Mass Atrocities, Retributivism, and the Threshold Challenge

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Abstract. The purpose of this paper is to direct attention to a challenge – referred to as *the threshold challenge* – facing a non-absolutist retributivist view on international criminal justice. It is argued, on the one hand, that this challenge constitutes a practically pertinent problem for the retributivist approach to the punishment of mass crimes and, on the other, that it is very hard to imagine any principled way of meeting this challenge.

KEY WORDS: deontology, ICC, Mass crimes, punishment, retributivism.

The questions as to how one should punitively deal with persons who are responsible for mass crimes or, as a closely related matter, how one should morally assess an institution such as the International Criminal Court (ICC) which is designed specifically to handle cases involving "the most serious crimes of concern to the international community as a whole"[1] have, over the last couple of years received increasing attention.

Amongst theorists favouring a consequentialist approach to the ethics of punishment, the discussion, unsurprisingly, has been mainly concerned with the empirical question as to whether it is reasonable to expect the punishment of mass

[1] *The Rome Statute*, Article 5. The subject-matter jurisdiction of the ICC is limited to war crimes, crimes against humanity, genocide, and – though not in practice – aggression.

crimes to have a crime preventive effect. Views range (strikingly!) from contending that the punishment of mass crimes and thus the ICC is highly desirable as an instrument to prevent the most atrocious human rights violations, to claiming that the main mechanisms of general prevention which cause people to refrain from committing such violations are unlikely to work in the case of international criminal law.[2] As a significant expression of the latter attitude, the view has even been held that international criminal justice "comes close to a religious exercise of hope and perhaps deception"[3].

Turning to the retributivist camp, the focus of theorists has obviously not been on empirical questions but on normative problems such as, first and foremost, what should be regarded as the proportionate punishment for a mass crime. Another problem prompted by the existence of mass crimes concerns the relation between collective and individual responsibility. In the present paper we shall remain within a retributivist framework. More precisely, the purpose is to direct attention to what I believe constitutes a serious problem facing the retributivist. This problem – to which I shall refer as *the threshold challenge* – concerns the question as to how one should, from a retributivist perspective, deal with some of the significant consequences that may follow from pursuing retributive justice in cases of mass crimes. There are two reasons why I regard this challenge as well worth considering.

First, it is a well-known fact that retributivism dominates modern penal theory. While retributivist concerns have to a large extent been eschewed and regarded as a

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[2] For an optimistic view, see for instance A. Ellis, ”What Should We Do With War Criminals?”. A more sceptical view is presented by B. T. Wilkins, "Whose Trials? Whose Reconciliation? Both articles appear in A. Jokic (ed.), *War Crimes and Collective Responsibility* (England: Blackwell, 2001).

reactionary or even barbarous approach to punishment in most periods of the twentieth century, this picture has changed significantly over the last two or three decades.[4] Today the theory of punishment is largely retributive theory. Obviously there is no reason to believe that this is any different when the focus is not on punishment of crimes in general but, more narrowly, on punishment of mass crimes. Moreover, it should be mentioned that, even though retributivism today constitutes an overall theoretical position which covers very different theories of punishment, the challenge I shall raise seems to constitute a general problem independently of the specific differences between different versions of retributivist outlooks.

Second, the threshold challenge is, on the one hand, crucial in the sense that as long as the challenge is unanswered it remains basically unclear how one should from a retributivist perspective deal with mass atrocities and thus how an institution like ICC should operate. On the other hand, the challenge is important for the simple reason that it is hard to see how it could be answered in a way that would not seem either morally dubious or extremely arbitrary; at least, so I suggest.

In order to sustain these claims, I shall proceed in the following way. In section (1), a number of ways, in which the pursuit of retributive justice in cases of mass atrocities may have very significant consequences, are pointed out. In section (2), the threshold challenge is presented and it is made clear how a retributive theory of justice must be shaped for it to be vulnerable to this challenge. Finally, a few concluding comments are presented on how the threshold challenge affects the

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[3] I. Tallgren, ”The Sensibility and Sense of International Criminal Law”, *European Journal of International Law* 13/3, 2002, p. 355.

