

A photograph of a long, grand hall with a high ceiling and a floor made of large, reddish-brown tiles. The hall is lined with tall, grey columns that support the ceiling. The lighting is warm and comes from recessed fixtures in the ceiling. In the background, there is a dark wooden door and a small, ornate window. The overall atmosphere is one of historical grandeur and architectural beauty.

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Philosophical Foundations of International Criminal Law: Foundational Concepts

Morten Bergsmo and Emiliano J. Buis (editors)



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Front cover: *The old library in San Marco Convent in Florence which served as an important library for the development of Renaissance thought from the mid-1400s. The city leadership systematically acquired original Greek and Latin texts and made them available in the library, which offered unusually open access for the time. They became part of the foundations of the Renaissance. Photograph: © CILRAP, 2018.*

Back cover: *Detail of the floor in the old library of the San Marco Convent in Florence, showing terracotta tiles and a pietra serena column. The clay and stone were taken from just outside the city, faithful to the tradition in central Italy that a town should be built in local stone and other materials. The foundational building blocks were known by all in the community, and centuries of use have made the buildings and towns of Tuscany more beautiful than ever. Similarly, it is important to nourish detailed awareness of the foundational building blocks of the discipline of international criminal law. Photograph: © CILRAP 2018*

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*Dedicated to Kai Ambos,
for the rigor and energy of his higher-end doctrinal research*

EDITORS' FOREWORD

This is the second volume to appear in the series *Philosophical Foundations of International Criminal Law*. The first volume – *Philosophical Foundations of International Criminal Law: Correlating Thinkers*, published on 30 November 2018 – correlates the writings of leading philosophers with the contemporary discipline of international criminal law. This volume zooms in on some foundational concepts or principles of the discipline, with a view to exploring their *Hinterland* beyond the traditional doctrinal discourse. A third volume – with the sub-title *Legally Protected Interests* – focuses on the values that are or should become protected by the discipline of international criminal law.

The series is in this manner built around correlation, foundational concepts, and values. The structure and purpose of the wider research project led by the Centre for International Law Research and Policy (CILRAP) is described in detail in Chapter 1 of *Philosophical Foundations of International Criminal Law: Correlating Thinkers*. That chapter also serves as introduction to this volume: we kindly refer readers to that text. It explains, among other matters, how we intend to expand the books in the series through new editions in the coming years, with the kind agreement of the publisher.

This first edition of *Foundational Concepts* contains eight chapters, on concepts such as sovereignty, global criminal justice, international criminal responsibility for individuals, punishment, impunity and truth. Future editions will include further chapters and concepts. Among the topics that should be addressed are ‘accountability’ or ‘responsibility’ and ‘intent’ or ‘mental state’. We look forward to working with additional authors on such topics in coming editions. We are committed to developing the book over the coming years.

We would like to thank the eight authors of this volume, all of whom spoke at CILRAP’s conference ‘Philosophical Foundations of International Criminal Law: Its Intellectual Roots, Related Limits and Potential’ in New Delhi on 25-26 August 2017. We also thank Devasheesh Bais and CHAN Ho Shing Icarus of the Torkel Opsahl Academic EPublisher, and the Norwegian Ministry of Foreign Affairs for its financial support.

Morten Bergsmo and Emiliano J. Buis

TABLE OF CONTENTS

<i>Editors' Foreword</i>	<i>i</i>
1. From Open Normativity to Normative Openness: Addressing the Elephant in the Room, That Is, the Fact of Justificatory Pluralism in International Criminal Justice	1
<i>By Christoph Burchard</i>	
1.1. Introduction.....	1
1.1.1. On Terminology and Methodology	2
1.2. The Open Normativity of International Criminal Justice: Observations	5
1.2.1. The Normativity of International Criminal Justice	5
1.2.2. The Open Normativity of International Criminal Justice. 7	
1.2.2.1. Open Set of Questions	7
1.2.2.2. From the Theory to the Practice of Open Normativity: Selectivity and Politicisation of International Criminal Justice	13
1.3. The Open Normativity of International Criminal Justice: An Elephant in the Room.....	14
1.3.1. Pragmatism	15
1.3.2. Seeking Normative Closure	15
1.3.3. Obfuscating Power	18
1.3.4. Relieving an Emancipated Law	19
1.4. Outlook	20
2. The Prince and the People: Sovereignty in International Criminal Law's Philosophical Foundations.....	23
<i>By Christopher B. Mahony</i>	
2.1. Introduction.....	23
2.2. Is International Justice Cascading?	25
2.3. A Philosophical Lens into the Independence of Institutional Design	27

2.3.1.	The Philosophical Role of ‘Deterrence’ in the Disposition of International Criminal Justice Institutional Design	30
2.4.	Confirmation Bias and the Philosophy of Language in Asserting Altruistic Intent of Elites to Constituents in the International Criminal Justice’s Design	34
2.4.1.	The Body-Politic of the ICC’s Design	36
2.4.2.	The Body-Politic of the International Criminal Justice System’s Function	39
2.5.	Conclusion	43
3.	Towards ‘Global’ Criminal Justice?	45
	<i>By Milinda Banerjee</i>	
3.1.	Introduction.....	45
3.2.	Understanding Pal’s ‘Global’ Criminal Justice	47
3.2.1.	Bengali Intellectual Genealogy	47
3.2.2.	Pal’s Opposition to Victors’ Justice.....	49
3.2.3.	Pal’s ‘Global’ Criminal Justice	50
3.3.	The Role of Sovereignty in ‘Global’ Criminal Justice	52
3.3.1.	Non-State Entities Possessing State-Like Powers	53
3.3.2.	Pal’s Views on Sovereignty	54
3.3.3.	Consequences of Sovereignty	56
3.4.	Anarchist Approaches to ‘Global’ Criminal Justice	57
3.5.	Law and Justice Beyond State Sovereignty	60
3.6.	Conclusion	63
4.	The Concept of International Criminal Responsibility for Individuals and the Foundational Transformation of International Law	65
	<i>By CHAO Yi</i>	
4.1.	Introduction.....	65
4.2.	The Concept of International Criminal Responsibility for Individuals as an Initiator of the Foundational Transformation of International Law	70
4.2.1.	International Criminal Responsibility for Individuals and the Changing Structure of International Law	73
4.2.1.1.	The Pluralisation of Subjects of International Law	73
4.2.1.2.	From Inter-State Law to the Law of the International Community.....	77

4.2.2.	Going Beyond Traditional Positivism	81
4.2.2.1.	International Criminal Responsibility for Individuals: A Revival of Natural Law Thinking.....	82
4.2.2.2.	Jus Cogens and International Crimes	91
4.3.	International Criminal Responsibility for ‘Individuals’: Tangled Threads of Rationales	96
4.3.1.	Who Commits International Crimes: Individual Guilt Intertwined with Collective Criminality	97
4.3.1.1.	“Men, not Abstract Entities”: More Complex than it Appears	99
4.3.1.2.	The Dimension of Collective Criminality in the Development of International Criminal Law.....	103
4.3.2.	Are There Other Forms of International Criminal Responsibility? The Relationship Between Individual and Collective Responsibility	110
4.3.2.1.	Individual Criminal Responsibility as a Form of Collective Criminal Responsibility ..	112
4.3.2.2.	Other Potential Forms of Collective Criminal Responsibility	112
4.4.	International Law in the Dilemma of Transformation: The Example of Foreign Immunity for Torture.....	115
4.4.1.	The Supreme Court of Canada’s <i>Kazemi</i> Judgment: Clash of Rationales regarding Foreign Immunity for Torture in Civil Suits	116
4.4.1.1.	The Majority Opinion.....	117
4.4.1.2.	The Dissenting Opinion.....	119
4.4.1.3.	The Clash of Philosophy and Rationales	120
4.4.2.	The Dilemma of Fragmentation: <i>Jus Cogens</i> Prohibition of Torture v. Customary International Law on Immunity	123
4.4.3.	Stuck in the Transformation: The Tension between States and the ‘International Community as a Whole’ ..	130
4.5.	Concluding Remarks	137
5.	International Criminal Responsibility as a Founding Principle of International Criminal Law.....	139
	<i>By Javier Dondé-Matute</i>	
5.1.	Introduction.....	139
5.2.	The Nuremberg Precedent	140

5.3.	Core Differences Between State Responsibility and International Criminal Responsibility	144
5.4.	International Criminal Responsibility v. Criminal Responsibility Before National Jurisdictions	147
5.5.	Group Responsibility	149
5.6.	Culpability	153
5.7.	Relationship with Other Principles of International Criminal Law	158
	5.7.1. International <i>Mens Rea</i>	158
	5.7.2. Mass Violence.....	160
5.8.	Conclusion	165
6.	Justifying International Criminal Punishment: A Critical Perspective.....	167
	<i>By Barrie Sander</i>	
6.1.	Introduction.....	167
6.2.	Retributivism.....	170
	6.2.1. The Selectivity Challenge.....	173
	6.2.2. The Adequacy Challenge.....	175
	6.2.3. The ‘Desert’ Challenge.....	177
	6.2.3.1. The Moral Intuitions Theory.....	178
	6.2.3.2. The Unfair Advantage Theory	180
6.3.	Utilitarianism	181
	6.3.1. The Probabilities Challenge.....	186
	6.3.2. The Non-Deterrability Challenge.....	189
6.4.	Expressivism	192
	6.4.1. Intrinsic Expressivism	196
	6.4.1.1. Victim-Based Expressivism	196
	6.4.1.2. The Communicative Theory	200
	6.4.2. Extrinsic Expressivism	209
	6.4.2.1. The Moral Education Theory	209
	6.4.2.2. The Gratifying Victim Hatred Theory	225
6.5.	Pluralising Post-Conflict Justice	232
	6.5.1. Criminal Justice Without Incarcerative Punishment	233
	6.5.2. From Criminal to Political and Social Justice.....	237
6.6.	Conclusion	240
7.	Impunity: A Philosophical Analysis	241
	<i>By Max Pensky</i>	
7.1.	Introduction.....	241

7.2.	Impunity as the Principal Norm of International Criminal Law	246
7.3.	Narrow and Broad Conceptions of Impunity	249
7.3.1.	The Narrow Conception of Impunity	251
7.3.2.	The Broad Conception of Impunity	257
7.4.	Sanction Accountability and Deliberation Accountability	258
7.5.	Conclusion	262
8.	Truth, Testimony, and Epistemic Injustice in International Criminal Law	269
	<i>By Shannon E. Fyfe</i>	
8.1.	Introduction	269
8.2.	Truth and Knowledge	270
8.2.1.	Knowledge	271
8.2.1.1.	Beliefs	272
8.2.1.2.	Justification	272
8.2.2.	Truth	275
8.2.2.1.	Theories of Truth	275
8.2.3.	Social Epistemology	280
8.2.3.1.	Branches of Social Epistemology and Truth	281
8.2.3.2.	Testimony	283
8.2.3.3.	Epistemic Injustice	284
8.3.	Truth and Legal Epistemology	287
8.3.1.	Issues of Criminal Law and Truth	288
8.3.1.1.	Theories of Truth and Criminal Law	288
8.3.1.2.	Adversarial v. Inquisitorial Systems and Truth	290
8.3.1.3.	Truth and Testimony as Evidence	292
8.3.1.4.	Truth and Justice in Criminal Legal Systems	293
8.4.	Truth and Epistemic Justice in International Criminal Law	296
8.4.1.	Goals of International Criminal Law	296
8.4.2.	Structure of International Criminal Procedure	298
8.4.3.	Truth and Testimony in International Criminal Law	299
8.4.3.1.	Excluded Testimony	301
8.4.3.2.	Discounted Testimony	302
8.4.4.	Epistemic Injustice in International Criminal Law	305
8.4.5.	Alternative Justice Mechanisms	307
8.5.	Conclusion	308

Index309
TOAEP Team317
Other Volumes in the Publication Series.....319

From Open Normativity to Normative Openness: Addressing the Elephant in the Room, That Is, the Fact of Justificatory Pluralism in International Criminal Justice

Christoph Burchard*

1.1. Introduction

Now that the honeymoon is over,¹ international criminal justice struggles with coming to terms with its own normativity. What are its rationales, objectives and aims, among others? What serves as a coherent and convincing justification for criminalising core international crimes, for administering justice on an international level, and for selectively prosecuting and possibly punishing certain individuals for the alleged commission of international crimes? These are but some of the foundational questions of international criminal justice, and answers are numerous of course. Due to the overabundance of practical and theoretical conceptualisations of international criminal justice,² there is a lack of agreement, at times even rudimentary, amongst the pertinent stakeholders about just what interna-

* **Christoph Burchard** is Professor of Criminal Law and Justice, Comparative Law and Legal Theory as well as Principal Investigator at the Cluster of Excellence ‘The Formation of Normative Orders’, Goethe University Frankfurt am Main, Germany. The author thanks research assistants Dušan Bačkonja and Nicola Recchia for their support in compiling the footnotes. Parts of this chapter draw on Christoph Burchard, “Die normative Offenheit der Strafrechtspflege”, in Frank Saliger *et al.* (eds.), *Festschrift für Ulfrid Neumann*, C.F. Müller, Heidelberg, 2017, pp. 535 ff., and *ibid.*, “Es efectivo el castigo penal de combatientes en un conflicto armado”, in Kai Ambos, Francisco Cortés and John Zuluaga (eds.), *Justicia Transicional y Derecho Penal Internacional*, Siglo del Hombre Editores, Bogotá, 2018, pp. 35 ff.

¹ As famously observed by David Luban, “After the Honeymoon: Reflections on the Current State of International Criminal Justice”, in *Journal of International Criminal Justice*, 2013, vol. 11, no. 3, p. 505.

² As famously observed by Mirjan R. Damaška, “What is the Point of International Criminal Justice?”, in *Chicago-Kent Law Review*, 2008, vol. 83, no. 1, p. 331.

tional criminal justice is or ought to be. This I will label the *open normativity of international criminal justice*.³ Since this is but an expression of the fact of justificatory pluralism⁴ in international criminal justice, I feel that we should not hastily seek normative closure, that is, a clear and determinate normative programme for international criminal justice. Rather, I contend, by way of a brief outlook, that we should switch our analytical and normative focus by moving from open normativity to normative openness of international criminal justice; only this approach allows us to address and come to terms with the fact of justificatory pluralism in international criminal justice.⁵ My argument begs the question: Is the open normativity of international criminal justice not a normal, even trivial and banal restatement of the many normative debates about the meaning and purposes of criminal law in general and international criminal law in particular? Why should we still focus on this triviality and banality? My answer to this challenge is that the open normativity of international criminal justice is the proverbial elephant in the room, a phenomenon that is so obvious and conspicuous that it is rarely addressed as such; and, or so I will argue, our normal way to address the open normativity of international criminal justice, that is, to seek normative closure, is not to address it.⁶

1.1.1. On Terminology and Methodology

Before venturing on to my observations on the open normativity of international criminal justice, I need to set the stage, by explicating, however briefly, the terminology I use, and by hinting at my research interest and methodology.

For me, the administration of international criminal justice represents an administration of power, which eventually requires a normative justification. However, from this account, it is all but clear *what* interna-

³ See *infra* Section 1.2.

⁴ The ‘fact of pluralism’ is a famous concept coined by John Rawls, “The Idea of an Overlapping Consensus”, in *Oxford Journal of Legal Studies*, 1987, vol. 7, no. 1, p. 1. Justifications and reasons are intrinsically linked so that the ‘fact of justificatory pluralism’ is largely synonymous with the ‘fact of a pluralism of reasons’, which then points to the ‘indeterminacy of rational justification’ in a non-ideal world (on the latter see Gerald F. Gaus, *The Order of Public Reason*, Cambridge University Press, Cambridge, 2011, pp. 36 ff.).

⁵ See *infra* Section 1.4.

⁶ See *infra* Section 1.3.

tional criminal justice actually is and whether it is something coherent and enclosed. Our traditional *modus operandi*, the legal justification of power,⁷ may well obfuscate the power, and thus possibly the violence, of legal justifications.⁸ Therefore, we must not easily glance over the fact that the law can easily be considered an instrument of power and violence.⁹

In order to appreciate the power, and possibly also the violence, of international criminal justice, I suggest that we look to the (lack of) *power of justifications and public reasons*¹⁰ because justifications and reasons move persons through acceptance, irrespective of whether these justifications are acceptable. “Justifications are basic, not interests or desires” (nor values or ideologies, among others, one might add) so that reasons are “better suited to explaining why people act in a certain way and how power functions.”¹¹ This, then, is a *non-normative reading of normativity*, one that does not label justifications as justifiable or public reasons as normatively authoritative. Fundamentally, my explorations of the open normativity of international criminal justice rest on a sociological, or rather socio-theoretical, approach to justifications and reasons. It seeks to explain and understand how international criminal justice administers normative power. Since international criminal justice has emancipated itself,¹² or so the dominant story goes, from the individual motives of its

⁷ For example, the International Criminal Court (‘ICC’) was set up by international law, and at times even operates with *ius cogens* prescriptions.

⁸ Christoph Menke, *Recht und Gewalt*, August Verlag, Berlin, 2011, p. 10.

⁹ See generally John Mearsheimer, “The False Promise of International Institutions”, in *International Security*, 1994, vol. 19, no. 3, p. 13; Susan Marks, “Empire’s Law”, in *Indiana Journal of Global Legal Studies*, 2003, vol. 10, no. 1, p. 449; Frédéric Mégret, “In Defense of Hybridity: Towards a Representational Theory of International Criminal Justice”, in *Cornell International Law Journal*, 2005, vol. 38, no. 3, p. 740.

¹⁰ Using the term ‘public reasons’ is delicate, as there is an immense, mostly normative, debate behind it. I use the term in an idiosyncratic descriptive sense that makes use of the original meaning of ‘public’ reasons – reasons that are used in public, that is, openly, because they are communicatively accepted in a specific communicative forum. I shall not inquire what is ‘accepted’ (note: not acceptable!) and what is not accepted in international criminal justice in this chapter.

¹¹ Rainer Forst, “Noumenal Power”, in *The Journal of Political Philosophy*, 2015, vol. 23, no. 2, pp. 112, 118.

¹² See, for example, Frédéric Mégret, “A Special Tribunal for Lebanon: The UN Security Council and the Emancipation of International Criminal Justice”, in *Leiden Journal of International Law*, 2008, vol. 21, no. 2, p. 499. See also Carsten Stahn and Göran Sluiter, “From ‘Infancy’ to Emancipation? A review of the Court’s First Practice”, in *idem* (eds.),

decision-makers, agents, stakeholders and critics, we need to look to the systemic rationales, purposes and objectives as they are attached to international criminal justice as a normative order in its own right in order to explain, and understand, how and why these rationales, purposes and objectives move people in accepting, or resisting, international criminal law.¹³ This allows us to bridge the observer with the participant perspective on international criminal justice.

Casting international criminal justice as a normative order is, of course, a blatant simplification, and perchance even an illusion or myth.¹⁴ Therefore, I am mostly concerned with authoritative decisions, arguably decisions about the undecidable, because it is in authoritative decisions that the normative (im)potence of international criminal justice becomes apparent. The first and descriptive question of power, therefore, is whether, and why, certain legislative, adjudicative or administrative decisions about introducing, deploying, enforcing and resisting legal prescriptions in the context of international criminal justice move people to either follow or resist the law.

This brings me to an important clarification. Although I will argue that international criminal justice is normatively open, or fluid, in that it reconciles many ambivalent and at times even incommensurable normative projects, I will argue that ‘the’ law and its interpreters must seek normative closure in many instances. Indeed, and perhaps this is what characterizes law as law – the law, and its makers, enforcers and critics, must render *decisions* that seek to bring about normative closure within the law from an internal perspective, although normative openness will prevail from an external perspective from outside the law. The act of choosing and deciding indeed moves to the centre of interest, and with it the inclusions and exclusions that it brings about. The crucial point here is simple, and yet disconcerting, as I treat authoritative decisions about the law as the legal manifestation of decisive authority, which operates on justifications and reasons that move people, addressors, addressees and third parties alike, to either accept or resist these decisions.

The Emerging Practice of the International Criminal Court, Martinus Nijhoff Publishers, Leiden, 2008, p. 1.

¹³ I will return to this in *infra* Section 1.3.4.

¹⁴ See *infra* Section 1.3.2.

1.2. The Open Normativity of International Criminal Justice: Observations

The open normativity of international criminal justice is a descriptive account of the current state of play, which compiles two observations: international criminal justice is at heart a normative enterprise.¹⁵ Its foundational normativity, however, is un(der)determined, fluid, ambivalent, and hence malleable, that is, open.¹⁶

1.2.1. The Normativity of International Criminal Justice

First on the (non-normative) *normativity* of international criminal justice. The deliberations, discussions, negotiations and disputes and even the critique, struggles and fights that we find in and about international criminal justice – including those that are rooted in power interests or emotions – will usually appeal to publicly accepted justifications that offer public reasons to obey and even value or to disobey, at least be critical of, international criminal justice. Put simply, international criminal justice is normative, because (and when) it needs to be justified, and because (and when) its defence and critique utilises reasons. Speaking of the latter, in current international criminal justice mere allusions to domination or emotional affects, among others, are off the table. Or can we, as of today, reasonably imagine a dictator ‘rationalising’ the genocide of her people with her brute capability or her mere pleasure to do so?¹⁷ Or, on the other side of the aisle, can we reasonably imagine the International Criminal Court (‘ICC’) ‘justifying’ that countries on the periphery are to be ‘civilised’ by the means of international criminal justice?¹⁸

¹⁵ See *infra* Section 1.2.1.

¹⁶ See *infra* Section 1.2.2.

¹⁷ Note that such rationalisations may very well find bases in normative theories that for example cherish power for the sake of power or that elevate a master over an inferior race. However, such normativity is no longer acceptable, and rightly so, and therefore excluded from the acceptable justifications. This very exclusion then bolsters the normativity of international criminal justice, for this exclusion is an expression of ‘normative power’ – a concept to which I will return immediately.

¹⁸ Note that public reasons have not necessarily replaced and can thus be ‘corrupted’ by apocryphal reasons, such as domination and emotion. For example, the critique that the ICC is, on a subliminal level, a neo-colonial and racist institution turns on ICC’s public justifications, trying to illustrate that they are a mere façade that obfuscate ‘sinister’ ambitions.

Moreover, international criminal justice cannot be but a primarily normative project, since its coercive apparatus is highly limited. The ICC, for example, and as it is well-known, only has coercive powers over defendants once it acquired them, but no coercive investigatory powers ‘on the ground’ or even to enforce obligations to co-operate against States Parties.¹⁹ I am, of course, not claiming that the normativity of international criminal justice is overriding the influence of domination or emotion, among others – as it can be marshalled pro and contra international criminal justice in general or against individual decisions in or about the law, in particular. But domination, emotion or other non-accepted reasons are being – from the vantage point of both the addressors and the addressees of international criminal justice – normatively reconfigured and brought into a justificatory space of public reasons. Sub-species, by their very legalisation, questions of factual domination, among others, are being transformed into normative ones so that they require justificatory answers that in turn need to be supplemented with public reasons.

In international criminal justice, then, what is really at stake is ‘normative power’,²⁰ that is, social and institutional discursive power. In other words, when looking to power, we are looking into the capacity to offer acceptable reasons that may motivate someone else to think and do something that he or she would otherwise not have thought and done.²¹

For example, arguing that a State Party will withdraw from the ICC because it threatens the reign of a dictator is hardly convincing. The argument is no longer discursively accepted. But what about a withdrawal that contends that the ICC is but a neo-imperialistic “Western Court to try African crimes”?²² If one finds this argument accepted and not per se excluded, one comes close to accepting the withdrawal in principle. This holds water even if one would thereby sanction that the withdrawal may

¹⁹ For this critique see, for example, Antonio Cassese, “Reflections on International Criminal Justice”, in *The Modern Law Review*, 1998, vol. 61, no. 1, p. 1, at p. 10; Jack Goldsmith, “The Self-Defeating International Criminal Court”, in *The University of Chicago Law Review*, 2003, vol. 70, no. 1, p. 89, at pp. 92 ff.

²⁰ James Bohman, *Democracy Across Borders: From Demos to Demoi*, MIT Press, Cambridge, Massachusetts, 2007, p. 7.

²¹ The latter is the definition of ‘noumenal power’ by Forst, 2015, p. 115, see *supra* note 11.

²² Mahmood Mamdani, “The New Humanitarian Order”, in *The Nation*, 10 September 2008 (available on *The Nation* web site).

eventually be motivated by our dictator's naked will to stay in power. At first glance, the *Al-Bashir* disaster offers a counter-example. But a closer look reveals that it rather delimits international criminal justice from politics. Where no proper reasons are offered, for example, by the UN Security Council, for why it does not 'comply' with its initial referral of the Sudan situation to the ICC,²³ international criminal justice proper ends and politics begins.

1.2.2. The *Open Normativity of International Criminal Justice*

This leads me to the second dimension of the open normativity of international criminal justice. The *openness* of this normativity condenses its indeterminacy, possibly its undecidedness, indeed its malleability. In this respect, I am not lamenting that we – as the epistemic community of international criminal lawyers – 'simply' have not found common answers to the foundational questions of international criminal justice. Nor do I lament any "theoretical deficits"²⁴ in the raising and responding to these questions. As, to the contrary, there is an overabundance²⁵ of normative theories – justifications and reasons, including critique – on the starting grounds as well as the finalities and rationalities of international criminal justice,²⁶ which is not only a problem of theory but one of practice.²⁷

1.2.2.1. Open Set of Questions

In order to illustrate the open normativity of international criminal justice, let us turn to four sets of open questions.

²³ On this see, for example, Louise Arbour, "The Relationship Between the ICC and the Security Council", in *Global Governance*, 2014, vol. 20, no. 2, p. 200; Stuart Ford, "The ICC and the Security Council: How Much Support Is There for Ending Impunity", in *Indiana International and Comparative Law Review*, 2016, vol. 26, no. 1, pp. 40 ff.

²⁴ Carl-Friedrich Stuckenberg, "Völkerrecht und Staatsverbrechen", in Jörg Menzel, Tobias Pierlings and Jeannine Hoffmann (eds.), *Völkerrechtsprechung*, Mohr Siebeck, Tübingen, 2005, p. 772. See also Kai Ambos, *Internationales Strafrecht*, 5th edition, C.H. Beck, München, 2018, p. 101.

²⁵ Damaška, 2008, p. 331, see *supra* note 2.

²⁶ See *infra* Section 1.2.2.1.

²⁷ See *infra* Section 1.2.2.2.

First, we are far from a common *theory of criminalisation* on the international level.²⁸ Here are some of the challenges we face:

- How do we justify the criminalisation of international offences?
 - By the protection of individual and/or collective human rights?²⁹
 - And/or the protection of world peace?
 - And/or the ‘cleanliness’ of warfare and armed conflict, among others?
- And from where do we start?
 - From a moral perspective which scourges core international crimes as pre-institutional, pre-legal, and/or pre-criminal *mala in se*?³⁰
 - And/or from a political perspective? This would make criminalisation dependent on a prior political theory,³¹ for example, liberal cosmopolitanism or international institutionalism. As a consequence, core crime offences would communicate and stabilise the authority of the international

²⁸ It comes as no surprise that the same holds true on a national level. Cf. the introduction to R.A. Duff, Lindsay Farmer, S.E. Marshall, Massimo Renzo and Victor Tadros, *Criminalization: The Political Morality of the Criminal Law*, Oxford University Press, Oxford, 2015, p. 2.

²⁹ It should be noted that human rights are thereby reconfigured from the *status negativus* to the *status positivus*. They no longer serve as a defence of the individual against a commonwealth (bottom-up defence), but justify (top-down) the infringement of the personal liberties of the offender, because it infringes upon the human rights of fellow human beings, which prompts a protective responsibility by the commonwealth.

³⁰ This convincing distinction of ‘pre-’ness is expounded by Robin Antony Duff, “Political Retributivism and Legal Moralism: Comment”, in *Virginia Journal of Criminal Law*, 2012, vol. 1, no. 1, p. 189. For a recapitulation of the ‘moral turn’ in Anglo-American criminalisation theory see *ibid.*, pp. 186 ff.

³¹ See generally Malcolm Thorburn, “Justifications, Powers, and Authority”, in *The Yale Law Journal*, 2008, vol. 117, no. 6, p. 1070. With regard to international criminal justice, see, for example, Adil Ahmad Haque, “Group Violence and Group Vengeance: Toward a Retributivist Theory of International Criminal Law”, in *Buffalo Criminal Law Review*, 2005, vol. 9, no. 1, pp. 320 ff.; Marlies Glasius, “Do International Criminal Courts require Democratic Legitimacy?”, in *The European Journal of International Law*, 2012, vol. 23, no. 1, pp. 63 ff.; Mégret, 2005, pp. 741 ff., see *supra* note 9.

community, which in turn may or may not be synonymous with Western domination.³²

- And/or from the (in moral or political terms allegedly neutral) perspective of the harm principle or the protection of *Rechtsgüter*, with the multitude of definitions that this concept holds?³³

Second, we are also far from a *theory of criminal procedure and punishment* in international criminal justice. To again only offer some superficial insights into what is at stake:

- Do we need a different set of reasons for criminal punishment than as regards criminalisation, so that the aesthetic³⁴ and per chance moralistic³⁵ distinction between criminalisation and sanctioning would collapse?
- Why do we punish offenders?
 - To redress a moral wrong?
 - And/or to deter?³⁶

³² See generally Michael McFaul, “Democracy Promotion as a World Value”, in *The Washington Quarterly*, 2004, vol. 28, no. 1, p. 155; Martti Koskeniemi, “International Law in Europe: Between Tradition and Renewal”, in *The European Journal of International Law*, 2005, vol. 16, no. 1, p. 115; Dawn Rothe and Christopher W. Mullins, “‘International Community’: Legitimizing a Moral Consciousness”, in *Humanity and Society*, 2006, vol. 30, no. 3, p. 273.

