

OPINION ARTICLE

PUNISHMENT TELEOLOGY IN INTERNATIONAL CRIMINAL JUSTICE: INSIGHTS FROM THE ICC'S JURISPRUDENCE

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Abstract

The following article explores the issue of rationales for international criminal punishment by studying the treatment this question has received in the jurisprudence of the International Criminal Court (ICC). The aim is to help construct a theoretical foundation for the practice of international criminal tribunals. First, it looks into all seven ICC sentencing judgements to deconstruct the parts in which the judges discuss why the Court punishes. Upon a comparative analysis of the teleological pronouncements, the article identifies three patterns in the ICC's teleological discourse. These include: the Court's indiscriminate import of domestic punishment rationales, fusion of different objectives and rhetorical and performative language used to justify punishment. Building on these findings, this article puts forward the claim that the ICC judges' discourse on penal rationales reveals an expressive function of punishment at play. Finally, the article discusses how the ICC uses this expressivist practice in its jurisprudence to build a narrative of legalism and situate itself in the wider project of international justice. By implication, this legalism narrative is seen as the Court's tool in fighting against its legitimacy crisis.

Keywords: Punishment Teleology; International Criminal Court (ICC); International Justice

I. Introduction

In the past three decades, international criminal justice developed into a 'grandiose industry' equipped with political authority and professional practices.² Yet, even before this subfield of international law became permanently institutionalised with the creation of the International Criminal Court (ICC), legal scholars faced a theoretical challenge. A normative theory of justifications for punishment had to be constructed for the new context of prosecuting the 'unimaginable atrocities that deeply shock the conscience of humanity'.³ Quoting Hannah Arendt's response to the Nuremberg Trials, some crimes are so grave they might seem to render all punishment in the legal system inadequate and absurd.⁴ It thus comes as no surprise that legal scholarship has developed an interest in formulating an adequate rationale

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² Sergey Vasilev, 'Punishment Rationales in International Criminal Jurisprudence: Two Readings of a Non-Question' in Florian Jeßberger and Julia Geneuss (eds), *Why Punish Perpetrators of Mass Atrocities?: Purposes of Punishment in International Criminal Law* (Cambridge University Press 2020), 1.

³ Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) 2187 UNTS 3, Preamble.

⁴ Hannah Arendt, *The Origins of Totalitarianism* (2nd edn., Meridian Books 1958), 439.

specifically for the punishment of international crimes. However, as the practice of international tribunals began to develop, the task of constructing a clear theoretical foundation for it was not prioritised.⁵

The interest in a new theory of justifications has been largely voiced by scholars simultaneously disputing the applicability of classical rationales for punishment, known from many domestic criminal justice systems, to the context of international criminal punishment.⁶ These conventional justifications generally fall into two categories: ‘crime-control and retributivist’ - with the former including deterrence, specific and general, incapacitation (as a form of specific deterrence) and rehabilitation, and the latter seeing punishment as following the crime as a ‘just dessert’.⁷ The overarching reflection among scholars critical of an unreflective import of such classical domestic rationales to the prosecution of international crimes is that these rationales - and, more broadly, domestic criminal law theory - ‘insufficiently take account of the distinct legal, moral, and constitutional context of international criminal law’.⁸ To offer an example, Sloane sees international criminal law (ICL) differing from domestic criminal law in at least three ways.⁹ First, ICL serves multiple communities, including both literal (ethnic or national) entities and the abstract ‘international community’ which covers diverse and often competing interests. Second, ICL addresses crimes with a collective character, and the collective nature of both victims and perpetrators brings additional nuances to culpability, compared with domestic criminal law. Finally, ICL crimes often occur in contexts of societal breakdowns, such as war and ethnic conflict, where social norms against violence are eroded or inverted, contrasting sharply with the stable societies assumed by national criminal justice systems.¹⁰ Importantly, it is *because of* these differences that Sloane is sceptical of the import of the aforementioned domestic rationales to the ICL context.

