
The year 2018 marked the twentieth anniversary of the Rome Statute of the International Criminal Court (ICC). Following the creation and operation of various ad hoc international and internationalised criminal tribunals, the ICC was welcomed with great anticipation and high hope as a global institution that would speak justice to power, hold high-level perpetrators accountable and satisfy the victims of the most serious crimes of international concern. Twenty rather turbulent years later, some would say that international criminal justice is in crisis.\(^1\) The first ad hoc courts have closed their doors and transferred their remaining cases to domestic jurisdictions or their follow-up mechanisms, others are struggling to complete their mandates. Given its relatively meagre record up till now the ICC is facing ever increasing criticism from States, academia and commentators.

Despite their place at the centre of scholarly, political and diplomatic attention in ‘ending impunity’, the prosecution of international crimes by the international(ised) courts have so far constituted only the tip of the imaginary iceberg of criminal justice after mass violence. Due to legal, practical and political constraints, the international criminal courts and tribunals have prosecuted, and in the foreseeable future will prosecute, only a marginal number of individuals suspected of having committed the most serious crimes of international concern. It is therefore clear that the largest number of prosecutions for this type of crime will continue to occur at the domestic level.\(^2\) Based on the principle of complementarity, domestic courts are ascribed a prominent place


in the architecture of the ICC system. Only if domestic authorities are unable or unwilling to genuinely prosecute, can the ICC step in. Over the past few decades, even before the establishment of the ICC, domestic courts across the globe have quite extensively prosecuted and punished perpetrators of international crimes. Individuals tried and sentenced at domestic courts clearly outnumber those at the international level. It is, therefore, quite surprising that legal and social scientific scholarship has dedicated vastly disproportionate attention to the international courts. Hundreds of studies have been conducted and published analysing the functioning of the international criminal courts, pondering the smallest details of their laws and court practices. Domestic international crimes trials, on the contrary, have so far attracted only very limited attention in scholarship. And punishment and sentencing of international

3 Preamble, Art. 17 ICC Statute.
INTRODUCTION

crimes by domestic courts, in particular, has been almost entirely neglected.\(^7\) Additionally, existing scholarship has been dominated by legal doctrinal and normative approaches. Empirically based studies have been relatively scarce and scattered. Finally, the commentary and evaluations of criminal justice for international mass atrocity crimes have to a large extent been conducted by Western scholars, neglecting engagement with local perspectives and dialogue with scholars based in the contexts where international or atrocity crimes took place, who are familiar with local legal, political and societal realities.

The articles included in this special issue can be seen as one of the first steps towards filling these major gaps. They all focus on domestic prosecutions of international crimes, and in particular punishment and sentencing. They all offer empirically based analyses written by scholars intimately familiar with the local context in which the international or atrocity crimes took place and where the prosecutions were conducted. The special issue is the result of an expert meeting conducted at the Centre for International Criminal Justice (CICJ) at the Vrije Universiteit Amsterdam in June 2017, which was financially supported by the Dutch Organisation for Scientific Research (NWO),\(^8\) the Netherlands Institute for the Study of Crime and Law Enforcement (NSCR) and the Amsterdam Law and Behaviour Institute (A-lab). The expert meeting brought together scholars from around the globe, who were asked to discuss sentencing practices and the legal, theoretical and practical challenges of punishing perpetrators of international crimes in domestic courts. This issue includes six original, empirically based case studies representing jurisdictions with

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different histories of conflict and atrocities and different post-conflict political transitions situated in different socio-political contexts. The case studies are spread across three continents: Africa (Ethiopia); Europe (Serbia, Bosnia and Herzegovina, Croatia); and Latin America (Peru, Colombia). Each contribution provides an overview of the challenging socio-political context in which prosecutions took place, a detailed analysis of sentencing laws and jurisprudence in each respective State, and sentencing facts and figures. The authors provide a high level of detail regarding the legal regulation and judicial determination of sentences in cases of international or atrocity crimes and compare domestic practice to the sentencing laws and practice of international institutions. All in all, the special issue brings new knowledge and insights into the mechanisms for and modalities of domestic sentencing of international crimes in some of the key contemporary cases from around the globe.

