Leiden Journal of International Law (2025), pp. 1–28
doi:10.1017/S0922156525100460

ORIGINAL ARTICLE

INTERNATIONAL CRIMINAL COURTS AND TRIBUNALS

Challenging punishment as the justice norm in the face of ongoing atrocities

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Abstract
International criminal law constitutes the culmination of the 'anti-impunity agenda' within international law, policy, and practice. This agenda, often advanced under the rallying cry of 'never again' – a pledge to never let atrocities like those of the Second World War happen again to anyone – is driven by the conviction that criminal sanctions are essential for fulfilling this promise and conveying collective condemnation of such horrors. This results in what we term the 'penal accountability paradigm' in relation to atrocities: positioning punishment at the forefront of the prevention of, and justice and accountability for, atrocities. This paper examines some of the damaging implications of this paradigm within and beyond international criminal law, particularly its distorting effects on responses to ongoing atrocities in Palestine. We suggest that, in the context of these ongoing atrocities, the framing of punishment as justice harms the 'never again' promise in several important ways: (i) it gives states the (undue) benefit of the doubt; (ii) it decontextualizes, individualizes, and exceptionalizes atrocities; (iii) it monopolizes discourses of accountability and condemnation, while sanitizing the suppression of dissenting voices; and (iv) it lends support to retaliatory impulses, distorting the discourse around the legitimate or lawful use of force in response to atrocities. We conclude by outlining the need to turn to more diverse and materially informed words, tools, and paradigms for naming, preventing, and standing in solidarity against abuses, in Palestine and elsewhere, that go beyond penal responses and directly engage with broader political and ethical conceptions of justice.

Keywords: accountability; anti-impunity; atrocity; international criminal law; Palestine

1. Introduction

> Accountability matters – not only because it provides justice for victims and punishment for perpetrators. It matters because ending impunity is central to ending genocide . . .

*The paper is current as of 13 May 2025. All authors contributed equally. We wish to thank the two anonymous reviewers, Barrie Sander, and the other journal editors for their many helpful suggestions on the initial drafts of this article. We are also grateful to Sanam Amin, Yassin Brunger, Michelle Farrell, Conor Gearty, Alan Greene, Piergiuseppe Parisi, Sophie Rigney, and Ntina Tzouvala for feedback on (much) earlier versions of the arguments made above. We also wish to extend our thanks to the attendees and organizers of events in which early drafts of this article were presented, including the workshop 'The Juridification of Justice: Potentials and Limitations', held on 18–19 April 2024 at the University of Exeter; the conference 'An Abolition Movement for International Criminal Law', held at RMIT University Melbourne (both in person and online) on 27–28 June 2024; and the talk at the School of Law, Queen's University Belfast, on 30 July 2024. The thoughtful feedback received on earlier versions of this work has been invaluable.

> Prevention and punishment . . . can never be seen in isolation from each other. Punishment is key to prevention.[1]

Contemporary international law includes a legal and institutional framework founded on the premise that individuals must be brought to justice for grave wrongdoing. This framework – with international criminal law at its centre – purports to bring about 'a transition from the age of impunity to the age of accountability',[2] where impunity is understood as the absence of appropriate criminal sanctions[3] and accountability as the prosecution and punishment of those responsible for serious violations of international law.[4] This 'anti-impunity agenda'[5] is frequently advanced under the rallying cry of 'never again' – a pledge born out of the horrors of the Second World War that embodies a collective vow to never let such atrocities happen again, to anyone.[6] It is driven by the conviction that criminal sanctions are essential for fulfilling this promise, and an understanding of punishment as the most potent means of securing equal justice and accountability for such horrors.[7]

These starting points, which treat punishment as central to prevention, accountability, and justice, are part of what we call the 'penal accountability paradigm'. As we explore in this article, this paradigm shapes responses to atrocity in ways that extend far beyond international criminal prosecutions, such as those pursued via the International Criminal Court (ICC). It also encompasses the tendency to apply criminal law logics and standards in other legal settings (for instance, around the burden of proof in establishing genocide in inter-state proceedings at the International Court of Justice (ICJ)). Crucially, it shapes political and public discourses concerning state violence, including by holding states to distorted culpability standards or informing understandings of legitimate military force as (both preventive *and* punitive) justice.[8] Within the penal paradigm's logic, punishing serious violations of international law is perceived as preventing atrocities, providing effective protection, accountability, and equal justice for the victims, as well as fostering a sense of belonging in the face of heinous wrongdoings. On this basis, the pursuit of punishment in response to egregious wrongs against persons or humanity at large has become the 'justice norm' within international criminal law and international human rights

[1]M. Bachelet, 'High-Level Panel to Commemorate the 70th Anniversary of the Convention on the Prevention and Punishment of the Crime of Genocide', 13 September 2018, available at www.ohchr.org/en/statements/2018/09/high-level-panel-commemorate-70th-anniversary-convention-prevention-and.

[2]B. Ki-moon, 'Secretary-General's Remarks at LexisNexis-Atlantic Council Rule of Law Now Event', 19 September 2013, available at www.un.org/sg/en/content/sg/statement/2013-09-19/secretary-generals-remarks-lexisnexis-atlantic-council-rule-of-law-now-event-%28-prepared-for-delivery%29.

[3]For a critical discussion, see M. Drumbl, 'Impunities', in K.J. Heller et al. (eds.), *The Oxford Handbook of International Criminal Law* (2020), 238.

[4]UN Commission on Human Rights, Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity, UN Doc. E/CN.4/2005/102/Add.1 (2005), at 6.

[5]K. Engle, Z. Miller, and D.M. Davis (eds.), *Anti-Impunity and the Human Rights Agenda* (2016).

[6]See A. Callamard, 'Gaza and the End of the Rules-Based Order: What the Israel-Hamas War Means for the Future of Human Rights and International Law', *Foreign Affairs*, 15 February 2024.

[7]See, e.g., Amnesty International, 'Campaign for International Justice', 1 April 2025, available at www.amnesty.org.uk/campaign-for-international-justice.

[8]The broader intersection of preventive, protective, and punitive drives in the context of military interventions is explored in T. Degenhardt, *War as Protection and Punishment: Armed International Intervention at the 'End of History'* (2024). Degenhardt mentions the Responsibility to Protect (R2P) doctrine as an example of how military interventions, particularly those justified as efforts to protect victims of mass atrocities and prevent future violations, often embody an unquestioned desire to punish perceived criminal groups within the international sphere. It is worth noting that the R2P has also been promoted under the rallying cry of 'never again' in the 2005 World Summit Outcome Document. On the (complex) relationship between the international criminal justice and the R2P, see 'Symposium: The International Criminal Court and the Responsibility to Protect', (2010) 21 *Finnish Yearbook of International Law*; 'Symposium: International Criminal Justice and the Responsibility to Protect', (2015) 26(1) *Criminal Law Forum*.

https://doi.org/10.1017/S0922156525100460 Published online by Cambridge University Press

law[9] – or, indeed, within international law as a whole. Even in contexts where punishment has not been meted out, such as the commission of atrocities in Palestine, the considerable justice-driven consensus against the impunity that is deemed to prevail discloses the paradigmatic character of penal accountability perceived as justice.[10]

While rich critiques of the dominance of penal approaches and the broader anti-impunity agenda within international law and advocacy abound, having been developed over time by numerous scholars (including ourselves),[11] the unfolding situation in Palestine provides a particularly stark and urgent context within which to illuminate key aspects of the penal accountability paradigm and critically examine its real-world harms and limitations. The framing of punishment as justice has dominated a vast range of political, legal, journalistic, and other responses to ongoing atrocities in Palestine, with both advocacy for and opposition to Israel's military campaign in Gaza articulated through the penal accountability paradigm. In this article, we focus on this military campaign to illuminate how this paradigm operates in real-time to undermine the 'never again' promise and its associated ideals of prevention, accountability, and equality. We argue that the harms materialize as follows: (i) the penal accountability paradigm gives states the (undue) benefit of the doubt; (ii) it decontextualizes, individualizes, and exceptionalizes atrocities; (iii) it monopolizes discourses of accountability and condemnation, while sanitizing the suppression of dissenting voices; and (iv) it lends support to retaliatory impulses, thereby distorting the discourse around the legitimate or lawful use of force in response to atrocities.

This analysis does not concretely put forward a wholesale rejection of prevailing legal mechanisms for holding individuals and states accountable for (ongoing) atrocities. Rather, it is concerned with how the centring of punishment as the justice norm, regardless of its laudable aims, tends to capture or at least distort the terrain of moral, political, and legal evaluation, condemnation, and opposition to (ongoing) atrocities, and the pursuit of justice therein. We therefore close by concretely challenging the paradigm: outlining the case for turning to more diverse and materially informed words, tools, and paradigms for naming, preventing, and standing in solidarity against abuses, in Palestine and elsewhere, that go beyond penal responses and directly engage with broader political and ethical conceptions of justice and accountability. In doing so, we show that a shift in progressive mobilization towards transformative, rather than hostile, solidarity represents not just an aspiration but an emerging reality that requires further support and advocacy.

2. Background

We are writing this at a time when Gaza, a 363-square-kilometre strip of land along the Mediterranean Sea northeast of the Sinai Peninsula, has become 'hell on earth' during a military campaign by Israel that has killed over 52,000 people (as of 4 May 2025), leaving many more

[9]L.A. Payne, 'The Justice Paradox? Transnational Legal Orders and Accountability for Past Human Rights Violations', in T.C. Halliday and G. Shaffer (eds.), *Transnational Legal Orders* (2015), 439 at 443.

[10]United Nations, 'Rise in Impunity Worldwide "Politically Indefensible and Morally Intolerable", Secretary-General Says as General Assembly Begins Annual High-Level Debate', 24 September 2024, available at press.un.org/en/2024/ga12633.doc.htm.

[11]See, e.g., T. Krever, 'International Criminal Law: An Ideology Critique', (2013) 26 LJIL 701; K. Engle, 'Anti-Impunity and the Turn to Criminal Law in Human Rights', (2015) 100 *Cornell Law Review* 1069; see Engle, Miller, and Davis, *supra* note 5; M. Pinto, 'Historical Trends of Human Rights Gone Criminal', (2020) 42(4) *Human Rights Quarterly* 729; C. Schwöbel-Patel, *Marketing Global Justice: The Political Economy of International Criminal Law* (2021); M. Pinto, *Human Rights as Sources of Penality* (2022); S. Tapia Tapia, 'Human Rights Penality and Violence Against Women: The Coloniality of Disembodied Justice', (2025) 36 *Law and Critique* 41; P. Alston, 'Criminalizing Human Rights', (2023) 15(3) *Journal of Human Rights Practice* 660; N. Mavronicola, 'The Case Against Human Rights Penality', (2024) 44(3) OJLS 535; S. Rigney, 'Building An Abolition Movement for International Criminal Law?', (2024) 22(1) *Journal of International Criminal Justice* 211.

https://doi.org/10.1017/S0922156525100460 Published online by Cambridge University Press

maimed, orphaned, and starved.[12] Israel launched the campaign after Hamas and other groups made armed incursions from the Gaza Strip into southern Israel on 7 October 2023, killing approximately 1,200 people, most of them civilians, and taking 253 people hostage.[13] The wider context of these developments is Israel's continuing occupation of Palestinian territories,[14] the Gaza blockade,[15] the subjection of Palestinian people to a system of apartheid,[16] and the legacy of the 1948 Nakba, the violent displacement and dispossession which ethnically cleansed Palestinians from their homeland.[17]

Responses to these events have varied widely. While many governments and political actors condemned both Hamas' actions and the subsequent mass killings by Israel, numerous governments and other political figures lent what appeared to be unqualified support to Israel immediately after the 7 October attacks, and several – including the US and the UK – have continued effectively to support or condone its campaign.[18] Meanwhile, substantial mobilization has taken shape across public squares, streets, and campuses protesting against atrocities committed by Israel in the course of this campaign, advocating for a ceasefire, and opposing arms sales and investments in Israeli institutions involved in apartheid and genocide.[19] This mobilization has, in some contexts, faced harsh repression: student protesters have been suspended or expelled from their universities, and have even faced arrest, detention, and orders of deportation by public authorities.[20]

This forms the backdrop of our critical analysis. We endeavour to consider the implications of conceiving punishment as justice while witnessing profound and irreparable harms being inflicted, denied, condoned, and/or treated as plausibly legal. The legal background to our analysis is well-rehearsed: a range of international legal norms are engaged by the events in Gaza, notably the law on genocide, as well as key elements of international humanitarian law, international human rights law, and international criminal law. A legal and institutional framework has now been cemented around the premise that serious violations of international law should not be left

[12]F. Albanese et al., 'End Unfolding Genocide or Watch It End Life in Gaza: UN Experts Say States Face Defining choice', 7 May 2025, available at www.ohchr.org/en/press-releases/2025/05/end-unfolding-genocide-or-watch-it-end-life-gaza-un-experts-say-states-face.

[13]Human Rights Watch, *Israel and Palestine: Events of 2023* (2024), available at www.hrw.org/world-report/2024/country-chapters/israel-and-palestine.

[14]Amnesty International, *Israel's Occupation: 50 Years of Dispossession* (2017), available at www.amnesty.org/en/latest/campaigns/2017/06/israel-occupation-50-years-of-dispossession/.

[15]WHO, 'Health Conditions in the Occupied Palestinian Territory, including East Jerusalem, and in the Occupied Syrian Golan', Doc No. A76/15 (2023), Para. 20.

[16]Human Rights Watch, *A Threshold Crossed: Israeli Authorities and the Crimes of Apartheid and Persecution* (2021), available at www.hrw.org/report/2021/04/27/threshold-crossed/israeli-authorities-and-crimes-apartheid-and-persecution. See M. Jackson, 'The Definition of Apartheid in Customary International Law and the International Convention on the Elimination of All Forms of Racial Discrimination', (2022) 71(4) ICLQ 831.

[17]See D. Allan (ed.), *Voices of the Nakba: A Living History of Palestine* (2021).