This paper reinterrogates the issue of rationales for international criminal punishment, guided by the notion that ‘Punishment [...] requires justification; otherwise, it is simply cruelty’.¹¹ It is assumed that this normative foundation is conceptually needed for any productive doctrinal work inside international criminal justice, particularly in times of scepticism about the legitimacy of *institutionalised* ICL. As Akhavan recognizes, optimism towards ICL’s commitment to fighting impunity developed in the wake of the century - and seen in the swift emergence of institutions applying it - has now faded.¹² Criticism is being mounted inter alia at the field’s ‘selective enforcement, the price tag, [and] the inordinate length of international trials’.¹³ Institutional ICL is often painted as unable to step outside the realm of politics, contrary to its advocates speaking of apoliticism as the field’s very essence.¹⁴ And while the attitude towards ICL institutions, particularly the ICC, as influenced by global politics needs to be separated from

⁵ Vasiliev 2020, supra note 1, p. 4.

⁶ Elies van Sliedregt, ‘Punishment and the Domestic Analogy: Why It Can and Cannot Work’ in Florian Jeßberger and Julia Geneuss (eds), *Why Punish Perpetrators of Mass Atrocities?: Purposes of Punishment in International Criminal Law* (Cambridge University Press 2020); Robert Sloane, ‘The Expressive Capacity of International Punishment: The Limits of the National Law Analogy and the Potential of International Criminal Law’ (2007) 43 *SJIL* 315; Vasiliev 2020, supra note 1.

⁷ Sloane 2007, supra note 6, 69.

⁸ van Sliedregt 2020, supra note 6, 1.

⁹ Sloane 2007, supra note 6, 41.

¹⁰ Ibid.

¹¹ Idem, p. 40.

¹² Payam Akhavan, ‘The Rise, and Fall, and Rise, of International Criminal Justice’ (2013) 11 *JICJ* 527.

¹³ Idem, p. 527.

¹⁴ Sarah M H Nouwen and Wouter G Werner, ‘Doing Justice to the Political: The International Criminal Court in Uganda and Sudan’ (2010) 21 *EJIL* 941.

the ICL project understood conceptually,¹⁵ this analysis sees the latter's success as at least partly related to the former's perceived legitimacy.

Nonetheless, it far exceeds this paper's objective to resolve, or even participate in, the teleological disputes. Its more modest goal lies in studying how punishment teleology has been tackled in the jurisprudence of the ICC and analysing what the ICC judges' engagement with the question says about the Court's rationale for punishment. The way punishment teleology is used in ICC jurisprudence hints at the prominence of the expressive function of international criminal punishment and contributes to building the ICC's legalism narrative.

II. Deconstructing the ICC Judgements

The ICC has at the time of writing issued seven sentencing judgements, publicly available on the tribunal's website. Although all seven decisions refer to punishment rationales, these teleological pronouncements occupy relatively little space. The discussion below investigates each of them in chronological order.

The first ICC sentencing decision was handed down in 2012 in the *Lubanga* case. The Decision opened the punishment rationale debate by stating that 'in considering the purposes of punishment at the ICC, the Chamber has taken into account the Preamble of the [Rome] Statute'.¹⁶ The Preamble's cited provisions read: 'the most serious crimes of concern to the international community as a whole must not go unpunished' and '[State Parties are] determined to put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes'.¹⁷ Yet, the *Lubanga* Chamber failed to elaborate on these clauses beyond merely quoting them.

In the sentencing judgement of the *Katanga* case, ICC judges made their first contribution to the punishment rationale question, going beyond citing the Preamble. The Chamber, still referring to the same two Rome Statute clauses, stated that punishment must follow crimes which 'threaten the peace, security and well-being of the world' and 'the sentence should act as a deterrent'.¹⁸ The Decision then elaborates that the punishment's purpose is 'twofold': punitive as an 'expression of society's condemnation' of the crime and 'a way of acknowledging the harm and suffering caused to the victims', and deterrent aiming 'to deflect those planning to commit similar crimes from their purpose'.¹⁹ Afterwards, the Chamber identified motives outside retribution and deterrence. These included: 'respond[ing] to the need for truth and justice voiced by the victims and their family members', 'contributing to the restoration of peace and reconciliation' and 'eas[ing] the [convicted] person's reintegration into society', though the last should not be considered 'primordial'.²⁰ The *Katanga* decision thus posits a lengthy catalogue of punishment rationales.

