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## The Limits of Judicial Idealism: Should the International Criminal Court Engage with Consequentialist Aspirations?

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**THE LIMITS OF JUDICIAL IDEALISM:  
SHOULD THE INTERNATIONAL  
CRIMINAL COURT ENGAGE WITH  
CONSEQUENTIALIST ASPIRATIONS?**

*Shabram Dana\**

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“Men are unable to forgive what they cannot punish.”

- Hannah Arendt, *The Human Condition* (1958)

## INTRODUCTION

Ten years after its statute came into force, the International Criminal Court (“ICC”) completed its first trial, issued its first verdict,<sup>1</sup> and sentenced its first perpetrator.<sup>2</sup> The prospect of a permanent mechanism to bring to justice perpetrators of gross human rights violations has captured the imagination of ordinary people, victims, human rights advocates, and even celebrities. Angelina Jolie, actress

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<sup>1</sup> See *Prosecutor v. Thomas Lubanga Dyilo*, Case No. ICC-01/04-01/06-2842, Judgment pursuant to Article 74 of the Statute, para. 1358 (Mar. 14, 2012), <http://www.icc-cpi.int/iccdocs/doc/doc1379838.pdf>.

<sup>2</sup> See *Prosecutor v. Thomas Lubanga Dyilo*, Case No. ICC-01/04-01/06-2901, Decision on Sentence pursuant to Article 76 of the Statute, paras. 92-99 (July 10, 2012), <http://www.icc-cpi.int/iccdocs/doc/doc1438370.pdf>.

and Goodwill Ambassador for the United Nations High Commissioner for Refugees, was in the court gallery to hear first-hand the judgment against Thomas Lubanga Dyilo.<sup>3</sup> He was found guilty of war crimes for conscripting and enlisting children under the age of fifteen and using them to participate actively in hostilities.<sup>4</sup> As a result, countless children died and those who survived will suffer continued psychological, emotional, and physical trauma for many years to come. For these grave crimes, Lubanga was sentenced to fourteen years of imprisonment.<sup>5</sup> It was a significant day capping many “firsts” in the nascent life of the world’s first permanent international criminal justice mechanism: the first guilty verdict of the ICC, the first international trial to focus exclusively on child soldiering,<sup>6</sup> and the first international trial to allow victims to participate directly in the trial proceedings.<sup>7</sup> Nevertheless, important milestones and the successful prosecution of Lubanga are not likely

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<sup>3</sup> Ben Child, *Kony 2012: Angelina Jolie calls for Ugandan warlord’s arrest*, THE GUARDIAN, Mar. 12, 2012, <http://www.guardian.co.uk/film/2012/mar/12/kony-2012-angelina-jolie>; *Angelina Jolie attends ICC hearing to witness Lubanga Decision*, AFRICANEWSWIRE.NET, Mar. 14, 2012, <http://www.africanewswire.net/story.php?title=angelina-jolie-attends-icc-hearing-to-witness-lubanga-decision>. See *Angelina Jolie in court as ICC finds Congo warlord Thomas Lubanga guilty of using child soldiers*, TELEGRAPH, Mar. 14, 2012, <http://www.telegraph.co.uk/news/worldnews/africaandindianocean/democraticrepublicofcongo/9143254/Angelina-Jolie-in-court-as-ICC-finds-Congo-warlord-Thomas-Lubanga-guilty-of-using-child-soldiers.html>, for a video of Ms. Jolie’s statements following the verdict.

<sup>4</sup> Prosecutor v. Thomas Lubanga Dyilo, Judgment pursuant to Article 74, *supra* note 1, at para.1358. See also Kai Ambos, *The First Judgment of the International Criminal court (Prosecutor v. Lubanga): A Comprehensive Analysis of the Legal Issues*, 12 INT’L CR. L. REV. 115, 138-39 (2012); Diane Marie Amann, *Prosecutor v. Lubanga*, 106 AM. J. INT’L L. 809, 812 (2012).

<sup>5</sup> Prosecutor v. Thomas Lubanga Dyilo, Decision on Sentence pursuant to Article 76, *supra* note 2, at para. 99.

<sup>6</sup> See generally MARK A. DRUMBL, REIMAGINING CHILD SOLDIERS IN INTERNATIONAL LAW AND POLICY (2012), for a reinvigorating and provocative examination of child soldiering.

<sup>7</sup> David Smith, *Congo Child Army Leader Thomas Lubanga Found Guilty of War Crimes*, THE GUARDIAN, Mar. 14, 2012, <http://www.guardian.co.uk/law/2012/mar/14/congo-warlord-thomas-lubanga-icc?intcmp=239>; Faith Karimi, *ICC finds Congolese warlord guilty in its first verdict*, CNN (Mar. 14, 2012), [http://www.cnn.com/2012/03/14/world/africa/hague-first-icc-ruling/index.html?\\_s=PM:AFRICA](http://www.cnn.com/2012/03/14/world/africa/hague-first-icc-ruling/index.html?_s=PM:AFRICA).

to end the debate any time soon over the merits of the ICC and the role of international criminal justice mechanisms.<sup>8</sup> Hours after the court sentenced Lubanga to fourteen years, negative reactions populated the media and the internet.<sup>9</sup> For ICC Presiding Judge Adrian Fulford to stare down at Lubanga and forcefully declare that his crimes are “undoubtedly very serious crimes that affect the international community as a whole[,]”<sup>10</sup> but then impose a punishment that is less than half of the maximum term penalty available under the ICC Statute must have been perplexing, even for supporters of the Court.<sup>11</sup> Human rights observers criticized the punishment as “a rather low sentence in relation to the crimes that he

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<sup>8</sup> Criticisms have targeted both the ICC model as a viable justice mechanism post-atrocity and the way Luis Moreno-Ocampo, the ICC Prosecutor, conducted the investigations and trial. See Joshua Rozenberg, *Delay in Lubanga judgment demonstrates ICC weaknesses*, THE GUARDIAN, Mar. 14 2012, <http://www.guardian.co.uk/law/2012/mar/14/delay-lubanga-weaknesses-icc-model>.

<sup>9</sup> See Rob Williams, *The Thomas Lubanga Trial – Dangerous for Children*, THOMSON REUTERS FOUND. (July 10, 2012), <http://www.trust.org/item/?map=the-thomas-lubanga-trial-dangerous-for-children> (“The handing down of such a paltry penalty will surely give ammunition to the courts critics and represents a difficult moment in the history of efforts to stop the culture of impunity around gross abuses of human rights.”). See also Thomas Escritt, *Congo warlord jailed for 14 years in landmark case*, REUTERS, July 10, 2012, <http://www.reuters.com/article/2012/07/10/us-warcrimes-lubanga-idUSBRE8690C320120710>; Mike Corder, Comments to *Congolese Warlord To Prison For 14 Years*, HUFFINGTON POST WORLD (last updated, July 10, 2012, 5:36 AM), [http://www.huffingtonpost.com/2012/07/10/thomas-lubanga-sentenced-international-criminal-court-congo\\_n\\_1661028.html](http://www.huffingtonpost.com/2012/07/10/thomas-lubanga-sentenced-international-criminal-court-congo_n_1661028.html) (reader reactions include the following. “14 years is not long enough.” “Should have received life.” “Not long enough.” “Should have got 14 years per child.”). See Comments to *Congo warlord jailed for 14 years in landmark case*, REDDIT WORLD NEWS, [http://www.reddit.com/r/worldnews/comments/wbqzs/congo\\_warlord\\_jailed\\_for\\_14\\_years\\_in\\_landmark/](http://www.reddit.com/r/worldnews/comments/wbqzs/congo_warlord_jailed_for_14_years_in_landmark/), for further reactions from readers.

<sup>10</sup> Prosecutor v. Thomas Lubanga Dyilo, Decision on Sentence pursuant to Article 76, *supra* note 2, at para. 37.

<sup>11</sup> Rome Statute of the International Criminal Court art. 77, July 17, 1998, 2187 U.N.T.S. 38544. The maximum imprisonment for a specific number of years is 30 years. Life sentence is permitted only “when justified by the extreme gravity of the crime and the individual circumstances of the convicted person.” *Id.* at art. 77(1)(b). See also Jenia Iontcheva Turner, *Policing International Prosecutors*, 45 N.Y.U. J. INT’L L. & POL. 175, 224 (2012) (arguing that Lubanga’s low sentence can be attributed to a remedy for prosecutorial misconduct).

committed.”<sup>12</sup> The Congolese government likewise agreed that Lubanga should have received a higher sentence, even though some punishment is still a “positive signal” for peace in the region.<sup>13</sup> Although Lubanga was sentenced to fourteen years of imprisonment, he will receive six years credit for time served during the trial. Thus, Lubanga will be out of prison in less than eight years.<sup>14</sup> Moreover, if the ICC follows the practice of the *ad hoc* international criminal tribunals of releasing perpetrators after they have served two-thirds of their sentence, Lubanga will be released in a little more than five years.

More significantly, despite all the ceremony and controversy<sup>15</sup> surrounding the *Lubanga* trial, the sentencing judgment presented the ICC judges with a significant opportunity to clarify the function and purpose of international criminal law (“ICL”). Its first sentencing judgment offered a seminal opportunity for the Court to elucidate the role of the world’s first permanent criminal court with global reach. Such clarity regarding the foundations of international justice is essential to the operation of the court from start to finish, from providing a vision to guide the work of the ICC and its Prosecutor to facilitating consistency in punishment. It would also facilitate better understanding of the Court’s decisions among communities and individuals impacted by the crimes.

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<sup>12</sup> DR Congo warlord Thomas Lubanga sentenced to 14 years, BBC, July 10, 2012, <http://www.bbc.co.uk/news/world-africa-18779726>; David Smith, *Thomas Lubanga sentenced to 14 years for Congo war crimes*, THE GUARDIAN, July 10, 2012, <http://www.guardian.co.uk/law/2012/jul/10/icc-sentences-thomas-lubanga-14-years>.

<sup>13</sup> DR Congo warlord Thomas Lubanga sentenced to 14 years, *supra* note 12.

<sup>14</sup> Prosecutor v. Thomas Lubanga Dyilo, Decision on Sentence pursuant to Article 76, *supra* note 2, at paras. 107-8. Lubanga is currently being detained at the Detention Centre in The Hague. *Situations: The Prosecutor v. Thomas Lubanga Dyilo*, ICC-CPI.INT, [http://www.icc-cpi.int/en\\_menus/icc/situations%20and%20cases/situations/situation%20icc%200104/related%20cases/icc%200104%200106/Pages/democratic%20republic%20of%20the%20congo.aspx](http://www.icc-cpi.int/en_menus/icc/situations%20and%20cases/situations/situation%20icc%200104/related%20cases/icc%200104%200106/Pages/democratic%20republic%20of%20the%20congo.aspx) (last visited Oct. 12, 2013).

<sup>15</sup> See Joshua Rozenberg, *supra* note 8. See also William A. Schabas, *Victor’s Justice: Selecting “Situations” at the International Criminal Court*, 43 JOHN MARSHALL L. REV. 535 (2010).

Unfortunately, the ICC's first sentencing judgment is disappointingly perfunctory regarding the fundamental pillars of the system, leaving open a deeply divisive question that could jeopardize the legitimacy and success of this endeavour. Moving towards clarity on this question is the main goal of this article. It permeates every critical decision of the ICC: the Prosecutor's selection of cases and defendants;<sup>16</sup> decisions about the scope of the indictment and witnesses called;<sup>17</sup> the manner in which the trial proceedings are conducted; judicial oversight of the Prosecutor's decisions and conduct;<sup>18</sup> and the determination of a just punishment. Thus, the questions and critiques addressed here will have continued significance to both practice and theory in ICL. The experience of the *ad hoc* tribunals indicates that both the defendant and the prosecutor frequently challenge the trial chamber's sentence on appeal, and the *Lubanga* case is no exception. Thus, the reflections offered in this article about the primary role and function of international criminal justice has immediate and long-term implications for Court's work.

Drawing on the experience of the International Criminal Tribunal for the Former Yugoslavia ("ICTY") and the International Criminal Tribunal for Rwanda ("ICTR"), this article argues that idealism about what international criminal justice mechanisms can achieve has led to ideologically-driven judicial decision-making in international criminal law.<sup>19</sup> ICL idealism manifests itself in the belief that international criminal prosecutions can achieve a wide range of aspirations and goals, both international and local.<sup>20</sup> According to the

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<sup>16</sup> See generally Margaret M. deGuzman, *Choosing to Prosecute: Expressive Selection at the International Criminal Court*, 33 MICH. J. INT'L L. 265 (2012).

<sup>17</sup> See WILLIAM SCHABAS, UNIMAGINABLE ATROCITIES: JUSTICE, POLITICS, AND RIGHTS AT THE WAR CRIMES TRIBUNALS, 162-64 (2012) (discussing the tension between the Prosecutor and judges at the ICTY regarding the scope of indictments based on competing visions of the role of the Tribunal).

<sup>18</sup> See generally Turner, *Policing International Prosecutors*, *supra* note 11; Jenia Iontcheva Turner, *Legal Ethics in International Criminal Defense*, 10 CHI. J. INT'L L. 1 (2010).

<sup>19</sup> As used herein, ideology refers to a normative view that shapes an actor's goals, expectations and actions.

<sup>20</sup> See U.N. Secretary-General, *The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies*, paras. 38-39, U.N. Doc. S/2004/616 (Aug. 23,

Secretary General of the United Nations, international criminal tribunals pursue a number of aims including “bringing to justice those responsible for serious violations of human rights and humanitarian law, putting an end to such violations and preventing their recurrence, securing justice and dignity for victims, establishing a record of past events, promoting national reconciliation, re-establishing the rule of law and contributing to restoration of peace.”<sup>21</sup> Idealism about the institutional capacity of international tribunals also found expression in the reports of Judge Antonio Cassese, the first President of the ICTY and ICTR.<sup>22</sup> Among the institutions’ “Future Priorities,” Judge Cassese confidently stated that the Tribunals were establishing an unassailable “historical record . . . thereby preventing historical revisionism,” which he lauded as “a most important function of the Tribunal.”<sup>23</sup> In the case of the ICTY in particular, Cassese added that in their judicial proceedings international judges endeavored “to establish as judicial fact the *full details* of the madness that transpired in the former Yugoslavia.”<sup>24</sup>

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2004), <http://www.unrol.org/files/2004%20report.pdf> (identifying deterrence, prevention, historical record, reconciliation, and reestablishing the rule of law and peace as objectives) [hereinafter UNSG Report on Transitional Justice]; U.N. Secretary-General, *Fifth Annual Report of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the former Yugoslavia since 1991*, para. 296, U.N. Doc. A/53/219-S/1998/737 (Aug. 10, 1998), [http://www.icty.org/x/file/About/Reports%20and%20Publications/AnnualReports/annual\\_report\\_1998\\_en.pdf](http://www.icty.org/x/file/About/Reports%20and%20Publications/AnnualReports/annual_report_1998_en.pdf) (identifying prevention historical revisionism as “a most important function of the Tribunal”) [hereinafter ICTY President’s Fifth Annual Report]. See also Darryl Robinson, *The Identity Crisis of International Criminal Law*, 21 LEIDEN J. INT’L L. 925 (2008) (discussing interpretation problems when ICL becomes “imbued with utopian aspirations”).

<sup>21</sup> UNSG Report on Transitional Justice, *supra* note 20, at para. 38.

<sup>22</sup> ICTY President’s Fifth Annual Report, *supra* note 20, at para. 296.

<sup>23</sup> ICTY President’s Fifth Annual Report, *supra* note 20, para. 296. Cf. Patricia Wald, *The International Criminal Tribunal for the Former Yugoslavia Comes of Age: Some Observations on the Day-to-Day Dilemmas of an International Court*, 5 WASH. U. J. LAW & POL’Y 87, 116-17 (2001) (noting that “the findings of judges may not produce the best approximations of history”). However, the factual accuracy of the historical record established by international tribunals has been challenged. See NANCY COMBS, *FACT-FINDING WITHOUT FACTS: THE UNCERTAIN EVIDENTIARY FOUNDATIONS OF INTERNATIONAL CRIMINAL CONVICTIONS* (2010).

<sup>24</sup> ICTY President’s Fifth Annual Report, *supra* note 20, at para. 296 (emphasis added).

Furthermore, canvassing the discourse surrounding international criminal courts, the following ambitions are often associated with ICL: retribution, deterrence, reconciliation, rehabilitation, incapacitation, restoration, historical recording building, preventing revisionism, expressive functions, crystallizing international norms, general affirmative prevention, establishing peace, preventing war, vindicating international law prohibitions, setting standards for fair trials, and ending impunity.<sup>25</sup> Ironically, such ambition, although usually well intended, has actually contributed to the politicization of the international judicial process.<sup>26</sup>

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<sup>25</sup> See e.g. SCHABAS, UNIMAGINABLE ATROCITIES, *supra* note 17, at 96; DRUMBL, REIMAGINING, *supra* note 6, at 151; Jan Nemitz, *The Law of Sentencing in International Criminal Law: The Purposes of Sentencing and the Applicable Method for the Determination of the Sentence*, 4 Y.B. OF INT'L HUMANITARIAN L. 87 (2001); GARY JONATHAN BASS, STAY THE HAND OF VENGEANCE: THE POLITICS OF WAR CRIMES TRIBUNALS 284 (2000); Turner, *Legal Ethics*, *supra* note 18; Minna Schrag, *Lessons Learned from the ICTY Experience*, 2 J. INT'L CRIM. JUST. 427, 428 (2004); Jean Galbraith, *The Pace of International Criminal Justice*, 31 MICH. J. INT'L L. 79 (2009); Ruti Teitel, *The Law and Politics of Contemporary Transitional Justice*, 38 CORNELL INT'L L. J. 837, 857 (2005); Richard A. Wilson, *Judging History: The Historical Record of the International Criminal Tribunal for the Former Yugoslavia*, 27 HUM. RTS. Q. 908, 908 (2005); Ralph Henham, *The Philosophical Foundations of International Sentencing*, 1 J. INT'L CRIM. JUST. 64 (2004); Martti Koskeniemi, *Between Impunity and Show Trials*, 6 MAX PLANCK Y.B. UN L. 4 (2002); Robinson, *The Identity Crisis of International Criminal Law*, *supra* note 20, at 926, 994.

<sup>26</sup> This is especially true when judges rely too much on reconciliation ideology to justify their rulings. See Valery Perry, *A Survey of Reconciliation Processes in Bosnia and Herzegovina: the Gap Between People and Politics*, in RECONCILIATION(S): TRANSITIONAL JUSTICE IN POST-CONFLICT SOCIETIES 207, 208 (Joanna R. Quinn ed., 2009) (stating that “[r]econciliation’ is a word rarely mentioned in good faith in political discourse.”). See also Statements on the Rome Conference Before the Committee on Foreign Relations of the U.S. Senate, 105th Congress (July 23, 1998) (statements of David J. Scheffer, Ambassador at Large, War Crimes Issues, Head of U.S. Delegation to the U.N. Diplomatic Conference on the Establishment of a Permanent International Criminal Court), [http://www.iccnw.org/documents/USScheffer\\_Senate23July98.pdf](http://www.iccnw.org/documents/USScheffer_Senate23July98.pdf); Silvia A. Fernandez de Gurmendi, *The Role of the International Prosecutor*, in THE INTERNATIONAL CRIMINAL COURT: THE MAKING OF THE ROME STATUTE 175, 181 (Roy S. Lee ed., 1999). See generally Alexander K.A. Greenawalt, *Justice Without Politics? Prosecutorial Discretion and the International Criminal Court*, 39 N.Y.U. J. INT'L L. & POL. 583 (2007).

My argument is that idealism about what international prosecutions can achieve has distorted the condemnation of high-ranking perpetrators and just distribution of punishment among the actors responsible for mass atrocities. This idealism sometimes manifests in the socio-political context, such as the conviction that international prosecutions will *ipso facto* lead to reconciliation. Other times this idealism reflects traditional criminal law consequentialism. I develop this thesis by examining the application of the goals of reconciliation and deterrence when sentencing of perpetrators of atrocity crimes. My conclusion is that, while both reconciliation and deterrence are laudable aspirations, these ideologies have perversely impacted sentencing such that the punishment too often does not reflect the culpability of the individual.

These ideologies have been interchangeably described as the purpose, aim, or objectives of international prosecutions, justifications for international criminal punishment, or sentencing rationales in international criminal law.<sup>27</sup> Through unpacking the sentencing jurisprudence, this paper breaks new ground by advancing a theory on the relationship between ICL and consequentialist aspirations. Thus, the article's findings are also instructive to international judges and others in the field for understanding how aspirations such as reconciliation and deterrence have influenced the severity of punishment at international criminal tribunals. The scope of this paper does not permit a full treatment of retributive approaches to ICL.<sup>28</sup> It focuses primarily on a normative analysis of

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<sup>27</sup> See Allison Marston Danner, *Constructing a Hierarchy of Crimes in International Criminal Law Sentencing*, 87 VA. L. REV. 415, 417 (2001) (stating that sentencing standards remain ill-defined); Mirko Bagaric & John Morss, *International Sentencing Law: In Search of a Justification and Coherent Framework*, 6 INT'L CRIM. L. REV. 191, 253 (2006) (calling tribunal sentences "breathtakingly light").

<sup>28</sup> For a discussion of retributive justification for ICL, see Jean Galbraith, *The Good Deeds of International Criminal Defendants*, 25 LEIDEN J. INT'L L. 799, 809-12 (2012). See generally Jens David Ohlin, *Towards a Unique Theory of International Criminal Sentencing*, in INTERNATIONAL CRIMINAL PROCEDURE: TOWARDS A COHERENT BODY OF LAW 373 (Goran Sluiter & Sergey Vasiliev eds., 2009); Andrew K. Woods, *Moral Judgements & International Crimes: The Disutility of Desert*, 52 VA. J. INT'L L. 633 (2012). See Adil Ahmad Haque, *Retributivism: The Right and the Good*, 32 LAW & PHIL. 59 (2013) and Andrew von Hirsch, *Proportionality in the Philosophy of Punishment*, 16 CRIM. & JUST. 55, 59-63 (1992), for broader discussions on retributive theory.

consequentialism, supported by an empirical and jurisprudential examination of its influence on sentencing.

The perverse effects of this consequentialism frequently surface in the sentencing jurisprudence, giving critics an easy target to denounce international law as a political tool of powerful countries. In particular, ICL's opponents target the apparently erratic sentences, the incoherent justifications, and the schizophrenic self-image of international criminal courts as evidence that international justice remains elusive in the current international paradigm, which is still largely the product of power.<sup>29</sup> In a trial process that frequently appears opaque to outsiders because of complex facts, extraordinary crimes, and unfamiliar procedural rules, the sentence is one feature that is readily accessible to the affected communities. Unfortunately, as illustrated by local reactions and criticized by observers, the sentencing practice appears unprincipled, political and unjust.<sup>30</sup> Sentences imposed by international criminal courts are slowly becoming the system's Achilles' heel.<sup>31</sup> This raises concerns even

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<sup>29</sup> See Mark Drumbl, *Collective Violence and Individual Punishment: The Criminality of Mass Atrocity*, 99 NW. U. L. REV. 539, 610 (2005) (observing that international criminal law sentencing “still remains confusing, unoriginal, unpredictable, and without the ordering benefits of a viable heuristic”) [hereinafter Drumbl, *Collective Violence*]; OLAOLUWA OLUSANYA, SENTENCING WAR CRIMES AND CRIMES AGAINST HUMANITY UNDER THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA 139 (2005) (describing sentencing at the ICTY as a “lottery system [where] penalties are picked randomly” and as “a game of Russian roulette . . . entirely dependent on a particular judge”); Ralph Henham, *Some Issues for Sentencing in the International Criminal Court*, 52 INT'L & COMP. L. Q. 81, 82 (2003) (discussing “substantive irrationality and an absence of penological justifications for international sentencing praxis”); Dirk van Zyl Smit, *Punishment by International Criminal Tribunals: Ideal Example for National Criminal Justice or Parody of a Penal Process?*, presented at the annual meeting of the American Society of Criminology, Denver, USA (2003).

<sup>30</sup> Mirko Bagaric & John Morss, *supra* note 27, at 193 (concluding that international sentencing is “marked . . . by discretion and uncertainty”). See also Danner, *supra* note 27, at 501 (criticizing the “coherency of international justice at the ICTY and ICTR”); Berislav Jelinić, *Kevin Parker – The judge who freed the villains of Vukovar*, NACIONAL (Oct. 2, 2007), <http://www.nacional.hr/en/clanak/38490/kevin-parker-the-judge-who-freed-the-villains-of-vukovar>.

<sup>31</sup> See generally Shahram Dana, *Beyond Retroactivity to Realizing Justice: A Theory on the Principle of Legality in International Criminal Law Sentencing*, 99 J. CRIM.

among supports of international criminal tribunals. Yet, there has been insufficient scholarly attention on ICL sentencing in academic literature.<sup>32</sup> This paper thus responds in part to this paucity.

Specifically, this article explores the impact of consequentialist ideologies on international criminal justice, and in particular on sentencing of perpetrators.<sup>33</sup> Part I elucidates the sentencing objectives advanced by the *ad hoc* international criminal tribunals.<sup>34</sup> Here the goal is twofold: first, to gain initial clarity on what international judges purport to be the purpose of sentencing in international prosecutions, and second, to track trends and shifting methodologies by which judges construct this purposive narrative. Two objectives appeared most frequently in the early jurisprudence: retribution and deterrence.<sup>35</sup> Reconciliation subsequently gained

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LAW & CRIMINOLOGY 857 (2009) [hereinafter Dana, *Beyond Retroactivity*]; Mirko Bagaric & John Morss, *supra* note 27.

<sup>32</sup> Many thoughtful scholars have called for greater attention to be given to the developing a coherent theory for sentencing atrocity perpetrators. *See, e.g.*, Robert Sloane, *Sentencing for the "Crime of Crimes": The Evolving 'Common Law' of Sentencing of the International Criminal Tribunal for Rwanda*, 5 J. INT'L CRIM. JUST. 713, 733-34 (2007) (noting that sentencing has not yet become an integral part of international criminal justice, but continues to be treated as an afterthought); Drumbl, *Collective Violence*, *supra* note 29, at 610 (lamenting under-theorization on this subject and calling for the need for evaluative research on international sentencing).