[18]E.g., N. Bertrand, A. Marquardt, and L. Fox, 'US Releases $3.5 Billion to Israel to Spend on US Weapons and Military equipment, Months after Congress Appropriated', *CNN*, 9 August 2024, available at edition.cnn.com/2024/08/09/politics/us-releases-billions-israel-weapons-military-equipment/index.html; A. Faguy, 'Biden Plans to Send $8bn Arms Shipment to Israel', *BBC News*, 4 January 2025, available at www.bbc.co.uk/news/articles/cpvne94v1rdo; K. Stacey, 'Attorney General Intervenes in Foreign Office Review of Weapons Sales to Israel', *The Guardian*, 25 August 2024, available at www.theguardian.com/politics/article/2024/aug/25/attorney-general-intervenes-in-foreign-office-review-of-weapons-sales-to-israel.

[19]N. Gohil and J. Henley, 'Why Have Student Protests against Israel's War in Gaza Gone global?', *The Guardian*, 8 May 2024, available at www.theguardian.com/world/article/2024/may/08/have-student-protests-campus-israel-war-gaza-global.

[20]M. Hellmann, 'They Staged Protests for Palestine. The Consequences Have Been Life-Changing', *The Guardian*, 26 April 2025, available at www.theguardian.com/us-news/2025/apr/26/university-student-protesters-discipline; Liberty Investigates, 'Uncovered: The "Worsening Crackdown" on Pro-Palestine Activism at UK Universities', 22 February 2025, available at libertyinvestigates.org.uk/articles/revealed-the-worsening-crackdown-on-pro-palestinian-activism-at-uk-universities/.

https://doi.org/10.1017/S0922156525100460 Published online by Cambridge University Press

unpunished.[21] A range of legal processes have been mobilized on this basis, and we touch on them at many points in our analysis.

3. Why is punishment deemed the justice norm?

On 20 May 2024, the ICC Office of the Prosecutor (OTP) announced applications to the Court's Pre-Trial Chamber for arrest warrants against three senior Hamas leaders, as well as Israel's prime minister, Benjamin Netanyahu, and defence minister, Yoav Gallant. The request for warrants related to crimes committed during Hamas's 7 October attacks and the ensuing Israeli offensive in Gaza. Both Hamas and Israeli leaders face accusations of crimes against humanity and war crimes – allegations of genocide are notably absent in the request – for conduct such as extermination, murder, rape, and the taking of hostages (Hamas), wilful killing (or murder), intentionally directing attacks against civilians, starvation of civilians and persecution (Israeli leaders). 'These acts demand accountability', the ICC prosecutor, Karim Khan, said in an official statement.[22] While, unsurprisingly, Israeli and US leaders described the applications as 'outrageous',[23] human rights activists and organizations have hailed them as a historic and crucial first step towards meaningful justice for the victims of atrocities in Palestine and Israel.[24] On 21 November 2024, the ICC Pre-Trial Chamber I issued arrest warrants for Netanyahu and Gallant, in respect of war crimes and crimes against humanity.[25] A warrant was also issued for Diab Ibrahim al Masri (known as Deif), though Israel reported he had been killed in an airstrike in July 2024.[26] The other Hamas leaders named in the applications were also subsequently killed.[27]

These arrest warrants are symbolically significant. Many see them as marking – at least as a matter of principle – the end of powerful states, such as Israel, acting above the law and with impunity.[28] For them, it makes Palestinian victims visible, emphasizing their equal humanity alongside other victims of atrocity. Beyond symbolism, the warrants could influence other states' decisions regarding arms sales to Israel. Additionally, the OTP's application might have at least implicitly exerted pressure on the ICJ, which days later ordered Israel to halt its military offensive

[21] A. Seibert-Fohr, *Prosecuting Serious Human Rights Violations* (2009), at 1; for a critical discussion, see Engle, *supra* note 11; S. Moyn, 'Anti- Impunity as Deflection of Argument', in Engle, Miller, and Davis, *supra* note 5, 68.

[22] 'Statement of ICC Prosecutor Karim A.A. Khan KC: Applications for Arrest Warrants in the Situation in the State of Palestine', 20 May 2024, available at www.icc-cpi.int/news/statement-icc-prosecutor-karim-aa-khan-kc-applications-arrest-warrants-situation-state.

[23] 'Statement from President Joe Biden on the Warrant Applications by the International Criminal Court', 20 May 2024, available at bidenwhitehouse.archives.gov/briefing-room/statements-releases/2024/05/20/statement-from-president-joe-biden-on-the-warrant-applications-by-the-international-criminal-court/; R.M. Eglash and L. Harkov, 'Netanyahu Slams ICC's "Audacious" Comparison of Hamas and IDF', *Jewish Insider*, 20 May 2024, available at jewishinsider.com/2024/05/netanyahu-icc-arrest-warrants-outrageous/.

[24] E.g., 'FIDH Welcomes the ICC Prosecutor's Historic Requests for Arrest Warrants in the Palestine Situation', 20 May 2024, available at www.fidh.org/en/region/north-africa-middle-east/israel-palestine/fidh-welcomes-the-icc-prosecutor-s-historic-requests-for-arrest; Human Rights Watch, 'Israel/Palestine: ICC Prosecutor Requests Arrest Warrants', 20 May 2024, available at www.hrw.org/news/2024/05/20/israel/palestine-icc-prosecutor-requests-arrest-warrants.

[25] 'Situation in the State of Palestine: ICC Pre-Trial Chamber I rejects the State of Israel's challenges to jurisdiction and issues warrants of arrest for Benjamin Netanyahu and Yoav Gallant', 21 November 2024, available at www.icc-cpi.int/news/situation-state-palestine-icc-pre-trial-chamber-i-rejects-state-israels-challenges.

[26] *Situations in the State of Palestine*, Prosecution's Notification of the Death of Mohammed Diab Ibrahim Al-Masri ('Deif') and Request to Terminate the Proceedings, ICC-01/18-413 26-02-2025 1/6 PT, 14 February 2025.

[27] 'Situation in the State of Palestine: ICC Pre-Trial Chamber I Issues Warrant of Arrest for Mohammed Diab Ibrahim Al-Masri (Deif)', 21 November 2024, available at www.icc-cpi.int/news/situation-state-palestine-icc-pre-trial-chamber-i-issues-warrant-arrest-mohammed-diab-ibrahim.

[28] 'Israel/OPT: ICC Applications for Arrest Warrants for Netanyahu, Sinwar and Other Senior Israeli and Hamas Officials Crucial Step towards Justice', *Amnesty International*, 21 May 2024, available at www.amnesty.org/en/latest/news/2024/05/israel-opt-icc-applications-for-arrest-warrants-for-netanyahu-sinwar-and-other-senior-israeli-and-hamas-officials-crucial-step-towards-justice.

https://doi.org/10.1017/S0922156525100460 Published online by Cambridge University Press

in Rafah in *South Africa* v. *Israel*.[29] Yet the decision not to seek arrest warrants for genocide may also carry some weight for the ICJ, which is adjudicating on the application of the Genocide Convention to Israel's offensive.

Despite the significance of the ICC's decision, (the prospect of) punishment remains a questionable deterrent for unfolding atrocities. While (international) criminal institutions continue to proliferate, most perpetrators are not held criminally accountable and most likely never will be.[30] In the Israeli–Palestinian context, the chances of perpetrators facing penal institutions are even slimmer. Enforcement relies on state cooperation to execute arrest warrants, and Israel, not a party to the Rome Statute of the ICC, has no intention of cooperating.[31] The warrants have not been welcomed positively by all ICC State Parties (which could also enforce the warrants), with a few states already confirming that they will not assist the Court in executing the warrants.[32] The US, which is not an ICC State Party, in a deeply troubling development, has gone as far as to impose sanctions on ICC officials.[33] More importantly, past practice across the ICC and other international criminal courts and tribunals suggests that, even when these bodies are deemed successful in terms of the number of trials they conduct and guilty verdicts they issue, they are far from successful in ending atrocities.[34]

Given these limitations, one might wonder why punishment tends to be framed as justice. We would argue that multiple reasons contribute to the consensus around individual criminal accountability as the 'justice norm'.[35] Punishment for atrocities is seen as ensuring effective protection of fundamental rights and values, accountability for perpetrators, and equality for victims.[36] First, the prospect that those who commit serious violations of international law are to be commensurately sanctioned is seen to give international law 'teeth'. In this account, punishment is understood to be the most potent means to prevent, protect people from, and/or redress serious violations of international law,[37] serving preventative and protective functions in line with general and specific deterrence theories.[38] At the same time, the prospect of punishment

[29]*Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (South Africa v. Israel)*, Order of 24 May 2024, [2024] ICJ Rep. 649.

[30]K. Lohne, *Advocates of Humanity: Human Rights NGOs in International Criminal Justice* (2019), at 128.

[31]'Approved in Preliminary Reading: Prohibition on Public Authorities and Bodies, Israeli Citizens and Residents, to Cooperate with the International Criminal Court in The Hague', 19 February 2025, available at main.knesset.gov.il/en/news/pressreleases/pages/press19225c.aspx.

[32]J. Borger, 'France Says Netanyahu Is Immune from ICC Warrant as Israel Is Not Member of Court', *The Guardian*, 27 November 2024, available at www.theguardian.com/world/2024/nov/27/france-says-netanyahu-is-immune-from-icc-warrant-as-israel-is-not-member-of-court.

[33]K. Demirjian, 'House Passes Bill to Impose Sanctions on I.C.C. Officials for Israeli Prosecutions', *The New York Times*, 9 January 2025, available at www.nytimes.com/2025/01/09/us/politics/icc-sanctions-house-israel.html.

[34]For a discussion of the peace-making dimension of international criminal tribunals, F. Mégret, 'International Criminal Justice as a Peace Project', (2018) 29(3) EJIL 835.

[35]See Payne, *supra* note 9, at 443. On justice understood as 'cascading' through prosecutions, K. Sikkink, *The Justice Cascade: How Human Rights Prosecutions Are Changing World Politics* (2011). For critical reflections about 'doing justice' through international criminal law, see S. Nouwen and W. Werner, 'Doing Justice to the Political: The International Criminal Court in Uganda and Sudan', (2011) 21 EJIL 941; S. Nouwen, 'Justifying Justice', in J. Crawford and M. Koskenniemi (eds.), *The Cambridge Companion to International Law* (2015), 327 at 327; B. Sander, *Doing Justice to History: Confronting the Past in International Criminal Courts* (2021).

[36]See Mavronicola, *supra* note 11, at 540–1.

[37]E.g., Seibert-Fohr, *supra* note 21, at 55, citing Inter-American Commission of Human Rights, *Masacre Las Hojas v. El Salvador*, 24 September 1992, 83; Inter-American Commission of Human Rights, *Carmelo Soria Espinoza v. Chile*, 19 November 1999, Para. 66.

[38]See, e.g., preambular paragraph 5 of the ICC Statute, which asserts that the 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'. The ICC has also accepted that prevention is one of the core aims of punishment, alongside retribution. See, e.g., *Prosecutor v. Ahmad Al Faqi Al Mahdi*, Judgment and Sentence, ICC-01/12–01/15–171, T.C. VIII, 27 September 2016, Para. 66.

https://doi.org/10.1017/S0922156525100460 Published online by Cambridge University Press

plays a more expressive role, supposedly altering the moral landscape within which potential perpetrators assess their options and choose their actions.[39] Second, the penal sanction tends to be understood as the pinnacle of accountability for serious wrongs against persons,[40] and even humanity itself.[41] Criminal measures are believed to communicate to the perpetrators the exceptional wrongfulness of their actions and signal to society that public authorities both recognize said wrongfulness and are prepared to respond to it in a way reflective of its gravity.[42] Third, the egalitarian dimension of anti-impunity mobilization treats the pursuit of punishment for serious violations of international law as aiming to uphold the universal protection of the law,[43] including by redistributing privilege and protection from powerful perpetrators to marginalized and vulnerable victims.[44] The significance of penal accountability is thought to rest in 'the rebalancing of the worth and social standing of victims' within the affected community.[45] Indeed, impunity is associated not just with ineffectiveness and lack of accountability, but also with inequality. It is viewed as reflecting an imbalance of power and regard for those left defenceless.[46] Thus, combatting impunity becomes a synonym for rejecting a status quo where marginalized communities are over-penalized and under-protected, while those who wield power and privilege often escape punishment for their wrongdoing, especially when their conduct affects the most disregarded segments of society.[47] This 'redistribution of punishment'[48] has also been referred to as 'progressive punitivism'.[49]

However, punishment in situations of atrocities, like those in Gaza, is not only invoked as a perceived means to certain worthy ends. If calls for the ICC intervention or criminal sanctions against Hamas or Israeli leaders were justified purely in terms of concrete results, one might expect anti-impunity activists to focus more explicitly on their efficacy.[50] Instead, all too often the validity of punishment (as justice) for atrocities 'goes without saying', as something we *feel* should occur.[51] Durkheim's theory of punishment sheds light onto our emotional investment in punishment.[52] For Durkheim, 'passion ... is the soul of punishment' and 'vengeance' (a vengeance that is not 'useless cruelty' but 'a veritable act of defence') is the fundamental driver of punitive actions.[53] Durkheim stresses that the moral feelings whose violation provokes punishment are 'strongly engraven' in our consciences and fundamental to who we are.[54]

[39]D. Celermajer, *The Prevention of Torture: An Ecological Approach* (2018), at 12.

[40]See Mavronicola, *supra* note 11, at 542–3.

[41]See W.A. Schabas, *Unimaginable Atrocities: Justice, Politics, and Rights at the War Crimes Tribunals* (2012), Ch. 1.

[42]A. Duff, *Punishment, Communication, and Community* (2001).

[43]On the link between this idea of universality and the promise of 'never again', see Callamard, *supra* note 6.

[44]B. Levin and K. Levine, 'Redistributing Justice', (2024) 124 *Columbia Law Review* 1531.

[45]A. Balta, 'Retribution through Reparations? Evaluating the European Court of Human Rights' Jurisprudence on Gross Human Rights Violations from a Victim's Perspective', in L. Lavrysen and N. Mavronicola (eds.), *Coercive Human Rights: Positive Duties to Mobilise the Criminal Law under the ECHR* (2020), 71 at 71.