³³ See here the comparative analysis of Kai Ambos, “The Overall Function of International Criminal Law: Striking the Right Balance Between the Rechtsgut and the Harm Principles”, in *Criminal Law and Philosophy*, 2015, vol. 9, no. 2, p. 301.

³⁴ As to this distinction see, for example, Claus Roxin, *Strafrecht Allgemeiner Teil*, 4th edition, CH. Beck, München, 2006, vol. 1, pp. 69 ff.; Ulfrid Neumann, “Institution, Zweck und Funktion staatlicher Strafe”, in Michael Pawlik and Rainer Zaczek (eds.), *Festschrift für Günther Jakobs*, Carl Heymanns, Köln, 2007, pp. 446 ff.

³⁵ As Emmanuel Melissaris, “Toward a Political Theory of Criminal Law: A Critical Rawlsian Account”, in *New Criminal Law Review*, 2012, vol. 15, no. 1, p. 129 has convincingly argued, the more criminal law and punishment become “normalised” as an ordinary means of governance, that is, the more a moral theory that claims the uniqueness of criminal law is discounted, the more criminalisation and punishment become part of the same scheme that can be justified with the same reasons.

³⁶ See, for example, ICTY, *Prosecutor v. Tadić*, Trial Chamber, Sentencing Judgement, 11 November 1999, IT-94-1-Tbis-R117, para. 60 (<http://www.legal-tools.org/doc/5c2dde/>). See also Payam Akhavan, “Beyond Impunity: Can International Criminal Justice Prevent

- And/or to incapacitate³⁷ or even to re-socialise?³⁸
- And/or to communicatively generate or stabilise norms,³⁹ so that the very concept of ‘show trials’, which do not necessarily have to be unfair, would become acceptable?⁴⁰
- If we look to the debates in international criminal justice, we must not stop there, since we are experiencing a *decentring of the discussion*. Punishment is no longer at its firm core.
 - So, do we punish in order to have a trial, because at rock bottom we seek to give victims a voice?⁴¹
 - And/or to (re)construct a historical record, among others?⁴²
 - And to what degree do we accept pragmatic rationales for criminal trials? Do we, for example, accept functions like familiarising a court with a situation, as in Goldstone’s fa-

Future Atrocities?”, in *The American Journal of International Law*, 2001, vol. 95, no. 1, pp. 7 ff.

³⁷ See, for example, Mark A. Drumbl, “Collective Violence and Individual Punishment: The Criminality of Mass Atrocity”, in *Northwestern University Law Review*, 2005, vol. 99, no. 2, p. 589.

³⁸ See, for example, Jessica M. Kelder, Barbora Holá and Joris van Wijk, “Rehabilitation and Early Release of Perpetrators of International Crimes: A Case Study of the ICTY and ICTR”, in *International Criminal Law Review*, 2014, vol. 14, no. 6, p. 1177.

³⁹ See, for example, Margaret M. deGuzman, “Choosing to Prosecute: Expressive Selection at the International Criminal Court”, in *Michigan Journal of International Law*, 2012, vol. 33, no. 2, p. 270; Robert D. Sloane, “The Expressive Capacity of International Punishment: The Limits of the National Law Analogy and the Potential of International Criminal Law”, in *Stanford Journal of International Law*, 2007, vol. 4, no. 1, p. 44.

⁴⁰ Also see Martti Koskeniemi, “Between Impunity and Show Trials”, in *Max Planck Yearbook of United Nations Law*, 2002, vol. 6, no. 1, p. 35; Stephan Landsman, “Alternative Responses to Serious Human Rights Abuses: of Prosecution and Truth Commissions”, in *Law and Contemporary Problems*, 1996, vol. 59, no. 4, p. 86.

⁴¹ See, for example, Charles P. Trumbull IV, “The Victims of Victim Participation in International Criminal Proceedings”, in *Michigan Journal of International Law*, 2008, vol. 29, no. 4, pp. 801 ff.; Jo-Anne Wemmers, “Victims’ Rights and the International Criminal Court: Perceptions within the Court Regarding the Victims’ Right to Participate”, in *Leiden Journal of International Law*, 2010, vol. 23, no. 3, pp. 639 ff.

⁴² Regina E. Rauxloh, “Negotiated History: The Historical Record in International Criminal Law and Plea Bargaining”, in *International Criminal Law Review*, 2010, vol. 10, no. 5, p. 739.

mous case-building strategy at the International Tribunal for the former Yugoslavia ('ICTY')?⁴³

Third, whilst the above-mentioned questions mirror discussions we have on a national level, international criminal justice brings with it *further complications* as we lack agreement about the addressees, the extent and the timing of international criminal justice.

- So, for whom do we administer international criminal justice?
 - For the international community as such (whatever that may be)?
 - Or primarily for Western communities, perchance even so that they have a fig leaf⁴⁴ for not intervening into or for even escalating conflicts, where international crimes are committed?⁴⁵
 - Or for conflict-ridden regions or societies (the keyword here is 'local ownership')?⁴⁶
 - Or even primarily for the victims, among others?
- Against whom⁴⁷ shall we bring international criminal justice to bear?
 - Against political, military, economic, bureaucratic, and/or other leaders?
 - And/or against paper-pushers, the Eichmann type perpetrators, who evidence the 'banality of evil'?

⁴³ See Richard J. Goldstone, *For Humanity: Reflections of a War Crimes Investigator*, Yale University Press, New Haven/London, 2000, pp. 101 ff.

⁴⁴ See, for example, Thomas W. Smith, "Moral Hazard and Humanitarian Law", in *International Politics*, 2002, vol. 39, no. 2, p. 175.

⁴⁵ This would make international criminal justice the '*prima ratio*', since prior political measures to prevent or pre-empt international crimes are too costly, in a wide sense.

⁴⁶ See, for example, Janine Natalya Clark, "Peace, Justice and the International Criminal Court: Limitations and Possibilities", in *Journal of International Criminal Justice*, 2011, vol. 9, no. 3, pp. 534 ff.; Vasuki Nesiah, "Local Ownership of Global Governance", in *Journal of International Criminal Justice*, 2016, vol. 14, no. 4, p. 985.

⁴⁷ See, for example, Hitomi Takemura, "Big Fish and Small Fish Debate: An Examination of the Prosecutorial Discretion", in *International Criminal Law Review*, 2007, vol. 7, no. 4, p. 677.

- And/or against the so-called small fish, who, however, we must be mindful of, are the ones pulling the proverbial triggers or opening the proverbial gas taps?
- To which extent do we seek to administer international criminal justice?
 - Do we, at least eventually and in an idealised world, seek to mete out international criminal justice universally, that is against anyone anywhere?
 - Or are we content with selective prosecutions? For example, in order to have ‘tainted’ members of the *ancien régime* uphold order in the *nouveau régime*? Or simply for reasons of feasibility? Or do we indeed sign up to symbolic justice, where the ‘guilt’ of the many is symbolically appraised in the trial of the few?
- And finally, when does the administration of international criminal justice ought to begin and when does it ought to bear fruits?
 - Immediately, for example, whilst a conflict is ongoing in order to end it?
 - And/or in the near future, for example, in order to foster reconciliation in a war-torn community?
 - And/or in the far future, for example, like in Germany, where the Nuremberg account of the Holocaust only made it into public consciousness after decades?

Fourth, international criminal justice struggles hard with defining its exact relationship with ‘neighbouring’ disciplines, or rather social practices, like national criminal justice, transitional justice or peacebuilding efforts. The ever-present question is whether international criminal justice is part of or distinct from them, a question that becomes even more blurry when taking into account that the latter disciplines are normatively open as well. It comes as no surprise, then, that, for example, international criminal justice and transitional justice can either be seen as antipodes or as one social practice to come to terms with systemic mass violence.

1.2.2.2. From the Theory to the Practice of Open Normativity: Selectivity and Politicisation of International Criminal Justice

These are but some – but in my eyes the most pressing – foundational questions that international criminal justice faces. They have received close attention and thorough inquiries in academia, practice and politics. And they are not only of theoretical but of practical importance, that is, they call for decisive resolutions by the law in action. Since this does not warrant closer inspection, suffice it to very briefly recall two core problems of international criminal justice, selectivity and politicisation.

As regards selectivity, it is a commonplace that the ICC needs to decide how it spends its scarce resources. Which situation, time frame, region, party to a conflict, perpetrator, acts and offences does it focus on? This intricate set of practical questions are evidently linked to the foundational ones mentioned before. In *Lubanga*,⁴⁸ for example, the ICC Office of the Prosecutor (‘OTP’), albeit not openly, resorted to pragmatism,⁴⁹ as it was done before in *Tadić*,⁵⁰ by going against an individual that was already in custody. Moreover, the OTP chose a communicative and symbolic agenda⁵¹ by focusing on child-soldier related crimes in its charging decision. It goes without saying that each of these decisions can be, and were, easily assailed or defended.

And as regards politicisation, the attempt to hold politics accountable by means of criminal law may very well lead into a vicious circle where the legalisation of the political turns into a politicisation of the law. With the normativity of international criminal justice out in the open, de-

⁴⁸ For an overview see the ICC’s collection of decisions, documents, press material, among others, available on ICC’s Lubanga case web site.

⁴⁹ See, for example, Phil Clark, “Law, Politics and Pragmatism: The ICC and Case Selection in the Democratic Republic of Congo and Uganda”, in Nicholas Waddell and Phil Clark (eds.), *Courting Conflict? Justice, Peace and the ICC in Africa*, Royal African Society, London, 2008, pp. 39, 41; Thomas Obel Hansen, “A Critical Review of the ICC’s Recent Practice concerning Admissibility Challenges and Complementarity”, in *Melbourne Journal of International Law*, 2012, vol. 13, no. 1, pp. 221 ff.

⁵⁰ On the issues surrounding Tadić’s extradition from Germany to The Hague, see Elizabeth Philipose, “Prosecuting Violence, Performing Sovereignty: The Trial of Dusko Tadic”, in *International Journal for the Semiotics of Law*, 2002, vol. 15, no. 2, p. 171.

⁵¹ Frédéric Mégret, “Practices of Stigmatization”, in *Law and Contemporary Problems*, 2013, vol. 76, no. 3, pp. 298, 305.

cisions are susceptible both to political activism by international criminal justice's organs⁵² and to political corruption from the outside.⁵³ For example, in the Colombia situation, the ICC has to decide whether it is in the interest of justice (Article 53 of the Rome Statute) to override, by means of determining Colombia unwilling under the complementarity regime,⁵⁴ a peace process that, at least initially, relied on amnesties and means of transitional justice to overcome a conflict that lasted for decades.⁵⁵ And in the (in)famous preliminary investigations of the ICTY into the North Atlantic Treaty Organization bombing campaign in Serbia,⁵⁶ the ICTY was under to pressure to possibly move against its own financiers and supporters.

1.3. The Open Normativity of International Criminal Justice: An Elephant in the Room

All that I have been saying on the open normativity of international criminal justice is, from an observer's point of view, a (superficial) synopsis of the many theoretical debates on, in, about and against international criminal justice that have turned practical in many instances. *Prima facie*, this will not come as a surprise to many. It may even sound trivial and banal, hearing that there are many disputes in international criminal justice, in-

⁵² See generally Alexander K.A. Greenawalt, "Justice Without Politics? Prosecutorial Discretion and the International Criminal Court", in *NYU Journal of International Law and Politics*, 2007, vol. 39, no. 3, pp. 612 ff.

⁵³ See, for example, John R. Bolton, "The Risks and Weaknesses of the International Criminal Court from America's Perspective", in *Law and Contemporary Problems*, 2001, vol. 64, no. 1, p. 180; Elizabeth Nielson, "Hybrid International Criminal Tribunals: Political Interference and Judicial Independence", in *UCLA Journal of International Law and Foreign Affairs*, 2010, vol. 15, no. 2, pp. 306 ff.

⁵⁴ See, for example, Diego Acosta Arcarazo, Russell Buchan and Rene Ureña, "Beyond Justice, Beyond Peace? Colombia, the Interests of Justice, and the Limits of International Criminal Law", in *Criminal Law Forum*, 2015, vol. 26, no. 2, pp. 300 ff.

⁵⁵ For an overview see, for example, Kimberly Theidon, "Transitional Subjects: The Disarmament, Demobilization and Reintegration of Former Combatants in Colombia", in *The International Journal of Transitional Justice*, 2007, vol. 1, no. 1, p. 66.

⁵⁶ "Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia" (<http://www.legal-tools.org/doc/83feb2/>); for a critical review of the report see, for example, Paolo Benvenuti, "The ICTY Prosecutor and the Review of the NATO Bombing Campaign against the Federal Republic of Yugoslavia", in *European Journal of International Law*, 2001, vol. 12, no. 3, p. 503.

cluding about its very foundation, and that these disputes mould the decisions taken by the agents of international criminal justice. I nonetheless think that the said open normativity of international criminal justice is lost in a blind spot. It is an elephant in the room, a phenomenon that is so obvious that one does not (want to) address it. We should at least explore four causes (not reasons) for why the open normativity of international criminal justice can be easily glanced over, and for why the normative openness of international criminal justice is commonly not addressed as such:

1.3.1. Pragmatism

A *first cause* roots in, albeit a very common-sense understanding of, pragmatism. Pragmatists amongst academics, practitioners and politicians, among others, may object that it is high time to face the doctrinal and procedural problems of international criminal justice, and leave the foundational ones be.⁵⁷ They might, and at least behind closed doors do, argue that the theoretical debates have so far only yielded the widening and deepening of the open normativity of international criminal justice, and that they have not brought us anywhere near agreement – or even a consensus – about where international criminal justice starts, stands and is oriented to. A subtler objection is that the open normativity of international criminal justice is not only nothing new,⁵⁸ but nothing special. After all, or so the objection goes, national criminal justice systems are normatively open as well,⁵⁹ so that one should not ‘make a fuss’ about it.

This, however, is not a particularly strong argument. To the contrary, it only begs the question why we do not address the open normativity of criminal law on a national level.

1.3.2. Seeking Normative Closure

A *second cause* for losing sight of the normative openness of international criminal justice rests in our legal academic culture, which may well have

⁵⁷ See, for example, Kai Ambos, 2018, p. 102, see *supra* note 24.

⁵⁸ See also Klaus Günther, “Normativer Rechtspluralismus – Eine Kritik”, in Thorsten Moos *et al.* (eds.), *Das Recht im Blick der Anderen*, Mohr/Siebeck, Tübingen, 2016, pp. 46 ff.

⁵⁹ This is explored in Christoph Burchard, “Die normative Offenheit der Strafrechtspflege”, in Frank Saliger *et al.* (eds.), *Festschrift für Ulfrid Neumann*, C.F. Müller, Heidelberg, 2017, pp. 535 ff.

spilled over onto practice and politics, or indeed vice versa.⁶⁰ After all, are we not required to find definite and coherent answers to the open normative questions of our times?⁶¹ Indeed, for those who are interested in international criminal law theory, the open normativity of international criminal justice is an ever-present incentive to come up with a, comprehensive or partial, but in all cases consistent, set of responses to the foundational questions of international criminal justice. *Consistent normative closure*, then, is the goal. Perhaps it makes us forget that these closures are only *intended* to bring closure and that they, *in fact*, will rarely do so. The ‘ought’, for example, that international criminal justice ought to communicatively generate the imperatives of humanity in the name of the world society, thus, lets us lose sight of the ‘actually will be’, that international criminal justice actually will be communicatively generating said imperatives.⁶² Further, the ‘ought’ lets us lose sight of the ‘was’. Indeed, rational and coherent normative prescriptions about how ‘the’ criminal law ought to be configured are rarely considerate of the contingencies of historical developments.

Again, this not only holds true on an international but even more so on a national level. As Lindsay Farmer has recently demonstrated, the notion of ‘the’ criminal law as a purposive institution is a historically contingent construct.⁶³ Yet, as brilliantly illustrated by Alice Ristroph in a review essay, this insight about the ‘actual was’ did not keep Farmer from falling for the quest, perchance even the crusade, for normative closure, as

⁶⁰ Zygmunt Bauman, *Modernity and Ambivalence*, Cornell University Press, Ithaca, 1991, even argues, from a sociological perspective, that the suppression of ambivalence is characteristic for modernity, but that this very suppression creates new ambivalences. See, for example, p. 3: “The struggle against ambivalence is both self-destructive and self-propelling. It goes on with unabating strength because it creates its own problems in the course of resolving them”.

⁶¹ On this see, for example, Gerry Simpson, “International Criminal Justice and the Past”, in Gideon Boas, William A. Shabas and Michael P. Scharf (eds.), *International Criminal Justice. Legitimacy and Coherence*, Edward Elgar, Cheltenham, 2012, pp. 125 ff.; Cassandra Steer, “Legal Transplants or Legal Patchworking? The Creation of International Criminal Law as a Pluralistic Body of Law”, in Elies van Sliedregt and Sergey Vasiliev (eds.), *Pluralism in International Criminal Law*, Oxford University Press, 2014, p. 63.

⁶² This is no critique, as long as the research interest lies with justifying what ought to be.

⁶³ Lindsay Farmer, *Making the Modern Criminal Law: Civil Order and Criminalization*, Oxford University Press, Oxford, 2016.

he himself sought to establish an ‘ought’ for the criminal law – civil peace, in his case.

Perhaps, instead, criminal law has no aims. Perhaps it has no purposes, no dreams, no coherence, and no limits. The persons who enact, enforce, justify, or critique criminal laws have aims, to be sure, and many of these people are indeed motivated to redress wrongs, prevent harms, or secure safety or civil order. But there is no consistent motivation across all of the people who make actual criminal laws or theories of criminal law, nor even are there consistent understandings of purported goals.⁶⁴

The *genius loci* of this consideration is Nietzsche’s *Genealogy of Morality*. Here, Nietzsche gives an early account of the fluidity (his words), the normative openness (my words), or the overall aimlessness (to paraphrase Ristroph) of punishment as an institution. To let him speak for himself:

With regard to “*punishment*, we have to distinguish between two of its aspects: one is its relative *permanence*, the custom, the act, the ‘drama’, a certain strict sequence of procedures, the other is its *fluidity*, its meaning [*Sinn*], purpose and expectation, which is linked to the carrying out of such procedures. And here, without further ado, I assume [...] that the latter was only *inserted* and interpreted into the procedure (which had existed for a long time though it was thought of in a different way), in short, that the matter is *not* to be understood in the way our naïve moral and legal genealogists assumed up till now, who all thought the procedure had been *invented* for the purpose of punishment, just as people used to think that the hand had been invented for the purpose of grasping. With regard to the other element in punishment, the fluid one, its ‘meaning’, the concept ‘punishment’ presents, at a very late stage of culture (for example, in Europe today), not just one meaning but a whole synthesis of ‘meanings’ [*Sinnen*]: the history of punishment up to now in general, the history of its use for a variety of purposes, finally crystallizes in a kind of unity which is difficult to dissolve

⁶⁴ Alice Ristroph, “The Definitive Article”, in *University of Toronto Law Journal*, 2015, vol. 68, no. 1, p. 144.

back into its elements, difficult to analyse and, this has to be stressed, is absolutely *undefinable*. (Today it is impossible to say precisely *why* people are actually punished: all concepts in which an entire process is semiotically concentrated defy definition; only something which has no history can be defined.)⁶⁵

1.3.3. Obfuscating Power

Nietzsche not only brought to the fore that the traditional attribution of normative purpose and meaning is oblivious of historical contingencies. He also highlighted that this very act, that is, interpretatively giving a legal phenomenon purpose or meaning, is an act of power and domination, and hence possibly violence. To again quote him *in extenso*:

There is no more important proposition or every sort of history than that which we arrive at only with great effort but which we really *should* reach, – namely that the origin of the emergence of a thing and its ultimate usefulness, its practical application and incorporation into a system of ends, are *toto coelo* separate; that anything in existence, having somehow come about, is continually interpreted anew, requisitioned anew, transformed and redirected to a new purpose by a power superior to it; that everything that occurs in the organic world consists of *overpowering*, *dominating*, and in their turn, overpowering and dominating consist of re-interpretation, adjustment, in the process of which their former ‘meaning’ [*Sinn*] and ‘purpose’ must necessarily be obscured or completely obliterated.⁶⁶

Perhaps, then, this is the *third possible cause* for why the normative openness of international criminal justice lies in a blind-spot, for why it is an elephant in the room. In not focusing on the open normativity of law as such, one can readily glance over the power dimension of bringing about normative closure. In downscaling the disputes about the meanings and purposes of the law as something trivial, insignificant or normal, the very attribution of meaning and purpose to the law becomes equally trivial, insignificant or normal. For the criminal law theorist, this is liberating.

⁶⁵ Friedrich Nietzsche, *On the Genealogy of Morality*, trans. Carol Diethe, 2nd ed., Cambridge University Press, Cambridge, 2007, pp. 52 ff.

⁶⁶ Nietzsche, 2007, p. 51, see *supra* note 65.

For politicians, on the other hand, it is empowering, since they are enabled to obfuscate the possible argumentative violence of a legal justification, for example, withdrawing from the ICC because it ‘is’ neo-imperial in ‘nature’, by referring to the argumentative justification of power.⁶⁷

1.3.4. Relieving an Emancipated Law

A condensation of these considerations points to the most troubling insight, one that challenges the very fabric of ‘our’ – at least continental European⁶⁸ – understanding of law as an emancipated realm in its own right, which follows its own substantive rationalities⁶⁹ and autonomously stands next to, for example, the social, political or economic realm.⁷⁰ If ‘the’ criminal law in general and ‘the’ international criminal justice ‘system’⁷¹ in particular are but historically contingent regimes, which are continuously shaped by attributions of meaning that, in turn, are but (or, at least, also) acts of power and domination (and hence possibly violence) by individual decision-makers (who therefore should be recast as meaning-makers), the autonomy and unity of ‘the’ law become tenuous to uphold. The definite article ‘the’ turns into a myth.⁷² Perhaps, then, one hopes to downplay the open normativity of ‘the’ law in order to relieve an allegedly emancipated law, which – or so the story goes – must not be driven by

⁶⁷ Note that conflicting justifications, for example, about justice, may well spiral into conflict, both rhetorical and physical. Justice, therefore, can propel conflict, or rather the open normativity of the justice concept can do so. See generally Christopher Daase and Christoph Humrich, “Just Peace Governance: Forschungsprogramm des Leibniz-Instituts Hessische Stiftung Friedens- und Konfliktforschung”, *PRIF Working Papers No. 25*, 2015 (available on HSFK web site).

⁶⁸ In the US, the (in)famous ‘seamless web of the law’ may actually serve as a counterpart, that is the idea of the interconnectedness of legal doctrine, and if this is too substantive a formulation, the interconnectedness of ‘the’ legal method.

⁶⁹ That is the ‘neo-formalist’ argument in system’s theory, which considers ‘the’ legal system as something separate and independent from the political, social, economic system, among others, see, for example, Niklas Luhmann, *Das Recht der Gesellschaft*, Suhrkamp, Frankfurt, 1993, pp. 407 ff.

⁷⁰ See also Judith N. Shklar, *Legalism: Law, Morals and Political Trials*, Harvard University Press, Cambridge, Massachusetts, 1986, pp. 1 ff.

⁷¹ On a critical reading of systems’ rhetoric in US criminal law, see Sara Mayeux, “The Idea of ‘The Criminal Justice System’”, *American Journal of Criminal Law*, forthcoming, 2018.

⁷² On this kind of use of the definite article, see again Ristroph, 2015, at p. 140 ff., see *supra* note 64.

external social, political, economic influences, among others, as it must operate on its own rationalities. Once we take note of the open normativity of international criminal justice, in contrast, international criminal law seems to lose its very core, its very meaning of the law as something other, as something, either substantively, or at least methodologically,⁷³ independent. And shall we really, to ask a question that is far from merely being a rhetoric one, cast the law as the continuation of the social, political or economic by other means?⁷⁴

Put bluntly, taking note of the open normativity of international criminal justice introduces the shock of legal realism to this discipline, one that questions whether decisions about ‘the’ law are distinctively legal in nature, or whether other motives and parameters – starting from the proverbial good or bad breakfast, and ranging to less mundane, but equally ‘realistic’ ones, like personal ideologies and upbringing of the decision-maker – bore impact on legislative, administrative or adjudicative decision-making in the context of bringing to justice international criminals.

1.4. Outlook

In this chapter, I have argued that international criminal justice is normatively open. For years and years, it has not only operated despite the foundational fluidity, ambivalence and even incommensurability of its normative agendas, but perhaps because of it, that is because of the possible malleability to adapt justifications and public reasons to the addressor, the addressee, and the context of the argument in question. Curiously enough, the open normativity of international criminal justice is rarely addressed as such, and if it is, it is normally but taken as a starting point for bringing, or at least suggesting, normative closure. Hence, in addressing it, it is forgotten, and left in a blind-spot. It has become an elephant in the room of international legislation, adjudication and academia. We do not know, consequently, how international criminal justice as a normatively open

⁷³ (The choice of) method requires a substantive normative justification as well, as method is far less ‘innocent’ than meets the eye at first glance – just think about the discussion about originalism in the US. Albeit on a different, higher level, methodology thus has substantive implications as well.

⁷⁴ Herbert M. Kritzer, “Law Is the Mere Continuation of Politics by Different Means: American Judicial Selection in the Twenty-First Century”, in *DePaul Law Review*, 2007, vol. 56, no. 2, p. 423, puts this question the same way, drawing on Clausewitz’s famous dictum.

regime, which operates on normative power, actually functions, that is, whether and how it convinces people to follow or resist authoritative decisions on or about the law. We consequently do not know what actually needs to be justified normatively, that is, the normative power of international criminal justice.

Therefore, I suggest switching our focus, from the open normativity of international criminal justice, as a *prima facie* trivial insight, to its normative openness. The latter puts the very fluidity of justifications and public reasons in international criminal justice at the centre of our attention. This reorientation raises two research questions, which I can only hint here and which I will explore more closely in the future.

- *First*, how can normative openness be *explained and understood* from a sociological perspective? What functions does it serve? And which externalities does it trigger? Indeed, how stable is a normatively open criminal justice system? And is it considered legitimate by the pertinent stakeholders, for example, because it is normatively overdetermined, and hence capable of appealing to many a justificatory set of beliefs?
- *Second*, is normative openness desirable from a truly normative perspective?⁷⁵ Indeed, why should one prefer normative openness to normative closure or to concealing normative disagreement?

But why should we tackle these grand and *prima facie* ‘cerebral’ questions at all, and thus make headway from the open normativity to the normative openness of international criminal justice? My answer is simple, yet unsettling, as it highlights what international criminal justice, at least in its honeymoon phase, has tended to overlook. The open normativity of international criminal justice is but a manifestation of the fact of justificatory pluralism in a non-ideal world where normative choices are unavoidable, at least if justificatory over-determination fails, so that the objectively undecidable is to be authoritatively decided upon within and outside

⁷⁵ See for instance in this sense Christian Becker and Amadou Sow, “Eppur si muove. Inkommensurabilitätsstrukturen im Recht und im Werk von Franz Kafka”, in Günther Ortman and Marianne Schuller (eds.), *Was ich berühre, zerfällt Organisation - Recht - Schrift - Kafka* (on file with the author).

international criminal justice.⁷⁶ So my turn to normative openness is an appeal to address the fact of justificatory pluralism in international criminal justice; an appeal to explore justificatory pluralism both sociologically and normatively in the context of international criminal justice; and an appeal to not suppress justificatory pluralism by prematurely either decreeing normative closure or by readily glossing over it.⁷⁷

⁷⁶ With a pluralistic context, the act of choosing and deciding moves to the centre of interest, and with it the exclusions it brings about. This holds water all the more, since international criminal justice is a normative enterprise situated in a ‘non-ideal world’, where decisions cannot rest on encompassing prior negotiations or deliberations. They require, for good or bad, ‘leaps of faiths’ and contingent value judgments, among others. Consequently, we have to assume that decisions do not necessarily rest on agreement or even consensus. For the very act of deciding, one has to pay the price of excluding the (public or apocryphal) reasons of certain stakeholders.

⁷⁷ The fact of justificatory pluralism distils that there may be no generally accepted normative standard for resolving justificatory conflicts. There is, for example and in remembering the critique of the Lubanga charging decision, no lexical priority rule establishing that gender related core crimes are more, or for that matter, less, grave than child-soldier related core crimes etc. One implication of justificatory pluralism is that quantitative approaches to the foundational questions of international criminal justice are delicate at best and impossible at worst. It comes as no surprise, then, that the quantitative situation selection strategy of the OTP – in a nutshell, the idea that the suffering of the many outweighs the suffering of the few – meets much and heavy resistance. Not only that it balances what, from a moral perspective, hardly seems balanceable: indefinite wrong plus indefinite wrong ‘only’ equates to indefinite wrong. It also disregards there is no objective order of prosecutorial policies, so that going after the gravest wrong does not necessarily outweigh communicative strategies according to which the OTP should go for cases that ‘send the best messages’ etc.

