More Than Just Victors' Justice:

A Defense of the Solely Retributive Character of Atrocity Crime Punishment by International Criminal Tribunals

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Our intuitions about justice are often strong, often deeply held, and often confused. Each item in this list motivates philosophical inquiry, underlining why and where we should clarify and explore our intuitions of justice. Social media has made public, democratic, discussion of justice more commonplace. As a result, exactly which intuitions are strong, deeply held, or contradictory enough to justify philosophic inquiry have become more apparent. One such area is our intuitions surrounding war crimes and other atrocities.

Anecdotally this is easy enough to observe—if one searches "war criminal" on Twitter, one will, of course, find a host of voices calling for the prosecution and punishment of people that the tweeter deems to have committed war crimes. Commonly, the targets of this ire are individuals who have long ago vacated the positions that enabled them to commit the actions deemed as war crimes (whether such actions are war crimes is irrelevant to demonstrating the intuition). These individuals range from former Presidents like Clinton,[1] Bush,[2] Obama,[3] and Trump;[4] to former Secretaries of State like Clinton, Albright, and Kissinger;[5] to former democratic heads of

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[1] @kielmw, Twitter post, October 27, 2020, https://twitter.com/kielmw/status/1321287791439802369. "Joe Biden is a war criminal. Barack Obama is a war criminal. Hillary Clinton is a war criminal. Bill Clinton is a war criminal. They should all be rotting away in prison."

[2] @plantbasedego, Twitter Post, January 30, 2021, https://twitter.com/plantbasedego/status/1355619112018452484. "... ppl thought ellen was a woke genius for laughing with george bush a literal war criminal....."[sic], @caleb_phillfree, Twitter Post, May 4, 2020, https://twitter.com/caleb_phillfree/status/1257331113455951872."GW Bush, a war criminal pig who deserves execution and hellfire…"

[3] @JamesPeppersalt, Twitter post, February 1, 2021, https://twitter.com/JamesPeppersalt/status/1356316823931805702. "...literal war criminal Obama....".

[4] @DavidLloydJone1, Twitter post, February 1, 2021, https://twitter.com/DavidLloydJone1/status/1356356734982492162. "Trump's Middle East policy was arming Saudi Arabia's war on the peoples of Yemen… he is a Nuremberg-scale war criminal."

[5] @Skott69, Twitter post, December 1, 2020, https://twitter.com/Skot69/status/1333758603828867073. "...the war criminal Clinton...", @Swee10Lo, Twitter post, June 19, 2020, https://twitter.com/Swee10Lo/status/1273990064675012608. "Mike Pompeo is a war criminal and already has the blood of tens of thousands of Venezuelans on his hands.",

state and government like UK Prime Minister Tony Blair, French President Nicolas Sarkozy, and Canadian PM Joseph Jacques Jean Chrétien.[6] Given the emotional weight that such a charge carries, these intuitions' strength and depth are apparent. Interestingly, at least some of the same individuals who seem very invested in the punishment of perceived war criminals believe that similar punishment in domestic crime is unwarranted, supporting, for instance, prison abolition.[7] I contend that this expresses an, on some level, confused intuition.

War crimes and other atrocities are a unique genre of crime; the mechanism of judgment, the criminal's status, and thus the justification for punishment set them in a category all their own. Since the Second World War, and the advent of modern war crimes prosecution, those prosecuted have commonly been tried by international tribunals. The Allies in Nuremberg and Tokyo first convened these tribunals. Subsequently, others in their mold have been convened in the later 20th century by the United Nations as temporary measures in the aftermath of particularly dirty wars (such

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@DerBatsu, Twitter Post, February 1, 2021, https://twitter.com/DerBatsu/status/1356339965613891585. "...war criminal Madeleine Albright...",
@AbsonJill, Twitter Post, January 31, 2021, https://twitter.com/AbsonJill/status/1355882569498308613. "...Being in a Foreign Policy Commission with War Criminal Henry Kissinger was a bit of a tip off, so was being advised by War Criminals at home."

[6] @ashvir, Twitter post, February 4, 2021, https://twitter.com/ashvir2012/status/1357370928762675203. "Blair is a war criminal not a hero,"
@sabrina69, Twitter post, March 4, 2019, https://twitter.com/sabrina68/status/1102448942468362240. "...first Libya War Criminal Neolib Sarkozy indicted on corruption charges. And now War Criminal neocon Netanyahu indicted on corruption charges. Next? Macron? Hillary? I cheer each time a war criminal is indicted…"
@RWJBoon, Twitter post, September 17, 2018, https://twitter.com/RWJBoon/status/1041768470856257536. "Chrétien has become Canada's George W Bush. A war criminal…."

[7] @Swee10Lo, Twitter post, October 17, 2019, https://twitter.com/Swee10Lo/status/1181314762317029376. [Expressing support in a thread on prison abolition] "1. More people incarcerated than any other country. 2. Highest prison population per capita.",
@caleb_phillfree, Twitter post, July 14, 2020, https://twitter.com/caleb_phillfree/status/1283077305758343168. "Ya sorry if you have #resist in your bio but no BLM, AbolishPD/ICE/PRISON, M4A, GND, etc, you're not getting the follow back."

as the International Criminal Tribunal for the former Yugoslavia or the International Criminal Tribunal for Rwanda), and most recently as the permanent International Criminal Court at the Hague. Because of the nature of war crimes and other atrocities, the defendants at these tribunals are all the vanquished, posing no further credible risk of offense. Additionally, because these tribunals focused on the culpability of leaders, the individuals who appear are highly socially functional. All of this often leads to accusations from some quarters of "victors' justice"—the claim that international tribunals are hellbent on nothing but retribution, a justification that has lately been far from in vogue. I contend that this accusation is true, although I do not share the implicature that international courts should not punish atrocity crimes.

Because atrocity crimes are *sui generis*, nothing other than the pursuit of retribution can justify their international prosecution. Other commonly given general justifying aims for punishment all fail—to incapacitation, to denunciation, from rehabilitation, to deterrence, leaving retribution as the only plausible candidate. This failure presents a dilemma for the many who hold strong intuitions that war criminals should be punished but have a distaste for retribution. Either give up international tribunals as currently constituted as mechanisms for providing justice after atrocities or embrace their retributive character.

To defend this thesis, I will first expand on what exactly constitutes war crimes, delving into their history and justifying my grouping them with other atrocities for this argument. I will second provide an overview of philosophical theories of punishment, before third, explaining the failures of every justifying aim of punishment besides retribution in the case of international tribunals. Fourth and finally, I will defend

retribution as an appropriate justification, primarily retribution as conceived and apologized for by Michael S. Moore, while touching on why we should accept retribution instead of repudiating the work of international tribunals.

1 Atrocity Crimes

The genus of crimes with which I am concerned possess unique characteristics that can only plausibly yield retributive justification for international prosecution and punishment. However, before this, I must first define the genus. I refer to and group what the establishing document of the International Criminal Court (ICC) (the most recent significant international tribunal to prosecute these crimes) deems the "most serious crimes of concern to the international community as a whole."[8] Then I provide a brief historical overview of the types of international criminal tribunals with which I am concerned before addressing the claim that such tribunals were only ever instances of "victors' justice."

1.1 Definitions

The crimes in this category are "[t]he crime of genocide… [c]rimes against humanity… [w]ar crimes… [and] [t]he crime of aggression." [9] The ICC and both precursor United Nations international criminal tribunals (the International Criminal Tribunal for the Former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR)) claimed jurisdiction over such crimes.[10] Each item on this list is painstakingly defined, not only by the so-called *Rome Statute* that established, under United Nations auspices, the ICC as the first permanent international criminal tribunal. Here, genocide refers to "acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group."[11] Crimes against humanity are more

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[8] *The Rome Statute*, Article 5.
[9] *Ibid.*
[10]David Scheffer, "Genocide and Atrocity Crimes." (*Genocide Studies and Prevention* 1, no. 3, 2006), p. 237.
[11] *The Rome Statute*, Article 6.

amorphously described as "acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack." These proscribed acts include such grave wrongs as murder, enslavement, torture, sexual violence, apartheid, and "[o]ther inhumane acts of a similar character intentionally causing great suffering, or serious injury…"[12] War crimes, which in the popular vernacular has largely come to refer to any of these crimes,[13] are significant breaches of earlier international treaties on the law of war such as the Geneva Conventions as well as "serious violations of the laws and customs applicable in armed conflicts…"[14] Violations of the law of war do not need to be significant to constitute a war crime. For example, it is a war crime for a militia member to violate the specific Third Geneva Convention stipulation that requires them to display an identifying insignia that qualifies them for prisoner of war status.[15] Such a war crime is not as significant as prisoners' mass execution or targeting civilians, but it is still a war crime. Although the ICC and other international criminal tribunals could prosecute less significant war crimes, they have been instead concerned with the most significant war crimes due to resource constraints. Finally, the crime of aggression is

> the planning, preparation, initiation or execution, by a person in a position effectively to exercise control over or to direct the political or military action of a State, of an act of aggression which, by its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations…. "[A]ct of

[12] *Ibid*, Article 7.
[13] My use of "war crime" will not mirror this popular conception. When "war crime" appears in this essay, it will specifically mean crimes defined in this paragraph.
[14] *Ibid*, Article 8.
[15] Third Geneva Convention (1949) Art. 4 §1.2.

aggression" means the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State… [16]

In this regard, aggression is a specific variety of war crime,[17] however, due to its relatively recent addition to the international understanding of the law of war,[18] *The Rome Statute* treats it separately.

