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The philosophy of punishment in the field of international criminal law

Elham Solayman Dehkordi [1,*], Farhad Abedini Saadabad [2], Zahra Salehabadi [3]

[1]*Doctorate student of Alameh Tabatabaii University, Tehran, Iran*
[2]*MA Student in International Law*
[3]*MA Student of Criminal Law and Criminology*

Abstract: International criminal law is an aftermath of the World War I as a remedy for the re-emerging phenomena. The consequences of war which was used as a domineering tool to challenge governments had always been ignored by the earnest people in international community, so it had engaged international community until the end of the First World War. After the experience of such a tragic event on the one hand, and the crimes which were against conscience on the other, the experts in international arena, who hadn't cared for this high-toll crime before, began to take some measures in this field. They were in the belief that the essential mindset for effectively countering these crimes and naturally criminals requires an explanation of the how and why of punishment and its functions in international fields such as domestic field or more important than that. Because, internationally crimes are committed in an organized manner and along with violence and massive-scale repercussions both on the part of the criminal and the victim. To explained the why, there are some views set forth that can be classified into two groups of result-oriented and background-oriented. The outcome-oriented ones only think of the advantage of the punishment while those who draw on background believe in the innate entitlement of the criminal to be punished. Any one of these two camps undergoes same repercussions. The viewpoint of benefit outweighs inhibition and on the other side, the record-oriented view emphasizes the punishment-oriented one. This article, first, discusses the objectives of punishment and then goes on to deal with the results of punishment depending on the choice of either one of these objectives in international arenas.

Key words: *Benefit; Punishment-orientation; The degree of crime; Entitlement*

1. Introduction

Throughout the 20th century we witnessed a lot of crimes with serious violence the commiters of which were not brought to justice. International criminal law system was unable to provide a philosophical explanation of the punishment, too. There was no permanent judicial establishment founded to take care of these important crimes, in a way that even the speaker of the human rights commission expressed his sorrow with the existing situations and mentioned, "A man is more likely to be convicted and penalized for the murder of an individual than for the massacre of one hundred thousand people". For instance, in Yugoslavia and Rwanda tribunals only a few numbers of the criminals were held accountable for what they committed according to the available shortlist. However, this punishment was not comprehensive enough to present the international community with a fair justice. So, it only bough about a fake justice that had turned a blind eye on its basic principle which was penalty-oriented and inhibition against all the criminals. Before the formation of international organizations criminals didn't sense a need for being reattributed. They easily excused themselves because they were only one of the thousands who committed such atrocities. With the bristle perspective they saw for crime and punishment, international aggressors didn't see any restrictions to enforce upon their own uncalculated threats and as a result kept on with their insurgency more than ever before. Due to inhibition, recompense, intimidation that was the least efficacy granted to this area regarding the sole out book of punishment, this condition was largely effective and drew a blank on the minimum reassurance on the issue. Now, it is not exaggerating to believe that the tribunals of Yugoslavia, Rwanda, and other international judicatories, for keeping faith on and respecting human norms including the right on soul and body, do their best to come to an agreement and unanimity on the goals of the security council that involve inhibitory measures, penalizing, spreading justice, as well as peace. It seems that the underlying them of these goals does not lie anywhere but in retribution and its implementation. This rationality of punishment will pose limitation on enforcing imitative and inefficient justice and, therefore, brings serious and meaningful threats for the potential or de facto offenders.

2. Theoretical models for punishment

* Corresponding Author.

The arbitrary explanation for the legitimacy of punishment classifies into two main categories: first, the theory of crime control.

Second, the theory of punishment orientation. These two explanations study and analyze the philosophy of imposing punishment on the culprit and degree (Javan Jafari, 2012). The viewpoint of crime control suggests punishing a culprit only if the gains of this punishment outweigh its loss. One of the prominent principles in this view is its inhibition force which is grouped into two classes of general and specific. This theory stresses on this idea that the upcoming and far-reaching perspective of punishment must be in a sense that keeps an individual from engaging in criminal acts or in case of the primary encounter it prevents from repeating the aggression. For instance, exacting long-term imprisonment due to serious crimes is justifiable only when the committed act is considered the least part of crime reduction or control tools on the whole. Instead of flashbacks, this view eyes the future horizons and draws on three significant functions in punishing a criminal: 1. Instruction and intimidation (inhibiting the general and specific). 2. Social rehabilitation of the wrong doer and restoration. 3. Debilitation and elimination of the criminal is punishment-orientation. This viewpoint, with nemesis as its base, springs from "Kant theory" which is a past-looking viewpoint (Rezai Elahi 1965).