[4] See, for instance, J. Ryberg, *The Ethics of Proportionate Punishment. A Critical Investigation* (Dordrecht: Kluwer Academic Publishers, 2004), Introduction.

retributive approach to international criminal justice and the ICC. The overall conclusion is that mass atrocities turn a problem, which has usually been sidestepped by penal theorists as a mere theoretical challenge, into a practically pertinent problem challenging the applicability – and thus in the end the plausibility – of the retributivist approach to international criminal justice.

(1) The consequences of pursuing justice

Mass atrocities can be committed in many diverse ways and in different societal contexts. The consequences of prosecuting and punishing people responsible for such crimes may therefore differ significantly from one context to another. In the following, a number of contexts are outlined in which a strict observance of the demands of criminal law turns out to have undesirable consequences. More precisely, I shall focus on a traditional but highly controversial issue in discussions of international criminal justice, namely the application of amnesties. Though I shall draw on a few actual examples, the point here is not to assess actual cases in which mass criminals have been given amnesty. More modestly, the purpose is to give some support to the claim that there may be real-life cases – not merely hypothetical scenarios dreamt up by imaginative theorists – in which impunity against the process of criminal law has desirable consequences.

(A) Impunity as a means to societal changes.

The first type of case to which it is in this respect worth directing attention, involves contexts in which amnesties constitute a precondition for the initiation of societal transitions. There may be several such contexts. For instance, one traditional context in which mass crimes take place is a country which, in one way or another, is racked by armed conflicts. As well-known examples, mass atrocities may occur when state leaders persecute and fight ethnic or religious minorities of their own country, when guerrilla movements or other armed groups fight a state, or when a country experiences a genuine civil war. How one responds to mass crimes committed under such circumstances may have significant consequences for a large number of members of the conflict-torn society. As has been underlined by several theorists, in some situations it may be the case that the endorsement of amnesties to state leaders or members of armed groups will work as an instrument toward the termination of armed struggles.[5] For instance, promising a guerrilla movement that their leaders will not be thrown into prison may be a way of persuading them to give up their weapons. Since an armed conflict almost always leaves a great deal of human suffering in its wake, the possibility of obtaining peace through amnesty may obviously be highly wished-for in terms of reducing such suffering.

Leaving aside armed conflicts, it has been held that amnesties may sometimes also work as an initiator of societal transitions in other ways. It is a fact that many of the most severe human rights violations have taken place within dictatorial regimes. Though it is probably an essential character trait of being a dictator, that one is willing to take great efforts to cling to power, dictators may nonetheless sometimes experience coming under extensive pressure to give up leadership. Under such

[5] See, for instance, L. May, *Crimes Against Humanity. A Normative Account* (United States of America: Cambridge University Press, 2005), chapter 13. For a fine critical discussion of amnesty as a means to the termination of armed conflict, see J. E. Méndez, ”National Reconciliation, Transitional Justice, and the International Criminal Court”, *Ethics and International Affairs* 15, 2000.

circumstances, the prospect of amnesty rather than of prosecution and punishment may improve the likelihood of a change of the political system in the direction of democracy.[6] Thus, in sum, there may be cases where impunity against the process of criminal law has desirable consequences by working as the trade-off for the cessation of hostilities or the surrender of power.

(B) *Impunity as a means to the maintenance of societal stability.*

Another context in which the application of amnesties may have desirable consequences is a society which is going though a transitional process and where the loss of societal stability or a newly-gained peace constitutes a genuine risk. In order to illustrate this, consider the following example.

As was the case in several other Latin American countries which underwent changes from dictatorial regimes to democratic administrations during the 1980s, the Argentine administration elected in 1983 faced the task of bringing military violators of human rights to trial.[7] This task faced several problems. Firstly, the massive human rights violations – including torture, executions etc – carried out by the military during the dictatorship were the result of a centralized nationwide policy. This meant that every officer was criminally liable (either by having perpetrated serious crimes or by not having averted or reported such crimes).[8] Secondly, when the military waived power and the democratic system took over, the military establishment was not

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[6] For instance, an amnesty proposal was offered in Kenya to persuade the leader Daniel Arap Moi to step down in favour of elections; see L. May ibid. p. 245.