The unique gravity and immorality of such actions are no doubt as readily apparent to the reader as they were to *The Rome Statute* drafters, who selected these offenses as the crimes over which they would claim jurisdiction. As such, there is already a *prima facie* reason to understand these transgressions as a family of interrelated crimes. As David Scheffer argues, this similarity is substantively borne out, and these crimes can be understood as constituting the class "Atrocity Crimes."

First, Scheffer points out that each of these crimes is of "significant magnitude," where they cannot occur without a systemic, or at least mass, commitment to wrongdoing.[19] Each crime (genocide, crimes against humanity, war crimes, aggression) harms a large number of people, either directly (as in the case of genocide, crimes against humanity, and some war crimes) or indirectly (in the case of certain violations of the laws and customs of war and aggression). This shared characteristic is the source of our deep-seated abhorrence and thus the moral motivation for international prosecution. Second, atrocity crimes are bundled, per Scheffer, by the unique conditions in which they occur—each atrocity requires a background of socio-political

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[16] *Ibid*, Article 8 *bis.*

[17] Hence aggression is defined in the same article (albeit *bis*.) of The Rome Statute as war crimes generally.

[18] *Infra*.

[19] Scheffer, p. 238.

upheaval, creates upheaval, or both.[20] This characteristic contributes to the unique prosecutorial status of atrocity crimes. The socio-political upheavals (war, ethnic cleansing, insurrection, etc.) that accompany or seed atrocities disrupt ordinary paths of justice.[21] This pairing results in those who commit atrocities rarely seeing a court while the upheaval persists. Third, Scheffer argues atrocity crimes are all identifiable breaches of "conventional international law."[22] This claim can be understood as a reinforcement of the *prima facie* case for understanding atrocity crimes as a group unto themselves: the crimes are similarly situated in the fabric of extant international law. Fourth, atrocity crimes are all executed through social structures, and through the leadership of some social elite, [23] defined as any individual whose elevated social position allows them some degree of control to either order, encourage, or fail to prevent an atrocity. Be it a squad of Freikorps, a Janjaweed militia, or the army of a strong state, some social structure and elite leadership are necessary for the crimes to attain their significant magnitude. A Freikorps boss, Janjaweed headman, or army lieutenant might not intuitively seem like elite leadership, but their leadership position in a social structure makes them responsible for atrocities. Fifth, and almost as a corollary to the third and fourth characteristics (upheaval and breaches of customary international law), the international law "applicable to such crime while it may impose state

[20] *Ibid*. Scheffer hedges somewhat on this point ("crime may occur"), but I think that atrocity crimes cannot be separated from socio-political upheaval of some kind.
[21] An example of the disruption of ordinary justice is ethnic cleansing during peace at the state level. There is no correctly functioning domestic procedural recourse to justice available to the victims--else, they would not be victims.
[22] *Ibid*.
[23] *Ibid*. p. 239.

responsibility and even remedies against states, is also regarded under customary international law as holding individuals criminally liable…."[24]

Finally, there is a pragmatic reason to give a common name to these similarly situated crimes. As the reader may have noticed,[25] without a common name, it is difficult to refer to the group without using stilted terminology. Without this unifying term, short of listing the individual subtypes of crime and then repeating "these crimes," there is no precise way to capture the whole group. This leads to a "certain sloppiness… infect[ing] public dialogue, official documents, and even scholarly works,"[26] as lists inevitably exclude one subtype of atrocity crime or another. As noted earlier, the most prominent example of this sloppiness is the use of "war crime" to capture those other atrocity crimes which are not necessarily war crimes, despite often occurring during armed conflict (a substantial socio-political upheaval) and in contravention of customary and statutory laws of war.

Definitionally summed, an atrocity crime is a substantial international crime, with characteristics such as attachment to socio-political upheaval and greater culpability for social elites that place international tribunals in a unique position as the most effective body for prosecution and punishment. Atrocity crimes are uniquely heinous, international in impact, and cannot realistically be prosecuted when they are committed.

1.2 Historical Overview

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[24] *Ibid.*

[25] Notice how unwieldy earlier passages have been where I was forced to forego the use of "atrocity crime."

[26] Scheffer, p. 238.

The use of international tribunals to prosecute atrocity crimes can be traced back to World War II (WWII). During the war and then immediately afterward, the international criminal tribunal as understood today took shape. The International Military Tribunal at Nuremberg (Nuremberg) and the International Military Tribunal for the Far East (Tokyo) were large-scale international tribunals convened by the victorious Allies with the express purpose of prosecuting atrocities committed by the vanquished Axis Powers. These tribunals served as the blueprint for the subsequent ICTY, convened in the aftermath of Yugoslavia's (literal) balkanization. The ICTR followed in the aftermath of the genocide in Rwanda. In both instances, significant international tribunals were convened in the aftermath of upheavals rife with atrocities. However, these efforts were only temporary. In 2002 the ICC began operating as the first permanent international criminal tribunal in history. In this section, I provide further detail for this historical outline and, in particular, note the charge of "victors' justice," which has dogged such tribunals since their inception in Tokyo and Nuremberg.

In January 1942, the representatives of the embattled Allied Powers met in London in Saint James’s Palace to deliberate on justice in the war. In addition to agreeing to adhere to pre-existing customs and statutes in war, the Allies also agreed that they

> would place among their principal war aims the punishment, through the channel of organised justice, of those guilty of or responsible for these crimes, whether they have ordered them, perpetrated them or participated in them.[27]

The Declaration of St. James's Palace, as it came to be known, committed the Allies to organized justice should they be victorious, an outcome which was hardly guaranteed in early 1942.[28] As the war continued and Allied victory became inevitable, the exact shape of this organized justice had to be determined. In summer 1945, the leaders of the Allied Powers met in London to settle this question. In addition to prosecuting conventional war crimes, the existence of which had been recognized for thousands of years,[29] The London Conference produced an agreement to try Nazi leaders for aggression and crimes against humanity (inclusive of what is now defined as genocide).[30] These two crimes as categories unto themselves were new and not obviously rooted in statutory and customary international military law. It was decided that World War II's horrors and atrocities would be insufficiently addressed if the only atrocities prosecuted were conventional war crimes. Thus, at Nuremberg and Tokyo, the Axis leaders on trial were accused of the whole gamut of atrocity crimes as earlier defined. To enforce participation in the trial, the Allies compelled the Axis to surrender unconditionally; military force induced the accused to appear. The victorious Allies were cognizant of the potential for the trials to tip over from justice into revenge. The chief

[27] Mark S. Martins and Jacob Bronsther, "Stay the Hand of Justice? Evaluating Claims That War Crimes Trials Do More Harm than Good." (*Dædalus, the Journal of the American Academy of Arts & Sciences* 146, no. 1), p. 84.
[28] *Ibid*.
[29] "The word 'atrocity' (or 'atrocities') derives from Roman military law. It described illegal acts performed pursuant to military orders…." (Scheffer, p. 238.)
[30] Richard H. Minear, *Victors' Justice* (Princeton, NJ: Princeton University Press, 1971), p. 7.

prosecutor sent by the Americans to Nuremberg, Supreme Court Justice Robert Jackson, promised to "stay the hand of vengeance" and lauded the decision to treat the vanquished as determined by law as "one of the most significant tributes Power has ever paid to Reason."[31] In the end, the promise to adhere to “organised justice” from The Declaration of Saint James’s Palace was kept. An international tribunal of judges oversaw the trials and handed down sentences. The accused freely chose their counsel, called and questioned witnesses, and produced evidence.[32] Further, a guilty verdict was not a forgone conclusion as it would be for strict revenge. Ultimately, after nine months, thirty-three witnesses called by the prosecution, and sixty-one witnesses called by the defense, Nuremberg handed down twenty-two verdicts: twelve death sentences, seven lengthy prison sentences, and three acquittals.[33] In Tokyo, after two-and-a-half years, all twenty-five defendants still living or fit to stand trial were convicted: seven received death sentences and eighteen received prison terms, sixteen of which were for life.[34]

In 1993, the United Nations established by Security Council Resolution the ICTY. This tribunal, modeled on Nuremberg and Tokyo, was to prosecute those whose atrocity crimes were “committed in the territory of the former Yugoslavia on or after January 1, 1991.”[35] The UN empaneled fourteen judges for four-year terms from fourteen different countries. Unlike at Tokyo and Nuremberg, the death penalty was forbidden. This tribunal judged the accused from The Hague in the Netherlands. Without a police force

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[31] Martins and Bronsther, p. 84.
[32] Minear, p. 22-3.
[33] Jenny Gesley, “Nuremberg Trial Verdicts,” September 29, 2016, https://blogs.loc.gov/law/2016/09/nuremberg-trial-verdicts/.
[34] Minear, p. 31.
[35] Patricia M. Wald, “Judging War Crimes.” (*Chicago Journal of International Law* 1, no. 1, 2000), p. 189.