According to this idea, punishment is explained as a decent response to the behaviour of the culprit, and plays its role efficiently only if it is proportionate to the committed crime. The focus of attention for punishment from punishment –oriented people is solely the committed crime. In fact, codes of codes of conduct have been violated by the crime and, that's why, the criminal court must try to restore and revive the disrupted order and, once again, strike a social balance with a reaction equal to the committed action. Based on this theory the correlation between the inflicted harm and the penalty is clear and unambiguous. The more serious the crime the harder the punishment to load. Through the criteria for the committed crime we can assess and estimate the damage inflicted as a result of this behaviour as well as the degree of client's irreproachability. The correlation among the level of crime on the one hand and punishment on the other is not desirably clear cut yet in control theory. So the loss that's inflicted on the victim through the criminal act can only effect the estimation of benefits and expenses. However, with all this, the common ground these two viewpoints share is that base on both punishment and gain-centered ideas the loss that the criminal directly or indirectly inflicts on the victim can be use as a criteria for considering an appropriate punishment. Some other theoreticians take a domination of the two explanations and the philosophy of punishment (Mahmudi, 2008). This integrative approach involves in itself elements from both crime control and punishment viewpoints. According to control approach, the overall objective for punishment, and based on punishment approach the fair divide and distribution of punishment is legalized and recommended. This logic does not have an independent status and is not introduced as a theory, though it is indebted to the two previous theories and has inherited features from both. A study of the scope for the theories of control and punishment reveals that the important and basic values violated in international scale are in need of explicit measures such as punishment proper for compensation. These measures are not enforced on the criminals just to suffer pain. They don't even primarily follow such objectives, but they are applied as deterrence from the repetition of the crime and a recompense for his debt that has been imposed on international community due to the commitment of such deeds. Punishment, in this field, is of a symbolic importance and impression. This is compensating the loss that the victims suffer (cttingham, 2008). However, the explanation of punishment in international scale is control or punishment-oriented, Just like domestic field. The effects of these two explanations are vague in control view. It is crystal clear that punishment cannot neutralize what results from violent crimes such as genocide, apartheid, war crimes, terrorism, and... hence, they appropriately shoulder the criminal heavy accountability. Because, firstly, committing these crimes is larger in scale and quality than the locally committed ones, and secondly, the only loss the committee has to suffer, is the fear of being arrested which can easily be resolved through the lack or insufficiency of international authorities. The impossible assumption would be the case in that the criminal would estimate the probable loss. It is logic that the criminal would ignore this loss in favour of all the gains he garners. In some instances, what gets considerable is the defect in logic and calculation on the part of these criminals, while performing such criminal acts. Impressed by the extraneous factors other than commercial estimations such as psychological diseases like hysteria, self-centric psychos, and ...., these criminals commit such crimes (Hinz, 2004). Thirdly, a lot of these people are not afraid of being held accountable and the sense of ethical responsibility for what they perform has waxed and gone faint, in that, there will be no feeling of embarrassment in them for what they have done, so they look up on themselves as the centre of gravity in all the affairs. Forth, a group of them are those who are internationally recognized as wicked individuals and act upon their etiquette. Following all the issues discussed about international criminals, penal institutions in this field insist on the application of the two explanations for punishment and have taken up some initiatives in the charter of Nurnberg and Tokyo courts. In chapter six and in articles 27 and 28 besides chapter five and in article 16 it reads," the court will issue death penalty, or any punishment chosen appropriate, against the convicted criminals". A study of this rule shows that" death penalty" which has come at the top by the law maker, is a reminiscent of punishment-oriented approach. Since, execution is a life-

