SOME ISSUES FOR SENTENCING IN THE INTERNATIONAL CRIMINAL COURT

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I. INTRODUCTION

The purpose of this paper is to raise several significant issues for debate which concern the sentencing of offenders to be convicted in the newly established International Criminal Court (ICC). Such has been the impact of the terrorist attacks in New York and Washington that they have thrown into sharp focus critical deficiencies in the purpose, coherence and practical mechanisms developed for sentencing in the ICC.[1] Not only did such events suggest a greater immediacy for the ICC, but also, more significantly, a realisation that crimes of this magnitude, loaded with so many ideological and political interests and crying out for a 'just' resolution, place the role of the international sentencer at the forefront of the debate.

More particularly, they force us to re-examine questions which relate to the penality of international trial process (such as the limits of retribution and vengeance), the construction of criminality and the impact of globalised systems of punishment on regional and domestic criminal justice process and policy. The latter may be expected both to reflect and influence the transformation or fragmentation of internationalised trial process.

In this paper I wish to suggest that a recognition of these weaknesses becomes crucial if we are to prevent sentencing in the ICC from becoming part

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[1] The Rome Statute establishing the ICC came into force on July 1 2002. There is a paucity of substantive analyses which evaluate the implications for international criminal justice theory and policy of sentencing in the proposed ICC . For a general overview, see WA Schabas, *An Introduction to the International Criminal Court* (Cambridge: Cambridge University Press, 2001), ch 7.

Note that the jurisdiction of the ICC is limited to 'the most serious crimes of international concern'; 'the most serious crimes of concern to the international community as a whole' (Preamble, Arts 1 and 5.1 of the ICC Statute); it does not extend (*inter alia*) to terrorism. The main reason for its exclusion has been the fear of politicisation of the ICC, particularly on the part of Arab States, such that no generally acceptable definition of 'terrorism' has been forthcoming, although general agreement exists regarding the legality of prosecuting states which aid or sponsor state terrorism (see further, K Kittichaisaree, *International Criminal Law* (Oxford: Oxford University Press, 2001), 227. However, informed opinion suggests that the organisers and perpetrators of the 11 September civilian aircraft highjackings and the subsequent crashing of these aircraft into buildings occupied by thousands of innocent civilians amounted to the commission of 'crimes against humanity' within the meaning of Art 7 of the ICC Statute; I Dennis, 'The International Criminal Court Act' [2001] CLR 767, and see generally, Kittichaisaree, op cit, ch 5.

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of the unaccountable apparatus of inter-state oppression where offenders and victims rights are subsumed to wider state interests. What provokes a consideration of these pressures is that it is in the context of international courts, judges, and trials that the guarantees provided by the separation of powers for democracy appear at their weakest. These are reflected in the problems of asserting the independence of the international judiciary experienced in the war crimes tribunals,[2] and the paradox of the international rights paradigm of fair trial.

The *locus* of the international trial may in the future provide the forum for global acts of retribution and vengeance on an unprecedented scale, or may become a distortion of the role of penality, the courts, sentencing and justice for ends which have either been submerged in criminal justice, or not previously recognised (ie, political domination, waging war). This in turn will infiltrate the principles and expectations for sentencing in other settings, and return penality to the stage where it was the crude province of the state and the judge as its representative.

The significance of international trial process as symbolic of hegemonic power, authority and control cannot be overemphasised. Although the trial's existence at the global level may argue for the unity and generalisation of justice,[3] it may also provide the interactive context for the disempowerment and marginalisation of social, political, and economic minorities.[4] In this context the historical development of the ICC as a 'world' body dealing with 'global' crimes might be contrasted with the selective opposition to the court voiced in specific terms of national interest.[5] Ultimately, it may legitimately be asked, who are the court and its judges expected to represent?

The analysis that follows examines the position of sentencing and the ICC from the following perspectives:

- Penality—the substantive irrationality and absence of penological justification for sentencing praxis. In this sense the paper seeks to expose out of the lack of substance, the underdeveloped and conflicting penal justifications and the irrationality of praxis in an international setting, rather than the conventional contradictions behind sentencing principles.

[2] In the sentencing context this was exacerbated by the absence of any coherent sentencing guidance following Nuremberg,Tokyo and the other post-Second World War tribunals which preceded the ICTY and ICTR, or the provision of any separate context for sentence decision-making.

[3] See, R Henham and M Findlay 'Theorising the Contextual Analysis of Trial Process' (in press). The extent to which the theory and practice of penal sanctioning is reflected in procedural synthesis at the international level is a major policy purpose of the International and Comparative Criminal Trial Project located within the Centre for Legal Research, Nottingham Law School.

[4] As Mathiesen suggests, imprisonment within advanced capitalist societies may serve expurgatory, symbolic and diversionary functions; T Mathiesen, *Prison on Trial* (London: Sage, 1990).

[5] More specifically, the opposition of the United States. For comment, see TC Evered, 'An International Criminal Court: Recent Proposals and American Concerns (1994) 6 *Pace International Law Review* 121; D McGoldrick, 'The Permanent International Criminal Court: An End to the Culture of Impunity' [1999] CLR 627, 644.

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- Trial process—the contexts of sentence determination and delivery.
- Access to justice and fair trial—the relationship between state interests and offenders and victim's rights from the perspective of humanitarian law.[6] Although given a much sharper focus by the well-developed and prevailing rights paradigms for international justice, the designation and substantive form of rights within the ICC trial process remains conjectural.
- Internationalisation—the impact on regional and domestic sentencing regimes of institutionalised global sentencing practice.[7] If the fundamental normative and ideological underpinnings of judicial practice are compromised or denied in the ICC setting, then arguably judicial professionalism must be reshaped and a new acceptance of penality in the trial setting allowed for.

Additionally, the discussion is couched in the wider context of some important questions concerning the relevance and future direction of criminal justice theory and its ability to anticipate or conceptualise internationalised sentencing praxis. More specifically, it develops some earlier arguments which suggest that internationalised procedural fairness paradigms are inadequately theorised, particularly as they relate to the role and outcome of sentencing.[8] The practical implications of this theoretical *lacuna* and its implicit distortion of conventional models are pertinent in that rights law can be seen as instrumental in sustaining the boundaries of permissible international and national state action against citizens. Given that the process of the ICC's formulation tends to suggest that it's sentencing function will be infected by state and regional interests, it becomes crucial to consider how this tendency might be resisted both normatively and practically.

It may be argued that the functional significance of such legal codes is considerable if we are to accept the Durkheimian notion that the function of punishment (as expressed in sentencing law and practice) is to reflect and reaffirm society's moral opprobrium. Despite the known weaknesses of Durkheim's position[9] and, in particular, his failure to theorise notions of

[6] More particularly, the European Court of Human Rights and the International Covenant on Civil and Political Rights. For discussion of how the former might provide a context for internationalised procedural synthesis through expansion of the notion of fair trial, see M Findlay 'Synthesis in Trial Procedures?: The Experience of International Tribunals' (2001) 50 *ICLQ* 26.

[7] In this the paper seeks to further the substantive objectives of the International Criminal Trial Project, op cit, n 3, by examining contexts which reflect on the contribution of civil law and common law process styles to the operation and development of international criminal trial procedure and, correspondingly, the downward influence of internationalisation on local jurisdictions. For an illustration of the issues involved in the context of the impact of European Community Law on domestic criminal justice systems, see E Baker, 'Taking European Criminal Law Seriously' [1998] CLR 361; E Baker 'The Impact of EC Law on Sentencing' Paper presented to the Sentencing and Society International Conference, University of Strathclyde, June 1999.

[8] See, in particular, R Henham 'Sentencing Theory, Proportionality and Pragmatism' (2000) 28 *International Journal of the Sociology of Law* 239; R Henham 'Theory and Contextual Analysis in Sentencing' (2001) 29 *International Journal of the Sociology of Law* 253.

[9] See further, D Garland, *Punishment and Modern Society* (Oxford: Clarendon Press, 1990).

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hegemony and inequality in social position, Cotterrell has argued that the strength in Durkheim's approach lies in his exhortation that law must be viewed in terms of its actual or potential moral worth.[10] Indeed, Cotterrell suggests that, far from ignoring questions about power and social control, Durkheim equates power with legitimate authority, a legitimation derived from an expressed moral consensus in society.[11] It is, therefore, important to recognise that the normative significance of internationalised legal rules and processes as representing a form of moral legitimacy is derived through the recursive exercise of judicial and state power in institutions such as the ICC.

Hence, discretionary sentence decision-making in the ICC represents judicial signification and justification of legal rules as morally appropriate, since sentencers effectively operationalise policy justified principles of punishment by transforming law into appropriate sanctions through the international penal process.[12] This leads us to consider the boundaries of judicial discretion and the extent to which conventional sentencing discretion is fettered in the context of the ICC. It also provides an opportunity to examine the implications for realising (or frustrating) a credible and convincing theory of international sentencing and punishment which recognises the political and ideological interests at work on the court and its judges (and the reasons for their existence).

The significance of this debate is not, therefore, just at the level of substantive law, legal sociology or the sociological analysis of judicial decision-making. Discussion of the principles of punishment and any associated theory of sentencing must, proceed at the levels of politics, ideology, symbolism, compromise, and accommodation. My argument is that the contextual analysis of sentencing and the ICC and the development and implementation of future policy demand a multi-levelled description and evaluation of *process*.[13] For this we must acknowledge, nurture and extend (but not ignore) our appreciation of theoretical insights which facilitate understandings of key procedural components within the international criminal justice process and their significance, at both the local and global level.[14] In this context the organisational history of the ICC is significant in introducing the present climate of immediacy, and the consequential urgency to address the need for a theory of international sentencing as ICC judges are called upon to punish.

[10] R Cotterrell, *Émile Durkheim: Law in a Moral Domain* (Edinburgh: Edinburgh University Press, 1999), 199. For further exploration of this theme in the context of sentencing see, Henham, op cit, n 8.

[11] Ibid, 205.

[12] Garland's (op cit, n 9) insistence on the nature of punishment as process is also relevant here. The international criminal trial and its verdict is a ceremony and the sentence is a balance to justice and a justification of a just cause delivered by the judge as controller of the ceremony.

[13] This process being international sentencing and its place in the imposition of punishment at the core of international criminal justice.

[14] M Findlay, *The Globalisation of Crime* (Cambridge: Cambridge University Press, 1999), vii.

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II. PURPOSES AND PRINCIPLES OF PUNISHMENT

The Rome Statute of the International Criminal Court is virtually silent regarding the purposes and principles which should inform the sentencing of offenders convicted before the ICC. As Schabas suggests,[15] this is largely due to the absence of any substantive debate on the subject at the Rome Conference in 1998. The discussions were instead dominated by the debate about capital punishment, and whilst the ultimate decision to exclude the death penalty from the sentences available to the ICC can no doubt be justly hailed as a humanitarian victory, the failure to establish which objectives and principles should characterise the penality[16] of the ICC constitutes a significant omission.[17]

It may be argued that the forum of the ICC should exist as public ceremony to give substance and form to previously articulated penal purposes. Instead, these purposes remain largely implicit to be discerned from statements previously made at the Nuremberg and Tokyo war crimes tribunals which suggest that retribution[18] should be the main objective of

[15] Op cit, n 1, 140.

[16] 'Penality' is here used in the sense proposed by Garland (op cit, n 9, 17) to refer to 'the networks of laws, processes, discourses, representations and institutions which make up the penal realm'. Because it occurs outside national contexts, international trial process alters or distorts the central objectives of trial process. The central objective may be retribution or deterrence, or pedagogical performance, national reconciliation, or exculpation; see further, J Alvarez, 'Rush to Closure: Lessons of the Tadic judgement' (1998) 96 *Michigan Law Review* 2031; T Howland and W Calathes, 'The UN's International Criminal Tribunal, is it justice or jingoism for Rwanda? A call for transformation' (1998) 39 *Virginia Journal of International* Law 135. For an excellent discussion of life imprisonment as an aspect of the penality of international law see, D van Zyl Smit, 'Life Imprisonment as an Ultimate Penalty in International Law: A Human Rights Perspective'(1999) 10 *Criminal Law Forum* 1. In this context it is significant that the death penalty was excluded in the case of the ICTR despite the fact that the Rwandese government wished to retain it for persons convicted of crimes of similar magnitude.