[46]See Mavronicola, *supra* note 11, at 543–4.

[47]Ibid.

[48]N. Mavronicola, 'Redistributing Punishment: The Limited Vision of Coercive Human Rights', *EJIL: Talk!*, 23 October 2020, available at www.ejiltalk.org/redistributing-punishment-the-limited-vision-of-coercive-human-rights/.

[49]H. Aviram, 'Progressive Punitivism: Notes on the Use of Punitive Social Control to Advance Social Justice Ends', (2020) 68 *Buffalo Law Review* 199.

[50]N. Peršak, 'Positive Obligations in View of the Principle of Criminal Law as a Last Resort', in Lavrysen and Mavronicola, *supra* note 45, 141 at 151.

[51]See Moyn, *supra* note 21, at 71.

[52]See Pinto, *Human Rights as Sources of Penality*, *supra* note 11, Ch. 7. Academic literature on the ICC that engages with Durkheim's theory includes S. Nimaga, 'An International Conscience Collective? A Durkheimian Analysis of International Criminal Law', (2007) 7 ICLR 561; I. Tallgren, 'The Durkheimian Spell of International Criminal Law?', (2013) 71 *Revue interdisciplinaire d'études juridiques* 137; see Lohne, *supra* note 30, Ch. 7.

[53]É. Durkheim, *The Division of Labor in Society* ([1893]1933), at 86–7.

[54]Ibid., at 77–8.

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> [W]hen it is a question of a belief which is dear to us, we do not, and cannot permit a contrary belief to rear its head with impunity. Every offense directed against it calls forth an emotional reaction, more or less violent, which turns against the offender.[55]

According to Durkheim, 'the true function' of punishment is to enhance social solidarity.[56] By channelling the moral outrage into collective rituals of condemnation, punishment works to keep 'social cohesion intact, while maintaining all its vitality in the common conscience'.[57] Crime 'brings together upright consciences and concentrates them'.[58] The resulting sanction acts as an occasion to express moral disapprobation, reaffirm group solidarity and restore the moral order violated by the offender.[59]

Despite its limitations,[60] Durkheim's theory offers a compelling explanation for why punishment has become synonymous with justice in the international arena. Atrocities generate moral outrage, offend the human community,[61] and, as stated in the Rome Statute's preamble, 'deeply shock the conscience of humanity'. Following Durkheim, this passionate reaction – an urgent compulsion to 'do something'[62] – fuels the fervent invocation of punishment. Punishment, therefore, is propelled by a collective sense of outrage, indignation, and disgust at atrocities, which Durkheim suggests is redirected into communal rituals of denunciation and solidarity. Hence, the demand for criminal accountability in the Israel–Palestine situation transcends the ICC's concrete capacity to hold individuals accountable for atrocities. As Mark Kersten suggests, '[i]t is about where we stand, what we think is right, and whether or not we are willing to use legal vagaries to insist that justice should stay selective and remain rested in the control of the powerful'.[63] Calls for the ICC intervention, and punishment more generally, amid the ongoing atrocities in Gaza/Palestine, help those who make the call feel that they are on the side of righteousness and justice against horrific abuses.

Durkheim's theory casts punishment and the solidarity attached to it in essentially benign terms. Carvalho and Chamberlen have, however, observed that the solidarity generated and reinforced by punishment is a 'hostile solidarity', inherently linked to aggression.[64] Punishment is, in fact, most sought during experiences of insecurity where the general perception is a deficit of morality and solidarity.[65] In these situations, feelings of solidarity arise as the result of sentiments of hostility towards those deemed responsible for this insecurity. Revulsion against perpetrators and those who condone them gives rise to a sense of solidarity and identification with an opposite group that actively condemns the violations and refuses to let them go unpunished. On the

[55]Ibid., at 97–8.

[56]Ibid., at 108; D. Garland, 'Punishment and Social Solidarity', in J. Simon and R. Sparks (eds.), *The SAGE Handbook of Punishment and Society* (2012), 23.

[57]Ibid.

[58]See Durkheim, *supra* note 53, at 102.

[59]Ibid. F. Mégret, 'Practices of Stigmatization', (2014) 76 *Law and Contemporary Problems* 287.

[60]Scholars have criticized Durkheim's one-dimensional account, his conception of the *conscience collective*, his lack of concern for power, and his assumptions that punishment promotes 'social solidarity'. See D. Garland, 'Sociological Perspectives on Punishment', (1991) 14 *Crime and Justice* 115, at 124–7.

[61]D. Luban, 'A Theory of Crimes Against Humanity', (2004) 29 *Yale Journal of International Law* 85.

[62]K. Lohne, 'Penal Welfarism "Gone Global"? Comparing International Criminal Justice to The Culture of Control', (2021) 23 *Punishment & Society* 3, at 12.

[63]M. Kersten, 'ICC and Palestine Symposium: "Injustice Anywhere Is a Threat to Justice Everywhere" – Palestine, Israel, and the ICC', *Opinio Juris*, 3 February 2020, available at opiniojuris.org/2020/02/03/icc-and-palestine-symposium-injustice-anywhere-is-a-threat-to-justice-everywhere-palestine-israel-and-the-icc.

[64]H. Carvalho and A. Chamberlen, 'Why Punishment Pleases: Punitive Feelings in a World of Hostile Solidarity', (2018) 20 *Punishment & Society* 217, drawing on G.M. Mead, 'The Psychology of Punitive Justice', (1918) 23(5) *American Journal of Sociology* 577.

[65]Ibid., at 224.

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international plane, those identified as the perpetrators of atrocities are treated as *enemies of all humankind*.[66]

The dynamics of hostile solidarity engendered by punishment are problematic for two primary reasons. First, the very fabric of solidarity and community identity becomes dependent on hostility for its existence.[67] Second, although punishment may facilitate emotional catharsis and a sense of belonging, it fails to address the underlying causes of these emotions and the need for solidarity. As Carvalho and Chamberlen note, punitive practices and discourses offer a convenient, readily available yet ultimately superficial solution when other sources of solidarity are lacking.[68] The more identities are cemented through punishment, the more its effects and inherent constraints are reproduced, leading to a cycle of punitiveness and hostility that not only determines how we address social problems but also shapes how we talk about and understand them.[69]

In essence, punishment generates a hostile, artificial, and transitory sense of justice, along with an epistemic framework and normative 'state of mind' – what we call the penal accountability paradigm – that relies heavily on, and spreads, punitive concepts and predispositions across various aspects of social life.[70] These punitive concepts and predispositions are not confined to anti-impunity activists but often permeate the legal – and moral – imagination or are appropriated by a range of actors and institutions, with diverse, and often divergent, goals. While punishment may not materialize as extensively in the international arena as it does in national 'law and order' regimes of mass incarceration, we find the penal 'state of mind' to capture or dominate the terrain of moral, political, and legal evaluation, condemnation, and opposition to (ongoing) atrocities and the pursuit of justice therein. The concerns we outline below relate to this dominance, which gives penal accountability its status as a paradigm in how justice is conceived.

A significant aspect of the analysis that follows encompasses a recognition that, although the penal accountability paradigm may appear to emerge from universalist principles or even align with counter-hegemonic aims in contexts where 'cultures of impunity'[71] dominate, it can often serve specific power interests of individual states or elites within those states – or even be actively employed to do so. This observation goes beyond distinguishing sincere from hypocritical invocations of punishment-as-justice. Rather, it concerns how various actors with differing agendas engage (explicitly or implicitly) with this paradigm, and its malleability in serving both (nominally) liberatory *and* oppressive purposes, as well as its often unintended (or less intended) effects as a governing principle of international justice.

4. Exposing the harms of the penal accountability paradigm in the context of Gaza

In this section, we examine how the predispositions and concepts of the penal accountability paradigm permeate the legal, political, and moral debates surrounding atrocities in Gaza, both within and especially beyond the ICC investigation. We argue that this paradigm distorts or harms the pursuit of prevention, accountability, and equality, by exposing the acute manifestation of key

[66]See Luban, *supra* note 61, at 90. On how the identification of the 'enemy' shapes who/what is prosecuted, G. Simpson, 'Human Rights with a Vengeance: One Hundred Years of Retributive Humanitarianism', (2015) 33 *Australian Yearbook of International Law* 1, at 12.

[67]See Carvalho and Chamberlen, *supra* note 64, at 225.

[68]H. Carvalho and A. Chamberlen, *Questioning Punishment* (2023); H. Carvalho and A. Chamberlen, 'Questioning our Need for Punishment', (2024) 112(1) *The Philosopher* 38.

[69]Ibid.

[70]Similarly, B. Sander, 'The Anti-Impunity Mindset', in M. Bergsmo et al. (eds.), *Power in International Criminal Justice* (2020), 325.

[71]The concept of 'culture of impunity' is long-standing in relation to Israel-Palestine. See B'Tselem, 'Rules of Engagement and Lack of Accountability Result in Culture of Impunity for Palestinian Civilian Deaths', 24 November 2004, available at www.btselem.org/press_releases/20041124; H. Khoury-Bisharat, 'Israel and the Culture of Impunity', *Adalah's Newsletter*, June 2007, available at www.adalah.org/uploads/oldfiles/newsletter/eng/jun07/ar1.pdf.

https://doi.org/10.1017/S0922156525100460 Published online by Cambridge University Press

pitfalls of the paradigm in the context of ongoing atrocities in Gaza/Palestine: in particular, that it gives states an undue benefit of the doubt; that it decontextualizes, individualizes, and exceptionalizes atrocities; that it monopolizes discourses of accountability and condemnation, while sanitizing the suppression of dissenting voices; and that it lends legitimacy to retaliatory impulses. We conclude that, especially when examined in the context of ongoing atrocities such as those occurring in Gaza/Palestine, the penal accountability paradigm is shown to undermine the 'never again' promise out of which it emerged.

4.1 Giving states the benefit of the doubt

The first way in which the centring of punishment as the justice norm harms the 'never again' promise relates to its distorting implications for determining state responsibility for atrocities. The distortion involved is twofold: first, an emphasis on penal accountability equates state wrongs with criminal wrongs, thereby demanding a level of culpability that states can easily disavow;[72] second, the penal accountability paradigm raises the evidentiary threshold for holding state authorities accountable to a criminal or criminal-like standard.[73]

The notion that the most serious violations of international law are necessarily *criminal* is evidenced across an array of international legal instruments and authoritative pronouncements, even when these do not directly pertain to (international) criminal law. The Convention on the *Prevention* and Punishment of the Crime of Genocide (emphasis added) – the treaty that perhaps most exemplifies the 'never again' promise – places penal accountability at its centre and constructs genocide in strictly criminal(-like) terms.[74] The Convention's definition of 'the crime of' genocide involves a precise *actus reus* and *mens rea*,[75] with the latter encompassing a very demanding 'threshold' of 'genocidal intent'.[76] The consequence of this is that a criminal-law-styled understanding of genocide dominates the international legal application of the concept even beyond the criminal law context. The jurisprudence of the ICJ on *state* responsibility for genocide, building on the case law of international criminal tribunals, confirms that the existence of an 'intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such' under Article 2 of the Convention requires evidence of either a 'general plan to this effect' or 'a pattern of conduct' if this is the only reasonable inference that can be drawn therefrom.[77] This understanding has been developed by largely aligning the standard for determining state responsibility for the *state wrong* of genocide with the *actus reus* and *mens rea* that shapes individual criminal responsibility for the *crime* of genocide.[78] This alignment suggests a notional one-track state of mind. In conditioning the finding of genocide on a criminal *dolus specialis*, the ICJ's existing jurisprudence appears to imply that the systematic devaluation of Palestinian life and personhood by Israeli authorities, extensively exhibited and documented both before and during the Gaza offensive,[79] may not in itself meet the

[72]The issue of (mis)alignment between international criminal law and human rights law was potently captured in D. Robinson, 'The Identity Crisis of International Criminal Law', (2008)21 LJIL 925.

[73]See Mavronicola, *supra* note 11.

[74]1948 Convention on the Prevention and Punishment of the Crime of Genocide (Genocide Convention), 78 UNTS 227, Art. 1.

[75]Ibid., Art. 2.

[76]N. Sultany, 'A Threshold Crossed: On Genocidal Intent and the Duty to Prevent Genocide in Palestine', (2024) *Journal of Genocide Research* 1.

[77]*Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia)*, Judgment of 3 February 2015, [2015] ICJ Rep. 3, Para. 148; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment of 26 February 2007, [2007] ICJ Rep 43, Para. 373.

[78]K. Aquilina and K. Mulaj, 'Limitations in attributing state responsibility under the Genocide Convention', (2018) 17(1) *Journal of Human Rights* 123.

[79]Amnesty International, *'You Feel Like You Are Subhuman': Israel's Genocide Against Palestinians in Gaza* (2024), at 33–4.

https://doi.org/10.1017/S0922156525100460 Published online by Cambridge University Press

threshold of genocidal intent.[80] Given the ICJ's limited examination of genocidal intent in its provisional measures judgments, and its finding that Palestinians' rights under the Genocide Convention are plausibly engaged and that they face a real and imminent risk of irreparable prejudice,[81] we remain hopeful that the Court may depart from its existing jurisprudence on genocidal intent in its assessment on the merits.

The conflation of state responsibility for serious wrongdoing under international law with (international) criminal liability can also have significant evidentiary implications. The belief that determining *state* responsibility for genocide requires proving genocidal act(s) and intent through 'fully conclusive evidence' – akin to the *criminal law* standard of 'beyond reasonable doubt' – exemplifies this point.[82] This demanding evidentiary approach, coupled with the *dolus specialis* attached in substantive criminal law terms to genocide, played a significant role in the ICJ's conclusion in relation to the allegations of genocide made by Bosnia and Herzegovina against Serbia and Montenegro. Although the ICJ did establish that the acts committed in Srebrenica in July 1995 constituted genocide,[83] regarding other allegations, it found 'that it has not been conclusively established that those atrocities, although they too may amount to war crimes and crimes against humanity, were committed with the specific intent (*dolus specialis*) to destroy . . . required for a finding that genocide has been perpetrated'.[84]

While the ICJ's majority judgment on provisional measures in *South Africa* v. *Israel* shows a readiness to find relevant rights under the Genocide Convention to be plausibly engaged and a real and imminent risk of irreparable prejudice to those rights,[85] some Separate or Dissenting Opinions employ a high standard of proof to deny plausibility and provisional measures. This is even though the ICJ's case concerns state responsibility, not criminal liability. Judge Barak, for example, stresses the absence of proof of genocidal acts and intent by comparing the evidence provided in the case to the 'meticulous collection of evidence over two years' informing the *Gambia* v. *Myanmar* provisional measures judgment.[86] Irrespective of how the ICJ's substantive and evidentiary stance crystallizes in its ultimate conclusions on the allegations of genocide in *South Africa* v. *Israel*, the ramifications of the criminal(-like) standards being invoked reach beyond this specific judicial context.