of its own, this tribunal relied on international peacekeeping forces and UN member states' participation. By 2000, thirty-four defendants were in physical custody, and thirty more were indicted but still evading capture.[36] Ultimately 161 individuals were indicted, and 109 tried by the tribunal. Ninety were found guilty and sentenced, and nineteen were acquitted.[37] In late 1994, the UN Security Council established the ICTR, with its seat in Arusha, Tanzania, with a mandate to prosecute individuals responsible for atrocity crimes of genocide and crimes against humanity. The court claimed jurisdiction over these crimes committed in 1994 either in Rwanda or by Rwandan citizens in neighboring countries.[38] Ultimately, before its closure in 2015, the ICTR indicted ninety-three individuals and successfully tried seventy-six, sentencing sixty-two individuals and acquitting fourteen others.[39] The last of the canonical international criminal tribunals I wish to provide background on is the ICC. Established by *The Rome Statute's* adoption in 1998, the ICC began operation in 2002 with a broad and (unlike its predecessors) permanent mandate to prosecute and punish atrocity crimes from its seat in The Hague. At the time of writing, the ICC has investigated fourteen situations of potential atrocity crime from Sudan in Northeastern Africa, to Myanmar in Southeast Asia, to Georgia in the Caucasus.[40]

1.3 Victors' Justice

Throughout and despite these successes, accusations of "victors' justice" have dogged these five tribunals since their inception. Even with such lofty ambitions and

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[36] *Ibid.*, p. 189-90.
[37] "About the ICTY," https://www.icty.org/en/about.
[38] S/RES/955(1994).
[39] "ICTR in Brief," https://unictr.irmct.org/en/tribunal.
[40] "Situations under investigation," https://www.icc-cpi.int/pages/situation.aspx.

motives as espoused by Justice Jackson, during and after the immediate post-WWII trials, these criticisms of "victors' justice" attached themselves to Nuremberg and especially Tokyo. Per these critics, notably Richard Minear, "victors' justice" can be seen in uneven application of punishment, motivated by a desire for vengeance or cynical political maneuvering on the part of the winners in the aftermath of a conflict. These accusations have continued and, in the recent past, were applied to the ICTY. Former President of Serbia, Slobodan Milošević, accused the ICTY of acting as an instrument of victors' justice before his trial, alleging that the victorious NATO powers were nakedly exercising their power to persecute him unjustly.[41] However, not all such accusations are as weak. These tribunals do see uneven enforcement of atrocity crimes, especially those in the aftermath of WWII. Evidence supporting the claim that these tribunals were vengeance-motivated exercises of power with a thin legal veneer ranged from the minor to structural. For instance, although the US selected the Honorable Justice Jackson, as prosecutorial representative, the Soviet Union sent Andrei Vyshinsky, who notoriously prosecuted the purge-era Moscow show trials.[42] Critics suggest that this shows that the Soviets, at least, similarly approached Nuremberg as they approached those show trials. The guilt of the accused was a forgone conclusion, the trial a “morality play.”[43] Critics allege that the British shared a similar outlook. Before the 1945 London Conference that set the form of Nuremberg (and indirectly Tokyo),

[41] Gary Bass, “Victor's Justice, Selfish Justice.” (*Social Research* 69, no. 4), p. 1035.
[42] *Ibid.*, p. 1039.
[43] Minear, p. 179.

> The British Government began an early aide-memoire: ‘H.M.G assume that is beyond question that Hitler and a number of arch-criminals associated with him (including Mussolini) must, so far as they fall into Allied hands, suffer the penalty of death for their conduct leading up to the war and for their wickedness… in the conduct of the war.’[44]

More substantially, neither Nuremberg nor Tokyo tried Allied soldiers and leaders for war crimes. Nuremberg’s charter explicitly set crimes committed by the defeated European Axis as their jurisdiction, but Tokyo’s mandate was the prosecution of “Major war criminals in the Far East.”[45] Nevertheless, these tribunals were set up and run by the victors of the war and prosecuted only the defeated. Additionally, those who champion the label of "victors' justice" point to the potential *ex post facto* nature of the aggression and crimes-against-humanity charges as additional evidence of injustice. One of the Tokyo judges, Radhabinod Pal, dissented from the tribunal's judgment and opined that all accused ought to have been acquitted of every count, in part because of the perceived retroactive nature of the prosecution.[46]

I find most of these criticisms unpersuasive. That the Soviet Union approached Nuremberg with potentially the same view as they approached a show trial does not mean Nuremberg itself was a show trial; the acquittals alone evince that. Furthermore, the UK's outlook is not proof of the court operating under an "assumption of guilt."[47] Instead, it is proof that one of the prosecuting parties fully believed in the guilt and moral

[44] *Ibid.*, p. 18.
[45] *Ibid.*, p. 93-4.
[46] *Ibid.*, p. 32-3, 63.
[47] *Ibid.*, p. 18.

necessity of punishment for the defeated atrocity criminals. Moreover, although Nuremberg and Tokyo did not try Allied war crimes, the victorious powers justified this by arguing that they could (and to some extent *did*) punish their war crimes in domestic military courts. An international criminal tribunal is a unique tool for a unique situation. That the NATO powers backed the ICTY in its mandate to prosecute war crimes committed by those in the anti-NATO former Yugoslavia is not evidence that NATO powers are being uniquely unjust, but instead, evidence that atrocity criminals who find their way before international tribunals do so because of the collapse of domestic paths of organized justice.

There is one aspect of the charge of victors' justice that I believe holds—though not in the way that critics charge—international criminal tribunals are "morality plays." These tribunals were established and are motivated by the deep-seated moral abhorrence of injustice. They exist because something so terrible has occurred that traditional methods of justice likely would not be sufficient to punish those who committed the atrocities, even if these traditional methods were still functional.[48] Somehow, international tribunals attempt to provide justice in the aftermath of such egregious wrongs. That we expect tribunals to have a moral character beyond simple ascertainment of facts, and the application of the law is far from a failure. Instead, these moral intuitions are central to our conception of justice. Further, they form the basis for my defense for retributivism in these cases as justification for punishment. However,

[48] Bass, p. 1036.

before beginning that defense, I will first provide an overview of punishment's philosophical justification.

2 Theories of Punishment

An early attempt to philosophize analytically about the law returned the claim that laws fundamentally are commands backed by sanction.[49] Although this rather crude definition has justifiably attracted significant criticism and finds few adherents today,[50] it does illustrate the intuitive importance of punishment to the law. Law, in particular, criminal law, relies on punishment or sanction of some kind to be reified.[51] Yet, what morally underpins the practice of punishment is far less clear. This moral underpinning is what H. L. A. Hart dubbed a "general justifying aim," the reason that purports to explain why we *can and should* (or should not) punish.[52] To this end, philosophers and legal theorists have advanced several rationales, notably incapacitation, denunciation, moral education, social rehabilitation, deterrence, and retribution. This section will contain an overview of punishment, then a specific explanation of general justifying aims, followed by delineation of the most notable (and plausible) of these of those aims.

2.1 Punishment Overview

Before we can adequately understand what justifies legal punishment, it is necessary to understand what legal punishment is. I define punishment to have three components. 1) Harm 2) Result of Determined Infraction and 3) Official Administration.[53]

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[49] John Austin via Edmund L. Pincoffs, *Philosophy of Law: A Brief Introduction* (Belmont, CA: Wadsworth, 1991), p. 91.
[50] *Ibid*, p. 92-95.
[51] Indeed, this is a somewhat common criticism of the concept of international criminal law—far too many crimes go unpunished.
[52] H. L. A. Hart, *Punishment and Responsibility: Essays in the Philosophy of Law* (Oxford University Press, 1968), p. 4.
[53] This definition draws heavily from Hart and Pincoffs.

1) Harm: To begin with the obvious, punishment injures in some way. This injury could run the gamut from painful (caning, hard labor, breaking upon the wheel), to embarrassing (the stocks, a struggle session), to depriving (monetary fine, property forfeiture, execution), to autonomy reducing (community service, incarceration, exile).[54] Additional components are needed, but it is worth dwelling on possible injury's (synonymous with "harm" from here on in) importance and breadth. Without the harm, there is no punishment. The broad scope of harm's definition helps fold into the category of punishment even those reasons for punishment that claim not to be punishment, such as incapacitation and rehabilitation—the rehabilitated surely had their autonomy reduced when he was compelled to participate in a program of reform or when he was placed under lock and key. In these cases, even though it could be claimed that "harm" more narrowly construed was not inflicted, harm as defined here indeed was.

2) Result of Determined Infraction: Legal punishment must also be administered because the punished was found to have contravened some official rules, more abstractly, as a result of meeting the antecedent in a system of conditional threats, or more basically because the punished violated the law.[55] Thus, it is not legal punishment in a case where, as in Shirley Jackson's *The Lottery*, a community randomly selects someone to be stoned to death for no supposed infraction, but instead simply as a means of ensuring social cohesion or maximizing some other societal good. However, this distinction is not meant to provide a "definitional stop," as Hart terms it, where a

[54] *Ibid*, Pincoffs, p. 9, 13.
[55] Hart, p. 5, Pincoffs, p. 13.

rationale that would call for inflicting harm on someone who had not violated the law (as in *The Lottery*) can avoid justifying itself by dint of not being a punishment *per se*.[56]

3) Official Administration: Punishment must be administered by agents of the system of rules, acting in their capacity as such agents.[57] That is, it is not punishment when someone violates some positive law—jaywalking, for instance—and is struck dead by lightning, or beaten by an angry taxi driver, or mugged for the 250 dollars that would have been the fine by a magistrate walking home as a private citizen.

