

## **Punishment, Responsibility and Justice Normative Structures of the International System**

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Does punishment take place at the global level?<sup>1</sup> Who gets punished? Why certain agents liable to punishment and others are not? What “crimes” deserve punishment at the global level? Should punitive practices be part of a just global political order? This paper provides some initial answers to these questions. It does so by focusing on three concepts: punishment, responsibility, and justice. It concludes that punishment does take place at the global level, but that most global punitive practices are unjust. Clarifying the connections between these three concepts and punishment provides a framework for the construction of international institutions and ideas about global justice and peace.

Why are these questions important? Punitive uses of military force have long been part of international affairs; the classical just war tradition included punishment as one of the three just causes for war. With the end of the cold war and the increase in American power and influence, punitive practices have become more common. Military interventions that are labelled humanitarian or peacekeeping become punitive as peacekeeping forces work to protect the human rights of individuals in the target

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<sup>1</sup> I use the term international to refer to relations among states and international organizations and the term global to refer to interactions among those agents and individuals, corporations, and NGOs. Both terms have different valences in the discipline of international relations, which I refer to either by the acronym IR or with capital letters, International Relations.

state. Coercive military campaigns, such as those in the Balkans, punish entire states by inflicting harm in response to previous violations of human rights norms.

Economic sanctions, employed most famously in Iraq during the 1990s, punish groups of individuals to encourage changes in state behaviours. The creation of the WTO, an institution that authorizes economic sanctions in retaliation for violations of global trade rules, suggests that not only states but also international institutions authorize punitive strategies. The recent “war on terror” includes punitive military responses against entire states (Afghanistan) and specific individuals, such as those killed by a Predator drone in Yemen in 2002.

As these punitive practices have increased in frequency, however, scholarly literatures have not addressed these issues. The literature on responding to past atrocities has focused on restorative justice or even forgiveness rather than punishment, with concerns expressed about how punitive practices lead to spirals of violence rather than resolutions of conflict. While these concerns are legitimate, perhaps they should not be avoid punishment, but seek greater clarity about what violations demand punishment and what types of agents can legitimately be punished. Others argue that the move toward greater prosecution of individuals for war crimes and the creation of the International Criminal Court will help create a more just system. While these institutions are important, the focus on persons alone ignores the fact that states commit crimes and should be liable to punishment as well. Finally, some argue that justice cannot exist in an anarchic world. This suggestion ignores the fact that justice is already part of the global system, but that we need to better understand its connection to punishment, rules and agency.

This paper sets a conceptual terrain for a larger project on punishment and international affairs. This larger project argues that political leaders and analysts of

international affairs engage in and write about political practices that have punitive dimensions, but do so in ways that fail to appreciate the complexities of what it means to punish and how punishment can and should be justified. The larger project will examine punitive uses of force (military intervention and coercive diplomacy), punitive economic statecraft (economic sanctions and trade retaliation) and punitive responses to past atrocities (war crimes tribunals and counter terrorism policy). Each of these topics will be explored as practices that employ punitive strategies, but which also fail to connect those strategies to any idea about justice. The overall point of the project, made more briefly in this paper, is agents are being punished in an unjust system.

This paper, which forms the initial step in this larger project, proceeds by first examining the rise in what I call “punitive interventions” to illustrate the punitive nature of current international affairs. Following this, I briefly review some philosophical accounts of punishment. I then examine the concept of responsibility, suggesting how a better appreciation of its complexity in political practice can help clarify how punishment can and cannot function. Finally, I explore the concept of justice and connect it to punishment.

### **Punitive intervention**

What does it mean to “find” punitive practices in international affairs? Discovering punitive practices requires employing an genealogical method, one popularized by the writings of Michel Foucault.<sup>2</sup> Foucault began his various excursions into social and political life with a current problem, leading him to

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<sup>2</sup> See Michel Foucault, *Madness and Civilization*, trans. by R. Howard (New York: Pantheon, 1965) for one his early attempts. Foucault’s ideas evolved and he consistently resisted any attempt to locate him a single method or school. For an overview of his work from a variety of perspectives, see Gary Gutting ed., *The Cambridge Companion to Foucault* (Cambridge: Cambridge University Press, 1994). Of relevance for this paper, see Michel Foucault, *Discipline and Punish: The Birth of the Prison*, trans. by Alan Sheridan (New York: Vintage Books, 1979)

undertake “histories of the present.” He sought to uncover the paths and structures by which certain social and political realities had come into existence. This meant his work was historical in part, but also anthropological, sociological, and political. In developing his arguments, Foucault focused on the idea of practices and discourses, the conglomeration of written work, political policies, sociological trends, and even artistic movements that constituted certain realities. Not only did he describe such practices, he connected them to broader trends in politics and society that relied upon and supported those same practices. His brilliance was in uncovering the history of things that seemed to be ahistorical. This included studies of madness, sexuality, and, of course, punishment. This paper does not draw on Foucault’s work on punishment directly, although it will be referenced at times; rather, what I draw from Foucault is his methodology.

At the same time, Foucault is not the only methodological source for this project. In making the case that certain punitive practices are increasing in frequency, I also resort to more traditional empirical methods, e.g., the construction of a database of military interventions that reveal punitive characteristics. Such compilations are not simply a matter of observation, however, for to describe a military intervention as punitive requires a reconsideration of criteria normally used to evaluate intervention, such as intention and outcome. The combination of these methods produces evidence, broadly understood, that punitive practices constitute an important part of international relations. These practices sustain and are sustained by certain shared assumptions about what is right, moral and legal (although not often what is just, a central critique that I will be making here).<sup>3</sup>

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<sup>3</sup> This paper can be located within a constructivist IR theory framework, although some elements of it do not conform to certain aspects of this emerging tradition. There is a burgeoning literature on this theoretical approach. For works that have informed this paper, see: Nicholas Onuf, *World of Our Making: Rules and Rule in Social Theory and International Relations* (Columbia: University of South

In this section, I focus on one particular practice, punitive intervention. The following is suggestive only, however, and should not be seen as a sustained treatment of this topic. I introduce it here in order to highlight its problematic status and to provide some instances for the more in-depth examination of justice that follows.