¹⁵ Frédéric Mégret, 'In Whose Name? The ICC and the Search for Constituency' in Christian De Vos, Sara Kendall and Carsten Stahn (eds), *Contested Justice: The Politics and Practice of International Criminal Court Interventions* (Cambridge University Press 2015), 29.

¹⁶ *The Prosecutor v. Thomas Lubanga Dyilo*, Decision on Sentence pursuant to Article 76 of the Statute (TC), ICC-01/0401/06-2901 (10 July 2012), para. 16.

¹⁷ Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) 2187 UNTS 3, *supra* note 3, paras. 4-5.

¹⁸ *The Prosecutor v. Germain Katanga* [Katanga], Decision on Sentence pursuant to article 76 of the Statute (TC), ICC-01/04-01/07-3484-tENG (23 May 2014), para. 37.

¹⁹ *Idem*, para. 38.

²⁰ *Ibid.*

The *Bemba* judgement builds on *Katanga*'s teleological findings. It again interprets the Rome Statute as establishing punishment objectives of retribution and deterrence.²¹ The Decision understands retribution as 'expression of the international community's condemnation of the crimes', rather than 'fulfilling a desire for revenge'.²² *Bemba* further echoes *Katanga* saying that punishment 'acknowledges the harm to the victims and promotes the restoration of peace and reconciliation'.²³ As a new addition to the teleological discourse, the *Bemba* Chamber divides deterrence into two types: specific and general. While the former aims to 'discourage a convicted person from recidivism', the latter 'dissuades' others from committing crimes.²⁴ Finally, the Decision mentions rehabilitation instead of reintegration of the criminal as a relevant, yet not deserving 'undue weight', objective of punishment.

The separate *Bemba et al.* decision, like *Katanga*, has a dedicated section on the 'Purpose of sentencing'. The punishment rationales identified in this case's judgement again mirror those in *Katanga* and *Bemba*. The Decision states that 'the primary purpose of sentencing individuals under Article 70 [...] is rooted in retribution and deterrence', with deterrence divided into specific and general.²⁵ No alternative rationales are mentioned. This exact mirroring exercise might appear curious given that *Bemba et al.* is the sole ICC sentence under The Rome Statute's Article 70 dealing with 'Offences against the administration of justice'. It seems ICC judges see it fully plausible that the same rationales apply for prosecuting the breaches of both the substantive prohibitions on perpetrating international crimes and the Court's procedural law.

Subsequent ICC judgements are repetitive of their predecessors in discussing punishment teleology. To illustrate, the *Al Mahdi* decision's section on punishment rationales is entirely a patchwork of teleological pronouncements taken from previous cases. The segment invoking the Preamble is identical to paragraph 10 of the *Bemba* judgement.²⁶ *Al Mahdi*'s paragraph 67, in turn, restates word-for-word *Bemba*'s take on retribution, deterrence, acknowledgement of harm, restoration of peace and reconciliation; as well as *Katanga*'s comment on reintegration. *Al Mahdi* does not add a single novel word to the teleological debate.

Afterwards, the *Ntaganda* decision's segment on punishment rationales again references the Rome Statute and the twofold purpose of retribution and deterrence, using the same words as *Bemba* and *Al Mahdi*.²⁷ The Trial Chamber then directly quotes the aforementioned *Al Mahdi*'s paragraph 67, only omitting the statement that punishment promotes the restoration of peace and reconciliation.²⁸ Finally, the Decision mentions rehabilitation, mirroring *Bemba* word-for-word.

Interestingly, the latest ICC judgement – the result of the *Ongwen* case – addresses penal rationales twice. The first relevant paragraph is surprisingly brief and even fails to quote the Preamble, but confirms sentencing aims primarily at retribution, deterrence, and 'to a lesser extent', rehabilitation.²⁹ Yet, the Chamber returns to punishment teleology at the end of the judgement while determining Ongwen's

²¹ *The Prosecutor v. Jean-Pierre Bemba Gombo* [Bemba], Decision on Sentence pursuant to Article 76 of the Statute (TC), ICC-01/05-01/08-3399 (21 June 2016), para. 10.

