

# Memorandum

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## **Retribution as a Sentencing Goal in International Criminal Justice**

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## **Introducing Retribution**

Newman defines punishment as any “unpleasant consequence that results from an offense against a rule and that is administered by others, who represent legal authority to the offender who broke the rule”.<sup>1</sup> Several theories give justification to the imposition of such punishment. Retribution is one of them. It suggests that a sanction should be imposed upon each wrongdoer, and that it should be proportionate to the crime’s gravity and the moral guilt of the perpetrator (1). The concept is however understood slightly differently by the judges in the context of international sentencing (2).

### **1. Theoretical concept of Retribution**

Purposes of punishment are widely discussed in the scholarship. Retributivism may be the oldest one, and is the subject of a myriad of contradictory theories and doctrinal debates. This essay first elaborates on the common concept of retributivism (1.1) and subsequently assesses how it is construed in the context of international sentencing (1.2).

#### **1.1 Classical Retributivism**

##### **Defining retributivism**

Retributivism is the theory that justifies the punishment of a criminal simply because the criminal deserves to be punished: offenders should get their comeuppance. Punishment is the morally appropriate response to the offense. Those who have committed an offense deserve a “hard treatment”. The punishment of wrongs is right in itself because the moral order requires its imposition.

Emile Durkheim noted that it is a primitive and instinctual response of humankind to punish wrongdoers. It dates back to biblical times in the form of *lex talionis*, which states: ‘*an eye for an eye, a tooth for a tooth, a life for a life*’.<sup>2</sup> The punishment does not have to achieve any future good such as the prevention of crime or the maintenance of social cohesion. It rather looks at the past, and makes that “someone who deserves it gets it”<sup>3</sup>. Punishment is an intrinsic good, not an instrumental one<sup>4</sup>.

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<sup>1</sup> G. Newman, *The Punishment Response* (New York: Lippincott, 1978).

<sup>2</sup> The sentence appears three times in the Bible, see for example Exodus, 21, 23-25.

<sup>3</sup> Michael S. Moore, *Placing Blame: A Theory of the Criminal Law*, (Oxford University Press, 2010.).

<sup>4</sup> Leo Zaibert, *Punishment and Retribution* ([n.p]: University of Wisconsin, 2006), p. 214.

Over time, the biblical conception of punishment which makes the offender lose whatever the victim has lost evolved towards a renewed balance: modern retributivists tend to say that the punishment should be proportionate to the offence rather than equal to it.<sup>5</sup> Proportionality is the key concept of retributive theory: the severity of the penalty ought to be in proportion to the gravity of the conduct in order to preserve its moral legitimization. Doing so, the punishment will guarantee that those who disobey will not gain an unfair advantage over those who do obey voluntarily. The penalty will nullify the unfair advantage law breakers gain over the law-abiding citizens.<sup>6</sup>

Hence, retributivists' main concern is the coherence of the penalty severity scale. This principle of commensurate or *just deserts*<sup>7</sup> has led to tariff sentencing, where the most serious punishment is reserved for the most serious crime. The punishment scale is determined by social conventions and cultural traditions. To do so, two types of proportionality are distinguished. Cardinal proportionality only provides the anchoring points of a penalty scale, that is to say the maximum and the minimum punishments that a system can impose. Ordinal proportionality would rather set an order of gravity of the crimes and scale the penalties accordingly. It conceptualizes the seriousness of the offenses by comparing them to each other. The higher the crime is located on the scale, the harder punishment it will deserve.

Thus, the proportionate penalty for a crime will depend on how the scale has been anchored and where the offense in question is located on the scale of gravity of the crimes.<sup>8</sup>

### **Criticism of retributivism**

Retributivism has been widely criticised. Detractors of retributivism argue that presenting punishment as a means to morally condemn the offender does not justify it, but rather denies the need for a justification to the punishment.<sup>9</sup> Another critical view refers to the blind culture of blame: demanding punishment without taking into account the cost or the gain of such punishment for the society has the adverse effect of requiring punishment even when it is pointless.<sup>10</sup>

In contrast, utilitarian theories suggest that the objective of punishment should not only be to place the moral blame on the offender. Rather, punishment should have a functional utility: to reduce the future crime rate mainly through incapacitation, rehabilitation and deterrence.<sup>11</sup>

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<sup>5</sup> B. Hudson, *Understanding Justice* (Open University Press, 1996).