The use of military force often arises from a punitive impulse. As noted above, one of the three classical justifications for using military force was the punishment of evil. With the rise of positivist international law, and the horrors of World War I, however, punitive justifications for war lost some of their appeal. Instead, the justification of self-defence rose in importance. What was considered to be punitive was redescribed as self-defence. As James Turner Johnson notes,

A retaliatory second strike, for example, would classically have been called “punishment of evil”; today it is categorized as “defense.” . . . So the underlying ideas remain, though the vocabulary has changed to reflect twentieth-century sentiment that first use of force in a developing country is morally suspect, while second use is not.<sup>4</sup>

A shift back to punitive uses of force began to appear with the end of the Cold War. Using military force to change the policies of governments or replace them completely did not suddenly appear, for such practices had been ongoing throughout the Cold War. What changed was the discourse surrounding and sustaining such practices. Political leaders now claimed that interventions resulted not from self-interest but from a desire to protect innocents from human rights violations. The overlapping interventions in the Balkans embodied this ethos. When negotiated

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Carolina Press, 1989); Friedrich Kratochwil, *Rules, Norms and Decisions: On the Conditions of Practical and Legal Reasoning in International Relations and Domestic Affairs* (Cambridge: Cambridge University Press, 1989); Peter Katzenstein, ed., *The Culture of National Security* (New York: Columbia University Press, 1996); Karin Fierke, *Diplomatic Investigations: Conflict and Change in a Globalizing World* (London: Palgrave, 2005); Michael Barnett and Martha Finnemore, *Rules for the World: International Organizations in Global Politics* (Ithaca: Cornell University Press, 2004)

<sup>4</sup> James Turner Johnson, *Morality and Contemporary Warfare* (New Haven: Yale University Press, 1999): 31

settlements broke down, the sides in the conflict would turn to ethnic cleansing strategies. In response, NATO and the United Nations authorized military strikes against those violating the agreements, particularly the Serb paramilitary forces in Bosnia-Herzegovina. When the marketplace in Sarajevo was bombed on 28 August 1995, NATO forces launched a sustained military bombardment of Bosnian Serb targets near Sarajevo. Some interpreted this campaign as an instance of coercive bombing, a diplomatic-military strategy of using sticks and carrots to convince an adversary to change its position.<sup>5</sup> Richard Holbrooke, the lead American negotiator during this time argues that he and others recommended the bombing campaign, despite the fact that it might adversely impact the negotiations. Reading Holbrooke's account of the diplomacy that resulted from these attacks suggests that a punitive purpose underlay the decision to use military force. He even lists the killing of three American diplomats as part of the underlying reason for the attacks, which could be labelled as punitive or even vengeance.<sup>6</sup> The fact that this attack occurred soon after the slaughter of over 10,000 men and boys in the Bosnian Muslim town of Srebrenica in July 1995 only added to the punitive justifications. This trend toward punitive uses of force culminated in the Balkans in the 1999 air campaign against Serbia over the disputed territory of Kosovo. As Serb forces engaged in ethnic cleansing of the region, NATO forces launched a two month sustained air attack on targets in Serbia. These targets began as military, but soon progressed to different "centres of gravity" that included leadership and civilian targets.<sup>7</sup> While the overall point of the campaign

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<sup>5</sup> See Daniel Byman and Matthew Waxman, *The Dynamics of Coercion: American Foreign Policy and the Limits of Military Might* (Cambridge: Cambridge University Press, 2002).

<sup>6</sup> Richard Holbrooke, *To End a War* (New York: Modern Library Edition, 1999): 91-105

<sup>7</sup> See Tim Judah, *Kosovo: War and Revenge* (New Haven: Yale University Press, 2000) for a history of the region and conflict. See Wesley Clark, *Waging Modern War: Bosnia, Kosovo and the Future of Conflict* (New York: Basic Books, 2002) for a description of the campaign from its military commander.

was to change Serbian behaviour, the campaign included strong punitive dimensions, especially as it turned toward attacks on civilian and leadership targets.

These instances of military interventions from the Balkans suggest a punitive ethos underlying the use of military force in the 1990s. Examining all the military interventions undertaken since 1950 provides even more support for the argument that interventions undertaken for punitive purposes have increased in frequency. Out of a total of 122 military interventions undertaken between 1950 and 2005, 18 can be described as punitive, according to whether or not they sought to inflict harm or create institutions that would eventually inflict harm in response to violations of standard human rights criteria.<sup>8</sup> Of these interventions, 13 of them, or 72%, have taken place since the end of the Cold War (1989). They also constitute 24% of the interventions undertaken since 1989, not a large number but certainly a statistically significant one. Some of these interventions have been designed to inflict harm without any judicial proceedings or institutions, such as the attacks on Afghanistan in 2001-2002 in response to the attack so September 11, 2001. Others are more subtly punitive. A growing trend in peacekeeping and peacemaking interventions in Africa includes attempts to “end impunity”, a phrase found in statements by United Nations officials, including Security Council Resolutions and Secretary General Kofi Anan’s reports on the situation in Darfur, Sudan.<sup>9</sup> Sudanese officials created a judicial court to try militia members and soldiers for violations of human rights in Darfur, but UN officials have been openly sceptical about its effectiveness in ensuring that punishment is carried out. As a result, the current intervention is devoted in part to

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<sup>8</sup> See Anthony F Lang, Jr “Punitive Intervention” October 2005, especially data included in Appendix.

