive approach to proportionality in international sentencing: Ohlin, *Proportional Sentences*, *supra* note 52; Jens David Ohlin, *Commentary: Hassan Ngeze v. Prosecutor*, in 24 ANNOTATED LEADING CASES OF INTERNATIONAL TRIBUNALS 938 (André Klip & Göran Sluiter eds., 2009) (discussing a motion by ICTR defendants for reconsideration of sentences based on disparity with ICTY sentencing); Ohlin, *Towards a Unique Theory*, *supra* note 1; and Jens David Ohlin, *Applying the Death Penalty to Crimes of Genocide*, 99 AM. J. INT'L L. 747 (2005) [hereinafter Ohlin, *Applying the Death Penalty*].

67. Ohlin, *Towards a Unique Theory*, *supra* note 1, at 398.

68. *Id.* at 407-08.

69. Ohlin, *Proportional Sentences*, *supra* note 52, at 328. Professor Ohlin calls cardinal proportionality "offense-relative proportionality" and ordinal proportionality "defendant-relative" proportionality. However, he acknowledges that the concepts are identical. *Id.* at 324 n.10 (citing ANDREW VON HIRSCH, PART OR FUTURE CRIMES: DESERVEDNESS AND DANGEROUSNESS IN THE SENTENCING OF CRIMINALS 43 (1985)). Professor Ohlin states that he prefers to avoid the terms "ordinal" and "cardinal" on the grounds that they assume there is no conflict between the two kinds of proportionality, which he disputes. *Id.* The difficulty with Professor Ohlin's terms, however, is that they obscure the question of how to assess desert. Most retributivists include in calculations of desert factors related to the crimes (harm) and the offender (culpability); it is not clear whether Professor Ohlin intends to diverge from this approach.

70. Professor Ohlin addresses the indeterminacy critique that has convinced many retributivists to reject cardinal proportionality in favor of ordinal. Ohlin, *Proportional Sentences*, *supra* note 52, at 328-31. He acknowledges that the problem has led some theorists to argue that cardinal proportionality should provide an upper limit to punishment, but that the amount of punishment awarded should be measured in ordinal terms. *Id.* at 329-30. In response he states that the goal of the concept of proportionality "is to suggest the kind of punishment that is warranted by virtue of the defendant's wrongdoing." *Id.* at 330. It should thus be able to answer questions about upper and lower limits of punishment. *Id.*

that international courts should “sentence offenders based on the inherent gravity of their offence, even if that requires identical sentences (such as life in prison) for dissimilar crimes.”⁷¹ The justification for this cardinal approach, according to Professor Ohlin, is that it is necessary to vindicate the “rule of law.”⁷²

Professor Ohlin further argues that only harsh punishment adequately inflicts retribution for international crimes.⁷³ He asserts that harsh punishment is necessary in light of the gravity of such crimes. Sentences must be long and served in uncomfortable conditions.⁷⁴ When international sentences are too short or the conditions of incarceration are too comfortable, “genocidal criminals are getting away with murder.”⁷⁵ Indeed, the failure of international courts to endorse a retributive approach has resulted in sentences that “may fail to reflect the moral and legal gravity of the offences involved.”⁷⁶ Professor Ohlin has even argued in support of allowing the death penalty for genocide in light of the extreme seriousness of that crime.⁷⁷

While Professor Ohlin has developed the argument for cardinal retributive international punishment in greatest detail, other scholars have implicitly adopted this approach in their work. For instance, in an article about the relevance of an offender’s “good deeds” to sentencing decisions, Jean Galbraith argues that a certain amount of retribution is “due” to both the individual victims of international crimes and the groups to which they belong.⁷⁸ Although she does not explain how courts should measure the amount of retribution owed, she seems to adopt a cardinal approach in advocating for “a rough comparison between the defendant’s crimes and good deeds.”⁷⁹ A good deed directed at a member of the victim’s group (but not the victim herself) only partly mitigates a crime of equal magnitude, because it reduces the amount of retribution owed to the group but not to the victim.⁸⁰ Mitigation should be based on the “objective value” of the good deed to the group.⁸¹ Moreover, Professor Galbraith implies that most international sentences should be severe, stating: “The crimes committed by most international criminal defendants are typically so heinous

71. See *id.* at 328.

72. *Id.* at 338. As Professor Ohlin notes several times in making this argument, the justification sounds quite similar to a utilitarian argument for deterrence.

73. *Id.* at 410 (“[E]ven the highest sentence – life in prison – may be inadequate to represent the moral gravity of some offences, especially in cases dealing with the highest perpetrators for crimes of genocide and crimes against humanity.”).

74. Ohlin, *Towards a Unique Theory*, *supra* note 1, at 385.

75. *Id.* at 396.

76. *Id.* at 390.

77. Ohlin, *Applying the Death Penalty*, *supra* note 66, at 768-69 (“It is unclear, however, why the expressive theory of punishment would require forgoing the death penalty in all cases . . . If the crime is as severe as genocide, only extreme forms of punishment may adequately express society’s condemnation of the evil act.”).

78. Jean Galbraith, *The Good Deeds of International Criminal Defendants*, 25 LEIDEN J. INT’L L. 799, 811 (2012).

79. *Id.* at 812.

80. *Id.*

81. *Id.*

that their good deeds are unlikely to merit significant mitigating effect.”⁸²

Shahram Dana also endorses a largely retributive approach to international sentencing in arguing that international courts have failed to do justice in their quest to accomplish dubious “consequentialist aspirations.”⁸³ He implies a cardinal view of proportionality in arguing that the punishment international courts have inflicted have often been too low to reflect adequately the offenders’ culpability.⁸⁴ Others have written in a similar vein.⁸⁵

None of these retributivist scholars has identified a principled way of determining how much punishment people who commit international crimes deserve. Instead, they simply invoke the gravity of international crimes to justify the claim that harsh punishment is required. Yet, as demonstrated above, there is no consensus either at the international level or among national systems about how much punishment is appropriate, even for the gravest crimes. Instead, the appropriate severity of punishment depends largely on prevailing norms in the relevant community. The retributive international criminal law scholarship, much of which is written by U.S. scholars, seems to draw on U.S. sentence-severity norms. For the reasons elaborated below, such norms are not appropriate for international courts.

B. *Utilitarian Arguments*

Although their arguments are less developed than Professor Ohlin’s retributivism, some scholars invoke utilitarian goals to advocate for international punishment that is harsh, or at least harsher than current practice.⁸⁶ Utilitarian theorists consider punishment appropriate when the benefits it yields outweigh its social costs. The eighteenth-century theorist Cesare Beccaria thus endorsed the principle of parsimony, which requires that punishment be no more severe than necessary to accomplish the desired ends,⁸⁷ and Jeremy Bentham elaborated several additional rules of utilitarian proportionality.⁸⁸ Modern theorists have built on this legacy.⁸⁹

82. *Id.*

83. Dana, *supra* note 1.

84. *Id.*

85. See, e.g., Steven Glickman, Note, *Victims’ Justice: Legitimizing the Sentencing Regime of the International Criminal Court*, 43 COLUM. J. TRANSNAT’L L. 229, 247-48 (2004) (“A review of the sentences issued by the ICTY and ICTR reveals that, although the Trial Chambers of both Tribunals stressed retribution as a primary justification for punishment, most of the sentences handed down by the ICTY were far too lenient to actually reflect this rationale”).

86. See, e.g., D’ASCOLI, *supra* note 37, at 37 (invoking restorative justice); Harmon & Gaynor, *supra* note 1, at 711-12 (“Low sentences, however well intentioned, not only weaken respect for human dignity and the rule of law, but may frustrate and impede reconciliation in the areas in which the crimes were committed.”); Andrew N. Keller, *Punishment for Violations of International Criminal Law*, 12 IND. INT’L & COMP. L. REV. 53, 65 (2001) (invoking deterrence).

87. See CESARE BECCARIA, OF CRIMES AND PUNISHMENTS 49 (Jane Grigson trans., Marsilio Publishers 1996) (1764) (“Punishments, therefore, and the method of inflicting them, should be chosen in due proportion to the crime so as to make the most efficacious and lasting impression on the minds of men, and the least painful impressions on the body of the criminal.”).

88. See JEREMY BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION 165-71 (J.H. Burns & H.L.A. Hart eds., 1996) (1789).

89. See H.L.A. HART, PUNISHMENT AND RESPONSIBILITY: ESSAYS IN THE PHILOSOPHY OF

The ends utilitarians seek to promote through punishment include specific and general deterrence, incapacitation, rehabilitation, and norm expression. Of these, the most commonly relied upon in international sentencing decisions is deterrence,⁹⁰ although some decisions also invoke the other three aforementioned ends.⁹¹

Unlike most desert-based theories of punishment, deterrence theories claim the ability to justify absolute amounts of punishment. Thus, theorists such as Richard Posner posit that the “optimal” amount of punishment can be ascertained for particular crimes.⁹² This economic approach to punishment assumes that most potential offenders are rational calculators who decide whether to commit crimes according to the severity of the punishment in relation to the benefit they anticipate from the crimes, as well as the likelihood of being punished.⁹³

The assumptions on which deterrence theories are based have been widely challenged in the literature on international criminal law.⁹⁴ More importantly for present purposes, none of the scholars who invoke such theories to advocate for harsh international punishment have sought to explain or justify the claim that such punishment is necessary to deter international crimes. Nor do the characteristics of international crimes support that notion. Perpetrators of genocide and crimes against humanity generally claim, and probably often believe, that their actions are morally appropriate.⁹⁵ They claim to be upholding a principle

LAW 173 n.20 (2008) (stating that “the law should not inflict greater suffering than it is likely to prevent”); Frase, *Excessive*, *supra* note 54, at 592-97 (identifying two utilitarian proportionality principles: ends proportionality and means proportionality); Richard S. Frase, *Punishment Purposes*, 58 STAN. L. REV. 67, 72-73 (2005) (stating, in discussing utilitarianism, that “[c]riminal penalties should not cost more than the benefits they achieve or cause individual or social harms which outweigh their crime-controlling effects or other benefits. Punishment should also be efficient. Penalties should not be more severe or more costly than necessary; if the same crime-control and other benefits can be achieved with less severe or less costly methods, those methods should be preferred.”).