These three components established, I will illustrate (in a way that hopefully comports with your intuitions) how absent one of the components, there is no punishment. In 897, Pope Stephen VII decided to seek redress for crimes committed by a, at the time, dead former pope. Thus, when Pope Formosus' seven months' cold corpse[58] was dragged before the papal court and was tried then partially dismembered and stripped of its vestments, there was no punishment, for no harm was inflicted (a cadaver can hardly feel shame or pain).[59] In addition to the earlier example from *The Lottery*, the lack of punishment without a legal finding of infraction is illustrated in another literary work: Fyodor Dostoevsky's Crime and Punishment. Here, the main character Rodion Raskolnikov murders an old woman and subsequently feels tremendous guilt. He agonizes over his wrong before eventually turning himself in to the police and ultimately the judgment of the court. However, Raskolnikov is punished for

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[56] Hart, p.5, Moore, p. 25.
[57] Hart, p. 5, Pincoffs, p. 13.
[58] Although some have held that you can be harmed after death, I disagree. As disputing this is beyond this essay's scope, I ask the reader with such sympathies to either put them away or ignore this example.
[59] The cadaver synod is also helpful as an example that shows how socially useful "punishments" are not legal punishments.

murder not when he internally agonizes over what he has done (as this is not officially administered), but instead when the state sends him to Siberia, although this external harm pales in comparison to what he inflicts on himself.[60] Returning to the subject of war crimes and atrocities, an officer fragged after ordering the liquidation of a village of suspected insurgent sympathizers[61] is not legally punished because he was harmed by an agent other than one acting on behalf of a system of rules.

2.2 General Justifying Aims

Before listing the commonly advanced justifications for punishment, I think it is worth explaining what goes into such a justification. The general justifying aim of a punishment is the moral good that the punishment supposedly achieves.[62] In Hart's words:

> [These theories of punishment] are not, as scientific theories are, assertions or contentions as to what is or what is not the case…. On the contrary, those major positions concerning punishment… are moral *claims* as to what justifies the practice of punishment—claims as to why, morally it *should* or *may* be used.[63]

Pursuing the good brought about either intrinsically or instrumentally by punishment motivates punishment. Although injury may be motivated differently, because punishment is officially administered in response to an infraction, motive and justification

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[60] Pincoffs also cites this example (Pincoffs, p. 11).
[61] As Hugh Thompson Jr. threatened Lieutenant Calley at Mỹ Lai.
[62] Hart, p. 8-9.
[63] *Ibid*, p. 72.

for punishment are linked inextricably. Understandably, as in all ethical disputes, there are significant differences in view as to which good is served by punishment. Some views of punishment even advance the claim that multiple moral goods justify punishment. These so-called "mixed theories" have attracted significant criticism despite their popularity. However, because I intend to eliminate as plausible any general justifying aim but retribution for war crimes, I need not get into these flaws here.[64]

The first general justifying aim I will outline is incapacitation. This general justifying aim is quite simple and is rarely held up as the sole good of punishment. Under incapacitation, punishment is good insofar as certain punishments, such as imprisonment, exile, or execution, directly prevent the guilty person from committing further crimes.[65] Thus, those punishments justified by incapacitation must deprive the punished of autonomy in some way, either by preventing them from participating in a particular polity in the case of exile, restricting them to an institution if imprisoned, or by ending their autonomous existence in the case of execution.

Denunciation as a general justifying aim seeks to promote the good of advertising a society's moral outrage at a crime.[66] Harms are merely emphasis per denunciation. The greater the harm, the more emphatic the denunciation, and thus the moral position of the community is more clearly and widely expressed. However, this is not meant to prevent future crimes, either by morally educating through example or by deterring.[67] Instead, this advertisement aids social continuity because "citizens do not

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[64] See Michael S. Moore, *Placing Blame: a General Theory of the Criminal Law,* (Clarendon Press, 1997), p. 92-94 for a thorough criticism of the coherence of mixed theories.
[65] Moore, p. 84.
[66] *Ibid.* p. 85.
[67] Were this the goal, the justification would be deterrence or social rehabilitation.

have the sense that the social contract has been broken with impunity by others."[68] For instance, under a denunciative theory of punishment, the death penalty is good because it provides possibly the most unequivocal and weighty condemnation of a crime.[69] In this way, denunciation sees this social emphasis as instrumentally good—it benefits society somehow to advertise its moral standards. Moreover, for denunciation, the ultimate good is *not* found in the punishment of the guilty even if that incidentally helps express moral abhorrence. Instead, the ultimate good is advertising the community's disgust. If the good is intrinsically linked to giving the truly guilty their just deserts or teaching a moral lesson through the punishment, the justification is no longer denunciative, but instead retributivist or of a moral education character.

Next is social rehabilitation or reform. Social rehabilitation seeks to render criminals non-dangerous and socially functional even once they are no longer incapacitated.[70] The goal here is to benefit society by eliminating the risk of infraction after "treating" criminals for a supposed social illness that lead to their crimes, which are seen as anti-social symptomatic expressions. This treatment seeks to strengthen "the offender's disposition and capacity to keep within the law,"[71] either by paternalistically seeking to promote their flourishing in society or by simply inducing a feeling of penitence. To be clear, the feeling of penitence in the second conception must be only instrumentally valuable for society, not intrinsically good; else, it runs the risk of qualifying as moral education. Social hygiene must be, above all, the ultimate good

[68] Moore, p. 85.
[69] Hart, p. 170.
[70] *Supra*, see note 67.
[71] Hart, p. 26.

promoted.[72] This is a general justifying aim for *punishment* only because of the broad definition of punishment presented earlier. With a more restrictive definition, rehabilitation champions could plausibly claim that because they do not seek to harm, that they are not justifying a punishment *per se* in the same way that a surgeon operating to remove a malignant tumor is not merely cutting another human. However, rehabilitation imposed on someone due to a crime is still a denial of autonomy and, as such, a punishment under our definition.

A moral education theory of punishment, sometimes called moral rehabilitation, seeks to get the guilty to recognize, through punishment, that they did wrong when they transgressed the law.[73] This theory relies on a view that individuals can freely choose to commit or not commit crimes—and further that crime results from either a lack of moral knowledge or an error in moral calculation and not a kind of executive weakness or *akrasia*. This theory claims that although it benefits society to morally educate (like incapacitation, rehabilitation, or deterrence (mentioned below)) as it prevents future crime or benefits society generally by vicariously providing a moral lesson, society is not the primary beneficiary of this good. Instead, punishment "is done for [the wrongdoer], not to [her]."[74] Thus moral improvement for its own sake is the goal, and the punishment only instrumental insofar as punishment brings about that moral improvement. Although the morally reformed are unlikely to commit further crimes, that is a happy accident. Like rehabilitation, a moral education theory necessarily restricts the types of harm that can

[72] *Ibid*, p. 52.
[73] Jean Hampton, "The Moral Education Theory of Punishment." In *Crimes and Punishments* (New York, NY: Garland, 1994), p. 499.
[74] Hampton, p. 500.

form the injurious component of punishment. For instance, execution can never serve to morally educate the executed.

Deterrence is divided into two subcategories, special and general. Special deterrence seeks to prevent an individual from committing a crime after punishment through fear of further punishment. General deterrence, on the other hand, seeks to prevent future crimes committed by members of a community broadly through punishing one individual.[75] Deterrence as a general justifying aim claims, more than any other justification, an instrumental nature to punishment. A criminal is dissuaded from further crimes because of reticence to repeat their punishment; members of a community are dissuaded from a crime when a punitive example is made of a criminal. In both instances, the ultimate good is social. Punishment is instrumental in pursuing that good but is in no way itself good.

Finally, there is retribution. Retributivists assert that punishing a deserving wrongdoer is an intrinsic good.[76] The wrongdoer is treated as one who made a moral calculation to do an evil act when they broke the law and as a moral agent deserves to be punishment. As Moore puts it:

> We are justified in punishing because and only because offenders deserve it. Moral responsibility ('desert') in such a view is not only necessary for justified punishment, it is also sufficient…. For a retributivist the moral responsibility of an offender also gives society the *duty* to punish.[77]

[75] Moore, p. 84.
[76] Hart, p. 81.
[77] Moore, p. 91.

Additionally, retributivism is committed to punishments in proportion to moral wrongdoing. This does not mean that retributivist punishments must injure equally to the crime, but simply that more significant moral wrongdoings call for more significant punishments.[78] Under a retributivist punishment scheme, it would not be just to punish the petty thief and the murderer equally, even if, for instance, it would take both criminals equally long to be socially or morally rehabilitated. I will write more about retribution and its unique status in the context of atrocity crimes later, so the simple formulation—that retributivism places the good of punishment in the intrinsic justice of the guilty getting the punishment they deserve—may be most beneficial for now.

[78] *Ibid*. p. 88.