<sup>9</sup> See UN Security Council Resolution 1590, 24 March 2005 and Report of the Secretary General S/2005/467 18 July 2005, both obtained from the United Nations Mission in Sudan (UNMIS) website, <http://www.un.org/Depts/dpko/missions/unmis/>.

helping to construct judicial institutions, but, more importantly, now includes efforts to have individuals tried before the International Criminal Court.

This evidence suggests that interventions, both coercive bombing engagements and traditional peacekeeping efforts, are becoming more punitive. Explaining this evolution requires a longer treatment, but one can see a punitive ethos merging with the current discourses of human rights protection. From his critical perspective, David Chandler has linked these trends. He argues that not only are governments engaging in more punitive tactics to protect human rights, aid workers and NGO activists have also moved away from traditions of neutrality to more aggressive attempts to punish those who violate human rights norms:

Through the human rights discourse, humanitarian action has become transformed from relying on empathy with suffering victims, in support of emergency aid, to mobilising misanthropy to legitimise the politics of international condemnation, sanctions and bombings.<sup>10</sup>

David Campbell's analysis of the textual strategies that partly constituted the war in the Balkans, but more so sustained the Western military response to those wars suggests other ways in which a punitive ethos might arise. Campbell identifies the constructed nature of the subject and its responsibility for violence as necessary for but also reliant on ideas about the state, nationality and war. While he does not address the issue of punishment directly, Campbell's account focuses on how discourses of responsibility, which are necessary when punishing agents, arise from structural assumptions in the politics of war and peace.<sup>11</sup>

Punishment has returned as a justification for using military force. Its return is linked to discourses of human rights, making it both attractive and justifiable on certain levels. If those who systematically kill and exploit others for nationalist or

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<sup>10</sup> David Chandler, *From Kosovo to Kabul: Human Rights and International Intervention* (London: Pluto Press, 2002): 51.

<sup>11</sup> David Campbell, *National Deconstruction: Violence, Identity and Justice in Bosnia* (Minneapolis: University of Minnesota Press, 1998)

personal reasons can escape without consequence, then the human rights provisions of the United Nations will remain simply parchment. In what ways, however, can punishment take place without leading to resentment, resistance, and further violence?

## **Punishment**

Before answering this question, a clearer understanding of punishment is necessary. A punishment is the infliction of harm in response to a violation of a norm.<sup>12</sup> The overall purpose of punishment is to halt the violation of the norm in question. But the decision to inflict harm in order to halt that violation is a contestable practice. As one philosopher notes the practice of inflicting harm is “something we regard as morally prohibited under normal circumstances.”<sup>13</sup> Much of the philosophical literature, then, has been devoted to justifying this practice. Its justification can be found in three ideas: deterrence, retribution, and rehabilitation.

Deterrence is the idea that by punishing agents who violate norms future violations will be prevented. Deterrence can be either specific or general: If it is specific, it is an attempt to deter a particular agent from violating the same norm again. If it is general, it is an attempt to deter others from violating the law by using the individual case as an example. Punishment premised on deterrence is largely unconcerned with the welfare or character of the agent being harmed. Instead, the practice aims to alter the agent’s behaviour and to demonstrate a larger point to the community. Deterrence can be evaluated in terms of whether or not the same crimes continue to occur. If they do, the deterrence approach may not be working; if they do

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<sup>12</sup> Note that this definition of punishment is the most basic. It includes punishment in any context, whether it be a family, civil association, or state. This avoids making the definition dependent on a notion of authority, although authority is a central issue in punishment. For an examination of authority in relation to these themes, see Anthony F Lang, Jr., “Punishing States”.

<sup>13</sup> A. John Simmons, “Introduction” in A. John Simmons, ed., *Punishment: A Philosophy and Public Affairs Reader* (Princeton: Princeton University Press, 1995): vii.

not, one would have a reason, though not a conclusive one, for thinking that deterrence does work. The general deterrent justification arises from a utilitarian philosophy, in that it seeks to justify punishment on the basis of contributing to a greater good for the entire society.

A rehabilitative theory of punishment seeks to change the moral character of the agent. While a deterrent effect may result from this approach, the primary focus is on making the agent more law-abiding. Unlike a deterrent approach, however, a rehabilitative approach to punishment provides means by which the agent can change behaviour not as a result of fear but through a genuine change in attitude. The evaluation of this form of punishment is similar to specific deterrence; its success depends on whether that individual agent commits further crimes. More importantly, and it is difficult to see how this could be observed, the agent would have to refrain from future violations because she believed it was wrong to do so and not because of a fear of getting caught.<sup>14</sup>

Retribution as the justification for punishment is more difficult to capture. It is, perhaps, the most common-sense notion of punishment. As one author suggests, it is the “idea that wrongdoers should be ‘paid back’ for their wicked deeds.”<sup>15</sup> This idea considers both the community and the criminal. It seeks to restore a sense of balance to a community by punishing wrongdoers. It differs from deterrence in not seeking to use the agent to teach a larger lesson. It differs from rehabilitation in not seeking to change the character of the criminal. Ironically, retributive punishment respects the moral autonomy of the agent more than does punishment aimed at deterrence or rehabilitation. Retribution assumes that the agent is not a tool to be used

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<sup>14</sup> Foucault’s treatment of punishment focuses in particular on this overriding purpose, which he links to other trends in society and politics.