The first three contributions included in this collection address the punishment practices of the courts of the successor countries of the Former Yugoslavia. Maja Munivrana Vajda from the University of Zagreb provides a critical analysis of the war crimes\textsuperscript{9} sentencing jurisprudence of the Croatian courts, and addresses three main issues: (1) allegations of bias against Serbian defendants; (2) the suitability of sentencing goals and principles provided for in Croatian law for the punishment of international crimes; and (3) a comparison of Croatian sentencing practices to those at the International Criminal Tribunal for Former Yugoslavia (ICTY). Over the past 25 years, more than 3,500 alleged war criminals have been put on trial, of whom 600 were finally convicted in Croatia. The vast majority of those have been Serbs, convicted \textit{in absentia}. Munivrana Vajda maps out the development of prosecutorial case selection, noting that – at least initially – judicial authorities in Croatia were largely hesitant to bring ‘their own’ soldiers and citizens to justice. This situation slightly changed in the early 2000s, probably due to the increased political pressure placed on Croatia regarding its accession to the European Union. While noting that it might be difficult to conclusively identify ethnic biases in war crime prosecutions, given the limitations of her analysis, Munivrana Vajda hints upon possible biases in charging practices and discusses ‘more subtle discriminatory practices’ in sentencing. While Croats have been exclusively charged only with killings, the scope and range of war crimes for which Serbs

\textsuperscript{9} In the Former Yugoslav countries, despite strict legal definitions and the differentiation among different categories of international crimes, the terms ‘war crimes’ or ‘war criminals’ are frequently used to refer to the general category of international crimes (including genocide, crimes against humanity and war crimes) and their perpetrators. In this editorial we also adopt this terminology. Therefore, ‘war criminal’ does not necessarily mean that a person was tried and convicted exclusively of war crimes.
were prosecuted is much broader, and includes also torture and inhuman conduct, sexual violence, and pillage. Regarding sentencing justifications, the article criticises the Croatian judges for a lack of transparency and insufficient reasoning underlying their sentencing deliberations. Munivrana Vajda discusses the use of mitigating and aggravating factors in war crimes cases by, on the one hand, criticising the practice of ‘exceptional mitigation’ which Croatian judges have used quite frequently to hand out sentences below the prescribed statutory minima and, on the other hand, indicating that Croatian courts have not attached any aggravating weight to abuse of authority or leadership positions despite some defendants being relatively prominent figures in the military. All in all, sentences for war crimes in Croatia have been very lenient compared to the ICTY. However, Munivrana Vajda also notes that this trend fits within the general sentencing policies of Croatian courts with regard to conventional crimes, which are known for their leniency. She concludes that ‘notwithstanding the undeniable moral depravity of war crimes, there is in fact nothing extraordinary about war crimes sentencing practices in Croatia compared to sentencing practices for ordinary crimes’. The only exception may be the political undertones and a particularly patriotic reading of the conflict and violence committed during the wars by Croats. These broader historical and political considerations seem to be used by Croatian judges to at least partially justify, or at least mitigate culpability for, atrocity crimes committed by their compatriots.

The second article of the special issue turns the readers’ attention to Croatia’s neighbouring country – Serbia. Serbs are considered and casted by many to be the main culprits and perpetrators of atrocities in the Yugoslav wars. Similarly to Croatia, but maybe even more prominently, Serbia’s repeated refusal to cooperate with the ICTY and its rather reluctant attitude towards the pursuit of justice for international crimes in its domestic courts has been