[17] See further, C Hall, 'The Fifth Session of the UN Preparatory Committee on the Establishment of an International Criminal Court' (1998) 92 *American Journal of International Law* 331. Similarly, both the Statutes of the International Criminal Tribunal for the Former Yugoslavia (IC TY) and the International Criminal Tribunal for Rwanda (ICTR) fail to allude to the objectives of sentencing, or the principles of punishment to be adopted by judges in sentencing; see W Schabas 'Sentencing and the International Tribunals: For a Human Rights Approach' (1997) 7 *Duke Journal of International and Comparative Law* 461; internet version cited at <http://www.law.duke.edu/journals/djcil/articles/djcil7p461.htm>, 19; N Grosselfinger, 'Sentencing in the International Court' Paper presented at the American Society of Criminology, Annual Meeting, Washington DC, Nov 1998. Only the ICTR mandate includes a reference to the need to contribute to 'national reconciliation' in its Preamble. The ICTY was established by United Nations Security Council Resolution 827 of 25 May 1993, UN Doc.S/RES/827. The ICTR was established by United Nations Security Council Resolution 955 of 8 Nov 1994, UN Doc. S/RES/955.

[18] Here 'retribution' is used in the wider sense of requiring that the offender should be made to atone for his crime by suffering. Support for the view that the context of the *ad hoc* tribunals is vindication and western exculpation derives from their primacy over national jurisdictions, subordination of the tribunals' jurisdictions through case selection and other Security Council pressure (see, MC Bassiouni and P Manakas, *The Law of the International Criminal Tribunal of the Former Yugoslavia* (Irvington-on Hudson, NY: Transnational Publishers Inc, 1996), 228–31) and the limited resources provided to the tribunals (see, D Forsythe, 'Politics and the International Tribunal for the Former Yugoslavia' (1994) 5 *Criminal Law Forum* 401).

such prosecutions.[19] As a moral position the desire for retribution is justified by a need to re-assert the fundamental virtues of humanity as represented by the international community and democratic principles of justice.[20] Nevertheless, the morality of retribution itself is questioned without the concomitant requirements of consistency and a rationale which determines how the severity of sentence should relate to the harm sustained by the offending behaviour. In this, the absence of any meaningful discussion of penal purpose in the establishment or foundation documents of the ICC undermines its legitimacy as a mechanism which can deliver democratic principles of justice.[21] It, therefore, renders meaningless assertions, such as those expressed in the following extract from the ICTY's judgment in *Furundzija*.[22]

> It is the infallibility of punishment, rather than the severity of the sanction, which is the tool for retribution, stigmatisation, and deterrence. This is particularly the case for the International Tribunal; penalties are made more onerous by its international stature, moral authority and impact upon world public opinion, and this punitive effect must be borne in mind when assessing the suitable length of sentence.

Such obfuscation of purpose is compounded by the rhetoric of moral justification expressed by the tribunal, and the implication that the ICTY (or any other such international forum) might be in a position to turn these sentiments into a fully articulated penality of proportionate retribution. Furthermore, the relativity of concepts such as justice and penality is ignored, it being assumed that these are synonymous for both the ICC and international trial justice. This threatens the implicit presumption that ICC justice and penality could be regarded in any international sense as democratic and, thus, the legitimate manifestation of a global moral consensus.

Notwithstanding, I suggest that the insights of liberal thinkers of the Enlightenment period such as Beccaria[23] are surely significant in this context. Faced with the unimaginable horrors of the *ancien regime* the liberal theory of criminal law espoused a doctrine that (although ignoring power and social inequality) emphasised individual rights and principles of equality before law to provide essential safeguards against the tyranny of social and political inequality. Significantly, the individual's relationship with the state was redefined so that the administration of justice was seen to embody and reflect principles of clarity and certainty which saw the moral justification for the

[19] See LS Wexler, 'The Proposed Permanent International Criminal Court: An Appraisal' (1996) 29 *Cornell International Law Journal* 665; Schabas, op cit, n 17.

[20] The associated desire for revenge or vengeance being regarded as a negation of such principles; see *Prosecutor v Delalic et al* (Case No. IT-96–21-T), Judgment, 16 Nov 1998, para 1231. ('*Celebici*' case).

[21] The expression 'democratic' is used deliberately to imply the need for principles that sustain and protect individual liberty against the incursions of state or interstate power.

[22] *Prosecutor v Furundzija* (Case No IT-95–17/1-T), Judgment, 10 Dec 1998, para 290.

[23] C Beccaria, *Dei Delitti e delle Pene* (1764).

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criminal law as emanating from the needs of a particular society.[24] In other words, specific guarantees in addition to (and supporting) declarations of intent or moral purpose were required in order to legitimate penality. I would argue that these postulates are equally pertinent in the contemporary contexts of international criminal law and, although reflected in certain principles of international humanitarian law, require to be mirrored and fully articulated in the statutes and procedural rules of the ICC (and similar international fora). As Kittichaisaree[25] suggests, international criminal law has evolved in order to reflect the moral judgments of the community of nations which, in the case of the Nuremberg and Tokyo tribunals consisted largely in the enforcement of victor's justice reflecting principles of communal vengeance rather than deterrence. It is this connection between retribution and international justice that has motivated and legitimated current mechanisms for international criminal trial.

As I have contended, the absence of penological justifications in the foundation documentation and Statute of the ICC weakens its claims to provide a rational foundation for the exercise of democratic principles of criminal justice. Yet this deficiency is further compounded by confusion relating to the possible ambit and meaning accorded to penal justifications in the proceedings and practice of the ad hoc Tribunals and, therefore, liable to be reflected in the position of the ICC in relation to such matters. A clear example concerns the role of deterrence, which has frequently been cited as a penal justification by both the ICTY and the ICTR. For instance, as Morris and Scharf point out,[26] one of the five enumerated goals of the ICTY was explicitly to deter future violations of international criminal law. Indeed, in *Erdemovic*,[27] the Trial Chamber of the ICTY discussed (*inter alia*) the objective of deterrence in the context of the United Nations Security Council's overriding concern to maintain peace and security in the former Yugoslavia. In so doing, it drew clear distinctions between 'general prevention (or deterrence), reprobation, retribution (or 'just deserts'), as well as collective reconciliation',[28] suggesting that these purposes would provide guidance in determining the appropriate punishment for a crime against humanity. Yet, no attempt was made to define these purposes, or explore their meaning in the trial context. Still less was there any suggestion of exactly how purposes might be linked to guidance in determining punishment.

[24] For comprehensive analysis, see L Radzinowicz, *Ideology and Crime* (London: Heinemann, 1966), ch 1. As van Zyl Smit (op cit, n 16, 27) points out, Beccaria argued that sentence severity should be predetermined, proportionate to the crime and sufficient to meet the minimum requirements of deterrence.

[25] Op cit, n 1.

[26] V Morris and M Scharf , *An Insider's Guide to the International Criminal Tribunal for the Former Yugoslavia* (Irvington-on-Hudson, NY: Transnational Publishers Inc, 1995), 334. See particularly on the limited usefulness of deterrence, J Braithwaite, 'On Speaking Softly and Carrying Big Sticks: Neglected Dimensions of a Republican Separation of Powers' (1997) 47 *University of Toronto Law Journal* 305.

[27] *Prosecutor v Erdemovic* (Case No IT-96–22-T), Sentencing Judgment, 29 Nov 1996.

[28] Ibid, para 58.

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Further instances of such inconsistency revealing an absence of applied principles are common. For example, in *Rutaganda*[29] the ICTR stated that there was a clear dichotomy between retribution and deterrence suggesting that the former objective should be subsumed to the overwhelming need to 'dissuade for good, others who may be tempted in the future to perpetrate such atrocities by showing them that the international community shall not tolerate the serious violations of international humanitarian law and human rights'. But how might deterrence achieve its end; indeed, what evidence exists to suggest that deterrence has any impact whatsoever as a consideration in the motivation of such offences?[30] Similarly, in *Tadic*[31] the ICTY gave equal emphasis to retribution and deterrence, but went on to suggest that incapacitation of the dangerous and rehabilitation were also desirable objectives, implying that the latter promoted the 'modern philosophy of penology that the punishment should fit the offender and not merely the crime'.[32] Again, no consideration was given to balancing or defining these objectives in the context of the demands for collective retribution personified by state interests and the adopted common law tradition which favours the individualisation of sentences.

In addition, the failure of the international tribunals either to satisfactorily define or draw a considered distinction between retribution and deterrence has concealed a fundamental misconception. This concerns the tendency to regard the overriding deterrent purpose of international punishment as somehow distinct from that of reprobation or denunciation.[33] Alternatively, the latter may be considered to be an implicit purpose of deterrence. However, I would suggest that the relative purpose of denunciation must be deconstructed to reveal why and to whom it is being directed before any such assumptions can be made. If denunciation exists in order to demonstrate abhorrence or disapproval it must seek to do so through punishment—the public manifestation of a view that regards the activity in question as incompatible with civilised human conduct. Consequently, it must be declared through the punishment process and the way in which it is to be delivered made explicit in an expression of purpose, be it retribution or deterrence. However, denunciation may be regarded as equally appropriate for other cogent reasons; for example, to re-enforce the collective conscience of a society or social group in the Durkheimian sense, or where it is considered as essentially justified for its own sake—as exemplified by nineteenth-century penality. However, it is apparent that the overriding sentiment of punishment in the international arena consists of revenge and retribution tempered by poorly articulated allusions to deterrence (and occasionally rehabilitation and reconciliation). As Schabas suggests:[34]

[29] *Prosecutor v Rutaganda* (Case No ICTR- 96–3), Judgment and Sentence, 2 Feb 1999.

[30] Surely, the advent of suicide terrorism is manifest proof of the irrelevance of deterrence in the present context.

[31] *Prosecutor v Tadic* (Case No IT-94–1-S), Sentencing Judgment, 14 July 1997.

[32] Ibid, para 61.

[33] Op cit, n 28.

[34] 1997, op cit, n 17, 21.

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> What is desired is a judgment, a declaration by society, and the identification and stigmatisation of the perpetrator.

Yet, as acknowledged by the ICTY in *Celebici*,[35] retribution and international justice may be irreconcilable aims.

If retribution and denunciation direct the so-called search for 'truth' as the dominant forces that drive the international trial process, then it is unsurprising that the trial as symbolism predominates in trial interaction. This may question whether the search for truth and the imposition of punishment as competing objectives is consistent with a more civil professional judicial role. Where sentences fall short of retributive expectations they may be rationalised in terms of rehabilitation and reconciliation.[36] But, such penal objectives are treated as subsidiary rationales, whilst the international tribunals continue to function on the basis that retributive punishment exercised in a manner consistent with a fundamentally just moral purpose leads inexorably to reconciliation. However, where is the evidence for such linkage, and to what extent are rehabilitation and reconciliation regarded as relevant imperatives for international penal praxis?