<sup>15</sup> James Rachels, “Punishment and Desert”, 468 in Hugh LaFollette, ed., *Ethics in Practice: An Anthology*, 2<sup>nd</sup> ed. (Oxford: Blackwell Publishers, 2002): 468

to convince a community a lesson (deterrence), nor that the agent is a pliant entity that can be coercively shaped into a new person (rehabilitation); instead, an agent is presumed to be morally autonomous and therefore responsible for his or her actions.

The philosophical literature on punishment has sought to develop these justifications, especially in combination with each other. Critics of the general deterrent or utilitarian justification have argued that, according to this justification, there is no need to actually punish the agent who committed the crime. Instead, a utilitarian justification could lead to the punishment of random individuals whenever a norm is violated.<sup>16</sup> A related problem is that a utilitarian or deterrent punishment, while actually focusing on the individual agent who committed the violation, might engage in excessive forms of violence to make the point. For example, one might execute individuals for jaywalking according to an extreme form of utilitarianism or deterrence.<sup>17</sup> Others have levelled important criticisms at the retributive model. While retribution might address the problems raised by the utilitarian model – that is, it can better connect the agent to the violation – critics have suggested that it “confuses the irrational thirst for vengeance with a rational ground for punishment.”<sup>18</sup>

These debates continue among both theorists and policy makers.<sup>19</sup> While public discourse oscillates among these different justifications in different domestic political contexts, rarely are these concepts addressed at the international level. Certainly, the idea of deterrence is commonplace among theorists of international relations. At the same time, its invocation in strategic debates rarely conceptualises it

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<sup>16</sup> Jeffrie Murphy has made this point in various places; see, for example, “Marxism and Retribution” in Simmons, ed., *Punishment: A Philosophy and Public Affairs Reader*: 3-29.

<sup>17</sup> See Alan Goldman “The Paradox of Punishment” in Simmons, *Punishment: A Philosophy and Public Affairs Reader*: 30-46 for an attempt to address the problem of excessive punishment.

<sup>18</sup> See Simons, “Introduction” *Punishment: A Philosophy and Public Affairs Reader*: viii.

<sup>19</sup> See John Braithwaite and Philip Pettit, *Not Just Deserts: A Republican Theory of Criminal Justice*. (Oxford: Clarendon, 1990) for an analysis of the public policy debate as it relates to some of these philosophical issues.

as a form of punishment. Rehabilitation rarely appears in debates about international criminal justice, perhaps because the heinousness of the crimes makes it difficult to justify rehabilitation. Retribution is perhaps the most commonly invoked justification for punishing at the international level, usually in uses of force. Retributive justifications, usually verging on the vengeful, have been an important part of the discourse surrounding war. One study of public opinion attitudes in the United States links support for the death penalty with support for retributive uses of military force.<sup>20</sup>

The lack of direct reference to these justifications for punishment at the global level does not mean they are not operative in different contexts. In fact, without these justifications the practices described in the larger project cannot really be called punitive. In other words, what makes certain actions punitive or not is precisely the discourse of justification that seeks to link them to prevention of harm for the community as a whole. So, when activists invoke “ending impunity” by bringing Sudanese militia members before the ICC, they are drawing upon deterrent and retributive logics. When American soldiers carry with them flags from New York City in the prosecution of the war on terror in Afghanistan, they are engaging in retributive actions. When economic sanctions were imposed on Iraq during the 1990s, especially when they were targeted at leaderships rather than whole communities, a deterrent and perhaps even a rehabilitative logic were at work.

Some may contest the label punitive for these practices because they question the intentions or motives of those imposing them. When leaders wage war, their invocation of reasons that are deterrent, rehabilitative and retributive seems designed to either promote specific strategic ends or appeal to domestic public opinion. But the framing of those strategies in punitive terms reveals a change in the political contexts

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<sup>20</sup> Peter Liberman, “An Eye for an Eye: Public Support for War Against Evildoers” American Political Science Association Meeting, Washington DC, 1-4 September 2005. Accessed from <http://www.apsanet.org> 15 October 2005.

that define global politics. One could say that punishment has become part of the international *episteme*, to borrow a concept from Foucault. Foucault explored the idea of an *episteme* as something that makes scientific and cultural knowledge possible.<sup>21</sup> I would suggest, instead, that the idea of punishment at the global level is growing in importance, giving meaning to a diverse range of practices by making them morally justifiable although they retain clearly indefensible elements. It is an overarching way in which military and economic statecraft has become more clearly linked to acceptable ways of being political.

But, although it has become more commonplace, certain conceptual issues underlying punishment remain underdeveloped. The next sections explore in depth some of the issues that arise from this lack of clarity about responsibility and justice.

### **Agency and Responsibility**

Although discourses and practices of punishment are an important part of the international system, who gets punished and why does not always seem clear. Crucially, punishment relies on clarity about who counts as an agent and what level of responsibility can be ascribed to those agents. The current international system lacks clarity on both of these counts. During the 19<sup>th</sup> and 20<sup>th</sup> centuries, sovereign states became the primary agents in the system, especially as the system became more of a society of sorts with rights and responsibilities granted to those agents.<sup>22</sup> In the last twenty to thirty years, other agents – including corporations, international organizations, NGOs, and (importantly for this paper), individual persons – have come to be seen as agents in the system as well. Certainly, corporations, people and

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<sup>21</sup> See George Canguilhem, “The Death of Man, or the Exhaustion of the Cogito?” in Gutting, *The Cambridge Companion to Foucault*: 71-91 for an exploration of Foucault’s use of the concept of *episteme*.