[7] In the following, I draw on J. Malamud-Goti, ”Transtional Government in the Breach: Why Punish State Criminals?”, *Human Rights Quarterly* 12, 1990.

[8] Ibid. p. 3.

replaced by new armed forces. Under these conditions, the advisers who were commissioned in order to develop prosecution criteria decided not to prosecute every offender, but only those officers considered principally responsible for the violations. Moreover, as the pressure from the military increased in the years after the democratic take-over, this initial criterion was modified in several ways. The reason was, simply and understandably, fear of a military coup or, as put by one of the commissioned advisors: "... I am convinced that trying military officers was indeed a moral imperative. Clearly, however, a line had to be drawn among officers so that the number of those put to trial would allow the government to retain control of the armed forces"[9].

What this example illustrates is that there may be cases where pursuing criminal justice consistently has very serious consequences, such as the loss of a fragile peace or the throwing of a country with a transitional democratic government into a new dark period of military dictatorship. Obviously, challenging the confidence of the military is often highly risky in transitional countries. However, in addition to this example there are also other ways in which the stability of a society can be threatened. When a country has endured a long period under the leadership of a dictatorial regime, there are often many societal institutions that have had a role to play in human rights violations. Obvious examples are the police or the courts. But there are other institutions too that serve important functions in the general administration of the society. Even though such institutions cannot effectuate a *coup d'état*, they may still collapse if they are drained of not easily substitutable employees

[9] Ibid. p. 5.

as the result of a strict pursuit of the demands of justice. Naturally, such a collapse may be a serious threat to societal stability.

(C) *Impunity as a means to societal recovery*.

Societies that have undergone major political changes often face the problem as to how one should address the legacies of past human rights violations and mass crimes, in order to maintain a tenuous peace and rebuild a stable society. Domestic or international prosecution of perpetrators may in this respect constitute important instruments. However, according to transitional justice theorists, several other approaches are available that can help wounded societies start anew. These approaches include a range of options such as truth-telling initiatives, compensatory and symbolic reparations, institutional reforms, reconciliatory initiatives, and construction of memorials and museums to preserve the past. An option that has received considerable attention is the establishment of truth and reconciliation commissions. Adherents of such commissions have underlined that they may serve several important inter-related goals of the sort often stressed in the modern victimology literature. In particular, it has been underlined that, in cases where human rights violations are characterized by denial or an imposed silence and where a large number of individual violations have taken place, a commission may be highly useful. For instance, it provides victims with a less formal process, one where they are treated not merely as pieces of evidence but one where they are able to voice frustrations and put their own side of the story. Rather than merely revealing an abusive political system, this helps establish individualized "truths" about the fate and whereabouts of victims.[10] In addition, adherents have also underlined that commissions may provide a forum for other aspects of emotional restoration for victims, such as those provided by a perpetrator's genuine confession or apology.

Now, I shall not engage here in a closer scrutiny of the empirical research in favour of these contentions. But let us at least assume that truth commissions may in some contexts have something to offer in terms both of victim recovery and of reconciliatory effects. In that case, there might be a conflict between, on the one hand, what a commission has to offer and, on the other, standard legal procedures. Consider the much-discussed South African Truth and Reconciliation Commission (TRC). The Act that created the TRC did not allow for blanket amnesties – such as those passed in several Latin American countries – but it did offer perpetrators immunity from prosecution on a number of strictly specified conditions. For instance, one condition was that perpetrators would come forward and contribute to the knowledge of the events, such as the fate of the victims. Furthermore, immunity was only conferred for crimes that were confessed, and was only granted by a special panel after hearing those victims who chose to object.[11] However, as has been underlined, the possibility of immunity did seem to work as the carrot that brought several perpetrators forward and thereby contributed to making the TRC work in the first place. Now, in so far as a commission has beneficial effects on victims and relatives, and the number of victims and other affected parties – due to the magnitude of the crime committed – is very large, then this constitutes a third example of a possible conflict between strictly pursuing the demands of criminal justice and minimizing human suffering.

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[10] See Méndez, op. cit., p. 29.