²² *Idem*, para. 11.

²³ *Ibid.*

²⁴ *Ibid.*

²⁵ *The Prosecutor v. Jean-Pierre Bemba Gombo, Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidèle Babala Wandu and Narcisse Arido* [Bemba et al.], Decision on Sentence pursuant to Article 76 of the Statute (TC), ICC-01/05-01/13-2123-Corr 22-03-2017 (22 March 2017), para. 19.

²⁶ *The Prosecutor v. Ahmad Al Faqi Al Mahdi* [Al Mahdi], Judgment and Sentence (TC), ICC-01/12-01/15-171 (27 September 2016), para. 66.

²⁷ *The Prosecutor v. Bosco Ntaganda* [Ntaganda], Sentencing Judgement (TC), ICC-01/04-02/06-2442 (7 November 2019), para. 9.

²⁸ *Idem*, para. 10.

²⁹ *The Prosecutor v. Dominic Ongwen* [Ongwen], Sentence (TC), ICC-02/04-01/15-1819-Red (6 May 2021), para. 60.

sentence. There, it identifies nearly all punishment rationales the ICC jurisprudence has mentioned thus far: retribution and deterrence (as ‘fundamental purposes’), condemnation of crime, acknowledgement of harm, social rehabilitation, and reintegration.³⁰ Notwithstanding, the Chamber fails to elaborate on the listed rationales or prioritise between them.

III. Analysing the ICC’s Teleological Discourse

In examining the seven ICC sentencing judgements, it can be noted that the Court routinely imports established domestic punishment rationales - particularly retribution and deterrence - into its jurisprudence. ‘Domestic’ rationales here stand for those which have been used in the context of national criminal justice systems long before any emergence of institutionalised international criminal justice. This observation accords with legal scholarship’s overarching opinion that international criminal law is ‘over-determined’ by domestic penal theories.³¹ While it goes beyond the scope of this article to review the numerous accounts doubting the appropriateness of this import of rationales, the more striking observation is that the ICC judges themselves make no attempt at, or reference to, these doubts. By way of illustration, the ICC sentences mention the crimes’ extraordinary gravity, yet still praise retribution irrespective of that, in the case of these crimes, it seems straightforward to argue no punishment equals the victims’ suffering.³² Deterrence is preached despite the conventional wisdom that no empirical evidence supporting international criminal law’s deterrent effect exists.³³ Moreover, whilst the judges propose alternative ambiguous punishment rationales - such as restoration of peace and reconciliation (not to be confused with the rehabilitation of the criminal himself) - they fail to define, not to mention elaborate on them. Expression of condemnation of the crimes is, for instance, viewed merely as part of retribution. The dominance of domestic penal rationales at the ICC then lacks reflection.

The second observation goes to the extent that the judgements tend to blur the lines between different punishment justifications. Vasiliev notes that the ICC judges oftentimes present the objectives of retribution and deterrence, conceptually conflicting as stemming from the retributive and utilitarian camps, as ‘concomitant’, ‘complementary’, and ‘two sides of the same coin’.³⁴ The *Bemba et al.* sentence referring to retribution and deterrence as the primary ‘purpose’ of punishment exemplifies this point.³⁵ According to Bagaric and Morss, such an ‘unhappy mix of different theories of punishment’ without attempts to prioritise between them might result in arbitrary sentencing.³⁶ Additionally, the ICC jurisprudence tends to assert links between the overarching institutional goals of the Court, as well as international criminal justice at large (such as reconciliation), and the purposes of punishment itself. While punishment should be consistent with the ICC’s goals,³⁷ scholars have noted that striving towards overabundant, too ambitious, and often antithetical goals of international criminal law might dilute the impact of punishment.³⁸ To illustrate, offering leniency (e.g. in the form of amnesties) to war criminals

³⁰ Ibid, para 369.

³¹ Alexander Greenawalt, ‘International Criminal Law for Retributivists’ (2014) 35 UPJIL 976.