<sup>22</sup> See Hedley Bull and Adam Watson, eds., *The Expansion of International Society* (Oxford: Clarendon Press, 1984) for interpretations of this process.

other organizations have always existed; the point to be made here is that they have only become agents in the system relatively recently.

Agency at its most basic is the idea that individuals can effect change around them. In a social system, agents are understood in relation to the structures within which they exist and participate. In a political system, agency is a formal status granted to certain individuals that gives them the right to participate in formal processes of governance, for example citizenship. When it comes to moral and legal agency, a further category is important: responsibility. Responsibility links agents to the actions they undertake, not only physically, but morally and legally as well. In social systems, agency does not necessarily lead to responsibility; for instance, if an agent is understood as beholden to structural constraints, he cannot be held responsible for his actions. In some political systems, agency becomes more closely aligned with responsibility. Certainly, in both morality and law, agents are considered responsible; indeed, in some senses responsibility is what defines legal and moral agency.<sup>23</sup>

Agency and responsibility make punishment possible. Responsible agents can be punished. If this is the case, then it is simply a question of identifying responsible agents within a particular system and then determining when the violations for which they can be held responsible. At the global level, however, this determination seems anything but simple, especially when it comes to punishment. War crimes trials reveal this most clearly. International lawyers have argued that the growth of various tribunals and the creation of the International Criminal Court reveal a move toward making individuals responsible, and thus “ending the culture of impunity.” Indeed, some have argued that the trials at Nuremberg were a first and important step away

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<sup>23</sup>Legal agency also has a very different meaning, one that relates to agents representing principals. This form of agency can be relevant for the analysis being made here, perhaps in the way diplomats represent states, but it will not be the focus of this paper.

from notions of collective guilt that were operative in the Treaty of Versailles.<sup>24</sup> The international system has determined, one might argue, that individuals are the primary agents when it comes to violating war crimes provisions and so should be held responsible for those violations.

At the same time, one of the most common defences invoked in those trials is the claim that a leader was acting in the name of the state and should thus not be held responsible. Conceptually, certain war crimes cannot be committed by individuals; genocide, for example, can only take place with a large number of people and institutions involved. The difficulties faced in defining the idea of a “crime of aggression” reveals both the political and conceptual difficulties in linking individual decisions to waging war, a political practice that takes place between entire communities not individual people.

So, a clearly identifiable idea of what constitutes a responsible agent seems absent from the discourse of international relations. This is because agency and responsibility are constructed concepts, as recent theorists of international relations have demonstrated. The constructed nature of agency that has been the focus of most attention in International Relations results is the relationship of agents and structures.<sup>25</sup> Although this avenue has resulted in important insights, it does not speak directly to questions of responsibility and punishment. Indeed, understanding agency in relation to structure actually undermines the relationship between responsibility and agency. While the insight that agents are constructed is a first step, for a fuller appreciation of how agency, responsibility and punishment are interrelated we need to turn to philosophical debates about responsibility. These debates reveal two further

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<sup>24</sup> Although, see Gary Bass, *Stay the Hand of Vengeance: The Politics of War Crimes Tribunals* (Princeton: Princeton University Press, 2000) for a more historical treatment of these institutions.

<sup>25</sup> Alexander Wendt, *Social Theory of International Politics* (Cambridge: Cambridge University Press, 1999).

insights that are central to understanding punishment at the global level: the necessity of responsibility for community and the relationship of power and responsibility.

These two interrelated points can help us realize the centrality of punishment to a just community but also chasten our urge to inflict punishment without carefully considering how we construct certain agents as responsible members of a system.

As noted above, responsibility establishes a connection between events and agents.<sup>26</sup> Not all types of events are connected to agents; hurricanes are not normally attributed to agents, unless one believes in an all-powerful creator.<sup>27</sup> Actions are particular types of events; only humans can act, or bring about change in the world with a purpose and only certain things that people do count as agents. My heart beating is not an action, but the swinging of my fist is. As with any important philosophical concept, this one has no single clear definition, but a host of competing claims and counterclaims. Much of that literature has focused on the question of free will versus determinism; i.e., responsibility for one's actions requires a free will, without which there is only a deterministic world in which persons respond to their environment like cogs in a machine. Furthermore, the free will idea corresponds to our common sense notions of responsibility; I am responsible for my actions only if I have a choice in what to do.

Some recent works in philosophy have sought to challenge this formulation of the question. Rather than seek to answer whether or not individuals have a free will, some have asked how responsibility functions *in spite* of the existence of free will. Two of these more recent attempts locate responsibility in the matrix of social and

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<sup>26</sup> This section draws upon my article, "Responsibility in the International System: Reading U. S. Foreign Policy in the Middle East" *European Journal of International Relations*, 5, 1 (March 1999): 67-107.