[11] See, for instance, Méndez ibid. p. 40; or Y. Beigbeder, *Judging War Criminals* (Great Britain: Macmillan Press, 1999), p. 119.

(2) The Threshold Challenge

Despite the differences between the three above-outlined examples, they all serve the same purpose. What they show is that there may be cases where applying standard legal procedures by prosecuting and sentencing perpetrators of mass atrocities has serious consequences. The question which such cases prompt for the retributivist enunciating the imposition of deserved punishment on perpetrators is how should one deal with such cases from a retributivist perspective?

Though, to my knowledge, no one has tried to provide an answer to this question, the structure of the challenge is certainly not new. On the contrary, what we have is a standard problem in modern deontology. According to the dominant modern conception, what characterizes deontological ethics is the existence of constraints. That is, there are certain acts which are morally prohibited even though to perform them would sometimes bring about the best consequences. The question which the existence of constraints naturally prompts is: Do such requirements allow for exceptions? More precisely, are there cases where the consequences of an act are so weighty as to overrule the moral prohibition? Or, put in penal terms: Is it acceptable to override retributive justice if there are strong countervailing reasons – such as a significant prevention of human suffering – for doing so?

Raising this problem, there is an important thing worth noticing. Whenever the question of overruling the demands of retributive justice has been posed, it has typically been in relation to cases such as the biblical one, where Caiaphas had to choose between the infliction of an undeserved punishment on a single person and the ruin of the entire nation. That is, those cases where a highly undesirable outcome can be prevented by punishing an innocent person or perhaps by imposing on a guilty person a punishment which is disproportionately severe. In contrast, the examples I have outlined in the previous section are somewhat different. They all concern cases where undesirable consequences can be avoided by giving partial or full amnesty to the perpetrators, i.e. by imposing *less* than the deserved punishment. However, even though this is the case, it does not change the basic problem. The reason is that almost all modern retributivists subscribe to *positive* versions of retributivism rather than to *negative* versions.

According to negative retributivism it is morally prohibited to punish someone more severely than the person deserves. Upward deviations from what constitutes the proportionate punishment for a certain crime – or, as a special case, the punishment of innocents – are unacceptable. However, in this view, retributive justice does not imply an obligation to punish perpetrators; it only places upper constraints on what we should not do. However, though such a position does constitute a theoretical possibility it is a fact that, with a few exceptions, no one in the modern retributively oriented era seems to favour negative retributivism. On the contrary, almost all modern retributivists – despite other major theoretical differences across the various versions of retributivism – seem to favour positive retributivist positions. That is, the modern retributivist believes that a perpetrator should neither be punished too severely nor too leniently. Or, in other words, there is a duty to impose on perpetrators a punishment that is proportionate to the gravity of the crime committed. The proportionality constraint is violated by downward deviations as well as by upward deviations from justice. This being so, it is obvious that we are still faced with our initial question: Is it acceptable to infringe the demands of retributive justice when there are strong consequentialist reasons for doing so? As is wellknown from the traditional discussion of deontology, this question is open to two answers.

The first possibility is to adopt an absolutist position, according to which the demands of justice cannot be set aside no matter what. This is the position traditionally ascribed to Kant. However, there are two things that should be noted in relation to this answer. The first is that absolutism is a radical stand. In particular, it seems, this is so when we are considering the sort of examples outlined above, that is, cases involving *impunity* or *reduced* punishments of perpetrators. To contend that it is morally prohibited to punish a perpetrator more leniently than deserved, even if this prevents the transition from a dictatorial regime to a democracy or leads to civil war with thousands upon thousands of people killed, is a morally extreme position. Moreover, it is in this respect worth recalling that retributivists for decades have criticized the utilitarian approach to punishment on the ground of intuition-based arguments. The repeatedly advanced counter-examples consist of scenarios where some people can be saved from being killed or injured only by punishing an innocent person, and where the framing of the innocent – by constituting the lesser evil – is what utilitarianism would prescribe. According to the critics, this implication is highly counter-intuitive and therefore constitutes a strong reason for rebutting the utilitarian approach.[12] However, insofar as retributivists subscribe to this type of *reductio*-argument they become vulnerable to intuition-based counterargument themselves.