To deal first with the latter question. Rehabilitation has not been considered significant in so far as the *ad hoc* tribunals have failed to articulate the need for retributive punishment to comply with human rights norms.[37] Neither is it mentioned in the ICC Statute.[38] Indeed, the theoretical discussion in the *Erdemovic* judgment plainly regarded rehabilitation as a subsidiary consideration to retribution, deterrence and stigmatisation as pre-eminent factors. Although there is scope for the individual rehabilitation of offenders to be accommodated within the ambit of sentence individualisation permitted under Article 78(1) by implication, there is no attempt made to define the possible meaning of rehabilitation in the wider context of international trials, or explain the nature of the values and attitudes that underpin it. As Garland convincingly argues,[39] in the postmodern era the rehabilitative ethos has become closely associated with the power-knowledge network of social control. Thus, the rationalisation of penality in the late twentieth-century has been characterised by the technical displacement of moral judgments as determinants of rehabilitative ideology and the substitution of administrative and political imperatives. As such the notion of rehabilitation has, in common with other conceptions of penality, drifted from the communitarian ideals of social justice

[35] Op cit, n 20.

[36] *Prosecutor v Kambanda* (Case No ICTR-97–23-S), Judgment and Sentence, 4 Sept 1998, para 50. Such rationalisations may not be endorsed at the local level.

[37] Although, as Schabas (op cit, n 17, 22) points out, rehabilitation is generally recognised as an essential component of international humanitarian law.

[38] Art 76 simply refers to the 'appropriateness' of any sentence, whilst Art 78(1) (determination of sentence) permits the individualisation of sentences. However, Art 75(1) specifically deals with the need for the court to establish principles relating (*inter alia*) to rehabilitation for victims in the context of reparations.

[39] Op cit, n 9, 186.

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and moral education to become symbolic of state interests. It has instead formed part of the panoply of institutional practice that needs to connect with its intended audience. Symbolism and rhetoric are paramount in this endeavour, and, crucially, 'the envisaged audience and its characteristics may be crucial in shaping the general form which the signifying practice will adopt'.[40]

In the context of ICC sentencing the envisaged audience is global, yet the moral values that will be significant in the shaping of its penality are those considered and adopted in the principles for normative practice contained in its foundation instruments. However, as with the ad hoc tribunals, such normative principles exist as rules and procedures borne of political compromise and accommodation, and, additionally for the ICTY and ICTR, the relative recognition and reflection of local processes which are (in any event) merely indicative of the sentence which should be adopted in any particular case. Hence, the future challenge for the ICC lies in the extent to which it succeeds in developing its penality by adopting principles and approaches designed to reconcile the local with the global at the moral and normative level, or whether it is destined to function merely as a symbolic component of globalisation that exists to provide a language and mechanism for asserting hierarchies of international power. As with the ad hoc tribunals, this will depend on the ability of the ICC to extend beyond performance and legitimise its sentencing practice in terms designed to engage successfully with local mechanisms of accountability and the institutions of punishment.[41]

There also exists cogent evidence to suggest that international agreement on matters of sentencing rationales and principles is problematic.[42] Consequently, not only may globality and locality posit contrary values which lead to conflict,[43] paradox and disharmony are disguised, submerged and ignored in the overwhelming nature of the rhetoric of retribution and vengeance. Thus, assertions, such as that in *Celebici*,[44] that 'retributive punishment by itself does not bring justice', conceal the institutional failure to confront contradiction and relativity in the context of developing an international penal rationale for the ICC. It fails to reach beyond the personification of the ICC as the global arbiter of guilt and punishment acting in accordance with fundamental principles of morality.

Such a scenario not only conceals and obfuscates the possible rationales of

[40] Ibid, 260.

[41] Op cit, n 14. It is arguable that the ICC, perhaps even more than the ad hoc tribunals, is a politically diplomatically engineered institution meant to function as a kind of global conscience in order to provide diplomats and politicians with a reference point when things go wrong.

[42] An example is provided by the failure of the Council of Europe's recommendation on consistency in sentencing to suggest any specific sentencing rationale; see, Council of Europe, *Consistency in Sentencing*, Recommendation No R (92) 17 (Strasbourg: Council of Europe Press, 1993).

[43] See Z Bauman, 'Social Uses of Law and Order', in D Garland and R Sparks (eds), *Criminology and Social Theory* (Oxford: Oxford University Press, 2000).

[44] Op cit, n 20, para 1231.

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rehabilitation and its relationship with other sentencing rationales, it also fails to consider the possibly constructive import of restorative justice principles prevalent in domestic justice paradigms and how these may be linked to mechanisms which might provide the path to reconciliation. We can postulate significant elements of restorative justice to include the following:[45]

- Humanitarian treatment of offenders
- Elements of compensation, restitution, reparation (possibly reintegration)
- Diversionary and mediatory processes
- Victim participation

These factors (with the exception of diversion and mediation) are already characterised in the ICC Statute and the Rules of Procedure and Evidence, Section III. Nevertheless, despite vague assertions that legal accountability contributes to rehabilitation of the victim's dignity and the reconciliation of opposing factions,[46] the documentation remains notably silent on a singularly vital issue i.e. how might the formal legal rules and procedures of the ICC actually provide a guide towards the achievement of a communitarian philosophy of punishment through the discretionary decision-making process of international sentencing. If we accept the notion that law exists as an integrative mechanism,[47] this must imply an acknowledgment that legal norms reflect notions of justice compatible and supportive of ideology at several levels.[48] However, it also implies a Durkheimian imperative which suggests a need to provide interpretations and adopt practices that might allow us to make the link between the recognition of law as a representation of morality and the existence of forms of expressed morality in civil society which exist in notions of communitarianism. Thus, the moral legitimacy of the international penal regime is constituted through its capacity to reflect socially meaningful (i.e. pluralistic) conceptions of morally unacceptable behaviour. This in turn requires an acknowledgement that it is the international sentencing *process* itself which provides the transformative mechanism and supplies linkage between moral purpose, legal norms and social behaviour. It follows, therefore that these purposes (if they are to include reconciliation, or provide linkage between rehabilitation and reconciliation) must be articulated. They cannot simply remain pragmatic contexts.[49]

[45] The nature of the restorative justice paradigm is notoriously elusive; see, L Zedner 'Reparation and Retribution: Are They Reconcilable?' (1994) 57 *MLR* 228; J Dignan and M Cavadino, 'Towards a Framework for Conceptualising and Evaluating Models of Criminal Justice from a Victim's Perspective' (1996) 4 *International Review of Victimology* 153.

[46] Eg, see Wexler, op cit, n 19, 711.

[47] See R Cotterrell, *The Sociology of Law: An Introduction*, 2nd edn (London: Butterworths, 1992), 71.

[48] Namely, global or regional, but also as suggestive of a morality of sanctioned punishment

[49] It may be that South Africa's Truth and Reconciliation Commission (which does not possess prosecutorial power) provides a more convincing mechanism than legal accountability to promote the re-establishment of coexistence. For discussion see, S Cohen, 'State Crimes of Previous Regimes: Knowledge, Accountability and the Policing of the Past' (1995) 20 *Law and*

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It was acknowledged in *Erdemovic*[50] that, whilst the ICTY has a clear mandate to investigate, prosecute and punish violations of international humanitarian law, the exercise of its judicial functions must contribute to the resolution of wider issues such as accountability, reconciliation and the establishment of the 'truth'. As the Trial Chamber put it:

> Discovering the truth is the cornerstone of the rule of law and a fundamental step on the way to reconciliation: for it is the truth that cleanses the ethnic and religious hatreds and begins the healing process . . . On the other hand, the International Tribunal is a vehicle through which the international community expresses its outrage at the atrocities committed . . .

I suggest that such observations illustrate and re-enforce what will become an urgent need for the ICC to balance retributive and reconciliatory demands through the development of appropriate sentencing norms based on articulated purposes. Precedent and judicial authority cannot reconcile such fundamental contradictions in the ICC's rationale. Failure to address this issue risks producing a tribunal founded on principles of revenge, prejudice, discrimination and oppression.

III. ASPECTS OF SENTENCING PROCESS

A. Issues of Principle and Consistency

One of the fundamental aims of retributivism in the context of ICC sentencing practice will be to ensure that in future there exists no justification for severe violations of human rights.[51] If it is argued that this objective can only be achieved through the development of a just and consistent sentencing practice then it is necessary to confront several paradoxes. Essentially, these relate to problems concerned with balancing elements of proportionality and culpability. The limited form of retributivism characterised in the approach adopted by the *ad hoc* tribunals requires adherence to two fundamental principles:

Social Inquiry 7; MJ Osiel, 'Ever Again: Legal Remembrance of Administrative Massacre' (1995) 144 *University of Pennsylvania Law Review* 463.

[50] Op cit, n 27, para 21. Similar sentiments were expressed by the ICTR in *Kambanda* op cit, n 36, paras 26 and 28. However, different members of the international community interpret the ICTR's objectives in very different ways. Many focus on the goal of prosecution and punishment, while others recognise a greater role for the ICTR in national reconciliation (see, Howland and Calathes, op cit, n 16.). Cockayne suggests that the major role of the ICTR is one of performance, not scrutiny—this is highlighted by the ICTRs failure to place great emphasis on its statutory 'reconciliation' mandate, particularly by failing to engage directly with the Rwandese people. Even in *Kambanda*, where the former prime-minister pleaded guilty to genocide, little effort was made to capitalise on the confessions and admissions of guilt in the process of reconciliation at a local level. Similar comments apply to the ICTY. As Cockayne points out, such isolation undermines the educative and reconciliatory purposes of the trial process, and its legitimacy; see J Cockayne, 'Procedural and Processual Synthesis in the International Tribunals, Part I: The Context of Synthesis' (unpublished paper).

[51] See, JC Nemitz and S Wirth, 'Some observations on the law of sentencing of the ICC' <http://www.ishr.org/ice/detail/nemitz.htm>.

- That consistency demands similar crimes be dealt with by similar punishments, and
- That the severity of any sentence should be related to the amount of harm caused by the offending behaviour.

These principles are, nevertheless problematic in that they do not readily accommodate notions relating to the individualisation of sentences. This is well-illustrated by the ICTY's judgment in *Todorovic*,[52] where the Trial Chamber stated:

> The principle of retribution, if it is to be applied at all in the context of sentencing, must be understood as reflecting a fair and balanced approach to the exaction of punishment for wrongdoing. This means that the penalty imposed must be proportionate to the wrongdoing; in other words, that the punishment be made to fit the crime.

This difficulty is compounded by the fact that Article 78(1) of the ICC Statute emphasises the importance of offence gravity and sentence individualisation by implication, but fails to indicate what factors should determine the relative weight to be accorded to these principles. Similarly, Rule 145(1)(a) of the Rules of Procedure and Evidence acknowledges the culpability of the offender as relevant only in so far as it relates to issues regarding the totality of sentence.

As von Hirsch has explained,[53] commensurate desert systems (as personified by the international tribunals) need to recognise that sentencing policy must consider the extent to which deserved punishment is applied in individual cases. It is, however, an unresolved weakness in deserts theory that the approach is unable to distinguish convincingly between different degrees of responsibility, or quantify harm.[54] It is, therefore, difficult to establish a relationship between the relative seriousness of behaviour (cardinal proportionality) and the relative severity of sentence (ordinal proportionality), as it is to define those moral values which should inform the setting of penalty levels.[55]

Modern social contract theorists such as Murphy[56] have taken account of political obligation and sought to justify retributive punishment on the basis of

[52] *Prosecutor v Todorovic* (Case No IT-95–99/1-S) Sentencing Judgment, 31 July 2001, paras 28–30.

[53] A von Hirsch, *Doing Justice* (New York: Hill and Wang, 1976), ch 8.

[54] See, A Ashworth, *Sentencing and Penal Policy* (London: Weidenfeld & Nicolson, 1983), 173–81; id, 'Criminal Justice and Deserved Sentences' [1989] CLR 340, 346.