<sup>27</sup> Even this does not necessarily follow. Medieval philosophical debates revolved around the question of occasionalism; i. e., does the existence of an all-powerful creator imply his participation in every single event in the universe?

political interaction. The first is Peter Strawson's "Freedom and Resentment."<sup>28</sup> He begins by identifying the pessimist and optimist as two sides in the free will/determinism debate. The pessimist believes that because there is no free will, there is no such thing as responsibility, and our entire structure of ethics collapses. The optimist believes that even if there is no free will, responsibility is still an important concept and should not be abandoned. He adopts an optimist view and presents an argument as to why it does not matter whether or not free will and/or determinism exists. It does not matter because of what he calls a key "commonplace" that philosophers have tended to ignore:

The central commonplace that I want to insist on is the very great importance that we attach to the attitudes and intentions towards us of other human beings, and the great extent to which our personal feelings and reactions depend upon, or involve, our beliefs about these attitudes and assumptions.<sup>29</sup>

Those attitudes, beliefs and reactions to others are in a fundamental way dependent on the assumption that individuals can be held responsible for what they do. For example, if I assume that my wife loves me, it matters a great deal to me that the actions that constitute our relationship can be in some sense attributed to her and not to some outside force. Without that assumption, my life would lose a great deal of its meaning. Strawson calls this an example of the "non-detached" feelings that are essential for life; attitudes like gratitude, resentment, forgiveness, love and hurt feelings. All these attitudes and feelings rely on the fact that they are attributable to fully responsible agents. Without that concept of responsibility – the connection between persons and actions/attitudes – the entire structure of our personal, social, legal, and even political interactions would simply collapse for want of meaning. In other words, without the concept of responsibility, the communities within which we live and act would simply make no sense.

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<sup>28</sup> Peter Strawson, "Freedom and Resentment" [1963] reprinted in John Martin Fischer and Mark Ravizza, eds., *Perspectives on Moral Responsibility* (Ithaca: Cornell University Press, 1993):45-66.

<sup>29</sup> Strawson, "Freedom and Resentment": 48.

But that structure does not explain the attribution of responsibility completely. Understanding how specific agents become responsible requires a focus on the interactions of those agents within the system. Marion Smiley suggests that those interactions depend to a great extent on the power of individual agents to construct particular types of roles for other agents. Smiley argues that the determination of moral responsibility is not a purely factual question, but instead "rest(s) on a variety of social and political considerations which we either make ourselves or inherit from others in the form of social expectations."<sup>30</sup> She emphasizes the role that power plays in the construction of these social expectations: "In particular, we will have to make explicit the expectations that we place on particular individuals [in making claims about responsibility], expectations which are frequently grounded in a variety of practical considerations, as well as in our configuration of the individual's social role and the distribution of power in society."<sup>31</sup> In other words, rather than contributing toward the free will of agents, power tends to constitute responsible agents based on preconceived notions of what their roles ought to be.

Note that both Strawson and Smiley are not providing us with an explanation as to how an individual can be held responsible (although their conclusions could help us understand how specific individuals become responsible). Instead, they are explaining the very existence of the institution of responsibility. They are, in effect, moving questions of responsibility out of the realm of individual guilt and morality and into the realm of social and political interaction. Rather than giving lawyers and moralists the means by which to indict certain individuals, they are giving social and political theorists the means by which to understand how this institution of responsibility has come to be and why it persists in circumstances where it does not make sense.

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<sup>30</sup> Marion Smiley, *Moral Responsibility and the Boundaries of Community: Power and Accountability from a Pragmatic Point of View* (Chicago: University of Chicago Press): 255

<sup>31</sup> Smiley, *Moral Responsibility and the Boundaries of Community*: 258.

In this brief review, I do not wish to claim that the free will has been transcended by arguments like these; rather, Strawson and Smiley helpfully locate questions of responsibility in contexts of social and political relationships. Moreover, in making this claim, I do not wish to argue that as a result, responsibility becomes a meaningless concept and simply disappears from our social and political lives; indeed, a central point of Strawson's argument is that without some notion of responsibility, we could not have normal social interactions.

How then does this point about the social and political nature of responsibility relate to punishment, especially punishment at the global level? Philosophers of punishment, especially those writing on criminal law, have addressed questions of responsibility through the debates about free will. H. L. A. Hart provides a solid defence of the importance of free will for determinations of criminal responsibility, what is called in the legal literature *mens rea*:

All civilized penal systems make liability to punishment for at any rate serious crimes dependent not merely on the fact that the person to be punished has done the outward act of a crime, but on his having done it in a certain state of frame of mind or will.<sup>32</sup>

This legal approach is one that continues to inform debates about international criminal law and the broader punitive practices that I identified above. The core concern in these approaches is the attribution of the crime (e.g., did this agent commit a violation of the rules) and *mens rea* (did this agent intend to violate those rules).

This legalistic understanding of responsibility and punishment ignores the constitution of agents and responsibility that is essentially a political project. Especially at the international level, where the constitution of agents is much more clearly a political project, this simplistic legal understanding fails to appreciate how

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<sup>32</sup> H. L. A. Hart, *Punishment and Responsibility: Essays in the Philosophy of Law* (Oxford: Clarendon Press, 1968): 114

roles are constructed through power relationships. Yet, appreciating the importance of power cannot lead us to abandon responsibility. As Strawson reveals, without responsibility, our political and moral interactions at the local and international levels would lose much of their meaning.

Is it possible to be both sensitive to the ways in which responsible agents are constructed yet also recognize the importance of responsibility and punishment for the constitution of a just society? Toni Erskine has argued that it is possible to have responsible agency without necessarily engaging in punishment, especially when it comes to state agents.<sup>33</sup> Hannah Arendt has argued that if we differentiate responsibility and guilt, recognizing responsibility as a collective concept and guilt as an individual one, we cannot ascribe responsibility to others without also implicating ourselves, a sure way to ensure caution in our desire to punish.<sup>34</sup> While these insights can lead down productive avenues, this paper will conclude by connecting these insights to notions of justice. In so doing, I argue that we can appreciate the political dimensions of agency and responsibility while also retaining them, and drawing upon them in a more nuanced way than the current legalism of the international system.