3 Against Non-Retributivism

In this section, I aim to eliminate, one by one, every justification offered in the previous section save for retributivism—arguing that they do not describe the current practices of international criminal tribunals and their punishment of atrocity crime. First, I take incapacitation and argue that because of the social upheaval that characterizes atrocity crimes, highlighted in the first section of this essay, it cannot be plausibly held up as a justification for punishment handed out by these after-the-fact-tribunals. Second, I eliminate denunciation by arguing that it relies too heavily on recourse to an imagined community. Third, I eliminate rehabilitation, arguing that the social elite status of atrocity criminals that appear before the court renders such a justification redundant and I further argue that the punishment practices of international criminal tribunals do not aim at rehabilitation. Fourth, I argue that although moral education could be a viable justification for a hypothetical international criminal tribunal differently constituted than any existing tribunal, that this could not justify the punishments that contemporary real tribunals mete out. If such a tribunal did exist, we would likely find its punishments normatively inadequate. Fifth and finally, I argue that although deterrence comes the closest (besides retribution) to justification in the unique case of internationally punished atrocity crimes, it is ultimately inadequate on an empirical basis. Fundamentally the lack of immediacy of the tribunals' punishment vitiates a deterrence argument, leaving only retributivism as a plausible general justifying aim.

3.1 Against Incapacitation

As mentioned in the previous section, under an incapacitative general justifying aim, the purpose of punishment is to restrict the offender's freedom so that they are unable to continue to commit crimes. Using this as a justification is, on its face, inadequate. In the last section, I pointed out that to be a punishment, the harm must be meted out after guilt is recognized by some organized process of justice, in the case of this essay by a trial before an international tribunal. Further, as pointed out in the first section, major social upheaval accompanies atrocity crimes, leaving local methods and modes of formal justice unworkable. Moreover, the atrocity criminal brought before and punished by international tribunals held a socially privileged position of power when they committed their atrocity. The atrocity criminal is able to avoid justice in this case until they are either removed from either their position of power or environment of social upheaval, both conditions that enable atrocity crimes. When atrocity criminals, primarily war criminals, are prosecuted and ultimately punished by international criminal tribunals, incapacitation is already achieved because of the nature of the offender and the offense. A criminal before the ICC is always in custody only once they have, for military or social reasons unrelated to their criminal status, been removed from the capacity to commit atrocity crimes. Take, for instance, the case of Omar Hass Al Bashir, the former president of Sudan. Due to Bashir's involvement with atrocity crimes in Darfur, in 2009, the ICC issued an arrest warrant for him.[79] However, because he was in an exceptionally socially elite position, he was not incapacitated until he was overthrown in an army lead coup d'état in 2019 and subsequently domestically jailed. Thus, he was

[79] Christopher W. Mullins and Dawn L. Rothe, The Ability of the International Criminal Court to Deter Violations of International Criminal Law: A Theoretical Assessment." *International Criminal Law Review* 10, no. 5 (2010), p. 779.

finally removed from his elite social position. The successful coupists initially refused to hand him over to the ICC, demonstrating that they undertook their coup for their interests—certainly not to further the interests of an international criminal tribunal. It took until 2020 for there to be a commitment for an ICC trial.[80] If the ICC ever punishes Bashir, the subsequent incapacitation will not have been what prevented further atrocity crimes; it will have been the actions of the Sudanese Army—both in imprisoning him and in ending any possibility of future access to the levers of power necessary to commit an atrocity crime—that precluded future crimes.

The actions of the Sudanese coupists point at another problem with an incapacitative justification—incapacitation is not the goal of the actual groups with the enforcement capabilities necessary to effect international criminal tribunal incapacitation. This is true in the case of the coupists, who had the ICC arrest warrant so far from their minds that they refused even to promise to extradite him to The Hague for nearly a year. This motive problem is even more severe for the most potent groups that could enforce the tribunals' will: major powers with extensive ability to project force. These powers, understandably, generally do not aim at projecting force because of any atrocity, but instead because it is in their strategic interests in winning a conflict or ending social disruption.[81] Major powers consider those motivations which concern major powers, and in a situation where lives and treasure are at stake, most powers would not risk either in sufficient measure solely to bring atrocity criminals before

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[80] Samy Magdy, "Official: Sudan to Hand over Al-Bashir for Genocide Trial," AP NEWS (Associated Press, February 11, 2020), https://apnews.com/article/c6698024bdd7f1cade89b9b4101d25c1.
[81] It is, of course, plausible that geopolitical powers have at some point intervened with motives mixed between *realpolitik* and justice for international tribunals, but that justice alone was not enough suggests against the plausibility of incapacitation as *the* general justifying aim of international criminal tribunals.

international criminal tribunals.[82] Thus, for the limited case of 20th-century international criminal tribunals, incapacitation is not a plausible justification for punishment.

3.2 Against Denunciation

With denunciation as a general justifying aim, punishment is meant to advertise that an action was wrong to the community in which the wrong was committed. For denunciation to work as justification for international tribunal punishment, it must be shown that attaining this good explains the punishments handed out by the court. On its face, this seems potentially plausible. The courts' focus on significant, international crimes suggests that they may be aiming at denunciation when they punish atrocity criminals, as these crimes seem to merit the greatest expression of moral abhorrence. Additionally, as these are the crimes that most concern the international community, it makes, at the least, superficial sense to rely on denunciation because of the justification's focus on community. However, the international community is different from a conventional community. The international community is a metaphor or, at best, a community of states. If the international community is merely a metaphor, then denunciation cannot justify punishment as there would be no real community that would benefit.

On the other hand, if the international community is a community of states, international tribunals' punishment cannot be justified by denunciation. For denunciation to work, the entity punished must be the same as the entities which compose a

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[82] Bass, p. 1041.

community. Conventionally this means citizens or inhabitants in a human society. The community members gain cohesion from seeing someone punished who, in the same position as them, broke "the social contract." In the case of international tribunals and the international community of states, the entity punished is an individual, but the entities meant to gain cohesion are states. This disconnect renders denunciation hollow in this instance. I anticipate that some might feel like I have unfairly limited the bounds of denunciation and that the international community is meant to learn the reality of international laws from punishment and implied denunciation of wrongdoing. But this widens denunciation beyond its limits. All punishments reify the law at some level. If punishment is meant to educate, it is no longer denunciation but social or moral rehabilitation. If it is meant to prevent future crime by fear of injury, it is a variety of crude deterrence.

3.3 Against Social Rehabilitation

Social rehabilitation as justification for punishment runs into two main problems when applied to international punishment of atrocity crimes. The first problem is the social status of atrocity criminals and the second the situation of the punishment.

To take the first problem first, social rehabilitation as justification requires a view of criminals as ill-socialized. That is, criminals do not function as they should for their society. As some societies (the Antebellum American South, Nazi Germany, South Africa under apartheid, etc.) are immorally organized, social positions are imposed by

the society that are immoral under most schemes of objective morality. However, under a rehabilitative punishment scheme, the primary flaw in the criminal is not that they are immoral, but that they are poorly socialized, although they can be both. The guilty's actions are an expression of a kind of social pathology that makes them unable to function in their society.[83] This gap between social and moral goals has already made social rehabilitation an unlikely justification. Recalling the first section of this essay, atrocity criminals are social elites of some variety. To commit an atrocity crime, they must have been able to wield some social unit in a way that suggests they are not socially pathological. They are socially functional in a profoundly immoral society. Some are so well socialized as to even attain the position of head of state. Their real problem is not that they are poorly socialized but that they are deeply immoral. If social rehabilitation were the justification and goal of punishment, then punished atrocity criminals would have to have some social defect in need of correction. That they chose to commit or participate in atrocities is a moral failing, not a social one. If a rehabilitative justification were to be accepted, one would have to accept that those tried before international tribunals were tried with the intention of socially reforming them. Such a claim becomes increasingly unlikely in light of those tried and punished by international tribunal. Nuremberg sentenced[84] Hermann Göring to death for his atrocities, yet Göring was clearly highly socially functional for the society in which he lived. He led one arm of the Nazi military and successfully maintained a high position within the Nazi Party. Hideki Tōjō, executed after a guilty verdict at Tokyo, held numerous positions one can

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[83] It is possible for there to be an immoral society that practices rehabilitative punishment. In such a society, there would be cases where individuals are socially rehabilitated away from their moral but socially dysfunctional impulses.
[84] Göring killed himself before the sentence could be fulfilled.

only associate with the socially functional, from prime minister, to minister of war, to general, to chief of the Japanese Army General Staff. Slobodan Milošević, tried[85] by the ICTY, was president of Serbia. Omar Hass Al Bashir, whom the ICC seeks to punish, was president of Sudan. In a more controversial example, many have called for the ICC to prosecute Henry Kissinger, a man so socially functional that he was secretary of state for two presidents, chaired the 9/11 commission, and has the international relations college at Johns Hopkins named after him. A rehabilitativist would have to argue that these men need to be reformed to be better socialized, despite the improbability of such a claim. However, the rehabilitativist might object that the society that they need to be reformed for is not the society in which they committed atrocities,[86] but instead the global community. However, this conception of rehabilitation seems to be little better because of the situation of punishment.

When international criminal tribunals punish atrocity criminals, they are punished after they are no longer able to commit further atrocities.[87] A rehabilitative justification is necessarily a consequentialist justification because of the instrumental use of punishment. The punishment is applied because society benefits. This reasoning only functions if some future socially ill-adjusted behavior, like crime, is prevented or some socially beneficial behavior is promoted. If the society that benefits from the punishment of atrocity criminals is the international community at large, as the earlier argument went, then either an ill-adjusted social action was prevented, or a well-adjusted one was brought about. However, if an atrocity criminal is before the court, they are almost

[85] Milošević died before the trial concluded.
[86] A dubious claim that decouples punishment from the circumstances of crime.
[87] See 3.1.

certain to never participate in the international community again. Göring released and out of power would not have committed further harms to international society, likewise Tōjō, Milošević, and Bashir.