<sup>33</sup> They could also be understood as utilitarian rationales. Other decisions influenced by one's ideological vision of international prosecution include selection of situations, cases, defendants, and charges; presentation of evidence at trial; and punishment of perpetrators.

<sup>34</sup> Referring to the ICTR and the ICTY, which were established by U.N. Security Council Resolutions 955 and 827, respectively. *See* S.C. Res. 955, para. 1, 49th Year, U.N. Doc. S/RES/955 (Nov. 8, 1994); S.C. Res. 827, para. 2, 48th Year, U.N. Doc. S/RES/827 (May 25, 1993).

<sup>35</sup> *See* Prosecutor v. Popović, Case No. IT-05-88-T, Trial Judgment, para. 2128 (Int'l Crim. Trib. for the Former Yugoslavia June 10, 2010), <http://www.icty.org/x/cases/popovic/tjug/en/100610judgement.pdf>;

Prosecutor v. Lukić, Case No. IT-05-87, Trial Judgment, para. 1049 (Int'l Crim. Trib. for the Former Yugoslavia July 20, 2009), <http://www.icty.org/x/cases/popovic/tjug/en/100610judgement.pdf>;

Prosecutor v. Milutinović, Case No. IT-05-87-T, Trial Judgment, Vol. 3, para. 1144 (Int'l Crim. Trib. for the Former Yugoslavia Feb. 26, 2009), <http://www.icty.org/x/cases/milutinovic/tjug/en/jud090226-e3of4.pdf>;

Prosecutor v. Delić, Case No. 1T-04-83-T, Trial Judgment, para. 559 (Int'l Crim.

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Trib. for the Former Yugoslavia Sept. 15, 2008), <http://www.icty.org/x/cases/delic/tjug/en/080915.pdf>; Prosecutor v. Milošević, Case No. IT-98-29/1-T, Trial Judgment, para. 987 (Int'l Crim. Trib. for the Former Yugoslavia Dec. 12, 2007), [http://www.icty.org/x/cases/dragomir\\_milosevic/tjug/en/071212.pdf](http://www.icty.org/x/cases/dragomir_milosevic/tjug/en/071212.pdf);

Prosecutor v. Martić, Case No. 95-11-T, Trial Judgment, para. 484 (Int'l Crim. Trib. for the Former Yugoslavia June 12, 2007), <http://www.icty.org/x/cases/martic/tjug/en/070612.pdf>; Prosecutor v. Zelenović, Case No. IT-96-23/2-S, Sentencing Judgment, para. 31 (Int'l Crim. Trib. for the Former Yugoslavia Apr. 4, 2007), <http://www.icty.org/x/cases/zelenovic/tjug/en/zel-sj070404-e.pdf>; Prosecutor v. Krajišnik, Case No. IT-00-39-T, Trial Judgment, para. 1134 (Int'l Crim. Trib. for the Former Yugoslavia Sept. 27, 2006), <http://www.icty.org/x/cases/krajisnik/tjug/en/kra-jud060927e.pdf>; Prosecutor v. Orić, Case No. IT-03-68-T, Trial Judgment, para. 718 (Int'l Crim. Trib. for the Former Yugoslavia June 30, 2006), <http://www.icty.org/x/cases/oric/tjug/en/ori-jud060630e.pdf>; Prosecutor v. Limaj, Case No. IT-03-66-T, Trial Judgment, para. 723 (Int'l Crim. Trib. for the Former Yugoslavia Nov. 30, 2005), <http://www.icty.org/x/cases/limaj/tjug/en/lim-tj051130-e.pdf>; Prosecutor v. Strugar, Case No. IT-01-42-T, Trial Judgment, para. 458 (Int'l Crim. Trib. for the Former Yugoslavia Jan. 31, 2005), <http://www.icty.org/x/cases/strugar/tjug/en/str-tj050131e.pdf>; Prosecutor v. Blagojević & Jokić, Case No. IT-02-60-T, Trial Judgment, para. 817 (Int'l Crim. Trib. for the Former Yugoslavia Jan. 17, 2005), [http://www.icty.org/x/cases/blagojevic\\_jokic/tjug/en/bla-050117e.pdf](http://www.icty.org/x/cases/blagojevic_jokic/tjug/en/bla-050117e.pdf);

Prosecutor v. Deronjić, Sentencing Judgment, *supra* note 52, paras. 142-50; Prosecutor v. Stakić, Case No. IT-97-24-T, Trial Judgment, paras. 900-02 (Int'l Crim. Trib. for the Former Yugoslavia July 31, 2003), <http://www.icty.org/x/cases/stakic/tjug/en/stak-tj030731e.pdf>; Prosecutor v. Kunarac, Case No. IT-96-23-T & IT-96-23/1-T, Trial Judgment, para. 838 (Int'l Crim. Trib. for the Former Yugoslavia Feb. 22, 2001), <http://www.icty.org/x/cases/kunarac/tjug/en/kun-tj010222e.pdf>; Prosecutor v. Delalić, Case No. IT-96-21-A, Appellate Judgment, para. 806 (Int'l Crim. Trib. for the Former Yugoslavia Feb. 20, 2001), <http://www.icty.org/x/cases/mucic/acjug/en/cel-aj010220.pdf>; Prosecutor v. Aleksovski, Case No. IT-95-14/1-A, Appellate Judgment, para. 185 (Int'l Crim. Trib. for the Former Yugoslavia Mar. 24, 2000), <http://www.icty.org/x/cases/aleksovski/acjug/en/ale-asj000324e.pdf>; Prosecutor v. Blaškić, Case No. IT-95-14-T, Trial Judgment, paras. 761-62 (Int'l Crim. Trib. for the Former Yugoslavia Mar. 3, 2000), <http://www.icty.org/x/cases/blaskic/tjug/en/bla-tj000303e.pdf>; Prosecutor v. Kupreškić, Case No. IT-95-16-T, Trial Judgment, para. 848 (Int'l Crim. Trib. for the Former Yugoslavia Jan. 14, 2000), <http://www.icty.org/x/cases/kupreskic/tjug/en/kup-tj000114e.pdf>; Prosecutor v. Erdemović, Case No. IT-96-22-T, Sentencing Judgment, paras. 58, 64 (Int'l Crim.

considerable traction, especially after the sentencing of Biljana Plavšić,<sup>36</sup> correlating with the coming of age of plea-bargaining at international tribunals.<sup>37</sup> What started out as an ill-fated justification for plea-bargaining genocide morphed to a general aim of international prosecutions.<sup>38</sup>

Part II examines more closely the influence of deterrence and reconciliation ideologies. The analysis demonstrates how these consequentialist ideologies lead to injustice and perverse results in sentencing. I argue that reconciliation should be abandoned as a rationale for sentencing purposes, and deterrence should be limited in its influence on the final sentence. Punishment influenced by these two ideologies often distorts the individual perpetrator's culpability. This is not to say that international criminal justice cannot contribute to these aspirations, but rather that such aspirations should not be as influential in sentencing judgments as they have been thus far. As Hannah Arendt concluded regarding criminal trials for mass atrocities, after observing the prosecution of a former Nazi SS Lieutenant Colonel: "The purpose of a trial is to render justice and nothing else; even the noblest of ulterior purposes . . . only detract

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Trib. for the Former Yugoslavia Nov. 29, 1996), <http://www.icty.org/x/cases/erdemovic/tjug/en/erd-ts961129e.pdf>; Prosecutor v. Tadić, Case No. IT-94-1-Tbis-R117, Sentencing Judgment, paras. 7-9 (Int'l Crim. Trib. for the Former Yugoslavia Nov. 11, 1999), <http://www.icty.org/x/cases/tadic/tjug/en/tad-ts991111e.pdf>).

<sup>36</sup> Prosecutor v. Plavšić, Case No. IT-00-39&40/1-S, Sentencing Judgment, paras. 66-70 (Int'l Crim. Trib. for the Former Yugoslavia Feb. 27, 2003), <http://www.icty.org/x/cases/plavsic/tjug/en/pla-tj030227e.pdf>.

<sup>37</sup> See NANCY COMBS, GUILTY PLEAS IN INTERNATIONAL CRIMINAL LAW: CONSTRUCTING A RESTORATIVE JUSTICE APPROACH (2007) [hereinafter COMBS, GUILTY PLEAS], for further discussion on plea-bargaining at international tribunals.

<sup>38</sup> See, e.g., Prosecutor v. Kamuhanda, Case No. ICTR-95-54A-T, Judgment and Sentence, para. 754 (Jan. 22, 2004), <http://www.unict.org/Portals/0/Case/English/Kamuhanda/decisions/220104.pdf>; Prosecutor v. Furundžija, Trial Judgment, Case No. IT-95-17/1-T, para. 288 (Dec. 10, 1998), <http://www.icty.org/x/cases/furundzija/tjug/en/fur-tj981210e.pdf>.

from the law's main business: to weigh the charges brought against the accused, to render judgment, and to mete out due punishment."<sup>39</sup>

## I. SENTENCING OBJECTIVES ADVANCED BY INTERNATIONAL CRIMINAL TRIBUNALS

What justifies international criminal justice mechanisms like the ICC and its recent predecessors like the United Nations International Criminal Tribunals for Rwanda and the former Yugoslavia? This is a question that the ICTY and ICTR never really settled. Over time, they advanced an impressive array of "functions" of international criminal courts.<sup>40</sup> Some of these functions are similar to justifications for punishment found in domestic systems, such as retribution, deterrence, and rehabilitation.<sup>41</sup> Others are proffered as

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<sup>39</sup> HANNAH ARENDT, *EICHMANN IN JERUSALEM: A REPORT ON THE BANALITY OF EVIL* 253 (1964).

<sup>40</sup> See *supra*, notes 19-20. See Teitel, *The Law and Politics of Contemporary Transitional Justice*, *supra* note 25, at 857-58; Richard A. Wilson, *Judging History: The Historical Record of the International Criminal Tribunal for the Former Yugoslavia*, 27 HUM. RTS. Q. 908, 908 (2005); Nemitz, *The Law of Sentencing in International Criminal Law*, *supra* note 25, at 92-97. For a critique of sentencing rationales in international criminal law, see generally the following: Andrew K. Woods, *Moral Judgments & International Crimes: The Disutility of Desert*, 52 VA. J. INT'L L. 633, 640 (2012); Mirjan Damaska, *What is the Point of International Criminal Justice?*, 83 CHI.-KENT L. REV. 329, 353 (2008); Robert 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, 43 (2007). For arguments on how the approach of the ICTR to jurisprudential issues regarding genocide can undermine Rwandan reconciliation, see Jean Marie Kamatali, *The Challenge of Linking International Criminal Justice and National Reconciliation: the Case of the ICTR*, 16 LEIDEN J. INT'L L. 115, 121-24 (2003).

<sup>41</sup> Michele Cotton, *Back with a Vengeance: The Resilience of Retribution as an Articulated Purpose of Criminal Punishment*, 37 AM. CRIM. L. REV. 1313, 1313 (2000). See Damaska, *What is the Point*, *supra* note 40. See also Prosecutor v. Rutaganira, Case No. ICTR-95-1C-T, Judgment, paras. 108-09 (Mar. 14, 2005), <http://www.unict.org/Portals/0/Case/English/Rutaganira/judgement/050314.pdf>; Prosecutor v. Kambanda, Case No. ICTR-97-23-S, Judgement and Sentence, para. 28 (Sept. 4, 1998), <http://www.unict.org/Portals/0/Case/English/Kambanda/decisions/kambanda.pdf>.

“special” or “unique” to international criminal law, such as reconciliation and preventing revisionism.<sup>42</sup>

The vision of international criminal justice that is prioritized will crucially shape the character of the ICC. Identifying a primary justification for international criminal law, of course, does not mean that ICL cannot make a meaningful contribution to other goals. However, it is imperative that the ICC coalesces around a primary justification for its work and set modest expectations. An idealism that avoids prioritizing goals and eagerly pursues them all can only delay the inevitable choice, as the experience of *ad hoc* international criminal tribunals reveals, because some of these objectives are in conflict. Eventually international judges are forced to prioritize. This article hopes to inform that decision-making process by evaluating the consequences of that choice through an examination of the sentencing jurisprudence and practice of international tribunals.

#### A. Developing a Framework: Paucity of Positive Law

Almost exactly fifty years to the day, a three judge trial chamber of the ICTY issued the first sentence by an international criminal tribunal for atrocity crimes since the International Military Tribunal for the Far East punished military and political leaders of the Empire of Japan following World War II. When the three judges, who were from France, Costa Rica, and Egypt, gathered in The Hague, in a building that formerly housed an insurance company, to deliberate on a just punishment for a war criminal, they found that “[n]either the Statute nor the Report of the Secretary-General nor the Rules elaborate on the objectives sought by imposing such a sentence.”<sup>43</sup> In identifying justifications for punishment and aims of

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<sup>42</sup> Janine Natalya Clark, *The Limits of Retributive Justice: Findings of an Empirical Study in Bosnia and Herzegovina*, 7 J. INT’L CRIM. JUST. 463, 474-75 (2009).

<sup>43</sup> Prosecutor v. Erdemović, Case No. IT-96-22-T, Sentencing Judgement, para. 57 (Int’l Crim. Trib. for the Former Yugoslavia Nov. 29, 1996), <http://www.icty.org/x/cases/erdemovic/tjug/en/erd-tsj961129e.pdf>. See also Uwe Ewald, *Predictably Irrational* – International Sentencing and its Discourse against the Backdrop of Preliminary Empirical Findings on ICTY Sentencing Practices, 10 INT’L CRIM. L. REV. 365, 379 (2010) (“The rather thin normative framework provided by the sentencing provisions of the Statute and Rules of Procedure and Evidence of the

sentencing in international criminal law, international judges have drawn largely from four sources: (1) the preamble of the Security Council Resolution establishing the ICTY and ICTR; (2) penal theories from national law; (3) the Nuremberg legacy, and (4) human rights norms.

The preamble provisions of Security Council Resolutions establishing the ICTY and ICTR are primarily intended to set forth the legal basis for Security Council action under Chapter VII pursuant to the U.N. Charter.<sup>44</sup> It is doubtful that they were intended as instructions for judges at the time of sentencing. Nevertheless, the methodology of the International Tribunals has been to turn to these provisions in their respective constitutive Resolutions to formulate objectives of international sentencing.<sup>45</sup> This methodology assumes that the conditions required to trigger the Security Council's powers under Chapter VII of the U.N. Charter would suffice for developing the justification and purpose of punishment of perpetrators of atrocity crimes.<sup>46</sup> It also assumes that the reasons supporting international prosecutions are one and the same as the rationales to guide its sentencing practice. In connection with establishing the ICTY, Security Council Resolution 808 states:

*Determined* to put an end to such crimes and to take effective measures to bring to justice the persons who are responsible for them,

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ICTY does not offer a consistent philosophical approach to international sentencing.”).

<sup>44</sup> While there is a natural overlap between the justification for international prosecutions and the object and purpose of international sentencing, they cannot be assumed to be identical. Unfortunately, this distinction and its relevance to international sentencing cannot be pursued in the short context of this contribution. See H. L. A. HART, *Prolegomenon to the Principles of Punishment, in PUNISHMENT AND RESPONSIBILITY* 1 (2d ed. 2008). See also Margaret M. deGuzman, *Choosing to Prosecute*, *supra* note 16, at 288-89 (making a distinction between justifications for the establishment of the International Criminal Court and rationales to guide case selection).

<sup>45</sup> E.g. Prosecutor v. Kamuhanda, Judgment and Sentence, *supra* note 38, at paras. 753-54.

<sup>46</sup> Prosecutor v. Kamuhanda, Judgment and Sentence, *supra* note 38, at paras. 753-54.

*Convinced* that in the particular circumstances of the former Yugoslavia the establishment of an international tribunal would enable this aim to be achieved and would contribute to the restoration and maintenance of peace.<sup>47</sup>

Likewise, Security Council Resolution 955, establishing the ICTR, states:

*Determined* to put an end to such crimes and to take effective measures to bring to justice the persons who are responsible for them,

*Convinced* that in the particular circumstances of Rwanda, the prosecution of persons responsible for serious violations of international humanitarian law would enable this aim to be achieved and would contribute to the process of national reconciliation and to the restoration and maintenance of peace.<sup>48</sup>

Both Resolutions speak to the Security Council's determination "to put an end to" international crimes, such as genocide, crimes against humanity, and war crimes, and "to bring to justice" the perpetrators. Furthermore, the Resolutions proclaim the Security Council's conviction that international prosecutions "would enable this aim to be achieved." Presumably, "this aim" refers to what was mentioned in the previous paragraph: "to put an end to such crimes" and "to bring to justice the persons" responsible. Thus, in the opinion of the Security Council, international prosecutions would "put an end to" international crimes and "bring to justice" the perpetrators. Moreover, the Security Council is also convinced that prosecution "would contribute to the restoration and maintenance of peace." While some ICTY judges have relied on this particular phrase to claim that the court's purpose is to promote national

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<sup>47</sup> S.C. Res. 808, 48th Year, S/RES/808 (Feb. 22, 1993). *See also* S.C. Res. 827, *supra* note 34. .

<sup>48</sup> S.C. Res. 955, *supra* note 34, at paras. 1-2.

reconciliation,<sup>49</sup> it is doubtful that this was the intent. This language is boilerplate and appears in every resolution that invokes Security Council's enforcement powers under Chapter VII. It is necessary to set for the legal basis of the Council's use of Chapter VII. Interestingly, while Resolutions 808 and 827 are silent regarding reconciliation, Resolution 955 establishing the ICTR explicitly mentions "national reconciliation" as part of the ICTR's mandate.<sup>50</sup> Although Tribunal judges routinely turn to their respective resolutions to formulate sentencing rationales, their judgments do not address important differences in the texts of these resolutions.<sup>51</sup>

## B. Extraordinary Crimes, Ordinary Objectives: Retribution and Deterrence

Although the sentencing jurisprudence of the *ad hoc* tribunals has never adequately distinguished between a *justification* for punishment versus the *aims* of punishment, the initial cases identified two primary purposes: retribution and deterrence.<sup>52</sup> A number of years later, the *Blaškić* Trial Chamber added rehabilitation and protection of society to the primary purposes of ICL sentencing, but

<sup>49</sup> See, e.g., Prosecutor v. Erdemović, Sentencing Judgment, *supra* note 43, at para. 58; Prosecutor v. Plavšić, Sentencing Judgment, *supra* note 36, at para. 79.

<sup>50</sup> S.C. Res. 955, *supra* note 34, at paras. 1-2.

<sup>51</sup> There is some concern that the judges may not have even noticed these differences. For example, Judge Inés Monica Weinberg de Roca opines about the "identical formulation" of resolutions establishing the *ad hoc* Tribunals. See Inés Monica Weinberg de Roca & Christopher M. Rassi, *Sentencing and Incarceration in the Ad Hoc Tribunals*, 44 STAN. J. INT'L L. 1, 2 (2008).

<sup>52</sup> See Prosecutor v. Tadić, Sentencing Judgment, *supra* note 35, at paras. 7-9 (stating that "retribution and deterrence serving as the primary purposes of sentence"); Prosecutor v. Furundžija, *supra* note 38, at para. 288. For more recent cases, see Prosecutor v. Đerónjić, Case No. IT-02-61-S, Sentencing Judgment, para. 142 (Int'l Crim. Trib. for the Former Yugoslavia Mar 30, 2004), <http://www.icty.org/x/cases/deronjic/tjug/en/sj-040330e.pdf> (concluding that the "[f]undamental principles taken into consideration when imposing a sentence are deterrence and retribution"). For cases from the ICTR, see also Prosecutor v. Rutaganda, Case No. ICTR-96-3-T, Judgment and Sentence, para. 455 (Dec. 6, 1999), <http://www.unict.org/Portals/0/Case/English/Rutaganda/judgement/991206.pdf> and Prosecutor v. Serushago, Case No. ICTR-98-39-S, Sentence, para. 20 (Feb. 5, 1999), <http://www.unict.org/Portals/0/Case/English/Serushago/decisions/os1.pdf>.

it did so without explanation or analysis.<sup>53</sup> These “four parameters” – retribution, deterrence, rehabilitation, and protection of society – mirror the rationalizations for sentencing found at the national level.<sup>54</sup> However, scholars contest the applicability and relevance of these rationales to international criminal justice.<sup>55</sup> As the sentencing jurisprudence developed, retribution and deterrence emerged as the primary rationales in ICL punishment.<sup>56</sup> Some observers criticize

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<sup>53</sup> See Prosecutor v. Blaškić, Case No. IT-95-14-T, Judgment, para. 761 (Int’l Crim. Trib. for the Former Yugoslavia Mar. 3, 2000), <http://icty.org/x/cases/blaskic/tjug/en/bla-tj000303e.pdf>.

<sup>54</sup> *Id.*

<sup>55</sup> See, e.g., MARK A. DRUMBL, ATROCITY, PUNISHMENT AND INTERNATIONAL LAW 149 (2007); David Luban, *Fairness to Rightness: Jurisdiction, Legality, and the Legitimacy of International Criminal Law*, in THE PHILOSOPHY OF INTERNATIONAL LAW 569, 575-77 (Samantha Besson & John Tasioulas eds., 2010); Margaret M. deGuzman, *Choosing to Prosecute supra* note 16, at 301-12; Damaska, *What is the Point, supra* note 40, at 339-40; Sloane, *The Expressive Capacity of International Punishment, supra* note 40, at 50-51; Diane Marie Amann, *Group Mentality, Expressivism, and Genocide*, 2 INT’L CRIM. L. REV. 93, 116 (2002); Nemitz, *The Law of Sentencing in International Criminal Law, supra* note 25.

<sup>56</sup> See Prosecutor v. Popović, Case No. IT-05-88-T, Trial Judgment, para. 2128 (Int’l Crim. Trib. for the Former Yugoslavia June 10, 2010); Prosecutor v. Lukić, Case No. IT-05-87 Trial Judgment, para. 1049 (Int’l Crim. Trib. for the Former Yugoslavia July 20, 2009); Prosecutor v. Milutinović, Case No. IT-05-87-T, Trial Judgment, para. 1144 (Int’l Crim. Trib. for the Former Yugoslavia Feb. 26, 2009); Prosecutor v. Delić, Case No 1T-04-83-T, Trial Judgment, para. 559 (Int’l Crim. Trib. for the Former Yugoslavia Sept. 15, 2008); Prosecutor v. Milošević, Case No IT-98-29/1-T, Trial Judgment, para. 987 (Int’l Crim. Trib. for the Former Yugoslavia Dec. 12, 2007); Prosecutor v. Martić, Case No. 95-11-T, Trial Judgment, para. 484 (Int’l Crim. Trib. for the Former Yugoslavia June 12, 2007); Prosecutor v Zelenović, Case No IT-96-23/2-S, Sentencing Judgment, para. 31 (Int’l Crim. Trib. for the Former Yugoslavia Apr. 4, 2007); Prosecutor v. Krajišnik, Case No IT-00-39&40-T, Trial Judgment, para. 1134 (Int’l Crim. Trib. for the Former Yugoslavia Sept. 27, 2006); Prosecutor v. Orić, Case No 1T-03-68-T, Trial Judgment, para. 718 (Int’l Crim. Trib. for the Former Yugoslavia June 30, 2006); Prosecutor v. Limaj, Case No 1T-03-66-T, Trial Judgment, para. 723 (Int’l Crim. Trib. for the Former Yugoslavia Nov. 30, 2005); Prosecutor v. Strugar, Case No IT-01-42-T, Trial Judgment, para. 458 (Int’l Crim. Trib. for the Former Yugoslavia Jan. 31, 2005); Prosecutor v Blagojević, Case No IT-02-60-T, Trial Judgment, para. 817 (Int’l Crim. Trib. for the Former Yugoslavia Jan. 17, 2005); Prosecutor v. Deronjić, Sentencing Judgment, *supra* note 52, at paras. 142-50; Prosecutor v. Stakić, Case No. IT-97-24-T, Trial Judgment, paras. 900-02 (Int’l Crim. Trib. for the Former Yugoslavia July 31, 2003); Prosecutor v. Kunarac, Case No. IT-96-23-T Trial Judgment, para. 838 (Int’l Crim. Trib. for the Former Yugoslavia Feb. 22,

ICL's focus on retribution and deterrence, hallmarks of a national system's response to ordinary crimes, as an unimaginative and unoriginal response to atrocity crimes.<sup>57</sup> Modesty, however, may be a safeguard for a nascent international justice system. Ambitious social engineering in the wake of mass atrocities is wisely left to other social processes and institutions. Legalism has its limits, and those limits should be respected. Its formality, rigidity, and obligation to protect the rights of parties make it a limited agent of social change. These meta-judicial goals require a matrix of social and spiritual institutions working together to rebuild the fabric of society post-atrocity. When other institutions and agents of society share this responsibility, international criminal justice can play a modest but important role.

Of course, this is not intended to suggest that deterrence or retribution are easy goals, but they are more familiar to a criminal justice mechanism. According to the Tribunal, the goal of general deterrence implies that "[t]he sentence imposed must also be sufficient in order to dissuade others from committing the same crime."<sup>58</sup> Individual deterrence, on the other hand, "refers to the

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2001); Prosecutor v. Blaškić, Case No IT-95-14-T, Trial Judgment, para. 762 (Int'l Crim. Trib. for the Former Yugoslavia Mar. 3, 2000); Prosecutor v Kupreškić, Case No IT-95-16-T, Trial Judgment, para. 848 (Int'l Crim. Trib. for the Former Yugoslavia Jan. 14, 2000); Prosecutor v. Erdemović, Sentencing Judgment, *supra* note 43, paras. 58, 64; Prosecutor v. Tadić, Case No IT-94-1-Tbis-R117, Sentencing Judgment, paras. 7-9 (Int'l Crim. Trib. for the Former Yugoslavia Nov. 11, 1999); Prosecutor v. Stakić, Case No. IT-97-24-A, Appeals Judgment, para. 402 (Int'l Crim. Trib. for the Former Yugoslavia Mar. 22, 2006), <http://icty.org/x/cases/stakic/acjug/en/sta-aj060322e.pdf>; Prosecutor v. Delalić, Case No. IT-96-21-A, Appeals Judgement, para. 806 (Int'l Crim. Trib. for the Former Yugoslavia Feb. 20, 2001), <http://icty.org/x/cases/mucic/acjug/en/cel-aj010220.pdf>; Prosecutor v. Aleksovski, Case No. IT-95-14/1-A, Appeal Judgment, para. 185 (Int'l Crim. Trib. for the Former Yugoslavia Mar. 24, 2000), <http://icty.org/x/cases/aleksovski/acjug/en/ale-asj000324e.pdf>; Prosecutor v. Milutinović, Case No. IT-05-87-T, Trial Judgment Vol. 3, paras. 1144-45 (Int'l Crim. Trib. for the Former Yugoslavia Feb. 26, 2009), <http://icty.org/x/cases/milutinovic/tjug/en/jud090226-e3of4>.