[12] The traditional argument was advanced by H. J. McCloskey in several writings, e.g. ”The Complexity of the Concept of Punishment”, *Philosophy* 32 1962, or ”A Non-Utilitarian Approach to Punishment”, reprinted in G. Ezorsky, *Philosophical Perspectives on Punishment* (Albany: State

And, as indicated, such arguments can easily be presented against absolutist versions of retributivism. The second, but obviously related point, that should be noted is that those retributivists who have considered the question of the limits of justice all seem to reject absolutism.

The second and apparently more attractive possibility then is to give in by rejecting absolutism in favour of a threshold position. According to this view, retributive justice may be infringed if there are sufficiently strong countervailing reasons for this. That is, the requirement of justice has a threshold above which it is no longer in force. The threshold position nicely avoids the most extreme counterexamples facing an absolutist outlook. However, it does so only at the cost of facing an obvious theoretical challenge, namely, that of providing an answer to the question: Where should the threshold be set? Or, in other words, how much is required in terms of human suffering to overrule justice? In the following, I shall refer to this question as *the threshold challenge*. Now, how could a retributivist respond to this challenge? And, given the fact that most retributivists seem to favour a threshold position, why has no one considered this challenge more thoroughly? The answers to these questions are – at least so I suggest – closely related. Moreover, they satisfactorily show why it is worth directing attention to this challenge in relation to the discussion of international criminal justice.

Turning to the first question, it is clear that, though no one has ventured to present a more precise answer, those who have commented on the question share the belief that *much is required*. A typical way of phrasing the answer has been that it is only in catastrophic cases and when an evil of "enormous magnitude" can be

University of New York Press, 1972). However, the objection has become a standard argument in prevented that overriding justice is justified.[13] But if this is so, then we have an easy answer as to why the challenge of locating the threshold is never addressed more thoroughly. After all, if the countervailing reasons against retributive prescriptions in standard criminal cases that come before the domestic criminal court – and which have, of course, constituted the centre of the discussion of modern penal theory – are far from being sufficiently strong to override justice, then the task of locating where the threshold should be set becomes a mere academic exercise without any practical implications. However, the important thing is that this is no longer the case when we take the step from typical crimes dealt with in domestic courts to the sorts of mass crimes which the ICC is designed to handle. As the examples in the previous section – on amnesty as an instrument to obtaining peace or maintaining societal stability – indicate, there may well be cases where, by overriding the demands of justice, one will be able to prevent an enormous amount of future human suffering. Thus, when it comes to mass crimes, the retributivist cannot sidestep the challenge of locating thresholds with an answer along the lines of "no need to consider the issue – the threshold is located at a much higher level". If one can contribute to reaching peace, inducing political changes or consolidating societal stability then this will affect the lives of thousands upon thousands of people. Thus, in order to answer how one should deal with mass crimes from a retributivist perspective, the task of identifying the threshold more precisely suddenly becomes a highly pertinent challenge.

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modern retributivist literature.

[13] See, for instance, W. D. Ross, *The Right and the Good* (Oxford University Press, 1967) p. 61; C. Fried, *Right and Wrong* (Cambridge: Harvard University Press, 1978), p. 10; or, more recently, I. Primiratz, *Justifying Legal Punishment* (London: Humanities Press Int., 1998), p. 60.

The fact that the threshold challenge is an urgent problem for the retributivist constitutes an obvious reason for drawing attention to the challenge. Another strong reason is provided by the fact that it is very hard to see how the challenge could be met in a way that would be anything close to a principled manner. Drawing a strict limit between the numbers of killed, injured or otherwise affected people seems extremely arbitrary. And to contend that there is no strict limit as to when justice is no longer in force, but rather some sort of penumbra zone between cases where justice matters and cases where the prevention of human suffering is all that counts, is of no help at all. First, it is not obvious what this means. Should the scale tip in favour of justice or human suffering within this sort of zone or is the idea that there is no answer to what one should do? And second, as is well known from other sorts of continuum problems, the introduction of grey zones seems only to increase the delimitation problem: instead of one threshold one will now have to identify two thresholds, namely, those constituting the lower and upper limits of the zone. Thus, such an answer has nothing to offer.