Also, in a purely descriptive sense, rehabilitation cannot justify the punishments that present courts mete out. Rehabilitativists generally limit themselves to specific, narrow impositions on autonomy. If a particular punishment is to have a rehabilitative goal, it must socially reform first and foremost. The punishments of tribunals are evidently not aimed at social rehabilitation. Long prison sentences tend not better one's social prospects.[88]

3.4 Against Moral Education

Moral education as a general justifying aim seeks to teach those who have committed crimes to make better moral decisions for their own good. This explanation is *prima facie* descriptively inadequate to justify the punishment of contemporary international criminal tribunals. The advocate of moral education has to accept two questionable claims. First, that atrocity criminals primarily need moral education, and second that present practice aligns with such a justification.

To take the first claim first, it is clear that atrocity criminals have committed immoral acts and thus have, on some level, done flawed moral reasoning. This, I think,

[88] Although normative claims are not necessary for my argument, I contend that this justification is normatively weak. If international tribunals were reworked to focus on rehabilitation above all else, this would entail accepting the proposition that without the court's rehabilitation, atrocity criminals would otherwise damage society again and that they are poorly socially functioning, two claims that seem particularly unlikely.

can be granted—atrocity criminals needed to be morally better than they were. However, this does not necessarily mean that atrocity criminals need better moral education going forward, especially that this need alone is enough to justify punishment. Moral education may make sense for a young thief or rash batterer, but it makes less sense for the atrocity criminals that ended up before the five tribunals in section one. Göring is once again an illustrative example. A moral educationist would have to accept that Göring should be punished primarily so he learns that he was wrong when he planned and waged a war of aggression. Of course, such an education process would not be quick or easy, but it hardly seems like it would be adequate to bring about justice. Millions died in the war that Göring brought about, his punishment ceasing when he recognizes that he erred does not seems to align with our intuitions about justice.

Even granting the premise that atrocity criminals need moral education in a way sufficient to justify punishment by an international tribunal, it would still have to be shown that such punishment aligns with the practices of contemporary tribunals. Like with the social rehabilitativist, this does not appear to be the case. Tribunals do not focus on moral instruction. Perhaps a hypothetical tribunal that seeks out lower-level atrocity criminals such as child soldiers, may reasonably punish with an eye towards moral education, but that is not present practice. Contemporary tribunals generally punish social elites. Yes, a lengthy prison term might aid an atrocity criminal in seeing that their actions resulted in bad outcomes, at least for themselves, but that does not seem to be the primary effect of such a sentence. Atrocity criminals are not released when and if they morally reform themselves, correcting their mistaken ways. The

explanation for the present punishment of atrocity crimes by international tribunals must lie elsewhere.

3.5 Against Deterrence

Deterrence is the most plausible theory besides retributivism to explain and justify international criminal tribunals. This plausibility is best evidenced by the stated intentions of major international tribunals' members and in the language of the laws establishing them. My approach here will be to show that, no matter the intentions of international tribunal prosecutions, deterrence cannot adequately justify them because of a dearth of empirical support. Further, there is evidence that the aim of deterrence is ill-served by international criminal tribunals and that not only would other methods be superior in deterring atrocities, but also that the threat of prosecution may encourage further atrocity. However, before criticizing the power of deterrence as an exponent for international criminal prosecutions, I will lay out the case for deterrence.

At the very least, deterrence must be considered an intended goal of international tribunals even if this goal is not achieved. The preamble to *The Rome Statute*, claims that atrocity criminals cannot be allowed to act within a culture of impunity and that ending this impunity is “thus to contribute to the prevention of such crimes.”[89] The Honorable Patricia M. Wald, who followed a decades-long career as a federal appellate judge by sitting on the ICTY wrote of the pride of place afforded to deterrence on the ICTY:

[89] *The Rome Statute*, p. 1.

> Judges on the ICTY—disparate as their backgrounds and cultures may be—are non-ideological about their goals to the court, fair treatment of defendants, truth in fact finding for history's sake, and development of international criminal law as a practical and feasible *tool for deterrence of wartime atrocities* in the future. (emphasis added)[90]

In a 2009 address, chief ICC prosecutor Luis Moreno-Ocampo claimed (at least in part) a deterrence rationale for every pending case before the court where the defendant was in custody.[91] The UN Security Council resolution that established the ICTY claimed that the body's goal was no less than bringing about the end of all international war atrocities.[92] The belief, advanced by one former ICTY prosecutor, is that without international criminal tribunals, an 'entrenched culture of impunity' holds sway and would make atrocity criminals feel at ease committing their atrocities.[93] Another former ICTY judge argued that the impunity of those who committed the Armenian Genocide 'gave a nod and a wink to Adolf Hitler and others to pursue the Holocaust some twenty years later.'[94] The contention is that weak, unstable states promote this culture of impunity, that this culture of impunity leads to atrocities, and that only international tribunals can resolve the problem.

These arguments are more robust than claims of a solely denunciative motivation or even more improbably an incapacitative motivation for international criminal tribunals.

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[90] Wald, p. 196.
[91] Mullins and Rothe, p. 772.
[92] Julian Ku and Jide Nzelibe, "Do International Criminal Tribunals Deter or Exacerbate Humanitarian Atrocities?" *Washington University Law Review* 84, no. 4 (2006), p. 779.
[93] *Ibid.*
[94] *Ibid.* p. 788.

Although punishing a war criminal applies all the legitimacy of a court to his censure, denunciation of this kind is merely instrumental for the goal of advertising moral outrage, which a deterrence proponent may argue, is itself instrumentally valuable for its deterrence effects.[95] Incapacitation is also a weaker explanation than deterrence, as explained earlier—the nature of international criminal tribunals and the nature of atrocity crimes mean that incapacitation has already been achieved by the time punishment is handed out.

The deterrence that the tribunals claim is intended in both the general and the specific senses. I will address the general sense of deterrence below and the specific here. In the specific sense, the argument is that the court's actions discourage future atrocities, such as when the courts issue arrest warrants or indictments (and the implicit promise of punishment) for individuals who have committed war crimes when they are not yet in custody.[96] However, this specific deterrence seems to fall short on empirical examination. After the ICC issued arrest warrants for Joseph Kony because of his presumed role in war crimes committed by the Lord's Resistance Army in Uganda, he intensified his campaign of illegal conscriptions and child soldiers, although aides claimed the prospect of international prosecution frightened him.[97] This behavior may be a response to perverse incentives. If the accused is not already incapacitated, many war crimes provide an advantage in conflict, and therefore rather than deter, the specific threat of punishment may encourage atrocities so the atrocity criminal can remain at large. For instance, then President of Sudan, Omar Hass Al Bashir, upon facing an

[95] Wald, p. 192, I insert this particular argument against denunciation here as one partition of denunciation was more than sufficient for its section.
[96] Meernik, p. 592.
[97] Mullins and Rothe, p. 779.

arrest warrant in 2009, continued committing atrocities unabated.[98] One criticism argues that the claim that international tribunals can, in fact, encourage atrocities is vulnerable to immanent critique. Phrased simply, the criticism goes: to claim perverse incentives; one must assume an atrocity has already been committed and that the fear of punishment for the atrocity can clearly be seen to be driving the guilty's subsequent behavior; thus, deterrence is evidently working. [99] Further, the critique can be extended: a claim of perverse incentives begs the question when it requires an assumption of an initial crime. However, this counter seems to fall apart when one recognizes that it relies on confusing deterrence with fear of prosecution when they are two different concepts. Fear of prosecution does not itself suggest a particular behavior. Someone afraid of prosecution can respond by not committing crimes or by being more careful about the crimes they commit to minimize the risk of prosecution. Deterrence, on the other hand, as explained above, is that specifically punishment (potentially through the instrument of fear of prosecution) makes future crimes less likely. Thus, if further war crimes or other atrocities make the possibility of prosecution more remote, then fear of prosecution motivated atrocities but did not deter them. [100] Additionally, I do not think the allegation of question-begging that can be extended from this critique is particularly strong—yes, it assumes an initial atrocity (and implicitly that deterrence has already failed), but that is hardly an unfair assumption to make in a world where atrocities are alarmingly common. Perhaps this may limit the perverse incentives critique to specific cases where an actor has already committed atrocity crimes, but the argument against deterrence need not

[98] *Ibid.*
[99] Martins and Bronsther, p. 87-88.
[100] I address this argument because Martins and Bronsther seem to advance it in earnest in an attempt to respond to Ku and Nzelibe. Thus, I consider it important to answer, even if it is, on its face, weak.

ride on the perverse incentive argument alone. Further, specific deterrence is also evidently not of much use in the case of international tribunals. As established, the atrocity criminal is at no risk of reoffending by the time they are before the court; the punishment adds nothing here. Thus, if there is a deterrence justification, it must be general.