90. See, e.g., *Prosecutor v. Popovic*, Case No. IT-05-88-T, Judgment, ¶¶ 2128-29 (Int’l Crim. Trib. for the Former Yugoslavia June 10, 2010) (affirming the ICTY’s commitment to deterrence); *Prosecutor v. Brima*, Case No. SCSL-04-16-T, Sentencing Judgment, ¶ 16 (July 19, 2007) (noting that consideration of deterrence in sentencing reaffirms the international community’s intolerance of serious breaches of international humanitarian law and human rights); *Prosecutor v. Kambanda*, Case No. ICTR 97-23-S, Judgment and Sentence, ¶ 28 (Sept. 4, 1998) (justifying a sentence of life imprisonment in part by stating that would-be perpetrators of mass atrocity must be dissuaded through punishment that demonstrates that the global community is not prepared to tolerate serious violations of international criminal law).

91. See *Prosecutor v. Nikolic*, Case No. IT-02-60/1-S, Sentencing Judgment, ¶ 93 (Int’l Crim. Trib. for the Former Yugoslavia Dec. 2, 2003) (recognizing the goal of reconciliation); *Prosecutor v. Blaškic*, Case No. IT-95-14-T, Judgment, ¶ 765 (Int’l Crim. Trib. for the Former Yugoslavia Mar. 3, 2000) (recognizing the goal of rehabilitation); Stuart Beresford, *Unshackling the Paper Tiger - the Sentencing Practices of the ad hoc International Criminal Tribunals for the Former Yugoslavia and Rwanda*, 1 INT’L CRIM. L. REV. 33, 90 (2001) (describing the utilitarian sentencing goals of the ICTY and ICTR).

92. See Richard A. Posner, *An Economic Theory of the Criminal Law*, 85 COLUM. L. REV. 1193, 1205-06 (1985).

93. *Id.* at 1205 (stating that the theory begins with the assumption that most criminals are sufficiently rational actors).

94. See, e.g., David S. Koller, *The Faith of the International Criminal Lawyer*, 40 N.Y.U. J. INT’L L. & POL. 1019, 1027-30 (2008) (discussing various criticisms of deterrence in international criminal law).

95. See, e.g., Jan Klabbers, *Just Revenge? The Deterrence Argument in International Criminal*

or protecting a group. They are usually in positions of power. If international criminal law can influence such actors, it is most likely to do so through strong expression of contrary values, not by inflicting long sentences. Although token punishment is probably insufficient to express adequate condemnation of serious crimes, neither is harsh punishment necessary. If a leader like Syria's Bashar Assad is to be deterred by the threat of international punishment, a highly debatable proposition to be sure, he is just as likely to be deterred by a possible ten- or fifteen-year sentence as by the threat of a life sentence.

C. *Utility of Desert*

A final set of arguments for harshness invokes both utilitarian and retributive theories, claiming that there is utility in giving offenders their just deserts.⁹⁶ A number of scholars, most prominently Paul Robinson, argue that humans share intuitions about desert and that failing to adhere to these intuitions undermines the law's ability to achieve socially beneficial outcomes such as deterrence.⁹⁷ Most advocates of the utility of desert theory, including Professor Robinson, view desert as providing guidance only regarding ordinal proportionality.⁹⁸ They rely on community norms rather than shared intuitions to determine the overall harshness or mildness of the punishment scale.⁹⁹

Jens Ohlin's argument for a cardinally retributive approach to international sentencing, however, also includes an appeal to the beneficial consequences of such retribution.¹⁰⁰ Without explicitly endorsing the utility of desert thesis, with its focus on ordinal proportionality, Ohlin argues that if sentences are too low victims may "engage in self-help measures and take matters into their own hands."¹⁰¹ He further states: "If the retributive goals are ignored, victims lose confidence in the system, the guilty are not adequately punished, the moral fabric to the international community is not repaired, ethnic conflict reignites, and the twin goals of collective peace and security, as codified in the

Law, 12 FINNISH Y.B. INT'L L. 249, 253 (2001) (arguing that perpetrators of international crimes tend to believe that history will vindicate their actions and are motivated by a belief that their actions are "good"); Sloane, *supra* note 65, at 81 (arguing that internationally criminal conduct often conforms "to a norm that prevails within the criminal's literal community, be it national, ethnic, racial or martial"); David Wipman, *Atrocities, Deterrence, and the Limits of International Justice*, 23 FORDHAM INT'L L.J. 473, 477 (2009) (discussing a survey conducted by the International Committee of the Red Cross that demonstrated that war criminals and civilians in Bosnia did not view their attacks on other civilians as wrongful, because they viewed the situation as "total war"); Andrew K. Woods, *Moral Judgments & International Crimes: The Disutility of Desert*, 52 VA. J. INT'L L. 633, 654-56 (2012) (arguing that the unique circumstances surrounding international crimes include the fact that perpetrators adhere to their own social norms such that desert based on violation of "community norms" becomes impractical).

96. See Robinson & Kurzban, *supra* note 63, at 1848; see also Robinson & Darley, *supra* note 63, at 18-31 (arguing that there is great utility in the criminal justice system that provides for a distribution of liability and punishment in accordance with the citizens' shared intuitions about justice); Robinson, Kurzban & Jones, *supra* note 63, at 1635 (referring to the theory of utility of desert).

97. Robinson & Kurzban, *supra* note 63, at 1892; see also Woods, *supra* note 95, at 651-52 (arguing that the theory is inapplicable in the international criminal law context).

98. See Robinson & Darley, *supra* note 63, at 12-13.

99. See Robinson, *Competing Conceptions*, *supra* note 64, at 162; Robinson & Darley, *supra* note 63, at 45-46.

100. Ohlin, *Towards a Unique Theory*, *supra* note 1, at 399-400.

101. *Id.*

UN Charter, are not respected.”¹⁰²

As with his arguments based on general retributive theory, Professor Ohlin does not explain why harsh punishment is necessary to achieve these consequences. Again, the argument seems to draw on the harsh sentencing norms typical of the United States.

Each of the arguments described above fails to supply a convincing theoretical basis for harsh international punishment. Theories focused on desert at most explain why crimes and punishments should be ranked according to seriousness; they do not answer the question whether punishment should be harsh, moderate, or mild overall. Likewise, utilitarian theories, which always encounter problems of counterfactual proof, are particularly problematic in the context of international crimes.

Calls for harsh international justice are not solely rooted in theory, however. Much of the commentary seems to rely instead on the intuition that international crimes are so serious that they require harsh punishment, whatever the purpose of that punishment. As the next Part explains, this often-invoked intuition can be misleading, making it especially important for international judges to look beyond intuition to guiding norms in determining appropriate sentences.

IV. DON'T TRUST YOUR INTUITIONS: RHETORIC, NARRATIVE, AND THE RISK OF OVERPUNISHING FOR INTERNATIONAL CRIMES

The implicit assumption in much of the commentary that international crimes are so serious as to make harsh punishment intuitively appropriate is dangerous for at least two reasons. First, and most importantly, there is no evidence that humans share intuitions about the appropriate punishment severity for any crime. As explained above, scholars who advocate an empirical approach to desert such as Professor Robinson, argue that humans share intuitions about how much punishment is deserved for particular crimes *relative to other crimes*, not about the appropriate severity of punishment in absolute terms.¹⁰³ Instead, our intuitions about appropriate punishment severity seem to be derived from the norms of the communities to which we belong.¹⁰⁴

The second reason to be wary of the implicit appeal to intuition is more specific to international crimes. The discourse surrounding international crimes is replete with rhetoric and narratives that risk misleading sentencing decisionmakers about the gravity of these crimes. Decisionmakers who rely on their intuitive sense of the gravity of international crimes to determine punishment severity therefore risk overpunishing. That is, they risk inflicting harsher punishments than they would impose if they understood more clearly the reality of the crimes, unencumbered by the rhetoric and narratives.

102. *Id.*

103. See Robinson & Kurzban, *supra* note 63, at 1892; Paul H. Robinson, *The Proper Role of the Community in Determining Criminal Liability and Punishment*, UNIV. PA. L. SCH., PENN L.: LEGAL SCHOLARSHIP REPOSITORY 9 (Nov. 21, 2012), http://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=1433&context=faculty_scholarship.

104. See Robinson, Kurzban & Jones, *supra* note 63, at 1677-78; Mark Warr et al., *Norms, Theories of Punishment, and Publicly Preferred Penalties for Crimes*, 24 SOC. Q. 75, 90 (1983).

While the potentially distorting effects of rhetoric and narrative are not unique to international criminal law,¹⁰⁵ they are especially acute in this context in light of the physical, political, and cultural distance between international courts and the crimes they adjudicate. The greater the distance between decisionmakers and the lived reality of crimes, the more likely decisionmakers are to be improperly influenced by misleading rhetoric and narratives.¹⁰⁶

A. *Gravity Rhetoric*

As Anthony Amsterdam and Jerome Bruner have stated, “[R]hetorics’ . . . denote the various linguistic processes by which a speaker can create, address, avoid, or shape issues that the speaker wishes or is called upon to contest, or that a speaker suspects (at some level of awareness) may become contested.”¹⁰⁷ In the context of international criminal law, an important contested issue is the appropriateness of international jurisdiction. Criminal jurisdiction is generally considered integral to the right of sovereign states to govern within their territories. Invocations of international jurisdiction over criminal conduct therefore require special justification.