<sup>6</sup> Jeffie Murphy, *Retribution reconsidered : More essay in the philosophy of Law* (Dordrecht: Kluwer Academic Publisher, 1992), pp. 22-23.

<sup>7</sup> A. von Hirsch, 'Giving criminals their just deserts', *Criminological Perspectives: Essential Readings*, 1996.

<sup>8</sup> A. von Hirsch, 'Proportionality in the Philosophy of Punishment: From "Why Punish?" to "How Much?"', *Criminal Law Forum*, 1990.

<sup>9</sup> B. Hudson, *Understanding Justice* ([n.p]: Open University Press, 1996).

<sup>10</sup> Desmond Tutu, *No future without forgiveness* (London:1999).

<sup>11</sup> M. And Dignan, J. Cavadino, *The Penal System: An Introduction* (London: Sage Publications, 2002).

Therefore, there have been numerous attempts to combine the assets of both approaches. The authority's response has multiple purposes<sup>12</sup>: the offender receives the punishment he deserves, and some social gain is achieved.<sup>13</sup>

## **1.2   Retribution of international crimes**

Much has been written about the need for International Criminal Justice and the goals it aims to achieve by convicting culprits of genocide, war crimes, and crimes against humanity. Although retribution was not necessarily mentioned in post World War II judgements as a sentencing principle, the punishments imposed for these massive crimes seem to be retributive by their very nature. **(1.2.1)**. However, the actual practice of international tribunals challenges the retributive purpose of sentencing international criminals **(1.2.2)**.

### **1.2.1.     Retribution as a principle of international sentencing**

For Hannah Arendt, mass atrocity calls out for a retributive punishment simply because it constitutes *radical evil* that always deserves sanction.<sup>14</sup> Henham agreed, stating that international tribunals have “the assumed moral right to inflict retributive punishment on those convicted of gross violations of international (...) law,” even though they are created and staffed by persons having nothing to do with the directly afflicted society.<sup>15</sup>

### **Retribution in Post World War II trials**

The Moscow declaration issued by the allies in 1943 promised the punishment of the major Axis war criminals. As a result, two International Military Tribunals, established in Nuremberg and Tokyo in August 1945, tried World War II criminals. It is argued that a review of the case-law of those tribunals would indicate that “the penalties seemed directed at general deterrence and retribution”.<sup>16</sup> However, neither the Charter, nor the political declarations and the judgements of the International Military Tribunals did expressly state the purposes sought in imposing sentences for war crimes or

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<sup>12</sup> Hudson, See supra, note 6.

<sup>13</sup> Von Hirsch, *Doing Justice* (New York: Hill and Wang, 1976), chapter 6.

<sup>14</sup> Hannah Arendt, *Eichmann in Jerusalem* (New York: Viking press Inc., 1963).

<sup>15</sup> Ralph Henham, 'The Philosophical Foundations of International Sentencing', *Journal of International criminal Justice*, 2003.

<sup>16</sup> See ICTY Erdemovic case, 29 November 1996, §59.

crimes against Humanity<sup>17</sup>. It simply expressed the will to punish war criminals. The attention that was paid to sentencing turned mostly on the question of whether the accused sentenced to death should be shot or hanged<sup>18</sup>. A strong retributive aspect deems from this heavy recourse to the death penalty, purportedly imposed in what was considered as the most defamatory way.<sup>19</sup>