The Prince and the People: Sovereignty in International Criminal Law's Philosophical Foundations

Christopher B. Mahony*

2.1. Introduction

This chapter traces the philosophical foundations of sovereignty from the conclusion of the 1648 Peace of Westphalia through the western post-Cold War “new political dispensation” that inferred a “post-sovereign era”, in which some international law elements impinge on State sovereignty.¹ The Treaty of Westphalia was premised upon States’ government as the sovereign power within its territory, and non-intervention in States’ domestic affairs by external actors.² Contemporaneously, I argue, philosoph-

* **Christopher B. Mahony** is Senior Political Economy Specialist at the Finance, Competitiveness, and Innovation Group at the World Bank (where he was formerly Political Economy Advisor at the Independent Evaluation Group), Consultant Strategic Policy Adviser at the United Nations Development Program (where he was formerly Rule of Law, Justice, Security and Human Rights Advisor), and Visiting Research Fellow at Georgetown University Law Center. He was admitted to the bar of the High Court of New Zealand in 2006, where he appeared for the Crown in criminal and refugee matters. In 2003, he drafted the recommendations on governance and corruption for the Sierra Leone Truth and Reconciliation Commission and co-authored the ‘Historical Antecedents to the Conflict’ chapter. In 2008, he directed the design of Sierra Leone’s witness protection programme. From 2012 to 2013, he was Deputy Director of the New Zealand Centre for Human Rights Law, Policy and Practice, Faculty of Law, Auckland University. He holds Bachelor of Commerce (B.Com.) and of Laws (LL.B.) degrees from the University of Otago and a Master’s in African Studies (M.Sc.) and a D.Phil. in Politics from the University of Oxford. The author thanks Benjamin Mugisho and Joshua McCowen for their invaluable research assistance in preparing this chapter.

¹ Morten Bergsmo and LING Yan, “On State Sovereignty and Individual Responsibility for Core International Crimes in International Law”, in Morten Bergsmo and LING Yan (eds.), *State Sovereignty and International Criminal Law*, Torkel Opsahl Academic EPublisher, Beijing, 2012, p. 1 (<http://www.toaep.org/ps-pdf/15-bergsmo-ling>).

² Andreas Osiander, “Sovereignty, International Relations, and the Westphalian Myth”, in *International Organization*, 2001, vol. 55, no. 2, p. 261.

ical disposition also reflects historical experience. In China, for example, exercise of foreign sovereignty is associated with external intervention, quasi-colonialism, and catastrophic levels of armed conflict with accompanying casualties.³ In the West, the impingement on State sovereignty by international law was viewed as a critical moral triumph in compelling adherence to norms and rules.

The French philosopher, Bodin, cites the Bartholomew massacres in France as demanding a sovereign with absolute power.⁴ Philosophically, Westphalian conceptions of sovereignty derive from religious conceptions of a higher unlimited power residing in the sovereignty of the State. I firstly trace Bodin's conception of such well-ordered power as necessary to control unruly behaviour within sovereign French territory – power to be respected and adhered to internally and externally, based on a body-politic comprised of both ruler and ruled. I then weigh Machiavelli's attribution of less consultative centralised power to a virtuous *prince* enabling internal contestation to be quelled and individual rights to be subordinated to that of State interests.⁵ Both approaches emphasise State unity but suggest alternative approaches for achieving it.

I then trace the legitimacy of international criminal law via Hobbes's conception of the peoples' establishment of a body-politic to inform endowment of civil, legal and other powers to a sovereign that can then, representatively, cede sovereignty to law, as under the Vienna Conventions.⁶

I consider, therefore, governments' representativeness of people and their consequent legitimacy in ceding or protecting sovereignty, including in relation to core international crimes' adjudication. Would an informed and engaged population support the ceding of such sovereignty and in relation to criminalisation of which conduct?

To consider these issues and their significant consequences, I argue, we must return to critical philosophical debates surrounding whether State

³ Bergsmo and LING, 2012, p. 4, see *supra* note 1.

⁴ Jean Bodin, *Bodin: On Sovereignty*, Julian H. Franklin (ed.), Cambridge University Press, Cambridge, 1992.

⁵ Niccolò Machiavelli, *The Prince*, Race Point Publishing, New York, 2017 (1532).

⁶ Alexander Wendt, "Anarchy is What States Make of It: The Social Construction of Power Politics", in *International Organization*, 1992, vol. 46, no. 2, pp. 391–425.

action is informed by structure (anarchy and the distribution of power), process (interaction and learning) and institutions.⁷ Can international regimes constitute a central sovereign power amongst sovereigns, or does it simply reflect unrepresentative sovereign competition? What do these philosophical questions mean for the weighing of *jus cogens* and State sovereignty and how do we weigh the legitimacy of specific cases (both of *jus cogens* law and sovereign legitimacy of States)? Finally, what assumptions does the philosophical disposition of interventionism and legalisation make and, ethically, how do they weigh the interests of various strata and social groups in international society?⁸

2.2. Is International Justice Cascading?

The debate about international criminal justice has been shaped by a presumption of efficacy in the participation of States in determining international criminal law and in designing the institutions that enforce it. For example, leading debates on whether criminal accountability for core international crimes conduct is a norm that is cascading centre on the increasing *number* of 'international crimes prosecutions'. Kathryn Sikkink, for example, notes that "after enough states adopt a norm, international pressure, without domestic pressure procures various levels of conformity".⁹ Sikkink also claims that victor's justice was no longer necessary by 1990, citing expectations that demand prosecution.¹⁰

I argue that to test whether the norm of international crimes prosecution is cascading, contracting, or static, we must examine the *quality* of the prosecutorial process, not the *quantity*. To determine the quality, we must ask, how independent a court is from political pressure in identifying and prosecuting those who bear the greatest responsibility for core international crimes. Elsewhere, I have employed the framework of 'case selection independence' to identify the jurisdictional and functional ele-

⁷ *Ibid.*

⁸ J.L. Holzgrefe and Robert O. Keohane (eds.), *Humanitarian Intervention: Ethical, Legal and Political Dilemmas*, Cambridge University Press, Cambridge, 2003.

⁹ Kathryn Sikkink, *The Justice Cascade: How Human Rights Prosecutions are Changing World Politics*, W.W. Norton and Company, New York, 2011, pp. 96–98.

¹⁰ *Ibid.*

ments that inform a court’s independence in applying law to fact.¹¹ The jurisdictional and functional variables can be seen below:

Jurisdictional element:	High independence:	The many in-between:	Low independence:
1. Subject matter efficacy	All international crimes and all modes of liability	Variant levels of independence	Specific crimes committed by some parties but not others
2. Jurisdiction over persons/groups/primacy	All nationality, groups without caveat		Exclusion of nationals or members of particular organisations
3. Precision of criminal conduct	Precise, precedent-informed <i>actus reus</i> and <i>mens rea</i>		Ambiguously defined conduct
4. Jurisdiction over territory	All territory of alleged crimes in broader conflict		Limited to specific territory despite related conflict elsewhere
5. Temporal jurisdiction	Including entirety of broader conflict		Constrained to specific years within a conflict
6. Process access	Civilians, NGOs governments and process investigators may trigger investigations		Only political actors may trigger investigation
7. Case selection criteria	Proportionality informed by numeric gravity (number of murders, torture incidents, among others)		No criteria – total discretion with investigation/prosecution

Figure 1: Jurisdictional Variables

¹¹ Christopher B. Mahony, “The Justice Pivot: US International Criminal Law Influence from Outside the Rome Statute”, in *Georgetown Journal of International Law*, 2015, vol. 46, no. 4, p. 1071; Christopher B. Mahony, “A Case Selection Independence Framework for Tracing Historical Interests’ Manifestation in International Criminal Justice”, in Morten Bergsmo, CHEAH Wui Ling, SONG Tianying and YI Ping (eds.), *Historical Origins of International Criminal Law: Volume 4*, Torkel Opsahl Academic EPublisher, Brussels, 2015, pp. 865–903 (<http://www.toaep.org/ps-pdf/23-bergsmo-cheah-song-yi>).

Functional element:	High independence:	The in-between:	Low independence:
1. Capacity to compel co-operation	Capacity to enforce via domestic courts	Variant levels of independence	No legal or normative means of enforcement
2. Investigative access to territory	Full, un-monitored, without caveat		Total control without obligation by party(s) to conflict
3. Access to and protection of witnesses	Full confidential witness access and protection		
4. Provision of information and evidence	Full, immediate access to originals and substantiating data		
5. Fiscal independence	Guaranteed assessed budgets		Total control by party to conflict
6. Personnel provision and appointment	Election by global peers, total security of tenure		Selection by leader of party to conflict
7. Process location	External location without historical interest in situation		On territory of party to conflict
8. Apprehension and surrender of accused	Full immediate co-operation and security deference (without caveat)		Total control of a party to conflict

Figure 2: Functional Variables

2.3. A Philosophical Lens into the Independence of Institutional Design

The scope for international criminal justice to strengthen or weaken (to ‘cascade’ or ‘contract’) is informed, in part, by the in-built jurisdictional and functional institutional checks and balances described in Figure 1 and Figure 2. Philosophical questions about independence arise from the integrity of the process that creates both the institutions that enforce international criminal law and international criminal law itself. The idea of a justice cascade infers that international criminal justice constitutes an ad-

vance of the interests of people via representation of their interests in law and its enforcement mechanisms. This assumption requires consideration of the extent to which the actors that designed law, and its enforcing courts, are representative of ‘the people’.

At the heart of this chapter are the efficacy of law and its enforcement in advancing the prevention of certain behaviour. The philosophical question, therefore, resides around whether the law and its enforcing courts have been designed and implemented in a way that authentically represents the interests of people, particularly people that are vulnerable to the consequences of violence. In this chapter, I explore this question philosophically by considering the process of designing the law and its enforcing courts. I consider whether this design process comprises a body-politic of representatives that constitute absolute sovereigns that genuinely reflect the will (and therefore represent) the people, as envisaged by Bodin.¹² This is taken further by Hobbes and Rosseau who demand such an arrangement vests power in an unbiased sovereign to advance the common good.¹³ Hobbes notes that the people submit to a sovereign in return for the sovereign’s protection of their physical safety.¹⁴ Contemporaneously, debate has formed around whether the sovereignty of a State may be breached where a State is interpreted to relinquish sovereignty when it loses popular will or fails to protect its own citizens.

Rousseau ascribes a more paternalistic approach to the sovereign. He asserts that the general will is always right but not necessarily enlightened and therefore may misinterpret the common good. This consideration of sovereignty as power granted by the people under condition of performance in maintaining the peace, suggests that the power of international criminal justice derives sovereign legitimacy from whether it prevents violence. To examine this, I consider the deterrent effect of international criminal justice. Rosseau also considers advance of the general will, rather

¹² Jean Bodin, *Les Six Livres de la Republique*, Fayard, Paris, 1986 (1576), p. 254.

¹³ Jean-Jacques Rousseau, *The Social Contract and the First and Second Discourses*, Susan Dunn (ed.), Yale University Press, New Haven, 2002; Thomas Hobbes, *Thomas Hobbes: Leviathan*, Marshall Missner (ed.), Routledge, Oxford, 2016 (1651).

¹⁴ *Ibid.*

than the will of groups or individuals, as legitimating the power of the sovereign.¹⁵

In contrast to Hobbes and Rosseau, Machiavelli identifies a sovereign as legitimately asserting itself, without consultation, in order to unify warring factions and prevent the violence accompanying their contestation.¹⁶ That sovereign constitutes a virtuous prince exhibiting prudence in decisions, actions and alliances to advance higher goals.¹⁷ I consider the question of whether, during the process of designing international criminal law and its courts, the informed population bequeaths power to the sovereign under conditions advancing the common will, or, whether it is asserted over them by a prudent prince. I test this by considering whether the representations of people by governments advance the common interests of people or those of the governing actors (princes) – the interests of all rather than those of individuals or groups.

I consider what the findings mean for the legitimacy of the representativeness of sovereign ceding of power to law and what that means for the international criminal justice system's outcomes. If the body-politic has comprised informed and representative participation by the people via their representation, in the form of their leadership, then sovereignty has been legitimately and representatively ceded to law and its enforcement mechanisms. However, if participation has comprised of singular participation by the representative of a nation State, then the legitimacy and representativeness of the ceding of sovereignty to external law and its enforcement are compromised.

The same questions arise when considering the relative participation between sovereign States in designing the international criminal justice system. Where participation between States is unequal – where one or a small number of States predominate, the integrity of the body-politic is compromised. Further, the legal decisions of the international criminal justice system are largely made beyond the accountability of the legislature of sovereign States, diminishing the accountability upon which Hobbesian sovereignty is premised. This process is sovereignty-impinging

¹⁵ Jean-Jacques Rousseau, *Rousseau: The Social Contract and Other Later Political Writings*, Victor Gourevitch (ed.), Cambridge University Press, Cambridge, 1997.

¹⁶ Niccolò Machiavelli, *The Prince*, George Bull (trans.), Penguin, London, 1961.

¹⁷ *Ibid.*

unless the body-politic of all States are informed of design elements and able to hold their negotiating representatives accountable to the body-politic's interests.

Theorists commonly justify the sovereignty-impinging nature of international criminal law as demanding that respect for sovereignty is conditional on the non-aggressive and minimally just nature of States' behaviour.¹⁸

2.3.1. The Philosophical Role of 'Deterrence' in the Disposition of International Criminal Justice Institutional Design

Premised within the idea of an international criminal justice system, is the idea of deterrence. Philosophically, deterrence theory resides around two conceptions: 'specific' and 'general' deterrence. General deterrence intends to prevent crime in the general population by presenting punishment of offenders as an example to the general population that did not participate in the criminal events.¹⁹ Specific deterrence is intended to deter only the specific offender from committing the same crime in the future.²⁰ Hobbes suggested that humans are sufficiently self-interested and rational to understand that self-interest incentivises harmful conduct and conflict between humans to the detriment of members of society.²¹ Rational self-interest also informed willing subordination to a social contract enforced by a sovereign that regulates behaviour.²² The force or punishment employed for enforcement, Hobbes argued, must be greater than the benefit of the crime. Deterrence, philosophically, is employed to uphold the social contract.

The empirical basis for deterrence is not strong in international or domestic criminal law. A meta-analysis of over 200 aggregate level studies of crime demonstrate that many of the macro-level variables such as police size or police per capita, arrest ratios, case clearance (prosecution)

¹⁸ Jean L. Cohen, *Globalization and Sovereignty: Rethinking Legality, Legitimacy, and Constitutionalism*, Cambridge University Press, Cambridge, 2012, p. 2.

¹⁹ Mark C. Stafford and Mark Warr, "A Reconceptualization of General and Specific Deterrence", in *Journal of Research in Crime and Delinquency*, 1993, vol. 30, no. 2, pp. 123–135.

²⁰ *Ibid.*

²¹ Hobbes, Missner (ed.), 2016, see *supra* note 13.

²² *Ibid.*

rates, and stiffer sentencing policies are consistently among the weakest predictors of crime across virtually all levels of aggregation.²³ However, at the level of the individual, certainty of detection and punishment, but not punishment's severity, has been shown to have a moderate relationship with individual inclination to commit crime.²⁴

Like the organization of the social contract *within* the State, *trans-national* construction of a social contract has also been premised on the rationality of actors during episodes of violent conflict or systematic and widespread human rights violations. The construction of the international criminal justice system, as a social contract between States on behalf of people, proceeds on the assumption of deterrence.

An objective starting point for determining the efficacy of sovereign ceding of power to law, and its enforcing institutions, is the extent to which the law and its enforcement have caused a decline in the relevant conduct – the extent to which the sovereign designs a system that maintains peace and security. Making a quantitative scientific determination about the cumulative causation of international criminal law and its multiple forums of enforcement is not possible. However, qualified qualitative observations that trace the rates of prohibited behaviour alongside the emergence of international criminal law and its enforcement can be made. We must, firstly, acknowledge that apart from the absence of the credible threat of the rule of law, there are multiple drivers of violent conflict – violent conflict being the environment in which the vast majority of alleged international criminal law violations occur.

Scholars, who proceed on assumptions of the rationality of actors in fragile and conflict-affected situations, identify rationalist, material and structural factors to explain mobilisation of collective violence. These include horizontal inequalities,²⁵ relative deprivation and long-standing

²³ Travis C. Pratt *et al.*, "The Empirical Status of Deterrence Theory: A Meta-Analysis", in Francis T. Cullen, John Wright and Kristie Blevins (eds.), *Taking Stock: The Status of Criminological Theory*, Transaction Publishers, Piscataway, 2006, p. 368.

²⁴ *Ibid.*, pp. 368–69.

²⁵ Frances Stewart (ed.), *Horizontal Inequalities and Conflict: Understanding Group Violence in Multiethnic Societies*, Palgrave Macmillan, Basingstoke, 2008; Robert Muggah, "Deconstructing the Fragile City: Exploring Insecurity, Violence and Resilience", in *Environment and Urbanization*, 2014, vol. 26, no. 2, pp. 345–58.

ethnic or religious grievances,²⁶ weak State capacity, political instability, poverty, rough terrain and large rural populations,²⁷ ethnic exclusion from State power,²⁸ the availability of lootable natural resources or illicit markets,²⁹ information asymmetries,³⁰ credible commitment problems,³¹ ethnic or sectarian security dilemmas,³² coercion³³ and selective incentives.³⁴

The objective evidence of the impact of the post-Cold War international criminal justice system is not necessarily positive. Battle deaths remain high today, although a decline has been observed. However, as the United Nations ('UN') and World Bank noted in their flagship study on conflict prevention, violence increasingly targets urban areas, including

²⁶ Ted Robert Gurr, *Why Men Rebel*, Princeton University Press, Princeton, 1970; Elise Giuliano, *Constructing Grievance: Ethnic Nationalism in Russia's Republics*, Cornell University Press, Ithaca, 2011.

²⁷ James D. Fearon and David D. Laitin, "Weak States, Rough Terrain, and Large-Scale Ethnic Violence Since 1945", Annual Meeting of the American Political Science Association, Atlanta, 1999.

²⁸ Lars-Erik Cederman, Andreas Wimmer and Brian Min, "Why Do Ethnic Groups Rebel? New Data and Analysis", in *World Politics*, 2010, vol. 62, no. 1, pp. 87–119.

²⁹ Mats Berdal and David M. Malone (eds.), *Greed and Grievance: Economic Agendas in Civil Wars*, Lynne Rienner Publishers, Boulder, 2000; Vanda Felbab-Brown, *Shooting Up: Counterinsurgency and the War on Drugs*, Brookings Institution Press, Washington, D.C., 2010; Michael L. Ross, "What Do We Know about Natural Resources and Civil War?", in *Journal of Peace Research*, 2004, vol. 41, no. 3, pp. 337–56.

³⁰ James Fearon, "Rationalist Explanations for War", in *International Organization*, 1995, vol. 49, no. 3, pp. 379–414.

³¹ Barbara F. Walter, "The Critical Barrier to Civil War Settlement", in *International Organization*, 1997, vol. 51, no. 3, pp. 335–64.

³² Erik Melander, "The Geography of Fear: Regional Ethnic Diversity, the Security Dilemma and Ethnic War", in *European Journal of International Relations*, 2009, vol. 15, no. 1, pp. 95–124; Barry R. Posen, "The Security Dilemma and Ethnic Conflict", in *Survival*, 1993, vol. 35, no. 1, pp. 27–47.

³³ Kristine Eck, "Coercion and Rebel Recruitment", in *Security Studies*, 2014, vol. 23, no. 2, pp. 364–98.

³⁴ Mancur Olson, *The Logic of Collective Action: Public Goods and the Theory of Groups*, Harvard University Press, Cambridge, Massachusetts, 1965; Samuel L. Popkin, *The Rational Peasant: The Political Economy of Rural Society in Vietnam*, University of California Press, Berkeley, 1979; Eli Berman, *Radical, Religious, and Violent: The New Economics of Terrorism*, MIT Press, Cambridge, Massachusetts, 2009.

public spaces.³⁵ Civilians, therefore, are increasingly vulnerable, even as technology advances.³⁶ Between 2010 and 2016, as the International Criminal Court ('ICC') expanded its situations and indictments, the number of civilian deaths in violent conflict doubled.³⁷ One naturally queries the impact of this institution in deterring atrocities. Logic proceeds from the position adopted by the first judgement at Nuremburg, which stated:

To initiate a war of aggression is not only an international crime; it is the supreme international crime, differing only from other war crimes in that it contains within itself the accumulated evil of the whole.³⁸

For the ICC, violent conflict has recurred in four of the seven countries where accused have been indicted. Evaluation of the ICC's impact has not necessarily focussed on deterrence. Jo and Simmons, for example, find that rebel killing of civilians is not reduced by either ratification or domestication of the Rome Statute.³⁹ They also find that Rome Statute ratification may be associated with increased rebel violence.⁴⁰ Instead, they suggest that power informs inclination to kill, citing relative strength and government behaviour as the most consistent predictors of rebel intentional killing.⁴¹

A joint UN-World Bank study found that the rate of conflict recurrence decreases by approximately 70 per cent when trials are pursued of middle- and low-level actors while prosecution of high-ranking individu-

³⁵ For a thorough consideration of these issues, see Robert Muggah, "Fixing Fragile Cities: Solutions for Urban Violence and Poverty", in *Foreign Affairs*, 15 January 2015; Muggah, 2014, see *supra* note 25.

³⁶ United Nations and World Bank, *Pathways for Peace: Inclusive Approaches to Preventing Violent Conflict*, Washington, D.C., 2018, p. xix (<http://www.legal-tools.org/doc/7bb4c2-1/>).

³⁷ Uppsala University, Department of Peace and Conflict Research, "UCDP Data for download", 2017 (available on the University's web site).

³⁸ International Military Tribunal, *United States of America et al. v. Hermann Wilhelm Göring et al.*, Judgment, 1 October 1946, in *The Trial of German Major War Criminals: Proceedings of the International Military Tribunal sitting at Nuremberg, Germany*, Part 22 (22 August 1946 to 1 October 1946), para. 421 (<http://www.legal-tools.org/doc/45f18e/>).

³⁹ Hyeran Jo and Beth A. Simmons, "Can the International Criminal Court Deter Atrocity?—Corrigendum", in *International Organization*, 2017, vol. 71, no. 2, pp. 419–21.

⁴⁰ *Ibid.*

⁴¹ *Ibid.*

als is associated with a 65 per cent increase in the rate of conflict recurrence.⁴²

2.4. Confirmation Bias and the Philosophy of Language in Asserting Altruistic Intent of Elites to Constituents in the International Criminal Justice's Design

Philosophically, a disposition that asserts a causal power within the prosecution of international crimes exists. Despite the above-cited evidence, civil society and many within academia have ascribed international criminal justice a deterrent effect without basis for doing so. For example, Jo and Simmons cite the work of Kim and Sikkink as demonstrating deterrence, despite the fact they test for the association of prosecutions with repression and not conflict, in which crimes occur.⁴³ The generation of this assertion has been commonly re-stated by governments, international criminal law practitioners and civil society observers to the point where, in 2004, the UN asserted that criminal trials:

can help to de-legitimize extremist elements, ensure their removal from the national political process and contribute to the restoration of civility and peace and to deterrence.⁴⁴

Only after empirical consideration of the impact of international crimes prosecutions, has the UN begun to include language that acknowledges the potential negative consequences of prosecutions, particularly where they are carried out in a discriminatory way. The 2018 joint UN-World Bank flagship study on Conflict Prevention, acknowledges the risk that prosecutions may exaggerate the likelihood of future conflict depending on how independent or discriminatory they are in who they hold accountable, stating:

⁴² Leigh Payne, Andrew G Reiter, Christopher B. Mahony and Laura Bernal-Bermudez, "Conflict Prevention and Guarantees of Non-Recurrence", Background Paper for United Nations-World Bank Flagship Study, *Pathways for Peace: Inclusive Approaches to Preventing Violent Conflict*, World Bank, Washington, D.C., 2017 (<http://www.legal-tools.org/doc/53cb7e/>).

⁴³ Hunjoon Kim and Kathryn Sikkink, "Explaining the Deterrence Effect of Human Rights Prosecutions for Transitional Countries", in *International Studies Quarterly*, vol. 54, no. 4, pp. 939–63.

⁴⁴ Report of the Secretary-General, *The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies*, S/2004/616, 23 August 2004, p. 13 (<http://www.legal-tools.org/doc/77bebf/>).

Frameworks to identify how accountability processes treat groups differently can help to identify ways in which to preempt spoilers and mitigate risks of conflict.⁴⁵

Ricoeur, in his consideration of the philosophy of language, notes that language ascribes meaning through the power of “metaphoricity”, repetition, the stating of things in novel ways, and creative narrative construction.⁴⁶ This behaviour can be observed amongst proponents of positions relating to critical issues of jurisdiction and function during debates surrounding international criminal justice design.

The primacy of jurisdiction provided to governments to prosecute crimes committed on their territory or by their nationals constitutes an example of novel narrative construction. The subordination of the ICC to domestic jurisdictions where those governments meet an easily ‘gamed’ threshold, that they are ‘able and willing genuinely’, is commonly described as a ‘principle’ of complementarity.⁴⁷ This description ascribes this mechanism of disempowerment for the ICC with the connotations surrounding the word, ‘principle’. These are connotations of a necessary fundamental truth underpinning belief in a causal chain, yet the preceding international criminal tribunals for Rwanda and Yugoslavia held no such subordination to domestic justice systems. Ricoeur’s conception of language as holding within itself the resources that allow it to be used creatively are omnipresent in the construction and repetition of complementarity as a positive international criminal justice development. The repetition and construction of terms such as ‘positive complementarity’⁴⁸ indicate the linguistic productive imagination of the actors designing the ICC

⁴⁵ United Nations and World Bank, 2018, p. 168, see *supra* note 36.

⁴⁶ Paul Ricoeur, *The Rule of Metaphor: Multi-Disciplinary Studies of the Creation of Meaning in Language*, in Robert Czerny, Kathleen McLaughlin and John Costello (trans.), Routledge and Kegan Paul, London, 1986 (1975), p. 4.

⁴⁷ Christopher B. Mahony, “If You’re Not at the Table, You’re on the Menu: Complementarity and Self-Interest in Domestic Processes for Core International Crimes”, in Morten Bergsmo and SONG Tianying (eds.), *Military Self-Interest in Accountability for Core International Crimes*, 2nd ed., Torkel Opsahl Academic EPublisher, Brussels, 2018, pp. 229–59 (<http://www.toaep.org/ps-pdf/25-bergsmo-song-second>).

⁴⁸ William W. Burke-White, “Implementing a Policy of Positive Complementarity in the Rome System of Justice”, in *Criminal Law Forum*, 2008, vol. 19, no. 1, pp. 59–85.

and the associated civil society advocates.⁴⁹ This narrative sought to draw the fictional towards the historical among the minority of constituents that participated in the construction of the international criminal justice system.

2.4.1. The Body-Politic of the ICC's Design

In the preceding section, I discussed one element of the ICC's design that was particularly emblematic of the rhetorical skewing of public conception of the Court. In this section, I will discuss the design of the Court, who participated in it and whether this reflects subordination of individual rights to a Machiavellian Prince, or, the product of an informed and representative peoples' body-politic.

The primary actor in driving the potential conceptualisation of an international criminal court was the United Nations General Assembly ('UNGA'). In 1947 the UNGA established the International Law Commission ('ILC') to explore the establishment of an international criminal court.⁵⁰ Its primary purpose was intended to be the crime of aggression for which it provided a 1954 draft statute criminalising offences against the peace. This included conduct considered 'war by proxy' such as organising, encouraging or assisting armed groups or civil unrest.⁵¹ By 1974, the definition of crimes against peace included key elements of waging war by proxy.⁵²

The United States of America ('U.S.') sought to shape the dialogue about prosecution of international crimes and an international criminal court's design away from crimes against peace and towards international humanitarian law violations. The U.S. House of Representatives passed a 1989 resolution calling for "the creation of an [i]nternational [c]riminal

⁴⁹ See, for example, the adoption of the language of Amnesty International Director, late Christopher Keith Hall, "Developing and implementing an effective positive complementarity prosecution strategy", in Carsten Stahn and Göran Sluiter (eds.), *The Emerging Practice of the International Criminal Court*, Brill, Leiden, 2008, pp. 219–28.

⁵⁰ Establishment of an International Law Commission, UN Doc. A/RES/174(II), 21 November 1947 (<http://www.legal-tools.org/doc/c2a5c3/>).

⁵¹ International Law Commission, Report of the ILC Covering the Work of its Sixth Session, 3 June–28 July 1954, Official Records of the General Assembly, Ninth Session, Supplement No. 9 (A/2693), UN Doc. A/CN.4/88, 28 July 1954, pp. 151–52 (<http://www.legal-tools.org/doc/dd7567/>).

⁵² Definition of Aggression, UN Doc. A/RES/3314(XXIX), 14 December 1974, Article 3 (<http://www.legal-tools.org/doc/90261a/>).