³² Colin Flynn, ‘Sentencing at the International Criminal Court: A Practice in Search of a Rationale’ (2015) [Doctoral Dissertation,], 111.

³³ James Alexander, ‘The International Criminal Court and the Prevention of Atrocities: Predicting the Court’s Impact’ (2009) 54 Villanova Law Review <<https://digitalcommons.law.villanova.edu/vlr/vol54/iss1/1>> p. 4.

³⁴ Vasiliev 2020, supra note 1, p. 25.

³⁵ *The Prosecutor v. Jean-Pierre Bemba Gombo, Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidèle Babala Wandu and Narcisse Aido* (22 March 2017), supra note 25, para. 19.

³⁶ Mirko Bagaric and John Morss, ‘International Sentencing Law: In Search of a Justification and Coherent Framework’ (2006) 6 International Criminal Law Review, p. 208.

³⁷ Flynn 2015, supra note 32, p. 167.

³⁸ Mirjan Damaška, ‘What Is the Point of International Criminal Justice?’ (2008) 83 Chicago-Kent Law Review, p. 331.

to facilitate peace agreements - and thus work towards the rationale of peace restoration - might be in tension with the rationale of providing justice for victims.

The analysis of the ICC's engagement with punishment rationales can benefit from the approach of seeing law as 'the very profession of rhetoric'.³⁹ Rhetoric in this context does not uphold its traditional derogatory meaning of 'specious, bombastic or deceitful use; [...] in other words, the abuse of language'.⁴⁰ Rather, what is meant is a general consensus that courts use persuasive language directed at a given audience,⁴¹ and, consequently, how they speak matters independently of the message's substance.⁴² This realisation is pertinent for a comprehensive analysis of ICC's punishment teleology as it emphasises that it is our task, as legal readers, to decipher the meanings the judgements conceal.⁴³ Accordingly, one can first observe that the language used by the ICC in rationale pronouncements is, perhaps as expected, similar between judgements. The teleological statements are characterised by brevity. It appears as if the judges automatically draw from a collection of perfunctory formulas to justify punishment, so as to satisfy top-down mandatory requirement of including any reference to rationales in every judgement. Vasiliev uses the phrases 'hypnotic repetition', 'ritualism', and 'monotony' to describe the ICC's discourse on punishment rationales.⁴⁴ On account of these characteristics, the judges' pronouncements on punishment teleology seem to act as non-reflective preachings of classical criminal law principles (such as that punishment is in reaction to a crime) rather than critical, comprehensive deliberations on the issue of justifying punishment. On the other hand, it seems significant to note the Court's tendency for strong, emotive, almost pompous language in its teleological assertions. These include the characterization of criminal conduct dealt with as 'most serious crimes of concern to the international community as a whole'⁴⁵ or stating that these crimes 'threaten the peace, security and well-being of the world'.⁴⁶ It could then be argued that these ceremonial, formalistic pronouncements point to a certain performative element⁴⁷ or, as Drumbl put it, 'the spectacle of theatre' at work.⁴⁸

IV. Identifying the Expressive Rationale of Punishment

This performative element has been studied under the notion of the expressive function of punishment in international legal scholarship.⁴⁹ It should be emphasised that there is currently a plethora of different theoretical accounts of this function⁵⁰, and providing a comprehensive review of them goes beyond the aim of this research. It could, however, be said that many of them have roots in, or bear the essence of, Joel Feinberg's long-recognized theory. According to Feinberg, punishment is a 'device for the expression of attitudes of resentment and indignation, and of judgements of disapproval and reprobation, [...] [which] has a symbolic significance'.⁵¹ Punishment condemns the crime committed as a grave violation of a profound shared norm. With this understanding, the (cited before) ICC judges' claims of

³⁹ Gerald B Wetlauffer, 'Rhetoric and Its Denial in Legal Discourse' (1990) 76 Virginia Law Review, p. 1554.

⁴⁰ Peter Goodrich, 'Rhetoric as Jurisprudence: An Introduction to the Politics of Legal Language' (1984) 4 Oxford Journal of Legal Studies, p. 88.