In addition, one can assess the insistence upon retribution of domestic courts that tried World War Two perpetrators under the principle of Universal Jurisdiction.<sup>20</sup> The Supreme Court of Israel stated in Eichmann Judgment that “there is no punishment under human law sufficiently grave to match the appellant’s guilt”.<sup>21</sup> Indeed, it is difficult to argue that this trial, like all the late convictions of Nazi criminals, was somehow utilitarian. The pursuit of Adolph Eichmann and other Nazi survivors such as Josef Mengel or more recently Werner C., “in their dotage, tending their rose gardens in South America” was hardly meant to incapacitate or rehabilitate them.<sup>22</sup> Indeed, the political conjuncture – essentially wartime - in which such crimes could be committed was not met anymore at the time of the trials. In addition, any rehabilitation purpose is to be dismissed, insofar as these old men seem to have already succeeded to reintegrate the society. According to Oldenquist, “we would not punish Hitler, Josef Mengele, or a brutal rapist-slayer, primarily in order to rectify their relation to the universe. We would kill or imprison them because of what they did to us, and have no self-respecting alternative.” Such punishment appears to be intrinsically retributive.

### **Retribution at the *ad hoc* tribunals and at the International Criminal Court (ICC)**

In the early 1990’s, *ad hoc* international criminal tribunals were established as a reaction to the ethnic crimes committed in the Former Yugoslavia and in Rwanda. A few years later, the ICC was created. Those tribunals seem to strive a much broader impact on the world community than a mere retributive one. The United Nations resolutions justified adopting the resolutions establishing the *ad hoc* tribunals by the necessity to put an end to these crimes, to emphasize the importance of International Humanitarian Law, and to contribute to the process of national reconciliation and to the restoration and maintenance of peace.<sup>23</sup> Without literally mentioning retribution, the Security Council asserted that it was determined to “bring to justice” the persons who are responsible for the crimes.

<sup>17</sup> See ICTY Erdemovic case, 29 November 1996, §59.

<sup>18</sup> Dirk Van Zyl Smit, 'International Imprisonment', *International and Comparative Law Quarterly*, April 2005, pp. 357-86.

<sup>19</sup> T. Taylor, *The anatomy of the Nuremberg Trials* (London: Bloomsbury, 1993).

<sup>20</sup> Linked to the idea that international crimes affect the international legal order as a whole, the concept of Universal Jurisdiction allows any national court to punish an international criminal regardless of the place of perpetration and the nationality of the suspect and of the victim.

<sup>21</sup> Judgement available at :

[http://www.trial-ch.org/fileadmin/user\\_upload/documents/trialwatch/eichmann\\_appeal.pdf](http://www.trial-ch.org/fileadmin/user_upload/documents/trialwatch/eichmann_appeal.pdf) (accessed on January 25th)

<sup>22</sup> Andrew Oldenquist, 'An Explanation of Retribution', *The Journal of Philosophy*, September 1988, pp. 464-78.

<sup>23</sup> See Security Council resolutions 827 of May 25<sup>th</sup> 1993, 955 of November 8<sup>th</sup> 1994 and 1315 of 14th August 2000.

Likewise, the preamble of the ICC Statute provides that the Court aims at putting “an end to impunity for the perpetrators of these crimes and thus [contributing] to the prevention of such crimes”, but does not refer to individual retribution.<sup>24</sup>

### 1.2.2.      **Retribution in the practice of international tribunals**

International tribunals were created in a time of rather exceptional international conjecture, and responded to a very specific need. Hence, the rules governing their practice sometimes contradict the central elements of retributive justice.

#### **Selection of the perpetrators to be prosecuted**

Retribution stems from a rigid moral order which requires each wrongdoer to receive the punishment proportionate to the crime he or she committed. Yet, international tribunals are not aimed, neither are they able, to bring to justice all international criminals. Only a limited number of conflicts ever become judicialized. As Dianne Amman stated, “a random confluence of political concerns produced *ad hoc* tribunals for just two out of a number of conflicts that warranted such treatment”.<sup>25</sup> Mark Drumbl added that “there is no principled moral basis for judicializing conflicts in Bosnia, but not in Chechnya, Tibet, or Kashmir”.<sup>26</sup> In addition, even within these situations, only “the most responsible for international crimes” are ever prosecuted, and less eventually get punished. As to the precise scope of those individuals who bear the greatest responsibility in the commission of crimes, it is not clearly defined and the decision whether to prosecute a specific individual falls under the prosecutors’ discretion.<sup>27</sup> Yet, several authors highlighted that prosecutors select or reject cases according to reasons unconnected to the culpability, and instead influenced by political consideration.<sup>28</sup> This conjectural and political determination of which individuals are being punished skews the moral order that justifies retribution.