threatening punishment (a punishment that costs life). Following its enactment, neither one of the functions of control theory such as prevention will be met. Only for an international committee, there is a reaction proper to his action. In the following, the lawmaker uses the phrase" or any punishment chosen appropriate." This phrase is also a reminiscent of the same approach that stresses on the entitlement of the criminal to a punishment equal and appropriate to the committed crime. After the events of Yugoslavia and Rwanda and the formation of the tribunals, it reads in articles 23 and 24,"the inferior court only issues the order of detention punishment." Item 3 of the above mentioned articles reads, "Moreover to detainment order, the legislator has also delegated the permit for issuing the order of extraditing properties and wealth from illegal ducts to their legal owners through court". Parallel to the articles above in item A, article 101 of regulations for legal proceedings and the evidence for the two courts, the maximum detainment penalty is defined death penalty. After a reflection upon these two rules, it seems that sentencing to confinement as the minimum framework is nothing but withholding and creating menace which is the main function of control theory. A criminal, who is sentenced to jail term, is deprived of being among the society, and this is another feedback from disabling and rejection. The elimination and rejection of a criminal does not happen only through carrying out surgery or physical manipulation. Detention can also be another example of it. Sentencing to life imprisonment can embark our claim as maximum framework for this punishment in item A, and gives the courts a free hand for constraining the liberty of the criminal throughout all life passages. Later on, when the legislator issues the order of extraditing properties and wealth that root in a crime, it is in a way returning to penalty-oriented views as well as trespassing the approach made the criminal compensate the damages imposed on the victim and enlightened the idea of remedial justice in mind. Finally, international criminal court has mentioned in article 77 of its Statute," 1.the court may impose one of the following punishments on a person convicted of a crime referred to in article 5 of this statute: (a) Imprisonment for a specified number of years, which may not exceed a maximum of 30 years; or (b)A term of life imprisonment when justified by the extreme gravity of the crime and the individual circumstances of the convicted person.2.In addition to imprisonment, the court may order: (a) A fine under the criteria provided for in the Rules of Procedure and Evidence; (b) A forfeiture of proceeds, property and assets derived directly or indirectly from that time, without prejudice to the rights of bona fide third party. Paying a closer look at this regulation shows that the the Statute has not addressed the minimum confinement and has sufficed to mentioning the word maximum in items A and B. The difference between item B from this regulation to the rule written down in trial law and court evidences in Yugoslavia and Rwanda is that to consider the penalty of detention for the committer, there must be an attention to the conditions of the importance of the crime as well as the situations of the convicted. These two conditions revive the logic of benefit, because the ultimate goal for them goes down to rehabilitation of the criminal. Other punishments such as cash fine, confiscation of properties, recompense of the damage in favour of the offended and ... have an eye on punishment – oriented views and they try to facilitate the return of the offended to the conditions before the crime. With regard to this procedure of Nurnberg court to criminal tribunal, it seems that international institutions and courts have stepped beyond their sever punishment-oriented approach that had appeared in Yugoslavia court in the form of imprisonment and finally, paid attention to both of the logics so they could apply them both. In the following, we deal with the function of retribution with reference to the application of both explanations.

3. The application of punishment

3.1. Inhibition

Inhibition is considered to be the main function in the logic of crime control, introduced by Bentham. It says," punishment is justified when its future perspective can restrain the actual or potential activists from committing the crime. Security Council warns the courts to recognize this essential principle. Based on this warning, courts must attempt to prevent from violence, racial discrimination, war crimes and other international crimes through the use of extrinsic control tools such as punishment as a prominent example (Luban, 2008). Despite this warning, it is hard to assume that international criminal punishment can bring about an inhibitory effect, since, as Bentham has added, "If punishment can't have an impact on a reasonable man. In other words, it can't prevent the person from getting involved into criminal behaviours; undoubtedly, it is not a preventive one". He believes in the idea that improper social conditions like war neutralizes the effects of penal laws, which is the fear of being reattributed, the same as personal problems like underage, madness, and... from his point of view, domestic criminals calculate the gain and loss of a crime before committing it, then they start it. However, international criminals don't strictly follow this logic. A group of these criminals, due to paranoid complexes, hostile prejudice and hatred, mass media propaganda and finally impressed by cultural beliefs take such actions. The majority of these people are those who pervert international norms, known as common heritage of mankind, such as the right to self, liberty, peace, and ... as tools to back their collapsed economy, unstable politics, or social chaos, or in better terms, altercate them. For such individuals, attaining political power, or racial privileges and ... Is of a higher importance than the