[c]ourt with jurisdiction over internationally recognized crimes of terrorism, illicit international narcotics trafficking, genocide, and torture, as those crimes are defined in various international conventions".⁵³ The resolution, citing a 1978 American Bar Association proposal, that only included international humanitarian law violations, excluded crimes against the peace.⁵⁴ The UNGA responded with a resolution asking that the ILC address the international criminal court's establishment to enforce a "Code of Crimes against the Peace and Security of Mankind".⁵⁵

Within the context of the conclusion of the Cold War and the emergence of the U.S. as the sole military and economic superpower, the U.S. was able to expand the power of the United Nations Security Council ('UNSC'), and to shape that expansion.⁵⁶ This allowed the U.S., despite other States' apprehension about UNSC overreach, to use the UNSC to establish the International Criminal Tribunal for the former Yugoslavia ('ICTY').⁵⁷ The U.S., conscious of its own realist self-interest in omitting the crime of aggression, focused the ICTY's jurisdiction on international humanitarian law violations only.⁵⁸

The UNGA requested ILC prioritisation of a draft international criminal court statute. The ILC's responding report included a definition of the crime of aggression that included intervention and colonialism.⁵⁹

⁵³ US House of Representatives, Calling for the Creation of an International Criminal Court with Jurisdiction over Internationally Recognized Crimes of Terrorism, Illicit International Narcotics Trafficking, Genocide, and Torture, as Those Crimes are Defined in Various International Conventions, 101st Congress, 1st Session, H.CON.RES.66, 2 March 1989.

⁵⁴ *Ibid.*

⁵⁵ International Criminal Responsibility of Individuals and Entities in Illicit Trafficking in Narcotic Drugs across National and Other Transnational Criminal Activities: Establishment of International Criminal Court with Jurisdiction over Such Crimes, UN Doc. A/RES/44/39, 4 December 1989 (<http://www.legal-tools.org/doc/32547a/>).

⁵⁶ Mahony, "The Justice Pivot: US International Criminal Law Influence from Outside the Rome Statute", 2015, see *supra* note 11; Mahony, "A Case Selection Independence Framework for Tracing Historical Interests' Manifestation in International Criminal Justice", 2015, see *supra* note 11.

⁵⁷ Interview with Senior Legal Advisor, US Department of State, Washington, D.C., 9 September 2014.

⁵⁸ Michael J. Matheson and David Scheffer, "The Creation of the Tribunals", in *American Journal of International Law*, 2016, vol. 110, no. 2, pp. 173–90; *Ibid.*

⁵⁹ See Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993), UN Doc. S/25704, 3 May 1993 (<http://www.legal-tools.org/doc/c2640a/>);

The other source of tension and interest for the leadership of weaker States was the primacy of an international criminal court's jurisdiction.⁶⁰ The majority of mainly Weak States, but including the U.S. and other powerful States, advocated for States to hold primacy of jurisdiction.⁶¹

Both the constituents of weak States and the leadership of weak States held an interest in enabling the meaningful criminalisation of the crime of aggression. However, the leadership of weak States prioritised the preservation of political control over ICC jurisdiction via the establishment of primacy of jurisdiction in the hands of State governments. The primacy of jurisdiction provided to States does not constitute an interest of weak State constituents who prefer their governments not be empowered to game complementarity and provide themselves *de facto* impunity.⁶²

The prioritisation of primacy of jurisdiction over the crime of aggression demonstrates the absence of informed engagement of the populations of weak States. It, therefore, illuminates the assertion of prince-like representation by weak State governments at ICC negotiations, rather than consented representation of a body-politic.

The significant constraints to the ICC's assertion of jurisdiction over the crime of aggression and the demand that conduct constitute a 'manifest' violation of the UN Charter to be prosecuted, indicates powerful States' significant power in negotiations.⁶³ Further, powerful permanent member States of the UNSC secured discretion to trigger and defer jurisdiction, including over non-States Parties, despite the expressed inter-

Report of the ILC on the Work of its Forty-Sixth Session, 2 May–22 July 1994, Official Records of the General Assembly, Forty-Ninth Session, Supplement No. 10, UN Doc. A/49/10, pp. 21, 23 ('ILC Report 1994') (<http://www.legal-tools.org/doc/49194a/>); Report of the ILC on the Work of its Forty-Fourth Session, 4 May–24 July 1992, Official Records of the General Assembly, Forty-Seventh Session, Supplement No. 10, UN Doc. A/47/10, p. 12 (<http://www.legal-tools.org/doc/ccc5b8/>).

⁶⁰ ILC Report 1994, pp. 23–24, see *supra* note 59.

⁶¹ *Ibid.*; David Scheffer, *All the Missing Souls: A Personal History of the War Crimes Tribunals*, Princeton University Press, Princeton, 2013, p. 169.

⁶² Mahony, 2018, see *supra* note 47.

⁶³ Kai Ambos, "The Crime of Aggression after Kampala", in *German Yearbook of International Law*, 2010, vol. 53, pp. 463–509.

est of weak States and civil society.⁶⁴ This situation demonstrates the power disparity between powerful and weak States rather than equitable consideration of States' interests. A processes failure to equitably recognise states' interests indicates a body-politic that is not genuinely or equitably representative of the interests of all States ceding sovereignty to an international instrument – the Rome Statute. It does not indicate, therefore, an informed and consenting population ceding sovereignty to a transnational institution. It instead indicates a group of princes representing States without the informed consent of their people to cede sovereignty and without equity among negotiating princes. The power disparity enabled the powerful princes to negotiate a statute that disarms weak States of unorthodox defensive methods against stronger adversaries – adversaries that are unconstrained in engaging in the crime of aggression.

The design of the international criminal justice system enjoyed participation and input from civil society actors that at times contested the positions of many States. However, these actors had little capacity to hold government representatives accountable. Philosophically, they had no capacity to compel withdrawal of the ceding of sovereignty by the body-politic of respective nation States to the negotiating governments.

2.4.2. The Body-Politic of the International Criminal Justice System's Function

The aforementioned power dynamics also informed the integrity of the ceding of sovereignty in how governments interacted with the international criminal justice system, after it was created. Governments, acting as princes, held an interest in promoting a controlled international criminal justice system, particularly as domestic extra-territorial exercise of universal jurisdiction emerged as a greater threat to the prince's sense of impunity. Universal jurisdiction's scope exceeds international criminal justice's and opens the door to multiple prosecutors less vulnerable to the self-interested pressure imposed by prince-like governments. It diminishes governments' capacity to control international criminal law enforcement.

⁶⁴ Rome Statute of the International Criminal Court, adopted 17 July 1998, entry into force 1 July 2002, Article 13(b) ('ICC Statute') (<http://www.legal-tools.org/doc/7b9af9/>); Lionel Yee, "The International Criminal Court and the Security Council: Articles 13(b) and 16", in Roy S. Lee (ed.), in *The International Criminal Court: The Making of the Rome Statute: Issues, Negotiations, Results*, Kluwer Law International, Boston, 1999, p. 147.

The indictment of General Augusto Pinochet in Spain or Charles (Chucky) Taylor Junior (former Liberian President Taylor's son) in the U.S., for international crimes committed in Chile and Liberia, respectively, constitute threatening episodes of concern to prince-like governments.⁶⁵ The movement of self-interested governments to close down the space for extra-territorial exercise of universal jurisdiction demonstrated again governments' philosophical disposition towards that of a prince less accountable to a body-politic. For example, The U.S. government threatened Belgium with the removal of the North Atlantic Treaty Organization ('NATO') headquarters from Brussels to compel constraint of its universal jurisdiction regime.⁶⁶ The U.S. and Chinese governments compelled constraint of Spain's universal jurisdiction regime.⁶⁷

Similarly, powerful governments also identified the potential threat to the impunity of themselves and their allies from an independent ICC Prosecutor, despite the extent to which independence would advance citizens' interests. The threat these governments perceived had been heightened by Carla Del Ponte's attempted assertion of independence at the ICTY and the International Criminal Tribunal for Rwanda ('ICTR'). Del Ponte, the tribunals' third Prosecutor, had initiated investigations into NATO's 1999 aerial bombardment of Serbia at the ICTY and into alleged conduct by the Rwandan Patriotic Front ('RPF') at the ICTR.⁶⁸ The government of a weak State, Rwanda, was constituted of the RPF – a party to the Rwandan Civil War. It held a seat on the UNSC at the time of the creation of the ICTR. The government expressed its opposition to a number of the ICTR's elements of design. Its opposition resided around a number of factors. Firstly, the ICTR's temporal jurisdiction – the temporal jurisdiction, including the period after July 1994, included a period of document-

⁶⁵ Mr. Pinochet and Mr. Taylor were indicted for crimes committed in their respective home states by prosecutors in other territories. Spanish National Court (Audiencia Nacional), Case 19/97 (Judge Garzon); United States Court of Appeals for the Eleventh Circuit, *United States of America vs. Roy M. Belfast, Jr.*, 18 September 2009, Appeal No. 09-10461-AA.

⁶⁶ Prosecutorial discretion was adjusted so it could not pursue cases not 'in the interests of justice' where the accused is not on Belgian territory. See Mahony, "The Justice Pivot: US International Criminal Law Influence from Outside the Rome Statute", 2015, p. 1127, see *supra* note 11.

⁶⁷ *Ibid.*

⁶⁸ Mahony, "A Case Selection Independence Framework for Tracing Historical Interests' Manifestation in International Criminal Justice", 2015, see *supra* note 11.

ed RPF crimes at a level of gravity that rendered any objective application of law to fact impossible for a prosecution to ignore.⁶⁹ Secondly, the ICTR's location, outside Rwanda in Tanzania, diminished the Rwandan government's capacity to monitor and interfere with the Court's function.⁷⁰ The Rwandan government also sought to exclude war crimes and crimes against humanity from the ICTR's jurisdiction, preferring that the Court focus only on the crime of genocide.⁷¹ This behaviour was all directed towards minimising the risk that the ICTR might prosecute the RPF for crimes it allegedly committed.⁷² The alleged victims of those crimes are Rwandan nationals indicating that those victims are not participants in a body-politic to which the Rwandan government is accountable. The Rwandan government's participation in the ICTR's design was informed by its self-interest in providing impunity for itself and not the interest of a significant part of a Rwandan body-politic in the prosecution of RPF conduct.

The body-politic of the actors designing the ICTR was also imbalanced. The determinant actors – the UN Security Council's permanent members – were not representative of the body-politic of the world's States. Within the permanent members, a post-Cold War economic and military power imbalance rendered the U.S. the sole global superpower, endowing it with significant influence over ICTR design. The Rwandan government did not secure its preferences. However, the RPF government was a close ally of the United States. Carla Del Ponte was informed by the U.S. government that were she to pursue RPF crimes, the UNSC may

⁶⁹ Scheffer, 2013, pp. 79–83, see *supra* note 61; Letter Dated 1 October 1994 from the Secretary-General Addressed to the President of the Security Council, U.N. Doc. S/1994/1125, 4 October 1994, p. 19 ('Letter Dated 1 October 1994') (<http://www.legal-tools.org/doc/4c5f41/>).

⁷⁰ Scheffer, 2013, pp. 79–83, see *supra* note 61; Letter Dated 1 October 1994, see *supra* note 69; Mahony, "The Justice Pivot: US International Criminal Law Influence from Outside the Rome Statute", 2015, pp. 1080–81, see *supra* note 11.

⁷¹ Scheffer, 2013, pp. 79–83, see *supra* note 61; Letter Dated 1 October 1994, see *supra* note 69; Mahony, "The Justice Pivot: US International Criminal Law Influence from Outside the Rome Statute", 2015, pp. 1080–81, see *supra* note 11.

⁷² Mahony, "The Justice Pivot: US International Criminal Law Influence from Outside the Rome Statute", 2015, pp. 1080–81, see *supra* note 11; Mahony, "A Case Selection Independence Framework for Tracing Historical Interests' Manifestation in International Criminal Justice", 2015, see *supra* note 11.

remove her as ICTR Prosecutor. She pursued the RPF investigation and was removed and was made *persona non-grata* in Washington, D.C. in response to her evaluation of NATO aerial bombardment of Serbia.⁷³ Del Ponte's attempt to advance the common interest of application of law to fact without deference to individuals or groups threatened those that sought a more prince-like approach. The threat posed to the impunity of actors in a very small number of governments informed their approach to the election of the ICC's first Prosecutor. They mobilised their resources to elect a prosecutor perceived as more deferential to their interest rather than to that of victims.⁷⁴ The United Kingdom and Canadian governments supported the campaign to elect Luis Moreno-Ocampo, an Argentinian prosecutor, as the ICC's first Prosecutor.⁷⁵ Ocampo subsequently hired the personnel who ran his campaign into key positions within the Jurisdiction, Cooperation and Complementarity Division of the Office of the Prosecutor with significant influence over the selection of situations and cases.⁷⁶ At the expense of an independent actor that advanced the interests of the body-politic, the ICC prosecution was captured by the prince-like self-interest of governments within the first two years of its function. Prosecution personnel identify internal support for the Prosecutor by actors engaged in his campaign to become prosecutor. Those actors supported the prosecutor in extending his own discretion and employing subjective justification for situation and case selection unsupported by the objective application of law to fact.⁷⁷ This capture can be seen in the interests advanced by the first Prosecutor's situation and case selection in advance of the self-interests of powerful States and at the expense of the interests of the body-politic.

⁷³ Mahony, "A Case Selection Independence Framework for Tracing Historical Interests' Manifestation in International Criminal Justice", 2015, pp. 890–94, see *supra* note 11; Mahony, "The Justice Pivot: US International Criminal Law Influence from Outside the Rome Statute", 2015, pp. 1080–81, see *supra* note 11.

⁷⁴ Mahony, "The Justice Pivot: US International Criminal Law Influence from Outside the Rome Statute", 2015, pp. 1096–98, see *supra* note 11.

⁷⁵ *Ibid.*

⁷⁶ *Ibid.*

⁷⁷ Interview with former Rome Conference delegate and ICC member, The Hague, 4 December 2012; Interview with former Rome Conference delegate and ICC member, 28 November 2012.

2.5. Conclusion

The philosophical foundation of the ceding of sovereignty of States to an international criminal justice system is rhetorically based on deterrence and governments' objective to advance their citizens' interests. However, tension exists between the interests of governments and the interests of citizens. This tension is only appeased when governments take on the informed and representative common interests of their citizens – a process and function that their continued representation of those interests is contingent upon. This is the transactional nature of the ceding of power to the sovereign as under Hobbes and Rosseau.

However, the foundations of international criminal law have not been rooted in such common interests. Their philosophical foundations instead reside in a power politics bid to restructure the international system.⁷⁸ These foundations enable some princes, those representing powerful States, to impinge upon sovereignty where their interest is advanced by prosecuting adversaries while preserving impunity from prosecution for themselves.

New hierarchies of sovereignty are established by the configuration of the international criminal justice system. This hierarchy preserves the State sovereignty of the primary actors designing the system while impinging on the sovereignty of weaker States. The rationale of maintaining sovereignty for those actors resides in the interest of preventing a greater scale of violence between major powers, as articulated in the Machiavellian justification for a unifying prince. The capacity of a virtuous prince resided in their prudence in decisions, actions and alliances that advance the common good. However, the common good resides around diminished levels of violent conflict. The international criminal justice system, as identified in this chapter is not associated with diminished levels of violence. This suggests that even where princes sought to advance the common good, their understanding of the appropriate mechanism for doing so was insufficient.

Cohen notes that the success of constitutionalising international law depends on how it is construed. This chapter has focused on the process of design and function – how the designing and co-operating actors ad-

⁷⁸ Cohen, 2012, p. 3, see *supra* note 18.

vanced the common interest or the interest of individuals or groups. The philosophical premise of the creation of the international criminal justice system is that elites are able to act as virtuous princes advancing the common interest in courts' design and function. That premise is not born out by the historical record. Instead, a philosophical foundation of negotiations led by prince-like State representatives advancing a small group's interests of power and hierarchy existed. They created institutions that impinge upon sovereignty rather than a stated intent of a regime that protected the human rights of every individual.⁷⁹ Human rights activism during the Cold War linked transnational human rights advocates with local activists. Post-Cold War approaches to enforcing rights largely bypassed domestic actors fighting injustice as government representatives dominated negotiations. It is this disconnect, between princes and the people, that laid the foundations for an international justice system – a system that reflects power rather than seriously confronting it.

⁷⁹ *Ibid.*, p. 165.

Towards ‘Global’ Criminal Justice?

Milinda Banerjee*

3.1. Introduction

In thinking about ‘global’ criminal justice – the meaning of this phrase will become clearer across this chapter – the Indian jurist Radhabinod Pal (1886–1967) appears at first to offer a singularly unpromising point of departure. Analysing Judge Pal’s dissenting Judgment at the International Military Tribunal for the Far East (‘Tokyo Trial’) (1946–1948), Totani notes that it was hostile to the majority judgment on the very “philosophical foundation” of “modern international law” and “runs counter to the current of international humanitarian law”.¹ As I have elsewhere analysed in detail,² in existing scholarship, Pal is generally seen as a champion of State sovereignty and positive law against the natural law inflected claims of international criminal justice. Depending on the particular scholar concerned, this stance is related either to his principled anti-colonial opposition to Western legal-political hegemony³ or seen as a morally problemat-

* **Milinda Banerjee** is Assistant Professor at the Department of History, Presidency University, Kolkata and Research Fellow at Ludwig-Maximilians-Universität (LMU), Munich. His research project at LMU is titled ‘Sovereignty versus Natural Law? The Tokyo Trial in Global Intellectual History’.

¹ Yuma Totani, *The Tokyo War Crimes Trial: The Pursuit of Justice in the Wake of World War II*, Harvard University Press, Cambridge, Massachusetts, 2008, pp. 220–21.

² Milinda Banerjee, “Does International Criminal Justice Require a Sovereign? Historicising Radhabinod Pal’s Tokyo Judgment in Light of His ‘Indian’ Legal Philosophy”, in Morten Bergsmo, CHEAH Wui Ling and YI Ping (eds.), *Historical Origins of International Criminal Law: Volume 2*, Torkel Opsahl Academic EPublisher, Brussels, 2014, pp. 67–117 (<http://www.toaep.org/ps-pdf/21-bergsmo-cheah-yi>).

³ See, for example, Judith N. Shklar, *Legalism: An Essay on Law, Morals and Politics*, Harvard University Press, Cambridge, Massachusetts, 1964, pp. 179–90; Richard H. Minear, *Victors’ Justice: The Tokyo War Crimes Trial*, Princeton University Press, Princeton, 1971; Elizabeth S. Kopelman, “Ideology and International Law: The Dissent of the Indian Justice at the Tokyo War Crimes Trial”, in *New York University Journal of International Law and Politics*, 1991, vol. 23, no. 2, pp. 373–444; Latha Varadarajan, “The Trials

ic pan-Asianist defence of Japanese State sovereignty and exculpation of Japanese sovereign violence.⁴ Even those who detect elements of natural law argumentation in Pal, see such naturalism as serving the cause of achieving postcolonial statehood through militant decolonisation via ‘just war’ – Kirsten Sellars offers a sharp articulation⁵ – and thus as not anti-theoretical to sovereignty as such. Sovereignty, particularly in its decolonial guise, rather than an ideology of ‘global’ criminal justice, appears to dominate Pal’s legal philosophy.

A careful reading of Pal’s Tokyo Judgment, as well as his broader corpus of writings and speeches, however, reveals a more complex project embedded in the notion of what Pal termed as ‘the world’. In a key moment in his Tokyo Judgment, which has scarcely been noticed with theoretical rigour in scholarship, Pal observed:

I doubt not that the need of the world is the formation of an international community under the reign of law, or correctly, the formation of a world community under the reign of law, in which nationality or race should find no place.⁶

What he refused to accept was not the future possibility of such a (‘the’) world, but the present existence of ‘the world’ as created by fiat of the Allied Powers:

I should only add that the international community has not as yet developed into “the world commonwealth” and perhaps as yet no particular group of nations can claim to be the custodian of “the common good”.

International life is not yet organized into a community under a rule of law. A community life has not even been agreed upon as yet. Such an agreement is essential before the

of Imperialism: Radhabinod Pal’s Dissent at the Tokyo Tribunal”, in *European Journal of International Relations*, 2015, vol. 21, no. 4, pp. 1–23.

⁴ See, for example, Totani, 2008, see *supra* note 1; Nariaki Nakazato, *Neonationalist Mythology in Postwar Japan: Pal’s Dissenting Judgment at the Tokyo War Crimes Tribunal*, Lexington Books, London, 2016.

⁵ Kirsten Sellars, “Imperfect Justice at Nuremberg and Tokyo”, in *The European Journal of International Law*, 2011, vol. 21, no. 4, pp. 1095–96.

⁶ International Military Tribunal for the Far East, *United States of America et al. v. Araki Sadao et al.*, Judgment of The Hon’ble Mr. Justice Pal, Member from India, p. 146 (‘Pal Judgment’) (<http://www.legal-tools.org/doc/712ef9/>).

so-called natural law may be allowed to function in the manner suggested.⁷

I intend to work through this paradox presented by Pal, which, unnoticed by generations of scholars, forms the core irony of his Tokyo Judgment. This is the gap between a denial of 'the world' and an affirmation of 'the world' – denial, in the sense that the present is not characterized by a unified world which is both the space and the moral agent for implementing consensually agreed principles of (criminal) justice; affirmation, in the sense that the hoped-for future would witness such a world, where, among other things, natural law would be able to function through consensus. Equally important is Pal's distinction between the 'international' and the 'world'. The "world community under the reign of law" is not an "international community", rather it is formed through a dialectical negation of the international, given that in the world to come "nationality or race should find no place".⁸ For such a world to come about, "political units" would have to "agree to yield their sovereignty and form themselves into a society. As I have shown elsewhere, the post war United Nations Organization is certainly a material step towards the formation of such a society".⁹

3.2. Understanding Pal's 'Global' Criminal Justice

3.2.1. Bengali Intellectual Genealogy

That scholars have not noticed the central importance of this vision of 'the world' in Pal can be attributed in large part to the fact that they have not contextualised the Indian (Bengali) judge within a longer South Asian (and particularly, Bengali) intellectual genealogy. Since at least the 1810s, Bengali actors had been consistently invoking 'the world' as a category of ethical action. An early prominent figure here is the socio-religious reformer Rammohun Roy (1772/4–1833), who repeatedly used 'the world' in his English-language writings, while in his Sanskrit and Bengali works and citations, he used terms like *vishva* (world), *jagat* (world) and *sarva* (all). Rammohun did not produce these categories out of nothing. He drew on centuries-old Sanskritic textual traditions, from the Vedic-Upanishadic

⁷ *Ibid.*, p. 151.

⁸ *Ibid.*, p. 146.

⁹ *Ibid.*, p. 145.

texts (between the second and first millennium BC) to more recent *purana* and *tantra* corpora (between the first and second millennium AD), where such universalistic categories were used to underscore the immanence of the divine/transcendental (*brahman*) in all beings to affirm the ultimate identity, or at least relation, of every being with other beings and the divine. In the context of early colonial India – but drawing on older South Asian debates about social hierarchy, rights, security of life and property from violence (including State violence) and the accessibility of salvation (*moksha*) to lower-castes, women and foreigners – Rammohun asserted the unity of ‘the world’ to criticise various racial, colonial, religious, caste and gender divisions and hierarchies, and to advocate a European liberalism-inflected vision of cosmopolitanism.¹⁰

Some decades later, Bankimchandra Chattopadhyay (1838–94), nineteenth-century India’s most famous nationalist litterateur, drew on Vedic-Upanishadic as well as epic and *purana* texts to articulate categories like *sarvabhuta* and *sarvaloka* (all beings). He translated Auguste Comte’s (1798–1857) notion of ‘humanity’ into the Bengali neologism *manushyatva*. As with Rammohun, Bankimchandra deployed such vocabularies to contest certain forms of social stratification and articulate ideals of popular welfare (*hita*), even as, again like Rammohun, he legitimated other expressions of social hierarchy and domination – ‘the world’ was never achieved as a pristinely unified category. Meanwhile, lower-caste peasant activists like Panchanan Barma (1866–1935) related categories like *jagat* – and models, also emphasised by Rammohun and Bankimchandra, about the immanence of the transcendental/divine (*brahman*) in all beings – with British/European-origin concepts of liberal-constitutional self-governance in order to demand political autonomy for subaltern communities.¹¹ I would argue that Pal’s project of creating a just ‘world’ thus emanated from a decades-long Bengali/Indian grappling with ‘the world’ as a conceptual category – a category instrumentalised to em-

¹⁰ Milinda Banerjee, “‘All This is Indeed Brahman’: Rammohun Roy and a ‘Global’ History of the Rights-Bearing Self”, in *The Asian Review of World Histories*, 2015, vol. 3, no. 1, pp. 81–112.

¹¹ Milinda Banerjee, *The Mortal God: Imagining the Sovereign in Colonial India*, Cambridge University Press, Delhi, 2017; Milinda Banerjee, “Sovereignty as a Motor of Global Conceptual Travel: Sanskritic Equivalents of ‘Law’ in Bengali Discursive Production”, in *Modern Intellectual History*, 2018 (available on Cambridge Core’s web site).

phasise the destabilisation, though, never total negation, of racial/ethnic-social distinctions by emphasising the unity of the transcendental.

3.2.2. Pal's Opposition to Victors' Justice

What differentiates Pal, however, from earlier Bengali thinkers is the manner in which he translated this mode of argumentation about the transcendentially-anchored unity of 'the world' into a project of achieving supra-(inter)national criminal justice. For Pal, victors' justice was a clear negation of the possibility of global criminal justice. Pal's animus against international – in the sense of inter-State – criminal justice was that it merely preserved the existing hegemonic order of sovereign States. Far from abolishing sovereignty and sovereign violence, international criminal law – at least when exercised by victor nations to try and punish the vanquished (the Tokyo Trial was exemplary for Pal) – pushed back the mission of achieving global (criminal) justice. In his Tokyo Judgment, Pal cited the jurist Hans Kelsen (1881–1973) to underline the importance of an impartial court to whose judgments actors from both victor and vanquished nations, accused of committing war crimes, would be made subject.¹² Pal was hospitable towards the idea of a court for international criminal justice:

Regarding the Constitution of the Court for the trial of persons accused of war crimes, the Advisory Committee of Jurists which met at The Hague in 1920 to prepare the statute for the Permanent Court of International Justice expressed a "voeu" for the establishment of an International Court of Criminal Justice. This, in principle, appears to be a wise solution of the problem, but the plan has not as yet been adopted by the states.¹³

Further, aligning with the jurist Hersch Lauterpacht (1897–1960), Pal commented:

I believe with Professor Lauterpacht that it is high time that international law should recognize the individual as its ultimate subject and maintenance of his rights as its ultimate end. [...] This certainly is to be done by a method very different

¹² Pal Judgment, pp. 10–15, see *supra* note 6.

¹³ *Ibid.*, p. 11 (underlining as per the original).

from that of trial of war criminals from amongst the vanquished nations.¹⁴

3.2.3. Pal's 'Global' Criminal Justice

In the narrowest terms, Pal's project of achieving 'global' criminal justice would thus amount to the constitution of an impartial court with authority to try and punish actors from anywhere, including from victor and vanquished nations. The judges here would be impartial and not represent the biased interests of State powers. In this sense, the court would not be a platform for bringing together the powers of individual States and sovereignties (least of all, as in the Tokyo Trial, of victor States), rather it would be the first step for going beyond such sovereignties altogether, with the intention of sternly and impartially prosecuting all abuses of sovereign force – the atomic bombing of Hiroshima and Nagasaki constituted such an unpunished crime for Pal.¹⁵ Pal's notion of the 'world' with respect to criminal justice was thus forged through the (graduated) abolition and sublation, rather than simple preservation, of the 'international', the latter understood in the sense of the inter-State order.

But this would still only be a first step. It is obvious that an impartial international criminal court cannot by itself remove the problems of sovereign violence altogether, or perhaps even serve as an adequate deterrent. To the extent that violence by State agents has deeper causes – racial discrimination (the Holocaust remains the paramount exemplar, but instances of colonial massacres, even genocides, are equally instructive),¹⁶ patriarchy (for example, rapes and sexual slavery as ubiquitous war crimes) and structural socio-economic iniquities (which place State power, in the first place, in some dominant classes, rendering others vulnerable) – any project of achieving global (criminal) justice has to address those

¹⁴ *Ibid.*, p. 145 (underlining as per the original).

¹⁵ *Ibid.*, pp. 137–38, 1091.

¹⁶ There is a growing corpus of scholarship on colonial State crimes, including genocide. See, for example, A. Dirk Moses and Dan Stone (eds.), *Colonialism and Genocide*, Routledge, Abingdon, 2007; A. Dirk Moses (ed.), *Empire, Colony, Genocide: Conquest, Occupation, and Subaltern Resistance in World History*, Berghahn Books, New York, 2008; Alexander Laban Hinton, Andrew Woolford and Jeff Benvenuto (eds.), *Colonial Genocide in Indigenous North America*, Duke University Press, Durham, 2014.

broader issues that sometimes resist easy penalisation. Pal's diagnosis of 'the world' in the 1950s was that of a fragmented stage:

Indeed till now the story everywhere seems to have been one of ruthless fight for wealth with little regard for the rights or welfare of 'inferior races'. Even to-day two-thirds of the World's population live in a permanent state of hunger. Even now all but a tiny fraction are condemned to live in degrading poverty and primitive backwardness even on a continent rich with land and wealth, with all human and material resources.¹⁷

Everywhere we witness lust for power to dominate and exploit: we witness contempt and exploitation of coloured minorities living among white majorities, or of coloured majorities governed by minorities of white imperialists. We witness racial hatred; we witness hatred of the poor.¹⁸

If we are to think about 'global' criminal justice without becoming dependent on the force of sovereign States, especially that of 'great powers' who often commit the greatest, rarely punished, abuses – if we are to avoid relying on the wolf to protect the sheep – it becomes imperative to make a world in which new processes of consensual decision-making can emerge, gathering the support of an adequate plurality of actors and societies, especially those from marginalised positions. Such translocal deliberations alone can remove the broader social disparities mentioned before which constitute some of the root causes of violence perpetrated by State agents or State-supported actors. To think along with Pal, the mechanism of global criminal justice would thus need to be continually reinforced by broad-based deliberations among actors from different societies.