<sup>57</sup> See, e.g., Drumbl, *Collective Violence*, *supra* note 29, at 610.

<sup>58</sup> Prosecutor v. Nikolić, Case No. IT-94-2-S, Trial Sentencing Judgment, para. 136 (Int'l Crim. Trib. for the Former Yugoslavia Dec. 18, 2003), [http://www.icty.org/x/cases/dragan\\_nikolic/tjug/en/nik-sj031218e.pdf](http://www.icty.org/x/cases/dragan_nikolic/tjug/en/nik-sj031218e.pdf); Prosecutor v. Todorović, Case No. IT 95-9/1-S, Sentencing Judgment, para. 30

specific effect of the sentence upon the accused” sitting in judgment before the court.<sup>59</sup> The “sentence should be adequate to discourage an accused from recidivism.”<sup>60</sup> In other words, the punishment should discourage an accused from re-offending after the sentence has been served and the accused has been released.<sup>61</sup>

The general jurisprudence of the Appeals Chamber affirms that the objective of deterrence, both general and specific, may influence the sentence.<sup>62</sup> However, it has also cautioned: “this factor must not be accorded undue prominence in the overall assessment of the sentences to be imposed on persons convicted by the International Tribunal.”<sup>63</sup> ICTY trial chambers recognize both specific and general deterrence have “an important function in principle” and serve “an important goal of sentencing.”<sup>64</sup> Some trial chambers have applied the term “individual” deterrence when referring to specific deterrence.<sup>65</sup> Other trial chambers rejected the applicability of specific deterrence in international criminal justice. For example, although the Trial Chamber in the *Dragan Nikolić* case recognized that specific deterrence “has an important function in principle and serves as an important goal of sentencing,”<sup>66</sup> it

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(Int’l Crim. Trib. for the Former Yugoslavia July 31, 2001), <http://icty.org/x/cases/todorovic/tjug/en/tod-tj010731e.pdf>.

<sup>59</sup> Prosecutor v. Nikolić, Trial Sentencing Judgment, *supra* note 58, at para. 135.

<sup>60</sup> Prosecutor v. Nikolić, Case No. IT-94-2A, Appeals Sentencing Judgment, para. 45 (Int’l Crim. Trib. for the Former Yugoslavia Feb. 4, 2005).

<sup>61</sup> Prosecutor v. Nikolić, Trial Sentencing Judgment, *supra* note 58, at para. 134.

<sup>62</sup> *See, e.g.*, Prosecutor v. Tadić, Case No. IT-94-1-A & IT-94-1-A *bis*, Appeal Sentencing Judgment, para. 48 (Int’l Crim. Trib. for the Former Yugoslavia Jan. 26, 2000), <http://www.icty.org/x/cases/tadic/acjug/en/tad-asj000126e.pdf>; Prosecutor v. Aleksovski, Case No. IT-95-14/1-A, Appeals Judgment, para. 185 (Int’l Crim. Trib. for the Former Yugoslavia Mar. 24, 2000), <http://www.icty.org/x/cases/aleksovski/acjug/en/ale-asj000324e.pdf>; Prosecutor v. Nikolić, Appeals Sentencing Judgment, *supra* note 60, at paras. 45-46.

<sup>63</sup> Prosecutor v. Tadić, Appeal Sentencing Judgment, *supra* note 62, at para. 48.

<sup>64</sup> Prosecutor v. Nikolić, Trial Sentencing Judgment, *supra* note 58, at para. 134.

<sup>65</sup> *Id.* at paras. 134-35.

<sup>66</sup> *Id.* at para. 134.

nevertheless found that specific deterrence had no relevance in the case before it.<sup>67</sup> The court did not elaborate on why it found that specific deterrence has no relevance to the punishment of Dragon Nikolić. The judges perhaps concluded that the aim of specifically deterring Nikolić from committing crimes against humanity is moot, assuming the circumstances that provided an opportunity for these crimes to be committed, namely war, will not be present when the accused is released.

Outside the tribunals, opinions are split on whether international prosecutions have any deterrent value. Professor Payam Akhavan argues that mass atrocities are the product of “elite-induced” violence aimed at the acquisition or preservation of power.<sup>68</sup> Leaders are making calculated choices and trade-offs and engaging in an immoral cost-benefit analysis. Akhavan makes a compelling case that political power gained through fomenting ethnic hatred resulting in mass violence can be discouraged. Threat of punishment and international stigmatization “can increase the costs of a policy that is criminal under international law.”<sup>69</sup> According to Akhavan, this can in turn impact the calculations of leaders contemplating engagement in criminal policies such as ethnic cleansing, genocide, or crimes against humanity as a viable policy for sustaining power.<sup>70</sup> Most supporters of deterrence in ICL acknowledge that some individuals may not easily be dissuaded from committing crimes when surrounded by routine cruelty. However, they maintain that punishment can be an effective deterrent in preventing such deviant contexts prior to their occurrence, or recurrence, in post-conflict situations.<sup>71</sup>

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<sup>67</sup> *Id.* at para. 135.

<sup>68</sup> Payam Akhavan, *Beyond Impunity: Can International Criminal Justice Prevent Future Atrocities?*, 95 AM. J. INT’L L. 7, 12 (2001).

<sup>69</sup> *Id.*

<sup>70</sup> *Id.*

<sup>71</sup> Generally see the following: Akhavan, *Beyond Impunity*, *supra* note 68; Rolf Einar Fife, *Penalties*, in THE INTERNATIONAL CRIMINAL COURT: THE MAKING OF THE ROME STATUTE, 211-36 (Roy S. Lee ed., 1999); Dominic McGoldrick, *The Permanent International Criminal Court: An End to the Culture of Impunity?*, CRIM. L. REV., Aug. 1999, at 627; M. Cherif Bassiouni, *Searching for Peace and Achieving Justice:*

Others are much more skeptical about the deterrent capacity of international prosecutions.<sup>72</sup> Professor Jan Klabbers, for example, takes the position that ICL will not play a significant deterrent role because human rights violators cannot be deterred.<sup>73</sup> He argues that the cost-benefit analysis underlying the deterrence argument advanced by Akhavan and others cannot be applied to human rights violators because they act mainly for political reasons. Because they willfully engage in mass murder for political motives, Klabbers considers them undeterrable. But there is no reason to assume that political motivations are beyond deterrence. As Professor Isaac Ehrlich observes, “willful engagement in even the most reprehensible violations of legal and moral codes does not preclude an ability to make self-serving choices.”<sup>74</sup> In sum, while the scholarship is divided on the deterrent capacity of international criminal law, tribunal judges nevertheless consider deterrence as a central purpose of international prosecution and claim that it is an influential factor in their sentencing decisions.

### C. The Lip Service to Rehabilitation

One sentencing purpose proffered by international criminal tribunals that appears to have no impact on sentencing allocations is rehabilitation. International human rights treaties encourage rehabilitation considerations in national penology.<sup>75</sup> While the focus of these treaties appears to be on the administration of prisons and

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*the Need for Accountability*, 59 L. & CONTEMP. PROBS. 9 (1996), for support of deterrence in ICL.

<sup>72</sup> Jan Klabbers, *Just Revenge? The Deterrence Argument in International Criminal Law*, 7 FIN. Y.B. INT'L L. 249 (2001) (disagreeing that human rights violators can be deterred); Drumbl, *Collective Violence*, *supra* note 29, at 610 (claiming that there is little or no evidence that punishment deters perpetrators of mass atrocities).

<sup>73</sup> Klabbers, *Just Revenge?*, *supra* note 72, at 253.

<sup>74</sup> Isaac Ehrlich, *Crime, Punishment, and the Market for Offenses*, 10 J. ECON. PERSP. 43, 43 (1996).

<sup>75</sup> See, e.g., International Covenant on Civil and Political Rights art. 10(3), Dec. 16, 1966, S. Treaty Doc. No. 95-20, 6 I.L.M. 368 (1967), 999 U.N.T.S. 171. (“The penitentiary system shall comprise treatment of prisoners the essential aim of which shall be their reformation and social rehabilitation”); U.N. GAOR, 47th Sess., cmt., U.N. Doc. CCPR/C/21/Rev.1/Add.3 (1992); American Convention on Human Rights, art. 5(6), Nov. 21, 1969, 1144 U.N.T.S. 143.

the manner of enforcement of a sentence,<sup>76</sup> the ICTY has purported to consider such provisions when determining the length of the sentence itself.<sup>77</sup>

In the early sentencing jurisprudence of the ICTY, several trial chambers stated that rehabilitation is one of the “four parameters” that guide international sentencing.<sup>78</sup> However, it is fair to say that rehabilitation was never highly significant<sup>79</sup> in the determination of a sentence and did not act as a meaningful “parameter” to limit the sentence. This was made apparent in the Trial Chamber’s judgment of General Blaškić.<sup>80</sup> Despite acknowledging “rehabilitation” as one of the parameters guiding its determination of Blaškić’s sentence, and despite its own factual finding strongly indicating the possibility of rehabilitation in the case of General Blaskic, the Trial Chamber nevertheless decided to not give these factors any weight, and certainly its forty-five-year sentence leaves little trace of rehabilitation considerations, especially since Blaskic was forty years old when he was sentenced.<sup>81</sup> Such a sentence suggests that the Tribunal was eager to send a strong signal of deterrence, and that this ideology predominated its sentencing considerations, even to the extent, some would argue, of trial chambers distributing exemplary sentences or exemplary justice and placing that foremost in their considerations. Taking caution that this practice did not go too far, the Appeals Chamber stated in one of its judgments that “this factor [deterrence] must not be accorded undue

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<sup>76</sup> See, e.g., MANFRED NOWAK, U.N. COVENANT ON CIVIL AND POLITICAL RIGHTS, 241-54 (Kehl am Rheine ed., 2d rev. ed. 2005).

<sup>77</sup> Prosecutor v. Delalić, Case No. IT-96-21-T, Appeals Judgment, paras. 805-06 (Int’l Crim. Trib. for the Former Yugoslavia Feb. 20, 2001), <http://www.icty.org/x/cases/mucic/acjug/en/cel-aj010220.pdf>.

<sup>78</sup> Prosecutor v. Blaškić, Case No. IT-95-14-T, Judgment para. 761, 765 (Mar. 3, 2000), <http://www.icty.org/x/cases/blaskic/tjug/en/bla-tj000303e.pdf> (discussing rehabilitation).

<sup>79</sup> Prosecutor v. Erdemović, Case No. IT 96-22-*Tbis*, Sentencing Judgment, para. 66 (Int’l Crim. Trib. for the Former Yugoslavia Mar. 5, 1998), <http://www.icty.org/x/cases/erdemovic/tjug/en/erd-tsj980305e.pdf>.

<sup>80</sup> Prosecutor v. Blaškić, Judgment, *supra* note 78, at para. 762.

<sup>81</sup> Prosecutor v. Blaškić, Judgment, *supra* note 78, at para. 762. See Shahram Dana, *Revisiting the Blaškić Sentence: Some Reflections on the Sentencing Jurisprudence of the ICTY*, 4 INT’L CR. L. REV. 321 (2004), for a critique of the Trial Chamber’s sentencing analysis in the *Blaškić* case.

prominence in the overall assessment of the sentences.”<sup>82</sup> It has likewise explicitly pronounced that “rehabilitation should not be given undue weight, confirming what was already implicit in the sentencing practice of earlier cases.”<sup>83</sup>

#### D. The Rise of Judicial Idealism: Enter Reconciliation & Social Engineering

The U.N. Security Council resolution establishing the ICTY does not mention “reconciliation” as such. Neither does the ICTY Statute or its Rules of Procedure and Evidence (RPE). Likewise, the preamble and statute of the ICC avoid incorporation of reconciliation as a goal of international prosecutions. Furthermore, reconciliation ideology is virtually absent in the early practice of the *ad hoc* Tribunals.<sup>84</sup> Even in the first few cases involving guilty pleas and plea bargains, international judges did not justify sentencing discounts in terms of promoting reconciliation.<sup>85</sup> The practice of justifying plea deals in terms of reconciliation became popular only much later. This is not to be confused with judicial unawareness of the potential contribution that international prosecutions and just punishments could make towards reconciliation in a post-conflict society.<sup>86</sup> The

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<sup>82</sup> Prosecutor v. Tadić, Appeal Sentencing Judgment, *supra* note 62, at para. 48.

<sup>83</sup> See Prosecutor v. Delalic, Case No. IT-96-21-A, Judgment, para. 806 (Int’l Crim. Trib. for the Former Yugoslavia Feb. 20, 2001) <http://www.icty.org/x/cases/mucic/acjug/en/cel-aj010220.pdf> (stating that “although rehabilitation (in accordance with international human rights standards) should be considered as a relevant factor, it is not one which should be given undue weight”).

<sup>84</sup> See, e.g., Prosecutor v. Kambanda, Judgment and Sentence, *supra* note 41; Prosecutor v. Erdemović, Sentencing Judgment, *supra* note 43; Prosecutor v. Tadić, Sentencing Judgment, *supra* note 35; Prosecutor v. Sikirica, Case No. IT-95-8-S, Sentencing Judgment (Int’l Crim. Trib. for the Former Yugoslavia Nov. 13, 2001), <http://www.icty.org/x/cases/sikirica/tjug/en/sik-ts011113e.pdf>.

<sup>85</sup> See, e.g., Prosecutor v. Erdemović, Sentencing Judgment, *supra* note 43; Prosecutor v. Kambanda, Judgment and Sentence, *supra* note 41; Prosecutor v. Sikirica, Sentencing Judgment, *supra* note 84.

<sup>86</sup> In the first annual report to the Security Council, the ICTY President Antonio Cassese noted that international criminal justice mechanisms can promote reconciliation and restore “true peace.” See President of the Int’l Crim. Trib. for the Former Yugoslavia (ICTY), *1st Ann. Rep. of the Int’l Crim. Trib. for the Former*

initial judges of the *ad hoc* Tribunals were mindful of this potential, but did not consider it as a differential principle for the purpose of allocating punishment.<sup>87</sup> This is most likely because reconciliation is largely unmeasured, slow building and aspirational.<sup>88</sup> Successful reconciliation requires the mobilization of diverse elements of social and legal order. Justice through criminal prosecution of violators of community norms is merely one step towards that goal.

Although reconciliation is an important goal,<sup>89</sup> the first generation of international criminal law judges understood it could not be captured by legalism or transformed into an operational rule or principle.<sup>90</sup> The very nature of mass atrocities problematizes achieving grand ambitions like reconciliation because the widespread participation in atrocity crimes creates deep complicity that is not easily overcome through the narrow lens of judicially constructed narratives via international criminal justice mechanisms. Moreover, international judges were initially hesitant to act as arbiters of history or to develop judicial narratives of the background to the conflict that would serve as a platform for reconciliation.<sup>91</sup>

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*Yugoslavia in Accordance with Article 34 of Security Council Resolution 25704 annex (1993), transmitted by Note of the Secretary-General, paras. 14-18, U.N. Doc. S/1994/1007 (Aug. 29, 1994) [hereinafter Note of Secretary-General: Rep. of ICTY]; See also Wald, The International Criminal Tribunal for the Former Yugoslavia Comes of Age, supra note 23 (discussing reconciliation through judicial adjudication).*

<sup>87</sup> Prosecutor v. Erdemović, Sentencing Judgment, *supra* note 43, at paras. 57-66 (discussing factors influencing sentence allocation but not treating reconciliation as a sentencing factor). *See also* Wald, *The International Criminal Tribunal for the Former Yugoslavia Comes of Age*, *supra* note 23, at 117.

<sup>88</sup> *See* Perry, *A Survey of Reconciliation*, *supra* note 26, at 207, 208 (Joanna R. Quinn ed., 2009).

<sup>89</sup> *See* Note of Secretary-General: Rep. of ICTY, *supra* note 86, at para. 16.

<sup>90</sup> *See* Wald, *The International Criminal Tribunal for the Former Yugoslavia Comes of Age*, *supra* note 23, at 117 (concluding that “adjudication” by ICTY of who started, prolonged, or ended the war and why in the context of criminal proceedings without the states themselves having input is basically unfair, or at least does not contribute to future reconciliation”). *See also* Prosecutor v. Erdemović, Sentencing Judgment, *supra* note 43; Prosecutor v. Kambanda, Judgment and Sentence, *supra* note 41; Prosecutor v. Sikirica, Sentencing Judgment, *supra* note 84.

<sup>91</sup> *See, e.g.*, Prosecutor v. Delalić, Case No. IT-96-21-T, Trial Judgment, para. 88 (Int’l Crim. Trib. for the Former Yugoslavia Nov. 16, 1998),

Reconciliation subsequently gained traction in the Tribunals' jurisprudence when an increasing number of convictions were secured by plea bargains. However, with plea bargains, the historical narrative of "what happened" was no longer constructed in open and public courts by documentation and witnesses to the atrocities, as was done at Nuremberg,<sup>92</sup> but behind closed doors in negotiations between perpetrators and international lawyers.<sup>93</sup> In sentencing judgments following a guilty plea or plea bargain, reconciliation became a useful ideology to legitimize plea deals and justify sentencing discounts.<sup>94</sup> While actors within the system view sentencing reductions as a normal outcome of plea bargains,<sup>95</sup> local populations, especially where plea bargaining is foreign to the domestic legal culture, view the sentencing reduction as political favoritism to a particular ethnic group, unwillingness of elites to hold other elites accountable, failure to acknowledge the suffering and

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[http://www.icty.org/x/cases/mucic/tjug/en/981116\\_judg\\_en.pdf](http://www.icty.org/x/cases/mucic/tjug/en/981116_judg_en.pdf). (stating that the "Trial Chamber does not consider it necessary to enter into a lengthy discussion of the political and historical background to these events, nor a general analysis of the conflict").

<sup>92</sup> Notwithstanding the fact that the "role of criminal tribunals as arbiters of historical truth has been contested since the first serious efforts of international justice, at Nuremberg and Tokyo." See SCHABAS, UNIMAGINABLE ATROCITIES, *supra* note 17, at 157.

<sup>93</sup> For concerns that plea-bargaining distorts the historical record, see COMBS, GUILTY PLEAS, *supra* note 37, at 67, 207.

<sup>94</sup> See Prosecutor v. Plavšić, Sentencing Judgement, *supra* note 36; Prosecutor v. Bralo, Case No. IT-95-17-A, Judgment on Sentencing Appeal (Int'l Crim. Trib. for the Former Yugoslavia Apr. 2, 2007), <http://www.icty.org/x/cases/bralo/acjug/en/bra-aj070402-e.pdf>; Prosecutor v. Nikolic, Case No. IT-94-2-S, Sentencing Judgment (Int'l Crim. Trib. for the Former Yugoslavia Dec. 18, 2003), [http://www.icty.org/x/cases/dragan\\_nikolic/tjug/en/nik-sj031218e.pdf](http://www.icty.org/x/cases/dragan_nikolic/tjug/en/nik-sj031218e.pdf); Prosecutor v. Bralo, Case No. IT-95-17-S, Sentencing Judgment (Int'l Crim. Trib. for the Former Yugoslavia Dec. 7, 2005), <http://www.icty.org/x/cases/bralo/tjug/en/bra-sj051207-e.pdf>.

<sup>95</sup> Tribunal lawyers from civil law countries were initially concerned about the practice of plea-bargaining. See Nancy A. Combs, *Copping a Plea to Genocide: The Plea Bargaining of International Crimes*, 151 U. PA. L. REV. 1, 139-41, 53 (2002) (reporting that judges and lawyers from civil law countries were uncomfortable with plea bargaining at international tribunals).

injustice inflicted on victim communities, or secretive deal-making.<sup>96</sup> Thus, the entrenchment of reconciliation ideology in ICL jurisprudence is largely a reactionary effort to legitimize the practice of plea bargaining in the face of mounting criticism.

Crucially, for this push back to be successful, the goal of reconciliation needed to be firmly anchored in the Tribunal's mandate. The problem facing the judges, however, was that Security Council Resolution 827, establishing the ICTY, did not position reconciliation as a teleological imperative.<sup>97</sup> In fact, the resolution does not even mention the word "reconciliation," thus calling into question whether reconciliation ideology should be considered as part of the Tribunal's mandate.<sup>98</sup> Nevertheless, some ICTY judges took it upon themselves to inject the goal of reconciliation into the court's mandate through a flawed interpretation of Resolution 827 that, even if well intended, was beyond the Tribunal's mandate and institutional capacity. They attempted to situate the Tribunal's role in promoting reconciliation within Resolution 827's reference to "contribute to the restoration and maintenance of peace."<sup>99</sup> Unfortunately, this methodology suffers from over dependence on the unlikely assumption that, by such preambular declarations, the Security Council intended to articulate a philosophy to guide international sentencing.<sup>100</sup> Even if we accept the assumptions necessary for this interpretation, this language fails to justify the emphasis given to the notion of reconciliation in ICL sentencing practice, resulting frequently in perversely lenient sentences. Arguably, restoration and maintenance of peace, in this context (i.e. criminal justice forum), require the realization of justice by accountability for crimes and fair punishment for wrongdoing. Thus, even assuming that reconciliation is part of the Tribunal's mandate, a difficult question follows: what

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<sup>96</sup> Cf. Stephanos Bibas & William W. Burke-White, *International Idealism Meets Domestic-Criminal-Procedure Realism*, 59 DUKE L.J. 637, 658–60 (2010).

<sup>97</sup> See S.C. Res. 827, *supra* note 34.

<sup>98</sup> See Clark, *The Limits of Retributive Justice*, *supra* note 42, at 465 (challenging the merits of reconciliation and historical record building as goals of international criminal justice mechanisms).

<sup>99</sup> S.C. Res. 827, *supra* note 34, at 1.

<sup>100</sup> The assumption also requires us to ignore the more obvious and immediate purpose of such declarations in the preamble, namely to trigger the Security Council's coercive powers under Chapter VII.

impact, if any, should the aim of reconciliation have in the determination of a sentence for international crimes?

The complexities and difficulties of advancing reconciliation ideology as part of the core mandate of the Tribunal were not fully appreciated when it gained traction as a justification for the increasing practice of plea-bargaining. Nevertheless, the notion of reconciliation now appears frequently, but largely perfunctory, in sentencing judgments.<sup>101</sup> Despite its absence from the court's constitutive documents, the extant practice among ICTY judges is to cursorily identify "promoting reconciliation" as part of the Tribunal's mandate. Thus, romanticism about international tribunals "promoting reconciliation" persists even though it remains elusively conceptually and pragmatically.<sup>102</sup> While the Tribunals have clarified how concepts such as "retribution" and "deterrence" are to be understood in the context of international criminal justice, the notion of "reconciliation" has remained undefined. Tribunal judges have struggled to coherently develop and integrate this concept in their decision-making and sentencing judgments.<sup>103</sup> The lack of clarity on what "reconciliation" means for international criminal justice, however, has not inhibited trial chambers from relying on it when allocating a sentence. Unfortunately, they have misapplied the notion of reconciliation in their sentencing judgments. As discussed in detail below, the ICTY's method of realizing reconciliation appears to contradict the aim of combating impunity, which is explicitly part of the Tribunal's mandate.

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<sup>101</sup> Prosecutor v. Babic, Case No. IT-03-72-S, Sentencing Judgment (Int'l Crim. Trib. for the Former Yugoslavia June 29, 2004), <http://icty.org/x/cases/babic/tjug/en/bab-sj040629e.pdf>; Prosecutor v. Banovic, Case No. IT-02-65/1-S, Sentencing Judgment (Int'l Crim. Trib. for the Former Yugoslavia Oct. 28, 2003), <http://icty.org/x/cases/banovic/tjug/en/ban-sj031028e.pdf>; Prosecutor v. Mrda, Case No. IT-02-59-S (Int'l Crim. Trib. for the Former Yugoslavia Mar. 31, 2004), <http://icty.org/x/cases/mrda/tjug/en/sj-040331.pdf>.

<sup>102</sup> See Clark, *The Limits of Retributive Justice*, *supra* note 42, at 465 (challenging the merits of reconciliation and historical record building as goals of international criminal justice mechanisms).

<sup>103</sup> See Kamatali, *The Challenge of Linking International Criminal Justice*, *supra* note 40, at 121-24, for arguments on how the ICTR's approach to jurisprudential issues regarding genocide can undermine Rwandan reconciliation.

### E. Didactic Function of International Prosecutions: Affirmative Prevention

Some of the objectives of punishment for atrocity crimes as articulated by the *ad hoc* tribunals mirror those found at the national level, such as deterrence, retribution, rehabilitation, and protection of society.<sup>104</sup> In addition, other considerations influence sentencing allocations in the international context such as national reconciliation, preserving history, and maintaining peace.<sup>105</sup> Another important consideration in the international context is reinforcing the values of the international community.<sup>106</sup> The work of international courts contributes to internalizing norms, values, and interests protected by international law in the consciousness and culture of national and international actors. An important step in the evolution of the global legal order is the crystallization of universal norms as more than mere soft law provisions, but rather as binding law backed by punishment for violations, especially norms embedded in human rights treaties, international humanitarian law conventions, and the Genocide Convention.

Referred to by some commentators as the didactic function,<sup>107</sup> in the context of international criminal justice this

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<sup>104</sup> Damaska, *What is the Point*, *supra* note 40, at 331, 339. *See also* Prosecutor v. Strugar, Case No. IT-01-42-T, Trial Judgment, para. 458 (Int'l Crim. Trib. for the Former Yugoslavia Jan. 31, 2005), <http://www.icty.org/x/cases/strugar/tjug/en/str-tj050131e.pdf>.

<sup>105</sup> *See* Prosecutor v. Rukundo, Case No. ICTR-2001-70-T, Judgment, para. 600 (Feb. 27, 2009), <http://www.unictt.org/Portals/0/Case%5CEnglish%5CRukundo%5C090227.pdf>; Prosecutor v. Perišić, Case No. IT-04-81-T, Trial Judgment, para. 1802 (Int'l Crim. Trib. for the Former Yugoslavia Sept. 6, 2011), [http://www.icty.org/x/cases/perisic/tjug/en/110906\\_judgement.pdf](http://www.icty.org/x/cases/perisic/tjug/en/110906_judgement.pdf); Prosecutor v. Strugar, Trial Judgment, *supra* note 104, at para. 163.