Since the emergence of international criminal law following the Holocaust, the primary justification for such jurisdiction has been the special gravity of the crimes at issue.¹⁰⁸ International criminal law is said to deal with atrocities, heinous offenses, crimes that violate humanity, and so on.¹⁰⁹ The Rome Statute preamble frames the project of the Court by reference to “unimaginable atrocities that deeply shock the conscience of humanity.”¹¹⁰ Less serious crimes are to be left to national adjudication. In light of this important justificatory role, gravity rhetoric has become pervasive in international criminal law discourse.¹¹¹

Despite its omnipresence, international criminal law’s gravity rhetoric has gone largely unexamined.¹¹² As Amsterdam and Bruner point out,

105. See ANTHONY G. AMSTERDAM & JEROME BRUNER, *MINDING THE LAW* 111-13 (2000) (discussing the effects of narrative on law in general).

106. See *id.* at 14-15 (suggesting that narrative and rhetoric are influenced by culture, so the farther away from the culture one gets, the more the narrative and rhetoric of that culture cannot properly be understood).

107. *Id.* at 165.

108. See, e.g., *Prosecutor v. Tadic*, Case No. IT-94-1-I, Decision on Defence Motion for Interlocutory Appeal on Jurisdiction, ¶ 57 (Int’l Crim. Trib. for the Former Yugoslavia Oct. 2, 1995) (holding that the jurisdiction of the international tribunal was justified in part because “of the nature of the offences alleged against Appellant, offences which, if proven, do not affect the interests of one State alone but shock the conscience of mankind”); BRUCE BROOMHALL, *INTERNATIONAL JUSTICE & THE INTERNATIONAL CRIMINAL COURT: BETWEEN SOVEREIGNTY AND THE RULE OF LAW* 10 (2003); Margaret M. deGuzman, *Gravity and the Legitimacy of the International Criminal Court*, 32 *FORDHAM INT’L L.J.* 1400, 1401-02 (2009).

109. See, e.g., David J. Scheffer, *The Future of Atrocity Law*, 25 *SUFFOLK TRANSNAT’L L. REV.* 389, 394-96 (2002) (describing the types of crimes dealt with in international criminal tribunals).

110. Rome Statute, *supra* note 6, at pmb1.

111. See, e.g., Andrea Carcano, *Sentencing and the Gravity of the Offense in International Criminal Law*, 51 *INT’L & COMP. L.Q.* 583 (2002).

112. deGuzman, *How Serious*, *supra* note 3, at 22.

“[U]nexaminated rhetorics can make trouble.”¹¹³ Such rhetorics can “narrow the range of discursive space and interpretive possibility.”¹¹⁴ Narrowing effects have been demonstrated in the literature on the impact of various heuristics and biases on legal decisionmaking.¹¹⁵ For example, Alice Ristroph has examined the limiting effects of “violence” rhetoric on efforts at criminal law reform in the United States.¹¹⁶

Scholars advocating harshness deploy gravity rhetoric to narrow the range of sentencing choices available to international courts. Yet the rhetoric is sometimes misleading. As I have elaborated elsewhere, international crimes are not uniformly as serious as the rhetoric suggests, and the scope of international criminal law is expanding to include increasingly less serious offenses and less responsible offenders.¹¹⁷

The subject matter jurisdiction of the ICC extends to isolated war crimes committed by individual soldiers.¹¹⁸ The harms associated with some war crimes, such as pillaging or directing attacks at protected buildings, can be rather minor in some cases.¹¹⁹ Even crimes against humanity are being interpreted in the jurisprudence to embrace increasingly less serious harms.¹²⁰

Moreover, even when the harms associated with international crimes are very serious, the culpability of the perpetrators may be relatively low. By highlighting the harms victims have suffered, gravity rhetoric can obscure or exaggerate the extent of the perpetrator’s culpability. National criminal laws generally presume that when a person intentionally or knowingly causes great harm, the person’s culpability is commensurately high absent exceptional circumstances.¹²¹ For several reasons, however, this presumption is questionable in international criminal law, where the offender’s culpability may be lower than one would normally expect.

First, as commentators beginning with Hannah Arendt have noted, unlike

113. AMSTERDAM & BRUNER, *supra* note 105, at 192.

114. *Id.* at 193.

115. See, e.g., Christine Jolls et al., *A Behavioral Approach to Law and Economics*, 50 STAN. L. REV. 1471, 1477 (1998) (discussing how heuristics can lead to errors in particular circumstances); Gregory N. Mandel, *Patently Non-Obvious: Empirical Demonstration that the Hindsight Bias Renders Patent Decisions Irrational*, 67 OHIO ST. L.J. 1391, 1393 (2006) (finding that hindsight bias distorts patent decisions “far more than anticipated”).

116. Alice Ristroph, *Criminal Law in the Shadow of Violence*, 62 ALA. L. REV. 571, 575 (2011).

117. See generally deGuzman, *How Serious*, *supra* note 3.

118. Rome Statute, *supra* note 6, at art. 8.

119. *Id.*, at art. 8(2)(b).

120. See Prosecutor v. Bikindi, Case No. ICTR-01-72-T, Judgement, ¶¶ 388-95 (Dec. 2, 2008), <http://www.unicttr.org/Portals/0/Case%5CEnglish%5CBikindi%5Cjudgement%5C081202eJudgement.pdf> (ruling controversially that hate speech can constitute persecution as a crime against humanity); Prosecutor v. Nahimana, Case No. ICTR-99-52-T, Judgement and Sentence, ¶ 1072 (Dec. 12, 2003), <http://www.unicttr.org/Portals/0/Case%5CEnglish%5CNahimana%5Cjudgement%5Cjudg&sent.pdf>; deGuzman, *How Serious*, *supra* note 3, at 38-44; Patricia M. Wald, *Genocide and Crimes Against Humanity*, 6 WASH. U. GLOBAL STUD. L. REV. 621, 629 (2007) (noting that judges have broadly interpreted “widespread” to include an area as small as twenty kilometers).

121. See Kenneth W. Simons, *Statistical Knowledge Deconstructed*, 92 B.U. L. REV. 1, 3 (2012) (stating that “[t]he law typically treats an actor who knows that he or she will likely cause serious harm to a particular individual, and who does cause that harm, as a very culpable wrongdoer who merits a severe sanction”).

“ordinary” crimes, international crimes are often committed in accordance with, rather than in violation of, prevailing social and sometimes legal norms.¹²² While leaders who shape the aberrant normative environment deserve strong sanction, the culpability of norm followers may be lower than the gravity rhetoric surrounding international crimes suggests.¹²³

A related problem is that some norms of international criminal law remain in early stages of development. With regard to such norms, culpability may be reduced even for leaders.¹²⁴ An important recent example concerns the prohibition on recruiting and using child soldiers—the crimes of which Thomas Lubanga was convicted.¹²⁵ These crimes have been identified as international crimes relatively recently. They were first included in an international court statute in 1998,¹²⁶ and only a handful of offenders have been prosecuted for them. Lubanga was the first defendant tried at the ICC for these crimes.

Lubanga may well have been unaware that recruiting and using child soldiers in armed conflict were crimes under international law. More importantly, however, he may have been unaware that what he was doing was immoral.¹²⁷ Lubanga was operating in a cultural context in which children are expected to contribute to family and social welfare at an earlier age than in some other parts of the world.¹²⁸ As such, requiring or permitting children to participate in armed conflict may have seemed less reprehensible to him than it does to many others.

This is not to say that the international community’s decision to punish Lubanga is illegitimate. The norms prohibiting his crimes were incorporated into the Rome Statute to which Lubanga’s state, the Democratic Republic of Congo, is a party. However, it does suggest that the ICC should be careful that the gravity rhetoric surrounding these crimes does not result in overly harsh

122. HANNAH ARENDT, *EICHMANN IN JERUSALEM: A REPORT ON THE BANALITY OF EVIL* 287-88 (1963); Mark A. Drumbl, *Accountability for System Criminality*, 8 SANTA CLARA J. INT’L L. 373, 375 (2010) [hereinafter Drumbl, *Accountability*].

123. See, e.g., Drumbl, *Accountability*, *supra* note 122; Mark A. Drumbl, *Collective Violence and Individual Punishment: The Criminality of Mass Atrocity*, 99 N.W. L. REV. 539, 571-72 (2005) [hereinafter Drumbl, *Collective Violence*] (explaining the phenomenon of international criminal prosecutions wherein an offender is a “captive[] of [a] social norm[]” and thus with a weakened sense of individual criminal responsibility receives what might be considered a lenient sentence despite being found guilty of crimes considered the most serious to the international community).

124. Joseph E. Kennedy has noted that in the United States, sentence discretion has served to mitigate the injustice of applying new norms to defendants operating under the old ones. Joseph E. Kennedy, *Making the Crime Fit the Punishment*, 51 EMORY L.J. 753, 754 (2002).

125. See *Prosecutor v. Lubanga*, Case No. ICC-01/04-01/06, Decision on Sentence Pursuant to Article 76 of the Statute, ¶ 107.

126. See Rome Statute, *supra* note 6, at art. 8(2)(b)(xxvi).

127. See David M. Rosen, *Child Soldiers, International Humanitarian Law, and the Globalization of Childhood*, 109 AM. ANTHROPOLOGIST, 298, 300, 304 (2007) (calling into question the prevailing humanitarian narrative of child-soldiering as a moral affront due to its lack of consideration for the context surrounding the recruitment and use of child soldiers in modern conflicts); Ah-Jung Lee, *Understanding and Addressing the Phenomenon of ‘Child Soldiers’: The Gap between the Global Humanitarian Discourse and the Local Understandings and Experiences of Young People’s Military Recruitment* 14-19 (Refugee Studies Ctr., Working Paper No. 52, 2009) (calling for a more critical examination of child soldiering given the international community’s failure to take into account local understandings of a child’s role in a community during times of peace versus war).