[55] See, A von Hirsch 'Deservedness and Dangerousness in Sentencing Policy' [1986] CLR 79, 87. Notwithstanding, as Gardner (1998: 39) points out, both cardinal and ordinal principles of proportionality need to be applied with the State's duty of humanity in mind, since this forbids cruel and brutalizing punishments even when these would be proportionate; see Gardner J, 'Crime: in Proportion and in Perspective', in A Ashworth and M Wasik (eds), *Fundamentals of Sentencing Theory* (Oxford: Clarendon Press, 1998). For a consideration of proportionality in the context of life imprisonment, see van Zyl Smit, op cit, n 16, 35–40.

[56] See, J Murphy, *Retribution, Justice and Therapy: Essays in the Philosophy of Law* (Dordecht: Reidel, 1979).

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the State seeking to achieve equilibrium between State interests and individual rights by maintaining the balance of advantage in favour of law-abiding citizens. However, in the international context, this notion implies the need to address the basis upon which such a moral imperative might be translated into a moral obligation on the part of the international community. This does not take effect in either the Statute or the Rules of Procedure and Evidence for the ICC. Consequently, the notion of individualisation is considered against a background where the primary consideration is overwhelmingly retributive rather than consequentialist.[57]

If it is accepted that the predominant rationale of individualisation should be consequentialist[58] in the context of international sentencing, then it becomes possible to conceptualise and implement rational principles that sustain the linkage between retributivism and constructive communitarian process. Furthermore, I would suggest that linkage of retribution and reconciliatory purposes at both the individual and interstate levels may best be achieved through emphasising the educative or communicative aspects of retributive punishment itself.[59] Such a consequentialist notion of communicative punishment should, therefore, extend beyond Duff's repentance/penitence paradigm to accommodate the concept of punishment as moral education designed to re-legitimate (pre-supposed) shared beliefs and aspirations. Thus, sentencing purposes for the ICC which combine an enlightened approach to retributive sentencing with clearly articulated consequentialist aspirations would constitute a significant step towards implementing communitarian notions of (re)constructive justice.[60]

The issue of consistency in sentencing practice is also likely to become a significant one for the ICC as the throughput of cases increases. The possibility of unjust and disproportionate sentences is addressed only in Part 8 (Appeal and revision) of the ICC Statute where Article 81. 2. (a) provides:

> A sentence may be appealed, in accordance with the Rules of Procedure and Evidence, by the Prosecutor[61] or the convicted person on the ground of disproportion between the crime and the sentence.

However, the demonstration of disproportionality between offence and sentence will be problematic since the Statute does not create a hierarchy of

[57] This was confirmed in both the *Celebici* case, Appeals Judgment, 20 Feb 2001, para 731, and *Prosecutor v Kupreskic* (Case No IT-95–16-T), Judgment, 14 Jan 2000, para 852.

[58] To accept the reverse merely supports the notion of retributive punishment.

[59] See, RA Duff and D Garland, 'Introduction: Thinking about Punishment', in Duff and Garland (eds), *A Reader on Punishment* (Oxford: Oxford University Press, 1994).

[60] The concept of communitarianism is used here to invoke the notion that international sentencing norms must serve a reintegrative function at both the global and local levels. It is significant, therefore, that attention should focus on the rationalisation or modification of *process*.

[61] An unfettered prosecution right of appeal in such circumstances is not widely available. In England and Wales, for example, prosecution appeals are limited to unduly lenient sentence determinations under the provisions of section 36 of the Criminal Justice Act (1988). The test of what constitutes 'undue leniency' is strictly legalistic. For criticism, see R Henham, 'Attorney General's References and Sentencing Policy' [1994] CLR 499.

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offence categories which might be developed into meaningful sentencing principles by the courts.[62] In addition, the only individual circumstances[63] specifically referred to as relevant to the Court on a review concerning reduction of sentence relate to willingness to cooperate with the prosecutor, assistance in locating assets and the enforcement of the Court's judgments and orders in other cases; Article 110.4(a) and (b).

Failure to deal adequately with consistency and the disproportionality issue raises fundamental questions regarding the capacity of the ICC to deliver a sentencing praxis that corresponds with contemporary due process paradigms promoting access to justice and fair trial, such as the European Convention on Human Rights. Since, as Findlay points out,[64] both substantive and procedural rights have featured prominently in the foundation instruments of the international tribunals their interpretation against the norms and principles developed by (*inter alia*) the European Human Rights Convention is expected to provide a further context for synthesis.[65]

In the context of dangerousness legislation in England and Wales, for example, we find that challenges are possible under Convention Articles with regard to fundamental concepts, such as the meaning and acceptability of 'preventative detention'; how decisions as to 'commensurability' are reached; what is meant by 'punitive' and 'inhuman and degrading' treatment; when is sentencing 'discriminatory', and what should be the extent of victims' rights in the sentencing process. The potential for state sentencing norms to conflict with normative imperatives demanded by transnational rights agendas such as the European Convention is well-illustrated by the Commission's decision in *Mansell v UK*. [66] The general point at issue was whether a particular form of extended sentence designed for dangerous violent and sexual offenders[67] should be regarded as wholly punitive, or, as containing a preventative element. If punitive, there exists an obligation for English courts not to pass disproportionate sentences which could be regarded as inhuman punishment under Article 3 of the Convention, whereas no proportionality requirement applies to the preventative element in a sentence, although that element must satisfy Article 5(4) which allows for sentence review. The Commission reached the bizarre decision that the sentence was essentially retributive and deterrent in character and, therefore, the controls and safeguards required by

[62] More particularly, by facilitating the ascription of weights to significant factors. Restrictions on the use of penalties beyond imprisonment, and lack of clarity regarding the appropriate use of alternatives, merely exacerbates this problem.

[63] These may be raised either during the trial, at a pre-sentence hearing, or during the appeal process.

[64] Op cit, n 6, 49.

[65] And (possibily) disharmony. For an analysis of the difficulties for sentencing theory and process produced by the globalisation of rights norms see, Henham, op cit, n 8.

[66] (1997) EHRR 66. The English Court of Appeal decision is reported at (1994) 15 Cr App R (S) 771.

[67] Namely, s 2(2)(b) of the Criminal Justice Act 1991 (now s 80(2)(b) of the Powers of Criminal Courts (Sentencing) Act 2000).

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Article 5(4) were inappropriate, these having been incorporated in the original conviction and sentence. It is difficult to imagine a clearer case of a sentence originally imposed for preventative purposes on the basis of the defendant's dangerousness and likely recidivism.

I would suggest, therefore, that in failing to provide the potential for the development of a coherent sentencing jurisprudence from a hierarchical categorisation of offences the ICC may produce similar normative interpretations of key concepts (such as proportionality) which do not accord with the distinct moral and normative meanings attributed to them by state jurisdictions. Furthermore, the problem may be compounded if praxis is developed against notions of fair trial demanded by rights paradigms such as the European Convention.

The potential for the systemic dysfunction of sentencing practice in the ICC is significantly enhanced by the absence of mechanisms designed to secure consistency. Inevitably, this will invite comparison, adoption or expansion of existing paradigms drawn from either state or interstate jurisdictions. Although the conundrum of achieving consistency in sentencing practice has exercised the minds of sentencing scholars and practitioners in common law jurisdictions for many years,[68] it has mainly been addressed in contexts combining common law and civil law traditions during the deliberations of EC institutions. For example, in a report presented to the Council of Europe's eighth Criminological Colloquium in 1987 on disparities in sentencing,[69] Ashworth specifically considered the difficulty of providing credible mechanisms to reduce disparity in mixed sentencing systems. In particular, it was acknowledged that systems, such as those of France or Portugal, consider that the philosophy of individualisation should be the guiding principle in each case, whilst most other member states have 'mixed' systems in the sense that, although proportionality is the primary aim, there are spheres of sentencing where other aims (such as individual and general prevention, incapacitation and rehabilitation) predominate. In order to combat the problem of 'subjective disparity'[70] it is necessary to establish the ideal sentencing pattern for a given jurisdiction. This could be achieved by first deciding upon the aim of sentencing, or the order of priority among competing aims. As Ashworth put it:

> Without a clear declaration of priority or a statement of the categories of offence or offender to which each aim is to apply, the crucial piece of guidance is missing and the system constitutes a veritable invitation to subjective disparity.[71]

[68] See further; Ashworth *Sentencing and Criminal Justice*, 2nd edn (London: Butterworths, 2000), ch 13.

[69] See, Council of Europe *Disparities in Sentencing: Causes and Solutions*, Collected Studies in Criminological Research, Vol. XXVI (Strasbourg: Council of Europe, 1989).

[70] It was acknowledged that the concept of 'subjective disparity' can have no constant point of reference, since its essence lies in deviations from the 'ideal sentencing pattern' in a given jurisdiction; ibid, 101.

[71] Op cit, n 69, 107. Ashworth goes on to dismiss as inadequate provisions which purport to address the problem of subjective disparity by: (a) providing authoritative lists of aggravating and

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Accordingly, the Council of Europe's 1993 recommendations on consistency in sentencing[72] fully endorsed this approach suggesting:

> 3. a. Wherever it is appropriate to the constitutions and traditions of the legal system, some further techniques for enhancing consistency in sentencing may be considered.
>
> b. Two such techniques which have been used in practice are 'sentencing orientations' and 'starting points'.
>
> c. Sentencing orientations indicate ranges of sentence for different variations of an offence, according to the presence or absence of various aggravating or mitigating factors, but leave courts with the discretion to depart from the orientations.
>
> d. Starting points indicate a basic sentence for different variations of an offence, from which the court may move upwards or downwards so as to reflect aggravating and mitigating circumstances.[73]

Whilst firmly supporting clarification of the rationales for sentencing as an essential prerequisite for consistency, the Council of Europe in its recommendations failed to suggest what primary rationale(s) might be appropriate for member states, leaving the matter to be determined instead by reference to the constitutional principles and legal traditions of each country.[74] It did emphasise, however, that, whatever sentencing rationales were declared, 'disproportionality between the seriousness of the offence and the sentence should be avoided'.[75]

It is apparent that neither the ICC Statute nor the Rules of Procedure and Evidence provide for any similar techniques for securing consistency. In fact, the ICC Statute positively encourages the conception of unfettered discretion in Article 76(1) without considering any stated primary rationale(s) or purposes in sentencing. A similar situation pertains in the case of the ad hoc tribunals, where, as discussed, practice has re-enforced an overriding consideration to have regard to the gravity of the offence[76] without any principled linkage to rationales such as retribution and deterrence. Although it might be

mitigating factors, or (b) maintaining proportionality as the guiding principle giving way to individualisation in various types of cases, or (c) relying on appeal systems to remedy subjective disparities.

[72] See, Council of Europe, op cit, n 42.

[73] Ibid, 7. Recommendation 4.b. suggests that 'Wherever it is appropriate to the constitution or the traditions of the legal system, one or more of the following means, among others, of implementing such orientations or starting points may be adopted: (i) legislation (ii) guideline judgments by superior courts (iii) an independent commission (iv) ministry circular guidelines for the prosecution.'

[74] Ibid, 21.

[75] Ibid, 6. The issue of what might constitute an appropriate mechanism to promote consistency in the future sentencing practices of the ad hoc tribunals is considered in S Beresford, 'Unshackling the Paper Tiger—The Sentencing Practices of the ad hoc Tribunals for the Former Yugoslavia and Rwanda' (2002) 1 *International Criminal Law Review* 33. Regrettably, Beresford fails adequately to distinguish between the self-regulation of judicial discretion, legislative orientation of sentencing policy, and the numerous variations in guideline sentencing systems.

[76] *Prosecutor v Aleksovski* (Case No IT-95–14/1-A), Judgement, 24 Mar 2000, para 182.

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possible for either the ICC or the Assembly of State Parties to develop techniques for securing consistency such as those described by the Council of Europe, a fundamental obstacle concerns the boundaries of the concept of gravity itself within the wider context of international sentencing norms.