above mentioned rights. Like domestic criminals, these people also count the costs and benefits that originate from crime, but this count is not a wise one, since for some of them, the balance they strike between costs and interests is influenced by an unusual base such as war, while some others, who are those high minded people, see themselves secure and undefeatable. So they turn a blind eye on the threat of getting pursued and caught. They just focus on their own immediate goals which is grabbing at power, conquering lands, perishing racial groups and…..This leads to the fact that they won't be held accountable by international community, or in case of issuing the bill of indictment against them, they can get away with it by paying huge kickbacks (Sloane, 2006). On the other hand, we have to consider this significant fact that even if these criminals have taken heed of the logic of benefit-oriented view in committing the crime, we won't be able to create obstacles on their way. The lack of criminal justice organizations such as courts and expert judges, remedial justice systems, and ….and normally, not enforcing punishment or ending up in forgiving the criminal will increase the number of those crimes or violent beasts. Politicians, researchers, pursuit officials, and judges have approved of the issue that the reoccurrence of violent behaviours in international fields is nothing but the consequence of giving amnesty and ignoring such deals by international courts. "Keneth Rod", the executive manager of human rights watchdog, claims that," almost all the violence that occur in the modern world will end up in the pardon of the criminals." Judge Jackson claimed in Nurnberg court that "the possibility of enforcing punishment on an individual will definitely have no effect on withholding people from war and other atrocities." Despite all the given facts, it seems that as pragmatists have suggested, the existence of a comprehensive criminal justice system in international scale can serve as a pre-emptive tool through enacting its functions. They say," before the formation of international criminal courts, there had been no useful and systematic structure in international community for implementing punishment until the time when, for the first time, Nurnberg court commenced to relieve the pain of the first world war victims. Though, this tribunal was also not effective enough, because it only imposed the justice of the victorious of war on international community and therefore, deviated from its primary objective which was bringing to appropriate justice for relieving the thirst of the victims for revenge. So it condemned the majority of the criminals, if not say all, to death penalty. This procedure was gradually regulated in the courts of Yugoslavia and Rwanda to some extent and it was tried to eliminate the defect of no punishment at all or very severe punishment. The letters of indictment that were issued by the pursuit officials in the two courts put heavy communal tolls on the accused people the majority of which left appreciable inhibitory effects on them. Judges in these two trials at least had this power to identify some certain punishment according to the international scale of the trial. They didn't suffice to the international scale of the trial. These trials drew on two variables of the legitimacy of penalty and equality of people before law and in its implementation as the most vital effective factors for prevention. The judges in both trials reasoned that this issue will not be produced only due to the imposition of a slight and short-lived punitive measure improper to the committed crime. However, it takes effect only when there will be some punishment, both domestically and internationally appropriate, predicted in response to the behaviour that the criminal performs. So, owing to the informed knowledge of the retribution, the criminal comes to this explicit understanding that in case of getting away with the international accounts, there will be an encounter with the local one in which is equal to the former from quantity and quality perspectives (Marston, 2001). Besides, it seems very necessary that moreover to the presence of criminal courts and sever punishments, there must be a particular attention paid to the enactment of the punishment in this field. Alongside this approach, some of the experts like "Akhavan" believe, "The legal system is capable of preventing the activists from carrying out such actions through internalizing, strengthening, and inculcating human values and norms like the right of life."These experts claim that there is no need for the legislator put out the tendency towards committing the crime in the activists always by enforcing pounding retributions, but instead, they can create a sense of hatred toward their violence and this way, uproot the existence of such behaviour in its origin. In the long run, this view can inhibit those potential or de facto activists in comparison with the viewpoint of Bentham, which emphasized entirely on the extrinsic control yjrough punishment (Drumbl, 2003,).