In particular, a high evidentiary standard is implicitly or explicitly adopted where key institutional actors refrain from taking a clear stance on ongoing atrocities and instead call for 'criminal investigations' to deliver conclusive evidence of relevant legal infractions.[87] The

[80]Yet there are scholars, independent experts, and civil society groups whose analysis suggests that genocide has been committed, and that the threshold of genocidal intent has been crossed here. See ibid; F. Albanese, 'Anatomy of a Genocide': Report of the Special Rapporteur on the Situation of Human Rights in the Palestinian Territories Occupied Since 1967, Francesca Albanese', UN Doc. A/HRC/55/73 (2024); F. Albanese, 'Genocide as Colonial Erasure': Report of the Special Rapporteur on the Situation of Human Rights in the Palestinian Territories Occupied Since 1967, Francesca Albanese, UN Doc. A/79/384 (2024); see Sultany, *supra* note 76.

[81]*Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (South Africa v. Israel)*, Order of 26 January 2024, [2024] ICJ Rep. 3, Paras. 60–74.

[82]See *Bosnia and Herzegovina v. Serbia and Montenegro*, *supra* note 77, Paras. 209, 319; see the discussion in A. Gattini, 'Evidentiary Issues in the ICJ's Genocide Judgment', (2007) 5(4) *Journal of International Criminal Justice* 889.

[83]See *Bosnia and Herzegovina v. Serbia and Montenegro*, *supra* note 77, Para. 297.

[84]Ibid., Para. 319.

[85]See *South Africa v. Israel*, *supra* note 81, Para. 74.

[86]Ibid. (Judge *ad hoc* Barak, Separate Opinion), Para. 34, citing *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar)*, Provisional Measures, Order of 23 January 2020, [2020] ICJ Reports 3, at 69, Para. 55.

[87]See the recent open letter from Palestinian human rights organizations to the UN Special Rapporteur on Torture: Al-Haq et al., 'Open Letter to Dr. Edwards on the Suspension of Engagement with the Mandate of the UN Special Rapporteur on Torture', 18 December 2024, available at www.alhaq.org/advocacy/25712.html. The emphasis on criminal accountability is evident in various statements by the Special Rapporteur: United Nations, 'UN Experts Call for Full and Independent Investigations into All Crimes Committed in Israel and the Occupied Palestinian Territory', 27 November 2023, available at www.ohchr.org/en/press-releases/2023/11/un-experts-call-full-and-independent-investigations-all-crimes-committed;

https://doi.org/10.1017/S0922156525100460 Published online by Cambridge University Press

expectation of obtaining such evidence during a large-scale aerial and ground offensive in densely populated areas inflicting massive destruction is deeply questionable. More importantly, the requirement that such an evidentiary standard be met is incompatible with the imperative of *preventing* genocide and other atrocities (including war crimes and crimes against humanity), an imperative that is quite distinct from their *ex post facto* forensic identification.[88]

The implications of this distortion extend beyond the juridical or quasi-juridical domain to the broader political and public sphere. 'We won't know if Israel has committed war crimes until the end of the conflict'[89] is an argument that has surfaced in various forms and been implicit in many political figures' simultaneous support for Israel and generic invocations of the imperative of adhering to international law, which fall short of stating that many of the red lines of international law have already and demonstrably been crossed. Even as several UN actors, journalists, and human rights organizations have reported substantial evidence of widespread atrocities, including the systematic killing of civilians, subjection to torture, and the destruction and looting of people's homes,[90] many politicians and commentators have insisted we are to reserve judgement unless or until serious violations are established *ex post facto* and to something approaching the penal standard of beyond reasonable doubt.[91]

Moreover, reliance on criminal law standards to dilute expectations on Israel to comply strictly with its international obligations has abounded. In one remarkable case, on 20 October 2023, well into Israel's mass bombing of Gaza, two prominent UK legal figures argued in a letter to *The Times*: 'criminal law understands that if people, in moments of unexpected anguish, do only what they believe is necessary to protect themselves from harm, this is the best evidence a jury can have that they are acting in lawful self-defence. What stands for people stands also for nations.'[92] To date, in spite of Israel's 'eliminationist conduct of hostilities', as Francesca Albanese describes it,[93] many have made similar arguments to question or vehemently deny that said conduct amounts to genocide, often relying on invocations of the high 'threshold' created by the Genocide Convention and its judicial interpretation.[94]

All of this shows the perniciousness of the penal accountability paradigm, which, in creating a sense of alignment between (exceptionally grave) criminal wrong-doing and state-wrongdoing, treats the state with the presumption of innocence that is afforded to the individual under penal standards, instead of with the scrutiny and stringency warranted by the coercive and military

A.J. Edwards, 'Statement by the UN Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment on One-Year Anniversary of the October 7th Attacks', 7 October 2024, available at www.un.org/unispal/document/statement-by-special-rapporteur-on-torture-07oct24/.

[88]The issue of prevention came into sharp relief in *Nicaragua v. Germany*, following the request for provisional measures to end Germany's supply of military equipment to Israel. The ICJ reminded Germany of its obligations to prevent genocide while finding that 'the circumstances are not such as to require . . . provisional measures': *Alleged Breaches of Certain International Obligations in respect of the Occupied Palestinian Territory (Nicaragua v. Germany)*, Order of 30 April 2024, [2024] ICJ Rep. 560, Paras 20–5.

[89]G. Lee, '"We Won't Know if Israel Has committed War Crimes until End of Conflict," Expert Says', *France 24*, 9 November 2023, available at www.france24.com/en/tv-shows/perspective/20231109-we-won-t-know-if-israel-has-committed-war-crimes-until-end-of-conflict-expert-says.

[90]See Albanese, 'Anatomy of a Genocide', *supra* note 80.

[91]E.g., K. Stacey and J. Grierson, 'Keir Starmer Cautions Israel but Refuses to Back Calls for Ceasefire', *The Guardian*, 31 October 2023, available at www.theguardian.com/politics/2023/oct/31/keir-starmer-israel-hamas-ceasefire-may-risk-further-violence; B.L. Cox, 'In Defence of Doctrinal Assessments: Proportionality and the 31 October Attack on the Jabalia Refugee Camp', *EJIL:Talk!*, 10 November 2023, available at www.ejiltalk.org/in-defence-of-doctrinal-assessments-proportionality-and-the-31-october-attack-on-the-jabalia-refugee-camp.

[92]Lord Macdonald and Lord Pannick, 'Times Letters: Israel's Military Response to Hamas Attacks', *The Times*, 23 October 2023, available at www.thetimes.com/uk/healthcare/article/times-letters-israels-military-response-to-hamas-attacks-5r2qzzntl.

[93]See Albanese, 'Anatomy of a Genocide', *supra* note 80, Paras. 57, 94.

[94]S. Bakumenko, 'Irrefutable Evidence for Unspeakable Crimes? The Role of the Written Order in Proving and Denying Genocide', *Just Security*, 13 May 2024, available at www.justsecurity.org/95558/genocide-denial-evidence-written-order/.

https://doi.org/10.1017/S0922156525100460 Published online by Cambridge University Press

power the state can wield. The paradigm functions in this way not just in the hands of those appropriating it to shield particular states – such as Israel – from criticism, sanction, or impediment, but also in (nominally neutral) legal and political analysis of ongoing events. As events unfold and key figures are increasingly called upon to make critical decisions as to whether to facilitate, withhold support for, or condemn and oppose the ongoing military campaign (most notably, whether to continue delivering weapons to Israel), the penal accountability paradigm creates both substantive and evidentiary distortions that operate to give the state of Israel the benefit of the doubt. By prioritizing penal standards, this paradigm prompts many to 'reserve judgement' or presume innocence, thereby effectively sanctifying inaction towards, or active facilitation of, ongoing atrocities.

4.2 Decontextualizing, individualizing, and exceptionalizing atrocities

An understanding of punishment as justice also harms the 'never again' promise because the penal accountability paradigm tends to reduce atrocities to extraordinary events stemming from the evil inclinations of (a few) bad actors. In so doing, it paints a distorted picture of reality and obscures elements that are crucial to both repair and prevention.[95] This is particularly harmful in the context of ongoing atrocities.

Criminal law promotes a particular understanding of the reality where atrocities unfold that is instrumental to the primary purpose of the criminal trial: establishing whether the specific individuals that are being tried bear legal responsibility for the specific actions that are legally defined as crimes. This means that, by design, criminal law limits the scope and depth of who and what is investigated and proven regarding atrocities. The 'truth' uncovered through the criminal process is inevitably a partial picture of the reality, one that prioritizes the actions of individual agents that have been proscribed as crimes and tends to dismiss everything that is not criminalized and cannot be correlated (under particular standards of causation and proof and strict evidentiary rules) to the criminal actions of specific individuals.[96] Criminal trials work this way for valid reasons, including safeguarding individuals against unwarranted criminalization and upholding principles of autonomy, fault, and individual responsibility.[97] However, this limited and rather simple understanding of reality becomes problematic in the context of the collective commission and/or facilitation of atrocity,[98] and perhaps even more problematic when it leaves the courtroom and dominates broader discussions and strategies related to responding to atrocities.

The penal accountability paradigm tends to emphasize the direct contribution of individual perpetrators, often perceived or cast as (uniquely) evil criminal actors. This focus can obscure the context in which atrocities occur. When UN Secretary-General António Guterres remarked that Hamas's attack on Israel 'did not happen in a vacuum',[99] Israeli leaders and other commentators

[95]M. Drumbl, *Atrocity, Punishment, and International Law* (2007), Ch. 8; M. Koskenniemi, 'Between Impunity and Show Trials', (2002) 6 *Max Planck Yearbook of United Nations Law* 1; G. Simpson, 'Men and Abstract Entities: Individual Responsibility and Collective Guilt in International Criminal Law', in A. Nollkaemper and H. van der Wilt (eds.), *System Criminality in International Law* (2009), 69 at 93-100.

[96]L. Douglas, 'Truth and Justice in Atrocity Trials', in W.A. Schabas (ed.), *The Cambridge Companion to International Criminal Law* (2015), 34. On criminal trials' limitations in uncovering historical truth, H. Arendt, *Eichmann in Jerusalem: A Report on the Banality of Evil* (Penguin, 2006).

[97]J. Horder, *Ashworth's Principles of Criminal Law* (2022), Ch 3.

[98]M. Drumbl, 'Collective Violence and Individual Punishment: The Criminality of Mass Atrocity', (2005) 99 *Northwestern University Law Review* 539.

[99]R. Carroll, 'UN's António Guterres Calls for Immediate Ceasefire to End "Epic Suffering" in Gaza', *The Guardian*, 25 October 2023, available at www.theguardian.com/world/2023/oct/24/un-calls-for-immediate-ceasefire-to-end-epic-suffering-in-gaza.

https://doi.org/10.1017/S0922156525100460 Published online by Cambridge University Press

accused him of downplaying Hamas's unjustifiable attacks or blaming Israel for them.[100] It is the penal accountability paradigm that promotes the idea that contextualization reduces perpetrators' responsibility and should be avoided. The idea of contextualization amounting to exculpation draws from the typical criminal process, which chiefly prioritizes a linear understanding of causation that foregrounds the direct contribution of individual agents while sidelining the contextual factors that create opportunities for, authorize, legitimize, and permit offences.[101] In many domestic criminal justice systems, the primary moment when a broader contextual lens is adopted is at sentencing, where context serves not to explain (sociologically) why the crime has been committed but often to mitigate the penalty. While international criminal law does enable the examination of a wider array of factors than might be the case in most domestic criminal trials (allowing certain forms of contextualization earlier than sentencing through, for instance, the structure of crime categories, modes of liability, or even defence arguments attempting to incorporate broader background factors),[102] it nonetheless tends towards what has been termed a 'selective contextualisation'.[103] Consequently, international criminal law maintains a 'narrow decontextualized conception of responsibility that risks masking the collective dimensions of mass atrocities behind the depoliticized veil of the individuals under prosecution'.[104] This way, the penal accountability paradigm not only risks removing from the picture Israel's occupation and the prolonged suffering of Palestinians, but also frames invocations of this context as apologia for the 7 October attacks. The more horrific and unjustifiable the atrocities, the greater the risk of context being dismissed, on the assumption that its consideration would convey the message that the atrocities are not as wrongful as they should be deemed to be.[105]

The decontextualization brought about by the criminal process is therefore accompanied by a *delegitimization of contextualization* in the wider legal and political arena. Yet extensive study of phenomena such as torture and genocide has made it clear that the context in which atrocities take place is key to understanding the occurrence of such events and ensuring their non-recurrence.[106] The promise of 'never again' demands engagement with the institutional, systemic, and structural factors – including attitudes, policies, and practices of othering[107] and dehumanization[108] – that shape such grave wrongdoing.

Phenomena that are individualized and stripped of context are also often treated as 'exceptional' events – as aberrations from the 'norm' or as the work of a 'few bad apples', while the poisoned 'orchards'[109] and the socio-economic and political ecosystems that produce the poison are disregarded.[110] This exceptionalization, which is not only shaped by but itself often drives dynamics of individualization and decontextualization, has at least three implications.

[100]A. Teibel, 'Israel Accuses UN Chief of Justifying Terrorism for Saying Hamas Attack "Didn't Happen in a Vacuum"', *AP News*, 26 October 2023, available at apnews.com/article/guterres-vacuum-cohen-erdan-justification-terrorism-47732bba62e2b1e9093bb76159ce236a.