As a member of the International Law Commission (1952-66; twice elected Chairman of the Commission, in 1958 and 1962) as well as a public intellectual, in an age of decolonisation and Cold War, Pal sought to build such a vision of transnational deliberation. Representative is a report he authored on the Fifth Session of the Asian–African Legal Consultative Committee, where he suggested that decolonising States, such as in Asia and Africa, would have to be pioneers in forging such co-operation and

¹⁷ Radhabinod Pal, *The History of Hindu Law in the Vedic Age and in Post-Vedic Times Down to the Institutes of Manu*, University of Calcutta, Calcutta, 1958, p. 269.

¹⁸ *Ibid.*, p. 274.

consensus, expressing thereby “the popular will of the world”, which was instigated by a “sense of injustice [...] universally felt being an indissociable blend of reason and empathy”, and moved people to “weld their souls and spirits in one flaming effort”, forging new “legal provisions” which would be “the instruments of the conscience of the community”, indeed for building up “world communal life”.¹⁹ Pal expressed his hope before the Committee that “all the Asian-African nations would join the organisation and help building up this new wholeness, always remembering that our environment now is no longer the world about us but rather the world”.²⁰

3.3. The Role of Sovereignty in ‘Global’ Criminal Justice

To emphasise global justice through deliberation is also to challenge the model of justice as predominantly implemented through top-down exercises of sovereign force. It is plausible to argue that any project of achieving global criminal justice which is dependent on the authority of sovereign States, however attractive, successful and compelling in the short run, is bound to fail in the long run because abuses (conventional war crimes, crimes against humanity, and so on) are not accidental by-products of sovereignty, of this or that aberrant sovereign rogue State, but rather what structure sovereignty itself. Sovereignty is dependent on force – in Max Weber’s famous definition in ‘Politics as a Vocation’ (1919), “the state is the form of human community that (successfully) lays claim to the *monopoly of legitimate physical violence* within a particular territory”.²¹ States thus often consider ‘excessive’ force (abuse) as ‘necessary’ to function and survive – this is part of *raison d’état*. Jacques Derrida convincingly argues: “Abuse of power is constitutive of sovereignty itself”.²² For Derrida, when powerful States accuse other States of being rogues in international (criminal) law, that often only serves to mask and legitimate their own violent, potentially roguish, behaviour:

¹⁹ Radhabinod Pal, “Report on the Fifth Session of the Asian–African Legal Consultative Committee (Rangoon, January 1962) by Mr. Radhabinod Pal, Observer for the Commission”, pp. 153–4 (www.legal-tools.org/doc/5b8e6e/).

²⁰ *Ibid.*, p. 154.

²¹ Max Weber, *The Vocation Lectures*, Hackett Publishing, Indianapolis, 2004, p. 33.

²² Jacques Derrida, *Rogues: Two Essays on Reason*, Stanford University Press, Stanford, 2005, p. 102.

It consists in accusing and mounting a campaign against so-called *rogue states*, states that do in fact care little for international law. This rationalization is orchestrated by hegemonic states, beginning with the United States, which has quite rightly been shown for some time now (Chomsky was not the first to do so) to have been itself acting like a rogue state. Every sovereign state is in fact virtually and a priori able, that is, in a state [*en état*], to abuse its power and, like a rogue state, transgress international law. There is something of a rogue state in every state. The use of state power is *originally* excessive and abusive.²³

It is thus impossible to disentangle the history of sovereignty from the history of sovereign violence, and to think of a world free, in any substantive way, from sovereign crimes, while still being grounded in an international order composed of sovereign regimes. To reduce sovereign violence, a broader structural challenge against sovereignty is fundamentally necessary.

3.3.1. Non-State Entities Possessing State-Like Powers

When I speak of sovereign regimes here, I refer not only to States, but also to, for example, corporations whose field of activity extends across one or more States and which wield State-like powers, or sectarian-religious organisations invested in acquiring military-political domination. There is no reason why the abuses committed by such organisations should not be taken into account as sovereign crimes in relation to global criminal justice.

Philip Stern has shown how our contemporary association of sovereignty with territorially bordered States is a rather recent invention; in the early modern period, sovereignty was a marker of a broad range of corporate organisations, including (Stern's particular focus) companies like the English East India Company.²⁴ Stern's theorisation about the English East India Company as a company-State, as an example of a broader phenomenon of corporate sovereignty, can bolster recent arguments to try and

²³ *Ibid.*, p. 156.

²⁴ Philip J. Stern, *The Company-State: Corporate Sovereignty and the Early Modern Foundations of the British Empire in India*, Oxford University Press, New York, 2011.

punish transnational companies via frameworks of international criminal justice.²⁵

It could be argued that structures of sovereignty are both conceptually and practically porous and in no way limited to States alone. Acts of sovereign violence are often committed by, or through the complicity of, corporate bodies which are not, in the formal sense, States. Nevertheless, often, especially in Asia, Africa and Latin America today, such acts encompass particularly brutal crimes, committed by companies wielding State-like powers or in collaboration with States, against economically vulnerable individuals and disempowered communities. Sectarian-militant organisations – which may arguably be seen, like companies, as corporate bodies – manifest comparable forms of sovereign violence. Theologically-mediated aspirations for statehood support the commission of egregiously violent crimes which, in my view, can be labelled as classic manifestations of sovereign violence. Global criminal justice can thus be sharpened into a tool against violence committed by capitalism as well as by sectarian-religious militants.

3.3.2. Pal's Views on Sovereignty

In thinking of sovereignty beyond the sovereign State, Pal is again helpful. For Pal, premodern-origin forms of hierarchy and violence – such as the caste order (including brutal practices of untouchability) in India as well as Christian-European forms of monotheism-inspired political authority and imperialism – were classic examples of the nexus between sovereignty and force. For Pal, the domain of religion indeed provided the earliest articulation of this nexus – a nexus later integrated and secularised into modern forms of State sovereignty.²⁶ As I have elsewhere shown in detail, Pal's hostility to statist deployments of natural law to bolster Western hegemonic authority over the non-West – for him, settler colonial ideas of

²⁵ See, for example, Joanna Kyriakakis, "Prosecuting Corporations for International Crimes: The Role for Domestic Criminal Law", in Larry May and Zachary Hoskins (eds.), *International Criminal Law and Philosophy*, Cambridge University Press, New York, 2010, pp. 108–37; Florian Jessberger and Julia Geneuss (eds.), "Special Issue: Transnational Business and International Criminal Law", in *Journal of International Criminal Justice*, 2010, vol. 8, no. 3, pp. 695–977; Michael J. Kelly, *Prosecuting Corporations for Genocide*, Oxford University Press, New York, 2016.

²⁶ Banerjee, 2014, see *supra* note 2.

terra nullius as well as, in Tokyo, naturalist principles of international criminal justice, were exemplary – stemmed from a broader animus against the legal and (adulterated/secularised) theological nexus between sovereignty, violence and legitimation of domination.²⁷ To think of the State, the big company and the sectarian-religious militant organisation/community in a triangular field, as comparable articulations of sovereignty and sovereign violence, would not be going against Pal's own vision. As he argued in his 1958 book on Hindu law:

There is little fundamental difference between the law viewed as the will of the dominant deity and the law viewed as the will of the dominant political or economic class. Both agree in viewing law as a manifestation of applied power.²⁸

Given Pal's understanding of the relation between sovereignty and law, and especially his criticism of law viewed in terms of the legitimation of sovereign power, one can transpose Pal's understanding of law as theological, political and economic dominance to an understanding of sovereign power as theological, political and economic dominance.

However, we also need to push Pal's challenge to sovereignty beyond the limits that he himself perhaps set. I have shown in earlier essays that, while Pal was deeply critical, at least since the 1920s, of sovereignty, in Tokyo, he attempted to protect the Japanese political-military leadership out of a concern for protecting Japan's sovereignty from Western/Allied control. Pal saw sovereignty, when wielded by non-Western States, as a necessary evil, a way to protect non-European societies from Western imperial sovereignty; I have theorised about this as a posture of 'subaltern sovereignty'.²⁹ In the Tokyo Judgment, for example, Pal argued:

The federation of mankind, based upon the external balance of national states, may be the ideal of the future and perhaps is already pictured in the minds of our generation. But until that ideal is realized, the fundamental basis of international

²⁷ *Ibid.*

²⁸ Pal, 1958, p. v, see *supra* note 17.

²⁹ Milinda Banerjee, "Decolonization and Subaltern Sovereignty: India and the Tokyo Trial", in Kerstin von Lingen (ed.), *War Crimes Trials in the Wake of Decolonization and Cold War in Asia, 1945-1956: Justice in Time of Turmoil*, Palgrave, London, 2016, pp. 69–91.

community, if it can be called a community at all, is and will continue to be the national sovereignty.³⁰

I, myself, am not in love with this national sovereignty and I know a strong voice has already been raised against it. But even in the post-war organizations after this Second World War national sovereignty still figures very largely.³¹

3.3.3. Consequences of Sovereignty

Writing today, with the benefit of hindsight, such a stance of tacitly accepting sovereignty as the basis of the international order appears problematic. Not only did Pal end up producing almost an apologia for Japanese State violence in Tokyo, exculpating the Japanese leadership of their role in imperial crimes, but also – at a deeper level – we need to be sceptical whether the translation of sovereignty into non-European societies has indeed been an adequate foundation for bettering the ‘world’. After all, postcolonial States – South Asian ones offer classic cases – have produced their own histories of sovereign violence, directed against populations within their own borders, as well as through conflicts against the neighbour – in the case of East Bengal/Pakistan, rising arguably to genocidal proportions and involving grave crimes against humanity, directed especially, but not exclusively, against non-Muslim minorities.³² Scholars have also made nuanced applications of the concept of genocide in conceptualising the violence carried out against *adivasi* populations with the complicity of the Indian and the Bangladeshi States, generally to further the control of majoritarian settler communities and/or private firms over agricultural-land and mining resources. Euro-American companies, with the connivance of Western States, have frequently been complicit in the construction of such sites of exploitation.³³

³⁰ Pal Judgment, p. 125, see *supra* note 6.

³¹ Pal Judgment, p. 125, see *supra* note 6 (underlining as per the original).

³² There is a growing, and often contentious, body of literature here. For example, see the special issue, edited by A. Dirk Moses, in *Journal of Genocide Research*, 2011, vol. 13, no. 4.

³³ See, for example, Mark Levene, “The Chittagong Hill Tracts: A Case Study in the Political Economy of ‘Creeping’ Genocide”, in *Third World Quarterly*, 1999, vol. 20, no. 2, pp. 339–69; Bhumitra Chakma, “The Post-Colonial State and Minorities: Ethnocide in the Chittagong Hill Tracts, Bangladesh”, in *Commonwealth and Comparative Politics*, 2010, vol. 48, no. 3, pp. 281–300; Felix Padel and Samarendra Das, “Cultural Genocide and the

These cases have been exemplary of the translation of imperial power into the makeup of what are, formally, postcolonial nation-States. I am, therefore, far less optimistic than Pal was about the potential for postcolonial Asian and African States to build a new world society, while still preserving the order of national sovereignty. State crimes have sadly all too often been constitutive of postcolonial sovereignty, especially when the latter has carried over classic colonial frameworks of bordered military power and political economies based on subjugating and dispossessing vulnerable groups. The compelling question is whether global criminal justice can try and punish such crimes committed directly by, or at least with the complicity of, State agents. Powerful States will obviously have little incentive in punishing such crimes. The punishment of a few perpetrators from select States, as done by various international criminal tribunals and by the International Criminal Court, is clearly inadequate in promoting the cause of global criminal justice.

A broader re-organisation of power is necessary in the future if global criminal justice is to emerge with any amount of adequacy. Such a project may seem utopian, but it needs to be remembered that the very formation of a regime of international criminal law, and eventually the birth of an International Criminal Court, would have seemed implausible before the First World War. That a programme seems utopian today, does not make it *a priori* implausible for the future.

3.4. Anarchist Approaches to 'Global' Criminal Justice

Scholars working with anarchist perspectives can perhaps offer helpful hints about the kind of rearrangement of power and erosion of sovereignty we may need to broaden the socio-political bases of global criminal justice. In speaking of this anarchist turn, I do not refer to the historical nineteenth century usage of the term for particular kinds of political action, but to the way in which, for example, the anthropologist David Graeber underlines key “anarchist principles – autonomy, voluntary association, self-organization, mutual aid, direct democracy”.³⁴ Scholars working through the anarchist turn typically look back to past societies as well as

Rhetoric of Sustainable Mining in East India”, in *Contemporary South Asia*, 2010, vol. 18, no. 3, pp. 333–41.

³⁴ David Graeber, *Fragments of an Anarchist Anthropology*, Prickly Paradigm Press, Chicago, 2004, p. 2.

to present politics, from a broad swathe of societies across the world, for shaping future horizons. The anthropologist James Scott thus identifies anarchist principles in various upland Southeast Asian societies, which he distinguishes from State societies of the plains.³⁵ Graeber draws inspiration from social forms in Madagascar, Central and South America and Africa (across the colonial divide), types of anti-colonial and anti-racial politics in colonial South Africa and India and present-day movements from the Americas and from Spain.³⁶ Both Scott and Graeber recognise that various forms of hierarchy and violence still exist in the social-political forms and movements they draw inspiration from, but claim that these forms are still often far less hierarchical and violent, and far more open to possibilities of emancipation, than societies and movements (even revolutionary movements) traditionally organised around State sovereignty.

It is fruitful to think of Pal in relation to global criminal justice through anarchist lenses. Hailing from a poor lower-caste-origin (potter) family, Pal was aware not only about the injustices of colonialism but also about forms of social hierarchy practised in premodern (and modern) India, based on caste and gender. I have elsewhere shown how Pal related the mythic Indian lawgiver Manu to Nietzsche, to brilliantly compare racial and caste forms of heredity-based social hierarchy and violence. I have further shown how Pal established homologies between forms of sovereignty and rulership operating in premodern India, via kingship and caste, and premodern and modern Europe, via Christian forms of political organisation, and compared these to modern forms of statehood and State-backed racism and imperialism. To recover a horizon of justice that was not trapped by sovereignty, Pal looked back to an ancient Indian Vedic past, and especially to Rigvedic (second millennium BC) notions of *rita* (cosmic-moral ‘law’). He argued that such notions of law and justice, also present in the Upanishads (first millennium BC), were not subordinate to State sovereignty; they had crystallised before caste and kingship became hegemonic (as it did in later centuries in India, and especially from around the mid-late first millennium BC). Pal further argued, critiquing Europe-

³⁵ James C. Scott, *The Art of Not Being Governed: An Anarchist History of Upland Southeast Asia*, Yale University Press, New Haven, 2009.

³⁶ Graeber, 2004, see *supra* note 34.

an-colonial scholars, that premodern India, at least some strands of it, needed to be commended, rather than castigated for supposedly lacking in State 'law', because the societies there showed how law could operate independent of State power and could indeed exist without the backing of, or at least above, the sovereign.³⁷ This forms a leitmotif in Pal's writings from the 1920s until the end of his life. Entirely typical is the following passage from the 1920s:

We have seen how the Vedic Rishis generally place law even above the divine Sovereign. The law, according to them, exists without the Sovereign, and above the Sovereign; and if an Austin or a Seydel tell them that "there is no law without a sovereign, above the sovereign, or besides the sovereign, law exists only through the sovereign", they would not believe him. Nay, they would assert that there is a rule of law above the individual and the state, above the ruler and the ruled; a rule which is compulsory on one and on the other; and if there is such a thing as sovereignty, divine or otherwise, it is limited by this rule of law.³⁸

This was not a facile nativism. Modern historians have argued that British colonial rule indeed introduced new forms of coercive State sovereignty and State-enforced codified law in India since the late eighteenth century, accentuating and universalising hierarchical strands in premodern Indian (especially Brahmanical and elite-Islamic) legal thinking and practice, while also introducing novel forms of colonial-racial domination, economic subjugation and violence. In doing so, the British marginalised social-political forms present among non-Brahmanical peasant, pastoral and other labouring communities who had, in the precolonial period, often resisted and circumscribed (within limits) governmentalities embedded in caste, patriarchy and kingship.³⁹ Many historians would also agree with Pal in terms of contextualising *rita* as the product of a social order where principles of caste and kingship had not fully crystallised, and the gradual

³⁷ Banerjee, 2014, see *supra* note 2.

³⁸ Radhabinod Pal, *The Hindu Philosophy of Law in the Vedic and Post-Vedic Times Prior to the Institutes of Manu*, Biswabhandar Press, Calcutta, 1927, pp. 72–73.

³⁹ For a summary bibliography, see Banerjee, 2014, footnote 7, see *supra* note 2. For a fuller discussion, see Banerjee, 2017, especially Chapter 4, see *supra* note 11.

replacement of *rita* by ideals of caste (*varna-jati*) *dharma* as emblematic of the growth of new forms of socio-political hierarchy in ancient India.⁴⁰

3.5. Law and Justice Beyond State Sovereignty

Certainly, scholars today would disagree with many specific details of Pal's historical readings. However, what interests me is the way in which Pal sought to uncouple law and justice from State sovereignty, and further to identify particular textual-historical sites in ancient/premodern India which offered (to him) evidence that such an uncoupling was not impractical – that justice could indeed operate independently of State coercion. In this sense, it is productive to read Pal through an anarchist lens. What Scott does for premodern Southeast Asia, in some senses, Pal tried to do for precolonial India – to show that societies can historically function for many centuries, and adopt principles of law and justice, without always having to rely on State coercion and rigid social hierarchies.

I disagree, however, with scholars who see Pal's vision as based on an unchanging millennia-old 'Indian' ethical-religious worldview which stands in sharp contrast to 'Western' law and ethics.⁴¹ Such a view of civilisational polarity and ahistorical timelessness is entirely alien to the way in which Pal worked, for example, by relating *rita* to principles of divine reason and certain aspects of natural law produced by Greek, Roman and European-Christian traditions, as well as by reading ideological contestations and diachronic changes (rather than homogenous stabilities) within South Asian as well as within European legal-philosophical traditions.⁴²

⁴⁰ In his review of Kumkum Roy, *The Emergence of Monarchy in North India: Eighth to Fourth Centuries B.C.: As Reflected in the Brahmanical Tradition*, Oxford University Press, Delhi, 1994 in *Journal of the Economic and Social History of the Orient*, 1998, vol. 41, no. 1, p. 130, Daud Ali succinctly summarises this perspective:

The social order, envisaged in the early Vedic period as composed of more or less identical groups fused through the inclusive category of *vis* or "people" and sustained by a holistic notion order (*rita*) gave way to a highly stratified system of political privilege, or *varna*, upheld by a differential code of conduct (*dharma*). Monarchy sat at the centre of this new order.

⁴¹ For such views, see Ashis Nandy, "The Other Within: The Strange Case of Radhabinod Pal's Judgment on Culpability", in *New Literary History*, 1992, vol. 23, no. 1, pp. 45–67; Barry Hill, "Reason and Lovelessness: Tagore, War Crimes, and Justice Pal", in *Postcolonial Studies*, 2015, vol. 18, no. 2, pp. 145–160.

⁴² Banerjee, 2014, see *supra* note 2.

What is also interesting is the way in which, definitely by the 1950s/60s, Pal was thinking, beyond Indian tradition and history, of a future world community, and especially mechanisms of global justice, which would emerge through the replacement of sovereign violence by transregional democratic deliberation, creating thereby a new 'world'. For example, in a lecture written for a meeting of the United World Federalists of Japan in 1966, Pal affirmed:

I have a firm faith in the mission of law in the matter of world peace. If we are sincerely cherishing a desire for creating a peaceful world-order, we must look to law. Such a world-order will be possible only if we succeed in bringing the world society under the reign of law, – under the might of that most reasonable force which alone can check the fatal unhinging of our social faculties. Law alone is entitled to claim recognition as the most reasonable of the forces which can help shaping the human society in the right form.⁴³

But simultaneously, Pal warned against all “pretension to finality”. People had to be aware of “the unavoidably partial character of all human knowledge”, an awareness which might encourage “men to invite the supplementation and completion of their incomplete knowledge from other partial perspectives”.⁴⁴ Rules of international law had to remain continually flexible and dynamic. Law, like everything else in this ‘world’ community, was to be “exercised with the active concurrence of the governed”; people would create “a democratically controlled planned community life for the world”.⁴⁵ This was, in effect, an alternate world – a world created not through sovereign fiat, which Pal (as I mentioned above) decried in Tokyo, but through genuine deliberation: “the creation of the world itself is the victory of persuasion over force and the instrument of that victory is justice”.⁴⁶ For Pal, genuine discussion, even planning, was only possible when people renounced the sovereignty of their certitudes and laws remained flexible. In his writings on Vedic law, Pal sketched this

⁴³ Radhabinod Pal, *World Peace Through World Law*, United World Federalists of Japan, Tokyo, 1967, p. 1.

⁴⁴ *Ibid.*, p. 1.

⁴⁵ *Ibid.*, p. 19.

⁴⁶ *Ibid.*, p. 20.

through a dialectic between the idea of cosmic law/justice (*rita*) and a corpus of transformable laws (*vrata*).⁴⁷

In his 1958 book on Hindu law, Pal underlined, by working through a famous creation hymn from the *Rigveda* (the Nasadiya Sukta), the importance of not knowing, of the unknowable (*na veda*).⁴⁸ Pal drew from the hymn a portrayal of the creation of the world which did not depend on the fiat of a sovereign deity, of “a whimsical wilful being”.⁴⁹ In this connection, we should remember that in his Tokyo Judgment, Pal had condemned the Western powers for enacting precisely such a sovereign cosmogony, for hypocritically claiming to act like “a valiant god struggling to establish a real democratic order in the Universe” while preserving colonial rule.⁵⁰ Pal saw genuine world-creation as a more complex process, where ultimate knowledge was not available. Not knowing was not anti-theoretical, but rather the spur, to world creation. “This principle of the relativity of our knowledge had a limiting effect on action as well as on thought; and we shall see later how it supplied the metaphysical basis of duty and ultimate guarantee of right”.⁵¹ For Pal, justice had to flow not from top-down legal certitude backed by sovereign force, but from incertitude and horizontal deliberation, coupled with the belief that the other person was sacred, towards whom one had duties which were as important as one’s own rights:

Justice is indeed a mutual limitation of wills and consciousnesses by a single idea equally limitative of all, by the idea of limitation itself which is inherent in knowledge, which is inherent in our consciousness as limited by other consciousnesses. In spite of ourselves we stop short before our fellow man as before an indefinable something which our science cannot fathom, which our analysis cannot measure, and which by the very fact of its being a consciousness is sacred to our own.⁵²

⁴⁷ Banerjee, 2014, p. 85, see *supra* note 2.

⁴⁸ Banerjee, 2014, p. 116, see *supra* note 2; Pal, 1958, pp. 119–22, see *supra* note 17.

⁴⁹ Pal, 1958, p. 121, see *supra* note 17.

⁵⁰ Pal Judgment, p. 240, see *supra* note 6.

⁵¹ Pal, 1958, p. 122, see *supra* note 17.

⁵² Pal, 1958, p. 172, see *supra* note 17; Banerjee, 2014, pp. 84–85, 116–17, see *supra* note 2.

Recent anarchist thinkers, like Graeber, while advocating the erosion of sovereign power, similarly emphasise renouncing dogmatism and stress “this very unavailability of absolute knowledge” as the basis for creating a new world.⁵³

3.6. Conclusion

If we are to think with Pal about global criminal justice and also against him, renouncing his ethically troubling apologia for non-Western sovereignty and sovereign violence, we need to think of action which gradually uncouples global criminal justice from the force of sovereign regimes. Rather than a momentous transformation right now, we need to deliberate with others, and especially with those in subalternised locations who suffer the most from acts of sovereign violence – from brutal behaviour committed by States, big corporations exercising State-like power (and/or in connivance with States) to commit exploitation, and sectarian militants and hierarchical religion-legitimated communities which all too often assert some form of superordinate political and legal authority. We need to establish translocal social solidarities and simultaneously call for deeply individuated ethical transformations, while renouncing any belief in the sovereignty of our interests and dogmas. Such transformations in our individual, as well as social, selves are not only necessary for legal actors, the judges and lawyers who carry out the practical task of criminal justice, but for everyone who wishes to support the end of sovereign atrocities.

Through such changes, perhaps, a future horizon of global criminal justice can take shape, in alliance with a ‘world’ where sovereign violence becomes a rarity. However utopian this sounds, this is no more an impossibility than any plan for international criminal law itself would have seemed before the twentieth century. Moreover, to examine and transform our own actions, including in relation to the realm of law and justice, is certainly not entirely utopian. Further, as Pal’s emphasis on planning reveals, we need not think of the erosion of sovereignty as the erosion of all forms of organisation. The latter is obviously necessary to carry out not only projects of global justice, but also, for example, to ensure campaigns to eradicate diseases, guarantee better distribution of food and other resources, and so on.

⁵³ Graeber, 2004, p. 10, see *supra* note 34.

Rather, the erosion of sovereignty in its present forms may lead to new, hitherto unimaginable, ways in which people can come together, discuss with each other and create new ways of organising their lives free from domination and exploitation, across multiple local, translocal and even planetary scales. This chapter, however, does not call for an exact manifesto or roadmap of how the future ‘world’ is to be achieved – to be dogmatic about how future justice would look like, about what is right and just, would be antithetical to the kind of epistemology of doubt and responsibility sketched here. This chapter is more an invitation to further deliberation, argument and solidarity.

The Concept of International Criminal Responsibility for Individuals and the Foundational Transformation of International Law

CHAO Yi*

4.1. Introduction

International law is undergoing a foundational transformation: sovereign States are no longer the sole subjects of the international legal order,¹ and State consent is no longer the exclusive source of the legitimacy of international law.²

Now, pluralistic participants in multiple facets of the globalised world are engaged in the making and governance of international law. While sovereign States are still the “fundamental or primary subjects”³ “at the heart of the international legal system”,⁴ a variety of actors other than States have gained real access to and influence over the making of international law.⁵ The international legal personality of certain international

* **CHAO Yi** is a doctoral candidate at McGill University Faculty of Law. He is a scholarship recipient from the China Scholarship Council and holds LL.M. and LL.B. degrees from Peking University Law School.

¹ See Robert Jennings and Arthur Watts (eds.), *Oppenheim's International Law*, 9th edition, Oxford University Press, Oxford, 1992, p. 16.

² See Jan Klabbbers, “Setting the Scene”, in Jan Klabbbers, Anne Peters and Geir Ulfstein, *The Constitutionalization of International Law*, Oxford University Press, Oxford, 2009, pp. 37–43.

³ Antonio Cassese, *International Law*, 2nd edition, Oxford University Press, Oxford, 2005, p. 71.

⁴ Rosalyn Higgins, *Problems and Process: International Law and How We Use It*, Clarendon Press, Oxford, 1994, p. 39.

⁵ See generally Alan Boyle and Christine Chinkin, *The Making of International Law*, Oxford University Press, Oxford, 2007, pp. 41–97.

institutions has been either explicitly established by treaty⁶ or presumed in practice.⁷ The development of international law in general and international human rights law in particular has rejected the “theoretical insistence of [traditional positivism] that the law of nations applies only to States”.⁸ In spite of the doctrinal reticence to pronounce the international subjectivity of individuals, they have gained not only criminal responsibility but also rights in international law.⁹

As international law moves in the direction of transformation from inter-State law to the law of the international community, the dependence of its legitimacy on State consent is gradually loosening. First, once international institutions are established by States, their operation is no longer in the complete control of the consent of member States. Although consent of member States is the initial source of the legitimacy of international institutions,¹⁰ “as international institutions gain greater authority [...] their consensual underpinnings erode [and] questions about their legitimacy are beginning to be voiced”.¹¹ In fact, the root of many legal controversies about international organisation is essentially the “clash between the organization and its member States”.¹² Second, with the concept of *jus*

⁶ See Rome Statute of the International Criminal Court, adopted 17 July 1998, entry into force 1 July 2002, Article 4(1) (‘ICC Statute’) (<http://www.legal-tools.org/doc/7b9af9/>). It establishes that “[t]he Court shall have international legal personality. It shall also have such legal capacity as may be necessary for the exercise of its functions and the fulfilment of its purposes”.

⁷ According to Jen Klabbers, the practice has shown a pragmatic approach of ‘presumptive personality’ to the international institutions that “as soon as an organization performs acts which can only be explained on the basis of international legal personality, such an organization will be presumed to be in possession of international legal personality”, Jen Klabbers, *An Introduction to International Institutional Law*, 2nd edition, Cambridge University Press, Cambridge, 2009, pp. 49–50.

⁸ Mark Weston Janis, “Individuals as Subjects of International Law”, in *Cornell International Law Journal*, 1984, vol. 17, no. 1, p. 61.