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<sup>24</sup> Preamble of the Rome Statute of 17 July 1998.

<sup>25</sup> Diane Marie Amann, 'Group Mentality, Expressivism, and Genocide', *International Criminal Law Review*, 2002.

<sup>26</sup> Drumbl, Mark. «Collective Violence and individual punishment: the criminality of Mass atrocity.» *NorthWestern Law Review* 2004-2005.

<sup>27</sup> X. Agirre Aranburu, Prosecuting the most Responsible for International Crimes: Dilemmas of Definition and Prosecutorial Discretion, J. Gonzalez (ed.) *Derechos Humanos, Relaciones Internacionales y Globalización*. II Edición (Bogotá: Gustavo Ibáñez Ediciones Jurídicas, 2009)

<sup>28</sup> See for example Hector Olásolo, 'The Prosecutor of The ICC Before the Initiation of Investigations: A Quasi-Judicial or a Political Body?', *International Criminal Law Review*, 2003; Guichaoua, A. (2011). L'instrumentalisation politique de la justice internationale en Afrique Centrale. *Revue Tiers Monde*, pp. 65-83.

### Nature of the punishment and proportionality

Once a case is brought before a court, the crucial question of the proportionality of the sentence arises. Bearing in mind that human rights standards limit the severity of punishment, can the punishment ever be proportionate to the enormous level of wrongdoing and culpability of international crimes and their perpetrators? The crimes are so egregious that according to the proportionality principle the punishment should reach a point of maximal deprivation of rights.<sup>29</sup>

Yet, according to the Statutes of the International Criminal Tribunal for Rwanda (ICTR), International Criminal Tribunal for the former Yugoslavia (ICTY) and Special Court for Sierra Leone (SCSL), the Chamber shall only impose a penalty of imprisonment, which, for the SCSL, has to be determined for a specified number of years.<sup>30</sup> At the ICTY and ICTR affirmed that the fact that under the criminal code of respectively the former Yugoslavia and Rwanda, a crime would have been eligible for death penalty or quite a long-term imprisonment is only indicative for them<sup>31</sup>. The tribunals do not regard themselves bound by such provisions. Consequently, international sanctions tend to be as severe, or even less severe than the punishments for ordinary crimes in many countries.<sup>32</sup> At the *ad hoc* tribunals, only 13% of the culprits were sentenced to life.<sup>33</sup>

As for the ICC, article 77 of the Rome Statute provides that the Court's sentencing is limited to 30 years imprisonment, life imprisonment remaining possible "when justified by the extreme gravity of the crime and the individual circumstances of the convicted person".<sup>34</sup> Moreover, Rule 223 supplements the grounds for further reduction of sentence through possibility of early release. Again, these provisions put quite low threshold to punish the *enemies of all mankind*. The only culprit, Thomas Lubanga, has been convicted of 14 years imprisonment, for the recruitment and use of child soldiers in his rebel army. The absence of significant difference between the severity of sanctions imposed on ordinary and international criminals questions the central issue of proportionality in international sentencing.

Challenging further the proportionality of the sentences is the variability of their length from a case to another, based on consideration external to the crimes challenges the proportionality. As a matter of fact, plea agreements can lead to reduction of sentences in exchange of some "service"

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<sup>29</sup> Stuart Beresford, 'Unshackling the Paper Tiger—the Sentencing Practices of the Ad Hoc International Criminal Tribunals for the Former Yugoslavia and Rwanda', *International Criminal Law Review*, 2001.

<sup>30</sup> Article 23 of ICTR statute, 24 of ICTY's, 19 of SCSL's.