[101]A. Norrie, *Crime, Reason and History: A Critical Introduction to Criminal Law* (2014), at 173.

[102]Consider, for example, the attempts to bring wider childhood context under the defence of duress in the *Ongwen* case at the ICC. See Rigney, *supra* note 11, at 221–8. Broader contextualization can also occur through the contextual elements required for crimes against humanity or the collective elements inherent in certain modes of liability.

[103]This 'selective contextualisation' occurs through specific legal mechanisms that structure how context is admitted and understood within the trial framework. See Sander, *supra* note 35, at 47–8, 311–12.

[104]M. Burgis-Kasthala and B. Sander, 'Contemporary International Criminal Law After Critique: Towards Decolonial and Abolitionist (Dis-)Engagement in an Era of Anti-Impunity' (2024) 22(1) *Journal of International Criminal Justice* 127, at 132. See further Sander, *supra* note 35, Ch. 6; see Engle, *supra* note 11, at 1120–1.

[105]See Celermajer, *supra* note 39, at 13.

[106]Ibid.; S. McLoughlin, *Mass Atrocities, Risk and Resilience: Rethinking Prevention* (2015).

[107]N. Mavronicola, 'Torture and Othering', in B.J. Goold and L. Lazarus (eds.), *Security and Human Rights* (2019), 27.

[108]D. Livingstone Smith, *Less Than Human: Why We Demean, Enslave, and Exterminate Others* (2012).

[109]M. Punch, 'Rotten Orchards: "Pestilence", Police Misconduct and System Failure', (2003) 13 *Policing and Society* 171.

[110]See Celermajer, *supra* note 39, at 9.

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First, it reinforces the idea that allegations of atrocities such as 'genocide' should not 'be thrown around lightly', as in the words of US National Security Council spokesman John Kirby.[111] This perspective is both factually and normatively problematic. It disregards that, from a historical perspective, genocide is 'not an anomaly or singular evil that interrupts intermittently the normal flow of human history'.[112] As Raphael Lemkin noted, '[t]he historical analysis is designed to prove that genocide is not an exceptional phenomenon, but that it occurs in intergroup relations with a certain regularity like homicide takes place in relations between individuals'.[113] Most significantly, framing genocide as exceptional discourages pronouncements that condemn and seek to end ongoing harm. Yet the legal (and political) concept of genocide is only effective and true to its 'never again' premise if it can be invoked in real-time, either when genocidal behaviour is imminent or can be argued to be occurring, thus activating its preventive potential.

Second, the exceptionalization of atrocities conjures images of monstrous evil and misses the banality of evil[114] – particularly, the circumstances where grave wrongdoing becomes 'accepted, routinised, and implemented without moral revulsion and political indignation and resistance'.[115] This perspective disproportionately emphasizes extreme and singular atrocities, diverting attention from patterns or slower forms of violence, discrimination, dispossession, and the repression of dissent, as experienced by Palestinians for decades.[116] Consequently, the ongoing apartheid against Palestinians in East Jerusalem and the rest of the West Bank, no matter how much suffering it keeps producing and no matter what might be its connections to the systematic devaluation of Palestinian life exemplified in the mass slaughter in Gaza, becomes peripheral or at worst normalized. It is notable, for example, that, in the ICC OTP's applications for arrest warrants, there is no mention of the occupation or other aspects of Israel's system of apartheid against Palestinians.

Third, viewing atrocities as exceptional events favours ideal(ized) victims,[117] such as unarmed women and children, and marginalizes those deemed less ideal, notably men or teenage boys.[118] Singling out the killing of Palestinian women and children can be a strategy to underscore the indiscriminate nature of Israel's offensive which mostly impacts 'the most vulnerable'.[119] However, widespread reliance on ideal victim narratives can implicitly 'allow' the Israeli military to treat every Palestinian who is not a woman or a child as a presumed enemy combatant. This is exemplified in Israel preventing men of 'military age' from evacuating Rafah before the planned Israeli offensive on the southern Gaza border city.[120] The other side of the coin of the ideal(ized) victims is the 'bad apple' perpetrators. The penal accountability paradigm treats atrocities as

[111]G. Imray, 'Genocide Case against Israel: Where Does the Rest of the World Stand on the Momentous Allegations?', *AP News*, 14 January 2024, available at apnews.com/article/genocide-israel-palestinians-gaza-court-fbd7fe4af10b542a1a4e2c7563029bfb.

[112]M. Abed, 'The Concept of Genocide Reconsidered', (2015) 41(2) *Social Theory and Practice* 328, at 333–4.

[113]Lemkin to Paul Fejos, Viking Fund, 22 July 1948, American Jewish Historical Society, Lemkin Collection, P-154, Box 8, Folder 10, cited in A. Dirk Moses, 'Genocide', (2013) 55 *Australian Humanities Review* 23, at 34.

[114]See Arendt, *supra* note 96.

[115]J. Butler, 'Hannah Arendt's Challenge to Adolf Eichmann', *The Guardian*, 29 August 2011, available at www.theguardian.com/commentisfree/2011/aug/29/hannah-arendt-adolf-eichmann-banality-of-evil. See also V. Nesiah, 'The Trials of History: Losing Justice in the Monstrous and the Banal', in R. Buchanan and P. Zumbansen (eds.), *Law in Transition: Human Rights, Development and Transitional Justice* (2014), 289.

[116]Amnesty International, *Israel's Apartheid against Palestinians: Cruel System of Domination and Crime against Humanity* (2022), available at www.amnesty.org/en/documents/mde15/5141/2022/en/. On missing these aspects of the picture, see R. DeFalco, *Invisible Atrocities: The Aesthetic Biases of International Criminal Justice* (2022).

[117]N. Christie, 'The Ideal Victim', in E. Abdel Fattah (ed.), *From Crime Policy to Victim Policy: Reorienting the Justice System* (1986), 17.

[118]C. Schwöbel-Patel, 'The "Ideal" Victim of International Criminal Law', (2018) 29(3) EJIL 703.

[119]'Bombardment, Displacement and Collapsed Health Care: A Crisis for Women and Girls in Gaza', *UNRWA*, 23 January 2024, available at www.unrwa.org/newsroom/features/bombardment-displacement-and-collapsed-health-care-crisis-women-and-girls-gaza.

[120]S. Mathews, 'Israel Planning Ring of Checkpoints to Prevent Men from Fleeing Rafah, Source Says', *Middle East Eye*, 29 April 2024, available at www.middleeasteye.net/news/exclusive-israel-planning-ring-checkpoints-prevent-men-fleeing-rafah.

https://doi.org/10.1017/S0922156525100460 Published online by Cambridge University Press

constituted by individually identifiable villains committing uniquely malevolent acts, with the effect of absolving the broader system with regard to everything else – including creating and maintaining the conditions in which such 'villains' freely commit abuses.[121] The penal accountability paradigm's absolution of the systems and structures of abuse has been put to work by several statesmen – it is exemplified in the US, UK, and EU sanctions against extremist Israeli settlers who violently attacked Palestinians in the West Bank.[122] By focusing on the most visible individual abusers inflicting direct interpersonal violence, the decisions by Western governments effectively authorized whatever they did not sanction.[123] As a result, not only is more diffuse, unidentified or unidentifiable settler violence in the West Bank legitimized, but Israel's broader occupation and system of colonial dispossession is also re-inscribed.

Separately and cumulatively, the decontextualizing, individualizing, and exceptionalizing tendencies we have identified contribute to both deliberate and inadvertent distortions and obfuscations of the realities of dehumanization, dispossession, and structural violence underpinning Israel's military campaign in Gaza. The marginalization and sanitization of these realities mean that, at best, efforts to pursue penal accountability address only the tip of the iceberg. At worst, these tendencies allow states committing atrocities to invoke exceptionalist narratives and make decontextualized appeals to the 'plausible legality'[124] of the very atrocities they are committing.

4.3 Monopolizing discourses of accountability and condemnation, while sanitizing the suppression of dissenting voices

Centring punishment as the path to justice harms the 'never again' promise for a third reason: it tends towards monopolizing or narrowly delineating what are deemed legitimate parameters of accountability and condemnation and framing them in punitive, juridified terms, thereby frustrating the pursuance of other avenues for opposing atrocities.[125] On this account, the costs of prioritizing punishment are not merely opportunity costs in terms of forgone alternatives. Rather, the dominance of punishment distorts and limits our frames of judgement, serving to sanitize or render (many of) us indifferent to the active suppression of dissenting voices.

Perhaps one of the most obvious observations in relation to the penal paradigm is that treating punishment as justice can reduce important discussions regarding violence, oppression and injustice into definitional quibbles over legal – if not penal – terminology. This allows states to shield themselves from allegations of atrocities by turning a broader political and ethical debate into a strictly (criminal) legal one.[126] Israel, for example, can claim that its actions are justified as long as a technical legal argument can be made that they do not meet the legal definition of 'genocide' (notably that 'there is no genocidal intent')[127] or 'war crimes' (maintaining that 'Israel is

[121]S. Marks, 'Apologising for Torture', (2004) 73 *Nordic Journal of International Law* 365, at 384; V. Nesiah, 'Doing History with Impunity', in Engle, Miller, and Davis, *supra* note 5, 95.

[122]'UK Sanctions Extremist Settlers in the West Bank', 12 February 2024, available at www.gov.uk/government/news/uk-sanctions-extremist-settlers-in-the-west-bank; L. O'Carroll and P. Beaumont, 'Extremist Israeli Settlers Hit by EU and US Sanctions', *The Guardian*, 19 April 2024, available at www.theguardian.com/world/2024/apr/19/extremist-israeli-settlers-sanctions-eu-us.

[123]S. Marks, 'Human Rights in Disastrous Times', in Crawford and Koskenniemi, *supra* note 35, 309 at 320.

[124]Term borrowed from R. Sanders, '(Im)plausible Legality: The Rationalisation of Human Rights Abuses in the American "Global War on Terror"', (2011) 15(4) *International Journal of Human Rights* 605. See further R. Sanders, *Plausible Legality: Legal Culture and Political Imperative in the Global War on Terror* (2018).

[125]S. Nouwen and W. Werner, 'Monopolizing Global Justice: International Criminal Law as Challenge to Human Diversity', (2015) 13 *Journal of International Criminal Justice* 157.

[126]M. Velickovic, 'International Law and Failure in the Context of Gaza', *CLT*, 2 April 2024, available at criticallegalthinking.com/2024/04/02/international-law-and-failure-in-the-context-of-gaza.

[127]E. Mack, 'Israel Is Not Committing Genocide in Gaza', *Haaretz*, 1 November 2023, available at www.haaretz.com/opinion/2023-11-01/ty-article-opinion/.premium/israel-is-not-committing-genocide-in-gaza/0000018b-8785-d055-afbf-b7a75d450000.

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acting proportionately'),[128] while also *unduly* benefitting from the penal standard of beyond reasonable doubt. Here, violence and oppression become matters of technical legal assessment, rather than matters of political and ethical evaluation.[129] The trouble with this goes beyond the shielding of the state behind 'plausible legality', however.

While the penal accountability paradigm does not necessarily exclude other forms of prevention and condemnation, the emphasis on punishment sets the 'justice agenda' and, by implication, marginalizes or even delegitimizes alternative responses. By foregrounding punishment, the penal accountability paradigm can tend towards limiting the scope of legitimate condemnation to the penal frame and the legal process, to the detriment of other forms of mobilization seeking to prevent further atrocities, express solidarity with those dehumanized and subjected to mass slaughter, and achieve justice broadly conceived.

This has enormous consequences for political and public engagement with unfolding events, as witnessed in relation to events in Gaza. When the UK Green Party published and disseminated information on how UK members of Parliament voted on a ceasefire request, political commentators deplored the move as a form of intimidation, departing from legitimate contestation.[130] Even before recent events, the movement for Boycott, Divestment, and Sanctions (BDS) against Israel had already been emblematic of a potent but widely delegitimized form of mobilization to prevent further abuses, due to its targeting of the socio-economic structures sustaining Israel's systems of oppression and its refusal to limit its ambition to the narrow boundaries of legal demands.[131] In February 2024, the UK House of Commons approved a bill that would prevent public bodies (including universities) from making any boycott, divestment or sanctions decisions based on their disapproval of policies or conduct by foreign authorities (the bill was carried over from the previous Parliament and is currently at Committee Stage in the House of Lords).[132] This bill mirrors legislation adopted in several US states over the past few years.[133] When a wave of protests expressing solidarity with the Palestinian people spread across US and European university campuses between April and May 2024, administrators responded with bans, (violent) police repression, criminalization, and sanctions, often arguing that the students' support for BDS made campuses 'unsafe' spaces.[134] In the US, this repression has been notably amplified by the Trump administration, which has pursued measures including arrests, detentions, and orders of deportation against student protesters. The new US administration has also leveraged federal power against universities to (further) restrict protest and constrain, or even dictate, fundamental university policy and practices.[135]

After the ICC Prosecutor announced the applications for arrest warrants, the heightened expectations around this development risked overshadowing the fact that the application of criminal law would not end starvation and human suffering in Gaza – only an immediate ceasefire

[128]A. Ostrovsky, 'Israel Is Acting Proportionately against a Terrorist Enemy', *Politico*, 26 October 2023, available at www.politico.eu/article/israel-acting-proportionately-against-terrorist-enemy-hamas.

[129]Cf. T. Kelly, 'What We Talk about When We Talk about Torture', (2011) 2 *Humanity* 327, at 328.

[130]L. Pollock, 'Gaza Ceasefire: Alastair Campbell Targets Greens for List of Labour MPs', *The National*, 19 November 2023, available at www.thenational.scot/news/23933561.gaza-ceasefire-alastair-campbell-targets-greens-list-labour-mps.

[131]N. Thrall, 'BDS: How a Controversial Non-Violent Movement Has Transformed the Israeli-Palestinian Debate', *The Guardian*, 14 August 2018, available at www.theguardian.com/news/2018/aug/14/bds-boycott-divestment-sanctions-movement-transformed-israeli-palestinian-debate.