## **Justice**

Justice is the cardinal political virtue, according to both ancient political philosophers such as Aristotle and modern, Anglo-American ones such as John Rawls. At its core, justice is the fair distribution of goods across a community. That distribution must be in accordance with some standard or metric that can be morally justified. It should reflect a balance, an equalling of status among agents in a community, although it does not necessarily mean that all agents should be equal in

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<sup>33</sup> Toni Erskine, "Kicking Bodies and Damning Souls: The Danger of Harming 'Innocent' Individuals While Punishing Delinquent States"

<sup>34</sup> Hannah Arendt, "Collective Responsibility" in Hannah Arendt, *Responsibility and Judgment*, edited and introduced by Jerome Kohn (New York: Schocken Books, 2003)

every sense. In terms of punishment, justice demands that the agent who has been harmed, along with the entire community of agents, must be taken into account when punishing the violator. It must also include attention to the rights of the criminal,<sup>35</sup> although those rights are diminished by the fact of having harmed others.

Because politics is an ongoing process, not one that has a single end point, most theorists of justice focus on the process more than the final outcome in determining that fair distribution. Rawls' theory of justice focuses on the process by which goods are distributed, but uses a set of ideals to provide a critique of outcomes.<sup>36</sup> Others focus much more directly on the process, with libertarian arguments being almost solely devoted to justifying political practices on the basis of historical accounts.<sup>37</sup> Some equate justice with adherence to human rights standards, or the construction of a world in which human rights are protected<sup>38</sup>

How does punishment relate to these standards of justice? The "good" punishment seeks to distribute is not wealth, even though in some cases punishments take wealth from one and give it to the state. Rather, the good that punishment seeks to promote is protection from harm.<sup>39</sup> Harm can be defined in terms of human rights, i.e., harm is inflicted when one's human rights are violated, but it need not be defined in such a way. By ensuring that individuals obey the rules and laws of a system, punishment ensures that those rules and laws continue to provide the good of protection. One could take this point even further and argue that the infliction of harm that punishment entails cannot conceptually be called punishment unless it is

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<sup>35</sup> I use the term criminal here rather than accused because once punishment becomes part of the process, the assumption is that the agent has already been found guilty by some judicial process.

<sup>36</sup> John Rawls, *A Theory of Justice* (Cambridge: Belknap Press, 1971)

<sup>37</sup> Robert Nozick, *Anarchy, State and Utopia* (Oxford: Blackwell, 1974)

<sup>38</sup> Allen Buchanan, *Justice, Legitimacy and Self-Determination: Moral Foundations for International Law* (Oxford: Oxford University Press, 2004) and Simon Caney, *Justice Beyond Borders: A Global Political Theory* (Oxford: Oxford University Press, 2005)

<sup>39</sup> It is important to emphasize that harm is inflicted by punishment, but the individual who has committed the violation is the one harmed. So, punishment does not prevent harm in general, but is intended to protect those who obey the rules from being harmed.

intended to protect others. That is, inflicting harm is simply violence unless it is connected to ensuring justice, i.e., protecting persons from harm.

This description of just punishment, however, focuses on how specific acts can be considered just. What of the justice of an entire punitive system, or what might be called criminal justice more broadly defined? For a system to be just, it must protect the society or group as a whole from harm, not just individuals in specific cases. This would mean include those who are potential criminals; i.e., the system should be designed not simply to inflict harm after a violation has occurred, but to construct a system in which individuals will not be put into a position to violate the rules in the first place. Furthermore, recalling the relationship between power and responsibility, it is important to consider how a just system will not only ensure that agents are not in a position to violate certain norms, they must also be protected from being construed as criminals or outlaws by those with more power. A just political system, in other words, not only punishes those who violate norms it seeks to ensure that attributions of responsibility result from a fair political process.

The international system does not currently conform to such a definition of justice, especially when it comes to the ways in which states are constructed as responsible agents. This is not a new phenomenon, as Gerry Simpson has recently argued.<sup>40</sup> Simpson traces the ways in which great powers and, crucially, international lawyers have compromised their rhetoric about sovereign equality in the international legal order with a category of outlaw, pariah or rogue states. This has resulted in what Simpson calls a legalised hierarchy of states. Current US foreign policy only provides the most recent evidence for this trend, with the doctrine of “rogue states” and an

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<sup>40</sup> Gerry Simpson, *Great Powers and Outlaw States: Unequal Sovereigns in the International Legal Order* (Cambridge: Cambridge University Press, 2003)

“axis of evil” as guiding principles for its post cold war foreign policy.<sup>41</sup> This is not to say that states that are labelled as rogue or pariah have not violated certain norms, and that they might well deserve punishment. Rather, the process by which their responsibility is established fails to account for either their lack of agency<sup>42</sup> or their decisions being the result of acting within a structure dominated by legal and moral regimes from which they are systematically excluded.

Does this mean we are left without any just punishment? I would argue that it is possible to retain a conception of justice which is sensitive to these political dimensions. John Rawls, in a paper originally delivered in 1954, suggests a novel way to understand punishment, one that suggests a way to construct a political system that both recognizes the political dimensions of power yet also ensures that those who violate the rules can be punished. Rawls begins his essay by noting that there exist two types of rules: those that justify a practice as a whole and those that justify a particular application of that practice. He uses this distinction to make the case that punishment can be justified in both utilitarian and retributive ways. The practice of punishment as a means of enforcing justice in a society – that is, as an institution – is utilitarian. But the particular application of punishment in specific cases – the action of punishment – is best understood as retributive. One way to see this distinction is through the different roles played by a legislator and a judge:

One can say, then, that the judge and the legislator stand in different positions and look in different directions: one to the past, the other to the future. The justification of what the judge does, qua judge, sounds like the retributive view; the justification of what the (ideal) legislator does, qua legislator, sounds like the utilitarian view (Rawls 1969: 108).