A significant paradox and circularity results from an inability or unwillingness to rank crimes falling within the ambit of international tribunals in terms of their respective gravity for the purposes of sentencing.[77] The consequences are exemplified by Article 77(1) of the ICC Statute which indicates imprisonment as the preferred sanction for any crime referred to under Article 5,[78] with fines and forfeiture regarded as additional under subsection (2).[79] Such an approach is undoubtedly attributable to the magnitude of international criminality in its various forms, but, allied to unfettered judicial discretion, it reduces considerably the potential for rationality.[80] The difficulty is clearly illustrated in remarks made by the Trial Chamber of the ICTR in *Kambanda*:[81]

> There is no argument that, precisely on account of their extreme gravity, crimes against humanity and genocide must be punished appropriately . . . the Chamber will prefer to lean more on its unfettered discretion each time that it has to pass sentence on persons found guilty of crimes falling within its jurisdiction . . .

In consequence, the question of disproportionality as regards sentence severity is worked out at the level of sentence individualisation. No attempt is made to relate offence seriousness to sentence severity, nor to provide some linkage between the principles of cardinal and ordinal proportionality.

Again, this may be illustrated by exploring the context of recent remarks of the Appeal Chamber in the *Celebici* case.[82] In considering a claim by the appellant Delic, that the sentence imposed by the Trial Chamber had been excessive and disproportionate to the severity of the crimes committed by him (even allowing for mitigation), the Appeal Chamber confirmed the importance of the principle applied earlier in the Trial Chamber's judgment,[83] that 'gravity is determined *in personam* and is not one of universal effect'. Hence, the standard measure of proportionality to be applied to sentences is that which

[77] For further comment on the problems of ranking international crimes experienced by the ad hoc tribunals see generally, Kittichaisaree, op cit, n 1, 317 and, M Bohlander, 'Prosecutor v Dusko Tadic: Waiting to Exhale' (2000) 11 *Criminal Law Forum* 217.

[78] Art 5 specifies genocide, crimes against humanity, war crimes, and the crime of aggression to be within the jurisdiction of the ICC.

[79] It is worth noting that this approach is completely at odds with the primacy accorded to imprisonment in most Western jurisdictions, or by the Council of Europe, op cit, n 42, recommendation 5.a, 8.

[80] This is magnified by the failure of the Statute to mention any aggravating or mitigating factors.

[81] Op cit, n 36, paras 17 and 25.; the latter cited in *Prosecutor v Serushago* (Case No ICTR 98–39-S), Sentence, 5 Feb 1999, para 18.

[82] Sentencing Judgement, 9 Oct 2001, para 30.

[83] Op cit, n 20, para 1226. For discussion of the relevance of subjective seriousness to sentencing and its relationship to objective seriousness in the context of the ad hoc tribunals see, Kittichaiseree, op cit, n 1, 318.

exists between the gravity of the crime and the individual culpability of the offender. In order to facilitate the construction of mechanisms to regulate the consistency of sentencing in the international tribunals (including the ICC) it is necessary to suggest ways of describing how offence gravity at the level of international crimes can be rationalised for sentencing purposes. Such a mechanism needs to reach out beyond the substantive procedural concerns of *process*[84] by ensuring some conceptual and practical linkage between the substantive features and definitions of international crimes and their relative reality (as perceived constructs) for the purpose of individual sentencing. In other words, adopting the terminology of the *Celebici* appeal,[85] there should be some accommodation between the notions of criminal conduct and criminality.[86]

In this sense, I concur with Gardner,[87] that it is necessary to 'grasp not only the crime's legal definition but equally of what counts as the *substance* or the *gist* or the *point* of the crime as legally defined'. One still needs a 'moral map' of the crime for the purposes of assessing the proportionate prima facie sentence.[88] Gardner nevertheless acknowledges the limitations of the proportionality principle in providing a just methodology for scaling criminal sentences (such as the fact that the axes of gravity of crimes and sentences do not reflect each other).[89] Instead, the sentencing stage should promote rational variation between cases rather than suppress them as does the trial stage. Notwithstanding, the moral sentiments engendered by the egregious nature of international crimes such as genocide are necessarily reflected in the construction of globalised notions of criminality. Such sentiments, whatever their justification, are further transformed through process into sentencing judgments.[90]

[84] See, N Lacey, 'Discretion and Due Process at the Post-Conviction Stage', in IH Dennis (ed), *Criminal Law and Justice* (London: Sweet & Maxwell, 1987), 229.

[85] Op cit, n 82, paras 32 and 33.

[86] Interestingly, Grosselfinger, op cit, n 17, 14 suggests that indirect categorisation of sentences in terms of their severity will be possible through the security classifications adopted in State's designated by the ICC to enforce sanctions under Art 103.
In *Prosecutor v Blaskic* (Case No. IT-95–14-T), Judgment, 3 Mar 2000, the Trial Chamber proposed a mixed objective/subjective method for assessing crime seriousness whereby legal characterisation of the crime would be determined by its intrinsic seriousness, with subjective considerations relating to the individual circumstances of the case being reserved for sentencing. Sentence levels would depend on a determination of the appropriate balance between objective and subjective seriousness factors, although the weight to be accorded to the latter would not (except in exceptional circumstances) be permitted to override the former. However, the later Appeal Chamber decision in *Furundzija* (*Prosecutor v Furundzija* (Case No IT-95–17/1-A), Appeals Judgement, 21 July 2000) did not refer to *Blaskic*, preferring instead an approach that retained greater flexibility for individual decision makers to determine the appropriate relationship between individual factors and the relative gravity of crimes against humanity and war crimes for sentencing purposes.

[87] Op cit, n 55, 41.

[88] Emphasis in the original. For arguments supporting the view that proportionality should form a key component in shaping the structure of the criminal law see, Ashworth, *Principles of Criminal Law*, 3rd edn (Oxford: Oxford University Press, 1999), 18–22.

[89] Op cit, n 55, 48.

[90] See, N MacCormick and D Garland, 'Sovereign States and Vengeful Victims: The Problem of the Right to Punish' in A Ashworth and M Wasik, *Fundamentals of Sentencing Theory* (Oxford: Clarendon Press, 1998), 26.

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Finally, it is significant that unresolved issues relating to rationale and consistency in sentencing are likely to be exacerbated by the fact that the operation of the ICC Statute is predicated on the principle of 'complementarity', by which the ICC's jurisdiction is regulated by strict conditions of admissibility,[91] which, if unfulfilled, leave national systems free to investigate and prosecute offences over which the ICC would otherwise have jurisdiction.[92] Since, as McGoldrick suggests,[93] the structural relationship between the ICC and national courts is best conceived at a horizontal level, the potential for further obfuscation of the purposes and normative principles which will in future govern the sentencing of those convicted of 'the most serious crimes of international concern' will be even greater than currently exists with the *ad hoc* tribunals.[94]

We now turn to consider several issues which are concerned with conceptions of due process and their relationship to notions of fair trial and procedural justice in the future development of ICC sentencing praxis. This is key to substantiating my contention that the evaluation and future significance of future international sentencing practice depends on the contextual analysis of existing trial process.

B. Issues of Procedural Justice

In this section I propose to investigate the nature of the relationship between due process principles and practice and its significance for ICC sentencing through an evaluation of the rationale for discounting sentences in return for guilty pleas and the status and function of plea agreements in the context of international sentencing.

The discussion that follows is predicated on the assumption that procedural justice cannot be satisfactorily evaluated on the sole basis of the extent to which procedures conform to 'objectively' defined characteristics, since ideology and political process are invariably crucial to the development of procedural norms and the policies which inform them. Indeed, some writers have recognised the illusory objectivity of the justice concept preferring to justify the inclusion of certain basic principles of due process by reference to political, libertarian or social values.[95] The paradigm of deserts theory manifestly

[91] For discussion see, Schabas, op cit, n 1, 66–70.

[92] Issues of admissibility are governed by Art 17 of the ICC Statute. The International Criminal Court Act 2001 gives effect to the Statute in the UK. The purpose of the Act, as Dennis suggests, op cit, n 1, was to enable the UK government to ratify it at an early stage and exercise some influence over the future development of the ICC.

[93] Op cit, n 5, 631.

[94] This is due to the fact that both the ICTY (Art 9) and ICTR (Art 8) assert the primacy of their respective tribunals over national jurisdictions.

[95] See, R Saphire, 'Specifying due process values: Towards a more responsive approach to procedural protection' (1978) 127 *University of Pennsylvania Law Review* 111; J Mashaw, 'Dignitory process: A political psychology of liberal democratic citizenship' (1987) 39 *University of Florida Law Review* 433. Others, such as Matza, have argued that the major components of justice have an entity which is objectively verifiable, although preferring the more mundane position of equating or conceiving fairness as a synonym for justice; D Matza, *Delinquency and Drift*

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fails to address the nature and desirability of due process beyond its commensurate concerns and, therefore, tends towards an erosion of due process in favour of crime control. Kamenka argues further that, once justice has become principle or policy, it ceases in importance and is replaced by a bureaucratic–administrative conception of justice which fosters the rational calculation of the 'proper' distribution of benefits.[96] Since international humanitarian law clearly recognises that guarantees should exist regarding the inviolability of state institutions to protect individual rights, it is imperative that courts exercising international criminal jurisdiction should provide a balance between maintenance of the presumption of innocence through due process and the justification of punishment, both in its nature and extent.

In terms of trial procedure, the ICC Statute (Article 65) provides that, where the accused admits guilt under Article 64.8(a), the Trial Chamber must satisfy itself as the voluntariness of the admission, that the accused understands the consequences and, that the admission is supported by the charges and factual evidence then available to it.[97] Article 65.3 goes on to state that, if the Trial Chamber is not satisfied that that these conditions are established, it may deem the guilty plea as not having been made and proceed to trial. The presumption of innocence is enshrined in Article 66, which also confirms that the onus is on the prosecution to prove to the satisfaction of the Court that the accused is guilty beyond all reasonable doubt.[98] However, the ICC Statute and the Rules of Evidence and Procedure are largely silent regarding the impact of a guilty plea on sentence. For instance, Article 76.1 refers only to the Trial Chamber's obligation to 'take into account the evidence presented and the submissions made', whilst Article 78.1 points vaguely to offence gravity and

(New York: John Wiley, 1964), 104–6. Bayles is closer to Matza in asserting the autonomous quality of process benefits such as participation and equality; M Bayles, *Procedural Justice: Allocating to Individuals* (Dordrecht: Kluwer, 1990).

[96] E Kamenka, 'What is justice?', in E Kamenka and A Tay E-S (eds), *Justice* (London: Edward Arnold, 1979).

[97] For further detail see, H-J Behrens, 'Investigation, Trial and Appeal in the International Criminal Court Statute (Parts V, VI, VIII)' (1998) 6 *European Journal of Crime, Criminal Law and Criminal Justice* 429. Schabas (op cit, n 1, 124–5) supports the view that the ICC Statute achieves an acceptable pragmatic compromise in reconciling the opposing philosophical approaches to the concept of the guilty plea characteristic of common law and civil law jurisdictions. It is worth noting that in England and Wales, when the offender pleads guilty the judge does not hear the evidence, only the prosecution's statement of facts. Disagreements relating to the factual basis for sentencing may be resolved by a 'Newton hearing.' For further discussion see, Ashworth, op cit, n 68, 308–11. The ICC Statute (Art 65.4) goes further than this in providing that the Trial Chamber may request the Prosecutor to present additional evidence (including witness testimony) in order to satisfy itself that a more complete presentation is made in the interests of justice.

[98] In civil law jurisdictions the guilty plea may not be recognised. In France, for example, the dossier must be examined for sufficient evidence of guilt, whilst in Germany 'plea bargains' involving the judge and the accused may be made despite the absence of a formal guilty plea being entered on the record. For further analysis see, H Jung, 'Plea-Bargaining and its Repercussions on the Theory of Criminal Procedure' (1997) 5 *European Journal of Crime, Criminal Law and Criminal Justice* 112.