128. Ah-Jung Lee, *supra* note 127, at 16.

punishment.

The distortive effect of gravity rhetoric on punishment remains a *potential* problem. At this stage in the regime's development there is little evidence that gravity rhetoric is in fact promoting harsh punishments. Indeed, current practice suggests that at least some judges are resistant to the rhetoric. As noted above, Lubanga was sentenced to fourteen years in prison despite the prosecution's recommendation of thirty years based on the purported seriousness of the crimes. The ICTY has likewise imposed many sentences at the mild end of the spectrum. Professor Ohlin attributes the lenient sentences at the ICTY to a misguided focus on relative, rather than absolute, desert.¹²⁹ An equally plausible explanation, however, is that judges are focusing on absolute desert but finding that the culpability of defendants does not merit severe sentences.

As the ICC continues to develop its sentencing practice, it should be careful to avoid imposing sentences based on the rhetoric rather than the reality of crime seriousness. The Prosecutor's argument in the Lubanga case that all ICC crimes should be subject to a baseline presumption of twenty-four years in light of their gravity illustrates the problem.¹³⁰ To adopt such a presumption would reinforce the risk of bias inherent in gravity rhetoric.¹³¹

B. Narratives

A related feature of international criminal law that also gives rise to a risk of overpunishing is the regime's reliance on narratives of monstrosity and binary narratives of good and evil. A significant body of scholarship recognizes law and legal process as narrative.¹³² As Amsterdam and Bruner note, the resolution of legal questions is not simply a matter of "examining free-standing factual data selected on grounds of their logical pertinency."¹³³ Rather, "answers in such matters of 'fact' depend largely upon one's choice (considered or unconsidered) of some overall narrative as best describing *what happened* or *how the world works*."¹³⁴

International criminal courts engage in at least two kinds of narratives that may encourage judges to overpunish. The first is closely related to the deployment of gravity rhetoric examined above. International courts tell a story about the *extreme* evil that offenders perpetrate against their fellow humans,

129. Ohlin, *Proportional Sentences*, *supra* note 52, at 327-28.

130. Prosecutor v. Lubanga, Case No. ICC-01/04-01/06, Decision on Sentence Pursuant to Article 76 of the Statute, ¶ 92.

131. See Daniel M. Isaacs, *Baseline Framing in Sentencing*, 121 YALE L.J. 426, 437-39 (2011) (discussing cognitive biases that may arise from the existence of sentencing baselines that "frame" the question of sentencing around how a situation is presented, not the situation itself).

132. AMSTERDAM & BRUNER, *supra* note 105, at 110; Jane Baron & Julia Epstein, *Is Law Narrative?*, 45 BUFF. L. REV. 142, 149 (1997) (arguing that a focus on narrative in law "can be helpful as a way of elucidating how meaning is made in legal contexts"); Peter Brooks, *Narrative Transactions—Does the Law Need a Narratology?*, 18 YALE J.L. & HUMAN. 1, 28 (2006) (calling for greater attention to the "narrativity" of the law); Lisa Kern Griffin, *Narrative, Truth, and Trial*, 101 GEO. L.J. 281, 335 (2013) (recognizing the need for balance between a convincing narrative at trial and fair and reliable fact-finding, and the importance of this balance to the messages that trials send to the public).

133. AMSTERDAM & BRUNER, *supra* note 105, at 111.

134. *Id.*

which fosters a sense of community among those supporting an international response. By portraying offenders as monsters, international criminal law forges solidarity in the face of cultural differences and appeals to state sovereignty.

Narratives of extreme evil or monstrosity evoke emotions of anger and hatred that encourage severe punishment.¹³⁵ Joseph Kennedy has examined the role that such narratives have played in promoting a culture of harsh punishment in the United States.¹³⁶ Drawing on Emile Durkheim's work, Kennedy argues that narratives of monstrosity have developed in the United States to help overcome anxiety based on change and diversity and to increase social cohesion.¹³⁷ The results have been "sentences tied to monstrous conceptions of crime, a sentencing process which attempts to measure only harm and not moral worth, and a mentality of risk assessment which holds our judges and prosecutors hostage to our worst fears."¹³⁸ Convicted persons have become scapegoats, blamed for society's intangible fears and frustrations.¹³⁹

While the narratives of international courts have yet to demonstrate such an effect on sentencing broadly, there is reason for concern. For instance, the sentence that the Special Court for Sierra Leone (SCSL) imposed on former Liberian President Charles Taylor has caused some alarm.¹⁴⁰ The narrative surrounding the Taylor case was one of a particularly evil individual abusing his position at the height of political power to inflict atrocious harms on huge numbers of people.¹⁴¹ The "reality" proven at trial was rather different. Taylor was not found to have abused his power or to have participated directly in the criminal enterprise at issue, let alone participated as a leader. Instead, he was convicted only of accessorial liability.¹⁴² Nonetheless, Taylor was sentenced to fifty years imprisonment, the second longest sentence the SCSL has handed down.¹⁴³

The Extraordinary Chambers in the Courts of Cambodia have thus far convicted only one defendant, Kaing Guek Eav, known as "Duch." Duch was

135. Joseph E. Kennedy, *Monstrous Offenders and the Search for Solidarity through Modern Punishment*, 51 HASTINGS L.J. 829, 845 (2000).

136. *Id.* at 830-31.

137. *Id.* at 907.

138. *Id.*

139. *Id.* at 862.

140. See Kevin Jon Heller, *The Taylor Sentencing Judgment: A Critical Analysis*, 11 J. INT'L CRIM. JUST. 835, 852 (2013).

141. See, e.g., The Associated Press, *War Crimes Trial Resumes for Former Leader of Liberia*, N.Y. TIMES, Jan. 8, 2008, <http://www.nytimes.com/2008/01/08/world/africa/08taylor.html>; David Blair, *Profile: Charles Taylor, Warlord and Ex-President of Liberia on Trial for War Crimes*, DAILY TELEGRAPH, July 14, 2009, <http://www.telegraph.co.uk/news/worldnews/europe/netherlands/5818861/Profile-Charles-Taylor-warlord-and-ex-president-of-Liberia-on-trial-for-war-crimes.html>.

142. Prosecutor v. Taylor, Case No. SCSL-03-01-T, Judgement, ¶ 6994 (May 18, 2012), <http://www.sc-sl.org/LinkClick.aspx?fileticket=k%2b03KREPCQ%3d&tabid=107>.

143. Prosecutor v. Taylor, Case No. SCSL-03-01-T, Sentencing Judgement, Disposition (May 30, 2012), <http://www.sc-sl.org/LinkClick.aspx?fileticket=U6xCITNg4tY%3D&tabid=107>. The longest determinate sentence handed down by the SCSL was Sesay's fifty-two year sentence. Prosecutor v. Sesay, Case No. SCSL-04-15-T, Sentencing Judgement, § VI (Apr. 8, 2009), <http://www.sc-sl.org/LinkClick.aspx?fileticket=mRoVnfyCuFY%3d&tabid=215>.

the commander of the notorious Tuol Sleng prison where he oversaw the torture of thousands of prisoners before sending them to their deaths in Cambodia's killing fields.¹⁴⁴ Duch pled guilty and asked for forgiveness.¹⁴⁵ There is general agreement that Duch was a functionary who would have been replaced, and probably killed, had he refused to carry out the orders he received.¹⁴⁶ Despite his guilty plea and remorse, Duch was sentenced to life in prison.¹⁴⁷ Notably, it was the appeals court that imposed this sentence. The trial court, which was closer to the facts and presumably less susceptible to misleading narratives about the case, had sentenced Duch to thirty-five years imprisonment.

Are these examples of narratives of monstrosity affecting sentences or of the kind of "scapegoating" that Professor Kennedy has identified in the United States? As with many questions concerning the appropriateness of particular sentences, it is difficult to know. However, in light of the role that narratives of evil and monstrosity play in community building, international courts should be alert to the possibility that such narratives will result in overpunishment.

The second narrative of international criminal law that may encourage overpunishment is the identification of participants in conflict as good or evil. Commentators have described how international criminal law institutions contribute to the development of such binary narratives. For instance, Sarah Nouwen and Wouter Werner refer to Carl Schmitt's theory of politics to demonstrate that the International Criminal Court divides conflict participants into "friends" and "enemies" of the international community when they decide whom to prosecute.¹⁴⁸ Christopher Mahoney makes a similar argument of political motivation with regard to the SCSL, arguing that those who created the court and guided its functioning manipulated the narrative surrounding the conflict in Sierra Leone to suit their agenda.¹⁴⁹

Participants in conflict, all of whom are likely responsible for serious crimes, are segregated into allies and enemies of the international community in its quest for justice. Thus, the Lord's Resistance Army and the government of Sudan become "evil," and the Ugandan government and Darfuri rebels become "good."¹⁵⁰ Likewise, these narratives paint the international community broadly as agents for good, regardless of the morally questionable roles that some of its

144. Prosecutor v. Eav, Case No. 001/18-07-2007/ECCC/TC, Judgement, ¶¶ 249-51, 267 (July 26, 2010), http://www.eccc.gov.kh/sites/default/files/documents/court/20100726_Judgement_Case_001_ENG_PUBLIC.pdf.

145. Prosecutor v. Eav, Case No. 001/18-07-2007-ECCC/SC, Appeal Judgement, ¶ 369 (Feb. 3, 2012), http://www.eccc.gov.kh/sites/default/files/documents/court/20120203_AppealJudgementEn.pdf.