<sup>31</sup> See for example §114 of ICTY Goran Jelusic, 14 December 1999, (Case No. IT-95-10-T), and Jean Paul Akayesu (Case No. ICTR-96-4-T).

<sup>32</sup> Stuart Beresford, 'Unshackling the Paper Tiger—the Sentencing Practices of the Ad Hoc International Criminal Tribunals for the Former Yugoslavia and Rwanda', *International Criminal Law Review*, 2001.

<sup>33</sup> Joris Van Wijk & Barbora Hola, 'Life after Conviction at International Criminal Tribunals - Empirical overview', *Journal of International Criminal Justice*, 2014.

<sup>34</sup> Article 77 of the Rome Statute of July 17th 1998.

rendered by the accused. The penalty has hence little to do with the accused' "just desert" for his crimes. It is rather due to his cooperation with the tribunal.<sup>35</sup> In addition, imprisonment's regime and especially the possibility of early release are determined by the criminal law system of country that agreed to host the international prisoner for the time of its sentence. Hence, there is a risk of certain prisoners benefiting from a more lenient early release regime and having their sentence significantly reduced as opposed to others who don't. Mark Drumbl stressed that "an institutional policy that punishes perpetrators to different degrees based on extraneous contingencies may fracture the deontological basis of retribution".

Thirdly, the proportionality of the sentence is not only defined by the number of years of imprisonment decided by the judge. The severity of the punishment also depends on how each prisoner experiences its sentence, which is indeed impacted by imprisonment conditions. Yet, those greatly differ from a country to another. As a matter of fact, a thirty years imprisonment sentence is not equally punitive whether served in a Malian or in a Swedish prison. Insofar as the imprisonment of an international culprit has to respect high human rights standards, the people convicted by international courts are provided with advantageous prison conditions. Remarkably enough, those who are serving their sentence in Africa are detained in wings of prisons specially arranged for the purpose of hosting international prisoners, and where they are provided much better conditions than common criminals. Biljana Plavšić, convicted by the ICTY to 11 years in prison was sent to serve her term in a wealthy Swedish prison that reportedly provides prisoners with use of a "sauna, solarium, massage room, and horse-riding paddock".<sup>36</sup> In any case, all detainees don't benefit from such advantageous conditions. The hard treatment inflicted by the punishment is substantially different from an international criminal to another, which flaws the scale of proportional sentences.

Nevertheless, as will be examined in the second part of this work, judges at international tribunals regularly stressed the importance of retribution in their sentencing.

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<sup>35</sup> As an example, although Stevan Todorovic's crimes were « extremely grave » said the Court, he only received a sentence of 10 years because a plea agreement resulted in the withdrawing twenty-six of the twenty-seven counts against him because he accepted to drop his charge against the SFOR which unlawfully arrested him.

<sup>36</sup> Nancy Amoury Combs, 'International Decisions', *American Journal of International law*, 2003.



## 2. Retribution in ICTY, ICTR, and SCSL sentencing judgements

### 2.1 Mention of retribution as a sentencing goal

Although some ICTY, ICTR, and SCSL judgements did not refer at all to sentencing principles, their vast majority addressed them and repeatedly referred to retribution (see figure hereinafter). Without establishing a clear hierarchy among the different sentencing goals, judges at the ICTY and SCSL often see retribution as one of the “main”, “most important” or “primary” sentencing principles, along with deterrence.

	Number of accused judged by the trial chamber	Number of cases referring to retribution	Retribution mentioned as one of the <i>main</i> or of the <i>most important</i> sentencing principles
<b>ICTY</b>	91	75 (82,4 %)	55 (73,3%)
<b>ICTR</b>	61	44 (72,1 %)	5 (11,4%)
<b>SCSL</b>	9	8 (88,9%)	8 (100%)
<b>All tribunals</b>	161	127 (78,9%)	68 (53,5%)

*Figure 1:* Retribution mentioned as a sentencing principle

### 2.2 Judges' conceptualization of retribution

#### At the ICTY

The judges at the ICTY are quite extensive when defining and developing the concept of retribution as a sentencing principle.