⁴¹ Birju Kotecha, 'The Art of Rhetoric: Perceptions of the International Criminal Court and Legalism' (2018) 31 Leiden Journal of International Law, p. 941.

⁴² Austin Sarat, *Rhetorical Processes and Legal Judgments* (Cambridge University Press 2016), p. 5.

⁴³ Desmond Manderson, *Songs without Music: Aesthetic Dimensions of Law and Justice* (University Of California Press 2000), p. 100.

⁴⁴ Vasiliev 2020, supra note 1, p. 3.

⁴⁵ *The Prosecutor v. Thomas Lubanga Dyilo* (10 July 2012), supra note 16, para. 16.

⁴⁶ *The Prosecutor v. Germain Katanga* (23 May 2014), supra note 18, para. 37.

⁴⁷ Ibid.

⁴⁸ Mark A Drumbl, *Atrocity, Punishment, and International Law* (Cambridge University Press 2007), p. 175.

⁴⁹ Sloane 2007, supra note 6.

⁵⁰ Flynn 2015, supra note 32, p. 170.

⁵¹ Joel Feinberg, 'The Expressive Function of Punishment' (1965) 49 Monist, p. 400.

punishment being an ‘expression of the international community’s condemnation of the crimes’⁵² points directly to expressivism.

Importantly, scholars have noted that a descriptive claim about the expressive nature of punishment - one that merely sees expressivism as punishment’s characteristic - needs to be distinguished from a normative claim, according to which expressivism becomes a suitable rationale for punishment.⁵³ While Feinberg has been criticized for not making this distinction abundantly clear, one can resort to other expressivists for a more explicitly normative account. One of them has been offered by philosopher Igor Primoratz, who usefully differentiates between an intrinsic and extrinsic expressive function of punishment.⁵⁴ The former refers to punishment being functional in that it gives vent to sentiments, such as public indignation at the criminal, which are itself intrinsically right and appropriate.⁵⁵ The message communicated is valuable in itself.⁵⁶ In the extrinsic dimension, in turn, the expression of sentiments through punishment furthermore carries forward-looking beneficial consequences or a didactic purpose.⁵⁷ Through stigmatising criminals and expressing commitment to the rule of law, punishment strengthens habitual conformity with the law, maintains social cohesion by expressing the anomaly of the criminal conduct, educates and instils a conception of right and wrong.⁵⁸ In both the intrinsic and extrinsic expressivism accounts, there appears to be a consensus that the punishment’s message is aimed at a wider audience; not solely the wrongdoer (as in the case of traditional retribution and deterrence theories) but, primarily, the society at large.⁵⁹ According to the ICC judgements, punishment is indeed a societal concern precisely because the grave crimes committed are ‘of concern to the international community as a whole’.⁶⁰ Perhaps further due to the audience being in fact society-wide, the ICC judges’ mentions of retribution and deterrence appear ceremonial and mechanical. Namely, it could be that the judges do not genuinely focus on the punishment’s effect on the wrongdoer because the punishment is justified by virtue of its wider societal impact. Expressivism then becomes the ultimate ‘meta-justification’ of punishment at the ICC.⁶¹

For a thorough understanding of the ICC’s discourse on punishment teleology, one could perhaps reflect on Sofia Stolk’s claim that courts are generally aware of their agency in constructing their own identity.⁶² The sole fact that including punishment rationales in ICC judgements is now, as shown, a standard might hint at the ICC’s expressivist commitment to a narrative of legalism – the superiority of law, as best suited for justice, over politics.⁶³ First, the substance of the teleological messages, framed in terms of retribution and deterrence, reinstates the faith in the authority of legal norms.⁶⁴ Besides, the aforementioned arguable impression that judges seem to somehow feel obliged to cite punishment justifications – this impression being based on how ceremonial and perfunctory their rationale pronouncements are – is telling. This perceived obligation implies that the ICC’s exercise of law must be justified and cannot be unrestricted.⁶⁵

⁵² *The Prosecutor v. Jean-Pierre Bemba Gombo* (21 June 2016), supra note 21, para. 11.

⁵³ Igor Primoratz, ‘Punishment as Language’ (1989) 64 *Philosophy*; Sloane 2007, supra note 6.