146. Prosecutor v. Eav, Case No. 001/18-07-2007/ECCC/TC, Judgement, ¶¶ 555-57.

147. *Id.* ¶ 679; Prosecutor v. Eav, Case No. 001/18-07-2007-ECCC/SC, Appeal Judgement, § VIII.

148. Sarah M.H. Nouwen & Wouter G. Werner, *Doing Justice to the Political: The International Criminal Court in Uganda and Sudan*, 21 EUR. J. INT'L L. 941, 943-44 (2010).

149. Christopher Mahony, *Prioritising International Sex Crimes before the Special Court for Sierra Leone: One More Instrument of Political Manipulation?*, in THEMATIC PROSECUTION OF INTERNATIONAL SEX CRIMES 59, 60 (Morten Bergsmo ed., 2012).

150. Nouwen & Werner, *supra* note 148, at 951-54, 960-61.

members may have played in the conflict.¹⁵¹

By simplifying complex questions regarding the appropriate allocation of moral blame, international courts risk exaggerating the culpability of those deemed enemies of the international community and thus inflicting excess punishment upon them. Like gravity rhetoric, therefore, the narratives that drive international criminal law create risks of overpunishment.

In light of these risks, judges should be wary of calls for harsh justice for all international crimes. Because international judges have wide discretion in imposing sentences, their intuitions will inevitably influence sentencing outcomes. To avoid overpunishing, they should keep in mind the potentially distorting effects of international law's gravity rhetoric and narratives of monstrosity, good, and evil. Moreover, international judges should be able to look beyond their intuitions to global sentencing norms to guide their decisions. The next Part turns to the question of how international courts should begin to identify such norms.

V. DEVELOPING INTERNATIONAL SENTENCE SEVERITY NORMS¹⁵²

Thus far, this Article has argued that the appropriate severity of sentences for international crimes cannot be derived from existing theories of punishment and that intuitions may be misleading in light of international criminal law's rhetoric and narratives. How then should international courts determine sentence severity? This Part argues, first that they should seek to build global sentencing norms rather than apply the national norms of the states where the crimes occurred. Second, it elaborates the relevance of human rights as a source of global sentencing norms, showing that they tend to oppose harshness and favor leniency. Finally, it suggests how international courts can respond to the objections that will inevitably be voiced if they adopt the recommendation of lenient sentencing.

A. *Why International Norms?*

If sentence severity is largely a matter of community norms, what is the relevant community for purposes of international sentencing? As other commentators have noted, international criminal law is torn between two audiences: the national communities where crimes are committed and the broader international community.¹⁵³ The Rome Statute reflects this tension. The preamble im-

151. *Id.*; Mahony, *supra* note 149, at 75-80 (explaining that at the SCSL, the first prosecutor painted the rebel RUF as the sole criminal party and the Sierra Leone government and the international community, in the form of Britain, as "the good guys").

152. While this Article is limited to addressing how international criminal courts should determine the overall severity of international punishment norms, an important related question is how such courts should identify proportionate sentences in particular cases. For a discussion of that issue see Margaret M. deGuzman, *A Theory of Proportionality for the International Criminal Court*, in *THE LAW AND PRACTICE OF THE INTERNATIONAL CRIMINAL COURT: A CRITICAL ACCOUNT OF CHALLENGES AND ACHIEVEMENTS* (Carsten Stahn ed.) (forthcoming 2014).

153. See, e.g., Alexander K.A. Greenawalt, *Justice Without Politics? Prosecutorial Discretion and the International Criminal Court*, 39 N.Y.U. J. INT'L L. & POL. 583, 658 (2007) (claiming the ICC "must face the irreducible tension between the policy priorities of the international institution on the one

plies a global agenda, stating that grave international crimes “threaten the peace, security and well-being of the world” and that the ICC was created to help prevent such crimes. At the same time, the statute provides for a significant level of victim participation, indicating a desire to meet the needs of the communities most affected by international crimes.¹⁵⁴

The scholarship is similarly divided between those who advocate a largely or entirely cosmopolitan vision of global justice and those who support a more state-oriented pluralist approach.¹⁵⁵ In the sentencing context, several scholars, including Alexander Greenawalt, argue that international courts should apply the sentencing laws of the states that would exercise jurisdiction in the absence of international action.¹⁵⁶ Likewise, a number of commentators advocate a victim-centered approach to international criminal law.¹⁵⁷ Such an

hand, and those of the societies most directly affected by international crimes on the other”); Sloane, *supra* note 65, at 41 (“First, unlike national criminal law, ICL purports to serve multiple communities, including both literal ones—for example, ethnic or national communities—and the figurative ‘international community,’ which, needless to say, is not monolithic; it consists of multiple, often competing, constituencies and interests.”).

154. Rome Statute, *supra* note 6, at arts. 15(3), 19(3), 43(6), 54(3)(b), 68(3), 75(3), 82(4).

155. See, e.g., Mireille Delmas-Marty, *The Contribution of Comparative Law to a Pluralist Conception of International Criminal Law*, 1 J. INT’L CRIM. JUST. 13, 25 (2003) (“By allowing the elaboration of hybrid international concepts and by favouring the harmonization of national criminal systems, comparative law could help promote a more pluralist conception of international criminal law. This legal, integrated pluralism would not be synonymous with relativism, but compatible with universalism, without the risk of hegemonic universalism based on an imperialist model.”); Drumbl, *Collective Violence*, *supra* note 123, at 610 (arguing that punishment in international criminal law must integrate international norms into local communities while accounting for cultural needs rather than imposing cultural values). Compare Stephanos Bibas & William W. Burke-White, *International Idealism Meets Domestic-Criminal-Procedure Realism*, 59 DUKE L.J. 637, 692-93 (2010) (suggesting that the ICC should seek to harmonize its sentences with the domestic sentencing practice in the state where the crimes were committed), and Alexander K.A. Greenawalt, *The Pluralism of International Criminal Law*, 86 IND. L.J. 1063, 1128-29 (2011) [hereinafter Greenawalt, *Pluralism*] (arguing for a pluralist approach to international criminal law, and stating that “[s]o long as national legal systems continue to embrace different views on the nature and consequences of criminality, the introduction of a distinctly international criminal law will inevitably perpetuate or foster unequal treatment of one form or another”), with DAVID HIRSH, *LAW AGAINST GENOCIDE: COSMOPOLITAN TRIALS* 159 (2003) (embracing the emergence of cosmopolitanism in the work and results of the international criminal courts and arguing that those courts have begun to forge “a cosmopolitan social memory”), and Patrick Hayden, *Cosmopolitanism and the Need for Transnational Justice: The Case of the International Criminal Court*, 104 THEORIA 69, 71 (2004) (advocating for an expansion of cosmopolitan values and objectives in transnational criminal justice), and Mark Osiel, *The Banality of Good: Aligning Incentives Against Mass Atrocity*, 105 COLUM. L. REV. 1751, 1826 (2005) (pointing out that “[m]uch has been made in recent years of how international courts have begun to influence national ones through judicial dialogue. In this way, cosmopolitan norms and self-understandings are increasingly injected into once-parochial municipal adjudication”). Some scholars straddle the line between pluralism and cosmopolitanism.

156. Greenawalt, *Pluralism*, *supra* note 155, at 1099; see also Bibas & Burke-White, *supra* note 155, at 692-93 (suggesting that the ICC consider the domestic sentencing practices of the territorial state in order to achieve greater “vertical sentencing harmonization”); Woods, *supra* note 95, at 672 (suggesting that standardized sentencing practices might be counterproductive in an international criminal law scheme that seeks to “credibly express moral norms to local actors” if justice intuitions are not universal). But see Drumbl, *Collective Violence*, *supra* note 155.

157. See Emily Haslam, *Victim Participation at the International Criminal Court: A Triumph of Hope Over Experience?*, in THE PERMANENT INTERNATIONAL CRIMINAL COURT: LEGAL AND POLICY ISSUES 315, 319 (Dominic McGoldrick, Peter Rowe & Eric Donnelly eds., 2004) (“[I]nternational criminal justice should accord victims ‘their rightful place’ which if not ‘at the heart of the international criminal justice system’ is very close to it.”); Raquel Aldana-Pindell, *In Vindication of Justiciable Victims’ Rights to Truth and Justice for State-Sponsored Crimes*, 35 VAND. J. TRANSNAT’L L. 1399, 1427 (2002) (arguing that international criminal law could benefit from a more victim-focused point of view);

approach suggests that international courts should draw on the sentencing norms of victim communities, since to do otherwise is less likely to satisfy victims. Andrew Woods goes so far as to argue that international courts should consider alternative forms of punishment beyond incarceration that appeal to affected local communities.¹⁵⁸

This Article rejects such arguments and adopts instead a cosmopolitan vision of the role of international courts that favors the development of global sentencing norms. International courts, in particular the ICC, should not simply be considered stand-ins for nonfunctioning national courts. Rather, the project of international criminal law is essentially to build a community of global norms.

While full development of the arguments supporting this global vision must await future work, one important justification for rejecting a local, victim-centered focus is practical—international courts simply do not have the ability to make significant direct contributions to local justice. The ICC in particular has the resources to investigate only a small number of situations around the world and to prosecute a small number of cases in each situation. Prosecuting a few perpetrators of crimes affecting thousands may have symbolic value for crime victims, but is unlikely to satisfy calls for retribution or to contribute significantly to local deterrence or reconciliation.