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individual circumstances as being relevant to the determination of sentence. Rule 145 of the Rules of Procedure and Evidence does little more than explicitly mention the relevance of aggravating and mitigating circumstances (Rule 145.1(b)), give further examples of individual circumstances (Rule 145.1(c)), and provide two examples of mitigating circumstances (Rule 145.2(a)(i) and (ii)). Nowhere is there any explicit recognition or explanation of the following crucial issues:

- whether a guilty plea counts as a mitigating factor.
- if it does, what conditions, circumstances or principles should govern the impact that the guilty plea has on the final sentence determination.

The absence of any discussion of these matters, or their elaboration in the ICC Statute or Rules is a matter of considerable concern. The concept of the sentence discount in return for a guilty plea has long provoked controversy in common law jurisdictions, the fundamental due process objection being that such discounts undermine the presumption of innocence and the necessity for the prosecution to prove its case.[99] However, there are many other serious concerns relating to the recognition of any principle which rewards guilty pleas with sentence reductions. Some of the arguments are summarised[100] below, and then evaluated in the context of the existing jurisprudence of the ad hoc tribunals:

1. There are due process concerns as to whether evidence has been effectively reviewed in pre-trial stages where pressures exist to encourage defendants to plead guilty as early as possible in the proceedings.
2. There may develop a practice whereby there is a significant difference in sentence severity for a defendant who pleads guilty compared to the sentence imposed for a similar case where the defendant was convicted after a trial.[101] Although usually referred to as a guilty plea discount (or sentencing or confession reward), it may also be regarded as a trial penalty to emphasise its coercive aspects. However, sentencers may justify the trial penalty on the basis that it is often prompted by the egregious nature of the crime as revealed in evidence given at the trial, and this would otherwise be concealed by a sterile guilty plea.[102] Indeed, some may argue that certain defendants do not deserve discounts under any circumstances, even if they are pleading guilty.

[99] For an important discussion of the issues of principle involved in the context of the European Convention on Human Rights see, Ashworth, *The Criminal Process: An Evaluative Study*, 2nd edn (Oxford: Oxford University Press, 1998), 286–92.

[100] For a detailed analysis see, C McCoy and R Henham, 'Is the Trial Penalty Inevitable? Guilty Plea Discounts in American and British Courts' (in press).

[101] For research which evaluates the practice of rewarding guilty pleas with sentence discounts in the English courts see, Henham, *Sentence Discounts and the Criminal Process* (Aldershot: Ashgate, 2001).

[102] See, C McCoy, 'What We Say and What They Do: Prosecutors' and Judges' Sentencing Decisions at Guilty Plea versus Trial', Paper presented at the American Society of Criminology, Annual Meeting, New Orleans, Nov 1994.

3. Notwithstanding, the guilty plea discount is frequently justified by sentencers on the basis of its remorse rationale.[103] It may be argued that a truly remorseful offender would be prepared to accept any just punishment and, therefore, should plead guilty without expectation of any sentencing concession.[104] Remorse may also be seen as a rationalisation used by sentencers to conceal the true nature of the transaction being undertaken i.e. bargaining away, or buying-off the defendant's due process[105] rights in return for the economy of a low trial rate, and/or absolving victims and witnesses from the ordeal of oral testimony.
4. There are important considerations regarding the extent to which victims should participate in the decision to accept a guilty plea in return for a sentence discount. Victims (actual and potential) clearly have an interest in seeing a true offender convicted, and many victims may be prepared to face the ordeal of a court appearance rather than seeing the offender receive a significant sentence reduction in return for a guilty plea.[106]

These considerations drawn largely from the common law adversarial tradition provide pertinent contexts for assessing the approach taken to these issues by the *ad hoc* tribunals. More specifically, as predictors of international procedural justice, they focus attention on significant issues against which to evaluate the relevance of existing fair trial and access to justice paradigms. As evidence of internationalisation, they also point to the potential subversive influence of processual concerns as determinants of judicial practice in any international arena where the politics of retribution are allowed to flourish at the expense of ideology and principle.

A considered evaluation of the guilty plea as a basis for conviction and its significance as a mitigating factor in sentencing is evident from the ICTY's judgment in *Todorovic*.[107] After pointing out that Todorovic was only the third accused before the ICTY to have been convicted on the basis of a guilty

[103] Bagaric and Amarasekara have recently argued that the doctrinal basis for the recognition of remorse as significant in sentencing is untenable; M Bagaric and K Amarasekara, 'Feeling Sorry?—Tell Someone who Cares: The Irrelevance of Remorse in Sentencing' (2001) 40 *Howard Journal of Criminal Justice* 364. Certainly, remorse does not fit easily into philosophical categories. For example, just deserts theorists, such as von Hirsch (1993: 72), argue that punishment must be assessed objectively on the basis of the degree of harm and offender blameworthiness, with remorse becoming relevant (if at all) at the post-sentencing stage; von Hirsch, *Censure and Sanctions* (Oxford: Clarendon Press, 1993), 72. On the other hand, the notion of a sentencing or confession reward corresponds closely with utilitarian considerations designed to prevent future crime by adopting a humane approach to the offender. Remorse may even be seen as punishment in itself and, therefore, justifying mitigation of sentence on the basis that the net cost in suffering would equal that of the non-repentant offender serving a longer sentence; McCoy and Henham, op cit, n 100.

[104] Ibid.

[105] Other supporting normative paradigms might reflect constitutional or human rights concerns.

[106] See further, H Fenwick, 'Procedural "Rights" of Victims of Crime: Public or Private Ordering of the Criminal Justice Process' (1997) 60 *MLR* 317; Henham, 'Bargain Justice or Justice Denied? Sentence Discounts and the Criminal Process' (1999) 62 *MLR* 515

[107] Op cit, n 52.

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plea, the Trial Chamber examined previous case-law, including decisions of the ICTR,[108] where guilty pleas had been considered as factors in mitigation of sentence. In particular, the Trial Chamber in *Todorovic* placed great emphasis on the following passage from the *Erdemovic*[109] sentencing judgment:

> An admission of guilt demonstrates honesty and it is important for the International Tribunal to encourage people to come forth, whether already indicted or as unknown perpetrators. Furthermore, this voluntary admission of guilt which has saved the International Tribunal the time and effort of a lengthy investigation and trial is to be commended.

Again, quoting at length from *Erdemovic*, the Trial Chamber in *Todorovic* went out of its way to express its agreement with remarks made *obiter* in *Erdemovic*[110] by Judge Cassese in which he recognised the significant contribution made by the guilty plea to the work of the ICTY. Such is their import that they are reproduced here at length:

> It is apparent from the whole spirit of the Statute and the Rules that, by providing for a guilty plea, the draftsmen intended to enable the accused (as well as the Prosecutor) to avoid a possible lengthy trial with all the attendant difficulties. These difficulties—it bears stressing—are all the more notable in international proceedings. Here, it often proves extremely arduous and time consuming to collect evidence. In addition, it is imperative for the relevant officials of an international court to fulfil the essential but laborious task of protecting victims and witnesses. Furthermore, international criminal proceedings are expensive, on account of the need to provide a host of facilities to the various parties concerned (simultaneous interpretation in various languages; transportation of victims and witnesses from far-away countries; provision of various forms of assistance to them during the trial etc). Thus, by pleading guilty, the accused undoubtedly contributes to public advantage.[111]

The *Todorovic* Trial Chamber also indicated that the timing of the guilty plea was crucial in securing the economic, managerial and bureaucratic advantages to be derived,[112] whilst continually re-enforcing and equating with this the notion that that the guilty plea is intrinsically concerned with the pursuit of 'truth'. Naturally, there should be some scepticism surrounding the claim that unequivocal and genuine pleas of guilty are consistent with crime control considerations and justifications. Certainly, the experience of common law adversarial procedure has been that the process by which courts have come to endorse and normalise the trial penalty has been a contingent response to the ascendance of crime control ideology and managerial approaches to justice.[113]

[108] In particular, *Kambanda*, op cit, n 36, and *Serushago*, op cit, n 81.
[109] Op cit, n 27, 16. [110] Appeals Judgement, para 8.
[111] The *Todorovic* Trial Chamber went on to add the important factor that 'by pleading guilty, an accused relieves victims and witnesses of the necessity of giving evidence with the attendant stress this may incur'. Op cit, n 52, para 80. [112] Op cit, n 52, para 81.
[113] See, MM Feeley and J Simon, 'The new penology: notes on the emerging strategy of corrections and its implications' (1992) 30 *Criminology* 440; McCoy and Henham, op cit, n 100.

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The threat to due process principles inherent in this insidious process has been largely ignored by some commentators, who appear to condone its crime control rationale.[114] Accordingly, it is arguable that the repeated affirmations of the primacy of the presumption of innocence, equality between the parties and the protection against self-incrimination to be found in the ICC Statute and Rules may amount to nothing more than rhetoric of dubious validity if the Court were to adopt the justifications espoused in the judgements of the ad hoc tribunals.

It is also significant that 'remorse' was dealt with as a separate mitigating factor in *Todorovic*, unconnected with rationales which might justify the guilty plea discount[115] Yet, this reveals some confusion in the approach of the ICTY, and the need for further debate regarding the purported relationship between the guilty plea discount and remorse, since it is clear from *Jelisic*,[116] that the ICTY acknowledged some connection between remorse and the accused's guilty plea by suggesting that its relative weight as a mitigating factor was attributable to the fact that the accused had failed to demonstrate any remorse for his crimes.[117] Such lack of clarity is compounded by Schabas,[118] when he asserts that a guilty plea is 'a sign of remorse that is germane to sentencing'. Nevertheless, the notion that remorse should be considered separately from the guilty plea as mitigation is consistent with aspects of both inquisitorial and adversarial criminal procedure, since it is often absent from the former, and of little relevance to the latter.[119]

As Schabas acknowledges,[120] the practice of discounting sentences in return for guilty pleas is intimately connected with forms of 'plea bargaining' in many common law jurisdictions.[121] Here again, however, Schabas appears

[114] See, eg, Schabas, op cit, n 17, 18.

[115] Op cit, n 52, paras 89–92, and 114. The Trial Chamber accepted the defendant's remorse as genuine, and appeared particularly impressed by his expressed desire to 'channel his remorse into positive action to reconciliation in Bosnia and Herzegovina', although this was expressed more by way of sentiment than intended action on the part of the defendant (paras 90 and 91).

[116] *Prosecutor v Jelisic* (Case No IT-95–10-T), Judgement, 14 Dec 1999, para 127.

[117] Jelisic's appeal on the point that the Trial Chamber had failed to give him any credit for his guilty plea floundered because he did not demonstrate that the Trial Chamber had erred in exercising its discretion regarding how much weight to accord the guilty plea. Appeals Judgement, paras 119–23. Furthermore, the ICTY Trial Chamber in *Blaskic*, op cit, n 86, refused to recognise any mitigating role for remorse where the accused had command responsibility for the crimes in question. Indeed, the Trial Chamber held that command responsibility should operate to 'systematically increase the sentence or at least lead the Trial Chamber to give less weight to the mitigating circumstances, independently of the issue of the form of participation in the crime' (ibid, para 789). Consequently, beyond the clear responsibility that exists where the accused has given specific orders leading to the commission of crimes, tolerance or effective approval in their perpetration on the part of a commander is a significant aggravating factor in sentencing by the ad hoc tribunals.

[118] Op cit, n 17, 18.

[119] See, Henham, op cit, n 106; McCoy and Henham, op cit, n 100.

[120] Op cit, n 118.