Claims of general deterrence must be examined in light of the continuing commission of war crimes and other atrocities and should be treated with some degree of skepticism. Of course, this failure can be blamed on the lack of immediacy or certainty of punishment. Both elements are hypothesized to have a significant bearing on the general deterrence of more quotidian crimes.[101] However, this excuse is of little help to justify international criminal tribunals' operation in the present, recent past, and near future. The all too real constraints that reduce immediacy and certainty are not departing anytime soon. For one, most tribunals are severely resource-limited. It is expensive to carry out trials under the conditions that international tribunals seek. The ICC budget in 2010 assumed that it would only try three cases a year going forward and only open four new full investigations over the next three years.[102] The temporary ICTY was given an operating budget of only $93 million in 1999 to employ 832 people, arrange transportation of witnesses from their homes to The Hague, detain the accused, and retain the services of defense counsel not included in the earlier employee count.[103] The more significant extant constraint pointed out in this essay's first section is the court's lack of an independent enforcement mechanism. Apprehending those accused

[101] *Ibid.* p. 773.
[102] *Ibid.* p. 780.
[103] Wald, p. 190.

of atrocities ultimately falls to states which are party to *The Rome Statute*. States, where atrocity crimes are committed are either unable or unwilling (due to social upheaval) to address these crimes with immediacy and certainty. Thus, *a fortiori* they are unable or unwilling to bring those responsible to the ICC with any certainty or immediacy. This enforcement problem extends even further than states where atrocities crimes exist amidst social upheaval—such major global and regional powers as the United States, China, India, Russia, Pakistan, Turkey, Saudi Arabia, Iran, and Israel are all not parties to *The Rome Statute*.[104] This lack of buy-in among major geopolitical players has a deleterious effect on both the immediacy and certainty of punishments meted out by the court, damaging its deterrent capacity.

One result of these constraints, previously highlighted as significant, is that individuals in front of the court are forever removed from power already. Since international tribunals have no independent enforcement wing, the defendants in international criminal tribunals since Nuremberg have been the weak and the defeated. Attempts at bringing more powerful individuals to international justice have failed, such as the first ICC-issued warrant for a sitting head of state, Sudanese President Omar Hassan Al Bashir, mentioned earlier. Bashir not only evaded capture[105] but also began another term as president while the warrant was outstanding. Additionally, Bashir induced those present at the 2009 African Union Summit of Heads of State and Government Assemblies to adopt a resolution declaring the warrant illegitimate.[106] The accused do not even need to be the leaders of armed contingents or heads of state to

[104] Although Russia and the United States are both signatories, their participation has not been domestically ratified.
[105] If indeed "evaded" is the right word, as no force beyond the court's pleas were brought to bear on him.
[106] *Supra note 78*, Ku and Nzelibe, p. 823.

enjoy the freedom of the as-of-yet-undefeated. A Sudanese minister, Ahmad Muhammad Harun, flouted a 2007 warrant and remained at large even though his "whereabouts were well known by government."[107] The protection of heads of state unrelated to their ability to evade capture presents another constraint on the certainty and immediacy of tribunals. Emperor Hirohito avoided prosecution at Tokyo for fear that his punishment would affect the post-WWII peace in the Pacific.[108] In another instance, leaders guilty of atrocities have been spared prosecution after being understood as integral for peace processes in the Sierra Leone conflict.[109]

Despite all of this, advocates for the deterrence capabilities of international atrocity prosecutions can point out that all claims of the failure of deterrence rely on an assumption of a counterfactual. No critic can prove that there would not be more or worse atrocities without the tribunals' actions. However, there are two responses available to someone, such as myself, arguing against deterrence. For one, this charge of reliance on a counterfactual is based on an undefended shift in the burden of proof. There is no evident and non-arbitrary reason why critics of international criminal tribunals' deterrence should be the ones that have to prove that tribunals do not deter relative to a counterfactual. Rather, tribunal advocates should have to prove that they do deter atrocities to their nay-sayers! They are also the ones advocating for the expenditure of resources to keep up, for instance, the ICC. Thus, they should be the ones burdened with providing proof of deterrence. However, this response is unlikely to be persuasive and result in anything but a stalemated discussion. So, the other

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[107] *Ibid.*
[108] Bass, p. 1042.
[109] Meernik, p. 591.

response from the anti-deterrence side should be favored: critiquing the rationale of those who claim a deterring general justifying aim.

The so-called "culture of impunity" thesis, offered as the primary rationale for why international tribunal deterrence works, is a prominent place to begin a critique of deterrence reasoning. This thesis has not fared well under empirical scrutiny. One study[110] used the fates of African coup participants as a proxy for the type of individual likely to find themselves accused in front of an international criminal tribunal. These putschists, by definition, were active in weak, unstable states. However, even in these environments where the "culture of impunity" would be expected to be most potent, the fates of coup participants were hardly happy. Domestically originating punishments from execution, to imprisonment, to exile befell 66% of them, with the proportion unsurprisingly rising to 78% for only the failed coup participants. Far from a culture of impunity, weaker states made severe injury more likely.[111] In narrowing the dataset to those states which experienced eleven or more coup events between 1955 and 2003, coup participants were more likely to be killed than their counterparts in *relatively* more stable countries. Further, the data only covers what happens to the coupists immediately following the coup event—history has shown that this year's successful coup leader is often next year's coup victim. For instance, Bashir initially came to power in a coup, and was removed from power by a coup. International courts do not seem to deflate a "culture of impunity" nearly as well as domestic courts or even extrajudicial methods do in the sort of weak states that furnish tribunal defendants. Instead of a

[110] Ku and Nzelibe, p. 802-806.

[111] One may argue that because the rule of law does not constrain these states, they tend to be more vengeful and severe. However, this already cedes that there is no impunity; there may even be injuries meted out to the undeserving.

"culture of impunity," weak states instead "possess an enabling environment where atrocities can easily be committed regardless of whether the perpetrators are punished or fear punishment."[112] This enabling environment is also often coupled with an environment where injury is likely and immediate, thus more deterring than the distant threat of the court, because of extrajudicial mechanisms: from a mob, to an assassin, to a counter-coup.[113] The threat of international criminal tribunals does not directly impact the enabling environment of unstable, violent regions, so protestations that tribunals would better deter with more power or resources seem ill-reasoned unless coupled with a more aggressive enforcement posture.

Even if one accepts the now dubious proposition that international tribunals reduce violations of the laws of war or other atrocities, it does not follow that this goal is best served through the deterrence rationale. Treating the justice wrought by international tribunals as merely instrumental to furthering peace and stability invites unflattering comparisons to other mechanisms of achieving the same end.[114] Empirical evidence abounds that different, more subtle mechanisms have far more significant reductive impacts on atrocities. For instance, one study of the behavior of United States troops in combat found that "instead of focusing exclusively on new treaties or new international judicial rulings that seek to inculcate norms formally, we might instead look to how best to alter the organizational structure and institutional culture on the ground" to deter violations of international law in actors whom the court does not immediately

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[112] *Ibid.* p. 214.
[113] *Ibid.* Although extrajudicial injury is not punishment under my definition, it should still have the same effect as the injury component of punishment in causing deterrence.
[114] Leslie Vinjamuri, "Deterrence, Democracy, and the Pursuit of International Justice." *Ethics & International Affairs* 24, no. 2 (2010), p. 204-205.

threaten.[115] Some have further argued that responsibility and truth commissions such as South Africa's Truth and Reconciliation Commission better reduce the threat of future atrocities than international criminal tribunals.[116] In fact, it has been argued that international tribunals hinder the objectives of these commissions and other attempts at transitional justice.[117]

With deterrence now also struck from our list of general justifying aims, only one theory discussed earlier still holds any promise for justifying international criminal tribunals' practice: retribution.

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[115] Laura A. Dickinson, Military Lawyers on the Battlefield: An Empirical Account of International Law Compliance." *American Journal of International Law* 104, no. 1 (2010), p. 24. In the US case, Dickinson suggests that involving judge advocates in the military decision-making process works to prevent war crimes.

[116] Kirsten Ainley, "Excesses of Responsibility: The Limits of Law and the Possibilities of Politics." *Ethics & International Affairs* 25, no. 4 (2011), p. 425.

[117] Geneviève Parent, "Reconciliation and Justice after Genocide: A Theoretical Exploration." *Genocide Studies and Prevention* 5, no. 3 (2010), p. 284.

4 For Retributivism

In this section, I argue that not only does retributivism descriptively fit as a justification for punishment that international criminal tribunals hand out, but that retributivism is also normatively fitting in a way that our intuitions about significant crimes suggest. This section will proceed in two parts. The first delineates how retribution as a general justifying aim of punishment matches the practices of the five canonical tribunals detailed in section one in a way other general justifying aims do not. In the second subsection, I draw heavily on the work of philosopher Michael Moore and advocate for an open acknowledgment of retribution as the sole necessary and sufficient penological goal of these tribunals, as well as assuaging worries held by those who would oppose such an admission.

4.1 Descriptive Fit

As argued in section three, incapacitation, denunciation, rehabilitation, moral education, and deterrence all fail to account for why and how international criminal tribunals punish. In the case of incapacitation, punishment effects no further incapacitation than what is already incidentally applied. Denunciation also does not adequately explain the courts' punishment. The type of offenders punished by international tribunals vitiates a socially rehabilitative justification, while the varieties of harm in the tribunals' punishment also do not align with harms recommended by rehabilitation. Moral education is similarly descriptively inadequate for present practices. Deterrence, although it goes a long way to explaining the punitive actions of the court

empirically seems to be failing. Retributivism dodges all obstacles which felled these justifications.