[132]Economic Activity of Public Bodies (Overseas Matters) Bill 2022-23, 2023-24 (HC Bill 38); 'Guidance: Carrying Over Bills in Parliament', 3 September 2024, available at www.gov.uk/government/publications/carrying-over-bills/carrying-over-bills-in-parliament.

[133]'US: States Use Anti-Boycott Laws to Punish Responsible Businesses', *Human Rights Watch*, 23 April 2019, available at www.hrw.org/news/2019/04/23/us-states-use-anti-boycott-laws-punish-responsible-businesses.

[134]R.D.G. Kelley, 'UCLA's Unholy Alliance', *Boston Review*, 18 May 2024, available at www.bostonreview.net/articles/uclas-unholy-alliance.

[135]See Hellmann, *supra* note 20; M. Goldberg, 'I Can't Believe Anyone Thinks Trump Actually Cares About Antisemitism', *The New York Times*, 28 April 2025, available at www.nytimes.com/2025/04/28/opinion/trump-antisemitism-jews-israel.html.

https://doi.org/10.1017/S0922156525100460 Published online by Cambridge University Press

could achieve that. Moreover, even if the OTP's and ICC's actions do not impede the (prospect of) ceasefire,[136] mobilization around the pursuit of criminal prosecutions carries the risk of drawing disproportionate attention compared to, or even inadvertently marginalizing, other more radical actions pursuing the prevention of further atrocities and expressing solidarity with the Palestinian people, as we will discuss in Section 5. It is true that mobilization around international criminal law in the context of Palestine has run concurrently with engagement with other international legal bodies like the ICJ, as well as various forms of direct action, mass protests, boycott campaigns, and student-led movements across the globe. Nonetheless, even amidst this diverse array of actions, the significant institutional weight and media spotlight afforded to the ICC's high-profile penal process have created a dynamic where demands central to other forms of mobilization – particularly those directly challenging arms flows and other forms of state complicity, and demanding immediate material changes to prevent ongoing harm – have struggled for equivalent traction or have become more susceptible to suppression by powerful actors reluctant to end their facilitation of Israel's atrocities.

The monopolization, or capture, of the debate around accountability and condemnation by a punitive, legalistic framework must be viewed against the backdrop of an ever-growing penal suppression of dissent.[137] Indeed, while the dominance of penal norms in international justice shields Israel from conclusive pronouncements on its 'guilt', this position is inverted in relation to the legitimacy of protests for Palestine.[138] For instance, despite its varied meanings,[139] the slogan 'From the river to the sea, Palestine will be free' is predominantly interpreted by US and European authorities as antisemitic.[140] Similarly, when protesters occupied campuses to protest their universities' involvement in the facilitation of atrocity (including the destruction of Gaza's universities), several academic institutions' senior management opted for police intervention and forced eviction over dialogue.[141] Politicians have called for investigation and expulsions of students and academics expressing solidarity with the Palestinian people, presuming them guilty of violence and antisemitism, despite Jewish students' participation in the protests and physical violence typically arising after police or counter-demonstrator intervention.[142] This trend of criminalizing dissent has been significantly advanced by the Trump administration, which has openly linked pro-Palestinian protests to terrorism and is using federal power and deportation threats as tools for suppression.[143]

[136]A temporary hostages-and-prisoners exchange and ceasefire between Israel and Hamas took effect from 19 January to 18 March 2025, when Israel announced the renewal of military action against Hamas.

[137]'Speaking Out on Gaza/Israel Must Be Allowed: UN Experts', *OHCHR*, 23 November 2023, available at www.ohchr.org/en/press-releases/2023/11/speaking-out-gaza-israel-must-be-allowed-un-experts.

[138]'The Dehumanization of Palestinian Men by Western Media', *Berkeley Political Review*, 20 April 2024, available at bpr.studentorg.berkeley.edu/2024/04/20/the-dehumanization-of-palestinian-men-by-western-media.

[139]F. Marsi, '"From the River to the Sea": What Does the Palestinian Slogan Really Mean?', *Al Jazeera*, 2 November 2023, available at www.aljazeera.com/news/2023/11/2/from-the-river-to-the-sea-what-does-the-palestinian-slogan-really-mean.

[140]D. Boffey, '"From the River to the Sea": Where Does the Slogan Come from and What Does It Mean?', *The Guardian*, 31 October 2023, available at www.theguardian.com/world/2023/oct/31/from-the-river-to-the-sea-where-does-the-slogan-come-from-and-what-does-it-mean-israel-palestine.

[141]J. Epp, 'Campus Protests for Gaza Are Proliferating — And So Is the Repression', *+972 Magazine*, 26 April 2024, available at www.972mag.com/campus-protests-gaza-us-students/; P.E. Ngendakumana, 'Dutch Police Clash with Pro-Palestine Protestors at Amsterdam University', *Politico*, 13 May 2024, available at www.politico.eu/article/dutch-police-steps-in-to-end-pro-palestinian-protest-at-university-of-amsterdam-war-in-gaza.

[142]R. Celikates, K. Koddenbrock, and T. Koloma Beck, 'Attacks on German Campus Protests Fuel Authoritarian Turn', *Jacobin*, 21 May 2024, available at jacobin.com/2024/05/germany-palestine-protest-authoritarianism-universities; A. Angel, 'Campus Protest Crackdowns Claim to Be about Antisemitism – But They're Part of a Rightwing Plan', *The Guardian*, 11 May 2024, available at www.theguardian.com/us-news/article/2024/may/11/us-university-protests-antisemitism-free-speech.

[143]A. Faguy and N. Iqbal, 'Judge Allows Columbia Graduate Mahmoud Khalil's Deportation', *BBC News*, 12 April 2025, available at www.bbc.co.uk/news/articles/cwy0ngd11yzo.

https://doi.org/10.1017/S0922156525100460 Published online by Cambridge University Press

4.4 Lending support to retaliatory impulses

We suggest that there is a fourth way the 'never again' promise is undermined by cementing punishment as justice: the penal accountability paradigm distorts dominant understandings of the international law on the use of force by giving (renewed) legitimacy to retaliatory impulses.

International law permits a range of lawful measures in response to an armed attack, including the use of force in self-defence. Self-defence is generally seen as the primary exception to the prohibition against the use of force under Article 2(4) of the UN Charter and customary international law.[144] However, for a state to lawfully act in self-defence, certain conditions need to be present. The armed attack that gives rise to self-defence needs to be ongoing or, at least, imminent. The circumstances in which an armed attack by non-state actors may lawfully trigger the entitlement to use force in self-defence remain contested.[145] It is, on the other hand, universally accepted that the use of force in self-defence needs to be both necessary and proportionate. Whereas necessity denotes a situation in which non-forcible alternatives are not enough to repel the armed attack, proportionality requires that no more force be used than needed to prevent further attacks.[146] Exceeding these requirements transforms the response into unlawful retaliation. Importantly, collective punishment – including through force – is firmly prohibited under international law.[147]

Without assessing whether Israel was justified in acting in self-defence against Hamas,[148] we highlight a distortion that has taken place within the *discourse* around Israel's military reaction. Mainstream news broadcasters and several political figures have openly embraced retributivist rhetoric around the purpose and character of Israel's military offensive in Gaza despite the conclusive illegality of punitive use of force. A language of 'retaliation' rather than self-defence was employed uncritically and dominated news coverage of Israel's offensive even in the immediate aftermath of the 7 October attacks.[149] At the same time, Israeli politicians adopted punitive and sometimes biblical language to convey the purpose of Israel's offensive in Gaza and galvanize support for it.[150] Some of their most notorious statements made their way to the ICJ's initial provisional measures judgment in *South Africa* v. *Israel* in the context of the Court's determination of the plausibility of genocidal acts being committed against the Palestinians.[151] These retaliatory narratives invoking the acceptability or perceived necessity of collective punishment not only reveal the violent intentions of those who utter them, but also expose the

[144]Cf. A.A. Haque, 'The United Nations Charter at 75: Between Force and Self-Defense — Part Two', *Just Security*, 24 June 2020, available at www.justsecurity.org/70987/the-united-nations-charter-at-75-between-force-and-self-defense-part-two.

[145]E. de Wet, 'The Invocation of the Right to Self-Defence in Response to Armed Attacks Conducted by Armed Groups: Implications for Attribution', (2019) 32 LJIL 91.

[146]Cf. D. Kretzmer, 'The Inherent Right to Self-Defence and Proportionality in Jus Ad Bellum', (2013) 24(1) EJIL 235; M.E. O'Connell, 'Weighing the Cost of War: A Response to Kretzmer's "The Inherent Right to Self-Defence and Proportionality in Jus Ad Bellum"', *EJIL: Talk!*, 24 April 2013, available at www.ejiltalk.org/weighing-the-cost-of-war-a-response-to-kretzmers-the-inherent-right-to-self-defence-and-proportionality-in-jus-ad-bellum.

[147]1949 Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War, 75 UNTS 287, Art. 33; S. Darcy, 'The Prohibition of Collective Punishment', in A. Clapham, P. Gaeta, and M. Sassòli (eds.), *The 1949 Geneva Conventions: A Commentary* (2015), 1155.

[148]Cf. R. Wilde, 'Israel's War in Gaza is Not a Valid Act of Self-Defence in International Law', *Opinio Juris*, 9 November 2023, available at opiniojuris.org/2023/11/09/israels-war-in-gaza-is-not-a-valid-act-of-self-defence-in-international-law; M. Milanovic, 'Does Israel Have the Right to Defend Itself?', *EJIL:Talk*, 14 November 2023, available at www.ejiltalk.org/does-israel-have-the-right-to-defend-itself.

[149]E.g., J. Saul and N. Al-Mughrabi, 'After Hamas Attack, Israeli Retaliation Tactics Raise Gaza Invasion Fears', *Reuters*, 11 October 2023, available at www.reuters.com/world/middle-east/after-hamas-attack-israeli-retaliation-tactics-raise-gaza-invasion-fears-2023-10-10/; A. Martínez and L. Fadel, 'Gazans Are under Siege as Israel Retaliates for the Massive Hamas Attack', *NPR*, 12 October 2023, available at www.npr.org/2023/10/12/1205357387/gazans-are-under-siege-as-israel-retaliates-for-the-massive-hamas-attack.

[150]'Netanyahu's References to Violent Biblical Passages Raise Alarm among Critics', *NPR*, 7 November 2023, available at www.npr.org/2023/11/07/1211133201/netanyahus-references-to-violent-biblical-passages-raise-alarm-among-critics.

[151]See *South Africa v. Israel*, *supra* note 81, Paras. 51–5.

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violence at the heart of the impulse to punish.[152] More recently, in response to the at best questionable legality of Israeli airstrikes killing scores of civilians in Lebanon, Joe Biden referred to the killing of Hassan Nasrallah through such an airstrike as a 'measure of justice for his many victims'.[153]

Over time, even commentators advocating for a ceasefire have employed eye-for-an-eye-style penal proportionality rhetoric to counsel against further killings – essentially embracing penal proportionality reasoning and then tentatively suggesting that punishment has been exacted (*enough people have been killed in retaliation*). For example, at a point where Israel had already killed tens of thousands, H.D.S. Greenway asked: 'Israel, how many deaths in Gaza are enough?'. The newspaper article continued: 'Retribution for Hamas's Oct. 7 attack was as swift as it was inevitable. But the moral question was and is: How much is enough?'.[154]

Our concern here lies with the power of the penal accountability paradigm, which resides not in its capacity to prevent atrocities, but in its legitimizing and delegitimizing force. We would argue that the penal paradigm's reinforcement of hostile solidarity and punitive impulses lends credence to the instinct for punishment in relation to states' use of force. While the *legality* of punitive slaughter and starvation may be refuted, the extent to which these impulses are embraced by those with the power to inflict, facilitate, or end them is critical to the material *reality* of those subjected to such punishment. For this reason, those of us who do not see punishment as a basis for a 'just' war should be deeply concerned about how far the punishment-as-justice norm appears to legitimize just that.

4.5 Harming the 'never again' promise

The consequence of what we have outlined above is that the penal accountability paradigm, in pervading relevant discourse and in being employed by various actors for different objectives, can undermine the promise from which it emerged. Its costs can be counted in how it can constrain judgement, obscure important dimensions of wrongdoing, and monopolize 'acceptable' accountability pathways for confronting and opposing atrocities. More insidiously, we have raised the possibility that the penal accountability paradigm not only legitimizes states' penal apparatuses even as they are wielded to suppress dissent, but also lends support to retaliatory impulses that embrace the use of force as a mechanism of collective or indeed individual punishment. What Gaza brings into sharp relief is that the hegemony of penal accountability in the face of atrocities is not just limited and limiting, but also harmful. Insofar as it contributes to a state of affairs where states are given the benefit of the doubt in relation to ongoing abuses, it enables other states (and other powerful entities) to appeal to plausible legality in erring on the side of facilitating atrocity in real-time.

5. Beyond the penal accountability paradigm

Penal norms seem to offer a powerful and, in many ways, universal(izing) pathway to accountability and condemnation. For example, invoking international-criminal-law terminology, such as calling Hamas's or Israel's wrongdoings 'war crimes' and 'crimes against humanity', imbues our condemnations with legal and moral authority. This also allows us to demand intervention from international criminal justice institutions and, at least in respect of the 'indicted' culprits, from state bodies that purport to adhere to the demands of international law. Even critical

[152]On how penal discourses animate the justification and operation of military interventions, see Degenhardt, *supra* note 8.

[153]The White House, 'Statement from President Joe Biden on the Death of Hassan Nasrallah', 28 September 2024, available at bidenwhitehouse.archives.gov/briefing-room/statements-releases/2024/09/28/statement-from-president-joe-biden-on-the-death-of-hassan-nasrallah/.

[154]H.D.S. Greenway, 'Israel, How Many Deaths in Gaza Are Enough?', *The Boston Globe*, 19 December 2023, available at www.bostonglobe.com/2023/12/19/opinion/israel-hamas-gaza-death-toll.