[121] Technically, in common law jurisdictions a plea bargain occurs only where there is a change of plea from not guilty to guilty but no charge or fact bargain is involved. In such circumstances the 'bargain' relates to the defendant exchanging his right to trial and possible acquittal for the certainty of a lower sentence than he would otherwise have received upon conviction.

to condone a view he asserts is generally held by judges that, even where plea bargains are not binding upon the court, such practices make a valuable contribution to 'the smooth operation of criminal justice.' He does, nevertheless, recognise the extreme pressures which may be placed on the accused to bargain in cases where the prosecution seeks life imprisonment.[122] Certainly, the most compelling arguments in favour of such bargains usually relate to crime control considerations involving prosecutorial certainty of conviction where evidence may be weak or non existent in relation to the more substantive charges, or, a saving of court time, expense and inconvenience in not having to prosecute a large number of charges.

Although there is no recognition or provision for such agreements in the Statutes and Rules of either the ICTY or the ICTR, they have come before both tribunals on a number of occasions, the first being the ICTY in the *Erdemovic*[123] case. The plea agreement made in *Erdemovic* was expressed to be for the purpose of clarifying the understanding of the parties as to the nature and consequences of the accused's guilty plea, and to assist in ensuring its validity.[124] However, it is apparent that the agreement contained two significant elements:

1. A charge bargain, whereby the Prosecutor agreed not to proceed with an alternative count of a crime against humanity, provided the defendant pleaded guilty to the lesser charge of a violation of the laws and customs of war, the factual basis of which was agreed.
2. A sentence bargain, whereby, whilst acknowledging the Trial Chamber's unfettered discretion to determine the sentence, the Prosecutor agreed to recommend a sentence of seven year's imprisonment in recognition of the mitigating circumstances.

By contrast, the plea agreement recognised by the ICTR in *Kambanda*[125] appears[126] to record in a straightforward manner the unequivocal nature of the defendant's guilty plea, and his professed motivation for tendering it, although there is passing reference to whether it contained matters constituting 'substantial cooperation' on the part of the convicted person with the Prosecutor, such as to amount to mitigation within the meaning of Rule 101(B)(ii) of the ICTR's Rules. Furthermore, the plea agreement in *Todorovic*[127] was explicit in recording the fact that the defendant had undertaken to provide full cooperation with the Prosecutor 'in relation to information and evidence known to him regarding the events surrounding the armed conflict in the former Yugoslavia from 1990 to the present'.[128] The plea

[122] As evidenced in some US States where bargains may effectively result in the substitution of life imprisonment in capital cases; *Alford v North Carolina* 400 US 25 [1970].
[123] Op cit, n 27, para 19 [124] Ibid, para 18.
[125] Op cit, n 36.
[126] Since the full text is not reproduced in the Judgement and Sentence.
[127] Op cit, n 52. [128] Ibid, para 10.

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agreement also went further than that accepted in *Erdemovic*, since the defendant acknowledged that by pleading guilty he voluntarily undertook to waive significant procedural rights.[129]

Although Jung[130] has drawn attention to the changing contexts of plea bargaining as evidence of 'consensus' or 'democratization', there is no doubt that its continued existence in both common law and civil law jurisdictions threatens to disturb the balance between state, individual and society implicit in social contract theory, and exemplified in notions of fair trial. As such, beyond the potential for undermining process already described, plea bargains in the international context may similarly be seen as unconstitutional in implicitly contravening the principles of legality established by relevant Statutes and Rules of Procedure. Despite reserving unfettered discretion in sentence decision-making to the tribunals, recent practice in the ad hoc tribunals has established the paradox of tacit acceptance of plea agreements for various reasons largely associated with crime control considerations. Whilst eschewing judicial complicity such practices are, nevertheless, hostages to the system interests of the prosecution and dependant on the bargaining competence of the defence. They also exist to marginalize the judiciary in a context where the theatre of the trial is paramount. On this point, the international trial becomes so much more relatively significant as the theatre for justice than trials may be in other jurisdictions. Justice, therefore, becomes negotiated and not imposed.

More generally, plea bargains in the international arena symbolise a repressive and coercive function of international tribunals. Pressures to convict and utilise effectively scarce resources by rewarding substantial co-operation and complicity by defendants with sentence discounts are re-legitimised as compatible with legal rationality in the rhetoric of international tribunal discourse.

As previously indicated, there exists a distinct lack of harmony between victim interests and the crime control interest of encouraging and rewarding guilty pleas, suggesting the need for entrenched rights of consultation and participation by victims in plea agreements and sentence discount decisions before the ICC. At present, Article 65.4(a) of the ICC Statute contains a general injunction to the Trial Chamber in connection with proceedings where an admission of guilt has been made, whereby it may request the Prosecutor to present additional evidence (including witness testimony) if it 'is of the opinion that a more complete presentation of the facts of the case is required

[129] According to the Plea Agreement, para 4 (cited in the Sentencing Judgement, para 10), these included the right to plead not guilty, the right to be presumed innocent until guilt has been established at a trial beyond a reasonable doubt, the right to a trial before the International Tribunal, the right to confront and cross-examine witnesses against the accused, the right to compel and subpoena witnesses to appear on the accused's behalf, the right to testify or to remain silent at trial and the right to appeal a finding of guilty or to appeal any pre-trial rulings.

[130] Op cit, n 98, 116.

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in the interests of justice, in particular in the interests of victims' (emphasis added). Schabas suggests that this provision appears aimed at situations where some kind of plea bargain is made between the Prosecutor and the defence such that the rights and interests of victims may not otherwise be fully taken into account.[131] Another general injunction occurs in Article 68.3, which is designed to ensure that the Court permits the 'views and concerns' of victims to be presented and considered at any stage in the proceedings where the 'personal interests of the victims' are affected, provided these are not inconsistent with the notions of fair trial.

No doubt the sentiments embodied in these Articles are laudable, but one remains sceptical regarding the extent to which crime control considerations will override any perceived need to obtain additional evidence in the interests of justice for victims. After all, as we have seen, the primary rationale of crime control is clearly evident in the sentencing judgements of the *ad hoc* tribunals, where plea-bargaining has taken place. Therefore, it cannot be stated with any degree of conviction that victims' rights in the ICC are likely to be a paramount consideration. A more realistic assessment suggests that the *interests of justice* are more likely to be equated with notions of retributive justice than victims' rights and reparation. As Zedner remarks,[132] whilst reparative goals of criminal justice possess no intrinsic penal character, thus rendering them apparently incompatible with retributive considerations, a broader conception of reparative justice recognises the communitarian aspects of victims rights.[133] The point is well made by Fenwick,[134] who reminds us that, a victim who does not testify at the trial has no interest in the notional 'balancing' which occurs where a lenient sentence given in return for a guilty plea is justified on the basis that victims may be spared the ordeal of giving evidence.[135] Aside from the personal impact,[136] wider considerations should include the need to for the 'community'[137] to pursue the consequentialist objectives of rehabilitation, reconciliation and regulation where socially harmful actions have been perpetrated on a catastrophic scale.

Whilst accepting the overwhelming case for safeguarding victims' rights and ensuring their legitimate participation in trial proceedings, alternative fair

[131] Op cit, n 1, 149. More generally, as Findlay suggests, access to justice at the international level fails to reflect that accorded to victims in several common and civil law jurisdictions, where direct access is given to the sentencing process. Certainly, in the case of the ICC it does not extend much beyond protection for victim witnesses and victim compensation; see, ICC Statute, Arts 43(6), 68(2), (3) and (4), 75, 79. For further discussion see, M Findlay, 'Internationalised Criminal Trial and Access to Justice' (in press).

[132] Op cit, n 45, 239

[133] This theme is developed further in the conclusion.

[134] Op.cit, n 106, 327

[135] More generally, as Tochilovsky points out, there is a certain irony in the fact that many of the procedural rights made available to victims for trials conducted by the ad hoc tribunals are absent from the criminal procedures of those countries where the crimes charged were perpetrated; V Tochilovsky, 'Trial in International Criminal Jurisdictions: Battle or Scrutiny? (1998) 6 *European Journal of Crime, Criminal Law and Criminal Justice* 55, 59.

[136] Such as the removal of uncertainty of conviction.

[137] This expression is not used here in any definitive sense.

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trial paradigms are not encouraging in this respect. For example, neither the 1985 Council of Europe recommendation on 'The Position of the Victim in the Framework of Criminal Law and Procedure', nor the 2000 EU Council's 'Draft Framework Decision on the Standing of Victims in Criminal Procedure', recommended any specific role for victims in the sentencing process, although, as Emmerson and Ashworth explain,[138] they constitute evidence of a positive commitment and flexibility towards the issue. Notwithstanding, in the English context there has been strong judicial objection to the notion that victims' representations should form part of the sentence-decision-making process.[139] As far as Article 6 of the European Convention is concerned, whilst the European Commission accepts the fact that Article 6 applies to sentencing decisions, it does not recognise Article 6 protection where a defendant pleads guilty since there is no trial per se. However, a plea bargain involving a charge, fact, or sentence bargain would presumably be covered by Article 6 in circumstances where a defendant later changed their mind. Again, recent English decisions appear to have fallen well short of sustaining an adequate balance between victims' rights and those of the defence in the case of plea bargains on the grounds of abuse of process at common law.[140]

More broadly, these arguments illustrate the apparent failure of existing rights paradigms to provide a principled basis for addressing the iniquitous prospect of negotiated justice in the ICC. If generalised notions of justice are to be developed which transcend process constraints and are tolerant of representative participation and communitarian objectives, then, the wider role of the victim in the penality of international justice must be elaborated.

IV. VICTIMS RIGHTS AND STATE INTERESTS

Tochilovsky[141] makes the point that the procedural rights enjoyed by victims in trials conducted by the ad hoc tribunals approximate those available in many civil law jurisdictions,[142] and are consistent with the general obligation of international judges to call whatever evidence is necessary in order to establish the 'truth'. Notwithstanding such attempts to remedy the deficiencies of adversarial process, are we really justified in suggesting, as does Schabas,[143]

[138] B Emmerson and A Ashworth, *Human Rights and Criminal Justice* (London: Sweet & Maxwell, 2001), 557.

[139] See further, ibid, 559–60) for possible forms of representation from victims. It is interesting to note the limited form of participation advocated by the Practice Direction, 16 Oct 2001, on the role of victim personal statements in sentencing in England and Wales. See further, I Edwards, 'Victim Participation in Sentencing: The Problem of Incoherence' (2001) 40 *Howard Journal of Criminal Justice* 39; A Sanders, C Hoyle, R Morgan, and E Cape, 'Victim Impact Statements: Don't Work, Can't Work [2001] CLR 447.

[140] One of the worst examples is *Attorney General's Reference (No 44 of 2000); sub-nom R v Peverett* [2000] TLR 739.

[141] Op cit, n 135, 59.

[142] Eg, the right to present evidence and put questions to the accused, witnesses, and expert witnesses.

[143] Op cit, n 1, 147.

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that this somehow reflects a wider 'important trend in criminal justice towards what is called 'restorative justice'? I contend that this is certainly not the case, for two reasons:

1. The suggestion is based on vague notions regarding the significance of restorative justice in the international context.[144]
2. There is no apparent rationale in the purposes of international sentencing. As already explained, consequentialist justifications sit uneasily with the predominant retributive rationale.