notorious. All this combined with the prevailing culture of state-denial when it comes to the international crimes committed, or instigated, by Serbian authorities make for a rather challenging environment for the prosecution of international crimes. The war crimes prosecutions in Serbia started in 2002 and, similar to Croatia, appear to have been more of a reaction to increased international pressure than a moral reckoning with its past. According to the website of the Serbian Office of the War Crimes Prosecutor in Belgrade, final judgement has been handed down in the case of 115 individuals tried for war crimes. Proceedings against 53 individuals are still pending, either on trial or appeal. In the second contribution to this special issue, Branislav Ristivojević and Stefan Radojčić from the University of Novi Sad focus on a selected number of publicly available trial and appeal decisions (concerning 96 individuals convicted on trial and 52 individuals convicted on appeal) and analyse the sentencing reasoning of Serbian judges in these war crimes cases. The authors offer an exploratory, comparative descriptive analysis of sentence ranges and sentence averages across different categories of cases and discuss how judges justify their sentence determinations. Ristivojević and Radojčić engage with criticism raised against Serbian punishment practices by non-governmental organisations and international observers. The authors conclude, that similar to the judges in Croatia, the Serbian sentencing jurisprudence suffers from insufficient reasoning, in particular when it comes to the purposes of punishment, and sentences passed in the Serbian war crimes cases have been relatively lenient. As a rule, according to the authors, Serbian judges do not sufficiently explain their sentence determinations and resort to standardised formulations when discussing relevant sentencing factors. The sentence determinations thus lack transparency and justifications. They however note that similar issues are identifiable at the ICTY and maybe even more importantly in general sentencing practice in Serbia, which has always been according to the authors ‘legally inferior’. Ristivojević and Radojčić offer three reasons to explain the relative leniency of Serbian sentencing practice: (i) the existence of a


proscribed legal maximum sentence for war crimes of 20 years; (ii) the composition of cases brought before the Serbian judges, which have so far predominantly focused on low-ranking soldiers; and (iii) the use of mitigating factors in war crimes cases. The authors question the way in which the Serbian judges apply conventional sentencing reasoning to cases of international crimes, which might not be very apposite. Sentences handed down to war criminals are often mitigated based on a set of rather banal mitigating factors, including family circumstances, young age or indigence. Ristivojević and Radojčić question the extent to which these mitigating factors are relevant in the case of war crimes perpetrators. They conclude that ‘critics might be correct that disparity in sentences and lenient penalties stipulated in the [Serbian] Criminal Code for war crimes have the potential to undermine the courts’ perceived fairness and put the credibility of the Serbian judiciary into question’ and offer possible remedies to rectify the sentencing practices.

In the third and final article focused on one of the successor countries of the Former Yugoslavia, Bosnia and Herzegovina,15 Mirza Buljubašić from the University of Sarajevo shifts our attention away from the courtroom. Instead, his contribution offers a detailed, critical explorative case study of the rehabilitation practices applied to war criminals in a Bosnian prison. The incarceration and rehabilitation of perpetrators of international crimes are largely neglected topics in scholarship dealing with prosecutions of perpetrators of international crimes, even at the international level. In this respect, Buljubašić offers original empirical insights into the ways in which incarcerated war criminals are being rehabilitated, and critically reflects on these rehabilitation practices. Based on an analysis of Bosnian law, prison rules and interviews with professionals and prison staff, he describes the rules that regulate incarceration and the routines of offender rehabilitation in one Bosnian prison. He questioned his respondents regarding their views and opinions on rehabilitation practices as applied to convicted perpetrators of international crimes. Buljubašić describes how in Sarajevo Prison war criminals are incarcerated with other ‘conventional’ offenders, who serve their sentences for property crimes or drug-related offences. The rehabilitation programmes developed and applied to these ordinary offenders are used to ‘rehabilitate’ war criminals and involve two aspects: labour and dialogue in prison. The author highlights how many of the war criminals incarcerated in Sarajevo Prison, however, tend to be of older age, and/or were wounded during the war or have mental problems, and consequently cannot participate in labour activities. Similarly, as the dialogue programme is centred