International courts can make significant *indirect* contributions to local justice by stimulating local prosecutions. Indeed, this indirect effect is arguably as important as their more direct contributions to global justice. At the ICC, this indirect effect operates through the principle of complementarity, which prohibits the ICC from prosecuting cases that national courts are pursuing in good faith.¹⁵⁹ The ICC Prosecutor has taken this further by endorsing the notion of “positive complementarity” whereby the ICC actively seeks to encourage national prosecutions.¹⁶⁰

However, the role that international courts play in promoting local prosecutions does not support the argument that they should adopt local norms. On the contrary, the threat that international courts will act inconsistently with local norms may encourage some national governments to fulfill their obligations to address international crimes. If international courts apply national norms, national governments will sometimes have less incentive to engage in their own prosecutions.

Since the primary task of international courts is to promote global justice, it is critical that they strive to build a community of shared criminal law norms at the global level. This work is part of the broader process of strengthening the

Henham, *supra* note 53, at 769 (“[T]he demands for justice of victims and postconflict societies should not simply be recognized symbolically as rationales for international punishment, but should be translated into effective procedural norms.”).

158. Woods, *supra* note 95, at 673.

159. Rome Statute, *supra* note 6, at art. 17.

160. See generally Office of the Prosecutor, *Paper on Some Policy Issues Before the Office of the Prosecutor*, INT’L CRIM. CT. 5 (2003), http://www.icc-cpi.int/NR/rdonlyres/1FA7C4C6-DE5F-42B7-8B25-60AA962ED8B6/143594/030905_Policy_Paper.pdf. (explaining the meaning of “complementarity” in the context of the ICC’s role in prosecuting crimes).

“international community.”¹⁶¹ The concept of community is aspirational. The long-standing debate in the academic literature over whether any “community” exists at the international level misses the point.¹⁶² As Georges Abi-Saab notes, the question is not binary but relative.¹⁶³ International cooperation and coordination confirm that some sort of community exists. The more useful inquiries explore “the degree of community existing . . . in relation to a given subject, at a given moment.”¹⁶⁴

In regard to international criminal law norms, the degree of community at the international level remains rather weak. This is to be expected of such a new regime. Indeed, the enterprise is progressing more rapidly than many of its founders anticipated. In just a couple of decades, a significant degree of consensus has been built around the appropriate jurisdiction and procedures of international courts. The ICC’s membership includes more than half of the world’s states. Nonetheless, significant work remains to be done.

Contrary to the claims of some pluralists,¹⁶⁵ the solution to the current weak state of consensus in many areas of international criminal law, including sentencing, is not to require international criminal courts to apply national norms. Undoubtedly, pluralism has important benefits. In particular, it enables the development of multiple solutions to legal problems that can be compared for their efficacy.¹⁶⁶ However, if the central project of international criminal courts is to build a normative community, such fragmentation is likely to undermine the enterprise. The process of community building requires identifying and enforcing shared normative commitments.

Such commitments are particularly important in the area of punishment severity, which depends heavily on moral values. As centuries of philosophers have argued, if collectives are to inflict suffering on individuals they must do so in ways that comport with the dictates of morality. Thus, identifying a shared morality in this area is important.

In addition to the normative arguments in favor of developing global sentencing norms, as a practical matter, international judges would have great dif-

161. Cf. Adeno Addis, *Imagining the International Community: The Constitutive Dimension of Universal Jurisdiction*, 31 HUM. RTS. Q. 129, 159 (2009) (arguing that the concept of universal jurisdiction in international criminal law is both “vindicative and constitutive” of the concept of the “international community”).

162. See, e.g., GENNADIĀ MIKHAILOVICH DANILENKO, *LAW-MAKING IN THE INTERNATIONAL COMMUNITY* 11-12 (1993) (claiming that the perception of a “planetary community of individuals” is seen as, at best, a grand, but futuristic, design); David C. Ellis, *On the Possibility of “International Community,”* 11 INT’L STUD. REV. 1, 23 (2009) (explaining that the state of the “international system” can best be described, currently, as “international society” as the conditions for a true “international community” are lacking given limited common interest and institutional coherence).

163. George Abi-Saab, *Whither the International Community?*, 9 EUR. J. INT’L L. 248, 249 (1998).

164. *Id.*; see also Karen Kovach, *The International Community as Moral Agent*, 2 J. MILITARY ETHICS 99, 100 (2003) (“The international community is a community of the world’s people, peoples, and states insofar as they take themselves to be part of a potentially universal agency.”).

165. Bibas & Burke-White, *supra* note 155, at 640-42; Greenawalt, *Pluralism*, *supra* note 155, at 1067-69, 1078-79.

166. See Paul Schiff Berman, *Global Legal Pluralism*, 80 S. CAL. L. REV. 1155, 1190-91 (2007) (“Just as states in a federal system function as ‘laboratories’ of innovation, so too the preservation of diverse legal spaces makes innovation possible.”).

faculty applying the sentencing norms of national systems with which they are unfamiliar. Even identifying the relevant norms would be challenging because there is a surprising lack of information collected about sentencing practices around the world.¹⁶⁷ Moreover, sentencing norms can differ dramatically even within national communities. In the United States, for example, there is significant variation in sentence severity among states.¹⁶⁸ Thus, efforts to apply the sentencing norms of affected communities would, at least in some cases, require judges to look beyond national laws to regional and local laws.

This is not to suggest that the task of developing global sentencing norms will be easy. Indeed, in the early years, this process will likely be more difficult than it would be simply to apply relevant national norms. As the first Part of this Article demonstrated, people around the world have widely different perspectives on the appropriate severity of punishment. As a result, the limited international sentencing precedents that exist are inconsistent and provide little useful guidance to the ICC or future courts. Nonetheless, by identifying and consistently applying international sentencing norms, international courts can greatly reduce the challenges associated with sentencing over time.

In sum, the community-building aspect of the international criminal law project suggests that international courts should develop their own sentence severity norms rather than apply those of national communities. As the ICC begins to sentence defendants it is thus critical that it start to identify relevant norms. As the next Section explains, one source of such norms should be international human rights. Although international human rights law supplies only a few firm guidelines for international sentencing, the principles underlying human rights norms, in particular the principle of human dignity, counsel international courts to err on the side of leniency.

B. *The Relevance of International Human Rights*

Given the diversity of sentence severity norms around the world, how should international courts begin to identify and develop global norms in this area? As William Schabas has argued, they should look to human rights norms for guidance.¹⁶⁹ The relevance of human rights to the work of international criminal courts is widely recognized.¹⁷⁰ Indeed, it was to a large extent the

167. The United Nations compiles detailed data relating to crime patterns around the world, including prosecution, conviction, and detention rates by country and by various population demographics, but specific data on sentencing practices are scant. See *Data: Statistics on Criminal Justice (Persons Detained)*, UN OFF. ON DRUGS & CRIME, <http://www.unodc.org/unodc/en/data-and-analysis/statistics/data.html> (last visited Dec. 9, 2013).

168. See generally Paula M. Ditton & Doris James Wilson, *Truth in Sentencing in State Prisons*, U.S. DEP'T JUST. (Jan. 1999), <http://bjsdata.ojp.usdoj.gov/content/pub/pdf/tssp.pdf> (analyzing variances in truth-in-sentencing laws in the United States and consequent differences in sentence length and time served by released violent offenders in different states).

169. See Schabas, *Sentencing*, *supra* note 1, at 495.

170. See, e.g., SALVATORE ZAPPALÀ, HUMAN RIGHTS IN INTERNATIONAL CRIMINAL PROCEEDINGS 2 (2005) (explaining that respect for the rights of defendants has been a fundamental concern of international criminal law at least since the advent of the *ad hoc* tribunals); Maximo Langer, *Trends and Tensions in International Criminal Procedure: A Symposium*, 14 UCLA J. INT'L L. & FOREIGN AFF. 1, 4 (2009) (discussing various approaches to international criminal procedure and the

post-World War II human rights movement that fueled the development of international criminal law.¹⁷¹ The establishment of the ICC was greatly propelled by the involvement of human rights organizations.¹⁷² The Court's statute requires that its work be consistent with international human rights.¹⁷³ With regard to conditions of imprisonment, for example, the statute requires the Court to adhere to "widely accepted international treaty standards governing treatment of prisoners."¹⁷⁴

However, in their zeal to promote the human rights of victims by prosecuting international crimes, supporters of international criminal law sometimes lose sight of the rights of defendants. They argue for instance in favor of very broad definitions of crimes and support limited defenses that threaten to convict the morally innocent.¹⁷⁵ With regard to sentencing, those who advocate for mercy at the national level tend to adopt a more severely punitive stance for international crimes.¹⁷⁶ Such one-sided respect for human rights detracts from the the project of building a community of universally applicable norms. Instead, international courts should both promote victims' rights by prosecuting violations of those rights, and foster defendants' rights by developing punishment norms that reflect established human rights as well as the principles that animate them.

Existing human rights norms suggest that international punishment severity should be restricted in at least three ways: (1) the death penalty should be precluded; (2) life sentences should be avoided, except perhaps in the most extreme cases, and should always include the possibility of early release; and (3) conditions of incarceration should be humane. Of these, the norm prohibiting the death penalty is the most strongly established. Many states are parties to treaties prohibiting the death penalty¹⁷⁷ and such punishment is arguably prohi-

impact of international human rights law on its goals).

171. Steven R. Ratner, *The Schizophrenias of International Criminal Law*, 33 TEX. INT'L L.J. 237, 242 (1998) (arguing that "[t]he silence of international law regarding the consequences for government-sponsored human rights abuses began to change after the first World War, and even more so after World War II").

172. See Kristie Barrow, *The Role of NGOs in the Establishment of the International Criminal Court*, 2 DIALOGUE 11, 22 (2004) (chronicling the detailed history of NGO involvement in the creation of the ICC).

173. Rome Statute, *supra* note 6, at art. 21(3) ("The application and interpretation of law pursuant to this article must be consistent with internationally recognized human rights . . .").

174. *Id.* at art. 106(1).