As displayed in the above table, retribution is widely mentioned as an important consideration to be borne in mind when determining the sentence. Retribution is said relevant “despite the primitive ring that is sometimes associated with it”<sup>37</sup> because inherited of the theory of revenge<sup>38</sup>. Nevertheless, retribution should not be considered as the only sentencing factor. Delalic judgement considers that reducing the sentencing purposes to only retribution is “likely to be counter-productive and disruptive

<sup>37</sup> ICTY Kupreskic, 14 January 2000, § 448;

<sup>38</sup> ICTY Delalic 16 November 1998, §1231

of the entire purpose of the Security Council, which is the restoration and maintenance of peace in the territory of the former Yugoslavia. Retributive punishment by itself does not bring justice”<sup>39</sup>.

Judges equate retribution to the “*just desert*, as attenuated in the contemporary version by the principle that punishment shall be proportionate to the crime’s gravity and the moral guilt of the perpetrator”<sup>40</sup>. The gravity of the crimes is the “cardinal feature<sup>41</sup>” or the “overriding obligation<sup>42</sup>” in sentencing. The idea of the proportionality of the sentence is hence quite recurrent (31% of the cases mentioning retribution). It entails a “fair and balanced approach to the punishment of wrongdoing”<sup>43</sup>, and should not be more than “a reasoned and measured determination of an appropriate punishment<sup>44</sup>”. More specifically, “unlike vengeance, retribution incorporates a principle of restraint” and “a sentence must not be capricious or excessive<sup>45</sup>”. In addition, “it should not be out of reasonable proportion with a line of sentences passed in similar circumstances for similar offences”<sup>46</sup>.

### At the ICTR

The ICTR’s judges are not very elaborate in defining retribution. Only six cases mention it succinctly, five of them simply providing that “the penalties must be directed at retribution of accused persons who must see their crimes punished”<sup>47</sup>. The Rutaganira case defines retribution as “the expression of the social disapproval attached to a criminal act and to its perpetrator and demands punishment for the latter for what he has done”<sup>48</sup>.

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<sup>39</sup> ICTY Delalic 16 November 1998, §1231; ICTY Dusko Tadic, 11 November 1999, §7.

<sup>40</sup> ICTY Drazen Erdemovic, 29 November 1996, §60.

<sup>41</sup> ICTY Biljana Plavsic, 27th February 2003 § 25.

<sup>42</sup> ICTY Predrag Banovic, 28th October 2003, §36.

<sup>43</sup> ICTY Stevan Todorovic, 1st July 2001, §29; ICTY Biljana Plavsic, 27 February 2003, §23; ICTY Radoslav Brdanin (Case No. IT-99-36-T) §2693.

<sup>44</sup> ICTY Dario Kordic and Mario Cerkez, §1075; ICTY Dragan Nikolic, 18 December 2003, §140; ICTY Miroslav Deronjic, Case No. IT-02-61-S §150; ICTY Radoslav Brdanin Case No. IT-99-36-T, §1090; ICTY Ljubomir Boovcanin, Radivoje Miletic, Milan Gvero, Vinko Pandurevic, Vujadin Popovic, Ljubisa Beara, Drago Nikolic Case No. IT-05-88-T, §2128; ICTY Dragoljub Ojdanic (codefendants: Milan Milutinovic, Nikola Sainovic, Nebojsa Pavkovic, Vladimir Lazarevic, and Sreten Lukic) Case No: IT-05-87-T.

<sup>45</sup> ICTY Tarculovski, Case No. IT-04-82-T, §2071; ICTY Vlastimir Dordevic, Case No.: IT-05-87/1-T 23, §2204.

<sup>46</sup> ICTY Vlastimir Dordevic, Case No.: IT-05-87/1-T 23, §2204; Johan Tarculovski, Case No. IT-04-82-T, §587;

<sup>47</sup> See ICTR Jean Kambanda, case No ICTR-97-23-S, §28 ; Jean Paul Akayesu, Case No. ICTR-96-4-T ; ICTR Omar Serushago, Case No: 98-394, §20; ICTR Georges Rutaganira, Case No: ICTR-96-3-7, §456; Alfred Musema, Case No. ICTR 96-13-T, §986, ICTR Vincent Rutaganira, Case No: ICTR-95-1C-T, § 108.