The significant step in this approach is a respect to the essence of human norms by incriminating those unjust and anti humanity conducts and instead intentionally suggesting human values. Many of the international activists are those who are willing to commit behaviors that are against human conscience and illogical. Such practices get internalized in the form of sacred commitments and beliefs in a way that pertaining to this interest in law and the punishment written down in it, disregard of the quality and quantity or enforcing or not enforcing it, they won't take heed. These people have not internalized the decent and highly-regarded human values inside and, in fact, the process of domesticating the values has not taken place in their interior. They always look for a chance to put into action their inner compulsion. David Vipman, in charge of international committee for the Red Crescent notes on war crimes of Herzegovina, "At the point where norms get intrinsic and endorsed by people then they are equally respected by both the military men and civilians. Therefore, the repressions they sense on their own part as a result of national and racial zeal or enthusiasm will be shed

and they keep faithful to the imperative norms. "This viewpoint believes that the lack of a spirit of obligation, love, and faith to decent and proper ethical, social, and humane norms will minimize the deterrent that is embodied in the foundations of punishment (Henham, 2003). Preventive strategy is meant to eradicate the roots of racial discrimination and political polarization that make the main backbone of inhumane actions and instead emphasize upon the unity and solidarity of all races as the basic norm in international scale. International organizations and courts should cooperate with each other to maximally internalize and stabilize ethical to strengthen and endorse the interaction among pre-emptive and penalty-oriented attitudes concomitantly so that inhibition takes place.

3.2. Retribution and punishment:

Criminal laws like a lot of other identical relationship where each focus on a function in their theme-based objectives, stress on intimidation and punishment. This function which is the outcome of a past-oriented logic insists on concepts such as worth, reproach ability, liability, and renewal of ethical equilibrium in the enforcement of punishment. With reference to this outcome, any shortcoming in the enforcement of punishment makes people not be able to control in themselves the innate qualities of revenge and fury and they view themselves free of any constraints and embark on committing massive violence's. As an example, during the time when the court of Rwanda pointed to intra racial violence's between two tribes of " Abahutu " and " Abatutsi " explicitly, judges from this trial like " Arendet " discussed, "the main reason for these violent phenomena is the lack of control on the flames of fury and avenge which was fueled since a very long time ago, with nobody ever thinking of putting it out or at least diminishing it. Therefore, it is useless if they are not reattributed proportionate to the insurrection they have brought about in the international scale. Yosalroget, another one of the judges in this trial mentioned, "Those individuals who carryout atrocities like genocide and other conducts with inhumane essence or violence can only be made to take heed of social norms through punishment according to the intensity of their misdemeanour. These victims are ethically indebted to society, and they must pay what they own based on their capability in the shortest time possible. "Parallel to these statements, the laws of Yugoslavia and Rwanda courts ruled," in the enforcement of punishment we must pay tribute to elements such as the intensity of committed crime and personal circumstances of the performer." International criminal court also followed in these footsteps to identify
a suitable punishment. So it has added in its Statute, "It is the intensity of the crime and the qualities of the committee that is definitive of a proper punishment. With respect to this criterion, the amount of inflicted loss is, directly or indirectly, assessed and retaliated". In fact, it must be said that as the major factor in deciding upon retribution, severity of crime must be taken into account. With the help of this standard court will be capable of recommending a homogeneous standard in the determination of punishment for committers after considering the conditions of each case, hence help provide justice, fairness, and legitimacy (Mc Mahan, 2005). These crimes will leave a serious, expanded, and deep impact on international peace respectively from violence, scale and influence perspectives. That's why these criminals must be punished severely. Iiniency in the retribution of these criminals means overlooking or neutralizing the elements that are the essence of Turing these faults to crime in the international arena. Only a punishment suitable to the level of these crimes can awaken an understanding of ethical convictions in the international scale besides reflecting upon the ethical blame ability of the condemned ones. The enforcement of a defective or selective punishment has little or no impact on the international arena. For instance, a criminal named Q is condemned to intentional murder under the title, crime against humanity and another criminal named Z who is condemned to intentional murder under the title, violating the laws and conventions of war. Though, there is not a huge difference between the two, it is the conditions and constituent elements of each crime that clarifies and identifies their intensity. Q has taken part informedly in an extensive assault against civilians and has rendered a large amount of harm. However, Z has not participated in an attack against civilians and only embarked on an intentional killing. In this example, Q is entitled to more serious punishment than Z. Despite this entitlement the scope of the intensity of punishment is not identified (Shelton, 2006). At first, the courts of Yugoslavia and Rwanda tried to identify the extent of punishment by observing the conditions of each case separately. But, today alongside the consideration of each case (criminal), they also pay attention to the degree of the committed crime as a variable in the identification of punishment and take care of punishment to its climax as the highest level. Yet they are not allowed to move beyond this extent. Now, other institutions and international courts are not merely a civic body so that it engages in exerting authority collaboratively but without a doubt they are organizations with an authoritative power that conceive the level of reproach ability and then react upon it accordingly. In spite of all these explanations and bargains, it seems that the court hasn't been able to accomplish this function fully. Because, instead of focusing all their attempts on the intensity of the crime and the level of blame ability of the criminal to take back the just interests that the committee has garnered as a result of committing the crime, and hence strike the due balance between the benefit and responsibility, they have only engaged in marginal and ineffective issues. In fact, it is through striking an explicit and the relation between the