<sup>106</sup> *See, e.g.*, Prosecutor v. Nikolić, Trial Sentencing Judgment, *supra* note 58, at para. 139; Amann, *Group Mentality, Expressivism, and Genocide*, *supra* note 55, at 95, 118-19, 127, 132.

<sup>107</sup> Damaska, *What is the Point*, *supra* note 40, at 347. Related to didactic function is the expressive function. *See* MARK A. DRUMBL, *ATROCITY*, *supra* note 55, at 173-76; Luban, *Fairness to Rightness*, *supra* note 55, at 569, 576-77; Amann, *Group Mentality, Expressivism, and Genocide*, *supra* note 55, at 95; Margaret M.

translates into building awareness of the distinction between legal and criminal conduct during war or armed conflict, whether international or non-international in character. At first blush, this aim may appear rather simplistic. After all, the line between legal and criminal conduct is rather obvious when considering murder, rape, torture, and other such crimes that occur in the context of armed conflict. However, crimes committed in these situations are often precipitated by direct and implicit indoctrination that dehumanizes the victim. Coupled with the awareness that war crimes historically go unpunished, these forces converge to disease belligerents with a “culture of inverse morality”<sup>108</sup> where killing, raping, and terrorizing civilians becomes an accepted part of the warfare itself.

An individual’s inner sense of morality and repulsion towards such brutality is overridden by peer pressure from immediate comrades and superiors, and reinforced by inflammatory rhetoric of national leaders. The perversity can reach a point where, far from being considered wrongful, violence against “the other” is considered a righteous deed. Thus, an educational or didactic function as an objective of sentencing is particularly significant in the context of international law.<sup>109</sup> Moreover, it approaches the notion of deterrence from a positive perspective of crime prevention. In addition to building awareness of international law, international sentencing may also help reinforce specific values that the international community seeks to advance such as tolerance or the immorality and wrongfulness of persecution of peoples on the basis of race, religion, ethnicity or nationality. At this same time, it is interesting to contemplate the moral dilemma and paradoxes of sustaining morality in war. The evils that inhere in war problematize achieving a didactic function through legalism, as does our extant framework. We outlaw aggressive war, but once that rule is violated, we say killing of a combatant by a combatant is lawful and killing of civilians is

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deGuzman, *Choosing to Prosecute*, *supra* note 16; Sloane, *The Expressive Capacity of International Punishment*, *supra* note 40, at 70-71.

<sup>108</sup> See Akhavan, *Beyond Impunity*, *supra* note 68, at 7, 10, 12.

<sup>109</sup> See Tom J. Farer, *Restraining the Barbarians: Can International Criminal Law Help?*, 22 HUM. RTS. Q. 90, 91-92 (2000); Jelena Pejic, *Creating a Permanent International Criminal Court: The Obstacles to Independence and Effectiveness*, 29 COLUM. HUM. RTS. L. REV. 291, 292 (1998).

unlawful. It is a position that is morally problematic, a legal fiction that struggles to survive the realities of war.

Some international judges, notably Judge Wolfgang Schomburg, have advanced the didactic function of international sentencing for atrocity crimes.<sup>110</sup> In sentencing a perpetrator to twenty-three years of imprisonment for persecution as a crime against humanity, Judge Schomburg opined that punishment by an international criminal court “is intended to convey the message that globally accepted laws and rules have to be obeyed by everybody.”<sup>111</sup> He further added: “this fundamental rule fosters the internalisation of these laws and rules in the minds of legislators and the general public.”<sup>112</sup> According to this ideology, “influenc[ing] the legal awareness of the accused, the surviving victims, their relatives, the witnesses and the general public” and “reassur[ing] them that the legal system is implemented and enforced” is one of the main purposes of international punishment.<sup>113</sup> Criminologists and criminal law scholars have likewise embraced the “general affirmative prevention” function of international criminal prosecutions.<sup>114</sup>

While international criminal prosecutions can contribute to this educational or didactic aim, it is unclear how this rationale can serve a differential principle to guide sentencing allocations. Even international judges who embrace didactic aims accept this limitation

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<sup>110</sup> See *Prosecutor v. Nikolić*, Trial Sentencing Judgment, *supra* note 58, paras. 139-40; *Prosecutor v. Stakić*, Case No. IT-97-24-T, Trial Judgment, para. 902, (Int’l Crim. Trib. for the Former Yugoslavia July 31, 2003), <http://www.icty.org/x/cases/stakic/tjug/en/stak-tj030731e.pdf>; *Prosecutor v. Deronjić*, Sentencing Judgment, *supra* note 52, at para. 149.

<sup>111</sup> *Prosecutor v. Nikolić*, Trial Sentencing Judgment, *supra* note 58, at para. 139.

<sup>112</sup> *Prosecutor v. Nikolić*, Trial Sentencing Judgment, *supra* note 58, at para. 139. Other trial chambers have also followed this approach. See, e.g., *Prosecutor v. Deronjić*, Sentencing Judgment, *supra* note 52, at para. 149.

<sup>113</sup> *Prosecutor v. Nikolić*, Trial Sentencing Judgment, *supra* note 58, at para. 139.

<sup>114</sup> Akhavan, *Beyond Impunity*, *supra* note 68, at 7; Damaska, *What is the Point*, *supra* note 40, at 334-35, 339, 345; Nemitz, *The Law of Sentencing in International Criminal Law*, *supra* note 25.

of the didactic function.<sup>115</sup> Expressivism thus becomes a potential consequence of international punishment for atrocity crimes, but not a factor for allocating sentence severity. The ICTY's leading proponent of the expressive potential of ICL, Judge Schomburg, prioritized retributivism over expressivism for the purposes of sentencing.<sup>116</sup> Expressivism operates under the umbrella of retributivism. In fact, absent a firm grounding in retributive justification, the expressive function loses its meaning and moral force. The "culture of inverse morality"<sup>117</sup> accompanying atrocity crimes does not take root for lack of awareness of the wrongfulness of the conduct. Rather, the absence of accountability and punishment in the face of pressures and orders from fellow soldiers and superiors sufficiently weakens the individual's moral resistance and motivation.

#### F. Judicial Schizophrenia? Between Punitive and Restorative Approaches

As reconciliation ideology gained traction in the jurisprudence, it challenged the tribunal's rhetoric that retribution and deterrence are the primary goals of sentencing for atrocity crimes.<sup>118</sup> The jurisprudence, however, is unsettled as to which ideology is the primary rationale in international punishment and which ones are secondary. Consequently, inconsistency, indeterminacy, and confusion persist from case to case when attributing priority and thus

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<sup>115</sup> Prosecutor v. Nikolić, Trial Sentencing Judgment, *supra* note 58, at para. 123 (ruling that "the individual guilt of an accused limits the range of the sentence").

<sup>116</sup> *Id.*

<sup>117</sup> Akhavan, *Beyond Impunity*, *supra* note 68, at 10.

<sup>118</sup> Prosecutor v. Stakić, Case No. IT-97-24-A, Appeal Judgment, para. 402 (Int'l Crim. Trib. for the Former Yugoslavia Mar. 22, 2006), <http://icty.org/x/cases/stakic/acjug/en/sta-aj060322e.pdf>; Prosecutor v. Delalić, Case No. IT-96-21-A, Appeals Judgment, para. 806 (Int'l Crim. Trib. for the Former Yugoslavia Feb. 20, 2001), <http://www.icty.org/x/cases/mucic/acjug/en/cel-aj010220.pdf>; Prosecutor v. Aleksovski, Case No. IT-94-14/1-A, Appellate Judgment, para. 185 (Int'l Crim. Trib. for the former Yugoslavia Mar. 24, 2000), <http://icty.org/x/cases/aleksovski/acjug/en/ale-asj000324e.pdf>; Prosecutor v. Milutinović, Case No. IT-05-87-T, Trial Judgment Vol. 3, paras. 1144-45 (Int'l Crim. Trib. for the Former Yugoslavia Feb. 26, 2009), <http://icty.org/x/cases/milutinovic/tjug/en/jud090226-e3of4.pdf>.

the influence of these rationales in sentencing allocations.<sup>119</sup> This results not only in the appearance of unfair sentences but also in arbitrary advancement of sentencing rationales. Thoughtful scholars, like Professor Mark Drumbl, Jan Nemitz, and Professor Mirjan Damaska, have observed that under-theorization and lack of clarity among international judges regarding the purpose of international criminal prosecutions has undermined the court's integrity and credibility.<sup>120</sup> Nemitz criticizes international judges for engaging in “*ex post facto* justification” designed to legitimize a pre-determined end.<sup>121</sup> His “*ex post facto*” criticism merits further consideration, especially regarding the advancement of reconciliation as both a grounds for justifying the practice of plea-bargaining and as a mitigating factor.<sup>122</sup>

Likewise, Drumbl argues that the *ad hoc* tribunals “vacillate” between retribution and deterrence, that is, between deontological and consequentialist approaches to punishment.<sup>123</sup> Closer examination of the jurisprudence of the tribunals, however, challenges this finding. In fact, both tribunals have been remarkably consistent in proffering deterrence and retribution as the primary aims of international punishment.<sup>124</sup> International judges do not

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<sup>119</sup> ANDREW ASHWORTH & ANDREW VON HIRSCH, PRINCIPLED SENTENCING: READINGS ON THEORY AND POLICY 167 (Andrew Ashworth et al. eds., 3d ed. 2009) (arguing that identifying a priority among sentencing rationales is essential to achieving consistency and justice).

<sup>120</sup> See Damaska, *What is the Point*, *supra* note 40, at 330 (arguing that “current views on the objectives international criminal courts are in disarray”); Drumbl, *Collective Violence*, *supra* note 29, at 593; Nemitz, *The Law of Sentencing in International Criminal Law*, *supra* note 25.

<sup>121</sup> Nemitz, *The Law of Sentencing in International Criminal Law*, *supra* note 25.

<sup>122</sup> See *infra* note 133.

<sup>123</sup> Drumbl, *Collective Violence*, *supra* note 29, at 560-61.

<sup>124</sup> See Prosecutor v. Popović, Case No. IT-05-88-T, Trial Judgment, para. 2128 (Int'l. Crim. Trib. for the Former Yugoslavia Jun. 10, 2010), <http://icty.org/x/cases/popovic/tjug/en/100610judgement.pdf>; Prosecutor v. Lukić, Case No. IT-05-87, Trial Judgment Vol. 3, paras. 1141, 1145-46 (Int'l Crim. Trib. for the Former Yugoslavia July 20, 2009), <http://icty.org/x/cases/milutinovic/tjug/en/jud090226-e3of4.pdf>; Prosecutor v. Milutinović, Case No. IT-05-87-T, Trial Judgment Vol.3, para. 1144 (Int'l Crim. Trib. for the Former Yugoslavia Feb. 26, 2009), <http://icty.org/x/cases/milutinovic/tjug/en/jud090226-e3of4.pdf>; Prosecutor v.

appear to vacillate between retribution and deterrence ideologies. They do, however, vacillate between retribution and deterrence together on the one hand, and reconciliation on the other. Thus, I build on Drumbl's theory and push the discussion forward by

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Delić, Case No. IT-04-83-T, Trial Judgment, para. 559 (Int'l Crim. Trib. for the Former Yugoslavia Sept. 15, 2008), <http://icty.org/x/cases/delic/tjug/en/080915.pdf>; Prosecutor v. Milošević, Case No. IT-98-29/1-T, Trial Judgment, para. 987 (Int'l Crim. Trib. for the Former Yugoslavia Dec.12, 2007), [http://icty.org/x/cases/dragomir\\_milosevic/tjug/en/071212.pdf](http://icty.org/x/cases/dragomir_milosevic/tjug/en/071212.pdf); Prosecutor v. Martić, Case No. IT-95-11-T, Trial Judgment, para. 484 (Int'l Crim. Trib. for the Former Yugoslavia June 12, 2007), <http://icty.org/x/cases/martic/tjug/en/070612.pdf>; Prosecutor v. Zelenović, Case No. IT-96-23/2-S, Sentencing Judgment, para. 31 (Int'l Crim. Trib. for the Former Yugoslavia Apr. 4, 2007), <http://icty.org/x/cases/zelenovic/tjug/en/zel-sj070404-e.pdf>; Prosecutor v. Krajišnik, Case No. IT-00-39-T, Trial Judgment, para. 1134 (Int'l Crim. Trib. for the Former Yugoslavia Sept. 27, 2006), <http://icty.org/x/cases/krajsnik/tjug/en/kra-jud060927e.pdf>; Prosecutor v. Orić, Case No. IT-03-68-T, Trial Judgment, para. 718 (Int'l Crim. Trib. for the Former Yugoslavia June 30, 2006), <http://icty.org/x/cases/oric/tjug/en/ori-jud060630e.pdf>; Prosecutor v. Limaj, Case No. IT-03-66-T, Trial Judgment, para. 723 (Int'l Crim. Trib. for the Former Yugoslavia Nov. 30, 2005), <http://www.icty.org/x/cases/limaj/tjug/en/lim-tj051130-e.pdf>; Prosecutor v. Strugar, Case Trial Judgment, *supra* note 104, at para. 458; Prosecutor v. Blagojević, Case No. IT-02-60-T, Trial Judgment, para. 817 (Int'l Crim. Trib. for the Former Yugoslavia Jan. 17, 2005), [http://icty.org/x/cases/blagojevic\\_jokic/tjug/en/bla-050117e.pdf](http://icty.org/x/cases/blagojevic_jokic/tjug/en/bla-050117e.pdf); Prosecutor v. Deronjić, Sentencing Judgment, *supra* note 52, at paras. 142-50; Prosecutor v. Stakić, Case No. IT-97-24-T, Trial Judgment, paras. 900-02 (Int'l Crim. Trib. for the Former Yugoslavia July 31, 2003), <http://icty.org/x/cases/stakic/tjug/en/stak-tj030731e.pdf>; Prosecutor v. Kunarac, Case No. IT-96-23 & IT 96-23/1-A, Trial Judgment, para. 838 (Int'l Crim. Trib. for the Former Yugoslavia Feb. 22, 2001), <http://icty.org/x/cases/kunarac/tjug/en/kun-tj010222e.pdf>; Prosecutor v. Delalić, Case No. IT-96-21-A, Appellate Judgment, para. 806 (Int'l Crim. Trib. for the Former Yugoslavia Feb. 20, 2001), <http://icty.org/x/cases/mucic/acjug/en/cel-aj010220.pdf>; Prosecutor v. Aleksovski, Appellate Judgment, *supra* note 118, at para. 185; Prosecutor v. Blaškić, Case No. IT-95-14-T, Trial Judgment, para. 762 (Int'l Crim. Trib. for the Former Yugoslavia Mar. 3, 2000), <http://icty.org/x/cases/blaskic/tjug/en/bla-tj000303e.pdf>; Prosecutor v. Kupreškić, Case No. IT-95-16-T, Trial Judgment, para. 848 (Int'l Crim. Trib. for the Former Yugoslavia Jan. 14, 2000), <http://icty.org/x/cases/kupreskic/tjug/en/kup-tj000114e.pdf>; Prosecutor v. Erdemović, Sentencing Judgment, *supra* note 43, at paras. 58, 64; Prosecutor v. Tadić, Sentencing Judgment, *supra* note 35, at paras. 7-9.

focusing on vacillation between reconciliation on the one hand and the two joint factors of retribution and deterrence on the other hand.

In other words, the tension is between restorative and punitive approaches. A number of factors have led me to prefer this explanation. First, almost every sentencing judgment of the *ad hoc* tribunals identifies both retribution and deterrence as the main rationales of international sentencing.<sup>125</sup> Thus, to argue that international judges vacillate between retribution and deterrence requires us to focus on one or two outlier judgments and ignore the bulk of the jurisprudence. The argument is advanced by creating three markers on a vacillation continuum: (1) judgments that treat retribution and general deterrence equally, (2) others that cite retribution as the “primary objective”, and (3) a third group that considers “deterrence as probably the most important.”<sup>126</sup>

The problem is that these markers do not carry the same weight or significance. When one plots all the cases on a continuum, the overwhelming majority of cases fall into group one. Only a few cases fall in groups two or three. Drumbl’s research confirms this.<sup>127</sup> For example, only one case (the *Čelebići Trial Judgment*) can be found to hold the space of the third marker, making it in my opinion more of an exception rather than a true vacillation. Additionally, the *Čelebići* Trial Chamber doesn’t even fully commit itself: it states “deterrence *probably* is the most important factor.”<sup>128</sup> Moreover, on appeal the Appeal Chamber distances itself from this notion by explicitly ruling that deterrence should not be given undue prominence in the determination of a sentence and suggesting that retribution and

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<sup>125</sup> Prosecutor v. Simić, Case No. IT-95-9/2-S, Sentencing Judgment para. 33 (Int’l Crim. Trib. for the Former Yugoslavia Oct. 17, 2002) (stating that “The Trial Chamber is cognisant of the jurisprudence of the Tribunal, which supports deterrence and retribution as the main general sentencing factors.”), [http://www.icty.org/x/cases/milan\\_simic/tjug/en/sim-sj021017e.pdf](http://www.icty.org/x/cases/milan_simic/tjug/en/sim-sj021017e.pdf). See also *supra* note 58.

<sup>126</sup> Drumbl, *Collective Violence*, *supra* note 29, at 560-62.

<sup>127</sup> Drumbl, *Collective Violence*, *supra* note 29, at 560 *et seq.*

<sup>128</sup> Prosecutor v. Delalić, Appeals Judgment, *supra* note 118, at para. 799 (emphasis added).

deterrence are equal considerations.<sup>129</sup> Thus, any value that the trial judgment potentially offered for the retribution-deterrence vacillation argument has been overruled by the Appeals Chamber.

The majority of judgments do not explicitly prioritize between retribution and deterrence. Instead, they appear to treat them as “equally important.”<sup>130</sup> The following has become a standard formulation found in these judgments (or language very similar): “the main purposes of sentencing for these crimes are deterrence and retribution.”<sup>131</sup> Of course, whether these rationales in fact influence sentencing allocations is another question entirely. However, I would advance Drumbl’s thesis by focusing on vacillation between reconciliation on the one hand and the two joint factors, retribution and deterrence, on the other hand. This vacillation is more problematic for ICL because it exerts a more substantial, yet unpredictable, influence on the sentence.

Furthermore, it highlights the serious and real tension between traditional criminal law functions (retribution and deterrence) and broader aspirations such as reconciliation and building a historical record. The vacillation argument takes new life when we unpack the impact of reconciliation ideology on the determination of a sentence. In fact, making more transparent the role of reconciliation in atrocity sentencing may help identify factors

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<sup>129</sup> Prosecutor v. Delalić, Appeals Judgment, *supra* note 118, at para. 801 (citing Prosecutor v. Tadić, Appeal Sentencing Judgment, *supra* note 62, at para. 48 (holding that deterrence “must not be accorded undue prominence in the overall assessment of the sentences to be imposed on persons convicted by the International Tribunal”). *See also* Prosecutor v. Alekovski, Case No. IT-95-14/1-A, Appeals Judgment, para. 185. (Int’l Crim. Trib. for the Former Yugoslavia Mar. 24, 2000), <http://icty.org/x/cases/alekovski/acjug/en/ale-asj000324e.pdf>; Prosecutor v. Nikolić, Case No. IT-02-60/1-S, Sentencing Judgment, para. 90 (Int’l Crim. Trib. for the Former Yugoslavia Dec. 2, 2003), <http://www.icty.org/x/cases/nikolic/tjug/en/mnik-sj031202-e.pdf>.

<sup>130</sup> Prosecutor v. Delić, Case No. IT-04-83-T, Trial Judgment, para. 559 (Int’l Crim. Trib. for the Former Yugoslavia Sep. 15, 2008), <http://icty.org/x/cases/delic/tjug/en/080915.pdf>; Prosecutor v. Ntabakuze, Case No. ICTR-98-41A-A, Appeals Judgment (May 8, 2012), <http://www.unict.org/Portals/0/Case%5CEnglish%5CNtabakuze%5CJudgement%5C120508.pdf>.

<sup>131</sup> Prosecutor v. Delalić, Appeals Judgment, *supra* note 118, at para. 806.

that contribute to seemingly incoherent sentences in international criminal law. Granted, establishing this link is immensely more challenging as reconciliation ideology is more influential in sentencing judgments following plea bargains, thus introducing a whole set of additional factors that complicate the sentencing matrix. Nevertheless, as elaborated more fully below, the introduction of reconciliation ideology into the determination of a sentence has considerably increased indeterminacy and confusion in international penology.

Before moving on to Part II, which focuses on deterrence and reconciliation, I acknowledge that there are many other factors that have been proffered as aspirations of international prosecutions.<sup>132</sup> As noted above, these include restoring peace,<sup>133</sup> preserving a historical record of the atrocities to prevent revisionism,<sup>134</sup> ending impunity, protecting the rights of the accused with exemplary standards for fair trials,<sup>135</sup> halting active armed

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<sup>132</sup> See, *supra* text accompanying note 25. See also Zoe Pearson, *Non-governmental Organizations and the International Criminal Court: Changing Landscapes of International Law*, 39 CORNELL INT'L L.J. 243, 271-81 (2006). See generally Vojin Dimitrijevic & Marko Milanovic, *Human Rights before International Criminal Courts*, in HUMAN RIGHTS LAW: FROM DISSEMINATION TO APPLICATION (Jonas Grimheden & Rolf Ring eds., 2006), [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=920807](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=920807).

<sup>133</sup> See, e.g., S.C. Res. 827, *supra* note 34, at pmbl.; S.C. Res. 955, *supra* note 34, at pmbl.; Pejic, *Creating a Permanent International Criminal Court*, *supra* note 109, at 292; Teitel, *The Law and Politics of Contemporary Transitional Justice*, *supra* note 25, at 857.

<sup>134</sup> Jonathan A. Bush, *Nuremberg: The Modern Law of War and Its Limitations*, 93 COLUM. L. REV. 2070 (1993) (reviewing TELFORD TAYLOR, *THE ANATOMY OF THE NUREMBERG TRIALS: A PERSONAL MEMOIR* (1992)). However, the ICTY seems to recognize that this function should not dominate the proceedings and is not first and foremost among the objectives of international criminal prosecution. Moreover, it likewise acknowledges that the criminal justice process is not ideally suited for this function. *Prosecutor v. Deronjić, Sentencing Judgment*, *supra* note 52, at para. 135 (noting that the “Tribunal is not the final arbiter of historical facts. That is for historians.”).

<sup>135</sup> See Robinson, *The Identity Crisis of International Criminal Law*, *supra* note 20, at 926; Pejic, *Creating a Permanent International Criminal Court*, *supra* note 109, at 294.

conflict,<sup>136</sup> providing reparations to victims,<sup>137</sup> denouncing racist ideologies, disarming urges for revenge,<sup>138</sup> establishing a narrative that culpability is individual and not collective,<sup>139</sup> and vindicating international law.<sup>140</sup> Many have been explicitly accepted by international judges as part of the mandate of international criminal tribunals.<sup>141</sup> This overburdening of ICL has complicated the task of international judges. It is beyond the scope of this article to address all of these aspirations, given that many of the above objectives are better understood as aims of trial proceedings rather than principles for the purpose of sentencing allocations. Therefore, the following sections address deterrence and reconciliation because they appear frequently in the sentencing judgments.

## II. PROBLEMATIC ENTANGLEMENT WITH DETERRENCE AND RECONCILIATION

A common criticism of ICL sentencing is that the proffered rationales for punishment are ill suited to atrocity crimes and that

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<sup>136</sup> See S.C. Res. 827, *supra* note 34, at pmb1; S.C. Res. 955, *supra* note 34, at pmb1.; Ruti Teitel, *Symposium: Milosevic & Hussein on Trial: Perspective on Transnational Justice: Collective Memory, Command Responsibility, and the Political Psychology of Leadership: The Law and Politics of Contemporary Transitional Justice*, 38 CORNELL INT'L L.J. 837, 857 (2005).

<sup>137</sup> See Farer, *Restraining the Barbarians*, *supra* note 109, at 91; Pejic, *Creating a Permanent International Criminal Court*, *supra* note 109, at 292.

<sup>138</sup> See Farer, *Restraining the Barbarians*, *supra* note 109, at 91.

<sup>139</sup> See S.C. Res. 955, *supra* note 34, at para. 1; Pejic, *Creating a Permanent International Criminal Court*, *supra* note 109, at 292; Teitel, *The Law and Politics of Contemporary Transitional Justice*, *supra* note 25, at 857.

<sup>140</sup> See S.C. Res. 827, *supra* note 34, at pmb1.; S.C. Res. 955, *supra* note 34, at pmb1. See also Farer, *Restraining the Barbarians*, *supra* note 109, at 91; Pejic, *Creating a Permanent International Criminal Court*, *supra* note 109, at 292.

<sup>141</sup> See Prosecutor v. Obrenovic, Case No. IT-02-60/2-S, Sentencing Judgment, para. 111 (Int'l Crim. Trib. for the Former Yugoslavia Dec. 10, 2003), <http://icty.org/x/cases/obrenovic/tjug/en/obr-sj031210e.pdf> (finding that “restoring peace,” “establishing a historical record,” “countering denials,” and providing victims with “some form of closure” are part of the mandate of international criminal tribunals); Prosecutor v. Nikolić, Trial Sentencing Judgment, *supra* note 58, at para. 233 (Tribunal has the task to contribute to the “restoration and maintenance of peace” and to ensure that serious violations of international humanitarian law are “halted and effectively redressed”).

they do not in fact guide sentencing allocations at international criminal courts. Per the statutes of their respective courts, international criminal law judges, who come from diverse countries, cultures, and legal systems, enjoy wide discretion in sentencing. This is also true for the International Criminal Court.<sup>142</sup> Compared to its predecessors, the ICC statute is more detailed, more rigid, and more procedural in nearly every aspect of the court's functioning,<sup>143</sup> except sentencing.<sup>144</sup> The wide discretion in sentencing matters afforded to judges at the *ad hoc* Tribunals failed to produce a unified articulated vision on punishment in the context of international criminal justice. The ICC might well draw important lessons in this regard. ICTY and ICTR judges have been accused of first sticking their arrow in the wall and then subsequently painting a bulls-eye target around it. In other words, international judges have a predetermined penalty in mind and simply mine among the rationales available to them under their wide discretion until they find one most convenient to their intended end. Although this may occur in some cases, it does not fully explain the sentencing practice. In the following sections, however, I will seek to offer a more comprehensive explanation.