<sup>48</sup> ICTR Vincent Rutaganira, Case No: ICTR-95-1C-T, § 108.

A few judgements also emphasize the need for a sentence to be “proportional to the gravity of the crime and the degree of responsibility of the offender”<sup>49</sup>. Twelve cases<sup>50</sup> - 27% of the judgements mentioning retribution - highlight the importance of the principle of gradation in sentencing which enables the Tribunal “to distinguish between crimes, based on their gravity”<sup>51</sup>. Thus, “the more heinous the crime, the heavier the sentence will be”<sup>52</sup>. Karera case adds that the punishment should “correspond to the overall magnitude [of the crimes] and reflects the extent of suffering inflicted upon the victims”<sup>53</sup>.

### **At the SCSL**

As displayed in the previous table, almost all the SCSL judgements mention retribution as one of the most important sentencing principles. SCSL judges recall the previous definitions provided by International Tribunals, and summarized it. For example, Charles Taylor’s judgement explains that retribution “is meant to reflect a fair and balanced approach to punishment for wrongdoing. The penalty imposed must be proportionate to the wrongdoing. In other words, the punishment must fit the crime”<sup>54</sup>.

### **Retribution and “stigmatization”**

Remarkably enough, a rather innovative element is regularly linked to retribution in the international tribunals judgments. The concept of *stigmatization* arises mostly from ICTY and SCSL’s decisions (see table hereinafter). Many judges refer to the need for retribution, in order to express the international community’s “outrage against the serious violations of human rights”. They tie the retribution to a distinct consequential good, which is the “[conveying of] the indignation of humanity”<sup>55</sup>. Judges stress the “fundamental” character of the value infringed by the criminal conduct

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<sup>49</sup> ICTR Gerard Ntakirutimana & Elizaphan Ntakirutimana (Case No: ICTR-96-10 & ICTR 96-17-T) §773; Joseph Serugendo (Case No:ICTR-2005-84-I) §38 and 39; ICTR Nahimana, Barayagwiza, Ngeze (ICTR-99-52-T), 3 December 2003, §1097.

<sup>50</sup> ICTR Gerard Ntakirutimana & Elizaphan Ntakirutimana (Case No: ICTR-96-10 & ICTR 96-17-T §773); Emanuel Ndindabahizi (Case No: ICTR-2001-71-I) §500; Mikaeli Muhimana (Case No. ICTR-95-1B-A) §500; Samuel Imanishimwe, André Ntagerura, Emmanuel Bagambiki, (Case No: ICTR 99-46-T) §815; ICTR Nahimana, Barayagwiza, Ngeze (ICTR-99-52-T), 3 December 2003, §1097; ICTR Karera (ICTR-01-74-T),7 December 2007, §572 ; Muvunyi (ICTR-2000-55A-T), 12 September 2006, §532.

<sup>51</sup> ICTR Nahimana, Barayagwiza, Ngeze (ICTR-99-52-T) 3 December 2003, §1097; Samuel Imanishimwe, André Ntagerura, Emmanuel Bagambiki, (Case No:ICTR 99-46-T) §815.

<sup>52</sup> Mikaeli Muhimana, (Case No. ICTR-95-1B-A) §591.

<sup>53</sup> Karera (ICTR-01-74-T), 7 December 2007, §572.

<sup>54</sup> SCSL Charles Taylor (Case No: SCSL-03-01-T) §13.

<sup>55</sup> ICTY Ranko Cestic, 11 march 2004, §23.

“not merely to a given society, but to humanity as a whole”. Hence, the “public reprobation [is] one of the essential functions of a prison sentence<sup>56</sup>”.