15 According to Buljubašić, as of January 2016, Bosnian courts have tried 569 individuals for war crimes and convicted 412 war criminals.
around a prisoner’s acceptance of responsibility, according to Buljubašić it seems to be a rather questionable rehabilitation practice, as the ‘majority of the war criminals do not accept responsibility nor do they have any moral dilemmas regarding the crimes they committed. In fact, they often deny the crime(s)’. Consequently, Buljubašić interrogates the extent to which these conventional rehabilitation practices are suitable for those convicted of international crimes and identifies obstacles to rehabilitating war criminals by these means. According to his respondents, their rehabilitation through labour and dialogue serves no meaningful purpose as these programmes are mainly aimed at preventing re-offending. However, outside of the war context war criminals tend to be socially well-adjusted, law obedient individuals with a very low proclivity to re-offend. According to Buljubašić, the extremely good behaviour of war criminals in detention, their compliance with prison rules and the prison authorities, and the lack of recidivism after release from prison all leave an impression that the perpetrators have been successfully rehabilitated. However, he argues that rehabilitation practices should rather be considered moot and ill-suited. He concludes that more tailored rehabilitation programmes should be developed, based on ideas of transitional, transformative and restorative justice to better reflect the specific collective and organised character of international crimes, their perpetrators, and the socio-political needs and challenges of post-conflict societies.

The following two articles included in the special issue bring readers to Latin America. Juan-Pablo Perez-Leon Acevedo, based at the University of Oslo, offers a detailed analysis of the sentencing reasoning of Peruvian judges in three prominent prosecutions of mass atrocity violence committed during the twenty-year long internal armed conflict in Peru (1980–2000). Prosecutions in Peru followed the recommendation of the Truth and Reconciliation Commission which issued its final report in 2003. As of May 2017, according to Peruvian human rights groups, ‘prosecutors had only achieved rulings in 78 cases related to abuses committed during the armed conflict […], and only 17 convictions’.
judges referred to and mentioned the ‘international nature and dimension’ of their crimes when meting out their punishment. Perez-Leon Acevedo discusses the fact that despite not being legally obliged to do so, Peruvian judges considered the substance of the ICC Statute and other international sources to contextualise the crimes on trial as serious human rights violations. According to the author such characterisations had an effect on sentencing, reparations, and the inapplicability of statutes of limitations, as well as possibilities for early release of the convicted individuals. The article notes how the Peruvian courts emphasised ‘the special nature of international crimes as serious human rights violations’ and how this classification was used to emphasise the extreme seriousness of the crimes, and in some cases impose the maximum sentences available to the judges. In this respect, there is a clear difference in the sentencing reasoning and determinations of the Peruvian judges compared to their Croatian and Serbian counterparts. In Peru, at least some of the high governmental and military representatives were put on trial and their acts, due to their ‘international nature’ were considered to be particularly serious and condemnable by the judges. The politically charged and sensitive character of the crimes and the prosecutions, however, became evident post-trial. Since the conviction of President Fujimori, there have been ongoing attempts and growing political pressure from his supporters who control the country’s Congress to ‘overrule’ the judiciary and secure his pardon and early release.17 Perez-Leon Aceveda does not discuss the broader socio-political context or power struggles in his article, but instead focuses on judicial reasoning, providing a detailed comparative analysis of sentencing factors identified in the Peruvian cases to those used by judges in sentencing determinations at the ICC. He notes that in contrast to the ICC, which has not convicted any State representative to date, the Peruvian courts prosecuted both State and non-State actors for mass atrocity crimes. He discusses congruences and divergences in factors considered relevant for sentencing among the cases of State officials and those of non-State actors, and among the Peruvian cases and the ICC cases. Despite the fact that the Peruvian courts adjudicated the violence as conventional crimes, the author identifies important common grounds and principles in the use of sentencing factors by the Peruvian as well as ICC judges. Perez-Leon Aceveda concludes with a plea for more dialogue and exchange between the domestic and international courts when it comes to sentencing in cases of mass atrocity

international crimes. According to him, the sentencing practices of neither of these courts are flawless, and each can learn from each other.