⁹ Andrew Clapham, “The Role of the Individual in International Law”, in *European Journal of International Law*, 2010, vol. 21, no. 1, p. 30.

¹⁰ QIN Julia Ya, “The Conundrum of WTO Accession Protocols: In Search of Legality and Legitimacy”, in *Virginia Journal of International Law*, 2015, vol. 55, no. 2, p. 435.

¹¹ Daniel Bodansky, “The Legitimacy of International Governance: A Coming Challenge for International Environmental Law”, in *American Journal of International Law*, 1999, vol. 93, no. 3, p. 597.

¹² Klabbers, 2009, p. 308, see *supra* note 7.

cogens, the “peremptory norm of general international law”¹³ invalidates the legitimacy of State consent contrary to it. Furthermore, if *jus cogens* is really “a norm accepted and recognised by the international community of States as a whole as a norm from which no derogation is permitted”,¹⁴ it would mean that sovereign States are even prohibited to consent to whatever is contrary to *jus cogens*. In this sense, not only does international law scrutinise the legitimacy derived from State consent, it also restricts the degree to which States can or cannot consent. This shows a clear transformation of the philosophical foundations of international law from the dictum from the *Lotus* case that “[t]he rules of law binding upon States [...] emanate from their own free will” and “restrictions upon the independence of States cannot therefore be presumed”.¹⁵

The concept of ‘international criminal responsibility for individuals’ has a particular and significant place in this foundational transformation of international law. After positivism replaced natural law as the dominant philosophical foundation of international law in the nineteenth century, States were the sole subjects in the international legal order for quite some time. As James Crawford points out, “in the late nineteenth and early twentieth centuries, international legal personality came to be regarded as synonymous with statehood”.¹⁶ But this changed with the initiation of international criminal responsibility for individuals. By prosecuting war criminals of the Second World War, the Nuremberg and Tokyo trials imposed direct international criminal responsibility on individuals, which presented a drastic transformation from the traditional view that individuals – who were not subject to international law – cannot be held personally responsible for violations of international law.¹⁷

¹³ Vienna Convention on the Law of Treaties, adopted 23 May 1969, entry into force 27 January 1980, Articles 53, 63 and 71 (‘VCLT’) (<http://www.legal-tools.org/doc/6bfcd4/>).

¹⁴ *Ibid.*, Article 53.

¹⁵ Permanent Court of International Justice, *The Case of the S.S. “Lotus” (France v. Turkey)*, Judgment, 7 September 1927, Series A, No. 10, p. 18 (<http://www.legal-tools.org/doc/c54925/>).

¹⁶ James Crawford, *The Creation of States in International Law*, 2nd edition, Oxford University Press, Oxford, 2006, p. 29.

¹⁷ Cassese, 2005, p. 435, see *supra* note 3.

The development of international criminal law, the entirety of which is based on the principle of individual criminal responsibility,¹⁸ also inspires and provides legal and philosophical foundations for concepts and doctrines such as *jus cogens*, obligations *erga omnes*, and universal jurisdiction. All of these concepts and doctrines aim for the prevention and punishment of certain State actions to safeguard the interests of the international community as a whole. Therefore, the concept of international criminal responsibility for individuals and especially the complex threads of philosophical foundations and rationales behind it are of profound relevance to this transformation of international law from inter-State law to the law of the international community.

But international criminal responsibility for individuals is not a simple concept as it might seem at first glance.¹⁹ Behind the seemingly straightforward dictum that “[c]rimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced”²⁰ lies a set of tangled philosophical foundations and rationales with respect to questions like why international criminal responsibility is imposed on *individuals* when international crimes clearly respond to *collective* criminality; how to determine who is individually responsible when international crimes usually occur with so many people engaging on so many levels and in so many different ways; and what are the implications of international criminal responsibility for individuals on the possibility of international criminal responsibility for ‘abstract entities’. Divergent philosophical foundations and rationales hide behind the single con-

¹⁸ See, for example, Charter of the International Military Tribunal, 8 August 1945, Article 6 (‘IMT Charter’) (<http://www.legal-tools.org/doc/64ffdd/>); International Military Tribunal for the Far East Charter, 19 January 1946, Article 5 (‘IMTFE Charter’) (<http://www.legal-tools.org/doc/a3c41c/>); Statute of the International Criminal Tribunal for the Former Yugoslavia, 25 May 1993, Article 7 (<http://www.legal-tools.org/doc/b4f63b/>); Statute of the International Criminal Tribunal for Rwanda, 8 November 1994, Article 6 (<http://www.legal-tools.org/doc/8732d6/>); ICC Statute, Article 25, see *supra* note 6.

¹⁹ Ciara Damgaard, *Individual Criminal Responsibility for Core International Crime: Selected Pertinent Issues*, Springer, Berlin, 2008, p. 3.

²⁰ International Military Tribunal, *United States of America et al. v. Hermann Wilhelm Göring et al.*, Judgment, 1 October 1946, in *The Trial of German Major War Criminals: Proceedings of the International Military Tribunal sitting at Nuremberg, Germany*, Part 22, p. 447 (22 August 1946 to 1 October 1946) (<http://www.legal-tools.org/doc/45f18e/>).

cept of international criminal responsibility for individuals, and they can lead its interpretation and application to different directions.

As international criminal responsibility for individuals is a concept premised on ambiguous philosophical foundations, it also brings confusions and fragmentation to the international legal order. This problem appears in the issue of foreign immunity in domestic civil proceedings for individual perpetrators of torture. On the one hand, it is tempting to lift the immunity and impose individual responsibility for acts of torture by adopting the argument that “crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced”.²¹ This should especially be the case as the prohibition on torture has frequently been pronounced as a peremptory norm of international law to which no derogation is permitted.²² On the other hand, it appears implausible to make a clear-cut distinction between State and the individual torturers since torture in international law is defined as acts “inflicted by or at the instigation of or with the consent or acquiescence of a *public official or other person acting in an official capacity*”.²³ The fragmentation and confusions that occur in the recent decades over foreign immunity for torture in civil proceedings is a testament to international law’s *status quo* of being ‘stuck’ in the transformation.

Against this background, this chapter explores the tangled philosophical and doctrinal foundations of international criminal responsibility for individuals in the context of the foundational transformation of international law. Part I elaborates the role of international criminal responsibility for individuals as an initiator of the transformation in which international law has grown to govern pluralistic subjects and relations in the global world and, to a certain degree, moved beyond the methodology of

²¹ *Ibid.*

²² As Lord Bingham has stated in a case before the House of Lords of the United Kingdom, “[t]here can be few issues on which international legal opinion is more clear than on the condemnation of torture”, *A and others and others v. Secretary of State for the Home Department*, 8 December 2005, [2005] UKHL 71, para. 33 (<http://www.legal-tools.org/doc/8465e1/>).

²³ Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted 10 December 1984, entry into force 26 June 1987, Article 1(1) (emphasis added) (‘CAT’) (<http://www.legal-tools.org/doc/713f11/>).

traditional positivism. Part II explores the tangled and ambiguous philosophical and doctrinal foundations of international criminal responsibility for individuals by asking two important questions: who commits international crimes? And, are there other forms of international criminal responsibility? Part III illustrates the fragmentation and confusions that international criminal responsibility for individuals has brought into the transformation of international law and the tensions between the reality of States and the aspiration of the international community as a whole by the example of foreign immunity for torture in domestic civil proceedings.

4.2. The Concept of International Criminal Responsibility for Individuals as an Initiator of the Foundational Transformation of International Law

Despite that “[e]nforcement of the laws and customs of war through punishment of individuals can be traced back to Grotius and Vattel”²⁴ and that commentators have indeed attempted to trace the evidence of recognition that individual could be responsible for crimes committed in armed conflicts back to ancient Greece,²⁵ this chapter perceives the Nuremberg and Tokyo trials after the Second World War as the actual origin of the concept of international criminal responsibility for individuals.

This is of course not to deny the existence of ideas and notions that can, in retrospect, be seen as the prelude to international criminal responsibility for individuals, but to emphasise that this concept, in its true sense, was only brought to life after the Second World War as a direct result of the Nuremberg and Tokyo trials. Several significant conceptual aspects of international criminal responsibility for individuals need to be clarified here for this particular historical identification of its origin.

First, ‘international criminal responsibility for individuals’ (‘ICRI’) requires criminal responsibility to be ‘international’: the source of legal force must be international law rather than domestic, religious, or natural law. This requirement would rule out activities based on religious or domestic law and courts as the origin of ICRI.²⁶

²⁴ Elies van Sliedregt, *Individual Criminal Responsibility in International Law*, Oxford University Press, Oxford, 2012, p. 4.

²⁵ See Damgaard, 2008, pp. 86–98, see *supra* note 19.

²⁶ Evidence of those activities is found even in ancient civilisations, see *ibid.*, pp. 87–88.

Second, the concept of ICRI must be understood with its fundamental importance to the identity of international criminal law. International criminal law, in essence, is a ‘fusion’ of international law and domestic criminal law.²⁷ As Georg Schwarzenberger succinctly put as early as 1950, international criminal law in the real sense “would have to be of a prohibitive character and would have to be strengthened by punitive sanctions of their own”.²⁸ While prohibitive prescription can derive from various sources in international law such as the laws and customs of war, it is the *actual* enforcement of punitive sanction based on ICRI that gives international criminal law its own identity. Therefore, treaty provisions before the Second World War that spelt out international responsibility without “provid[ing] a mechanism by which violators could be punished for their crimes”²⁹ are not qualified to be considered the origin of ICRI. Even Ciara Damgaard, who argued that the concept of ‘individual criminal responsibility for international crimes’ predated the Second World War, had to admit that:

such ‘evidence’ is haphazard, prosecutions have failed, or sentences have not been enforced and the wording used in some international instruments is vague and imprecise. The significance of this ‘evidence’ is the principle that it seeks to illustrate – i.e. that the concept of individual criminal responsibility for international crimes committed in the context of an armed conflict was recognised prior to World War II – rather than its success or failure in actual terms.³⁰

Without the actual enforcement of criminal responsibility under international law,³¹ ICRI cannot be said to exist, because the essential com-

²⁷ Ilias Bantekas and Susan Nash, *International Criminal Law*, 2nd edition, Cavendish Publishing Limited, London, 2003, p. 1.

²⁸ Georg Schwarzenberger, “The Problem of an International Criminal Law”, in *Current Legal Problems*, 1950, vol. 3, no. 1, p. 273.

²⁹ CHEN Lung-Chu, *An Introduction to Contemporary International Law: A Policy-Oriented Perspective*, 3rd edition, Oxford University Press, New York, 2015, p. 510.

³⁰ Damgaard, 2008, pp. 97–98, see *supra* note 19.

³¹ As Andreas Gordon O’Shea precisely noted, “[t]he first *truly international enforcement* of international criminal law came with the prosecutions before the Nuremberg Tribunal and Tokyo Tribunal after the Second World War”, Andreas Gordon O’Shea, “International Criminal Responsibility”, in *Max Planck Encyclopedia of Public International Law*, last updated on 15 March 2018, para. 13 (emphasis added) (available on Oxford Public International Law web site).

ponent of ICRI is that criminal responsibility is actually imposed in tangible forms under international law rather than the mere notion or theory that there might potentially be ‘international criminal responsibility’.³²

Third, there is a trend among international lawyers to turn to the past – sometimes the ancient past – searching for historical occurrences that resemble a new concept of modern international law and to claim the past incidents as the ‘hidden origin’ of that new concept.³³ Such an approach is rejected here, because it not only results from a far-fetched interpretation of history,³⁴ but also undermines the transformative role of ICRI for the international legal order at the critical time of the Nuremberg and Tokyo trials. In fact, one of the biggest legal questions for the International Military Tribunals in Nuremberg and Tokyo was whether there was indeed criminal responsibility for individuals under international law and whether the Tribunals were applying laws retroactively.

This part traces back to ICRI as seen in the Nuremberg and Tokyo trials and analyses how it has initiated and propelled the foundational transformation of international law.

³² Even as for the mere notion of international criminal responsibility, this author agrees with the statement that “[t]he notion of individual criminal responsibility [is] largely nonexistent prior to the Second World War [in international law]”, CHEN, 2015, p. 509, see *supra* note 29.

³³ A well-known example is the separate opinion of Vice-President Weeramantry of the International Court of Justice (‘ICJ’) in *Gabčíkovo-Nagymaros Project* in which he tried to trace to origin of ‘sustainable development’ to ancient civilisations “millennia ago” by examples of “the practice and philosophy of a major irrigation civilization of the pre-modern world”, International Court of Justice, *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)*, Judgment, 25 September 1997, pp. 98–104 (<http://www.legal-tools.org/doc/e45b69/>).

³⁴ Quentin Skinner’s arguments for interpreting history are summarised by Anne Orford as follows, “[i]n order to understand a particular statement, utterance, or text, the historian needs to reconstruct *what its author was doing in making that statement, uttering that utterance, or writing that text*”, Anne Orford, “International Law and the Limits of History”, in Wouter Werner, Marieke de Hoon and Alexis Galán (eds.), *The Law of International Lawyers: Reading Martti Koskenniemi*, Cambridge University Press, Cambridge, 2017, p. 301 (emphasis added). In light of this standard, reading the history before the Second World War as the origin of international criminal responsibility for individuals (‘ICRI’) is far-fetched, because historical occurrences that purportedly resemble ICRI had no effect of creating actual international criminal responsibility.

4.2.1. International Criminal Responsibility for Individuals and the Changing Structure of International Law

As is previously emphasised, ICRI requires international law to have obtained an independent identity. Therefore, ‘international’ criminal responsibility in a real sense could only exist after positivism gave international law its own identity separate from natural law and domestic law.³⁵ Starting to gain dominance in the nineteenth century, positivism remains the foundation of international law. Although many new approaches/methods/theories³⁶ of international law have been put forward to reveal the weakness and insufficiency of positivist international law, none has replaced positivism as the authority on what international law is in the real world. Today, positivism “forms the basis of mainstream thinking in international law in one form or another”,³⁷ and no international lawyer “can do without constantly – and near-exclusively – referring to ‘positive law’ in order to make a ‘legal point’”.³⁸

The structure of the international legal order has changed considerably since international law first gained its own identity from positivism in the nineteenth century. ICRI has played a vital role as an initiator of this structural transformation of international law in at least the following two aspects.

4.2.1.1. The Pluralisation of Subjects of International Law

The first important aspect of the structural transformation is the pluralisation of the subjects of international law. It is the view of orthodox positiv-

³⁵ Anne Peters, *Beyond Human Rights: The Legal Status of the Individual in International Law*, Cambridge University Press, Cambridge, 2016, pp. 12–13. See also Stephen C. Neff, *Justice among Nations: A History of International Law*, Harvard University Press, Cambridge, 2014, pp. 222–26.

³⁶ For example, the recent edition of *The Oxford Handbook of the Theory of International Law* includes 13 approaches of international law, see Anne Orford and Florian Hoffmann (eds.), *The Oxford Handbook of the Theory of International Law*, Oxford University Press, Oxford, 2016.

³⁷ Peter Malanczuk, *Akehurst's Modern Introduction to International Law*, 7th revised edition, Routledge, London, 1997, p. 32.

³⁸ Joerg Kammerhofer, “International Legal Positivism”, in Anne Orford and Florian Hoffmann (eds.), *The Oxford Handbook of the Theory of International Law*, Oxford University Press, Oxford, 2016, p. 407.

ism that States are the only subjects of international law.³⁹ Although such doctrinal dogma may not be an entirely true reflection of reality as some atypical entities such as the Holy See have already acted as *de facto* subjects of international law in the nineteenth century,⁴⁰ States as the sole subjects of international law largely remains a foundational understanding of the international legal order before the Second World War.

Such a situation poses a great obstacle to ICRI as “[o]nly States could be held responsible at international law and the responsibility of individuals remained a matter of domestic law”.⁴¹ According to Cassese:

In the old international community normally individuals were not direct addressees of international rules. It followed that at the international level they could not be held personally accountable for any breach of those rules.⁴²

The International Military Tribunal in Nuremberg is the first international criminal tribunal in history.⁴³ Article 6 of the Charter of the International Military Tribunal (‘IMT Charter’) provided for individual responsibility for crimes against peace, war crimes, and crimes against humanity. Naturally, the defendants raised arguments based on the exclusive status of States as the subjects of international law. They argued that:

international law is concerned with the actions of sovereign States and provides no punishment for individuals; and further, that where the act in question is an act of State, those who carry it out are not personally responsible, but are protected by the doctrine of the sovereignty of the State.⁴⁴

³⁹ Wolfgang Friedmann, *The Changing Structure of International Law*, Columbia University Press, New York, 1964. p. 213; Hersch Lauterpacht, *International Law: Collected Papers*, Cambridge University Press, 1975, vol. II, p. 489.

⁴⁰ Malcolm N. Shaw, *International Law*, 6th edition, Cambridge University Press, Cambridge/New York, 2008, p. 197. See also Christian Walter, “Subjects of International Law”, in *Max Planck Encyclopedia of Public International Law*, last updated on 15 March 2018, para. 2 (available on Oxford Public International Law web site).

⁴¹ Andrea Bianchi, “State Responsibility and Criminal Liability of Individuals”, in Antonio Cassese (ed.), *The Oxford Companion to International Criminal Justice*, Oxford University Press, Oxford, 2009, p. 17.

⁴² Cassese, 2005, p. 435, see *supra* note 3.

⁴³ See CHEN, 2015, p. 513, see *supra* note 29.

⁴⁴ International Military Tribunal, 1948, vol. 22, p. 465, see *supra* note 20.

The Tribunal dismissed these arguments by asserting that “international law imposes duties and liabilities upon individuals as well as upon States has long been recognised” – although the validity of this assertion was rather doubtful – and, came up with the famous *dictum* that:

[c]rimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced.⁴⁵

This marks a remarkable transformation as to how the ‘subjects’ question is approached. The traditional approach frames the question on the subjects of international law as asking precisely what international law is, as “international law has traditionally been defined by reference to those to whom it is said to apply”.⁴⁶ If A, B, and C are recognised as the subjects of international law, then international law is defined as the law that governs the relationships between A, B, and C. Therefore, States are traditionally considered as the exclusive subjects of international law, a body of law that is “binding by civilised States in their intercourse with each other”,⁴⁷ and “can only apply to the mutual relations among coordinated States”.⁴⁸ As Henkin pointed out, “[b]y definition, international law is law between nations, between States”.⁴⁹

The Nuremberg Judgment brings about a new approach to the subjects of international law. The reach of international law is no longer presumed to be limited to certain actors who are accordingly defined as the ‘subjects’ of international law – and everything else is defined as the ‘objects’ of international law.⁵⁰ Rather, an actor would be regarded as a subject of international law if doing so serves the purpose and function of the

⁴⁵ *Ibid.*, p. 466.

⁴⁶ Higgins, 1994, p. 48, see *supra* note 4.

⁴⁷ Lassa Oppenheim, *International Law: A Treatise*, Longmans Green and Co., 1905, vol. 1, p. 3.

⁴⁸ Heinrich Triepel, *Völkerrecht und Landesrecht*, Verlag von C. L. Hirschfeld, 1899, pp. 20–21, cited in Peters, 2016, p. 14, see *supra* note 35.

⁴⁹ Louis Henkin, *International Law: Politics and Values*, Martinus Nijhoff Publishers, 1995, p. 8.

⁵⁰ This dichotomy of subjects/objects of international law is featured in the traditional positivist writings on international law. For a contemporary critique of this dichotomy, see Higgins, 1994, pp. 49–50, see *supra* note 4.

international legal order. According to the International Military Tribunal in Nuremberg:

the maxim *nullum crimen sine lege* is not a limitation of sovereignty, but is in general a principle of justice. To assert that it is unjust to punish those who in defiance of treaties and assurances have attacked neighboring States without warning is obviously untrue, for in such circumstances the attacker must know that he is doing wrong, and so far from it being unjust to punish him, it would be unjust if his wrong were allowed to go unpunished.⁵¹

The Tribunal clearly emphasised ‘justice’ as the purpose and function of international law to justify the punishment of individuals directly under international law, which in the meantime recognised individuals as the subjects of international law.

This new approach has led to the pluralisation of the subjects of international law. The advisory opinion of the International Court of Justice (‘ICJ’) in *Reparation for Injuries*⁵² provides another example of resorting to the purpose and function of the international legal order to recognise the subjects of international law. In 1948, the Court was asked if the United Nations as an international organisation had the capacity to bring an international claim against the responsible government for the death of its employee Folke Bernadotte.⁵³ The Court directly linked the capacity to bring international claims to the international personality of the organisation.⁵⁴ According to the Court, the development of international law needs to respond to “the requirements of international life”⁵⁵ and:

the Organization was intended to exercise and enjoy, and is in fact exercising and enjoying functions and rights which can only be explained on the basis of the possession of a large measure of international personality and the capacity to operate upon an international plane. It is at present the su-

⁵¹ International Military Tribunal, 1948, vol. 22, p. 462, see *supra* note 20.

⁵² International Court of Justice, *Reparation for Injuries Suffered in the Service of the United Nations*, Advisory Opinion, 11 April 1949, p. 174 (<http://www.legal-tools.org/doc/f263d7/>).

⁵³ *Ibid.*, pp. 176–77.

⁵⁴ *Ibid.*, pp. 178–79.

⁵⁵ *Ibid.*, p. 178.

preme type of international organization, and it could not carry out the intentions of its founders if it was devoid of international personality.⁵⁶

The Court rejected the traditional approach that presumed only States are the subjects of international law,⁵⁷ and resorted to the function of international organisations and the need for the international legal order to recognise the legal personality of the United Nations.

Today, the pluralisation of the subjects of international law has been well recognised in the depiction of the international legal order. For example, in the latest edition of the *Brownlie's Principles of Public International Law*, James Crawford listed six types of established subjects and three types of special subjects of international law.⁵⁸ As John Grant succinctly summarised for the *status quo*:

[i]nternational law recognises personality primarily in States, but also to a lesser extent in international organizations and individuals, and, to an even lesser extent, in a range of other entities that play some role on the international stage.⁵⁹

This new approach to the subjects of international law puts the international legal order in the process of transformation from inter-State law to the law of the international community.

4.2.1.2. From Inter-State Law to the Law of the International Community

The international legal order was traditionally perceived as the aggregate of bilateral inter-State laws. This has changed largely due to the emergence of international criminal law. In *Barcelona Traction*⁶⁰ the innova-

⁵⁶ *Ibid.*, p. 179.

⁵⁷ The Court in particular stated that “the subjects of law in any legal system are not necessarily identical in their nature or in the extent of their rights, and their nature depends upon the need of the community”, *ibid.*, p. 178.

⁵⁸ James Crawford, *Brownlie's Principles of Public International Law*, 8th edition, Oxford University Press, Oxford, 2012, pp. 115–26.

⁵⁹ John P. Grant, *International Law*, Dundee University Press, Dundee, 2010, p. 35.

⁶⁰ International Court of Justice, *Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain)*, Judgment, 5 February 1970, p. 3 (<http://www.legal-tools.org/doc/75e8c5/>).

tive concept of obligations *erga omnes* was put forward by the ICJ when it reasoned that :

an essential distinction should be drawn between the obligations of a State towards the international community as a whole, and those arising *vis-à-vis* another State in the field of diplomatic protection. By their very nature the former are the concern of all States. In view of the importance of the rights involved, all States can be held to have a legal interest in their protection; they are obligations *erga omnes*.⁶¹

In this paragraph, the Court explicitly confirmed the emerging dimension of contemporary international law as the law of “the international community as a whole”. And the influence of international criminal law was more than obvious in the judges’ mind frame when “the outlawing of acts of aggression, and of genocide” and “the principles and rules concerning the basic rights of human being, including protection from slavery and racial discrimination”⁶² were enumerated as the sources of obligations *erga omnes* in international law. As Prosper Weil has pointed out, “the intention behind the *erga omnes* theory” is to contribute to the transformation of international law from inter-State law to the law of the international community by “sound[ing] the death knell of narrow bilateralism and sanctif[y]ing egoism for the sake of the universal protection of certain fundamental norms”.⁶³ He has also noted that the theories of international crimes, obligations *erga omnes*, and *jus cogens* have the same philosophical foundation, namely the aspiration of “highly respectable ethical considerations”.⁶⁴ Without the historic enforcement of ICRI in the Nuremberg and Tokyo trials, none of these theories would likely gain normativity in the international legal order. But largely thanks to the emergence and development of international criminal law based on the fundamental concept of ICRI, international crimes and *jus cogens* have already gained well-accepted normative status in the corpus of international law.

When international law evolves towards the direction of becoming the law of the international community, legal characterisation of the world

⁶¹ *Ibid.*, p. 32, para. 33.

⁶² *Ibid.*, para. 34.

⁶³ Prosper Weil, “Towards Relative Normativity in International Law?”, in *American Journal of International Law*, 1983, vol. 77, no. 3, p. 432.

⁶⁴ *Ibid.*

system is also transformed with an increasingly blurred boundary between domestic and international law. Under traditional positivist understandings of the international legal order, the line between domestic and international law is relatively clear, and the two legal orders operate in an almost mutually exclusive way. Gerald Fitzmaurice, for example, denied there is any “*common field* in which the two legal orders [of domestic law and international law] both simultaneously have their spheres of activities”.⁶⁵ To a large extent, this clearly perceived line between domestic and international law was a corollary of the traditional positivist approach to the subjects of international law.⁶⁶ When sovereign States were considered the exclusive subjects of international law, it was confined to the legal sphere of inter-State relations and everything else remained “solely a matter of domestic jurisdiction”.⁶⁷

International law is a “social phenomenon”.⁶⁸ “Interdependence and the close-knit character of contemporary international commercial and political society” have therefore inevitably “led to an increasing interpenetration of international law and domestic law”.⁶⁹ The emerging identity of international law as the law of the international community reflects and reinforces the ongoing structural change of the world system. The emergence and development of international criminal law based on the concept of ICRI is an especially pertinent aspect of this ongoing structural change.

As Andreas Paulus has succinctly summarised, the identity of international law “is based on an understanding of the social structure international law applies”⁷⁰ and also “adds a normative element, a [...] subjective

⁶⁵ Gerald Fitzmaurice, “The General Principles of International Law Considered from the Standpoint of the Rule of Law”, in *Recueil des Cours*, 1957, vol. 92, p. 71.

⁶⁶ See *supra* Section 4.2.1.1.

⁶⁷ See the Covenant of the League of Nations, 28 June 1919, Article 15 (<http://www.legal-tools.org/doc/106a5f/>). Article 15 provided that “[i]f the dispute between the parties is claimed by one of them, and is found by the Council, to arise out of a matter which by international law is solely within the domestic jurisdiction of that party, the Council shall so report, and shall make no recommendation as to its settlement” (emphasis added).

⁶⁸ See Martti Koskenniemi, “The Legacy of the Nineteenth Century”, in David Armstrong (ed.), *Routledge Handbook of International Law*, Routledge, London, 2009, pp. 148–50.

⁶⁹ Shaw, 2008, pp. 129–30, see *supra* note 40.

⁷⁰ Andreas Paulus, “International Law and International Community”, in David Armstrong (ed.), *Routledge Handbook of International Law*, Routledge, London, 2009, p. 46.

cohesion”⁷¹ to the social structure of the world system. The traditional identity of international law as inter-State law is a normative projection of a decentralised and horizontal world structure in which States are the only members and the ‘communal’ bond among members does not go beyond bilateral relations. The emerging identity of international law as the law of the international community, on the other hand, presupposes a ‘community idea’⁷² of what the world system is and should be. An ‘international community’ in its true sense – as ‘community’ connotes a common social tie that glues the whole system together – would inevitably break the clear boundary between domestic and international law.

International criminal law and, in particular, ICRI has played a key role in breaking the traditional boundary between domestic and international law in the aspect of criminal prosecution. Before the emergence of international criminal law, criminal prosecution existed only in domestic law, and there was no criminal legal system on a global or transnational level. But thanks to ICRI, criminal responsibility has now been established on both global and transnational levels.⁷³ In the area of criminal justice, the clear-cut boundary between domestic and international law is now replaced by the flexible dynamic of complementarity.⁷⁴ A community structure is forming in the world system to protect mankind from grave atrocities, with the increasing body of international criminal law being enforced by the intertwined networks of global, transnational, and domestic criminal justice mechanisms.

⁷¹ *Ibid.*, p. 45.

⁷² Andreas Paulus, “International Community”, in *Max Planck Encyclopedia of Public International Law*, last updated on 15 March 2018, para. 31 (available on Oxford Public International Law web site).

⁷³ It has been argued that a certain subdivision of ICL should be re-characterised as “transnational criminal law” for a better doctrinal match, Neil Boister, “Transnational Criminal Law?”, in *European Journal of International Law*, 2003, vol. 14, no. 5, pp. 953–76.

⁷⁴ See Michael A. Newton, “A Synthesis of Community-Based Justice and Complementarity”, in Christian De Vos, Sara Kendall and Carsten Stahn (eds.), *Contested Justice: The Politics and Practice of International Criminal Court Interventions*, Cambridge University Press, Cambridge, 2015, p. 122; Rod Rastan, “Complementarity: Contest or Collaboration?”, in Morten Bergsmo (ed.), *Complementarity and the Exercise of Universal Jurisdiction for Core International Crimes*, FICHL Publication Series No. 7 (2010), Torkel Opsahl Academic EPublisher, Oslo, 2010, p. 83 (<http://www.legal-tools.org/doc/d3f01a/>).