#### A. Deterrence

The effectiveness of deterrence through punishment has been well debated at the national level. Many are skeptical of this function of punishment in the domestic context and have repeated their skepticism in the context of international criminal justice.<sup>145</sup> Professor Tom Farer has noted that “[b]elief about the potential efficacy of penal sanctions as vehicles for enforcing international law is a fairly

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<sup>142</sup> Rome Statute of the International Criminal Court art. 77 (b)(1), July 17, 1998, 2187 U.N.T.S. 38544.

<sup>143</sup> Judge Philippe Kirsch, *The International Criminal Court: From Rome to Kampala*, 43 J. MARSHALL L. REV. 515, 519 (2010).

<sup>144</sup> Shahram Dana, *Law, Justice & Politics: A Reckoning of the International Criminal Court*, 43 J. MARSHALL L. REV. xxiii, xxvi-xxvii (2010). See Dana, *Beyond Retroactivity*, *supra* note 31, at 905-08.

<sup>145</sup> See, e.g., Jan Klabbbers, *Just Revenge? The Deterrence Argument in International Criminal Law*, 12 FIN. Y.B. INT'L L., 249-67 (2001) (disagreeing that human rights violators can be deterred); Drumbl, *Collective Violence*, *supra* note 29, at 609-10 (2005) (claiming that there is little or no evidence that punishment deters perpetrators of mass atrocities).

straightforward extrapolation from the collective appreciation of law enforcement at the national level.”<sup>146</sup> He cautions, however, that “[c]onfidence in this extrapolation is not universally shared.”<sup>147</sup> Any fair observer would have to concede that it is too early to judge whether international criminal justice can have an effective deterrent quality.<sup>148</sup> If we consider Farer’s reminder that “[o]ne widely accepted dictum of domestic law enforcement is that a high probability of punishment generally deters more effectively than a very severe sanction rarely applied,” then the establishment of a permanent international criminal court can contribute to increasing the probability that instigators and prime movers of mass atrocities will be punished. International criminal law has long lacked the necessary enforcement mechanisms to give relative certainty to punishment for violations of human rights and international humanitarian law.<sup>149</sup> Moreover, with the current international criminal justice system remaining dreadfully dependent on voluntary cooperation of states, questions still remain whether the international system, in its present state, can sustain a credible threat of certain punishment so as to deter potential violators. Full treatment of these questions is beyond the scope of this article, but we may begin the discussion by focusing on a narrower question: to what extent does the objective of deterrence *actually* influence sentencing considerations of international judges? The aim here is not simply to consider the rhetoric employed by international judges in their discussion of the sentence, but to go beyond the rhetoric and examine the practice itself.

All trial chambers without exception state that deterrence is one of the primary objectives in international sentencing.<sup>150</sup> Several of

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<sup>146</sup> Farer, *Restraining the Barbarians*, *supra* note 109, at 92.

<sup>147</sup> *Id.*

<sup>148</sup> Drumbl, *Collective Violence*, *supra* note 29, at 608 (noting that international criminal law “is still relatively young” and “in a nascent stage”).

<sup>149</sup> See William W. Burke-White, *A Community of Courts: Toward a System of International Criminal Law Enforcement*, 24 MICH. J. INT’L L. 1, 3 (2002).

<sup>150</sup> For rulings by the ICTY Appeals Chamber see, for example, *Prosecutor v. Delalić*, Appeals Judgment, *supra* note 118, at para. 806 (“[T]he Appeals Chamber (and Trial Chambers of both the Tribunal and the ICTR) have consistently pointed out that two of the main purposes of sentencing for these crimes are deterrence and retribution.” (internal citations omitted)). For ICTY trial

the early sentencing judgments even considered deterrence to be “the most important factor” in determining a sentence for international crimes.<sup>151</sup> Sending a strong message that the international community will not tolerate the perpetration of international crimes by political leaders and senior military officials has been considered as part of the Tribunals’ mandates from the very start. Particular importance was attached to effectively deterring the so-called “masterminds” and “architects” of genocidal policies and crimes against humanity.

However, deterrence is sometimes proffered as more than an objective of international sentencing. According to some ICTY judges, it is also the justification for punishment in international justice. As a justification, it operates as the prime determinant of the appropriate length of punishment. Thus, it is a factor that influences the trial chambers’ determination of the length of the sentence. Whether the goal of deterrence meaningfully influences ICTY sentences can be challenged; nevertheless the sentencing judgments ostensibly claim sentencing allocations to be deterrence orientated. For example, in the *Dragan Nikolić* case, the Trial Chamber held that deterrence was among the “[f]undamental principles *taken into consideration when imposing a sentence*”.<sup>152</sup> Thus, the objective of deterrence was a factor that influenced the length of Dragan Nikolić’s

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chambers, see, for example, Prosecutor v. Deronjić, Sentencing Judgment, *supra* note 52, at para. 142 (concluding that the “[f]undamental principles taken into consideration when imposing a sentence are deterrence and retribution”). For cases from the ICTR, see Prosecutor v. Rutaganda, Case No. ICTR-96-3-T, Judgment and Sentence (Dec. 6, 1999), <http://www.unict.org/Portals/0/Case/English/Rutaganda/judgement/991206.pdf> and Prosecutor v. Serushago, Case No. ICTR-98-39-S, Sentence (Feb. 5, 1999), <http://www1.umn.edu/humanrts/instreet/ICTR/SERUSHAGO ICTR-98-39/SERUSHAGO ICTR-98-39-S.htm>.

<sup>151</sup> See, e.g., Prosecutor v. Delalić, Case No. IT-96-21-T, Trial Judgment, para. 1234 (Int’l Crim. Trib. for the Former Yugoslavia Nov. 16, 1998), [http://icty.org/x/cases/mucic/tjug/en/981116\\_judg\\_en.pdf](http://icty.org/x/cases/mucic/tjug/en/981116_judg_en.pdf) (stating that “[d]eterrence is probably the most important factor in the assessment of appropriate sentences for violations of international humanitarian law.”); Prosecutor v. Blaškić, Case No. IT-95-14-T, Judgment, para. 761 (Int’l Crim. Trib. for Former Yugoslavia Mar. 3, 2000), <http://www.icty.org/x/cases/blaskic/tjug/en/bla-tj000303e.pdf>.

<sup>152</sup> Prosecutor v. Nikolic, Sentencing Judgment, *supra* note 94, at para. 132 (emphasis added).

sentence. This was not the first time that an “objectives orientation” towards sentencing was adopted by an ICTY trial chamber to fix a sentence.<sup>153</sup> Both the *Blaškić* case and the *Todorović* case express the view that the goal of deterrence may legitimately influence the sentence. In fact, the sentencing jurisprudence of international tribunals generally recognizes the “importance of deterrence as a consideration in sentencing for international crimes.”<sup>154</sup> The *Todorović* Trial Chamber understood this to mean that the goal of deterrence is relevant to determining whether an individual’s punishment should be in the high or low end of the penalty range.<sup>155</sup> Punishment “imposed by the International Tribunal must, in general, have sufficient deterrent value to ensure that those who would consider committing similar crimes will be dissuaded from doing so.”<sup>156</sup> The *Blaškić* Trial Chamber likewise adopts an objectives-orientated approach, namely general deterrence, to sentencing. But do these trial chambers in fact follow it? In other words, do the results (i.e. the sentence impose) resonate with deterrence philosophy? What, if any, impact did deterrence have on the sentence of Todorović and Blaškić?

Todorović’s crimes included murder, sexual assaults, beatings, ordering and participating in the unlawful detention and cruel and inhuman treatment of non-Serb civilians, ordering subordinates to torture a person, ordering and participating in deportation and forcible transfers, ordering and issuing directives violating the rights of non-Serb civilians to equal treatment under the law, and infringing on their basic rights.<sup>157</sup> He was convicted of persecution as a crime against humanity. He also participated in the forcible take over of the non-Serb towns and villages in the municipality of Bosanski Samac.<sup>158</sup> Todorović was the Chief of Police in Bosanski Samac and also a

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<sup>153</sup> See Dana, *Revisiting the Blaškić*, *supra* note 81, at 326.

<sup>154</sup> Prosecutor v. Todorović, Sentencing Judgment, *supra* note 58, at para. 30 (citing Prosecutor v. Aleksovski, Case No. IT-95-14/1-A, Appeals Judgment, para. 185 (Int’l Crim. Trib. for the Former Yugoslavia Mar. 24, 2000)).

<sup>155</sup> Prosecutor v. Todorović, Sentencing Judgment, *supra* note 58, at para. 30.

<sup>156</sup> *Id.*

<sup>157</sup> *Id.* at para. 9

<sup>158</sup> *Id.* at paras. 12, 35.

member of the Serb Crisis Staff.<sup>159</sup> The *Todorović* Trial Chamber considered “his abuse of such a superior position” and the “particular cruelty” and “duration” of the beatings as an aggravating factor.<sup>160</sup> As mitigating factors, the Trial Chamber held that Todorović’s guilty plea, expression of remorse, and substantial cooperation with the Prosecution merited reduction in the penalty.<sup>161</sup> For his crimes, the Prosecution recommended a sentence of five to twelve years; the Trial Chamber sentenced him to ten years imprisonment.

In comparison with penalties at the national level,<sup>162</sup> Todorović’s punishment is notably lenient: ten years for a murder, multiple lengthy and brutal beatings, and sexual assaults. Thus, while recalling the Appeals Chamber’s rulings that deterrence is a legitimate consideration when fixing a penalty, the actual sentencing imposed by the *Todorović* Trial Chamber—ten years—suggests that deterrence had little impact on the penalty. The *Todorović* Trial Chamber appears to concede as much: “while the Chamber recognises the importance of deterrence as a general consideration in sentencing, it will not treat deterrence as a distinct factor in determining sentence in this case.”<sup>163</sup> Apart from the general and indeterminate nature of this ruling, it raises a more serious concern. In essence, the *Todorović* Trial Chamber takes the position that it is free to ignore deterrence as a consideration when fixing its penalty, despite the pronouncements of the Appeals Chamber. Moreover, it gives no explanation for why it chooses to not factor deterrence rationale into its sentence in this case. The Trial Chamber may have a good reason for not giving much weight to deterrence, but this reason is not made transparent. The lack of transparency, in turn, can lead to criticism that the Tribunal’s sentencing practice is unjust and arbitrary. Such criticism calls into question the legitimacy of international sentencing and undermines its expressive value. In subsequent sections, this article

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<sup>159</sup> *Id.* at para. 60.

<sup>160</sup> *Id.* at paras. 59-62.

<sup>161</sup> *Id.* at paras. 67-95.

<sup>162</sup> See generally THE PUNISHMENT OF SERIOUS CRIMES: A COMPARATIVE ANALYSIS OF SENTENCING LAW AND PRACTICE (Ulrich Sieber ed., vol. 2 2004) (citing punishment reports of various countries).

<sup>163</sup> *Prosecutor v. Todorović*, Sentencing Judgment, *supra* note 58, at para. 30.

advances a theory that arguably explains the Trial Chamber's approach here.<sup>164</sup>

What about the *Blaškić* Trial Chamber?<sup>165</sup> If the *Todorović* case serves as an example of a trial chamber paying lip service to the objective of deterrence but not following that ideology in its actual sentencing, what example does the *Blaškić* case provide? General Blaškić was the first high-ranking figure to appear before the ICTY.<sup>166</sup> At the start of his trial, the Tribunal had a meager eight alleged war criminals in its custody. War criminals to prosecute were hard to come by and the dockets were empty despite the fact that the Office of the Prosecutor (OTP) had publically issued indictments for seventy-five individuals.<sup>167</sup> Among those in custody, Blaškić was not only the highest-ranking defendant, but also the only one of any significance.<sup>168</sup> The Trial Chamber found the accused guilty of persecution as a crime against humanity for ordering attacks on towns and villages, murder, destruction of property and institutions dedicated to religion or education, inhuman treatment, and forcible transfer of civilians.<sup>169</sup> He was also convicted of war crimes, but the underlying acts overlapped almost entirely with the crimes against humanity charges.<sup>170</sup> In other words, due to the different

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<sup>164</sup> Arguably, the circumstances of Todorović's case necessitated powerful pragmatic considerations, leading to a plea agreement between the accused and the Prosecutor. However, the low sentence is not fully explained by them. After all, the Trial Chamber could have given a higher sentence (that of 12 years) and still satisfied the terms of the plea agreement.

<sup>165</sup> The Trial Chamber was composed of Judge Claude Jorda (Presiding), Judge Almiro Rodrigues, and Judge Mohamed Shahabuddeen.

<sup>166</sup> GARY JONATHAN BASS, *STAY THE HAND OF VENGEANCE* 4 (2000).

<sup>167</sup> *Id.*

<sup>168</sup> *Id.*

<sup>169</sup> Prosecutor v. Blaškić, Trial Judgment, *supra* note 151, at para. 267. The trial lasted more than two years. The Prosecution opened the trial on 24 June 1997 and completed its case-in-chief on July 29, 1998. Presentation of evidence by the Defense commenced on September 7, 1998. Following a period of recess after the Defense rested, the Trial Chamber heard closing arguments from July 26 to 30, 1999.

<sup>170</sup> See ANNOTATED LEADING CASES OF INTERNATIONAL CRIMINAL TRIBUNALS, VOLUME IV: THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA 1999-2000, 659-66. (André Klip & Göran Sluiter eds., 2002), for further analysis of General Blaškić's criminal responsibility.

jurisdictional elements of crimes against humanity and war crimes, the alleged criminal acts were charged as both.<sup>171</sup> I have elsewhere criticized the *Blaškić* Trial Chamber's analysis of modes of liability,<sup>172</sup> which was subsequently overturned on appeal in large part.<sup>173</sup>

For the judges in the *Blaškić* case, the key to determining a “fair” and “just” sentence was not the gravity of the offense but the “objectives sought” by international prosecutions and punishment.<sup>174</sup> In their estimation, the main objective of international prosecutions is deterrence.<sup>175</sup> The commitment of the judges to deterrence is asserted several times and unequivocally increased General Blaškić's sentence: “The Tribunal's mission is to put to an end serious violations of international humanitarian law.”<sup>176</sup> In order to achieve this objective, deterrence became “the most important factor in the assessment of appropriate sentences for violations of international humanitarian law.”<sup>177</sup> Thus, the international judges here are clearly adopting a consequentialist approach towards General Blaškić's punishment. The result was forty-five years of imprisonment; the

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<sup>171</sup> See William Fenrick, *A First Attempt to Adjudicate Conduct of Hostilities Offenses: Comments on Aspects of the ICTY Trial Decision in the Prosecutor v. Tibomir Blaškić*, 13 LEIDEN J. INT'L L. 931 (2000), for a discussion on the Trial Chamber's findings on the charge of unlawful attacks and its relation to persecution as a crime against humanity.

<sup>172</sup> See Dana, *Revisiting the Blaškić*, *supra* note 81. See also *Prosecutor v. Blaškić*, Trial Judgment, *supra* note 151, at paras. 267-70.

<sup>173</sup> *Prosecutor v. Blaškić*, Trial Judgment, *supra* note 151, at para. 502.

<sup>174</sup> *Id.* at para. 761.

<sup>175</sup> *Id.* at para. 762.

<sup>176</sup> *Id.*

<sup>177</sup> *Prosecutor v. Blaškić*, Trial Judgment, *supra* note 151, at para. 761 (quoting *Prosecutor v. Delalić “Čelebići”*, Case No. IT-96-21-T, Trial Judgment (Int'l Crim. Trib. for the Former Yugoslavia Nov. 16, 1998)). Moreover, the *Blaškić* Trial Chamber considered both specific deterrence and general deterrence as relevant factors in allocating a punishment: “Apart from the fact that the accused should be sufficiently deterred by appropriate sentence from ever contemplating taking part in such crimes again, persons in similar situations in the future should similarly be deterred from resorting to such crimes.” *Id.* (quoting the *Čelebići* Trial Judgment at para. 1234).

most senior figure in the court's custody received the highest punishment ever imposed by the ICTY at that time.<sup>178</sup>

The influence of deterrence in increasing Blaškić's punishment is demonstrated not only by court's consequentialist philosophy and severe sentence, but it is also illustrated by its treatment of aggravating and mitigating factors and its marginalization of factors relevant to individualizing the sentence.<sup>179</sup> In the Trial Chamber's own words, in light of the deterrence "mission of the Tribunal, it is appropriate to attribute a lesser significance to the specific personal circumstances."<sup>180</sup> From the perspective of the Trial Chamber's ideology, this makes perfect sense. It is a logical extension of its ideology because such factors are less relevant to the goal of deterrence. The *Blaškić* Trial Chamber's treatment of "personal factors" and "the rehabilitation parameter" only serve to underscore its deterrence ideology. The court's own

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<sup>178</sup> Prosecutor v. Furundzija, Case No. IT-95-17/1-A, Judgment (Int'l Crim. Trib. for the Former Yugoslavia July 21, 2000), <http://www.icty.org/x/cases/furundzija/acjug/en/fur-aj000721e.pdf> (sentenced to 10 years); Prosecutor v. Aleksovski, Appeals Judgment, *supra* note 118, at para. 191 (sentenced to 7 years); Prosecutor v. Tadić, Appeal Sentencing Judgment, *supra* note 62, at para. 76 (3) (sentenced to 20 years); Prosecutor v. Jelisić, Case No. IT-95-10-A, Judgment, para. (7) (Int'l Crim. Trib. for the Former Yugoslavia July 5, 2001), <http://www.icty.org/x/cases/jelisić/acjug/en/jel-aj010705.pdf> (sentenced to 40 years); Prosecutor v. Kupreskic, Case No. IT-95-16-A, Appeal Judgment, paras. 439, 466 (Int'l Crim. Trib. for the Former Yugoslavia Oct. 23, 2001), <http://www.icty.org/x/cases/kupreskic/acjug/en/kup-aj011023e.pdf> (Josipovic and Santic were sentenced to 12 and 18 years, respectively); Prosecutor v. Kupreskic, Case No. IT-95-16-T, Judgment, paras. 1, 3 (Int'l Crim. Trib. for the Former Yugoslavia Jan. 14, 2000), <http://www.icty.org/x/cases/kupreskic/tjug/en/kup-tj000114e.pdf> (The Trial Chamber acquitted Papic. The Kupreskic brothers were sentenced to 6, 8 and 10 years, but all three were acquitted on appeal). *See* Prosecutor v. Kupreskic, Case No IT-95-16-A, Appeal Judgment (Int'l Crim. Trib. for the Former Yugoslavia Oct. 23, 2001), <http://www.icty.org/x/cases/kupreskic/acjug/en/kup-aj011023e.pdf>.

<sup>179</sup> In one way or another, the *Blaškić* Trial Chamber found reason to reject the following mitigating factors: voluntary surrender (Prosecutor v. Blaškić, Trial Judgment, *supra* note 151, at para. 776); remorse (*Id.* at para. 775); lack of direct participation in the crime (*Id.* at para. 768); duress (*Id.* at para. 769); material context of armed conflict, *i.e.* disorder ensuing from a state of armed conflict (*Id.* at para. 770); and co-operation with the Prosecutor (*Id.* at para. 774).

<sup>180</sup> Prosecutor v. Blaškić, Trial Judgment, *supra* note 151, at para. 765.

findings strongly indicate that Blaškić is well suited for rehabilitation: he had no prior criminal record;<sup>181</sup> assisted victims;<sup>182</sup> was a dutiful and professional soldier,<sup>183</sup> and demonstrated “exemplary behaviour” throughout the entire trial.<sup>184</sup> The Trial Chamber even went so far as concluding that it was “evident” that Blaškić’s “character is reformable.”<sup>185</sup> In sum, the Trial Chamber stated that rehabilitation is a factor “to be taken into account in fixing the length of the sentence”<sup>186</sup> and further found, after detailed accounting, that the defendant before them was reformable.<sup>187</sup> Then, in what can only be described as a 180, judges abruptly decide to do just the opposite of the principles and finding they just laid out, declaring that these factors will not be taken into account and are “non-existent” for the purposes of fixing Blaškić’s sentencing.<sup>188</sup>

What is objectionable, even bizarre, about the judgment authored by Judge Claudia Jorda (France) is not its rejection of rehabilitation. In fact, I agree that rehabilitation is not a relevant factor in fixing punishment for war criminals, although their punishment may have that outcome. But if you are not going to take rehabilitation into account when allocating sentences, then why make a big show of it in the first place? Why declare that rehabilitation is a relevant to sentencing allocation? Why engage in a lengthy discussion that the defendant is reformable? Given this detailed analysis, we would have expected the judges to provide a similarly detailed explanation of why it is rejecting its own analysis. Instead, in a single sentence, the Trial Chamber summarily concludes that factors indicative of Blaškić’s reformability are “*non-existent* when determining the sentence.”<sup>189</sup> It is as though by the time the Trial Chamber

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<sup>181</sup> *Id.* at para. 780.

<sup>182</sup> *Id.* at para. 781.

<sup>183</sup> *Id.* at paras. 765, 780.

<sup>184</sup> *Id.* at paras. 765, 780.

<sup>185</sup> Prosecutor v. Blaškić, Trial Judgment, *supra* note 151, at para. 781.

<sup>186</sup> *Id.* at para. 761.

<sup>187</sup> *Id.* at para. 781.

<sup>188</sup> *Id.* at para. 782.

<sup>189</sup> *Id.* at para. 782 (emphasis added). The Trial Chamber gave two reasons to justify its positions here: the “serious” nature of the case and the fact that “many accused share these personal factors” *Id.* at para. 782.

reaches the end of its analysis, it has forgotten the principles it set up at the start.

Thus, although the Trial Chamber sets-out “four parameters”,<sup>190</sup> it appears only seriously interested in deterrence. Nevertheless, despite the criticisms that may be levied against the *Blaškić Trial Judgment*,<sup>191</sup> it must be noted in its favor that, unlike the *Todorović Trial Chamber*, it remains faithful to its espoused ideology. It takes the position that sentences must reflect the object of Tribunal’s mandate. It identifies deterrence as the main objective, and it imposes a sentence commensurate with that objective.

In sum, both the *Todorović* and *Blaškić* trial chambers overtly state that deterrence is one of the primary goals of international sentencing and as such may influence the sentence. However, the resulting penalty in the *Todorović* case suggests that the goal of deterrence did not have much of an impact on the sentence whereas it appears to have a substantial influence on the *Blaškić* Trial Chamber’s sentence. The apparent inconsistency here is only exacerbated by the *Todorović* Trial Chamber’s admission that it opted not to consider deterrence ideology in fixing the penalty, adding a degree of arbitrariness to the inconsistency. Why was *Blaškić* not so fortunate to benefit from a suspension of the penalty enhancing effects of deterrence ideology? I will argue that the both trial chambers “got it right” intuitively, even if they could have done better to articulate their approaches. Below I will offer a theory that both explains the sentencing decisions of international judges and also guides the application of deterrence in international criminal justice. Before doing so, allow me to briefly identify two challenges in general to realizing deterrence in international criminal prosecutions.

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<sup>190</sup> They are retribution, protection of society, rehabilitation and deterrence. Prosecutor v. Blaškić, Trial Judgment, *supra* note 151, at para. 761.

<sup>191</sup> For example, it has departed in both ideology and practice from the general sentencing jurisprudence of the ICTY and ICTR that treat “gravity” of the crime as the primary factor in determining a sentence. Dana, *Revisiting the Blaškić*, *supra* note 81, at 330-32.

### 1. *Challenges to realizing deterrence*

*a. Practical challenges to realizing deterrence.* – As noted above, effectively deterring future “masterminds” and “architects” of atrocity crimes constitutes a primary mandate of international tribunals. In the early days of the ICTY, the main challenge to realizing this mandate was that those in custody were not the masterminds. They were low-level soldiers like Dražan Erdemović<sup>192</sup> and Duško Tadić. High-ranking political and military leaders like Slobodan Milošević, Radovan Karadžić, Rako Mladić, and Biljana Plavšić who bear the greatest responsibility for the Yugoslavia atrocities, were at that time beyond the reach of the ICTY.<sup>193</sup> Nor was there any prospect that these men would ever see trial and punishment at the ICTY. The most senior ranking accused in the custody of the ICTY in the early days was Tihomir Blaškić, who had just been made a colonel at the time of the war. Although Blaškić was by no means a “mastermind” of the policies that lead to the atrocities, nor even among the high-ranking decisions makers within the Bosnia Croat or Croatian power structure, he was nevertheless the highest-ranking person before the ICTY. If the ICTY wanted to send a message of deterrence through severe punishment of senior political and military officials, who lead the masses of people into a bloodbath, then the Tribunal would need to impose a severe sentence on Blaškić. It did so without hesitation.

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<sup>192</sup> *Croat is First to be Convicted by Balkan War Crimes Panel*, N.Y. TIMES, June 1, 1996, <http://www.nytimes.com/1996/06/01/world/croat-is-first-to-be-convicted-by-balkan-war-crimes-panel.html>.

<sup>193</sup> Milošević was surrendered to the Tribunal on June 28, 2001. SLOBODAN MILOSEVIC CASE INFORMATION SHEET, INT’L CRIM. TRIB. FOR THE FORMER YUGOSLAVIA, [http://www.icty.org/x/cases/slobodan\\_milosevic/cis/en/cis\\_milosevic\\_slobodan\\_en.pdf](http://www.icty.org/x/cases/slobodan_milosevic/cis/en/cis_milosevic_slobodan_en.pdf). Karadžić was surrendered on July 30, 2008. RADOVAN KARADZIC CASE INFORMATION SHEET, INT’L CRIM. TRIB. FOR THE FORMER YUGOSLAVIA, [http://www.icty.org/x/cases/karadzic/cis/en/cis\\_karadzic\\_en.pdf](http://www.icty.org/x/cases/karadzic/cis/en/cis_karadzic_en.pdf). Mladić was surrendered on May 31, 2011. RAKTO MLADIC CASE INFORMATION SHEET, INT’L CRIM. TRIB. FOR THE FORMER YUGOSLAVIA, [http://www.icty.org/x/cases/mladic/cis/en/cis\\_mladic\\_en.pdf](http://www.icty.org/x/cases/mladic/cis/en/cis_mladic_en.pdf). Biljana Plavšić voluntarily surrendered to the ICTY on January 10, 2001. BILJANA PLAVSIC CASE INFORMATION SHEET, INT’L CRIM. TRIB. FOR THE FORMER YUGOSLAVIA, [http://www.icty.org/x/cases/plavsic/cis/en/cis\\_plavsic+en/pdf](http://www.icty.org/x/cases/plavsic/cis/en/cis_plavsic+en/pdf).