In the fifth article of the special issue, Lily Rueda Guzman and Barbora Holá discuss the most recent case of negotiated punishment stipulated for perpetrators of international crimes in the peace agreement reached by the Government of Colombia and the Fuerzas Armadas Revolucionarias de Colombia (FARC-EP) in November 2016. Rueda Guzman and Holá describe the unique legal, moral, political and pragmatic challenges of designing and implementing punishment for international crimes during times of political and societal transitions, and focus specifically on transitions triggered by peace negotiations. In this sense, the Colombian case is unprecedented as it represents the first time in peace-making history that the parties agreed on provisions for the adjudication of criminal responsibility and the enforcement of criminal sanctions for international crimes following the peace negotiations. Diverging from the assumed irreconcilable dichotomy between ‘peace’ and ‘justice’, the Colombian peace agreement with the FARC-EP provides for the ‘broadest amnesty possible’, but also for the punishment of those considered most responsible for international crimes. Moreover, the envisaged punishment is unprecedented. Perpetrators of the most serious crimes will receive restorative sanctions not entailing incarceration but consisting of reparations and community service in war-torn regions of the country. Prosecutions and punishment for international crimes stipulated in the peace agreement form part of a broader ‘Comprehensive system to satisfy victims’ rights to truth, justice, reparation and non-repetition’. The system includes not only a Special Jurisdiction for Peace (SJJP) responsible for prosecuting, judging and sanctioning perpetrators of international crimes but also other non-judicial mechanisms, such as a truth commission and a unit for the search of disappeared persons. Consequently, in Colombia, the peace agreement set up a special jurisdictional regime to punish perpetrators of international crimes. Punishment is part and

18 However, note that, to a similar extent, a special criminal procedure (though much more limited and constrained) was enacted in Colombia in 2005 by the so-called Justice and Peace Law (Law 975 of 2005, JPL) following the peace agreement between the Colombian government and the paramilitary groups (AUC) concluded in 2003. According to the JPL, demobilised paramilitary members could appear before the ordinary system of justice to confess their crimes and to disclose truth and offer reparations. In exchange, defendants could receive so called ‘alternative sanction’ consisting of 5 to 8 years of deprivation of liberty. However, the implementation and enforcement of the JPL has been marred with difficulties and many challenges. Only a limited number of individuals have been tried, and proceedings have been heavily criticised.
parcel of the comprehensive transitional justice system designed to satisfy victims and pursues not only retributive but also broader transitional and socio-political goals. Therefore, while perpetrators of the most serious international crimes committed during the Colombian conflict will be tried, they will only be subjected to very lenient, ‘restorative’ sanctions, in cases where they reveal the truth, acknowledge their responsibility and offer to make amends. Rueda Guzman and Holá offer a detailed contextual analysis of these unprecedented penal policies, which have been heavily debated and contested within Colombian society, and beyond. Drawing on the Colombian experience, they argue that punishment for international crimes implemented in domestic contexts is always contingent and dependent on broader socio-political circumstances. They propose a set of contextual factors that might be relevant for understanding and assessing the design, type and severity of punishment negotiated during peace talks to deal with mass atrocity crimes committed during a violent armed conflict.

The final article included in the special issue discusses the prosecution and punishment of international crimes in Ethiopia. Despite being a country with a very large number of prosecutions of perpetrators of international crimes, Ethiopia hardly ever figures in scholarly discussions on the topic. According to Tadesse Metekia from the University of Jimma, 5,492 suspects were prosecuted by Ethiopian courts for acts amounting to international crimes, and 3,760 individuals have been convicted and punished. Four sets of trials, regarding different episodes of mass violence, have been held in Ethiopian courts. Probably the most famous, but also to an extent the most controversial, among these have been the so-called Red Terror trials conducted by the Special Prosecutor’s Office to prosecute mass atrocities perpetrated during the Dergue regime in Ethiopia (1974–1991). The trials were held between 1992 and 2010, and the majority of defendants was tried in absentia. In his article Metekia offers a detailed overview of the Ethiopian laws regulating the punishment of international crimes and compares domestic sentencing practices to those