First, retributivism need not be applied to only those capable of further crimes in the way that incapacitation requires. Because of events unrelated to the tribunal's pursuit of justice, atrocity criminals will never again commit atrocities: they are incapacitated. Nevertheless, the tribunals still seek to punish them often years after they have stopped being a threat and after they will never again present a threat. Incapacitation cannot explain this, but retribution can: it is good in and of itself when the morally deserving are punished, regardless of when.

Denunciation could not explain why tribunals punish individuals while claiming to benefit communities of states. Retribution, however, need not worry about such a disconnect. Under a retributivist scheme, of course tribunals punish individuals, they are the only possible moral agent, and thus the only possible entity deserving of just desert.

Social rehabilitation cannot explain the punitive practices of international criminal tribunals, but retributivism can. Because atrocity crimes are significant, the desert of the guilty is also significant. Like decades-long prison terms, life-long deprivations of autonomy make retributive sense if the guilty party committed an atrocity that led to horrific, widespread suffering.

Moral education similarly does not comport with the actions of the ICC, ICTR, ICTY, Nuremberg, and especially Tokyo. As with rehabilitation, the harm component of tribunal punishments does not comport with a moral education justification. However, it does comport with retributivism.

Deterrence implicitly relies on punishment's practical effects, as punishments under deterrence are only instrumentally good—they achieve a social good. If punishments do not empirically deter, punishment is not justified. As shown in section 3.5, it cannot be adequately shown that international criminal tribunals deter further atrocities in a non-redundant way. Retributivism, based instead on the intrinsic good of punishment of the guilty proportional to their crimes' seriousness, does not need to prove any effect to be justified empirically. Yes, punishment may reduce the likelihood of future crimes, but this is a happy accident, ultimately superfluous to retribution.

4.2 Closet Retributivism

Retributivism better descriptively explains tribunal punishment than any other general justifying aim. However, this is not the whole of my project. I also argue that tribunals should embrace and normatively defend retributive justification. As it stands now, the tribunals' practices align with what Moore calls the "closet retributivist." A closet retributivist has on some level retributive intuitions about justice but is, for whatever reason, reticent to defend them. This section explains why tribunals should embrace a retributive justification and hopefully assuages the closeted retributivists' worries.

Suppose retributivism is not embraced as the justification for international criminal tribunals; the tribunals and their sentences would have to be repudiated. My argument for this is relatively simple: without a justification for punishment, international criminal tribunals would need to be repudiated as unjust, and the only justification that is

possible is retributivism. So, either abandon international criminal tribunals as presently constituted or embrace retributivism. I hope to make the path of embracing retributivism more attractive than abandoning international criminal tribunals outright.

Obviously, from the international tribunal's standpoint, retributivism needs to be embraced; to do otherwise would be self-repudiation. The other horn of the dilemma is more of a live option for those who do not have to justify their existence. A repudiation of international criminal tribunals might look like Minear's "victors' justice" attack on in section one or involve a thorough embrace of truth and reconciliation commissions, which rely on mechanisms like total amnesty, which eliminate any application of harm and thus any punishment.[118]

Yet, most of us have the intuition that atrocity criminals need to be punished. Moore establishes a broad principle of retribution from our particular retributive intuitions in thought experiments.[119] He assuages those who may feel uncomfortable because of this. Atrocity crimes reveal similar retributive intuitions as Moore's thought experiments, only more so. Thought experiments are extreme hypothetical examples designed to test the limits of justifications. Atrocity crimes are nearly unimaginably extreme and heinous crimes. They test the limits of belief of more than just justification.

In an illustrative thought experiment built off an actual instance, Moore evokes a retributive intuition over an incapacitative one. He posits a case where a man robs and repeatedly rapes a woman, afterward expressing no remorse. Before he can be

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[118] Kent Greenawalt, "10, Amnesty's Justice." Essay. In *Truth v. Justice: the Morality of Truth Commissions*, edited by Robert I. Rotberg and Dennis Thompson (Princeton University Press, 2001), p. 189-191.
[119] Moore, p. 159-60.

incapacitated by punishment, he inherits a substantial amount of wealth while suffering a neurological accident that extinguishes any possibility of further violence towards women, almost like the conditioning from in Anthony Burgess' A Clockwork Orange. Because of this, he will certainly never rob or assault another woman.[120] Incapacitation as a general justifying aim could not support punishment in this case. Nevertheless, we have a strong intuition the man should still be punished. The status of atrocity criminals before international criminal tribunals is similar to this. If the court punishes Bashir, it will be long after he was incapacitated. Yet, we feel strongly that his participation in atrocity means he should still be punished—the magnitude of the crimes demands it. This intuition comports with retributivism.

Atrocity crimes involve social elites, those prosecuted are especially elite, and thus intuitively seem to be unlikely recipients of moral education or social rehabilitation. Another of Moore's thought experiments, also drawn from a real example, might help clarify this intuition. Richard Herrin murdered his twenty-three-year-old girlfriend following a conversation that hinted at a breakup. Herrin waited for her to fall asleep, then using a claw hammer, "smashed open [her] skull."[121] He was sentenced to an eight-to-twenty-five-year prison term. After three years and extensive involvement with a Christian movement and psychological counseling (presumably in the neighborhood of the type of actions the guilty should undertake under a moral education or social rehabilitation theory), he felt like he had learned his moral and social lesson. He expressed that the minimum remaining five years were "excessive," given his reform.

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[120] Moore, p. 100 In this instance, such conditioning could not be intentionally delivered—the neurological change is a cosmic accident.
[121] *Ibid.*, p. 145.

This was his first arrest, and he had a self-described robust "personal background, [and high] capacity for a productive life in society." Herrin told his psychiatrist that

> I'm not saying I shouldn't have been punished, but the punishment I feel is excessive. I feel I have five more years to go, and I feel that's way too much… I don't see any purpose in it. It's sad what happened, but it's even sadder to waste another life.[122]

Presumably, most everyone reading does not think that three years is sufficient punishment for premeditated murder because of a potential breakup, and it is even easier to see moral education and rehabilitation's inadequacy for atrocity crimes.[123] Atrocity criminals under these justifications could make an argument similar to Herrin's. If Göring realized his moral wrong and attained greater moral capacity, and was socially reformed (as established earlier, most atrocity criminals do not need social reform), would it be just to let him out after just three years? This despite his atrocities leading to millions of deaths? Obviously not.

Moore expands on the thought experiment of the naturally incapacitated man to put deterrence and retribution in tension. Suppose that the naturally incapacitated man only seems like he has been punished but instead was allowed to go free with a new identity. There is no chance that society would ever find out about the switch, so the "punishment" generally deters.[124] Most of us would agree the man should still be punished. Alternatively, if someone committed no wrong but was perfectly advertised to

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[122] *Ibid.*, p. 146.
[123] Of course, it is possible that Herrin is not reformed, morally or socially. However, even if he expressed genuine remorse and actual empathetic identification with his victim, or whatever else he does not do that marks him as unreformed, it could be entirely possible that Herrin could have reformed in three years.
[124] *Ibid.*, p. 100-1.

have by those who go on to punish her, general deterrence would be served, but likely even more of us recoil at the idea of an innocent woman being harmed for instrumental ends. Because deterrence cannot justify tribunals' actions, it cannot justify the punishment of a Milošević, or a Bashir, or one of the many criminals who successfully evade arrest warrants and live the rest of their lives anonymously. Nevertheless, these all should be punished.

These examples have likely led at least some admit to themselves that they have retributive impulses, but others likely remain in denial. Moore notes that the source of this denial is likely because of a belief that such impulses are motivated by unvirtuous feelings.[125] However, some of these feelings are virtuous, and atrocity crimes illustrate that well. Moore claims that there can be virtue in a certain kind of anger or revulsion, the kind that motivates retributive feelings.

> [I]t evinces both a lack of empathetic attachment to morality, to be indifferent to culpable wrongdoing by another. The virtuous person may turn the other cheek when it is his cheek that has been slapped… but there is no virtue in turning someone else's cheek when they have been slapped. Violations of others' moral rights should make us angry at those who flout that morality, and that anger need not be tainted by cruel, sadistic, fearful, or resentful emotional accompaniments.[126]

[125] *Ibid*. p. 163 Moore offers two ways to prove this. The one not discussed involves placing oneself in the position of the offender. Should we commit a grave wrong, such as a crime, the morally upright would feel guilt, and, such guilt is morally virtuous. Recognizing the guilt that a moral agent ought to feel in such a situation helps confirm that that retribution would be justified. p. 147.
[126] *Ibid*. p. 164.

I urge you to accept and embrace your retributive tendencies and intuitions as they apply to the crime of crimes and other gross violations of human dignity. It is because you recognize the moral worth of Göring's victims that you believe it would be right to punish him even if he did not need social reform. It is because you recognize the culpability attached to the significance of atrocity crimes that you would have Bashir punished even if no other good came of it. It is because you understand that it would be unimaginably wrong to commit an atrocity that you believe Tōjō deserves punishment.

It may be the victor who must punish with no other justification than retribution, but that does not mean they act unjustly. To fail to punish would be the true arbitrary act, to abdicate an obligation to justice that only they can now fulfill. Retributive justice is more than just victors' justice. It is the only justice upon which international criminal tribunals can rely. It is the only justice we should seek.

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