*b. Theoretical challenges to realizing deterrence.* – To further examine the role and relevance of deterrence to international sentencing at the individual level, it may be helpful to place perpetrators of atrocities crimes in two broad categories of offenders: low-level perpetrators and high-level perpetrators. Regarding the former, contextual considerations, such as a culture of inverse morality as noted by other authors,<sup>194</sup> challenges the appropriateness and effectiveness of deterrence. Although here, the didactic function of ICL or “affirmative general prevention” can play a role in preventing such a culture from taking root.<sup>195</sup> Deterrence, however, may be better suited to sentencing in relation to the latter group of high-level perpetrators. If we assume the model of the “rational calculating” criminal, then from a utilitarian perspective, punishment can have a deterrent effect by tipping the scales on the cost-benefit analysis<sup>196</sup> so that “crime does not pay.” Naturally, more contextual and factual research needs to be preformed in order to firm up this proposition.<sup>197</sup> But there is a sufficient basis, grounded in facts and the realities of the rise of such atrocities, to say that many of the high-level leaders, who are responsible for instigating the circumstance that lead to such dire calamities and cataclysms, deliberately and calculatedly promulgated doctrine of racial hatred or extreme nationalism and cynically propagated such divisive currencies to ascend to political power. Punishment of such persons can demonstrate that there is a cost, in terms of a severe penalty, for those that seek to gain political power through tactics that endanger the stability of society. The punishment must outweigh any political gains.

## 2. Perpetrator hierarchy and deterrence

Even if one disagrees with this approach, it may explain what the Tribunals are doing. As demonstrated above, some ICTY trial

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<sup>194</sup> See Akhavan, *Beyond Impunity*, *supra* note 68, at 7.

<sup>195</sup> Nemitz, *The Law of Sentencing in International Criminal Law*, *supra* note 25, at 90, 110-11.

<sup>196</sup> See generally, Akhavan, *Beyond Impunity*, *supra* note 68, at 8.

<sup>197</sup> Jan Klabbbers, *Just Revenge? The Deterrence Argument in International Criminal Law*, 12 FINNISH Y.B. INT'L L. 249, 2001 (disagreeing that human rights violators can be deterred).

chambers took a consequentialist approach towards punishment of human right violators, focusing on deterrence. While the rhetoric on deterrence is bold and broad, the practice reveals a more subtle and sophisticated nuance. There is some evidence that international judges weigh the relevance of deterrence in determining the penalty for a particular perpetrator based on that person's position of authority. This is illustrated through the examples of the punishment of Blaškić and Todorović. Both trial chambers declare the objective of deterrence to be a factor in their sentencing approach. The *Blaškić* Trial Chamber in particular appears wholly fixated on deterrence, but a closer reading reveals that its myopic consequentialism is induced by the presence of a high-ranking perpetrator. It even declares that “the Tribunal was set up to punish according to the accused's level of responsibility.”<sup>198</sup> Thus, the judges in the *Blaškić* case approached the deterrence factor with regard to the Blaškić's role and position in the overall hierarchy that was responsible for the atrocities.

Moreover, regarding the influence of general deterrence on punishment, with a few exceptions, ICL sentencing practice indicates that the objective of general deterrence will increase the sentence of a high-ranking perpetrator, but generally has little affect on the sentence of rank and file soldiers, unless they demonstrated notorious cruelty or exceptional brutality. This explains to some extent why Todorović received a very low sentence. Boiler plate rhetoric aside, international judges do not actually seem to be very convinced that deterrence is relevant or effective in the case of rank and file, low level perpetrators. A more cynical view attributes Todorović's low punishment to the embarrassing situation the ICTY found itself in when the United Nations sanctioned peacekeeping force, S-FOR,<sup>199</sup> refused to comply with the Court's order to turn over documents relevant to his arrest and transfer to The Hague.<sup>200</sup> This perspective, however, does not entirely account for how low the Trial Chamber went with Todorović's sentence because the judges could have given

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<sup>198</sup> Prosecutor v. Blaškić, Trial Judgment, *supra* note 151, at para. 808.

<sup>199</sup> S-FOR stands for “Stabilization Force” which was led by NATO but established by United Nations Security Council pursuant to Resolution 1088 on December 12, 1996.

<sup>200</sup> Combs, *Copping a Plea*, *supra* note 95, at 118-22; See discussion *infra* Section II(B)(2).

a higher sentence and still remained within the scope and terms of the plea agreement.

Moreover, the point can be established by other examples less tainted by cynicism. Consider for example the ICTR's punishment of Mikaeli Muhimana, the *conseiller* of the Gishyita *secteur*.<sup>201</sup> The Trial Chamber found that he "occupied a position of influence in the community" and that instead of using his position to protect the defenseless, he actively participated in the attacks against Tutsi civilians seeking refuge in churches and hospitals. Muhimana raped and killed women who he believed to be Tutsi in the most gruesome and brutal manner.<sup>202</sup> In sentencing him to imprisonment for the remainder of his life, the Trial Chamber found a host of aggravating factors such as his position of influence,<sup>203</sup> the fact that the victims were seeking refuge,<sup>204</sup> the young age (fifteen years old) of one of the rape victims,<sup>205</sup> presence of others during the rapes,<sup>206</sup> intentionally increasing the suffering of the victim,<sup>207</sup> public humiliation,<sup>208</sup> savagery,<sup>209</sup> and the fact that the victim was pregnant.<sup>210</sup> Some of these aggravating factors could arguably be characterized as factors pertaining to the gravity of the offense. In fact, in its recent

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<sup>201</sup> Prosecutor v. Muhimana, Case No. ICTR-95-1B-T, Summary of Judgment, paras. 3, 4 (Apr. 28, 2005), <http://www.unict.org/Portals/0/Case%5CEnglish%5CMuhimana%5Cjudgment%5C280405summary.pdf>.

<sup>202</sup> Prosecutor v. Muhimana, Case No. ICTR-95-1B-T, Judgment and Sentence, paras. 606-15 (Apr. 28, 2005), <http://www.unict.org/Portals/0/Case/English/Muhimana/decisions/muhimana280505.pdf>. (In one incident, Muhimana "used a machete to cut the pregnant woman Pascasie Mukaremera from her breasts down to her genitals and remove her baby, who cried for some time before dying. After disembowelling the woman, the assailants accompanying Muhimana then cut off her arms and stuck sharpened sticks into them.").

<sup>203</sup> Prosecutor v. Muhimana, Judgment and Sentence, *supra* note 202, at para. 604.

<sup>204</sup> *Id.* at para. 605.

<sup>205</sup> *Id.* at para. 607.

<sup>206</sup> *Id.* at para. 609.

<sup>207</sup> *Id.* at para. 610.

<sup>208</sup> Prosecutor v. Muhimana, Judgment and Sentence, *supra* note 202, at para. 611.

<sup>209</sup> *Id.* at para. 612.

<sup>210</sup> *Id.* at para. 612.

sentencing judgment, the ICC treated similar factors as relevant only to its assessment of “gravity” and rejected them as aggravating factors, which was how the ICC Prosecutor characterized them.<sup>211</sup> In the context of the ICTR’s sentencing provisions, which give international judges “unfettered discretion” in fashioning a penalty, the distinctive functions of “gravity of the offense” and “aggravating circumstances” are somewhat marginalized, so long as the trial chamber is careful to not consider the same factor twice. However, the lack of doctrinal and theoretical clarity on the intersection between and distinctiveness of “gravity” and “aggravating circumstance” will prove more problematic for the ICC because, *inter alia*, the Rules of Procedure and Evidence (RPE) require the existence of at least one aggravating circumstance before the court can impose life imprisonment.<sup>212</sup>

Both the Prosecution and the Trial Chamber position Muhimana as a “*conseiller*” and “businessman.”<sup>213</sup> The Trial Chamber found that the defendant’s status in the society where he lived constituted an aggravating factor.<sup>214</sup> Generally speaking, persons in positions of public authority who abuse their positions and the powers entrusted to them to commit or advance mass atrocities merit greater punishment because such perpetrators are more dangerous in that they cast a wider net of harm and destruction. The enhanced punishment is also justified because they have breached a sacred trust by employing their position and the machineries at their disposal to victimize those to whom they had a duty to serve and protect. These factors have a direct impact on the criminality. The jurisprudence of the ICTY and ICTR recognizes these principles by holding “superior position,” or in some cases, “abuse of authority” as an aggravating factor. The ICTR Trial Chamber viewed Muhimana as a high-level

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<sup>211</sup> Prosecutor v. Thomas Lubanga Dyilo, Decision on Sentence pursuant to Article 76, *supra* note 2, at paras. 92-9.

<sup>212</sup> INT’L CRIM CT. R. P. & EVID. 145 (3) (2003).

<sup>213</sup> Prosecutor v. Muhimana, Judgment and Sentence, *supra* note 202, at paras. 596, 604.

<sup>214</sup> *Id.* at paras. 595-96.

and influential person and, like the ICTY's *Blaškić* Trial Chamber, imposed a severe punishment.<sup>215</sup>

In *Muhimana* case, however, the Defense should have challenged the Prosecutor's submission that his status should be an aggravating factor. In this case, it is unclear how his "status" aggravated his criminality. The Prosecution does not argue that Muhimana held any political position or that his "status" lead to an abuse of authority. The Prosecution only submits that "his close associations with senior civil servants and prominent business people, and his popularity . . . further enhanced his 'status'."<sup>216</sup> The Trial Chamber accepted this argument and aggravated his penalty because of his "status."<sup>217</sup> However, while his associations and popularity may have enhanced his "status," the Trial Chamber does not explain how it enhances his culpability in relation to his crimes. The *Muhimana* Trial Chamber found no mitigating circumstances,<sup>218</sup> and the Defense surprising made no submissions on this point.<sup>219</sup>

In sum, international judges at the *ad hoc* Tribunals boldly proclaim the deterrent function of international criminal prosecutions.<sup>220</sup> They demonstrate confidence in the deterrent capacity of international courts, and state that the goal of deterrence influences their determination of penalties.<sup>221</sup> This obtuse rhetoric

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<sup>215</sup> *Id.* at para. 618.

<sup>216</sup> *Id.* at para. 596.

<sup>217</sup> *Id.* at para. 604.

<sup>218</sup> Prosecutor v. Muhimana, Judgment and Sentence, *supra* note 202, at para. 616.

<sup>219</sup> *Id.* at para. 602.

<sup>220</sup> See Prosecutor v. Galic, Case No. IT-98-29-A, Judgment, para. 441 (Int'l Crim. Trib. for the Former Yugoslavia Nov. 30, 2006), <http://www.icty.org/x/cases/galic/acjug/en/gal-acjud061130.pdf>. See also Prosecutor v. Stakić, Case No. IT-97-24-T, Judgment, paras. 891, 900, 902 (Int'l Crim. Trib. for the Former Yugoslavia July 31, 2003), <http://www.icty.org/x/cases/stakic/tjug/en/stak-tj030731e.pdf>.

<sup>221</sup> See Prosecutor v. Plavšić, Sentencing Judgement, *supra* note 36, at para. 24; Prosecutor v. Krajišnik, Case No. IT-00-39-A, Judgment, paras. 775-77 (Int'l Crim. Trib. for the Former Yugoslavia Mar. 17, 2009), <http://www.icty.org/x/cases/krajisnik/acjug/en/090317.pdf>. See also Prosecutor v. Stakić, Case No. IT-97-24-T, Judgment, paras. 900-02 (Int'l Crim. Trib. for the Former Yugoslavia July 31, 2003),

obfuscates the actual sentencing practice, which demonstrates greater nuance. The general sentencing jurisprudence reveals that the goal of deterrence has little impact on increasing the penalty of low-level war criminals. Deterrence plays a more significant role in enhancing the penalty for a high-level perpetrator or those that had significant power or influence. This unspoken distinction mirrors the position of some observers that rank and file common persons cannot be easily deterred when surrounded by the chaos of systematic criminality during war.<sup>222</sup> Instead, the goal of deterrence should focus ICL's

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<http://www.icty.org/x/cases/stakic/tjug/en/stak-tj030731e.pdf>; Prosecutor v. Blaškić, Judgment, *supra* note 151, at para. 761; Prosecutor v. Delić, Case No. 1T-04-83-T, Trial Judgment, para. 559 (Int'l Crim. Trib. for the Former Yugoslavia Sept 15, 2008), <http://www.icty.org/x/cases/delic/tjug/en/080915.pdf>; Prosecutor v. Milutinović, Case No. IT-05-87-T, Judgment, para. 1144 (Int'l Crim. Trib. for the Former Yugoslavia Feb. 26, 2009), <http://www.icty.org/x/cases/milutinovic/tjug/en/jud090226-e3of4.pdf>; Prosecutor v. Lukić, Case No. IT-98-32/1-T, Trial Judgment, para. 1049 (Int'l Crim. Trib. for the Former Yugoslavia July 20, 2009), [http://www.icty.org/x/cases/milan\\_lukic\\_sredoje\\_lukic/tjug/en/090720\\_j.pdf](http://www.icty.org/x/cases/milan_lukic_sredoje_lukic/tjug/en/090720_j.pdf); Prosecutor v. Popović, Case No. IT-05-88-T, Trial Judgment, para. 2128 (Int'l Crim. Trib. for the Former Yugoslavia June 10, 2010), <http://www.icty.org/x/cases/popovic/tjug/en/100610judgement.pdf>; Prosecutor v. Kunarac, Case No. IT-96-23-T & IT-96-23/1-T, Trial Judgment, para. 838 (Int'l Crim. Trib. for the Former Yugoslavia Feb. 22, 2001), <http://www.icty.org/x/cases/kunarac/tjug/en/kun-tj010222e.pdf>; Prosecutor v. Blagojević, Case No. IT-02-60-T, Trial Judgment, para. 817 (Int'l Crim. Trib. for the Former Yugoslavia Jan. 17, 2005), [http://www.icty.org/x/cases/blagojevic\\_jokic/tjug/en/bla-050117e.pdf](http://www.icty.org/x/cases/blagojevic_jokic/tjug/en/bla-050117e.pdf); Prosecutor v. Strugar, Trial Judgment, *supra* note 104, at para. 458; Prosecutor v. Limaj, Case No. 1T-03-66-T, Trial Judgment, para. 723 (Int'l Crim. Trib. for the Former Yugoslavia November 30, 2005), <http://www.icty.org/x/cases/limaj/tjug/en/lim-tj051130-e.pdf>; Prosecutor v. Orić, Case No. 1T-03-68-T, Trial Judgment, para. 718 (Int'l Crim. Trib. for the Former Yugoslavia June 30, 2006), <http://www.icty.org/x/cases/oric/tjug/en/ori-jud060630e.pdf>; Prosecutor v. Tadić, Sentencing Judgment, *supra* note 35, at paras. 7-9; Prosecutor v. Kupreški, Case No. IT-95-16-T, Trial Judgment, para. 848 (Int'l Crim. Trib. for the Former Yugoslavia Jan. 14, 2000), <http://www.icty.org/x/cases/kupreskic/tjug/en/kup-tj000114e.pdf>.

<sup>222</sup> However, this is by no means universal. In the both the Yugoslav and Rwandan atrocities, there are a number of examples of great human moral courage resisting the systematic criminality. See Bernard Muna, *The ICTR Must Achieve Justice for Rwandans*, 13 AM. U. INT'L L. REV. 1481 (1998).

punitive sting for leaders who used their power and influence to execute criminal policies.

## B. Reconciliation

One unresolved question regarding the primary role of international criminal justice mechanisms is to what extent the ICC should allow reconciliation ideology to influence its decision-making. Prioritizing reconciliation (a restorative focus) over retribution and deterrence (punitive focuses) may alter decisions by the ICC Prosecutor at the front end, for example in case and situation selection, as well as decisions by judges at the back end, for example when sentencing. The experience of the ICTY shows that the absence of a coherent theoretical underpinning for the application of reconciliation ideology has led to some troubling results. To illustrate this we may consider the following cases: *Erdemović*,<sup>223</sup> *Jelišić*,<sup>224</sup> *Sikirica*,<sup>225</sup> *Plavšić*,<sup>226</sup> *Bralo*,<sup>227</sup> and *Nikolić*.<sup>228</sup>

Since 2001, the practice of plea-bargaining increased exponentially in international prosecutions.<sup>229</sup> At the same time,

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<sup>223</sup> Prosecutor v. Erdemović, Sentencing Judgment, *supra* note 43; Prosecutor v. Erdemović, Case No. IT-96-22-A, Appeals Judgment (Int'l Crim. Trib. for the Former Yugoslavia Oct. 7, 1997), <http://www.icty.org/x/cases/erdemovic/acjug/en/erd-aj971007e.pdf>.

<sup>224</sup> Prosecutor v. Jelišić, Case No. IT-95-10-T, Judgment (Int'l Crim. Trib. for the Former Yugoslavia Dec. 14, 1999), <http://www.icty.org/x/cases/jelusic/tjug/en/jel-tj991214e.pdf>; Prosecutor v. Jelišić, Case No. IT-95-10-A, Appeals Judgment (Int'l Crim. Trib. for the Former Yugoslavia July 5, 2001), <http://www.icty.org/x/cases/jelusic/acjug/en/jel-aj010705.pdf>.

<sup>225</sup> Prosecutor v. Sikirica, Sentencing Judgment, *supra* note 84.

<sup>226</sup> Prosecutor v. Plavšić, Case No. IT-00-39&40/1-S, Sentencing Judgment (Int'l Crim. Trib. for the Former Yugoslavia Feb. 27, 2003), <http://www.icty.org/x/cases/plavsic/tjug/en/pla-tj030227e.pdf>.

<sup>227</sup> Prosecutor v. Bralo, Sentencing Judgment, *supra* note 94; Prosecutor v. Bralo, Judgment on Sentencing Appeal, *supra* note 94.

<sup>228</sup> Prosecutor v. Nikolić, Sentencing Judgment, *supra* note 94; Prosecutor v. Nikolić, Case No. IT-94-2, Judgement on Sentencing Appeal, (Int'l Crim. Trib. for the Former Yugoslavia Feb. 4, 2005), [http://icty.org/x/cases/dragan\\_nikolic/acjug/en/nik-isa050204e.pdf](http://icty.org/x/cases/dragan_nikolic/acjug/en/nik-isa050204e.pdf).

<sup>229</sup> See COMBS, GUILTY PLEAS, *supra* note 37.

reconciliation ideology gained traction among international judges.<sup>230</sup> To appreciate this phenomenon, it is necessary to start with the early practice at the Tribunal in relation to both plea-bargaining and reconciliation. As a preliminary matter, it should be noted that guilty pleas at international tribunals come in two varieties: “unilateral” guilty pleas and bargained-for guilty pleas. The latter consists of situations where the defense engages in negotiations with the Prosecutor for the defendant’s admission to the certain charges in exchange for the Prosecutor’s agreement to dismiss other charges and/or allegations from the indictment (charge reduction), and/or to recommend a lenient sentence, or to refrain from seeking a particular (high) penalty (sentence reduction). It excludes situations where the accused accepts his or her criminal responsibility and enters a guilty plea without negotiating for charge or sentence reduction. In these guilty pleas, no bargaining or negotiating is needed to secure the defendant’s admission. In other words, not all guilty pleas are the result of plea-bargaining.<sup>231</sup>

1. *Early practice: reconciliation ideology has no influence on sentencing.*

In the first ten years of the ICTY’s operations, only two cases were disposed of by plea bargaining: the *Todorović* case and the *Sikirica* case.<sup>232</sup> Each contained some element out of the ordinary. A third

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<sup>230</sup> Prosecutor v. Obrenović, Case No. IT-02-60/2-S, Sentencing Judgment, para. 111 (Int’l Crim. Trib. for the Former Yugoslavia Dec. 10, 2003), <http://icty.org/x/cases/obrenovic/tjug/en/obr-sj031210e.pdf>; Prosecutor v. Nikolić, Trial Sentencing Judgment, *supra* note 58, at para. 233; Prosecutor v. Mrđa, Case No. IT-02-59-S, Sentencing Judgment, para. 78 (Int’l Crim. Trib. for the Former Yugoslavia Mar. 31, 2004), <http://www.icty.org/x/cases/mrda/tjug/en/sj-040331.pdf>; Prosecutor v. Jokic, Case No. IT-01-42/1-S, Sentencing Judgment, para. 76 (Int’l Crim. Trib. for the Former Yugoslavia Mar. 18, 2004), [http://icty.org/x/cases/miodrag\\_jokic/tjug/en/jok-sj040318e.pdf](http://icty.org/x/cases/miodrag_jokic/tjug/en/jok-sj040318e.pdf); Prosecutor v. Rajic, Case No. IT-95-12-S, Sentencing Judgment, para. 146 (Int’l Crim. Trib. for the Former Yugoslavia May 8, 2006), <http://www.icty.org/x/cases/rajic/tjug/en/raj-tj0060508e.pdf>.

<sup>231</sup> An illustrative example is the case of Dražan Erdemović and his immediate plea of guilt at his initial appearance. See *Erdemović, Dražen*, HAGUE J. PORTAL, <http://www.haguejusticeportal.net/index.php?id=6096> (last visited Oct. 13, 2013). See also Prosecutor v. Erdemović, Sentencing Judgment, *supra* note 43. .

<sup>232</sup> Prosecutor v. Jelusic, Case No. IT-95-10-T, Judgment, para. 11 (Int’l Crim. Trib. for the Former Yugoslavia Dec. 14, 1999),

case—against Goran Jelišić, a camp commander—involved the accused pleading guilty to all counts but one—genocide—and the Office of the Prosecutor (OTP) continued to trial on the remaining count. Thus, his plea does not appear to have been bargained for. All three cases underscore an OTP policy against plea-bargaining, especially when the accused has been charged with genocide. Reconciliation ideology is virtually non-existent as a sentencing factor in these early cases.<sup>233</sup>

In the *Jelišić* case, a camp commander pled guilty to thirty-one individual counts of crimes against humanity and war crimes. The only charge that Jelišić refused to accept responsibility for was a single charge of genocide.<sup>234</sup> Given that the OTP had substantial evidence to prove genocide, it refused to drop the charge from the indictment. Much to the disappointment of the judges, the Prosecution insisted on proceeding to trial against Jelišić for the single count of genocide, even though Jelišić was already facing a very severe prison sentence resulting from his guilty plea to very serious crimes, including multiple murders committed in the most chilling and wicked manner. The tension between the ICTY judges and the Prosecutor was plainly evident during the course of the trial. The judges were frustrated at what they considered wasteful expenditure of time and resources on a trial of a relatively minor figure that had already pled guilty to crimes against humanity and war crimes grave enough to merit a forty-year sentence. The OTP was equally determined to try Jelišić for genocide so that the record would reflect what it believed was the true scope of his culpability. The policy behind the OTP's uncompromising stance was the idea that the

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<http://www.icty.org/x/cases/jelistic/tjug/en/jel-tj991214e.pdf> (pleading guilty on October 29, 1998); Prosecutor v. Todorović, Sentencing Judgment, *supra* note 58, at para. 5 (pleading guilty on December 13, 2000); Prosecutor v. Sikirica, Sentencing Judgment, *supra* note 84, at paras. 12-15 (pleading guilty on September 19, 2001; September 19, 2001; and September 4, 2001, respectively). As explained above, the Erdemović case is not included among these cases because Erdemović pled guilty at his initial appearance.

<sup>233</sup> See also Prosecutor v. Erdemović, Sentencing Judgment, *supra* note 43.

<sup>234</sup> Press Release, Int'l Crim. Trib. for the Former Yugoslavia, "Brcko" Indictment: Goran Jelisc Pleads Guilty to the Majority of the Charges in the Second Amended Indictment, JL/PIU/357-E (Oct. 29, 1998), <http://www.icty.org/sid/7624>.

crime of genocide carries too much significance to be dropped simply because the accused has accepted responsibility for other crimes. The *Jelišić* case demonstrates the OTP's unwillingness to provide the accused with any concession by way of charge or penalty reduction for his guilty plea. As noted above, however, it would be incorrect to characterize Jelišić's guilty plea as a plea bargain. Jelišić *sua sponte* accepted responsibility for all the charges against him except the crime of genocide.<sup>235</sup> No bargaining or negotiating was needed to secure his admission to the other crimes.

Stevan Todorović and Biljana Plavšić, on the other hand, represent cases of carefully crafted plea bargains. Todorović muscled a highly favorable plea deal out of the Prosecutor. His Defense team successfully obtained an order from the ICTY directing the NATO led S-FOR to cooperate with the defendant by producing documents and making senior officials available as witnesses for his hearing challenging the lawfulness of his arrest, detention, and transfer to The Hague by S-FOR. Todorović was living comfortably in his hometown in the Federal Republic of Yugoslavia (FRY) and woke up one morning to find himself hooded and handcuffed in a helicopter on his way to S-FOR's Tuzla Air Force Base.<sup>236</sup> One version of the events attributes his capture to four bounty hunters.<sup>237</sup> According to Todorović, his kidnapping was a clandestine operation orchestrated by S-FOR in which he was hooded, beaten, kidnapped, and taken to the boarder of Bosnia Herzegovina to be subsequently transferred by S-FOR to the ICTY.<sup>238</sup>

Claiming that his arrest was illegal and violated fundamental human rights, Todorović sought to compel S-FOR to hand over

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<sup>235</sup> *Id.*

<sup>236</sup> Press Release, Int'l Crim. Trib. for the Former Yugoslavia, Decision on Todorovic's Motion For Judicial Assistance, XT/ P.I.S./ 636-e (Oct. 20, 2000), <http://www.icty.org/sid/7811>.

<sup>237</sup> See, Combs, *Copping a Plea*, *supra* note 95, at 118.