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at the international criminal courts and tribunals. Compared to their international counter-parts, Ethiopian law provides detailed sentencing structures and guides Ethiopian judges in their sentence determinations quite rigorously. In contrast to the international statutes, Ethiopian law does not exclude the death penalty, and the Ethiopian courts did not shy away from using this ultimate punishment. Fifty-nine individuals have been sentenced to death, though none of them has been executed. The vast majority of perpetrators of international crimes convicted by the Ethiopian courts received prison sentences of less than 15 years. Metekia notes an interesting paradox of sentencing regulation in Ethiopian law as the Criminal Code prescribes more lenient penalties for criminal acts classified as international crimes. Murder, for example, if classified as an act of genocide or as a war crime, entails a minimum penalty of 5 years. If a similar act is adjudicated as a ‘conventional crime’ such as aggravated homicide, a minimum penalty of life imprisonment is prescribed. He calls it an ‘absurd penalty scheme’ given the arguably elevated seriousness of international crimes due to their contextual elements. Similar to Perez Leon-Aceveda, Metekia identifies differences and similarities between Ethiopian and international sentencing practices. One of the most striking differences relates to the scope of the trials. The Ethiopian courts, in particular during the Dergue trials, often adjudicated cases with large numbers of defendants, even exceeding 100 individuals in one trial. Such cases certainly raise many challenges for the fair determination of criminal liability and the individualisation of sentence for each convicted defendant. In addition, similarly to Croatia and Serbia, Metekia notes that ‘Ethiopian courts […] have employed sentencing rationales in a manner that is typical to the punishment of [conventional] domestic crimes’.

Consequently, the articles included in the special issue offer detailed insights into domestic prosecutions of international crimes in a number of selected jurisdictions, discussing their extent, modalities and challenges. They analyse domestic sentencing practices, judicial reasoning and sentence severity in international crimes cases, and compare and contrast these to the practice of the international courts. Some of the authors raise broader theoretical and normative questions such as what appropriate punishment for international crimes should be, how it should be implemented and the importance of looking at and understanding the broader socio-political and historical context in which it is designed and implemented. All in all, the contributions included in this issue do not only introduce original empirical data, detailed analyses of prosecutions, sentencing practices and punishment of international crimes in domestic contexts, but also reveal important parallels between them. First of all,
given the politically sensitive and complex character of international crimes, domestic prosecutions need time, and maybe above all, conducive political and social conditions. In many contexts, political considerations might bar, hinder, significantly slow down, or in one way or another affect the judicial reckoning with mass atrocities. Given the politically charged, and often politically contingent character of domestic prosecutions of international crimes, fair trials and fair sentencing could be compromised, and different biases might be much more prominent compared to criminal justice responses to conventional crimes. Domestic criminal justice systems operate in particular historical, societal and political contexts, which need to be accounted for when trying to understand its reckoning with mass atrocity crime. This ‘situatedness’ of domestic criminal justice after atrocities certainly deserves much more attention in scholarship.

Secondly, in most of the case studies included in the special issue, judges seem to have been using their ‘standard operating procedures’ regularly applied to cases of conventional offences when punishing perpetrators of international crimes. No specific sentencing goals or principles seem to have been developed or applied to mass atrocity crimes in any of the examined jurisdictions. In this sense, when it comes to punishment, it seems that in the eyes of judges there does not seem to be anything extraordinary in the ‘extraordinary’ acts classified as international crimes. Colombia, however, clearly stands out as the most recent peace agreement with the FARC-EP stipulated a special jurisdictional regime, special laws have been enacted and unprecedented penal measures designed specifically for perpetrators of international crimes. Finally, what the case studies also demonstrate is that more often than not perpetrators of ‘the most serious crimes of international concern’ are punished with relatively lenient penalties.

As guest editors, we believe that both the individual articles and the special issue in its entirety contribute highly original research and innovative perspectives that have been so far largely neglected in the discussion of criminal justice responses to international crimes. We hope that the articles included in the collection will inspire others and open the door for more research of and engagement with local prosecutions of mass atrocity crimes. We would like to thank all the contributors for their contributions and hard work. We would also like to thank the reviewers for taking the time and effort to comment on

20 In this respect, the Peruvian case clearly differs since the extraordinary character of acts, which could have been classified as international crimes, was used by judges to justify severe sentences.
the articles and help the authors to improve their contributions. Finally, we would like to express our gratitude to Caroline Fournet, the Editor-in-Chief of the International Criminal Law Review, for providing us with the opportunity to publish the special issue in this journal.

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