175. Darryl Robinson, *The Identity Crisis of International Criminal Law*, 21 LEIDEN J. INT'L L. 925, 929 (2008) ("[T]he influence of interpretive approaches from human rights and humanitarian law, such as victim-focused teleological reasoning . . . not only undermines strict construction but also fosters sweeping interpretations that run afoul of culpability and fair labelling [sic].").

176. See Schabas, *Sentencing*, *supra* note 1, at 501 (stating that even human rights advocates often argue for severe punishment for international crimes in the name of retribution).

177. Protocol No. 13 to the European Convention for the Protection of Human Rights and Fundamental Freedoms Concerning Abolition of the Death Penalty in All Circumstances, *opened for signature* May 2012, E.T.S. No. 183 (43 states parties); Second Optional Protocol to the International Covenant on Civil and Political Rights, Dec. 15, 1989, 1642 U.N.T.S. 414 (74 state parties); Protocol No. 6 to the European Convention for the Protection of Human Rights and Fundamental Freedoms Concerning Abolition of the Death Penalty, *opened for signature* Apr. 28, 1983, E.T.S. No. 114 (46 state parties); Protocol to the American Convention on Human Rights to Abolish the Death Penalty, Aug. 6, 1980, O.A.S.T.S. No. 73 (13 state parties); *Death Penalty: Ratification of International Treaties*, AMNESTY

bited by customary international law.¹⁷⁸ As noted above, no international court permits the death penalty.¹⁷⁹

Nonetheless, the decision to exclude the death penalty at international courts has sometimes encountered significant opposition. For instance, the Rwandan government, which had originally supported the establishment of the ICTR, withdrew its support when it became clear that the Tribunal would not be permitted to impose the death penalty.¹⁸⁰ Indeed, the preclusion of the death penalty at the ICTR has led to the incongruous result that some of the most responsible perpetrators have been incarcerated in European prisons while lower level perpetrators have been sentenced to death by national courts.¹⁸¹ Despite this discrepancy, for many of the states that supported the establishment of the ICTR, exclusion of the death penalty was nonnegotiable.¹⁸² In fact, as the ICTR began the process of concluding its work, it refused to refer cases to the Rwandan national courts until Rwanda abolished the death penalty.¹⁸³ Similarly, while the drafters of the Rome Statute engaged in a vigorous debate about whether to include the death penalty, a significant number of states made it clear that they could not support an institution that puts people to death.¹⁸⁴ Thus, while the prohibition of the death penalty is not universally accepted, the norm is strong enough that many consider it a requirement of human rights.

Less established, but perhaps emerging as a human rights norm, is the prohibition on life sentences except in exceptional cases¹⁸⁵ along with the requirement that such sentences be accompanied by the possibility of parole.¹⁸⁶

INT'L, <http://www.amnesty.org/en/death-penalty/ratification-of-international-treaties> (last visited Dec. 9, 2013).

178. See WILLIAM A. SCHABAS, *THE ABOLITION OF THE DEATH PENALTY IN INTERNATIONAL LAW* (3d ed. 2002) (stating in 2002 that capital punishment was not yet prohibited by customary law, but that the growing trend against it meant that “[this] will not be true for very long”); see also U.N. GAOR, 67th Sess., 20th & 21st mtgs. at 1, U.N. Doc. GA/SHC/4046 (Oct. 23, 2012) (stating that “[t]he Special Rapporteur on Torture called on States in the Third Committee (Social Humanitarian and Cultural) today to seriously reconsider whether the death penalty amounted to cruel, inhuman and degrading treatment, or even torture”).

179. See *supra* note 33.

180. See WILLIAM A. SCHABAS, *THE UN INTERNATIONAL CRIMINAL TRIBUNALS: THE FORMER YUGOSLAVIA, RWANDA AND SIERRA LEONE* 548 (2006).

181. See Christina M. Carroll, *An Assessment of the Role and Effectiveness of the International Criminal Tribunal for Rwanda and the Rwandan National Justice System in Dealing with the Mass Atrocities of 1994*, 18 B.U. INT'L L.J. 163, 177 (2000) (explaining that this incongruity in sentencing was one of Rwanda's reasons for opposing the ICTR ban on the death penalty).

182. Ohlin, *Applying the Death Penalty*, *supra* note 66, at 748 (stating with regard to the establishment of the ICTR, “[j]ust as the permissibility of the death penalty was considered so obvious at Nuremberg that no serious discussion of the matter was required, so its impermissibility was now considered so obvious that once again no serious debate ensued”).

183. Greenawalt, *Pluralism*, *supra* note 155, at 1131 n.172 (stating that Rwanda eliminated the death penalty primarily to facilitate referral of cases).

184. Rolf Einar Fife, *Penalties*, in *THE INTERNATIONAL CRIMINAL COURT: THE MAKING OF THE ROME STATUTE: ISSUES, NEGOTIATION, RESULTS* 319, 322-32 (1999).

185. Catherine Appleton & Bent Grøver, *The Pros and Cons of Life without Parole*, 47 BRIT. J. CRIMINOLOGY 597, 606 (2007); see also *supra* note 25 and accompanying text (discussing that far from allowing life sentences, many European states' maximum sentences are ten to fifteen years imprisonment).

186. J. Paul McCutcheon & Gerard Coffey, *Life Sentences in Ireland and the European Convention*, 3 IRISH Y.B. INT'L L. 101, 101 (2012) (discussing the limitations that the European Court of Human Rights has placed on life sentences); Dirk van Zyl Smit, *Life Imprisonment: Recent Issues in*

The European Court of Human Rights has adopted such limitations,¹⁸⁷ as have many national systems.¹⁸⁸ Even the United States, with its harsh sentencing culture, recently recognized the impermissibility of life sentences without parole for persons under the age of eighteen who commit non-homicide offenses.¹⁸⁹ International courts have rightly been at the forefront of these developments as well. They impose life sentences relatively infrequently and typically only for genocide, which is generally considered the most serious crime.¹⁹⁰ The possibility of release is never precluded.

Finally, there is general agreement that international human rights proscribe harsh prison conditions.¹⁹¹ In this respect, international courts have thus far been less attentive to human rights, permitting incarceration in states with very tough prison conditions.¹⁹² As already noted, the ICC's statute requires it to adhere to international treaties restricting conditions of incarceration. There is thus reason to hope that the ICC will be more conscientious in ensuring humane prison conditions.

In addition to complying with these existing human rights norms, international criminal courts should situate their punishments at the leading edge of developing human rights norms concerning sentences.¹⁹³ Human rights norms are constantly evolving. The solidifying prohibition of the death penalty and recently recognized prohibition of life sentences without parole for juveniles in the United States and for all in Europe are three examples of such development.

National and International Law, 29 INT'L J.L. & PSYCHIATRY 405, 409-10 (2006) (discussing that the European Court of Human Rights and several European constitutional courts have questioned the compatibility with human rights norms of life sentences without the possibility of release).

187. *Vinter v. United Kingdom*, Eur. Ct. H.R. ¶¶ 12, 119-22 (2013), (finding the United Kingdom's "whole life order" policy allowing for the imposition of life sentences without parole for offenses deemed exceptionally serious to be in violation of Article 3 of the Convention for the Protection of Human Rights and Fundamental Freedoms).

188. Dirk van Zyl Smit, *Outlawing Irreducible Life Sentences: Europe on the Brink?*, 23 FED. SENT'G REP. 39, 40-41 (2010) [hereinafter van Zyl Smit, *Outlawing*]. The Constitutions of Brazil and Colombia, for example, explicitly prohibit the use of life imprisonment. CONSTITUIÇÃO FEDERAL [C.F.] [CONSTITUTION] art. 5 (Braz.); CONSTITUCIÓN POLÍTICA DE COLOMBIA [C.P.] art. 34.

189. See *Graham v. Florida*, 130 S. Ct. 2011, 2034 (2010) (holding unconstitutional the sentence of life without parole for a juvenile who committed a non-homicide offense).

190. Compare Smeulers et al., *supra* note 37, at 22-23 (explaining that in the post-Cold War tribunals, only 45 out of 281 (16%) convicted perpetrators received life sentences, and of those, 21 were convicted at the ICTR where 52 out of 61 sentenced individuals were convicted for genocide; 10 of the 45 life sentences are still in some stage of appeal), with Ashley Nellis, *Life Goes On: The Historic Rise in Life Sentences in America*, SENT'G PROJECT 6 (2013), http://sentencingproject.org/doc/publications/inc_Life%20Goes%20On%202013.pdf (citing statistics in the United States where 10.6% of all incarcerated individuals—including nonviolent offenders—are serving life sentences).

191. See e.g., HUMAN RIGHTS WATCH, WORLD REPORT 2013: EVENTS OF 2012, at 640 (2013) (accusing the United States of prison "[p]ractices contrary to human right principles [including] solitary confinement"); Bruce Zagaris, *Developments in the Institutional Architecture and Framework of International Criminal and Enforcement Cooperation in the Western Hemisphere*, 37 U. MIAMI INTER-AM. L. REV. 421, 459 (2006) (referring to poor prison conditions as human rights violations).

192. See *supra* note 46 and accompanying text; cf. Schabas, *Sentencing*, *supra* note 1, at 494-95 (arguing that provisions in the ICTY and ICTR Statutes recommending that defendants serve their sentences in specific, internationally designated prisons rather than their home countries may result in harsher penalty conditions due to isolation from family, unfamiliar conditions, and inability to communicate or socialize while incarcerated).

193. Cf. Schabas, *Sentencing*, *supra* note 1, at 516 ("As human rights tribunals, the ad hoc tribunals should be aware that they are mandated to provide a model of enlightened justice.").