<sup>238</sup> Combs, *Copping a Plea*, *supra* note 95, at 118-19. See also Susan Lamb, *Illegal Arrest and the Jurisdiction of the ICTY*, in *ESSAYS ON ICTY PROCEDURE AND EVIDENCE IN HONOUR OF GABRIELLE KIRK MCDONALD* 27-35 (Richard May et al. eds., 2001) (discussing the events surrounding Todorovic's arrest and transfer to the ICTY).

documents and witnesses to support his allegations.<sup>239</sup> The trial judges ordered the North Atlantic Council, thirty-three individual States, and S-FOR itself to disclose specific documents. In a bold move, they also ordered the Commanding General of S-FOR, Eric Shinseki of the United States, to appear as a witness in his individual capacity at the hearing. All parties promptly refused to comply with the order, citing possible security risks to an on-going military and peacekeeping operation.<sup>240</sup> The standoff was an embarrassment to the United Nations and the ICTY—a U.N. created peacekeeping force flatly refused to comply with an order of a U.N. judicial body. Would power submit to the law? NATO's non-compliance with the ICTY order seemingly contradicted the principle that *all* must obey the law. The ICTY—in fact the entire enterprise of international criminal justice—was predicated on the notion of accountability and that no one was above the law. It was a direct challenge to the authority of the court from an unexpected source, something ICTY defendants had been doing since the first time the court asserted jurisdiction.<sup>241</sup>

With his motion threatening the legitimacy of the ICTY if NATO were to continue to disobey the order, Todorović gained leverage in his negotiations with the Prosecutor. NATO, the U.S., and other states appealed the decision and the Appeals Chamber stayed the Trial Chamber's order pending the outcome of the appeal. Meanwhile, ICTY lawyers scrambled behind the scenes. While the appeal was pending, the OTP and the defendant filed a joint and confidential *ex parte* motion, submitting to the court a negotiated plea agreement.<sup>242</sup> Todorović agreed to plea guilty to the crime of persecution on political, racial, and religious grounds as a crime

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<sup>239</sup> See Combs, *Copping a Plea*, *supra* note 95, at 119.

<sup>240</sup> Combs, *Copping a Plea*, *supra* note 95, at 119.

<sup>241</sup> Prosecutor v. Tadić, Case No. IT-94-1, Decision on the Defense Motion on Jurisdiction (Int'l Crim. Trib. for the Former Yugoslavia Aug. 10, 1995), <http://www.icty.org/x/cases/tadic/tdec/en/100895.htm>.

<sup>242</sup> See Prosecutor v. Simic, Simic, Tadic, Todorovic, and Zaric, Case No. IT-95-9-PT, Judicial Supplements, Decision on (1) Application by Stevan Todorovic to re-open the Decision of 27 July 1999, (2) Motion by ICRC to Re-Open Scheduling Order of 18 November 1999, and (3) Conditions for Access to Material (Int'l Crim. Trib. for the Former Yugoslavia Feb. 28, 2000), <http://icty.org/x/file/Legal%20Library/jud%20supplement/supp12-e/simic.htm>.

against humanity.<sup>243</sup> Tellingly, the plea agreement specifically required him to withdraw: (1) all pending motions regarding his arrest; (2) all factual allegations that his arrest was unlawful; and (3) all claims that NATO or SFOR participated in any unlawful activity in connection with his arrest.<sup>244</sup> To secure the deal, the OTP withdrew the remaining twenty-six counts and recommended a prison sentence of five to twelve years.<sup>245</sup>

The *Sikirica* case involved three defendants: Duško Sikirica, Damir Došen and Dragan Kolundžija.<sup>246</sup> All three were charged with crimes against humanity and violations of the laws and customs of war. However, Sikirica was also charged with genocide. The defendants all entered a plea of not guilty and the case proceeded to trial.<sup>247</sup> After the close of the Prosecution's case-in-chief, Sikirica filed a Rule 98*bis* motion to dismiss the genocide count, which was granted. Then, to everyone's surprise, during the presentation of the defense rebuttal, one of Sikirica's co-defendants changed his plea and pled guilty to crimes against humanity. With the code of silence broken, the remaining defendants also sought the Prosecutor for a plea bargain. The plea agreement between Sikirica and the OTP made clear that the Prosecutor would not have accepted his plea while the charges of genocide were still pending against him.<sup>248</sup> This reluctance towards plea-bargaining is in line with the OTP's policy in the *Jelisić*

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<sup>243</sup> Count 1 of the indictment. *Prosecutor v. Todorović*, Sentencing Judgment, *supra* note 58, at para. 5.

<sup>244</sup> *Prosecutor v. Todorović*, Case No. IT-95-9/1, Decision on the Prosecution Motion to Withdraw Counts of the Indictment and Defence Motion to Withdraw Pending Motions, para. 1 (Int'l Crim. Trib. for the Former Yugoslavia Feb. 26, 2001),

<http://www.icty.org/x/cases/todorovic/tdec/en/10226DC515095.htm>;

*Prosecutor v. Todorović*, Sentencing Judgment, *supra* note 58, at para. 5.

<sup>245</sup> *Prosecutor v. Todorović*, Decision on the Prosecution Motion to Withdraw Counts of the Indictment and Defence Motion to Withdraw Pending Motions, *supra* note 244, at para. 2; *Prosecutor v. Todorović*, Sentencing Judgment, *supra* note 58, at para. 4.

<sup>246</sup> Sikirica was the most senior ranking of the three.

<sup>247</sup> See William Schabas, *Commentary*, in ANNOTATED LEADING CASES OF INTERNATIONAL CRIMINAL TRIBUNALS, VOLUME VIII: THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA 2001-2002 1078-82 (André Klip & Göran Luide eds., 2005), for a commentary on this case.

<sup>248</sup> *Prosecutor v. Sikirica*, Sentencing Judgment, *supra* note 84, at para. 24.

cases. The ICTY Prosecutor manifested complete aversion toward any type of bargaining or deal making that would require her to withdraw a genocide charge.

While the Prosecution refused to bargain in the *Jelisić* case, it did not have to in the *Erdemović* case—he comprehensively and immediately accepted responsibility to the entire indictment against him. The *Erdemović* case challenges the ICTY’s current ideological narrative constructed around reconciliation. Extant sentencing judgments declare reconciliation as an ideology—something more than mere *ex post facto* rationalization of an expanding plea bargaining practice and lenient sentences, but as a principled justification for mitigating penalty. However, the judges do not advance such a view of reconciliation in the *Erdemović* sentencing judgment, even though the facts of the case offered an opportunity to establish this platform. Erdemović did not attempt to negotiate a deal behind the scenes. He plead guilty to all crimes charged at his first hearing, expressed genuine remorse, and fully cooperated with the Prosecution in bring to light what happened. Although in subsequent cases, notably the *Plavšić* case, these factors are considered relevant to determining the accused’s contribution to reconciliation and thus a reduction in punishment, the *Erdemović* Trial Chamber did not consider contribution to reconciliation *per se* as a sentencing factor. In fact, “reconciliation” is mentioned merely twice in passing in the entire judgment.<sup>249</sup> It is not discussed in relation to Erdemović’s acceptance of guilt, nor do the international judges appear to be particularly interested in the possibility that his unreserved admission of responsibility for his share in the atrocities will foster reconciliation.

Compare this to the twenty-seven times the ICTY judges discuss reconciliation in the *Plavšić* case and their unbridled enthusiasm about how her narrowly crafted and limited admission will have a significant impact on reconciliation in the former Yugoslavia. It comes as no surprise that the notion of reconciliation overwhelms the analysis of the sentencing judgment in the *Plavšić*

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<sup>249</sup> Prosecutor v. Erdemović, Sentencing Judgment, *supra* note 43, at para. 58. In comparison, in the *Plavšić* case, the concept of reconciliation appears no less than 27 times in the sentencing judgment. Prosecutor v. Plavšić, Sentencing Judgment, *supra* note 36.

case, but is non-existent in the *Erdemović* case. The latter did not bargain his plea, made no demands for charge reduction, made no effort to limit the factual basis of his admission (i.e. he did not limit the historical record), and did not insist on first obtaining the Prosecution's agreement to recommend a reduced sentence. Therefore, I argue that the rise of reconciliation as an ideology in international criminal law has less to do with the goal of reconciliation and more to do with rationalizing plea-bargaining. Reconciliation gained notoriety in cases where the accused bargained for a less comprehensive factual record and a reduction in charges or punishment.<sup>250</sup> But this deal making in the face of grossly unspeakable crimes required a counterweight. Enter reconciliation. It is an apology for plea-bargaining atrocity crimes, an attempt to recast plea deals as an ally of truth and history rather than cutting the legs of public and accurate record building. These matters are addressed in greater detail in the next section.

To summarize the background materials, the ICTY's early jurisprudence and practice seems to indicate that reconciliation was not a central issue in sentencing and that the Prosecution was unwilling to bargain away the charge of genocide. The *Plavšić* case reversed the trajectory on both matters. It was the first time the Prosecutor willingly dropped the charges of genocide against an accused in return for her guilty plea. Moreover, it marked the coming of age of "reconciliation" as it proved an influential force in mitigating Biljana Plavšić's sentence.

## 2. *The coming of age of reconciliation ideology*

The *Plavšić* case marks a turning point in the ICTY's legacy. The rise of reconciliation ideology as a justification for the practice of plea-bargaining<sup>251</sup> and as a mitigating factor in sentencing can trace their origins to this case. Prior to the *Plavšić Sentencing Judgment*, only

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<sup>250</sup> Janine Natalya Clark, *Plea-Bargaining at the ICTY: Guilty Pleas and Reconciliation*, 20 EUR. J. INT'L L. 415, 416 (2009) (arguing that reconciliation is "seriously undermined" by plea-bargaining and reduced prison sentences).

<sup>251</sup> See Damaska, *What is the Point*, *supra* note 40, at 341 (concluding that the only viable justification for plea bargaining is efficiency), for a critique of various justifications for plea-bargaining.

three cases in the ICTY's ten-year history had been disposed of by plea-bargaining. In sharp contrast, following the *Plavšić* judgment, the first twelve months alone witnessed at least seven cases disposed of by way of plea-bargaining.<sup>252</sup> These plea bargains occasioned “unseemly” lenient sentencing recommendations by the OTP.<sup>253</sup> Likewise, the practice of dismissing the charge of genocide can trace its origins to the *Plavšić* case. *Plavšić* was initially indicted for the

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<sup>252</sup> Prosecutor v. Simić, Case No. IT-95-9-2-S, Sentencing Judgment, paras. 9-16 (Int'l Crim. Trib. for the Former Yugoslavia Oct. 17 2002), [http://www.icty.org/x/cases/milan\\_simic/tjug/en/sim-sj021017e.pdf](http://www.icty.org/x/cases/milan_simic/tjug/en/sim-sj021017e.pdf) (pleading guilty on May 13, 2002); Prosecutor v. Obrenović, Case No. IT-02-60/2-S, Sentencing Judgment, paras. 10, 12-21 (Int'l Crim. Trib. for the Former Yugoslavia May 21, 2003), <http://www.icty.org/x/cases/obrenovic/tjug/en/obr-sj031210e.pdf> (pleading guilty on May 21, 2003); Prosecutor v. Momir Nikolić, Case No IT-02-60/1-S, Sentencing Judgment, para. 12 (Int'l Crim. Trib. for the Former Yugoslavia Dec. 2, 2003), <http://www.icty.org/x/cases/nikolic/tjug/en/mnik-sj031202-e.pdf> (pleading guilty on May 7, 2003); Prosecutor v. Mrda, Case No. IT-02-59-S, Sentencing Judgment, para. 5 (Int'l Crim. Trib. for the Former Yugoslavia Mar. 31, 2004), <http://www.icty.org/x/cases/mrda/tjug/en/sj-040331.pdf> (pleading guilty on July 24, 2003); Prosecutor v. Jokić, Case No. IT-01-42/1-S, Sentencing Judgment, paras. 7-14 (Int'l Crim. Trib. for the Former Yugoslavia Mar. 18, 2004), [http://www.icty.org/x/cases/miodrag\\_jokic/tjug/en/jok-sj040318e.pdf](http://www.icty.org/x/cases/miodrag_jokic/tjug/en/jok-sj040318e.pdf) (pleading guilty on Aug. 27, 2003); Prosecutor v. Banović, Case No. IT-02-65-1-S, Sentencing Judgment, para. 13 (Int'l Crim. Trib. for the Former Yugoslavia Oct. 28, 2003) (pleading guilty on June 26, 2003), <http://www.icty.org/x/cases/banovic/tjug/en/ban-sj031028e.pdf>; Prosecutor v. Dragan Nikolić, Case No. IT-94-2-S, Sentencing Judgment, paras. 5, 14 (Int'l Crim. Trib. for the Former Yugoslavia Dec. 18, 2003), [http://www.icty.org/x/cases/dragan\\_nikolic/tjug/en/nik-sj031218e.pdf](http://www.icty.org/x/cases/dragan_nikolic/tjug/en/nik-sj031218e.pdf) (pleading guilty on Sept. 4, 2003); Prosecutor v. Češić, Case No. IT-95-10/1-S, Sentencing Judgment, para. 4 (Int'l Crim. Trib. for the Former Yugoslavia Mar. 11, 2004), <http://www.icty.org/x/cases/cesic/tjug/en/ces-tj040311e.pdf> (pleading guilty on Oct. 8, 2003); Prosecutor v. Deronjić, Sentencing Judgment, *supra* note 52, at paras. 18-19 (pleading guilty on Sept. 30, 2003); Prosecutor v. Babić, Case No. IT-03-72-S, Sentencing Judgment, para. 10 (Int'l Crim. Trib. for the Former Yugoslavia June 29, 2004), <http://www.icty.org/x/cases/babic/tjug/en/bab-sj040629e.pdf> (pleading guilty on Jan. 27, 2004); Miroslav Bralo, Case No. IT-95-17-S, Sentencing Judgment, para. 3 (Int'l Crim. Trib. for the Former Yugoslavia Dec. 7, 2005), <http://www.icty.org/x/cases/bralo/tjug/en/bra-sj051207-e.pdf> (pleading guilty on July 19, 2005).

<sup>253</sup> See Nancy Amoury Combs, *Procuring Guilty Pleas for International Crimes: The Limited Influence of Sentencing Discounts*, 59 VAND. L. REV. 69, 93 (2006).

crime of genocide and complicity in genocide.<sup>254</sup> Departing from its practice in the past, the Chief Prosecutor Carla Del Ponte subsequently made a deal with Plavšić to withdraw the counts and allegations specifically pertaining to genocide and complicity in genocide and also all remaining crimes, with the exception of persecution as a crime against humanity. In return, Plavšić would plead guilty to one count for the crime of persecution.<sup>255</sup>

She was the first defendant for whom the Prosecution willingly withdrew the genocide charges from the indictment in exchange for a plea. Ironically, this first time willingness came in a case where the defendant was most likely among the more culpable for the allegedly genocidal policies from among those charged with the crime.<sup>256</sup> Given the magnitude of the case, the high ranking and profile of the accused, the gravity of her crimes (as originally alleged), and the fact that the Chief Prosecutor herself appeared at an accused's sentencing hearing, which she rarely did, the people of Yugoslavia and the international community rightfully expected an accounting for Del Ponte's decision to drop genocide from the indictment. However, she offered no explanation in the public forum of an international courtroom. Nor did the judges press her for one. If there was a good reason for the compromise, it did not appear in the Court's official records or sentencing judgment.

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<sup>254</sup> Prosecutor v. Plavšić, Case No. IT-00-40-I, Indictment, para. 19 (Int'l Crim. Trib. for the Former Yugoslavia Apr. 3, 2000), <http://www.icty.org/x/cases/plavsic/ind/en/pla-ii000407e.pdf>. The counts were: Count 1(Genocide) and Count 2 (Complicity in Genocide).

<sup>255</sup> Prosecutor v. Plavšić, Case No. IT-00-39&40-PT, Plea Agreement (Int'l Crim Trib. for the Former Yugoslavia Sept. 30, 2002), [http://www.icty.org/x/cases/plavsic/custom4/en/020930plea\\_en.pdf](http://www.icty.org/x/cases/plavsic/custom4/en/020930plea_en.pdf). This was filed *ex parte* confidential and under seal. This document is available and on file with the author.

<sup>256</sup> In her published memoirs, Del Ponte describes Plavšić as a “close associate” of the notorious Radovan Karadzic and Momcilo Krajisnik. Del Ponte further claims that Plavšić “participated at the highest political levels in the campaign to dismember Bosnia and Herzegovina and ethnically cleanse large swaths of its territory.” See CARLA DEL PONTE, MADAME PROSECUTOR: CONFRONTATIONS WITH HUMANITY'S WORST CRIMINALS AND THE CULTURE OF IMPUNITY 160 (2008).

If the judges genuinely believe that the goal of reconciliation is central to the Tribunal's mandate, that International Tribunals have the capacity to contribute to reconciliation, and that substantial sentencing reductions actually promote reconciliation, then they must account for why genocide was removed from the scope of Plavšić liability and why a prison sentence of eleven years supports rather than undermines the goal of reconciliation. The absence of transparency regarding the circumstances resulting in a factual record narrower than the original indictment undermines reconciliation and truth finding. Rather than address difficult questions about responsibility and punishment that are crucial to the goal of reconciliation, international sentencing judgments idealize reconciliation as vague aspirations of ICL while remaining impervious to factors that undermine it. The judgments mistake acceptance of responsibility and apology (often short lived) for reconciliation. Del Ponte has even admitted that Plavšić's admissions and apologies offered nothing towards reconciliation.<sup>257</sup> The *Plavšić* Trial Chamber's discussion and analysis of reconciliation raises three concerns in relation to sentencing.

*a. Is reconciliation itself mitigating?* – Certain post-crime actions by the accused, such as expression of remorse, truth-telling, cooperation with the Prosecutor, and genuine and sincere acceptance of responsibility have been accepted as appropriate reasons to mitigate the punishment of a convicted person precisely because these factors, *inter alia*, potentially contribute to the aim of reconciliation. However, the *Plavšić* Trial Chamber appears to go beyond this and treat reconciliation itself as an independent mitigating factor.

The problem with treating reconciliation as an independent ground for sentence mitigation lies in the limitations of criminal justice legalism. Reconciliation is better understood as a slow rebuilding process, not an event. While judicial institutions are quite capable of determining whether a war criminal “voluntarily surrendered,” they are not particularly apt at predicting future events. Whether the accused has “contributed to reconciliation” is usually difficult to measure with legal certainty. It cannot be put sufficiently

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<sup>257</sup> See CARLA DEL PONTE, MADAME PROSECUTOR, *supra* note 256, at 161.

beyond the realms of speculation so as to satisfy the Tribunal's legal standards or the requirements of law.<sup>258</sup> Some factors relevant to assessing a defendant's contribution to reconciliation are admittedly less speculative such as an accused who goes door to door apologizing to specific families that he has victimized, or volunteers for demining operations, or helps victims identify locations where murdered family members have been hidden or buried. But the contribution to reconciliation of factors, such as a general apology, on which the *Plavšić* Trial Chamber relied, is highly speculative. Moreover, they can be undone in a way that concert action (such as the above list) beyond mere words cannot be. Thus, as is the case with other consequentialist aims, the court treads in dangerous territory when judges allow reconciliation to influence its sentencing allocations.

For example, Plavšić gave an interview to Banja Luka ATV on March 11<sup>th</sup>, 2005, that undermines her purported contribution to reconciliation based on her apology and public statement that the judge used to justify mitigating her penalty to eleven years imprisonment.<sup>259</sup> Barely two years after her public remorse and apology in the courtroom of the ICTY, she denied all responsibility for her role in the atrocities to the viewing public back in the former Yugoslavia. With thousands, if not tens of thousand, of persons whose lives she victimized, she emphatically claimed: (1) she only pled guilty because witnesses that would establish her innocence were afraid to come forward; (2) smug international judges sitting in The Hague far away from the realities of the conflict could not comprehend that a high ranking person in her position, removed from the battlefield, may not know what is going on at the ground level; (3) Western powers accept that the real culprits of the conflict

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<sup>258</sup> While aggravating circumstance must be proved beyond a reasonable doubt, mitigating circumstance need only be proved on a balance of probabilities. See *Prosecutor v. Milan Simić*, Case No. IT-95-9/2-S, Sentencing Judgment, paras. 39-40 (Int'l Crim. Trib. for the Former Yugoslavia Oct. 17, 2002), [http://www.icty.org/x/cases/milan\\_simic/tjug/en/sim-sj021017e.pdf](http://www.icty.org/x/cases/milan_simic/tjug/en/sim-sj021017e.pdf).

<sup>259</sup> Interview by Banja Luka ATV with Biljana Plavšić (Mar. 11, 2005), <http://www.atvbl.com/home.php?id=billjanaintervju>. An unofficial translation into English by the ICTY Outreach Office in Sarajevo is available on file with the author.

where the Bosnians that wanted independence in the first place.<sup>260</sup> To the victims, her statements most likely came across as: (1) I am not responsible; (2) the Bosnian Serb leadership is not responsible; and (3) the victims got what they deserved. Perhaps Del Ponte and the international judges had no reason to suspect that Plavšić would so fantastically and publically unravel the foundations of her mitigated penalty. Nevertheless, the experience illustrated why the ICC should not entangle with consequentialist aspirations. At least, judges should not allow the goal of reconciliation to influence sentencing allocations.

*b. Failure to link lack of cooperation to sentencing discounts based on purported contribution to reconciliation.* – The sentencing law of international criminal courts and tribunals recognize cooperation with the Prosecutor or Court as a mitigation factor.<sup>261</sup> Under the ICTY rules in particular, it is the only mitigation factor explicitly provided. Plavšić firmly refused to cooperate with the ICTY OTP, despite several interventions by Del Ponte and her team to get Plavšić to reverse course.<sup>262</sup> When Del Ponte tried to include in the plea agreement a condition that Plavšić agree to be a witness in the cases of persons who bore the greatest responsibility for the atrocities such as Radovan Karadžić, Momčilo Krajišnik, and Ratko Mladić, Plavšić flatly refused and the Chief Prosecutor backed down.<sup>263</sup> Del Ponte would later write in her memoirs that Plavšić had deceived her into thinking that she would cooperate.<sup>264</sup>

If part of the justification for the Prosecution to engage in plea-bargaining lies in the theory of “breaking the circle of silence” among the leadership, then her guilty plea wholly deprived international justice of any such benefit. In fact, she appears to go out of her way to insulate them and protect them from the atrocities she

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<sup>260</sup> *See id.*

<sup>261</sup> INT’L CRIM CT. R. P. & EVID. 145 (2)(a)(iii) (2003); INT’L CRIM. TRIB. FOR THE FORMER YUGOSLAVIA R. P. & EVID. 101 (2009), [http://www.icty.org/x/file/Legal%20Library/Rules\\_procedure\\_evidence/IT032\\_Rev43\\_en.pdf](http://www.icty.org/x/file/Legal%20Library/Rules_procedure_evidence/IT032_Rev43_en.pdf).

<sup>262</sup> *See* CARLA DEL PONTE, MADAME PROSECUTOR, *supra* note 256, at 161-62.

<sup>263</sup> *See id.* at 161.

<sup>264</sup> *See id.*

acknowledges took place. She expressly stated that the responsibility for the crimes to which she bore witness are hers and hers “alone” and do not “extend to other leaders who have the right to defend themselves”.<sup>265</sup> Her failure to cooperate should have been factored in to the weight given to her “contribution to reconciliation.” I am not suggesting that the court do what the *Blaskic* Trial Chamber did when it treated non-cooperation as an aggravating factor.<sup>266</sup> The international sentencing jurisprudence correctly rejects such an approach.<sup>267</sup> Nevertheless, failure to cooperate with international justice is relevant to assessing the accused’s “contribution to reconciliation.” Plavšić’s conduct and statements carefully avoid implicating her co-perpetrators Karadžić and Krajišnik in the atrocities and cast doubt on her commitment to reconciliation. Loyalty to her fellow nationalist over accounting for crimes perpetrated against other ethnic groups does little to defuse ethnic tensions. The judges noted expert testimony that “full disclosure in confessions is vital for the reconciliatory process.”<sup>268</sup> Again, we see another example of the international judges failing to meaningfully analyze the accused’s conduct and factors relevant to punishment in relation to what they earlier identified as the purpose of sentencing, in this case, reconciliation. Plavšić’s failure to disclose the role of other high-ranking Serbs in atrocity crimes to the full extent of her knowledge undermines the goal of reconciliation. The judges should have weighed the potential adverse impact this has on their purported goal, especially because they used reconciliation ideology to justify a lower sentence.<sup>269</sup>

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<sup>265</sup> Dragan Stanimirovic, *Plavšić’s Guilt Trip*, TRANSITIONS ONLINE (Dec. 23, 2002); Prosecutor v. Blaškić, Case No. IT-95-14-T, Factual Statement in Support of Plea (2000).

<sup>266</sup> Prosecutor v. Blaškić, Judgment, *supra* note 151, at para. 774. See Dana, *Revisiting the Blaškić*, *supra* note 81, at 327.

<sup>267</sup> See Dana, *Revisiting the Blaškić*, *supra* note 81, at 328.

<sup>268</sup> Prosecutor v. Plavšić, Sentencing Judgment, *supra* note 36, at para. 77 (emphasis by Trial Chamber).

<sup>269</sup> Prosecutor v. Plavšić, Sentencing Judgment, *supra* note 36, at paras. 66-81. In the Trial Chamber’s own assessment, “these circumstances make a formidable body of mitigation”. Prosecutor v. Plavšić, Sentencing Judgement, *supra* note 36, at para. 110.

Local reactions support my argument. Sefko Alomerović, President of the Helsinki Board in Sandzak at the time of Plavšić's sentencing, also drew attention to her failure to "bring into question the state policy that led towards the extinction of the Bosnian people, in which she played an important role."<sup>270</sup> Although the Trial Chamber expressly disagreed with the Prosecutor's evaluation of the weight to be accorded to this factor in mitigation,<sup>271</sup> in light of the foregoing, the Prosecutor's assessment seems to better capture the extent of her contribution to reconciliation. The OTP recommended a prison term of fifteen to twenty-six years.<sup>272</sup> The Trial Chamber sentenced her to eleven years.<sup>273</sup> This was not the first time a trial chamber imposed a sentence lower than the Prosecutor's recommendation, but it was the first time the Prosecutor did not appeal a low sentence outside its recommended range.