Furthermore, what makes the threshold challenge particularly intricate is that it is faced with a problem of relativity. To see this, let us once again return to traditional considerations on the shape of deontological ethics. Consider the standard deontological constraint against harming others. On reflection, it is certainly not reasonable to hold that there is a single fixed threshold for this constraint.[14] On the contrary, the most plausible view is that the threshold is determined relatively to the size of the harm in question. While it may require a very large number of saved lives to make it permissible to kill someone or cause someone excruciating pain, it may be sufficient that a single life can be saved to justify kicking someone in the leg. In the same vein, it seems reasonable to believe that a threshold retributivist will hold that there are varying thresholds for different deviations from justice. It simply does not require equally strong countervailing reasons to justify a minor deviation from the just (i.e. proportionate) punishment of a perpetrator as it does to justify awarding a full amnesty. This may, for instance, be relevant in cases such as the one mentioned above, where penal reductions for mass criminals may work as a carrot for participation in truth and reconciliation commissions to the benefit of large groups of victims and relatives. However, how one should in a non-arbitrary manner determine thresholds relatively to different degrees of deviation from what constitutes the proportionate punishment for different types of crimes seems at best a very difficult problem – at worst, an insurmountable one. But, as we have seen, it is a problem which the non-absolutist retributivist is forced to confront.

(3) Conclusion

Even though the philosophical discussion of international criminal law is still in its infancy, a number of theorists have strongly emphasized the ICC to be justified on retributivist grounds.[15] This is not surprising. If one believes in retribution as the proper goal of criminal justice then it certainly seems that an institution designed to prosecute and sentence the greatest criminals – those responsible for the “crimes of

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[14] See S. Kagan, *Normative Ethics* (Westview Press, 1998), chapter 3.2; or J. Ryberg, ”Mercy and Justice in Criminal Law”, *SATS – Nordic Journal of Philosophy* 6, 2005.

[15] See, for instance, A. Fichtelberg, ”Crimes beyond Justice? Retributivism and War Crimes”, *Criminal Justice Ethics*, Winter/Spring 2005.

crimes” – should be welcome. However, the question as to whether the ICC is actually shaped in accordance with retributivist prescriptions is, as we have seen, more complicated than that. The challenge I have pointed at, and which exists across the many different versions of modern retributivism, is to explain how thresholds should be determined. When it comes to domestic criminal justice this challenge might, due to the fact that the countervailing consequentialist reasons are never sufficiently weighty, be passed off as lacking practical relevancy. However, as mentioned, this answer will no longer do when it comes to ICC crimes. The fact that ICC crimes are large-scale crimes sometimes leaving many thousands of victims and their relatives, combined with the societal conditions under which such crimes are often perpetrated (e.g. the lack of societal stability), means that criminal justice reactions to such crimes may have consequences for the lives of very many people. The threshold challenge thereby, changes from being a merely hypothetical challenge to becoming a practically pertinent problem. This has noteworthy implications.

Besides the earlier mentioned standard criticism directed at the consequentialist view on punishment , namely that it allows for the use of the punishment of innocents or the disproportionately severe punishment of perpetrators, another criticism often presented is that the consequentialist approach seems to get us nowhere. The difficulties in estimating the consequences of different ways of punishment means that consequentialism fails when it comes to the delivering of practical guidance and, as was added, a theory of punishment must “stand up in practice or fall”. Whether this criticism of consequentialism is valid is not an issue to be discussed here. However, if should be noticed that, insofar as the criticism is justified, this may also obstruct an evaluation of the ICC from a threshold retributivist perspective. And, in addition, ICC crimes present the retributivist with the further challenge of specifying in a non-arbitrary manner how thresholds should be determined. Thus, the question as to how one should punitively deal with mass crimes and whether we should applaud the ICC in its present design is presently an open one if seen from a retributivist outlook. And, as argued, it is hard to imagine principled answers to be around the nearest corner – that is, of course, unless one wishes to stick to the absolutist dictum of *fiat justitia, et ruat mundus*[16].

[16] ”Let the world perish so long as justice be done”.