⁵⁴ Primoratz 1989, supra note 53.

⁵⁵ Ibid, pp. 188-191.

⁵⁶ AJ Skillen, ‘How to Say Things with Walls’ (1980) 55 *Philosophy*, p. 515.

⁵⁷ Damaška 2008, supra note 38, p. 345.

⁵⁸ Van Sliedregt 2020, supra note 6; Primoratz 1989, supra note 53.

⁵⁹ Bill Wringe, ‘Why Punish War Crimes? Victor’s Justice and Expressive Justifications of Punishment’ (2006) 25 *Law and Philosophy*, p. 178.

⁶⁰ *The Prosecutor v. Thomas Lubanga Dyilo* (10 July 2012), supra note 16, para. 16.

⁶¹ Vasiliev 2020, supra note 1, p. 28.

⁶² Sofia Stolk, ‘“The Record on Which History Will Judge Us Tomorrow”: Auto-History in the Opening Statements of International Criminal Trials’ (2015) 28 *Leiden Journal of International Law*, p. 996.

⁶³ John Czarnetzky and Ronald Rychlak, ‘An Empire of Law? Legalism and the International Criminal Court’ (2003) 79 *Notre Dame Law Review*.

⁶⁴ Drumbl 2007, supra note 48, p. 17.

⁶⁵ Wringe 2006, supra note 59, p. 181.

Teleological pronouncements in ICC judgements then assume the expressivist role of ‘accurate but simple messages that reach a non-specialist audience that situate the Court as part of the international justice movement’.⁶⁶ This situating or ‘branding’ project⁶⁷ is, in turn, pertinent, given that internationally recognized legitimacy is not something a court claiming to act in the interest of humanity can take for granted.⁶⁸ The significance of authority-building rings particularly true for the ICC in times of the aforementioned scepticism about the legitimacy of institutional ICL. ICC’s more explicit commitment to expressivist punishment rationales could help sharpen the Court’s focus amid its overabundant and overambitious catalogue of functions, and consequently provide a weapon in this battle for authority.

V. Conclusion

This opinion piece aimed to dissect the punishment teleology discourse in the jurisprudence of the ICC. It identified the ICC’s unreflective import of classical punishment rationales (particularly retribution and deterrence), the blurring of lines between different objectives, and the formalistic, ritualistic language used in the teleological pronouncements. Considering these findings, it is argued that the way the ICC engages with penal teleology hints at the expressive function of punishment, or ‘the loudspeaker echoing the values of the international community’⁶⁹ at work. This expressivist exercise helps to advance the Court’s narrative of legalism.

This analysis could be a small stepping stone in building a comprehensive normative theory of criminal punishment tailored to the international context. As for the ICC, the construction of such a theoretical grounding for its practice, paired with a more straightforward commitment to the expressive rationale of punishment, could contribute to the Court’s growing legitimacy. This article has entirely ignored the punishment justifications’ impact on the determination of adequate sentences. Indeed, thus far, punishment teleology and international sentencing – the latter described as ‘haphazard’ and ‘indeterminate’ by Bagaric and Morss⁷⁰ – have ‘evolved with only a cursory consideration of each other’.⁷¹ Further research might perhaps strive to bridge that gap and open a dialogue between the present issue of *why* with the question of *how* to punish.

⁶⁶ Kotecha 2018, *supra* note 41, p. 952.

⁶⁷ Christine Schwöbel-Patel, ‘The Market and Marketing Culture of International Criminal Law’ in Christine Schwöbel-Patel (ed), *Critical Approaches to International Criminal Law: An Introduction* (Routledge 2014).

⁶⁸ M Glasius and T Meijers, ‘Constructions of Legitimacy: The Charles Taylor Trial’ (2012) 6 *International Journal of Transitional Justice*, p. 262.

⁶⁹ Immi Tallgren, ‘The Sensibility and Sense of International Criminal Law’ (2002) 13 *European Journal of International Law*, p. 592.

⁷⁰ Bagaric and Morss 2006, *supra* note 36, p. 208.

⁷¹ *Idem*, p. 195.