*c. Superior position results in paradoxical boost for mitigation.* – Generally, sentencing discounts for guilty pleas are justified on the grounds of their functional utility, namely that plea bargains can result in efficiency benefits by saving costs and Tribunal resources related to investigation, counsel fees, trial costs, etc. The *Plavšić* Trial Chamber, however, attempts to offer more than a functional justification for plea bargains that result in large sentencing reductions by arguing that they substantially contribute to the Tribunal's presumed mandate. In the *Plavšić* case, the judges characterized Plavšić's negotiated and carefully contrived guilty plea as a genuine expression of remorse that contributed to reconciliation, rather than a self-interested maneuvered that resulting in limiting her criminal liability and punishment.<sup>274</sup>

Apparently, the Trial Chamber was guided in this direction by the Prosecutor who amplified the mitigating value of Plavšić's contribution to "reconciliation" and "expressions of remorse" based

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<sup>270</sup> See Milanka Saponja-Hadzic, *Hague Deals Reduce Impact*, INST. OF WAR & PEACE REPORTING (July 24, 2003), <http://iwpr.net/report-news/hague-deals-reduce-impact>.

<sup>271</sup> Prosecutor v. Plavšić, Sentencing Judgment, *supra* note 36, at para. 130.

<sup>272</sup> *Id.* at para. 128.

<sup>273</sup> *Id.* at para. 132.

<sup>274</sup> *Id.* at para. 70.

on her superior position as a high-ranking and high-profiled member of the Bosnian Serb war leadership.<sup>275</sup>

The Trial Chamber noted: “[t]he Prosecution states that this expression of remorse is noteworthy *since it is offered from a person who formerly held a leadership position*, and that it ‘merits judicial consideration.’”<sup>276</sup> Thus, the *Plavšić* Trial Chamber endorsed the notion that expressions of remorse have added value for the purposes of reconciliation when offered by high-ranking defendants, and thus are deserving of greater reduction in sentence.<sup>277</sup> This position, however, is at odds with basic principles of justice and the ICTY’s own jurisprudence, which has long held that the superior position of the accused is a factor that aggravates, rather than mitigates, the accused’s punishment.

Unfortunately, the *Plavšić* precedent favoring high-ranking perpetrators when it comes to mitigation of penalty based on contribution to reconciliation is having a pernicious influence on the subsequent cases. In some cases, it appears that both the Prosecutor and the judges award less sentencing reduction for low-level defendants who contribute to reconciliation.<sup>278</sup> Citing the *Plavšić* ruling, some defense counsels even appear convinced that their client’s potential contribution to reconciliation is only worth arguing if the client is a person of high rank.<sup>279</sup>

### 3. *The perverse effects of reconciliation*

As noted above, reconciliation was not a significant factor in sentencing in the early practice of the ICTY. However, since the *Plavšić Sentencing Judgment*, it has received frequent consideration by trial chambers when addressing sentencing. In the *Plavšić* case, it

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<sup>275</sup> *Id.* at para. 70.

<sup>276</sup> Prosecutor v. Plavšić, Sentencing Judgment, *supra* note 36, at para. 70 (emphasis added).

<sup>277</sup> *Id.* at para. 70.

<sup>278</sup> *See, e.g.*, Prosecutor v. Bralo, Sentencing Judgment, *supra* note 94. This case is discussed in detail below.

<sup>279</sup> Prosecutor v. Obrenović, Case No. IT-02-60/2-S, Sentencing Judgment, para. 110 (Int’l Crim. Trib. for the Former Yugoslavia Dec. 10, 2003), <http://www.icty.org/x/cases/obrenovic/tjug/en/obr-sj031210e.pdf>.

exerted a significant influence in mitigating her punishment. Many commentators consider Plavšić's eleven-year sentence to be very lenient in both absolute terms and in symbolic terms.<sup>280</sup> As it has done with other factors such as deterrence and rehabilitation, the Appeals Chamber should likewise encourage a cautious approach towards awarding significant reduction of the penalty on the basis of "contribution towards reconciliation." Caution here is justified on both moral and practical basis. The *Plavšić* case illustrates why.

During Plavšić's sentencing hearing, I observed, first hand, defense counsel argue to the judges that her remorse and acceptance of responsibility was a more significant contribution to reconciliation than had the same come from a lower ranking perpetrator. Defense counsel boldly declared: "what greater contribution do you have to your mandate than my client's—a person at the very top of the Bosnian Serb leadership—admission of responsibility."<sup>281</sup> Never mind that her limited acceptance of responsibility was known to the judges or that her remorse proved to be ostensible. Nonetheless, all this coming from the Defense was largely expected. The real surprise was that Chief Prosecutor Carla de Ponte, in a rare court appearance at a sentencing hearing, made the same argument but even more emphatically.<sup>282</sup> She argued that as a high-ranking figure and former leader, her remorse and contribution to reconciliation is particular noteworthy and merits special consideration.<sup>283</sup> Thus, in advancing a framework for how reconciliation should influence sentencing allocations, the Chief Prosecutor advocates for greater sentencing reductions for those in high-ranking positions, thereby turning upside

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<sup>280</sup> See Nancy A. Combs, *Procuring Guilty Pleas for International Crimes*, *supra* note 253, at 98; Mark B. Harmon & Fergal Gaynor, *Ordinary Sentences for Extraordinary Crimes*, 5 J. INT'L CRIM. JUST. 683, 688-9, n.21 (2007). See also Daria Sito-Sucic, *Muslim Victims Outraged, Say Plavšić Sentence Low*, REUTERS, Feb. 27, 2003; Amra Kebo, *Regional Report: Plavšić Sentence Divides Bosnia*, INST. OF WAR & PEACE REPORTING (Feb. 22, 2005), <http://iwpr.net/report-news/regional-report-plavsic-sentence-divides-bosnia>.

<sup>281</sup> See Prosecutor v. Plavšić, Case No. IT-00-39&40/1, Sentencing Hearing Transcript, para. 649 (Int'l Crim. Trib. for the Former Yugoslavia Dec. 17, 2002).

<sup>282</sup> Prosecutor v. Plavšić, Sentencing Judgment, *supra* note 36, at para. 70.

<sup>283</sup> *Id.*

down the relationship between superior position and punishment.<sup>284</sup> The judges agreed, finding that Plavšić's position at the very top of the Bosnian Serb Presidency gave "significant weight" to her contribution to reconciliation. Because the Trial Chamber accepted the goal of reconciliation as a relevant factor for fixing a sentence, it was able to justify substantial reduction of prison time.

Accordingly, greater contributions to reconciliation merit greater reduction in punishment. Unfortunately, ICTY judges and the Chief Prosecutor appear to weigh the value of an accused's contribution to reconciliation based largely on his or her rank. Under their approach, high-ranking offenders, who accept responsibility for their wrongdoings, deserve more sentencing reduction than low-level individuals merely because of their status. The perverse effect of this consequentialist approach towards punishment is that the leaders who are most culpable for the atrocities receive greater sentencing discounts, as demonstrated by how the ICTY subsequently dealt with the punishment of low-level perpetrators.<sup>285</sup> Adding to a sense of injustice is the fact that their purported "contribution to reconciliation" is in relation to sufferings and atrocities that the leaders themselves created.

Therefore, the logical conclusion of the reconciliation ideology adopted by the *Plavšić* Trial Chamber is that less culpable and lower ranking perpetrators will not receive the same degree of mitigation, resulting in higher penalties. If so, this would be elitism at its worst and consequentialism at its most perverse. In order to test this hypothesis, I examined the ICTY sentencing judgments to identify cases similar to Plavšić. Two cases—the prosecutions of Miroslav Bralo and Dragan Nikolić—shared several factors in common with the *Plavšić* case. Both involved plea-bargained guilty pleas, convictions for crimes against humanity, underlying crimes that included killings and murder, and in both cases, the trial judges found reconciliation to be a mitigation factor in sentencing.

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<sup>284</sup> Superior position is an aggravating factor in the ICTY jurisprudence.

<sup>285</sup> See, e.g., Prosecutor v. Bralo, Sentencing Judgment, *supra* note 94, at para. 95; Prosecutor v. Nikolić, Case No. IT-94-2-S, Sentencing Judgment, § X (Int'l Crim. Trib. for the Former Yugoslavia Dec. 18, 2003), [http://www.icty.org/x/cases/dragan\\_nikolic/tjug/en/nik-sj031218e.pdf](http://www.icty.org/x/cases/dragan_nikolic/tjug/en/nik-sj031218e.pdf).

In the *Bralo* case, a Croatian defendant—a relatively minor figure in the conflict—was initially only charged with war crimes.<sup>286</sup> Because of his complete self-effacing cooperation with the Prosecutor, Miroslav Bralo exposed himself to further criminal liability for persecution as a crime against humanity. The Prosecution mercilessly moved to amend the indictment to expanded Bralo's individual criminal responsibility to include the crime of persecution.<sup>287</sup> Bralo did not oppose the motion. In fact, he did not challenge or dispute any charge or allegation in the extended indictment and pled guilty to all charges.<sup>288</sup> The trial judges considered his unexpurgated acceptance of criminal responsibility as an unequivocal sign of sincere remorse and willingness to be held accountable.<sup>289</sup>

As noted above, the process leading to an accused's admission to his or her participation in atrocity crimes and ethnic violence impacts the goal of reconciliation. Plavšić and Bralo stand in sharp contrast. The former machinated to limit and diffuse the scope and gravity of her crimes, successfully minimizing her criminal responsibility. Her plea deal included charge reduction with the removal of genocide from the record, thereby alternating the narrative of the conflict and degree of victimization. Bralo, on the other hand, showed unabridged acknowledgement of his moral blameworthiness and took full responsibility for his wrongful conduct. While Plavšić bargained down her responsibility, Bralo accepted responsibility beyond the initial charges against him.

Working from the ICTY premise that reconciliation is an appropriate goal of sentencing for international crimes, Bralo's contribution to reconciliation arguably merits greater mitigation.<sup>290</sup> The Trial Chamber found that Bralo apologized to victims in person and through personalized letters, identified previously unknown

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<sup>286</sup> Press Release, Int'l Crim. Trib. for the Former Yugoslavia, Indictment against Miroslav Bralo Made Public, JL/P.I.S./902-e, (Oct. 13, 2004), <http://www.icty.org/sid/8352>.

<sup>287</sup> Prosecutor v. Bralo, Sentencing Judgment, *supra* note 94, at para. 62.

<sup>288</sup> *Id.* at paras. 5-6.

<sup>289</sup> *Id.* at para. 60.

<sup>290</sup> *Id.* at para. 72.

locations of mass graves allowing survivors to carry out funerals for their departed in accordance with their religion and customs, in some cases exhuming the body from the mass grave himself, and participated in de-mining operations.<sup>291</sup> This may be understood as *direct* reconciliatory acts. It is more tangible to individual victims than Plavšić's prescribed general apology. Although the Tribunal held that Bralo contributed to reconciliation,<sup>292</sup> it did not afford Bralo's acts as much weight in mitigation as was awarded to Plavšić. Has the ICTY's reconciliation ideology turned the significance of superior position or authority as an aggravating factor upside down? Plavšić's punishment was imprisonment for eleven years. Bralo received a prison sentence of twenty years,<sup>293</sup> nearly twice as much as Plavšić, despite the fact that she was in the very highest echelons of the Bosnian Serb leadership prosecuting the war, second only to Radovan Karadžić.<sup>294</sup> At the time of her sentencing, she was the highest-ranking figure on any side of the conflict to be punished by the ICTY.<sup>295</sup> Bralo was a relatively low ranking figure, a Croatian foot soldier in a notorious military unit with little or no command authority.<sup>296</sup> Dragon Nikolić,

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<sup>291</sup> *Id.* at paras. 66-71.

<sup>292</sup> Prosecutor v. Bralo, Sentencing Judgment, *supra* note 94, para. 71.

<sup>293</sup> *Id.* at para. 95.

<sup>294</sup> Prosecutor v. Plavšić, Sentencing Judgment, *supra* note 36, at para. 10.

*See also* Nancy A. Combs, *International Decisions: Prosecutor v. Plavšić*, 97 AM. J. INT'L L. 929, 930 (2003) ("From 1990 through 1992, Plavšić was the Serbian representative to the Presidency of the Socialist Republic of Bosnia and Herzegovina, serving for a time as the acting co-president of the Serbian Republic of Bosnia and Herzegovina, and later as a member of the collective and expanded Presidencies of the Republika Srpska. Known as the 'Serbian Iron Lady' as a result of her hard-line nationalism and rabidly anti-Muslim views, Plavšić was a close ally of Radovan Karadžić."); CARLA DEL PONTE, MADAME PROSECUTOR, *supra* note 256, at 160-61.

<sup>295</sup> Prosecutor v. Plavšić, Sentencing Judgment, *supra* note 36, at para. 10; Combs, *International Decisions*, *supra* note 295, at 930; CARLA DEL PONTE, MADAME PROSECUTOR, *supra* note 256, at 160. When Plavšić was sentenced, the other senior figures who bore the greatest responsibility for the atrocities were either not in custody or their trials were ongoing.

<sup>296</sup> Prosecutor v. Bralo, Judgment on Sentencing Appeal, *supra* note 94, at para. 2.

also a relatively low level perpetrator, was sentenced to 23 twenty-three years of imprisonment.<sup>297</sup>

Plavšić's low sentence compared to higher penalties for Bralo and Nikolić is inconsistent with the Tribunal's sentencing practice and legal rulings that superior position or authority is an aggravating factor. By this measure, Plavšić should have received a more severe punishment, all other material factors being equal—and they generally are. Similarly, the difference in the distribution of punishment does not square with Tribunal sentencing law in that cooperation with the Prosecution is a significant mitigating factor, if not the most significant. The trial judges found that Bralo and Nikolić substantially cooperated with the Prosecutor, a mitigating factor that was absent in Plavšić's case. Compounding the disparity, one could reasonably conclude that cooperation with the Court or the Prosecutor itself constitutes "contribution towards reconciliation." Likewise, it would have been reasonable for the trial chambers to treat intentional non-cooperation as diminishing the value of an accused's asserted contribution to reconciliation. In sum, analyzing the court's treatment of the two sentencing factors—one aggravating factor (superior position/authority) and one mitigating circumstance (cooperation with the Prosecution)—reveals perverse results where judges attempt to reflect the goal of reconciliation in sentencing allocations. Plavšić, who used her superior position to perpetrate grave crimes and offered no cooperation with the OTP, received a very lenient penalty, while other defendants, who were low-level perpetrators and cooperated with the Prosecution, received significantly harsher sentences. Reconciliation ideology was so influential that it resulted in misapplication of two well entrenched sentencing principles in international criminal law.

Judging by the fact that low-level offenders were punished twice as harshly as high-ranking perpetrators, the ICTY disproportionately awards more penalty reduction for reconciliation to the latter. Interestingly, the *Bralo* Trial Chamber stated that if there were no mitigating factors, it would have imposed a prison sentence

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<sup>297</sup> Prosecutor v. Dragan Nikolić, Appeals Sentencing Judgment, *supra* note 60, at paras. 2, 4.

of twenty-five years.<sup>298</sup> Thus, Bralo received a sentencing reduction of 5 five years that accounts for all the mitigation factors found in his case. His contribution to reconciliation amounts to something much less than a 5 five-year discount, significantly lower than the discount given to Plavšić's.

Unfortunately, the perverse effects of consequentialism permeate the entire ICTY institution beyond the international judges. Consequentialism in the decision-making of the ICTY Prosecutor influenced its presentation of the case during oral arguments, its application of sentencing factors, and finally its sentencing recommendation. It argued that Plavšić's contribution to reconciliation based on her "expression of remorse is noteworthy since it is offered from a person who formerly held a leadership position, and that it 'merits judicial consideration.'"<sup>299</sup> Thus, the Prosecutor links the mitigating value of an accused's contribution to reconciliation to her superior position. Similarly, in cases where reconciliation is a factor, the OTP exercises its discretion to recommend sentences that offer greater penalty reduction to high-ranking perpetrators. The court typically follows the OTP's recommendations in plea bargains.

For example, the Chief Prosecutor Carla Del Ponte recommended a prison sentence of fifteen to twenty-five years for Plavšić. She represented to the Court that if Plavšić had not pled guilty she would have recommended life imprisonment.<sup>300</sup> Typically, the ICTY grants early release after the defendant has served two-thirds of the sentence.<sup>301</sup> Accordingly, when the OTP recommends a prison term of twenty-five years, it is effectively asking for a sentence

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<sup>298</sup> Prosecutor v. Bralo, Sentencing Judgment, *supra* note 94, at para. 95.

<sup>299</sup> Prosecutor v. Plavšić, Sentencing Judgment, *supra* note 36, at para. 70 (emphasis added).

<sup>300</sup> *Id.* para. 59. See also CARLA DEL PONTE, MADAME PROSECUTOR, *supra* note 256, at 161.

<sup>301</sup> Ines Monica Weinberg de Roca & Christopher M. Rassi, *Sentencing and Incarceration in the Ad Hoc Tribunals*, 44 STAN. J. INT'L L. 1, 50-51 (2008) ("At the ICTY, early release is determined by the implied powers of the President, which is particularly instructive when examining the case of the eight ICTY-convicted persons granted early release, after serving approximately two-thirds of their sentence.").

of a little more than sixteen-and-a-half years. Thus, its low-end recommendation of fifteen years in the *Plavšić* case is effectively a recommendation for ten years. The Trial Chamber gave Plavšić eleven years, which meant she was out in seven years and a few months.

The OTP's discretion was exercised more harshly when recommending a sentencing for Bralo. Although it initially asked for a prison sentence of twenty-five years, at the sentencing hearing the OTP stated that it was in fact seeking a "mandatory minimum" of twenty-five years.<sup>302</sup> Thus, accounting for the two-thirds approach outline above, the OTP recommendation was effectively a prison sentence of thirty-seven-and-a-half years. The OTP's policy towards reconciliation and mitigating factors indicate that it assigned less value to Bralo's contribution to reconciliation because he is a low profile perpetrator, in other words, because of his status.<sup>303</sup> Its policy manifested an aggressive recommendation for a harsher penalty for the low level perpetrator *because he is a low level person*, despite his cooperation with the Prosecution. The ICTY's reconciliation ideology is driving this recommendation.

A final point of interest here concerns Plavšić's release from prison. She reserved her prison time at a women's prison called "Hinseberg" located in Frövi, Örebro County, Sweden. The inmates call it "the castle" because it is a mansion overlooking a lake.<sup>304</sup> The prisoners can engage in artistic activities, enjoy saunas, bake for leisure, and even ride horses.<sup>305</sup> In 2009, after serving two-thirds of her sentence, she applied to the ICTY for early release.<sup>306</sup> Although her application for early release was made *after* her repudiation of

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<sup>302</sup> Prosecutor v. Bralo, Sentencing Judgment, *supra* note 94, at para. 90.

<sup>303</sup> *Id.* at para. 62.

<sup>304</sup> *Luxury prison for Bosnia's Iron Lady*, TELEGRAPH, June 7, 2013, [http://www.telegraphindia.com/1030607/asp/foreign/story\\_2044806.asp](http://www.telegraphindia.com/1030607/asp/foreign/story_2044806.asp).

<sup>305</sup> *Id.*

<sup>306</sup> *See generally* President of the Int'l Trib. Judge Patrick Robinson, IT-00-39 & 40/1-ES, Decision of the President on the Application for Pardon or Commutation of Sentence of Mrs. Biljana Plavšić (Int'l Crim. Trib. for the Former Yugoslavia Sept. 14, 2009), <http://www.icty.org/x/cases/plavsic/presdec/en/090914.pdf> [hereinafter Plavšić Pardon Decision].

responsibility on public television, something she repeated again for a local newspaper,<sup>307</sup> ICTY President Judge Patrick Robinson granted her motion for release finding that she was “rehabilitated.”<sup>308</sup> No mention was made of her renunciation of responsibility, her slide backwards towards justifying her criminal behavior, or her complete nullification of her apology, which was central to mitigating her sentence.<sup>309</sup>

## CONCLUSION

With the creation of the ICC, international criminal justice gained a permanent mechanism with potentially global reach. The potential latent in such an international court has fueled high expectations.<sup>310</sup> Yet, the growing list of objectives and goals has resulted in unrealistic expectations of international prosecutions of atrocity crimes. Consequently, fulfilment of the core functions of international criminal justice has been jeopardized. The pressure to chase aggrandized ambitions comes not only from politicians, or special interest groups, or media frenzies. Actors within the system, particularly international judges, have to some extent bought into romanticized notions that their legal institutions can achieve an awesome array of societal goals, even when some of those objectives are in direct conflict with each other. This overreach has had a negative impact on the sentencing of perpetrators of genocide, crimes against humanity, and war crimes. Judges at international criminal courts have elaborated a smorgasbord of ideological objectives for international criminal prosecutions, resulting in perverse and confusing justifications for individual sentences.

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<sup>307</sup> Carrie Schimizzi, *Bosnia war crimes victims submit evidence against former Serbian officials*, JURIST (Apr. 8, 2011), <http://jurist.org/paperchase/2011/04/bosnia-war-crimes-victims-submit-evidence-against-former-serbian-officials.php>; Iva Martinović, *Outcry at Plavšić's Belgrade Welcome*, INST. FOR WAR & PEACE REPORTING (Nov. 4, 2009), <http://iwpr.net/report-news/outcry-plavšics-belgrade-welcome>.

<sup>308</sup> See Plavšić Pardon Decision, *supra* note 306, at para. 8.

<sup>309</sup> See *id.*

<sup>310</sup> Although, significantly, it is lacking its own law enforcement regime to carry out basic police tasks, or a standing “police force” so to speak.

The *ad hoc* tribunals have drawn on a wide range of sources when identifying the sentencing rationales for international criminal justice. Although deterrence and retribution appear most frequently in the tribunal's sentencing judgments, international judges appealed to a much wider range of justifications, legal and political, to legitimize their sentences, in particular sentences that would otherwise appear to be extremely lenient. This toggling at will between punitive and restorative approaches to punishment has opened the work of international criminal tribunals to criticism of bias, politicization, and victor's justice. International idealism defeats itself. There are many learning lessons here for the ICC and pitfalls to avoid.

This article's findings caution against international criminal justice mechanism becoming too entangled with idealistic aspirations, such as reconciliation or producing a historical record, at the cost of their primary function to punish perpetrators of atrocity crimes. By analyzing the tribunals' jurisprudence, this article demonstrates how international judges often veer off course away from their primary role in light of the realistic capacity of international criminal courts when attempting to achieve other well-meaning goals that are beyond the institutional capacity of international criminal courts. This results in problematic rulings, distortion of responsibility or accountability, and ultimately failure to achieve the desired aspirations because of institutional and structural limitations.

Arguably, international judges cannot commit to serious punitive measures and simultaneously prioritize pragmatic considerations, as weak institutions must—such as, incentivizing voluntary surrender or encouraging cooperation. Perhaps they are unwilling to impose meaningful penalties out of misplaced idealism that their leniency will bring other high-ranking perpetrators, those who bear the greatest responsibility, to the table. This strategy failed. None of the remaining most wanted perpetrators followed Plavšić's suit in either surrendering to the court or admitting responsibility. Krajišnik maintained his innocence and opted for a trial.<sup>311</sup>Karadžić

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<sup>311</sup> Prosecutor v. Krajišnik, Case No. IT-00-39-T, Trial Judgment, para. 888 (Int'l Crim. Trib. for the Former Yugoslavia Sept. 27, 2006), <http://www.icty.org/x/cases/krajsnik/tjug/en/kra-jud060927e.pdf>.

and Mladić refused to surrender.<sup>312</sup> Vojislav Šešelj defiantly denounce the ICTY as an “illegal tribunal” and his court appointed counsel as a “spy” for Western imperialism.<sup>313</sup>

An analysis of the sentencing jurisprudence suggests that international judges pick and choose, without principled justification, an ideology to follow in a particular case that serves the desired result they have in mind for that case. In subsequent cases, that ideology may be abandoned or marginalized, without explanation, if it proves to be an obstacle to their desired sentence. This is particularly true in the case of the ICTY where the sentencing jurisprudence lacks commitment to prioritizing a principle to guide sentencing allocations. In other words, ICL sentencing lacks commitment to a general principle that will influence its determination of a sentence.

Another observation that may be made, aside from failure to identify a primary sentencing philosophy, is that quite often the proffered rationales are inconsistent with the actual sentencing results. Under-theorization and the absence of scholarly examination of the sentencing jurisprudence of international criminal courts has left us with an *ad hoc* approach to sentencing for genocide, crimes against humanity, and war crimes. In the absence of a guiding theory, the wide discretion given to international judges in sentencing has failed to produce a rational and consistent international sentencing practice. To the contrary, certain ideologies resulted in injustice in sentencing. This is particularly so when reconciliation ideology influenced the sentence, and therefore it should be abandoned or given very limited weight. A possible unfortunate legacy of the ICTY’s sentencing jurisprudence is that high-ranking perpetrators in leadership positions receive more reduction in prison sentence than foot soldiers where both are found to have “contributed toward

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<sup>312</sup> Ed Vulliamy, *Twelve years on, a killer on the loose*, THE GUARDIAN, Dec. 1, 2007,

<http://www.theguardian.com/world/2007/dec/02/warcrimes.edvulliamy1>.

<sup>313</sup> *Serb nationalist rejects UN court*, BBC, Nov. 8, 2007, <http://news.bbc.co.uk/2/hi/europe/7084506.stm>; *Serb ultranationalist disrupts war crimes trial*, REUTERS, Nov. 1, 2006, <http://uk.reuters.com/article/2006/11/01/uk-warcrimes-seselj-idUKL0146563020061101>.

reconciliation.”<sup>314</sup> Those most responsible for atrocities, in particular, have benefited the most when reconciliation was advanced as a rationale for mitigating punishment. They have received significantly reduced sentences, often lower than their subordinates, thus trivializing their culpability for the atrocities. Moreover, in general, most utilitarian aspirations associated with international criminal prosecutions should be abandoned as sentencing rationales because they distort the individual perpetrator’s culpability.

This paper’s analysis demonstrates that when international judges give undue weight to utilitarian aspirations in their sentencing judgments, they distort and diminish the culpability and just distribution of punishment among the various actors’ responsibility for atrocity crimes in a situation. Moreover, the goals they seek to achieve with their sentencing reductions, like reconciliation, are beyond the immediate capacity of criminal courts. International prosecutions should assume a more modest posture regarding its capabilities, lest it damages its core responsibility of punishing perpetrators of atrocities crimes. This is not to say that international criminal justice cannot contribute to these aspirations, but rather that it should not be given weight as a factor in sentencing.

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<sup>314</sup> See generally *Prosecutor v. Plavšić, Sentencing Judgment*, *supra* note 36; *Prosecutor v. Bralo, Judgment on Sentencing Appeal*, *supra* note 94.