	Cases mentioning retribution	Cases referring to expressivism or stigmatisation
<b>ICTY</b>	75	47 (62,7%)
<b>ICTR</b>	44	6 (13,6%)
<b>SCSL</b>	8	8 (100%)
<b>All judgments</b>	127	61 (48%)

*Figure 2: Stigmatisation mentioned as a sentencing principle*

Stigmatisation seems to be a rather utilitarian purpose of the retributive punishment. Kordic’s judgement states that stigmatisation “refers to the educational function of a sentence. (...) The sentence seeks to internalise these rules and the moral demands they are based on in the minds of the public<sup>57</sup>”. This would “create trust in and respect for the developing system of international criminal justice<sup>58</sup>”, making it “abundantly clear that the international legal system is implemented and enforced<sup>59</sup>”.

Judges in the Furundzija case affirm that they bear the responsibility, “because of their international stature, moral authority, and impact upon world public opinion<sup>60</sup>”, to affirm the importance of the impassable limits imposed by human rights. Their punishment therefore “stigmatizes those crimes at a level that corresponds to their overall magnitude and reflects the extent of the suffering inflicted upon the victims<sup>61</sup>”. Thereby, they give a certain outreach to international criminal and humanitarian law.

<sup>56</sup> ICTY, Drazen Erdemovic, 29 November 1996, §64 and §65.

<sup>57</sup> ICTY, Dario Kordic and Mario Cerkez, 17 december 2004, §1080.

<sup>58</sup> ICTY, Zoran Kupreskic, Mirjan Kupreskic, Vlatko Kupreskic, Drago Josipovic, Dragan Papic, Vladimir Santic, 14 January 2000, §848.

<sup>59</sup> ICTY, Dario Kordic and Mario Cerkez, 17 december 2004, §1080.

<sup>60</sup> ICTY, Anto Furundzija, 10 December 1998, § 290.

<sup>61</sup> ICTR, Gerard Ntakirutimana & Elizaphan Ntakirutimana (Case No: ICTR-96-10 & ICTR 96-17-T) §773

### 3. **Reflection**

#### **Stigmatisation vs. individualization of guilt**

International judges significantly emphasized the need for “stigmatisation”, which requires the punishment to express the indignation of the international community over heinous crimes, and to convey moral values. The adjunction of this new element to retribution challenges its classical definition, since retribution originally focuses on the perpetrator’s crime in itself, irrespective of the possible future benefits of punishment. Such consequential definition stems from the nature of international crimes, and may be better adapted to international sentencing. It can however be criticized, especially with respect to the accused’s rights. Indeed, a sentence should be aimed at convicting an offender for the crimes he committed, and only for them. This need for stigmatization leads to an instrumentalization of the accused in order to strengthen the rule of law and express the outrage of the international community. This was precisely one of the major criticism made by Hannah Arendt concerning the Eichmann’s trial: Judges seemed to be looking for achieving a symbolical condemnation of the whole Holocaust, not only of the accused according to the provided material evidence.<sup>62</sup>

#### **Human rights vs. Retribution**

As detailed earlier, the severity of the punishment is a central consideration in assessing the proportionality of a sentence, and thus its retributive purpose. However, the human rights of the accused set a limit to the harshness of the penalty he can receive. International criminal justice system is particularly vigilant to protect the offender’s rights while determining both the sentence and its conditions of enforcement. To the average citizen therefore, international sentencing is seemingly highly lenient since convicts are provided particularly good treatment while imprisoned, despite being branded as “enemies of all mankind”.

Nevertheless, one should not ignore the fact that human rights are meant to put an elementary human limit to punishment. This impassable threshold is not meant to impede the retributive purpose of the sentence, which only has to fit within an acceptable scale of severity. Imprisonment remains a hard penalty, a complete removal of the right to individual liberty. In the international sentencing context, it is however quite difficult for society to perceive that the actual “leniency” of international tribunals stems from a broader goal of raising the threshold of human rights, as opposed to being aimed at reducing their retributive sentencing purpose.

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<sup>62</sup> Hannah Arendt, *Eichmann in Jerusalem* (New York: Viking press Inc., 1963).

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