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<sup>41</sup> See Robert S. Litwak, *Rogue States and US Foreign Policy: Containment After the Cold War* (Baltimore: Johns Hopkins University Press, 2000), which traces this doctrine back to the first Bush and Clinton administrations.

<sup>42</sup> See Toni Erskine, “Assigning Responsibilities to Institutional Moral Agents: The Case of States and Quasi-States” *Ethics & International Affairs* 15, 2 (2001): 67-87 for one account of how certain states should not be labelled as sovereign, yet they are held responsible for specific outcomes in the international system.

Rawls concern in writing this essay was to intervene in the philosophical debates I identified earlier in the paper. My purpose in invoking him here slightly different, although overlaps. If we interpret Rawls' conception of the legislator as the international community's role in constituting itself through legal and political practices, while the particular decisions made about guilt and innocence as part of a judicial process that will punish those who can fairly be considered as responsible agents. The current international system has been seeking to develop a judicial system in its creation of international criminal tribunals and the ICC. This remains an important part of constructing a just political system. At the same time, the international community needs to reconsider the legislative function that Rawls identifies. Resolutions passed by the Security Council and judgments made by the International Court of Justice provide two sources of law making in the current order. As I have argued elsewhere, the former institution tends to constitute the powers of some over others, while the latter has not been effectively utilized, especially in possibly punishing states that violate international norms.<sup>43</sup>

Rawls' essay does not answer the question of how to construct a just punitive system, especially one that will be sensitive to the unequal distribution of power in a political system. What it should do, however, is demonstrate that if judicial institutions arise from a political system in which there is not sufficient attention being paid to the constitution of agents as responsible through discourses of power, such judicial institutions (like the ICC) may assuage our desire to inflict vengeance, but may not be just.

The essay does point toward some possible concrete suggestions that combine an awareness of the constructed nature of responsibility and the importance of just

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<sup>43</sup> See Anthony F. Lang, Jr, "Punishing States".

punishment. First, judicial institutions need to be capable of trying both individual persons and corporate entities. The ICC should be complemented by a more robust ICJ, one that could actually try and punish states. The passage of the Articles on State Responsibility by the International Law Commission suggests that states can be considered responsible agents, although their refusal to include punitive sanctions as part of those articles vitiates their impact.<sup>44</sup>

Second, while empowering the ICJ to undertake such punishments would move determinations of responsibility and punishment away from institutions where power differentials determine outcomes, such as the Security Council, more judicial institutions will not necessarily avoid the problems of the constructed nature of responsibility. This requires greater political participation by the international community in the construction of the rules and norms that determine blame and responsibility. This is not a suggestion that Libya should serve on the Human Rights Commission in the United Nations; rather, it is that institutions such as the United Nations need to be made more effective and participatory for various members of international society in the formulation of international norms. Powerful agents will always play a strong role in rule making, but incorporating more and diverse structures and institutions in which states and non-state actors can play a role in determining political norms is a first step.

Third, Western states and IR scholars need to keep in mind Hannah Arendt's understanding of responsibility. Only when we understand that the structures within which we are enmeshed, whether those be domestic or international, constitute us as responsible agents will be less willing to engage in unthinking punitive actions. For

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<sup>44</sup> *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentary*, edited by James Crawford (Cambridge: Cambridge University Press, 2001). For a legal analysis of the ILC's work, see Nina H. B. Jørgensen, *The Responsibility of States for International Crimes* (Oxford: Oxford University Press, 2000).

example, the US war against Iraq (2003) and the results of that war, especially the revelations about how US soldiers treated Iraqi and Afghani prisoners of war might be interpreted through Arendt's argument.<sup>45</sup> In attempting to respond to the egregious violations of the prisoners' rights, the Bush administration sought to locate the responsibility on a "few" soldiers who acted outside the boundaries of what it means to be an "American". In so doing, the political leadership sought to distance not only itself but the entire American polity from responsibility for these actions. According to Arendt, perhaps such distancing is not possible. While individual Americans (other than the soldiers involved) cannot be found guilty of abusing the prisoners, they do have a certain political responsibility for what happened. One might argue that the war on Iraq is the culmination of a 25 year process by which American foreign policy has engaged the Islamic and Arab world, a process justified in terms of creating a constructed other who is so unlike an American that he/she does not deserve the same treatment.<sup>46</sup> Thus, rather than implicating this particular administration, or these particular soldiers, the culmination of various discourses has resulted in this set of abuses, making Americans in general responsible (though not guilty) for happened in Abu Gharib.

This essay does not provide an answer to what a just punitive system would look like. Rather, it suggests some considerations that are necessary in constructing such a system. The larger project of which this essay is a part does conclude with some suggestions for new institutional arrangements that are not too idealistic to be achieved, but that do pay more attention to the differences among agents and the

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<sup>45</sup> This section is drawn from Anthony F Lang Jr and John Williams, "Conclusion" in Lang and Williams, eds., *Hannah Arendt and International Affairs: Reading Between the Lines* (New York: Palgrave, 2005).

<sup>46</sup> For further elaboration of this point, but from two different perspectives, see Edward Said, *Covering Islam: How the Media and Experts Determine How We See the Rest of the World* (London: Routledge, 1981) and Fawaz Gerges, *America and Islam: Clash of Cultures or Clash of Interests?* (Cambridge: Cambridge University Press, 1999).

importance of justice. In describing the various ways in which punishment operates in the international system, this project will seek to reveal how far from or close to these ideals of a just punitive system the current international order actually is.

Understanding both the importance and dangers of punishment for a just international order can result from being aware of the nuances involved in agency, responsibility, and punishment.