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legal scholars, otherwise cognizant of the limits of the legal form in achieving political emancipation, are tempted to turn to the ICC and attribute its failures (at least prior to the relatively recent arrest warrants) in providing accountability for Palestinian victims to the ICC prosecutor's lack of impartiality.[155] To paraphrase Wendy Brown, this approach treats the ICC – and the broader apparatus underpinning the penal accountability paradigm – 'as if it were not the codification of various dominant social powers, but was, rather, a momentarily misguided parent who forgot her promise to treat all her children the same way'.[156] Positioning penal processes as if they were or could be 'the last resort for victims'[157] of serious wrongdoings risks shifting the attention towards improving and 'working with' what Section 4 has demonstrated to be a deeply-flawed penal accountability paradigm. This shift detracts from exploring, sustaining, and investing in other accountability avenues that already exist or are emerging and more meaningfully address the conditions under which the penal accountability paradigm dispenses partial 'justice' while absolving systems and structures of oppression.

The limitations of confining accountability and condemnation to penal processes, and the urgent need for embracing a different framework for naming, condemning, and opposing ongoing atrocities, are potently evoked by Rabea Eghbariah. In an essay whose publication in the *Harvard Law Review* blog was blocked by the journal's leadership after review and editing had been completed, Eghbariah eloquently identifies the 'inertia of legal academia' in the face of atrocities in Gaza.[158] He writes: 'Clearly, it is much easier to dissect the case law rather than navigate the reality of death. It is much easier to consider genocide in the past tense rather than contend with it in the present. Legal scholars tend to sharpen their pens after the smell of death has dissipated and moral clarity is no longer urgent'.[159] He posits the 'material reality' of genocide for Palestinians in Gaza, and identifies the Nakba – the 'Catastrophe' – as not only a crime or isolated event but as a continuing structure of 'forced fragmentation and cruel domination' and material reality of violence and death.[160]

In this section, we take up Eghbariah's exhortation and propose re-orienting the drive for penal justice towards a richer and materially grounded framework for attaining meaningful protection, accountability, and equality, as well as expressing social solidarity with Palestinians and other oppressed populations. The aspirations and sentiments identified in Section 3 as underpinning the push for punishment must be taken seriously. Rather than justifying the penal accountability paradigm, we see them as inviting us to move beyond the language, tools, and paradigm(s) of penality.

We face a threefold imperative: one of shifting our energies towards alternative words, alternative tools, and alternative paradigms. In other words, we must identify and foreground a language that better captures what is at stake in the face of ongoing atrocities such as those unfolding in Gaza/Palestine; seek more potent, more encompassing and less dignity-endangering tools for ending and preventing atrocities; and pursue a solidarity that is emancipatory and transformative, rather than 'hostile'. We locate much of this alternative vision in existing and emerging activism and advocacy on and for Palestine/Gaza. In contemplating how we can move beyond the penal frame while addressing the drivers that sustain the penal accountability paradigm, we are not attempting to advance, within the confines of this article, a wholesale penal

[155]'Open Letter to the Assembly of State Parties Regarding the ICC Office of the Prosecutor's Engagement with the Situation in Palestine' (TWAILR Open Letter), *TWAILR*, 6 December 2023, available at twailr.com/open-letter-to-the-assembly-of-state-parties-regarding-the-otps-engagement-with-situation-in-palestine.

[156]W. Brown, *Politics Out of History* (2001), at 36.

[157]See TWAILR Open Letter, *supra* note 155.

[158]R. Eghbariah, 'The Ongoing Nakba: Towards a Legal Framework for Palestine', *The Nation*, 21 November 2023, available at www.thenation.com/article/archive/harvard-law-review-gaza-israel-genocide.

[159]Ibid.

[160]Ibid.

https://doi.org/10.1017/S0922156525100460 Published online by Cambridge University Press

abolitionist or carceral abolitionist agenda for international (criminal) law.[161] Rather, we are more modestly aiming to explore how the critical need for accountability, active condemnation, and prevention in situations like Palestine compels us to look beyond the narrow confines of the penal accountability paradigm towards the alternative vocabularies, tools, solidarity practices, and visions of justice already being forged in contemporary advocacy.

5.1 New words

Language is crucial in capturing the essence and wrongfulness of what is described. Naming a certain event with denunciatory language can serve as both recognition of wrongdoing and an expression of condemnation, inviting political opposition. The law has increasingly framed the language in which atrocities are identified and condemned, with terms like 'war crimes', 'crimes against humanity', and 'genocide' becoming prevalent not only in legal contexts but also in political debates, media coverage, and public discourse. While these established legal terms carry significant communicative power and widely understood meaning, as we argue above, legal definitions and judicial (or quasi-judicial) pronouncements centring on these terms can often reduce potentially rich engagements with layers of violence and structures of oppression to quibbles over legal terminology. Ultimately, the law may fail to capture the factual and moral substance of – and thereby fail to *do justice to* – what is taking place.

Attention to the substance of what is being condemned and opposed should lead us to explore alternative language, both within *and* beyond legal confines. Eghbariah recently highlighted the importance of '[g]enerating legal language, and by extension doctrine, to name certain types of oppression' as 'a crucial step toward demanding justice'.[162] He advanced a compelling case for recognizing the Nakba as an independent legal concept that captures the distinctive nature of the violence and 'structure of fragmentation' inflicted on Palestinians from 1948 onwards.[163] Eghbariah argues that, while 'occupation', 'apartheid', and 'genocide' each illuminate crucial aspects of the wrongs committed against the Palestinian people, 'the Nakba framework as an overarching legal concept insists on contending with the totality of the Palestinian condition, one that is greater than the sum of its parts'.[164] He defines the Nakba as both a foundational rupture of violence, displacement and dispossession, and an ongoing structure of fragmentation aimed at minoritizing Palestinians and denying their self-determination.[165] He offers a pathway to remedying the ongoing Nakba through recognition, return, reparations, redistribution, and reconstitution.[166] The framework he proposes is one that we would consider to fall within the domain of transformative justice,[167] seeking both to repair harm and to transform the (unjust) circumstances in which it has occurred, including by 'reformulation of the polity in a way that dismantles the Nakba regime and reconfigures the constitutional design of the system(s) on an egalitarian and democratic basis'.[168]

Eghbariah's intervention is an important call for enriching the legal vocabulary to better do justice to what is at stake. It is also a reminder that we should approach language more expansively and transcend rigid legal frames when we try to make sense of ongoing atrocities in the public domain.

[161]See Rigney, *supra* note 11.
[162]R. Eghbariah, 'Toward Nakba as a Legal Concept', (2024) 124(4) *Columbia Law Review* 887, 968.
[163]Ibid., at 894.
[164]Ibid., at 932.
[165]Ibid., at 972–88.
[166]Ibid., at 990.
[167]P. Gready and S. Robins (eds.), *From Transitional to Transformative Justice* (2019).
[168]See Eghbariah, *supra* note 162, at 990.

https://doi.org/10.1017/S0922156525100460 Published online by Cambridge University Press

5.2 New tools

Within the international *legal* sphere, a variety of accountability mechanisms go beyond the predominantly *ex post facto* model of *enforceability* afforded in the criminal process, engaging (instead or in addition) in continuous and preventive forms of *responsibility* and *answerability*. As we have seen, accountability for atrocities is commonly intended as corrective and remedial action taken after violations occur (enforceability) – predominantly through criminal penalties. However, it also encompasses the respect, protection, and fulfilment of international law's duties and standards (responsibility), as well as processes (judicial or otherwise) where those in authority have their conduct monitored and assessed and where they are called to answer for their actions (answerability).[169]

A key non-penal pathway to addressing ongoing atrocities and preventing future violations is a renewed attention to *state* responsibility (and answerability) under international law. In particular, we would stress three dimensions of state responsibility in relation to atrocities and other serious breaches of international law that warrant closer attention and clearer delineation: (i) substantive standards on state responsibility, as distinct from individual criminal conduct standards, in terms of both the character of conduct involved and the degree of involvement required; (ii) evidentiary standards for determining state responsibility that are distinct from (and less onerous than) the standards applicable to determining individual criminal liability; and (iii) the obligations of third states (and other entities) in response to a state's violations of international law.

In particular, more can be done to clarify the substantive parameters of key norms related to atrocities and other serious breaches of international law, including peremptory norms, as they pertain to state responsibility and answerability (through juridical or other channels) rather than individual criminal liability.[170] Evidentiary standards for state accountability can be clarified and delineated so as to approach states as entities that are clearly distinct from an individual criminal defendant; such approaches should uphold the 'never again' promise rather than a 'presumption of innocence' for states, and should accordingly prioritize the prompt identification and prevention of atrocities over giving states the benefit of the doubt (including by means of an onerous standard of proof in respect of (ongoing or past) atrocities). Additionally, more focus should be placed on clarifying the legal obligations of third states and other entities regarding non-recognition, non-facilitation, prevention, and cessation of atrocities and serious violations of international law, and unlocking the political mobilization necessary to fulfil them.

In a recent Advisory Opinion, the ICJ established that Israel's occupation of the Occupied Palestinian Territories (OPT) and its policies and practices within the OPT violate several international law norms,[171] requiring Israel to withdraw from the OPT.[172] The Court also stipulated that 'all States are under an obligation not to recognize as legal the situation arising from the unlawful presence of Israel in the Occupied Palestinian Territory' and 'an obligation not to render aid or assistance in maintaining the situation created by Israel's illegal presence in the Occupied Palestinian Territory'.[173] While underlining that the duty of non-recognition applies also to the UN, the ICJ indicated that 'it is for the General Assembly and the Security Council to consider what further action is required to put an end to the illegal presence of Israel, taking into account the present Advisory Opinion'.[174] In our view, the Advisory Opinion serves as a potent

[169]OHCHR, Who Will Be Accountable? Human Rights and the Post-2015 Development Agenda, HR/PUB/13/1 (2013), at 10.

[170]On issues arising about state responsibility for genocide, W. Schabas, *Genocide in International Law: The Crime of Crimes* (2009), Ch. 9; see Aquilina and Mulaj, *supra* note 78.

[171]*Legal Consequences arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem*, Advisory Opinion of 19 July 2024, Paras. 103–264.

[172]Ibid., Para. 267.

[173]Ibid., Para. 279.

[174]Ibid., Paras. 280–1.

https://doi.org/10.1017/S0922156525100460 Published online by Cambridge University Press

reminder of the standards to which state authorities should be held under international law and the significance of holding them accountable accordingly. The obligation on third states not to support Israel's unlawful occupation is legally significant in itself and can be mobilized juridically or otherwise to prevent states from facilitating atrocities and other serious violations of international law by Israel.[175]

There is more scope for elucidating other states' obligations regarding a state's ongoing, grave violations of international law than what is offered in the ICJ Advisory Opinion. Indeed, the numerous Separate Opinions and Declarations appended to the Opinion (14) and growing legal commentary highlight various ambiguities and uncertainties. For example, although the ICJ found a violation of Article 3 of the Convention on the Elimination of Racial Discrimination, it did not use the term 'apartheid' or identify its constitutive elements and wider legal significance.[176] In addition, the ICJ's finding that 'Israel's withdrawal from the Gaza Strip has not entirely released it of its obligations under the law of occupation' and that 'Israel's obligations have remained commensurate with the degree of its effective control over the Gaza Strip',[177] while significant, left unresolved whether Gaza was regarded as fully or partially occupied (and over what period post-2005), or whether some obligations under the law of occupation are understood 'simply' to apply residually even after the occupation had ostensibly ended.[178] This ambiguity leaves critical questions unanswered about the legality of Israel's military campaign in Gaza.[179] Moreover, while the Court indicated that 'in cases of foreign occupation such as the present case, the right to self-determination constitutes a peremptory norm of international law',[180] it did not adequately unpack the implications of this finding. Questions also remain regarding the precise basis and specification of the obligations of third states and other entities identified by the Court. The Court's analysis did little to resolve the uncertainty surrounding the obligation under Article 41 of the ILC Principles, which requires states to cooperate to end serious breaches of peremptory norms of international law, and its relationship with Article 48 of the ILC Principles, concerning obligations *erga omnes*.[181]

Beyond the legal domain, a variety of tools deserve the attention of those committed to preventing, halting, and seeking justice for atrocities. One example is large-scale grassroots political mobilization to protest against ongoing atrocities and their facilitation. Since 2005, the BDS movement has called for boycotts, divestment, and sanctions to pressure Israel to end its regime of settler-colonialism, military occupation, and apartheid against Palestinians. More recently, it has increasingly been employed to compel other state governments as well as corporations and institutions to cease facilitating or legitimizing Israel's oppression of Palestinian

[175]E.g., UN Independent International Commission of Inquiry on the Occupied Palestinian Territory, including East Jerusalem, and Israel, 'Implementation of ICJ Advisory Opinion: State, GA, SecCo obligations – Position Paper of the United Nations Independent International Commission of Inquiry on the Occupied Palestinian Territory, including East Jerusalem, and Israel', 18 October 2024, available at www.un.org/unispal/document/position-paper-commissionof-inquiry-18oct24/; 'World Leaders Must Act to End Israel's Unlawful Presence in the Occupied Palestinian Territory', *MAP*, 21 April 2025, available at www.map.org.uk/news/archive/post/1729-world-leaders-must-act-to-end-israelas-unlawful-presence-in-the-occupied-palestinian-territory; GLAN, 'UK Weapons Sales to Israel', 2025, available at www.glanlaw.org/israel-weapons-sales.

[176]M. Milanovic, 'ICJ Delivers Advisory Opinion on the Legality of Israel's Occupation of Palestinian Territories', *EJIL: Talk!*, 20 July 2024, available at www.ejiltalk.org/icj-delivers-advisory-opinion-on-the-legality-of-israels-occupation-of-palestinian-territories.

[177]See Advisory Opinion, *supra* note 171, Para. 94.

[178]M. Milanovic, 'The Occupation of Gaza in the ICJ Palestine Advisory Opinion', *EJIL: Talk!*, 23 July 2024, available at www.ejiltalk.org/the-occupation-of-gaza-in-the-icj-palestine-advisory-opinion.

[179]Ibid.

[180]See Advisory Opinion, *supra* note 171, Para. 233.