4.2.2. Going Beyond Traditional Positivism

Under the traditional positivist doctrine that sovereign States are the exclusive subjects of international law, its normativity and legitimacy are entirely based on the consent of States. As “[p]ositivism is as dead as it is all-pervading”⁷⁵ today, State consent is still one of the most significant and uncontroversial conceptual foundations of the legitimacy of international law.

For example, as Alexander Orakhelashvili noted:

The international legal system has always been and remains a decentralised legal society in which *rules, and hence the limitations on sovereignty, are produced by the consent and agreement of sovereign States*. This position has always been among the structural underpinnings of international law, as confirmed at all relevant stages of jurisprudence.⁷⁶

Louis Henkin, in his general course on public international law given at the Hague Academy of International Law, stated straightforwardly that “State consent is the foundation of international law. The principle that law is binding on a State only by its consent remains an axiom of the political system, an implication of State autonomy”.⁷⁷ Even in the writing of Jan Klabbers, who has already identified other potential legitimising sources of international law such as expertise and effectiveness,⁷⁸ the *status quo* was confirmed as:

[i]n international law, a strongly legitimizing role in securing procedural legitimacy is still played by the notion of State consent; in the absence of any general law-making procedure, consent plays a pivotal role.⁷⁹

With the ongoing transformation of international law from inter-State law to the law of the international community, however, the dependence of international law’s legitimacy on State consent is gradually diminishing. For example, Anne Peters identified “the erosion of the consent

⁷⁵ Kammerhofer, 2016, p. 407, see *supra* note 38.

⁷⁶ Alexander Orakhelashvili, *The Interpretation of Acts and Rules in Public International Law*, Oxford University Press, Oxford, 2008, p. 37 (emphasis added).

⁷⁷ Henkin, 1995, p. 27, see *supra* note 49.

⁷⁸ Klabbers, 2009, p. 42, see *supra* note 2.

⁷⁹ *Ibid.*, p. 39.

requirement” as the “first cross-cutting phenomenon” in “t[he] current shift of the justificatory basis of international law”,⁸⁰ and concluded that “the constitutionalist reconstruction of international law draws attention to *existing legitimacy deficiencies in [international law], which can obviously no longer rely on State sovereignty and consent alone*”.⁸¹

It is fair to observe that the ongoing transformation of the international legal order has pushed the understanding of international law beyond the narrow paradigm of traditional positivism. The development of international criminal law based on the fundamentally important concept of ICRI has played a significant role in this paradigm transformation, which not only revitalised a thread of natural law thinking but also paved the way for the doctrine of *jus cogens* in contemporary international law.

4.2.2.1. International Criminal Responsibility for Individuals: A Revival of Natural Law Thinking

The establishment of ICRI in the Nuremberg and Tokyo trials marks one of the most important turning points in the contemporary development of international law. In establishing that major war criminals of the Second World War have individual criminal responsibility under international law, the paradigm of traditional positivism – or what Cherif Bassiouni called ‘strict positivism’⁸² – was rejected as the unchallengeable methodological foundation of international law, and a revival of natural law theory was brought back to the making and interpretation of international law.

Article 6 of the IMT Charter, which provided the legal basis of ICRI for the Tribunal to prosecute German major war criminals, stated:

The Tribunal established by the Agreement referred to in Article 1 hereof for the trial and punishment of the major war criminals of the European Axis countries shall have the power to try and punish persons who, acting in the interests of the European Axis countries, whether as individuals or as members of organizations, committed any of the following crimes:

⁸⁰ Anne Peters, “Global Constitutionalism Revisited”, in *International Legal Theory*, 2005, vol. 11, p. 51.

⁸¹ *Ibid.*, pp. 66–67 (emphasis added).

⁸² M. Cherif Bassiouni, *Crimes against Humanity: Historical Evolution and Contemporary Application*, Cambridge University Press, Cambridge, 2011, pp. 313, 315.

The following acts, or any of them, are crimes coming within the jurisdiction of the Tribunal for which there shall be individual responsibility:

- a. Crimes against peace: namely, planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing;
- b. War crimes: namely, violations of the laws or customs of war. Such violations shall include, but not be limited to, murder, ill-treatment or deportation to slave labour or for any other purpose of civilian population of or in occupied territory, murder or ill-treatment of prisoners of war or persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns or villages, or devastation not justified by military necessity;
- c. Crimes against humanity: namely, murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war; or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated.

Leaders, organisers, instigators and accomplices participating in the formulation or execution of a common plan or conspiracy to commit any of the foregoing crimes are responsible for all acts performed by any persons in execution of such plan.⁸³

The concept of ICRI, by definition, asks two questions: first, *who* is individually responsible under international law (as opposed to collective entities such as States); and second, *for what* are the individuals responsible for under international law (for example crimes against peace). A simi-

⁸³ IMT Charter, Article 6, see *supra* note 18.

lar formulation of ICRI was also stipulated in Article 5 of the International Military Tribunal for the Far East Charter ('IMTFE Charter') for the prosecution of the major Japanese war criminals.

Since the Nuremberg and Tokyo trials were the first occasions of an international tribunal to apply individual criminal responsibility under international law, it is natural to ask if individual criminal responsibility indeed existed in international law for the enumerated crimes. This question asks whether ICRI contained in the IMT Charter and the IMTFE Charter was declaratory of existing international law or new law.

While some claimed the IMT Charter was merely declaratory, others were more straightforward in admitting that a large portion of the Charter created new law.⁸⁴ Unsurprisingly, the Nuremberg Tribunal insisted on the declaratory nature of the IMT Charter. According to the Tribunal, "[t]he Charter is not an arbitrary exercise of power on the part of the victorious nations [...] it is the expression of international law existing at the time of its creation; and to that extent is itself a contribution to international law".⁸⁵

From the perspective of traditional positivism, however, it is hard to maintain that ICRI had been made a part of *lex lata* in the international legal order prior to the IMT Charter. In addition to the much discussed controversies as to whether crimes against peace and crimes against humanity had been recognised in international law when the relevant conduct took place during the Second World War,⁸⁶ it also appeared particularly difficult to establish that positive international law had recognised

⁸⁴ Guénaël Mettraux, "Trial at Nuremberg", in William A. Schabas and Nadia Bernaz (eds.), *Routledge Handbook of International Criminal Law*, Routledge, 2011, p. 7. See also Damgaard, 2008, p. 99, see *supra* note 19; Hans Kelsen, "Will the Judgment in the Nuremberg Trial Constitute a Precedent in International Law?", in *International Law Quarterly*, 1947, vol. 1, no. 2, p. 155.

⁸⁵ International Military Tribunal, 1948, vol. 22, p. 461, see *supra* note 20.

⁸⁶ For example, as for crimes against peace, "British and French officials had in 1944-1945 privately questioned the validity of the charge [of crimes against peace], while the trial was in progress, academics began to publicly raise similar concerns", Kirsten Sellars, "Imperfect Justice at Nuremberg and Tokyo", in *European Journal of International Law*, 2011, vol. 21, no. 4, p. 1089.

individual responsibility for these crimes.⁸⁷ At that time, as Hans Kelsen precisely pointed out, sanctions of international law only imposed collective responsibility towards States, and individual criminal responsibility was reserved exclusively to domestic criminal justice systems.⁸⁸ This status of international law fit perfectly with the dominant positivist ideas that international law was by definition inter-State law and sovereign States were the only subjects of the international legal order.⁸⁹ Before the IMT, defense lawyer Hermann Jahrreiss cited Hans Kelsen to argue that “in questions of breach of the peace, the liability of individuals to punishment does not exist according to the general international law at present valid and that it cannot exist because of the concept of sovereignty” and “[o]f course, acts of State are acts of men. Yet they are in fact acts of State, that is, acts of the State carried out by its organs and not the private acts of Mr. Smith or Mr. Muller”.⁹⁰

Such an argument was, of course, brushed off by the Tribunal’s famous dictum that “crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced”. The IMT, by citing the Treaty of Versailles and the United States Supreme Court case of *ex parte Quirin* and simply stating that “[m]any other authorities could be cited, but enough has been said to show that individuals can be punished for violations of international law”,⁹¹ confirmed individual criminal responsibility as an existing norm of international law.

The Tribunal’s reasoning is clearly flawed based on a positivist understanding of international law. Since “many other authorities [that] could be cited” were indeed not cited, the judgment of the IMT based its finding of ICRI as *lex lata* entirely on the positive legal evidence of Arti-

⁸⁷ This issue of “retroactive individual responsibility”, however, had not provoked as much discussion as the issue of retroactive crimes (such as “retroactive prohibition of aggressive war”), *ibid.*

⁸⁸ Hans Kelsen, “Collective and Individual Responsibility in International Law with Particular Regard to the Punishment of War Criminals”, in *California Law Review*, 1943, vol. 31, no. 5, pp. 533–34.

⁸⁹ See *supra* Sections 4.2.1.1 and 4.2.1.2.

⁹⁰ International Military Tribunal, 1948, vol. 17, p. 478, see *supra* note 20.

⁹¹ *Ibid.*, vol. 22, pp. 465–66.

cle 228 of the Treaty of Versailles and the *ex parte Quirin* case.⁹² But neither can sufficiently support the existence of ICRI. Reference to the Treaty of Versailles does not provide much support to finding individual criminal responsibility under *international* law, because the military tribunals envisaged in Article 228 for “persons accused of having committed acts in violation of the laws and customs of war” are, strictly speaking, tribunals with a *domestic* rather than *international* legal character. According to Article 229, accused individuals would be prosecuted before a domestic tribunal of the State against whose nationals the alleged crimes were committed. This is merely a form of domestic jurisdiction based on the nationality principle. And the ‘mixed’ military tribunal⁹³ for individuals who were accused of criminal acts against nationals of more than one State is merely a mechanism to coordinate parallel domestic jurisdictions and, therefore, has nothing to do with *international* criminal responsibility for individuals.

It might be argued, however, that the ‘special tribunal’ envisaged in Article 227 for William II – if indeed established in reality to prosecute him – would have been an *international* criminal tribunal applying ICRI. But even ignoring the fact that Article 227 had not been enforced, ICRI in Article 227 would still be distinguished from that in the IMT Charter as its legal foundations lay in positive international law because Germany consented to the Treaty of Versailles by signing and ratifying it.⁹⁴ But such State consent – keeping in mind that traditional positivism regards State consent as the ultimate normative and legitimising source of international law⁹⁵ – of Germany was not attached to the IMT Charter.

⁹² Damgaard, 2008, p. 101, see *supra* note 19.

⁹³ Treaty of Versailles, 28 June 1919, Article 229 (<http://www.legal-tools.org/doc/a64206/>). Article 229 provides that “[p]ersons guilty of criminal acts against the nationals of more than one of the Allied and Associated Powers will be brought before military tribunals composed of members of the military tribunals of the Powers concerned”.

⁹⁴ See Kelsen, 1947, p. 167, see *supra* note 84.

⁹⁵ As Alexander Orakhelashvili precisely articulated, “[f]rom the viewpoint of the character of international law, where State consent is the principal basis of legal obligations, positive law can only be described as the law laid down through consent and agreement of the actors that are entitled to create norms of international law”, Alexander Orakhelashvili, “Natural Law and Justice”, in *Max Planck Encyclopedia of Public International Law*, last updated on 15 March 2018, para. 29 (available on Oxford Public International Law web site).

The IMT's reliance on the *ex parte Quirin* case is also problematic. As Damgaard has carefully analysed:

The issue to be decided by the [United States] Supreme Court in the *ex parte Quirin* case was whether the detention of the primarily German petitioners for trial by Military Commission, on alleged charges of violating the laws of war and the Articles of War, was in conformity with the laws and Constitution of the United States. The Supreme Court did not have to determine the petitioners' guilt for the crimes charged or to determine whether a person could be held individually criminally responsible for certain international crimes [...] Understood in this light, the considerable weight put on the comments of the Supreme Court by the IMT does not seem appropriate.⁹⁶

Therefore, the Tribunal's conviction that ICRI for stipulated crimes in the IMT Charter is merely declaratory of existing norms of international law is more than questionable from the standpoint of positivist international legal methodology. It also needs to be noted that for positivists whether certain conduct has been recognised as violations of international law and whether international law has recognised individual responsibility for these violations are two distinct questions, because:

[t]o deduce individual criminal responsibility for a certain act from the mere fact that this act constitutes a violation of international law [...] is in contradiction with positive law and generally accepted principles of international jurisprudence.⁹⁷

Indeed, it was the creation of ICRI by the IMT and IMTFE Charter and the actual enforcement of ICRI by IMT and IMTFE Judgments that established individual criminal responsibility in *international* law and settled the dispute of whether international law could impose criminal responsibility directly on individuals, once and for all. Since ICRI had been effectively enforced by two international tribunals to prosecute and punish major war criminals of the Second World War, there would no longer be any room to argue that individual criminal responsibility is non-existent or conceptually incompatible with international law. Now, the

⁹⁶ Damgaard, 2008, p. 101, see *supra* note 19.

⁹⁷ Kelsen, 1947, p. 156, see *supra* note 84.

concept of ICRI has not only been firmly established in international law but also become the very conceptual foundation upon which the body of international criminal law – one of the youngest branches of international law – develops and flourishes.

The establishment of ICRI, therefore, marks a transformation of international law – traditional positivism is rejected as the unchallengeable methodological foundation and a sort of natural law thinking is re-introduced into the making and interpretation of international law. At least two aspects of natural law revival were more than visible in how the Nuremberg and Tokyo Tribunals established ICRI as international law: first, a turn from sovereign States to humans/individuals as the foundation of international law; and second, an emphasis on moral and ethical arguments about ‘justice’ in establishing what international law is and should be.

The IMT’s statement that “crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced” demonstrated a transformation of the metaphysical understanding of international law. Traditional positivism conceptualises the entire international legal order based on the idea of sovereign States and their consent, and the establishment of ICRI has revived the natural law tradition of regarding human and human nature as a metaphysical foundation of law.⁹⁸

Francisco de Vitoria, for example, “characterised comprehensive collectivity in terms of interdependence among the people and peoples of the world [...] to the effect that ‘nature has established a bond of relationship between all men’”.⁹⁹ He, therefore, established the ‘human community’ as a metaphysical unit “with interests and ends of its own” and that “the subjective authority of the nation-State would yield before the con-

⁹⁸ As Elies van Sliedregt noted, the natural law theories of Grotius and Vattel “constitute early versions of international rules that directly bind the individual”, Sliedregt, 2012, p. 4, see *supra* note 24.

⁹⁹ Geoff Gordon, “Natural Law in International Legal Theory: Linear and Dialectical Presentations”, in Anne Orford and Florian Hoffmann (eds.), *The Oxford Handbook of the Theory of International Law*, Oxford University Press, Oxford, 2016, p. 282 (internal citation omitted).

solidated norms of the world collective within the latter's proper areas of interests or ends".¹⁰⁰

Similarly, naturalists like Francisco Suárez and Hugo Grotius, while recognising concrete collectives like sovereign States, also appealed to the idea of 'human race', 'society of mankind', or 'human society' as a meta-physical foundation of international law.¹⁰¹ If individuals, as well as States, are conceptually the interests and ends of international law, there would be no inherent incompatibility between 'individual' criminal responsibility and 'international' law. With the pluralisation of subjects of international law,¹⁰² the rights, duties, and responsibilities of individuals have gained increasing recognition,¹⁰³ and certain scholars have "assume[d] a basis in natural law for the international legal personality of the individual".¹⁰⁴ Although it is still questionable whether individuals have obtained international legal personality that is entirely independent from States,¹⁰⁵ the transformative trends of the 'humanization'¹⁰⁶ or 'individualization'¹⁰⁷ of international law have become increasingly visible in recent decades.

Natural law is also almost immediately linked to the concept of 'justice'.¹⁰⁸ Traditional positivism attempts to adopt a *scientific* approach to international law, identify the 'sources'¹⁰⁹ of international law based on

¹⁰⁰ *Ibid.*, p. 283.

¹⁰¹ *Ibid.*, pp. 283–84.

¹⁰² See *supra* Section 4.2.1.1.

¹⁰³ For a detailed survey of the rights, duties, and responsibilities of individuals in international law, see Peters, 2016, see *supra* note 35.

¹⁰⁴ *Ibid.*, p. 428.

¹⁰⁵ See, for example, Alexander Orakhelashvili, "The Position of the Individual in International Law", in *California Western International Law Journal*, 2000, vol. 31, no. 2, pp. 241–76.

¹⁰⁶ Theodor Meron, *The Humanization of International Law*, Martinus Nijhoff Publishers, Leiden, 2006. See also Antônio Augusto Cançado Trindade, *International Law for Human-kind: Towards a New Jus Gentium*, Martinus Nijhoff Publishers, Leiden, 2010.

¹⁰⁷ Peters, 2016, pp. 1–3, see *supra* note 35.

¹⁰⁸ As Paulo Ferreira de Cunha succinctly articulated, "[w]hen we think about natural law, we will think about justice", Paulo Ferreira de Cunha, "Preface", in *Rethinking Natural Law*, Springer, Heidelberg, 2013, p. v.

¹⁰⁹ For a critique of the consensual presumptions in the "source theory" of international law, see Martti Koskeniemi, *From Apology to Utopia: The Structure of International Legal Argument*, Cambridge University Press, Cambridge, 2005, pp. 307–33.

State consent, and therefore to a large extent distinguish the question of international law from that of morality or ethics. Natural law, on the other hand, fuses the question of legality with that of morality and ethics by deriving norms and principles from “nature, reason, or the idea of justice”.¹¹⁰ Therefore, “natural law incorporates the considerations of justice that may [...] contradict the requirements of positive law”.¹¹¹ This is precisely the case for establishing ICRI after the Second World War when there was insufficient support for individual criminal responsibility in positive international law. The IMT clearly appealed to the concept of justice as a moral and ethical ground for establishing ICRI. In rejecting the *nullum crimen sine lege* argument against the charge of crime against peace, for example, the Tribunal stressed that *nullum crimen sine lege* is ‘a principle of *justice*’ and uttered the word ‘unjust’ three times in the next sentence which stated:

To assert that it is *unjust* to punish those who in defiance of treaties and assurances have attacked neighboring States without warning is obviously untrue, for in such circumstances the attacker must know that he is doing wrong, and so far from it being *unjust* to punish him, it would be *unjust* if his wrong were allowed to go unpunished.¹¹²

Therefore, the choice between traditional positivism and the natural law approach to international law as to the existence of ICRI was essentially an ethical decision about whether finding individual criminal responsibility in international law “in breach of strict legal positivism was a greater or lesser breach than to allow [the] perpetrators [of human atrocities] to go unpunished”.¹¹³ Like it or not, the revival of natural law thinking in the Nuremberg and Tokyo trials has brought back moral and ethical considerations – or ‘values’ as a broader label – to a more than visible place in the sphere of international law. Different values have penetrated into the making and interpretation of international law in a pervasive manner,¹¹⁴ meanwhile leading to fragmentation of the international legal order. With the role of values becoming more and more visible, interna-

¹¹⁰ Orakhelashvili, 2018, para. 1, see *supra* note 95.

¹¹¹ *Ibid.*

¹¹² International Military Tribunal, 1948, vol. 22, p. 462 (emphasis added), see *supra* note 20.

¹¹³ Bassiouni, 2011, p. 309, see *supra* note 82.

¹¹⁴ See Orakhelashvili, 2008, pp. 180–94, see *supra* note 76; Henkin, 1995, see *supra* note 49.

tional law can no longer be perceived as a scientific system purely based on State consent. The question of international law's legality/normativity will always be intertwined with that of legitimacy. In this sense, international law's values, ethics, and moralities will always be international law itself.¹¹⁵

4.2.2.2. *Jus Cogens and International Crimes*

The prosecution of war criminals of the Second World War and the establishment of the United Nations witnessed “a watershed for international law's values”.¹¹⁶ As “the international community accepted that State sovereignty could not alone guide international affairs”,¹¹⁷ contemporary development of international law has endeavoured to regulate the legitimacy of State consents by introducing the concept of *jus cogens* (peremptory norms) into the international legal order.

In many domestic legal systems, there exists a distinction between *jus cogens* and *jus dispositivum*, where parties can derogate from the latter but not the former in their contractual relationships.¹¹⁸ Whether *jus cogens* existed in international law prior to its appearance in the Vienna Convention on the Law of Treaties (‘VCLT’), on the other hand, is a disputed question that can only be properly understood as one aspect of the larger debates over international law's methodological, philosophical, and structural foundations.

Under the methodological dogma of traditional positivism that State sovereignty and consent are the ultimate source of international law's normativity and legitimacy, the concept of *jus cogens* is impossible to maintain in the international legal order because “State did not intend to place limitations on their sovereign powers that they had not expressly or

¹¹⁵ This sentence is altered from Martti Koskeniemi's statement that “international law's objective is always also international law itself”, Martti Koskeniemi, “What is International Law For?”, in Malcolm D. Evans (ed.), *International Law*, Oxford University Press, Oxford, 2003, p. 110.

¹¹⁶ David J. Bederman, *The Spirit of International Law*, University of Georgia Press, Athens, 2002, p. 111.

¹¹⁷ *Ibid.*

¹¹⁸ This distinction can date back to the distinction between *ius strictum* and *ius dispositivum* in Roman law, Jochen A Frowein, “Ius Cogens”, in *Max Planck Encyclopedia of Public International Law*, last updated on 15 March 2018, para. 1 (available on Oxford Public International Law web site).

implicitly accepted”.¹¹⁹ By contrast, the idea of peremptory norms has fit comfortably with the natural law approach to international law.¹²⁰ The concept of peremptory norms also presupposes a community structure to which the law applies, since rules of *jus cogens* are essentially ‘norms of public order’¹²¹ that signify the supremacy of community values over the consent of individual members. Therefore, the appearance of *jus cogens* in the international legal order also signifies the transformation of international law from inter-State law to the law of the international community.

It has been acknowledged in the drafting of VCLT that *jus cogens* is grounded in “the interests [...] of the international community as a whole”.¹²² According to Article 53 of the VCLT, *jus cogens* are:

norm[s] accepted and recognised by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.¹²³

In accordance with Articles 53 and 64 of VCLT, conflicts with *jus cogens* will make a treaty void and terminate it.

Jus cogens has been generally accepted in today’s scholarly writing of international law. But as Anthony Aust precisely noted for the historical and current status of *jus cogens* in international law, “[t]he concept was once controversial” and “[n]ow it is more its scope and applicability that is unclear”.¹²⁴ The proposal of enumerating peremptory norms in VCLT

¹¹⁹ Cassese, 2005, p. 198, see *supra* note 3.

¹²⁰ See Alfred Verdross, “*Jus Dispositivum* and *Jus Cogens* in International Law”, in *American Journal of International Law*, 1966, vol. 60, no. 3, p. 56. Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law, UN Doc. A/CN.4/L.682, 13 April 2006, para. 361 (‘Fragmentation of International Law’) (<http://www.legal-tools.org/doc/dda184/>).

¹²¹ Thomas Weatherall, *Jus Cogens: International Law and Social Contract*, Cambridge University Press, Cambridge, 2015, p. 21.

¹²² Yearbook of the International Law Commission 1963, vol. 1, UN Doc. A/CN.4/SER.A/1963, 12 July 1963, p. 68 (<http://www.legal-tools.org/doc/177ae4/>).

¹²³ VCLT, Article 53, see *supra* note 13.

¹²⁴ Anthony Aust, *Handbook of International Law*, 2nd edition, Cambridge University Press, Cambridge, 2010, p. 10.

was rejected in the drafting,¹²⁵ and no dispute concerning a treaty's conflict with *jus cogens* has been submitted to the ICJ so far under Article 66 of VCLT.¹²⁶ It is noteworthy that the ICJ “has been reluctant to [even] refer to” let alone discuss the concept of *jus cogens* in its decisions.¹²⁷ As a result, there is no single list of peremptory norms in international law that everyone agrees upon.

Nonetheless, there has been a strong consensus that prohibition of international crimes – such as genocide, crimes against humanity, war crimes, and aggression as enumerated in the Rome Statute¹²⁸ – forms the very core and therefore generally undisputed rules of *jus cogens*.¹²⁹ The concept of *jus cogens*, in essence, introduces a system of ‘relative normativity’,¹³⁰ or the ‘hierarchy of norms’,¹³¹ into the international legal order, claiming some norms are superior to others. Although Article 53 of the VCLT seems to provide a ‘test-oriented’,¹³² approach to identifying peremptory norms, it is the moral values – or in Weil’s words the “unimpeachable moral concerns”¹³³ – behind the norms that distinguish *jus cogens* from other ‘ordinary’ rules in international law.

As Thomas Weatherall noted, the conception of *jus cogens* as normative expressions of international morality “has endured throughout the evolution of peremptory norms”.¹³⁴ Similarly, Brian Leppard also found the legitimacy of *jus cogens* in “the importance of values [...] that either fur-

¹²⁵ Yearbook of the International Law Commission 1966, vol. 2, UN Doc. A/CN.4/SER.A/1966/Add.1, 19 July 1966, p. 248 (<http://www.legal-tools.org/doc/74bb2d/>).

¹²⁶ According to Article 66 of VCLT, “any one of the parties to a dispute concerning the application or the interpretation of articles 53 or 64 may, by a written application, submit it to the International Court of Justice for a decision unless the parties by common consent agree to submit the dispute to arbitration”, see *supra* note 13.

¹²⁷ Fragmentation of International Law, para. 378, see *supra* note 120.

¹²⁸ ICC Statute, Article 5(1), see *supra* note 6.

¹²⁹ See, for example, Aust, 2010, p. 10, see *supra* note 124; Jennings and Watts, 1992, pp. 7–8, see *supra* note 1.

¹³⁰ Weil, 1983, see *supra* note 63.

¹³¹ Alexander Orakhelashvili, *Peremptory Norms in International Law*, Oxford University Press, Oxford, 2008, p. 7.

¹³² Maurizio Ragazzi, *The Concept of International Obligations Erga Omnes*, Oxford University Press, 2002, pp. 43, 72.

¹³³ Weil, 1983, p. 424, see *supra* note 63.

¹³⁴ Weatherall, 2015, p. 67, see *supra* note 121.

ther compelling or essential ethical principles or are at least consistent with fundamental ethical principles”.¹³⁵ It has been confirmed in the drafting of the VCLT that “the character of *jus cogens* [...] must be deeply rooted in the international conscience”.¹³⁶ It is precisely this ethical/moral basis of peremptory norms that put prohibition of international crimes, and therefore international criminal law, in the centre of *jus cogens* in international law.

Before the concept of *jus cogens* introduced normative hierarchy into positive international law, every rule of international law is ‘equal’ in the sense that “whatever their objects or importance, all norms are placed on the same plane, their interrelations ungoverned by any hierarchy, their breach giving rise to an international responsibility subject to one uniform regime”.¹³⁷ This equal normative status also reflects the positivist perception that all rules have the same normative source, that is State consent. Traditional positivism attempts to minimise if not completely eliminate the relevance of morality and ethics by treating State consent as a factual and scientific element. Only by re-emphasizing the moral values or ethical principles behind legal norms – which can certainly be seen as a revival of natural law thinking¹³⁸ – is the distinction between *jus cogens* and *jus dispositivum* able to sustain in the international legal order.

Today, the ‘equality’ of norms is still somewhat enshrined in the principle that violation of any international norm – provided it is attributable to a State – entails international responsibility of that State.¹³⁹ But *jus cogens* calls for international law to provide some special recognition in response to the moral/ethical importance attached to peremptory norms. The response of international law so far has been to characterise certain breaches not only as ‘violations’ of international law but international ‘crimes’. The ‘criminal’ label certainly signifies a moral condemnation.

¹³⁵ Brian D. Lepard, *Customary International Law: A New Theory with Practical Applications*, Cambridge University Press, Cambridge, 2010, pp. 243–44.

¹³⁶ Yearbook of the International Law Commission 1963, 1963, vol. 1, p. 63, see *supra* note 122.

¹³⁷ Weil, 1983, p. 423, see *supra* note 63.

¹³⁸ See *supra* Section 4.2.2.1.

¹³⁹ International Law Commission (‘ILC’), *Draft Articles on Responsibility of States for Internationally Wrongful Act, with Commentaries*, 10 August 2001, Article 1 (<http://www.legal-tools.org/doc/10e324/>).

Chapter III (and Article 41 in particular) of the Draft Articles on State Responsibility by the International Law Commission (‘ILC’) stipulates “particular circumstances of serious breaches of obligations under peremptory norms of general international law”. And it must be borne in mind that this ‘serious breach’ regime is a compromise substitution of the ‘international crime’ regime that appeared in the much-debated Article 19 of the previous draft.¹⁴⁰ Although the dichotomy between international crimes and international delicts were eventually deleted from the Draft Articles, the inherent (and almost mutually definitional) connection between *jus cogens* and international crime contained in that provision – that “the breach by a State of an international obligation so essential for the protection of fundamental interests of the international community that its breach is recognised as a crime by that community as a whole constitutes an international crime”¹⁴¹ – still holds truth in international practice.¹⁴²

Therefore, international crimes – a core subject matter of international criminal law – serve as the core of *jus cogens* concept, and ICRI seems to be the only visible enforcement mechanism of international law that can signify the moral/ethical imperative of peremptory norms. The concept of *jus cogens* per se does not provide any enforcement mechanism in response to violations of peremptory norms. As the ICJ has clearly ruled in the case of *Jurisdictional Immunities*, the non-derogatory character of *jus cogens* does not render non-peremptory procedural norms, such as rules of State immunity, non-applicable in preventing violations of *jus cogens* from being punished.¹⁴³

The concept of obligations *erga omnes*, which “inextricably coincide”¹⁴⁴ with the scope of *jus cogens*, is also unhelpful when it comes to

¹⁴⁰ ILC, Draft Articles on Responsibility of States for Internationally Wrongful Act as adopted on first reading, 1996, reprinted as Appendix 5 in James Crawford, *State Responsibility: the General Part*, Cambridge University Press, Cambridge, 2013, pp. 743–60.