If it is accepted[145] that sentencing in the international tribunals must include retributive considerations but go beyond them to include mechanisms supportive of reconciliation, then notions of restorative justice should be developed to facilitate the achievement of this objective through sentencing praxis.[146] These mechanisms should be predicated on principles which are concerned to re-establish recognised conduct norms and the rights and obligations existing between citizens, and citizens and the state. However, they must be transformative at both the local and global level, a process which has often failed in the ad hoc tribunals.[147]

Moreover, conceptions of restorative justice, whilst being more suggestive of non-adversarial procedures, are not necessarily at variance with deserts-based retributive sentencing. For example, Zedner suggests that both reparation and retribution are predicated upon notions of individual autonomy,[148] although ignoring the impact of structural inequality, power and social control variables. A further problem lies in the fact that, whilst retribution equates proportionality with an objective assessment of offender culpability (and harm), reparative justice is proportionate to victim harm. Zedner goes on to suggest that:

> if reparative justice is to be more than a criminal analogue to civil damages, then it should go beyond the offence itself to enquire about its wider social costs and the means to making them good.[149]

[144] This is not surprising given the difficulties encountered in conceptualising notions of victim participation evidenced in common law jurisdictions; see, eg, Dignan and Cavadino, op cit, n 45; Edwards, op cit, n 139; G Johnstone, *Restorative Justice: ideas, values, debates* (Cullompton: Willan Publishing, 2001)

[145] As I argued earlier.

[146] The route to reconciliation through amnesty offered by mechanisms such as the South African Truth and Reconciliation Commission was rejected by the ad hoc tribunals as incompatible with the primary purpose of prosecution and the willingness of a state to bring the perpetrators of atrocities to justice. For arguments supporting a holistic approach see, K Moghalu, 'The role of international criminal/humanitarian law in conflict settlement and reconciliation', Paper presented to the International Conference, University of Utrecht, Netherlands, 26–28 Nov 2001.

[147] The difficulties encountered by the United Nations in establishing domestic criminal courts in Cambodia, Kosovo, and Sierra Leone exemplify the problems of enforcing universal jurisdiction over international crimes. See further, M Bohlander, 'The direct application of international criminal law in Kosovo' (2001) 1 *Kosovo Legal Studies* 7.

[148] Op cit, n 45, 248. These issues are explored further in J Braithwaite, *Restorative Justice and Responsive Regulation* (Oxford: Oxford University Press, 2001).

[149] Ibid, 249.

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Although cautioning that this process invites social intervention going beyond the normal boundaries of conventional crime prevention, it is precisely the need to address significant structural and ideological concerns that characterises those crimes of the magnitude with which we are concerned. Thus, notions of criminality as reflective of destruction, disintegration, conflict and breakdown go beyond traditional models that equate crime with social injustice. Instead, they lead directly to imperatives for reconstruction and reparation compatible with restorative justice principles aimed at increasing understanding, empowering victims and citizens and increasing their potential for participation and the resolution of conflict.[150] Certainly, in the arena of conventional crime restorative justice principles are seen as potentially capable of re-empowering citizens and a force for social cohesion.[151]

Whatever the potential for restorative justice, its value and relevance in the present context is its capacity to challenge conventional notions of the relationship between retributivism and other conceptualisations of penality in international sentencing. This includes a recognition that restorative objectives are *necessary* for the resolution of social conflict, and that notions of reparation and reconciliation should direct sentencing rather than be accommodated by retributive practices which are inconsistent and so lacking in any coherent philosophical basis as to threaten their legitimacy.

V. CONCLUSION

At the level of symbolism, the expressive function of punishment in the ICC's Trial Chamber will be of major significance in reasserting the primacy of the prevailing international moral order.[152] It represents the re-enforcement of moral legitimacy and legal ideology in the hegemonic struggle among social groups (or societies) intent upon asserting their own version of morally acceptable rules. Yet, within such a context it becomes problematic to envisage international sentencing as a coherent and credible unilateral force that is capable of creating and facilitating opportunities for transforming moral principles that

[150] Some writers, such as Bush and Folger, would argue that practices like mediation have the potential to transform conflict through empowerment and recognition by citizens of the need to acknowledge and be responsive to the needs of others; R Bush and J Fogler, *The Promise of Mediation: Responding to Conflict through Empowerment and Recognition* (San Francisco: Jossey-Bass Publishers, 1994), 84–5.

[151] See further, Garland, *The Culture of Control: Crime and Social Order in Contemporary Society* (Oxford: Oxford University Press, 2001).

[152] This is not meant to imply support for any particular moral position. In the postmodern world moral legitimacy is ambivalent and conjectural. For example, as Caplan rather cynically commented on the Bill providing for UK ratification of the ICC; 'Perhaps the Prime Minister should authorise the Foreign Office Minister, Baroness Scotland of Asthal, to table an amendment to the ICC Bill saying that it does not apply when Nato has the moral right to intervene. If so, who will decide when it is acceptable morally to invade or bomb a country in the name of international justice?'; M Caplan, 'International criminal court sounds a wake up call', *The Times*, 10 April 2001.

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combine retributive and restorative aspirations into practice. Consequently, it is crucial to view the achievement of these objectives within the context of universally accepted rights paradigms which satisfy the functional requirement of legitimating the boundaries of international action against citizens and states. As Cotterrell implies,[153] this requires a pluralistic vision of law which reaches beyond parochial state interests to reflect communitarian concerns at the international level. Accordingly, such communitarian aspirations, whether at the global or local level, must reflect adequately individual demands for guaranteed freedoms against power exercised arbitrarily in the name of the international community. In this respect, this paper has highlighted significant imperatives for the future development of principled sentencing in the ICC which should sustain these aspirations. More specifically, these consist of the need for:

- A statement of principles or purposes for sentencing
- Mechanisms to provide guidance and ensure consistency through the development of a principled sentencing jurisprudence
- Additional safeguards against bureaucratic and managerial agendas which compromise due process
- The development of due process norms which adequately address victims concerns
- The de-politicisation of the international criminal trial process
- A re-engagement beyond retributive concerns to address more adequately communitarian notions that resonate with rehabilitation, reconciliation, and restorative justice.

These prescriptions also reflect on the need to reconcile 'an acute sensitivity to the peculiarities of the local' with 'the universalising imperative' in the contextual analysis of international justice, or, in other words, provide a more general consideration of the means whereby localised criminal trial procedures may be recognised as instrumental (or reflective) in the transformation and internationalisation of criminal procedure in the sentencing context.[154] Hence, it is important to recognise that we have, in this paper, been concerned with deconstructing the contexts of international sentencing at several levels, both horizontal and vertical. For instance, our evaluation of fair trial paradigms against the practices of international sentencing must recognise the relativity of particular notions of justice. As Findlay correctly suggests,[155] access to justice as measured by adherence to principles of fair trial can only be understood by research which considers the dynamic of practice and process through a detailed examination of the developing contexts of discretionary decision-making within particular sites of the international trial, such as

[153] R Cotterrell, 'A legal concept of community' (1997) 12 *Canadian Journal of Law and Society* 75, 91.
[154] See Findlay, op cit, n 14.
[155] Ibid, n 6, 50.

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sentencing. The prospects and reality of synthesis in institutional and procedural form is, therefore dependant on a careful observation of these processes and their effects at both the international and local level. At the international level, however, symbolism and judicial dominance will be important determinants of the discretionary decision-making aspects of sentencing procedure in the ICC. Nevertheless, the forces of greatest significance are likely to remain those ideological and political dynamics that forged the ICC's Statute and Rules. These are liable to re-enforce and sustain such philosophical compromises and pragmatic contexts as have been revealed by the sentencing practices of the ad hoc tribunals.

For criminal justice theory, there is the further recognition that its role in the international sphere is to provide the appropriate epistemological contexts for developing penal strategies.[156] These may reflect communitarian desires for justice in the sentencing process. For example, Cotterrell argues that, whilst justice must be predicated on order, the balance and interplay between them should 'determine the level of legitimacy accorded to legal doctrine and the agencies involved in its institutionalisation'.[157] Hence, although not prescriptive of the social values to be ascribed to order and justice, Cotterrell's position is tolerant of a communitarian vision of rights which is predisposed to recognise diversity and pluralism in the world order.

Recognising the need to reflect upon the diversity and instrumental desires of public opinion at the level of the international criminal trial and sentencing forces criminal justice theory to develop strategies for understanding the moral contexts of international law's implementation at both the international and domestic level. This acknowledges that our appreciation of such social experience, including the development of penality,[158] is contingent on our knowledge of how international legal norms are transformed and understood as conduct norms and values at these levels through sentencing practice. I would argue that coherent policy and the future development of sentencing purposes and principles for the ICC depend on conceptualising in this manner.[159]

At the micro-level, understanding the significance of discretionary decision-making in sentencing at the international level suggests a need to reconsider how sentencing decisions can be conceptualised, described and analysed.[160] This raises crucial issues relating to the merging (or otherwise) of adversarial and inquisitorial styles in the international criminal trial as

[156] See Henham , 'Theory, Rights and Sentencing Policy' (1999) 27 *International Journal of the Sociology of Law* 167, 178.

[157] Cotterrell, *Law's Community: legal theory in sociological perspective* (Oxford: Clarendon Press, 1995), 316.

[158] This includes the ambit of rights norms within criminal procedure.

[159] In this endeavour autopoietic theory may assist us to conceptualise and contextualise discourses which present competing interpretations of the legal and social meaning of forms of justice; see further, M King, 'The Truth about Autopoiesis' (1993) 20 *Journal of Law and Society* 218; R Nobles and D Schiff, 'Miscarraiges of Justice: A Systems Approach' (1995) 58 *MLR* 299.

[160] See further, Henham and Findlay, op cit, n 3.

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evidenced in the process of judicial decision-making. For instance, as Tata suggests,[161] sentencing decisions should be analysed at the discrete level from the standpoint of the description and explanation of sentencers' accounts of 'similarity' and the construction of 'whole offence stories'. However, intuitive accounts must also be balanced against accounts of how the formal exercise of discretion becomes patterned, normalised, and typified as an exercise in contextual analysis.[162] Descriptions at the level of legal formalism are patently inadequate as a methodology that might contribute to our understanding of the comparative analysis of trial process.

I have suggested that the sentencing practices of the ad hoc tribunals have done little to promote principles that argue for the unity or generalisation of justice, and have failed to appreciate fully the fact that our interpretation of justice is dependent on social context. In addition, the contextual stage must be considered as multi-layered and responsive to the demands of justice as perceived at both the international and domestic state levels. Therefore, whilst appearing to have reconciled and synthesised some aspects of adversarial and inquisitorial procedural approaches in their respective Statutes and Rules, these practices are currently more reflective of judicial pragmatism and style than a concerted attempt to forge an influential procedural hybrid sentencing process which might serve as a paradigm for future international sentencing. Nevertheless, whereas focusing our attention on style also directs us to examine judicial practice,[163] this does not address context, nor resolve the manifest inconsistencies and paradoxes that have produced and sustained the present arrangements.[164] Such relative insularity and irrelevance contributes to weaken any claim for international sentencing to exercise democratic principles of justice.

Rather than perpetuating sterile arguments over the relative seriousness of heinous crimes, I have argued that the prospects for a more integrated sentencing regime for the ICC would be much enhanced by relating those considerations to a principled reassessment of its penality.[165] Such a move would ultimately invest the crucial process of sentencing by the ICC with greater credibility and legitimacy at both the international and local level, and help dissipate its otherwise likely place in history as the twenty-first century forum for international public retribution.

[161] C Tata, 'Conceptions and Representations of the Sentencing Decision Process' (1997) 24 *Journal of Law and Society* 395.

[162] The analysis of trial transcript material is one element in this process. Neither this, nor the adoption of other methodologies for deconstructing sentence decision-making can be adopted in a theoretical vacuum; Henham and Findlay, op cit, n 3.

[163] See further, FJ Pakes, 'Styles of Trial Procedure at the International Criminal Tribunal for the Former Yugoslavia', Paper presented at the European Society of Criminology, First Annual Meeting, University of Lausanne, Switzerland, Sept 2001.

[164] See, Cockayne, op cit, n 50.

[165] Limitations on the use of penalties beyond imprisonment militate against restorative development. Removal would also facilitate a more constructive debate concerning the sentencing potential for rehabilitation and reconciliation as realistic primary sentencing objectives.