degree of the committed crime and the length of punishment that the inclination to providing with and compensating for the victims is sparkled in the criminals. They estimate the corresponding retaliation for the damage inflicted and then pay it back (Meernik, 2003, pp. 159-162). Security Council which is in charge of these trials points out to the conditions of the criminal and the intensity of crime as two influential factors to identify the degree of punishment.

3.3. Rehabilitation and Restoration

International human rights laws refer to restoration and rehabilitation of the criminal as the most important function of punishment, which this function has been less paid attention to in the international criminal law field and by the experts. In the primary judgment in Yugoslavia court, over this issue, it is said, "in specific crimes that is in the field of international tribunals, the rehabilitation of the criminal is not taken into consideration." Anyway, according to what some of the human rights supporters believe, a few numbers of war criminals expect that they get corrected after suffering the punishment and keep on with their service as a good soldier.

Yet, some of the commanders who have committed crimes due to self-conceit hope that they turn to malevolent leaders or official figures with good intentions after going through the punishment. The words and ideas of these criminals show that these people, though not the victim of these crimes, understand the heinousness of their own actions, measure the damage exerted on the victims, feel repentant, increase the level of their tolerance, and try not to repeat these conducts in similar situations (Dana, 2009). In the field of human rights, the idea of rehabilitation conveys several meanings most of which, or if we don't exaggerate all, are attainable, while in the field of international criminal laws only some of these meaning are achievable. For instance, traditional rehabilitation involves a social assumption of the criminals as the individuals who are sick and in need of treatment, but this case of rehabilitation which is known as the medical model is neither mentioned nor supported in the rules of tribunals because the hard situation these criminals are involved in makes them committee such crimes. Therefore, the eradication and uproot of these situations with the use of this model is ridiculous and ironical. However, another kind of rehabilitation, which is known as the non-medical model, is practical for some of these criminals. These criminals are those who have committed a crime incidentally, are in good mental health, and are not vicious people in their heart. They are mostly the victim of the order of a superior.

That is they abide by the orders of a superior due to an baseless fear, national zeal, racial hatred, and ... for example, most of the people in Herzegovina believe that their neighbour has united with the enemy so to wage an imminent war against them. Therefore the Bosnian soldiers are also expected to stand up and legitimately defend themselves (Fatic, 2008). Nowadays, the international criminal court is also entangled with this predicament on how to behave different criminals and lead them towards coordination with human values and norms. On the one hand, there are some insurgent soldiers who easily perform actions such as child abduction, violent racial crimes, sexual assaults, who are in normal state while they commit crime following the order of a superior.
From the viewpoint of the court, if we would like to deal with both groups of criminals based on punishment-oriented attitude, undoubtedly, neither one is correctable, since this view draws merely on punishment in its merit sense. Nevertheless, if they are dealt with according to the crime control theory, we will get to this desirable outcome that punishment has at least a minimum positive effect on some of these criminals. According to this approach, it is wrong to take all the criminals as equal and punish them equally. In some cases, all the committers are usual, so that in specific situations, they carry out extraordinary violent assaults. In some other cases, the committers are those who are abnormal in mind and soul, while some others take action following the orders of their superiors. The latter are those who are more vulnerable to coordination and correction in normal occasions. Specifically for getting the international criminals corrected and generally for other criminals, there is a need for the analysis of conflicts besides the actualization of some preconditions such as the conflict between corrective considerations and achievement of honour through mere criminal punishment. All because, corrective Considerations look at mental factors, even for the incidental criminals, as a dynamic element. However, for the case of sole punishment ideas, it has no position. Besides this conflict, corrective feedback draws on the committed action joint appropriately with punishment, while mere criminal punishment does not care for the consequences of penalty. To resolve these conflicts, it seems that there should be a common ground stricken between the two fields of justice and benefits of punishment. What comes out of the specific proceedings is the lack of success in this field, though these two cases, in their article 23 and 24 from the charter of rules, have pointed out to the conditions of crime in order to grant appropriate punishment, however in practice, they did not respect it.