Although human rights law does not currently contain restrictions on sentence severity beyond those already discussed, the principle of human dignity at the core of the human rights regime suggests that lengthy terms of incarceration for all but the most serious crimes are increasingly recognized as violating human rights. Respect for human dignity arguably requires not only humane conditions of incarceration but also recognizing and affirming the possibility of rehabilitation and redemption.¹⁹⁴ Indeed, the International Covenant on Civil and Political Rights mandates that the aim of any system of imprisonment must be “reformation and social rehabilitation.”¹⁹⁵ Harsh punishment is antithetical to these objectives.

The Rome Statute appropriately reflects such evolving norms by limiting terms of incarceration to thirty years except when life imprisonment is justified by the “extreme gravity of the crime and the individual circumstances of the convicted person.”¹⁹⁶ Other international courts, including the ICTR and SCSL, SCSL, which have imposed much harsher sentences, should likewise respect such limitations on sentence lengths.

In sum, in developing global sentencing norms, international courts should respect existing as well as developing human rights norms. By doing so, international courts both affirm the developing norms and serve as examples to national courts.¹⁹⁷

C. *Responding to Objections*

Given the diversity of sentence severity norms around the world, criticism of international sentences is inevitable, at least until the regime develops its own norms against which sentences can be judged. This Section suggests how international courts can address some of the criticisms that may arise should they follow the recommendation of inflicting sentences at the lenient end of the spectrum.

First, some retributivists will likely object that the sentences fail to inflict adequate retribution. As already explained, this argument inaccurately posits that retribution mandates particular amounts of punishment for particular crimes. Since punishment severity is instead a matter of community norms, in-

194. See Margaret Colgate Love, *Paying Their Debt to Society: Forgiveness, Redemption, and the Uniform Collateral Consequences of Conviction Act*, 54 HOW. L.J. 753, 758-59 (2011) (recognizing redemption is an essential element to “a mature justice system”); Nilsen, *supra* note 20, at 159-66 (discussing how the Eighth Amendment to the U.S. Constitution may demand a similarly robust respect for human dignity in sentencing as found in European countries, noting that international law finds that “barriers to a prisoner’s successful reintegration violate his fundamental dignity rights”); van Zyl Smit, *Outlawing*, *supra* note 188, at 40 (noting the Germany Federal Constitutional Court’s determination that prisoners have a right, based in human dignity, to resocialization).

195. International Covenant on Civil and Political Rights art. 10(3), Dec. 19, 1966, 999 U.N.T.S. 171; see also Schabas, *Sentencing*, *supra* note 1, at 503 (discussing additional sources of human rights law supporting the importance of rehabilitation). The European Court of Human Rights has recently affirmed this sentencing goal in the Vinter decision. *Vinter v. United Kingdom*, Eur. Ct. H.R. (2013).

196. Rome Statute, *supra* note 6, at art. 77.

197. William A. Schabas, *Penalties*, in *THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY* 1497, 1533 (Antonio Cassese, Paola Gaeta & John R.W.D. Jones eds., 2002).

international courts can respond to this critique by pointing out that many communities reject the premise that harsh punishment is required for any crime. Indeed, some communities view harsh punishment as a violation of human rights, a charge that would be especially damaging to the legitimacy of international courts in light of their close connections with the human rights movement.

Likewise, some critics will attack lenient punishment not based on the general requirements of retribution but rather on the purported needs for retribution of specific victims.¹⁹⁸ International sentencing judgments sometimes invite such criticism by invoking the goal of retribution without specifying for whom the retribution is intended.¹⁹⁹ International courts should clarify that, to the extent retribution is one of their sentencing goals, their aim is not to satisfy particular victims, who may have varying expectations regarding appropriate amounts of punishment, but rather to act on behalf of the global community.

Moreover, in some cases, courts may explicitly privilege goals other than retribution in inflicting lenient punishment. For instance, societal rehabilitation may sometimes be an important objective that would be undermined by harsh punishment. Both the perpetrator and any groups that identify with him or her are likely to view harsh punishment as unjust, reducing the likelihood of reconciliation.

An especially troubling critique may come not from retributivists but from expressivists. Proponents of the expressive function of international punishment may argue that mild or moderate punishment fails to express sufficient condemnation to promote the norms prohibiting international crimes.²⁰⁰ The expression of global norms concerning international crimes is probably the most important goal of international prosecution.²⁰¹ Such expression is critical to the courts' central objective of preventing international crimes. It is therefore crucial that international punishment norms support rather than undermine this

198. See, e.g., Katie Kerr, *Making Peace with Criminals: An Economic Approach to Assessing Punishment Options in the Colombian Peace Process*, 37 U. MIAMI INTER-AM. L. REV. 53, 98 (2005) ("The desire for retribution is a powerful emotion among the surviving victims and family members of victims of gross human rights violations."); Ohlin, *Towards a Unique Theory*, *supra* note 1, at 399 ("In addition to the basic fact that the guilty deserve to be punished, the victims of various conflicts . . . may feel that the guilty deserve to be punished.")

199. See, e.g., Danner, *supra* note 53, at 444 ("In their sentencing decisions, the Tribunals have most often cited deterrence and retribution as the principal justifications for international punishment . . . [T]he Tribunals have not directly connected these justifications for punishment with the methodology used to determine individual sentences.")

200. Beresford, *supra* note 91, at 90 (stating that "[l]ower sentences would not only fail to deter prospective violators of international humanitarian law, they would signal that genocide, crimes against humanity and war crimes are less serious than ordinary crimes under national law"); Keller, *supra* note 86, at 66 (citing Mary Penrose, *Lest We Fail: The Importance of Enforcement in International Criminal Law*, 15 AM. U. INT'L L. REV. 321, 383-86 (2000)) ("Unfortunately, neither Erdemovic's nor Serushago's prison sentences 'communicate the appropriate disgust or intolerance necessary to dissuade' potential perpetrators in the Balkans or Rwanda from massacring other innocent civilians.")

201. See generally, Mirjan R. Damaska, *What is the Point of International Criminal Justice?*, 83 CHI.-KENT L. REV. 329, 345 (2008) (claiming that international criminal courts are in a better position to promote "a sense of accountability for international crime by exposure and stigmatization of . . . extreme forms of inhumanity" than to deter future perpetrators); Margaret M. deGuzman, *Choosing to Prosecute: Expressive Selection at the International Criminal Court*, 33 MICH. J. INT'L L. 265, 270 (2012) [hereinafter deGuzman, *Choosing to Prosecute*] (arguing that norm expression is the most appropriate goal on which to base the ICC's situation and case selection decisions).

expressive function.

International courts can address such concerns in at least two ways. First, they can point to the diversity of sentence severity norms around the world to argue that in many quarters the sentences they award are in fact considered appropriate for serious crimes. Moreover, over time, the courts' own consistent application of mild or moderate punishments will render such punishments normative at the international level.

Additionally, international courts can explain that the expressive effect of international criminal law comes at least as much from the process of investigating, trying, and convicting offenders of international crimes as from the particular punishments inflicted.²⁰² Unlike national systems where the presumption is that most crimes will be punished, at the international level the mere selection of crimes for adjudication performs an important expressive function.²⁰³ In fact, international courts have already made such statements in some of their judgments.²⁰⁴

VI. CONCLUSION

Contrary to the claims of the prevalent scholarly critique, there is nothing in punishment theory that mandates harsh punishment for international crimes. Moreover, proponents of harsh international punishment implicitly rely on the intuitive but erroneous assumption that international crimes are uniformly so grave as to merit harsh punishment. The gravity rhetoric, as well as the narratives of monstrosity and good and evil that characterize international criminal law, have the potential to distort judicial analysis of crime seriousness and lead to overpunishment. Rather than rely on theory or intuition, therefore, international courts should recognize that punishment severity norms are largely a matter of community consensus.

While some scholars have urged international courts to apply the national sentencing norms of relevant communities, such an approach would undermine the global community-building project in which the courts are engaged. Instead, international courts should develop their own sentence severity norms in accordance with existing and emerging norms of human rights and respect for human dignity.

While the process of developing international sentence severity norms is barely underway, the conclusions reached in this Article suggest that international courts are generally moving in the right direction. They have rightly rejected the death penalty and strictly limited their use of life sentences. The ICC

202. See David Luban, *Fairness to Rightness: Jurisdiction, Legality, and the Legitimacy of International Criminal Law*, in *THE PHILOSOPHY OF INTERNATIONAL LAW* 569, 576-77 (Samantha Besson & John Tasioulas eds., 2010).

203. deGuzman, *Choosing to Prosecute*, *supra* note 201, at 269-70.

204. *Id.*; see, e.g., *Prosecutor v. Brima, Kamara & Kanu*, Case No. SCSL-2004-16-A, Appeals Chamber Judgement, ¶ 202 (Feb. 22, 2008). The Appeal Chamber overturned the Trial Chamber but declined to enter a separate conviction for forced marriage on grounds that the required condemnation of the act "is adequately reflected by recognising that such conduct is criminal" and that it constitutes an "Other Inhumane Act" capable of giving rise to individual criminal responsibility in international law.

restricts terms of imprisonment to thirty years, except in extremely grave cases. It sentenced its first defendant to a term of fourteen years, despite the prosecutor's recommendation of thirty.

In further developing sentence severity norms, international courts, in particular the ICC, should continue to reject calls for harsh punishment and instead err on the side of leniency. In particular, it is critical that the ICC Appeals Chamber resists calls for harsher punishment in the Lubanga case. As the ICC's first punishment decision, the Lubanga sentence will serve as a marker against which future punishment will be measured. A harsh sentence would set the ICC on the wrong course. The judges should also continue to reject the prosecutor's argument for a presumptive twenty-four-year sentence for all crimes. Such a presumption would almost certainly result in excessively harsh punishment in at least some cases.