[181]Ibid. (Judge Tladi, Declaration). See also J. Crawford, 'Responsibility for Breaches of Communitarian Norms: An Appraisal of Article 48 of the ILC Articles on Responsibility of States for Internationally Wrongful Acts', in U. Fastenrath et al. (eds.), *From Bilateralism to Community Interest: Essays in Honour of Bruno Simma* (2011), 224.

https://doi.org/10.1017/S0922156525100460 Published online by Cambridge University Press

people, and has expanded in scope and momentum amidst Israel's military actions in Gaza.[182] BDS has both symbolic and concrete potency,[183] and constitutes 'an urgent act of solidarity, designed to advance a just and lasting solution to the ongoing crisis in Palestine'.[184] In Naomi Klein's words,

> From bus boycotts to fossil fuel divestment, BDS tactics have a well-documented history as the most potent weapons in the nonviolent arsenal. Picking them up and using them at this turning point for humanity is a moral obligation.[185]

5.3 New paradigms

The atrocities in Palestine provoke a collective sense of outrage, indignation, and horror, along with an urgent conviction that action is necessary. While these intense emotions are often harnessed to create 'hostile solidarity' through the pursuit of punishment, they can also be channelled towards more emancipatory and tangible goals. Indeed, solidarity action in response to atrocities can take very different forms. The case of Palestine not only illustrates the perniciousness of the penal accountability paradigm and its underlying 'hostile' solidarity but also presents a readily available alternative through the strong and widespread presence of solidarity networks, in all their diverse forms, supporting Palestinians' quest for liberation.

Since October 2023, we have witnessed massive solidarity actions in favour of Palestinians worldwide. These actions have ranged from spontaneous protest events in cities on every continent to student-led rallies and 'solidarity encampments' on university campuses. Additionally, marches and processions organized by unions and charity groups, as well as targeted boycotts and disruptions urging governments to cease arms trade, have contributed to this global movement of solidarity with Palestinians. Hundreds of thousands of people, from all backgrounds and age groups, have participated in these actions. Some observers have even drawn parallels between the current level of solidarity with the Palestinian cause and the anti-apartheid movement against South Africa in the 1980s and early 1990s.[186] Despite facing repression, sometimes severe and violent, these acts of solidarity continue to draw large crowds across the globe. Their goals vary, including calling for a ceasefire, highlighting the complicity of respective governments and calling for it to stop, acknowledging Palestinian suffering, and promoting boycotts, divestments, and economic sanctions against Israel. During rallies, some participants have held placards calling for ICC intervention. However, punishment is rarely (if ever) the primary focus of these solidarity acts.

The Israeli offensive in Gaza, which has persisted for over a year and a half (at the time of writing), might lead one to believe that solidarity actions are ineffective. At the same time, it is worth stressing that the intervention of the ICC has not stopped the killing and devastation either. On the other hand, when solidarity action shifts from a primarily 'hostile' stance to an emancipatory one, it offers a justice paradigm that can address the underpinning drivers of the

[182]N. Klein, 'We Have a Tool to Stop Israel's War Crimes: BDS', *The Guardian*, 10 January 2024, available at www.theguardian.com/commentisfree/2024/jan/10/only-outside-pressure-can-stop-israels-war-crimes.

[183]I. Feldman, 'Reframing Palestine: BDS against Fragmentation and Exceptionalism', (2019) 134 *Radical History Review* 193, at 196.

[184]S. Sharoni et al., 'Transnational Feminist Solidarity in Times of Crisis', (2015) 17(4) *International Feminist Journal of Politics* 654, at 666.

[185]See Klein, *supra* note 182.

[186]A. Sayed and L. Eslava, 'On the Question of Palestine Solidarity', in T. Krever et al., 'On International Law and Gaza: Critical Reflections', (2024) 12 *London Review of International Law* 217, 282 at 282; O. Barghouti, T. Jones, and B. Ransby, 'Let Us Remember the Last Time Students Occupied Columbia University', The Guardian, 3 May 2024, available at www.theguardian.com/commentisfree/article/2024/may/03/columbia-pro-palestinian-protest-south-africa-divestment; but cf. D. Fassin, 'How the World Failed to Stop the Destruction of Gaza', *Verso blog*, 6 January 2025, available at www.versobooks.com/en-gb/blogs/news/how-the-world-failed-to-stop-the-destruction-of-gaza.

https://doi.org/10.1017/S0922156525100460 Published online by Cambridge University Press

pursuit of punishment – demands for effective protection, equality, accountability and a deep sense of moral belonging – in a more fruitful, sustainable, and less harmful manner than the penal accountability paradigm. To embed such a paradigm, solidarity action must go beyond merely 'activating' and coordinating large numbers of people against particular phenomena, and extend to building long-term unity around concrete demands as well as establishing collective decision-making procedures and pathways to change.[187] Such solidarity is generative and transformative rather than hostile, punitive, or destructive. It acknowledges the privilege and safety of those acting in solidarity who are not Palestinian and recognizes their complicity, as many of their governments fund and enable the dispossession and violence. Transformative solidarity, while acknowledging these realities, seeks to address and trigger reparations for continuums of colonial and racial injustice as well as stopping and preventing further injustices in the here and now.[188] This approach is exemplified by some forms of solidarity actions with Palestinians, such as student-led 'solidarity encampments' and the BDS movement. What is the concrete significance of such paradigm-shifting solidarity action?

First, while effective protection cannot rely solely on acts of generative or transformative solidarity, this does not mean that such actions cannot contribute to it. Demanding that third states and other entities end their complicity with Israel's military occupation through arms sales and financial support has demonstrated tangible impact. In the UK, for instance, activist pressure at least in part contributed to the new Labour government's adoption of a partial suspension of arms exports to Israel[189] and resumption of funding for the UN Agency for Palestinian Refugees (UNRWA).[190] In response to trade unions' appeals, global workers' movements have also taken action, refusing to transport weapons bound for Israel, blocking cargo movement, picketing arms manufacturers' factories, urging governments to halt arms trade, and signing up for BDS campaigns.[191]

Second, transformative solidarity promotes the answerability dimension of accountability by generating pressure upon governments and other decision-makers (including, for example, university senior managers) to inform, explain, and answer to the public in respect of their decisions and actions that can be linked to Israel's offensive. Additionally, these acts of solidarity can and have created widespread awareness and shifted social attitudes in favour of the Palestinian struggle, leading to a wider public understanding and adoption of terms like apartheid, genocide, and settler-colonialism to characterize Israel's violence and oppression.[192] Even if the Israeli government remains resistant to policy changes amid growing global condemnation, neither Israel nor its allies are impervious to the reputational and concrete consequences of this backlash.[193]

Third, transformative solidarity has concretely conveyed to Palestinians, both within and outside Gaza, that they are not alone in their grief and fight for justice. While Palestinian solidarity movements and activists have mounted important resistance and advocacy efforts over many decades, mainstream institutional silence has long marginalized Palestinian voices and

[187]R. Zheng, 'Reconceptualizing Solidarity as Power from Below', (2023) 180 *Philosophical Studies* 893, at 906.

[188]On 'transformative reparations', see R.U. Yepes, 'Transformative Reparations of Massive Gross Human Rights Violations: Between Corrective and Distributive Justice', (2009) 27 *Netherlands Quarterly of Human Rights* 625; W. Lambourne, 'Transitional Justice and Peacebuilding after Mass Violence', (2009) 3 *International Journal of Transitional Justice* 28.

[189]Cf. D. Sabbagh, 'Incoherence Over Arms Exports to Israel Leaves UK on Shaky Middle Ground', *The Guardian*, 3 September 2024, available at www.theguardian.com/world/article/2024/sep/03/labour-arms-exports-ban-israel-gaza.

[190]'Press Release: UK to Restart Funding to UNRWA', 19 July 2024, available at www.gov.uk/government/news/uk-to-restart-funding-to-unrwa.

[191]N. Nagarajan, 'On Solidarity: Responses of European Labor to the Gaza Genocide', *Antipode Online*, 10 April 2024, available at antipodeonline.org/2024/04/10/on-solidarity.

[192]Y. Gülsüm Acar et al., 'Why Protest When It Is Not Working? The Complexities of Efficacy in the Current Palestine Solidarity Protests', (2024) 26(1) *Social Psychological Review* 10.

[193]Y. Serhan, 'How Israel and Its Allies Lost Global Credibility', *TIME*, 3 April 2024, available at time.com/6963032/israel-netanyahu-allies-global-standing.

https://doi.org/10.1017/S0922156525100460 Published online by Cambridge University Press

experiences. This institutional silence is now being increasingly challenged. As observed in a recent article on the value of solidarity protests:

> For over 75 years, Palestinians have endured silence, denial of traumas, and unacknowledged suffering ... Witnessing thousands of allies unite in support of their rights and aspirations provides long-awaited acknowledgement and social recognition.[194]

Fourth, transformative solidarity actions serve as a platform for encountering and building coalitions among people from different political ideologies, faiths, or ethnic and racial backgrounds, who are united in horror at Israel's atrocities and seek an end to the slaughter. Indeed, many of the current protests are organized jointly by Palestinian, Jewish, Muslim, and other groups representing various identities and communities. While bringing people together, such solidarity action provides an emotional outlet, fulfilling the need for belonging and community amidst uncertainty and insecurity. The opportunity to collectively express shared values can instil participants with hope and the belief that change is possible.[195] This channels the emotional fallout of atrocity not towards punishment, but towards both companionship and non-violent resistance.

Centring transformative solidarity also allows us to revisit the notion of 'impunity' that in large part shapes the penal paradigm, and the hostile solidarity that surrounds it. As Rocío Lorca posits, a 'thick' conception of impunity must attend to the *inequality* exemplified in the idea that certain people or entities are 'above or below the reach of the law'.[196] Moreover, a richer conception of *accountability* can take us beyond the 'narrow and retributivist'[197] pursuit of individual punishment to better make sense of, and confront, the both massive and collective nature of atrocities. Understanding impunity as both a 'failure of equality'[198] and accountability – within and beyond the confines of law – aligns with the imperative of an egalitarian vision of solidarity and mobilization which transcends the pull of hostile solidarity and seeks to counter the conditions in which the systematic devaluation of certain people's life and dignity culminates in atrocity.

6. Conclusion

On 12 October 2023, just days after Hamas's attack and during Israel's bombing campaign, Arielle Angel, editor-in-chief of Jewish Currents, posed the following question in an editorial: 'How can we publicly grieve the death and suffering of Israelis without these feelings being politically metabolized against Palestinians?'.[199] Angel sees this as 'ultimately an organizing question', one that invites us to envision a movement for liberation, for a departure (an 'exodus') from the current state of affairs where neither 'Jews or Palestinians' must leave. Instead, people 'stay to pick up the pieces, rearranging themselves not just as Jews or Palestinians but as antifascists and workers and artists'. She concludes by invoking the words of poet and activist Aurora Levins Morales: 'We cannot cross until we carry each other,/all of us refugees, all of us prophets. ... /This time it's all of us or none'.[200]

[194]See Gülsüm Acar et al., *supra* note 192.

[195]Ibid.; M.J. Hornsey et al., 'Why Do People Engage in Collective Action? Revisiting the Role of Perceived Effectiveness', (2006) 36(7) *Journal of Applied Social Psychology* 1701.

[196]R. Lorca, 'Impunity Thick and Thin: The International Criminal Court in the Search for Equality', (2022) 35 LJIL 421, 425.

[197]M. Pensky, 'Amnesty on Trial: Impunity, Accountability, and the Norms of International Law', (2008) 1 *Ethics & Global Politics* 1, 2.

[198]R. Lorca, 'Should Feminists be Worried about Impunity?', (2024) 37 *Harvard Human Rights Journal* 47, 50.

[199]A. Angel, 'We Cannot Cross Until We Carry Each Other', *Jewish Currents*, 12 October 2023, available at jewishcurrents.org/we-cannot-cross-until-we-carry-each-other.

[200]A.L. Morales, 'Red Sea', April 2022, available at www.auroralevinsmorales.com/red-sea.html.

https://doi.org/10.1017/S0922156525100460 Published online by Cambridge University Press

Angel's vision cuts through the dominant legal and political discourse surrounding the atrocities in Palestine and Israel. In a landscape where moral, political, and legal assessments are steeped in fundamentally hostile and punitive concepts and predispositions, Angel presents a different vision of 'never again' – one rooted in emancipatory rather than hostile solidarity; in organizing, rather than punishing, towards a more peaceful and just future; and in cultivating a society where such atrocities become unthinkable. Angel's words echo Judith Butler's concept of non-violent activism:

> We can always fall apart, which is why we struggle to stay together. Only then do we stand a chance of persisting in a critical commons: when nonviolence becomes the desire for the other's desire to live, a way of saying, "You are grievable; the loss of you is intolerable; and I want you to live; I want you to want to live, so take my desire as your desire, for yours is already mine."[201]

As argued throughout this article, the prevailing penal accountability paradigm, though it may seem more grounded in our current reality, offers a hollow vision of justice while generating significant and multifaceted harms that undermine its 'never again' promise. This paradigm gives states an undue benefit of the doubt, thereby shielding them from accountability for, or even impediments to, their (ongoing) commission of atrocities; it decontextualizes, individualizes, and exceptionalizes atrocities, thereby obscuring the realities of mass violence and obstructing its prevention; it marginalizes alternative forms of accountability and opposition to atrocities, when these are both vital and under threat; and it fuels retaliatory impulses that threaten hard-fought red lines within international law. To challenge the paradigm, we have called for a more expansive language that transcends the paradigm's narrow legalistic pull and captures the continuums of harm and injustice in which atrocities occur. We have advocated for a redistribution of attention and energy towards more potent, inclusive, and dignity-preserving tools to identify, to condemn, to put a stop to, and to prevent atrocities. And we have argued for foregrounding a solidarity that is emancipatory and generative, rather than antagonistic and hostile.

[201] J. Butler, *The Force of Non-Violence: An Ethico-Political Bind* (2020), at 203–4.

Cite this article: Mavronicola N and Pinto M (2025). Challenging punishment as the justice norm in the face of ongoing atrocities. *Leiden Journal of International Law*. https://doi.org/10.1017/S0922156525100460