This issue was completely obvious through Milesovic case, and instead, the truth commission went through a better and more efficient process in order to achieve the function of correction and rehabilitation. During these trials, they distinguished the criminal from the innocent. Those who were pleased with committing the criminal act and had taken part in the international arenas, as observers for carrying out these crimes, were separated from those who were solely instructed in the scene and played an international role in the commitment of

crime, so that, overshadowed by this discrimination, they could engage in a better identification of criminal spectrum and therefore, start to think of ways to rehab and put right the criminals relying on this understanding. The international criminal court and regulation of Rome took action alongside the truth-seeking commission in order to correct and reform the criminals, and as a result presented some principles in this field.

The primary principle is, then, distinguishing the hearings for the criminal claims. This principle declares," if a criminal case is preceded based on just principles and regulations, the punishment that gets declared will also be fair." By just proceedings, it is meant that there should be an opportunity granted to the accused both in the process of the pursuit and the defence in that, the criminal expresses both his personal conditions such as mental state, ethical issues, social and family condition as well as conditions in their file like having or lacking any priors and... courts also must be able to address the intensity of the committed crime besides the damage the victim suffers, and then be able to request the criminal to give the pursuit officials a helping hand in the identification of a proper punishment for themselves. Second, criminal courts must benefit from experts and well-informed judges so that, after applying logic from the philosophy of punishment, they can focus on the suggested punishment by the criminal himself.

Then, after verifying its appropriacy they would use it as the subject of the sentence and then provide the requirements for its implementation. By reflecting upon these principles, the court dealt with the identification of the extent and volume of punishment in legal regulations. In article 77 of the charter in this court it is said, "The court must rule a certain period of imprisonment which is no more than 30 years, unless of court, the life imprisonment is justifiable through the intensity of the committed crime and personal conditions of an individual who is condemned." Article 78 orders the courts that they should take into consideration the degree of the crime and the personal circumstances of the condemned one.

"Article 145 from the first draft of the charter of law and evidences also point out personal circumstances in defining punishment. This draft has addressed the hidden and intensified factor such as the damage inflicted upon the victim and his family, the nature of the illegal behaviour, the tools by which the criminal has committed the crime, the degree of personal inventory the conditions dominating the behaviour, the time and place for the crime, age, education. Economic and social conditions, and ... These conditions can regulate the communal nature of international crimes to some extent. Based on all these descriptions, it seems, although tribunals haven't been triumphant in accomplishing the function of rehabilitation as supposed, the truth commission besides criminal courts have taken some efficient steps in line with this issue.

4. Conclusion

Based on the mentioned issues, it seems that the function of international criminal courts has stayed at a symbolic level. Since, neither in Nurnberg court, nor in Yugoslavia and Rwanda or even the tribunal court, there has been a unified strategy taken according to one of the judiciary explanations.

Today, the administrators of criminal justice have been rendered incapable of managing the most efficient function of punishment which is rejecting or uprooting criminal behaviour and supporting human ethical norms. Criminal justice system must back international norms like rights of freedom; peace and ... and as a result put an end to racial or national conflicts. By issuing orders, based on the logic of punishment, it must scold those who attempt to disrupt racial unity, do massacre, limit freedom, inflict sever violence and ... through the harsh and explicit announcement of punishment. The orders that are not compatible with the value of the violated norms can't help with the actualization of the objectives of punishment including crime control and holding accountable. For instance, we can point the identification of punishment of imprisonment for genocide. It seems the hatred and fury that has appeared as a result of this crime in international fields, sought the expectation of a punishment more them the due imprisonment. The communal nature of international crimes with the scope of the inflicted damage or loss has made international community to define some factors for the identification and enactment of punishment. As examples of these factors we can refer to the following. First: Punishment must be appointed before hand in the laws and charters of international tribunals based on one of the two logics of crime control and penalizing or a blend of both according to the occasions. Second: Judges in criminal courts must consider two variables of crime intensity and criminal conditions in the appointment of punishment, so that they can identify the proper punishment with regard to these elements. Third: Criminal court judges must not suffice to a sole punishment. Yet, for figuring out and identifying the degree of the committed crime in deciding upon an appropriate punishment, they had better pay attention to qualities, written down in law, such as having priors, the level of the damage inflicted on the direct or indirect subjects to crime, independence of the criminal from the benefits coming from the crime, vulnerability of the subject to crime, misuse of the criminal from the trust of others, explicitness of crime commitment, plurality of crime commitment, intensity of breaking obstacles and enforcing violence, committing the crime without a need in critical situations, intensity of disorder, international peace and hidden qualities like the ignorance of international community and formation of criminal tendencies in criminals, physical or mental weakness of the criminal, cooperation of the criminal in the facilitation of pursuit, trial and implementing the sentence, safeguarding emotional ties among the criminal and

other people involved in the crime, exciting the criminal from the subject to crime's side, and... Forth: The officials in charge of administering international punishment must consider the criteria for implementing the punishment and imposing hurt on the criminal such as the harmony of the shape of imposing a punishment with the ways of committing the crime, physical and mental conditions of the criminal, and in the meantime they implement it, and do not suffice solely on issuing the sentence.

Five: International criminal courts must try to harmonize their proceedings with the internal courts and develop their cooperation more and more every day.

References

A Drumble, M. (2003). Toward a Criminology of International Crime. *Washington and Lee Public Law and Legal Theory Research Paper Series* , pp.1-31.

Dana, S. (2009). Beyond Retroactivity To Realizing Justice. *A Theory on the Principle of Legality in International Criminal Law Sentencing* , Northwestern University School of Law pp.1-72.

Durant, W. (2009). *philosophy history.* Tehran.

Fatic, A., & Butatovic, A. (2008). Justice Reconciliation in the International Criminal Tribunal for the Former Yogoslavia" IzvorniNaucni Rad. pp. 31-46.

Heinz Fiona, R. W. (2004). *crime and criminology.* Tehran: research institute of Houzeh Elmiyeh and university.

Henham, R. (2003). Some Issues for Sentencing in the International Criminal court. *The International and Comparative Law* , pp. 81-114.

Jaafari Javan, A., & Sadaati, S. M. (2012). *Remuneration-oriented view at penalty philosophy, criminal rights journal*.

Katingham, J. (2004). penalty philosophy. *rights and jurisprudence journal*.

Luban, D. (2008). Fairness to Rightness. *Jurisdiction, Legality and Legitimacy of International Criminal LawGeorge Town University Law Center* , pp. 2-26.

Mahmoudi Janaki Firouzi Aghaii, s. (2008). study of punishment influence theory. *politics and rights college journal*.

Marston Danner, A. (2001). Constructing a Hierarchy of Crimes in International Criminal Law Sentencing,Virginia Law . pp. 415-501.

Mcmahan, J. (2005). *Collective Crime and Collective Punishment*. George Town University Law Center.

Meernik, J. (2003). "Victors Justice or the Law? Judging and Punishing at the International Criminal Tribunal for the Former Yugoslavia". *The Journal of Conflict Resolution* , pp.140-162.

pradel, j. (1994). *the history of criminal ideas*. Tehran: Shahid Beheshti university.

Razavi Fard, B. (2011). *criminal international rights*. Tehran: Mizan publication.

Rezaii Elahi, M. (1955). *freedom concept from Kant view.* Vahid publication.

Shelton, D. (2006). "Normative Hierarchy in International Law". *The American Journal of international Law* , pp. 291-323.

Sloane, R. (2006). "The Expressive Capacity of Intrnational Punishment". *Columbia Law School and Legal Theory Working Papers* , pp. 5-25.

Soltani, M. (2004). *quantitative and qualitative parameters of punishment determination at Iran criminal laws*. Tehran: MA thesis of criminal law, Tarbiat Modares University.

Tabit, M. (2005). *rights philosophy.* Tehran: Razavi university of Islamic science.