¹⁴¹ *Ibid.*, Article 19.

¹⁴² See Weatherall, 2015, pp. 270–71, see *supra* note 121.

¹⁴³ International Court of Justice, *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)*, Judgment, 3 February 2012, paras. 92–97 (‘*Jurisdictional Immunities of the State*’) (<http://www.legal-tools.org/doc/674187/>).

¹⁴⁴ Antonio Cassese, “The Character of the Violated Obligation”, in James Crawford, Alain Pellet and Simon Olleson (eds.), *The Law of International Responsibility*, Oxford University Press, Oxford, 2010, p. 417.

the enforcement of peremptory norms, for the “precise implications [of obligations *erga omnes*] remain at best uncertain”.¹⁴⁵ Moreover, it is highly questionable whether the concept has gained any normative status beyond the scope of *obiter dictum* in the ICJ’s *Barcelona Traction* decision.

The prosecution and punishment of individual perpetrators of international crimes based on ICRI thus appears to be the principal legal mechanism in place for contemporary international law to move beyond the paradigm of traditional positivism and, in turn, scrutinise the legitimacy and limits of State consent. In this sense, ICRI serves as the safeguard of international law’s ethics and morality by holding individuals responsible, because “the moral effect of the law is vastly reduced if the human agents involved are able to separate themselves personally both from the duties the law imposes and from the responsibility which it entails”.¹⁴⁶

4.3. International Criminal Responsibility for ‘Individuals’: Tangled Threads of Rationales

Since the Nuremberg Trials announced that “[c]rimes against international law are committed by men, not by abstract entities”, international criminal responsibility for individuals has been the conceptual cornerstone of international criminal law, as it is generally perceived as “the application of individual responsibility to international law”,¹⁴⁷ to “deal[] with individuals [but] not States”.¹⁴⁸ The two questions contained in the definition of international criminal responsibility for individuals have since been the central legal issues in the development and teaching of international criminal law: what individuals are responsible for (the issue of ‘international crimes’)? And, who exactly are individually responsible (the issue of ‘modes of responsibility’)?

¹⁴⁵ Christian J. Tams, *Enforcing Obligations Erga Omnes in International Law*, Cambridge University Press, Cambridge, 2005, p. xv.

¹⁴⁶ Philip Allott, “State Responsibility and the Unmaking of International Law”, in *Harvard International Law Journal*, 1988, vol. 29, no. 1, p. 14.

¹⁴⁷ Gerry Simpson, “Men and Abstract Entities: Individual Responsibility and Collective Guilt in International Criminal Law”, in Harmen van der Wilt and André Nollkaemper (eds.), *System Criminality in International Law*, Cambridge University Press, Cambridge, 2009, p. 72.

¹⁴⁸ Sliedregt, 2012, p. 5, see *supra* note 24.

This part critiques the philosophical and doctrinal foundations of the concept of international criminal responsibility for individuals, especially those behind the seemingly straightforward assertion that international crimes are committed by individuals rather than States and organised groups. By unveiling the intertwinement between individual guilt and collective criminality within ICRI and exploring differing perspectives on the relationship between individual and collective criminal responsibility under international law, this author aims to point out where internal tensions lie and contradict within the conceptualisation of ICRI. The overarching argument is that the role of abstract entities and collective criminality is essential in conceptualising ICRI and that there is no basis in law, philosophy, or logic to support the assertion that international crimes “are committed by men, *not* by abstract entities”. In most cases, international crimes are committed by *both* individuals *and* the abstract entities they form.

4.3.1. Who Commits International Crimes: Individual Guilt Intertwined with Collective Criminality

Legal responsibility is a double-layered question. First, it needs to be ascertained *whose* conduct or behaviour triggers the responsibility (the ‘whose’ question); and second, we ask on *whom* the responsibility is imposed (the ‘whom’ question). Our first intuition might be that legal responsibility should always be imposed on the person whose conduct triggers the responsibility because it seems unfair for one to be responsible for another’s behaviour. This is, however, not always legally true. Consider, for example, commercial law where the conduct of an agent can create legal responsibility for the principal.

The above two questions of ‘whose’ and ‘whom’ become considerably more complex when abstract entities are involved, and this complexity is particularly pertinent for legal responsibility under international law. Since abstract entities such as States and international organisations are major players in the international legal order, international law has developed certain norms to deal with legal responsibility imposed on them. The ILC has codified and progressively developed such rules and principles in the Draft Articles on Responsibility of States for Internationally Wrongful Acts and the Draft Articles on the Responsibility of International Organizations.

These two Draft Articles, therefore, answer the ‘whom’ question in a definitive manner. But ‘whose’ conduct triggers the responsibility? Since abstract entities cannot physically attend conferences or sign treaties, it is often the conduct of individuals in their official capacity that triggers responsibility. Therefore, one answer to the ‘whose’ question is individuals. But the fact that States and international organisations cannot ‘act’ in a literal sense does not mean, from a legal perspective, the conduct or behaviour is not *theirs*. It has been clear that it is the “internationally wrongful act of a State/an international organization” that “entails the international responsibility of that State/organization”.¹⁴⁹ There is no doubt that international law recognises the conduct of individuals attributable¹⁵⁰ to abstract entities as the conduct of the abstract entities *themselves*,¹⁵¹ and it is up to international law to prescribe whether given conduct is attributable.

Therefore, when abstract entities are involved, the ‘whose’ question does not necessarily warrant an either-or answer: the conduct could be recognised under international law as the deed of individuals, abstract entities, or both. The answer depends on our perception of the relationship between the abstract entity and its individual members with respect to the particular conduct/activity in question and our perception of how international law should characterise and govern such a relationship. It deserves to be stressed that whatever our answer to the ‘whose’ question might be – whether the conduct is considered to be the deed of the abstract entity, its individual members, or both – it is a matter of perception and choice rather than fact or ultimate truth. As the following analysis attempts to illustrate, there are tensional and even contrary perceptions about the ‘whose’ question and the concept of ICRI has been built on tangled threads of rationales about individual guilt and collective criminality.

¹⁴⁹ ILC, *Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries*, 2001, Article 1, see *supra* note 139; ILC, *Draft Articles on the Responsibility of International Organizations*, 12 August 2011, Article 3 (<http://www.legal-tools.org/doc/4ac169/>).

¹⁵⁰ ILC, *Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries*, 2001, Article 2, see *supra* note 139; ILC, *Draft Articles on the Responsibility of International Organizations*, 2011, Article 4, see *supra* note 149.

¹⁵¹ In fact, for a long time in international law, the abstract entity of State is perceived as “a collective, which [...] could not be reduced to individual actors, as bearers of individual rights and duties”, Sliedregt, 2012, p. 19, see *supra* note 24.

4.3.1.1. “Men, not Abstract Entities”: More Complex than it Appears

When it is revealed that ‘who (or whose conduct) commits international crimes’ is a question of perception, the rationale of the Nuremberg dictum that “[c]rimes against international law are committed by men, not by abstract entities” needs to be scrutinised. The seemingly straightforward persuasiveness of this dictum comes from the commonsensical perception that abstract entities cannot ‘act’ in a literal sense. But as this author has argued, the fact that abstract entities cannot literally ‘act’ does not mean the relevant conduct is not theirs under international law. If this commonsense rationale is taken seriously and applied universally, the entire project of positivist international law would not have existed in the first place, as no conduct could be attributed to States at all.

Therefore, the focus of the dictum moves to the incompatibility of abstract entities and international crimes. Instead of arguing for a total banishment of the idea of State conduct from the international legal order, the Nuremberg dictum should be understood as a perception strictly confined to a particular category of conduct, namely ‘crimes against international law’. Thus, the rationale is the perception that it is appropriate and desirable to associate the conduct of committing international crimes with individuals, yet not appropriate or desirable to link the same conduct with abstract entities. In other words, the establishment of the concept of ICRI in the Nuremberg trial is seemingly founded on the perception that international crimes should be perceived as the result of individual perpetrator’s guilty mind (*mens rea*) rather than the systematic criminality of abstract entities such as States.

Several reasons can account for such a perception. First, it seems to be a criminal law tradition to attribute the commission of crimes ultimately to the guilty mind of individuals rather than to conceptualise an abstract entity as inherently criminal.¹⁵² It has been a cornerstone of western criminal law culture that “individuals are perceived as rational and autonomous actors” and that “a person is only culpable to the extent of his [or

¹⁵² As Harmen van der Wilt succinctly put, “[c]riminal law stresses the value of individual guilt and personal fault”. Harmen van der Wilt, “Joint Criminal Enterprise and Functional Perpetration”, in Harmen van der Wilt and André Nollkaemper (eds.), *System Criminality in International Law*, Cambridge University Press, Cambridge, 2009, p. 160.

her] own will or guilty mind”.¹⁵³ The subjective requirement of *mens rea* is one of the most important elements of criminal law,¹⁵⁴ but it is hard to speak of the mental culpability of an abstract entity. Since ultimately it is the individual members’ minds that decide for the abstract entity such as a State to commit international crimes, “[c]ulpability so construed may rest with the individual actor but not with the [collective entity] he is acting for”.¹⁵⁵ Second, in response to the criminal law tradition of tracing culpability to *mens rea* on the individual level, perceiving individuals rather than abstract entities as the true authors of international crimes is said to be more effective to strengthen the moral effect of international law.¹⁵⁶ The moral strength of international law in deterring future atrocities could become much stronger when the perception that international crimes are committed by “persons of flesh and blood”¹⁵⁷ is embedded in people’s mind. Third, attributing international crimes to “men, not abstract entities” exonerates the States and its people from criminality, blame, and stigma, which is desirable for reconciliation and post-conflict stabilisation.¹⁵⁸

As for the question of ‘who commits international crimes’, the Nuremberg dictum in its plain reading seems to have provided a clear answer: international crimes are committed by individuals instead of abstract entities. But read more carefully in the whole international legal construction that dealt with crimes against international law during the Second World War, the establishment of ICRI did not exclude abstract entities as the author of international crimes. In contrast, the role of collective entities in the commission of crimes against international law was clearly recognised in the Nuremberg trial.

¹⁵³ Sliedregt, 2012, p. 17, see *supra* note 24.

¹⁵⁴ See Mohamed Elewa Badar, *The Concept of Mens Rea in International Criminal Law: The Case for a Unified Approach*, Hart Publishing, Oxford, 2013, p. 1.

¹⁵⁵ Albin Eser, “Criminality of Organization: Lessons from Domestic Law – A Comparative Perspective”, in Harmen van der Wilt and André Nollkaemper (eds.), *System Criminality in International Law*, Cambridge University Press, Cambridge, 2009, p. 232.

¹⁵⁶ Allott, 1988, p. 14, see *supra* note 146.

¹⁵⁷ Hersch Lauterpacht, *International Law and Human Rights*, Archon Books, 1968, p. 40, cited in Harmen van der Wilt and André Nollkaemper (eds.), *System Criminality in International Law*, Cambridge University Press, Cambridge, 2009, p. 8.

¹⁵⁸ André Nollkaemper, “Introduction”, in Harmen van der Wilt and André Nollkaemper (eds.), *System Criminality in International Law*, Cambridge University Press, Cambridge, 2009, pp. 8, 11–12.

As Gerry Simpson has argued, the orthodox account of the origin of ICRI that the Nuremberg and Tokyo trials “were fashioned with a view to cleansing Japan and Germany of collective guilt”¹⁵⁹ is not historically accurate. According to Simpson, the defeated proposal of the United States Treasury Secretary Henry Morgenthau planned an “even more punitive version of the Versailles model” to punish German as a State, and “elements of Morgenthau’s Plan survived alongside Nuremberg” in a set of legal arrangements concerning post-war Germany.¹⁶⁰ Three international crimes were enumerated in the IMT and IMTFE Charters: crimes against peace, war crimes, and crimes against humanity. The core of crimes against peace – war of aggression or in violation of international law – is by definition State conduct. Therefore, individual conduct is only punished for their role in the – “planning, preparation, initiation, or waging of a war [...] or participation in a common plan or conspiracy for the accomplishment of any of the foregoing”¹⁶¹ – collective criminality attached to the State conduct. The other two categories of international crimes differ from the crime against peace in the sense that war crimes and crimes against humanity can be committed by individual perpetrators. But it is mostly due to the State-inflicted/instigated background of system criminality that the gravity of the *actus reus*, such as murder or ill-treatment, is exacerbated from an individual *vis-à-vis* individual scenario to the unimaginable level of war crimes and crimes against humanity.¹⁶² A collective-based perception of criminality can be found in the IMT’s application of the conspiracy doctrine in the contexts of war crimes and crimes against humanity. According to Wilt, the conspiracy doctrine in its restricted form requires agreement among individuals, whereas conspiracy in a wider sense “cover[s] not only single agreements, but also sustain[s] the individual responsibility of scores of individuals who were only loosely connected inter se or indirectly implicated in the (commission of)

¹⁵⁹ Simpson, 2009, p. 80, see *supra* note 147.

¹⁶⁰ *Ibid.*, pp. 81–82.

¹⁶¹ IMT Charter, 1945, Article 6, see *supra* note 18; IMTFE Charter, 1946, Article 5, see *supra* note 18.

¹⁶² As George Fletcher cautioned, “[t]he great danger of ignoring the collective component of every international crime is that we think of these crimes of killing, rape, and cruelty just as we think of individual crimes against domestic law”. George P. Fletcher, “Liberals and Romantics at War: The Problem of Collective Guilt”, in *Yale Law Journal*, 2002, vol. 111, no. 7, p. 1522.

crimes”.¹⁶³ The fact that the IMT “did not shy away from applying conspiracy in [the] wider sense in respect of war crimes and crimes against humanity” implies to a certain extent that individuals are responsible not only as the autonomous agency of their own but also as a functioning part of certain collective systems whose criminality has been implicitly recognised in the first place.

In addition to the perception of collective entities and conduct in the conceptualisation of international crimes, the perception of collective criminality is also reflected in Article 9 of the IMT Charter which empowered the Tribunal to “declare (in connection with any act of which the individual may be convicted) that the group or organization of which the individual was a member was a criminal organization”. Article 10 of the IMT Charter provided:

In cases where a group or organization is declared criminal by the Tribunal, the competent national authority of any Signatory shall have the right to bring individuals to trial for membership therein before national, military or occupation courts. In any such case the criminal nature of the group or organization is considered proved and shall not be questioned.

It is important to note that:

the list of twenty-one defendants [before the IMT] was inspired by the underlying idea of maximum representation of all the different segments of German society which had underpinned the Nazi dictatorship, not just the political and military elites, but the ‘cultural’, economic and industrial ones as well.¹⁶⁴

And the Potsdam Agreement indeed spelt out as a political principle to govern the post-war Germany that it is a purpose of the occupation to:

convince the *German people* that they have suffered a total military defeat and that *they cannot escape responsibility* for what they have brought upon themselves, since their own ruthless warfare and the fanatical Nazi resistance have de-

¹⁶³ Van der Wilt, 2009, p. 161, see *supra* note 152.

¹⁶⁴ Andrea Gattini, “A Historical Perspective: From Collective to Individual Responsibility and Back”, in Harmen van der Wilt and André Nollkaemper (eds.), *System Criminality in International Law*, Cambridge University Press, Cambridge, 2009, p. 106.

stroyed German economy and made chaos and suffering inevitable.¹⁶⁵

The punishment of key industrialists in the subsequent trials under Control Council Law No. 10¹⁶⁶ was also illustrative of the recognition of corporate entities in the commission of international crimes. As Telford Taylor said in his opening statement against the principal corporate figures of Flick KG, “[t]he Third Reich dictatorship was based on this unholy trinity of Nazism, militarism, and economic imperialism”.¹⁶⁷ Although no corporate entities were prosecuted, the Allies prosecuted key industrialist figures of corporates such as Friedrich Flick (of Flick KG), Carl Krauch (of IG Farben), and Alfred Krupp (of Krupp Holding) that had been involved deeply in and profited greatly from the commission of international crimes. Although prosecutions of these industrialist actors were based on ICRI, it was more than clear that the international criminal responsibility imposed was linked with the identity of these individuals as the directors, managers, and staff in the relevant corporations. It was the activities of the corporations rather than the personal acts of the individuals accused that served as the basis of ICRI. It would be both counterfactual and counterintuitive to deny that the relevant international crimes were committed by corporations as well as individuals.

Therefore, the collective dimension of criminality was embedded in the concept of ICRI since its very creation in the Nuremberg trials,¹⁶⁸ and it is necessary to examine this dimension of collective criminality in the development of international criminal law from Nuremberg to this day.

4.3.1.2. The Dimension of Collective Criminality in the Development of International Criminal Law

Discussion of the collective dimension in the concept of ICRI is of course not to deny the individualistic dimension of the concept. Under some cir-

¹⁶⁵ Potsdam Declaration, 1 August 1945, Principle 3(ii) (emphasis added) (<http://www.legal-tools.org/doc/f966df/>).

¹⁶⁶ *Trials of War Criminals Before the Nuernberg Military Tribunals Under Control Council Law No. 10*, United States Government Printing Office, Washington, 1952, vol. 15, pp. 23–28 (<http://www.legal-tools.org/doc/ffda62/>).

¹⁶⁷ *Ibid.*, vol. 6, p. 32.

¹⁶⁸ Slidregt, 2012, p. 19, see *supra* note 24; Simpson, 2009, p. 82, see *supra* note 147; Gattini, 2009, pp. 106–07, see *supra* note 164.

cumstances, international crimes can be committed by individuals in a purely private capacity “for personal, selfish reasons, in disregard of national regulations and superior orders”.¹⁶⁹ A soldier’s commission of war crimes in violation of martial laws and superior orders would be the most pertinent example to trigger the individualistic dimension of ICRI. The collective dimension of ICRI emphasised, however, that more likely than not the commission of international crimes involves not only individual but also collective criminality of the system.

Bert Roling attaches what he calls ‘system criminality’, as opposed to ‘individual criminality’, to:

crimes committed in the national interest, as a consequence of a general policy or in accord with the official attitude; crimes committed to serve national military goals, or illegal means used in the furtherance of victory.¹⁷⁰

While Roling focuses on governments as the collective system,¹⁷¹ there is no reason why system criminality should be exclusively tied to States. The key of system criminality is the close relationship between the commission of crimes and the collective system (regardless of the form or international legal status of that system) when the commission of crime “is caused by the structure of the situation and the system”¹⁷² and “express[es] the tendencies of the existing system”.¹⁷³ Therefore, system criminality in international law can connect to any “situation where collective entities order or encourage international crimes to be committed, or permit or tolerate the committing of international crimes”.¹⁷⁴ Criminality in international criminal law can be found in various forms of collective system such as States, international and regional organisations, organised armed groups, ruling political parties or transnational terrorists groups¹⁷⁵

¹⁶⁹ Bert V.A. Roling, “Criminal Responsibility for Violations of the Laws of War”, in *Revue Belge de Droit International*, 1976. vol. 12, no. 1, p. 11.

¹⁷⁰ *Ibid.*

¹⁷¹ Bert V.A. Roling, “The Significance of the Law of War”, in Antonio Cassese (ed.), *Current Problems of International Law: Essays on UN Law and on the Law of Armed Conflict*, A. Giuffrè, Milano, 1975, p. 138.

¹⁷² Roling, 1976, pp. 12, see *supra* note 169.

¹⁷³ *Ibid.*, p. 11.

¹⁷⁴ Nollkaemper, 2009, p. 16, see *supra* note 158.

¹⁷⁵ See, for example, *ibid.*, pp. 17–19.

as long as the commission of international crimes “serves the system, and is caused by the system”.¹⁷⁶

4.3.1.2.1. Collective Criminality in the Conceptualisation of Core Crimes

The dimension of collective criminality is first and foremost reflected in the conceptualisation of international crimes. The Rome Statute enumerates four international crimes: the crime of genocide; crimes against humanity; war crimes; and the crime of aggression. These four crimes are now the core categories of international crimes,¹⁷⁷ and the role of the collective system of abstract entities in committing these crimes is more than visible and recognised.

The crime of aggression is by definition a State crime, as aggression under international law is “the use of armed force by *a State* against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations”.¹⁷⁸

The systematic structure is also explicitly recognised in crimes against humanity, as the material elements of the crime need to be “committed as part of a widespread or systematic attack directed against any civilian population”.¹⁷⁹ The dimension of collective criminality is clear in this conceptualisation of the crimes against humanity, since “[a] system or widespread attack [...] is not something that can be readily undertaken by a single individual”.¹⁸⁰

As for the crime of genocide, although the theoretical possibility of a “lone genocidaire” is not eliminated by the letter of law,¹⁸¹ it is hardly

¹⁷⁶ Roling, 1975, pp. 138, see *supra* note 171.

¹⁷⁷ For a survey of different conceptualisation of international crimes in international practice and academic commentaries, see Terje Einarsen, *The Concept of Universal Crimes in International Law*, FICHL Publication Series No. 14 (2012), Torkel Opsahl Academic EPublisher, Oslo, 2012, pp. 135–286 (<http://www.legal-tools.org/doc/bfda36/>).

¹⁷⁸ Definition of Aggression, UN Doc. A/RES/3314(XXIX), 14 December 1974, Article 1 (<http://www.legal-tools.org/doc/90261a/>).

¹⁷⁹ ICC Statute, Article 7(1), see *supra* note 6.

¹⁸⁰ Simpson, 2009, p. 90, see *supra* note 147.

¹⁸¹ See ICTY, *Prosecutor v. Jelisić*, Trial Chamber, Judgment, 14 December 1999, IT-95-10-T, para. 100 (<http://www.legal-tools.org/doc/b3ece5/>).

imaginable that one or several individuals without a highly developed organised structure can commit genocide in its true sense. According to the Rome Statute, genocide is defined as certain acts “committed with the intent to destroy, in whole or in part, a national, ethnical, racial or religious group”.¹⁸² The “in-built presumption against the idea that an individual can commit [genocide] acting independently of [State or State-like instrumentalities]”¹⁸³ should be recognised, because the essential components in the conceptualisation of genocide are not the material elements of the crime. The *actus reus* of the crime of genocide – such as killing, bodily harm, and force transfer of children – can be criminalised under domestic law as murder, assault, and kidnapping; but murder, assault, and kidnap are legally characterised as regular domestic crimes instead of international crimes. The key differences between these domestic crimes and the crime of genocide are the mass scale and genocidal purpose of the latter. The purpose of genocide is to “destroy [...] a national, ethnical, racial or religious group”¹⁸⁴ or, in Fletcher’s words, to “eliminate a *genos* from the human species”.¹⁸⁵ Therefore, the genocidal purpose is always accompanied with the scale of mass killing which “requires a degree of planning and organization typically beyond the capacity of all but State or State-like instrumentalities”.¹⁸⁶ It is precisely in this sense that the Trial Chamber of the International Criminal Tribunal for former Yugoslavia reasoned in *Jelisić* that: “it will be very difficult in practice to provide proof of the genocidal intent of an individual if the crimes committed are not widespread and if the crime charged is not backed by an organization or a system”.¹⁸⁷

¹⁸² ICC Statute, Article 6, see *supra* note 6. Enumerated acts are killing members of the group; causing serious bodily or mental harm to members of the group; deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; imposing measures intended to prevent births within the group; and forcibly transferring children of the group to another group.

¹⁸³ Simpson, 2009, p. 89, see *supra* note 147.

¹⁸⁴ ICC Statute, Article 6, see *supra* note 6.

¹⁸⁵ Fletcher, 2002, p. 1525, see *supra* note 162.

¹⁸⁶ Simpson, 2009, p. 89, see *supra* note 147. See also ICTR, *Prosecutor v. Kayishema et al.*, Trial Chamber II, Judgment, 21 May 1999, ICTR-95-01-1088, para. 94 (<http://www.legal-tools.org/doc/0811c9/>).

¹⁸⁷ ICTY, *Prosecutor v. Jelisić*, Trial Chamber, Judgment, 1999, para. 101, see *supra* note 181.

Last but not least, collective criminality is also intertwined with individual guilt in the commission of war crimes. Except for the scenarios in which war crimes are “carried out by individual perpetrators on their own initiatives and in disregard of the policies and orders of the authorities under which they function”,¹⁸⁸ the commission of war crimes are usually ‘crimes of obedience’, which results from “act[s] performed in response to orders from authority that is considered illegal or immoral by the larger community”.¹⁸⁹ As Fletcher precisely noted, “war crimes exist at the frontier of two legal orders”. On the one hand, the identity of individual soldier is suppressed by the operation of collective military entities in armed confrontation; on the other hand, international criminal law prescribes international criminal responsibility to individuals based on their agency and individuality.¹⁹⁰ Therefore, when war crimes are committed by the hands of individuals “as part of a plan or policy”¹⁹¹ under the authority of collective entities such as States, the crimes should be perceived as being committed by the collective entities as much as by individual perpetrators.¹⁹²

4.3.1.2.2. Collective Criminality in Responsibility Attribution

The dimension of collective criminality is also reflected in the ways criminal responsibility is attributed under the concept of ICRI. Although the Nuremberg trial “relied on broad, singular concepts of liability”, post-Nuremberg development of ICRI has shown “a specification of criminal participation”¹⁹³ under the ‘modes of liability’ doctrine to allocate individuals liability for their participation in the commission of international crimes.¹⁹⁴

¹⁸⁸ Herbert C. Kelman, “The Policy Context of International Crimes”, in Harmen van der Wilt and André Nollkaemper (eds.), *System Criminality in International Law*, Cambridge University Press, Cambridge, 2009, p. 26.

¹⁸⁹ Herbert C. Kelman and V. Lee Hamilton, *Crimes of Obedience: Toward a Social Psychology of Authority and Responsibility*, Yale University Press, New Haven, 1989, p. 46.

¹⁹⁰ Fletcher, 2002, p. 1499, see *supra* note 162.

¹⁹¹ ICC Statute, Article 8(1), see *supra* note 6.

¹⁹² See Jennings and Watts, 1992, p. 535, see *supra* note 1.

¹⁹³ Sliedregt, 2012, p. 74, see *supra* note 24.

¹⁹⁴ James G. Steward, “The End of ‘Modes of Liability’ for International Crimes”, in *Leiden Journal of International Law*, 2012, vol. 25, no. 1, p. 166.

On the one hand, international criminal responsibility could be imposed upon purely ‘individual’ acts. If a person committed war crimes or crimes against humanity against or without the authority of the collective entity,¹⁹⁵ individual responsibility allocated to him would not imply collective criminality. This scenario of ‘direct perpetration’,¹⁹⁶ pins the commission of international crimes down to the guilty acts and *mens rea* of the individual perpetrator.¹⁹⁷ But under other circumstances, international criminal responsibility for individuals is allocated precisely because of the structure of collective criminality. In most cases, commission of international crimes (especially aggression and genocide) “entails the cooperation of a large number of persons [...] [in] a more or less established network”.¹⁹⁸ The acts and mind of no one single person are sufficient for the whole crime. Individual guilt is therefore determined by the involvement and participation in the collective criminality. Statutes and case law of international criminal courts and tribunals have developed various doctrines – such as conspiracy,¹⁹⁹ criminal organization,²⁰⁰ joint criminal enterprise,²⁰¹ and commander/superior responsibility²⁰² – to ascertain individual responsibility from the collective commission of international crimes.

It should be particularly noted that:

[u]nlike domestic criminal law where the traditional image of a criminal is the primary perpetrator such as the person who pulls the trigger, in international criminal law the paradigmatic offender is the person who orders, masterminds, or

¹⁹⁵ Roling, 1976, p. 11, see *supra* note 169.

¹⁹⁶ Article 25(3)(a) of the ICC Statute conceptualises direct perpetration when a person commits an international crime “as an individual”, see *supra* note 6. The same article also conceptualises joint perpetration and perpetration through another person.

¹⁹⁷ Gerhard Werle, “Individual Criminal Responsibility in Article 25 ICC Statute”, in *Journal of International Criminal Justice*, 2007, vol. 5, no. 4, p. 958.

¹⁹⁸ *Ibid.*, p. 953.

¹⁹⁹ IMT Charter, 1945, Article 6, see *supra* note 18; IMTFE Charter, 1946, Article 5, see *supra* note 18.

²⁰⁰ IMT Charter, 1945, Articles 9–10, see *supra* note 18.

²⁰¹ See, for example, ICTY, *Prosecutor v. Duško Tadić*, Appeals Chamber, Judgment, 15 July 1999, IT-94-I-A, paras. 185–234 (<http://www.legal-tools.org/doc/8efc3a>).

²⁰² ICC Statute, Article 28, see *supra* note 6.

take part in a plan [of committing international crimes] at a high level.²⁰³

This demonstrates a normative approach to liability that focuses on allocating responsibility to who are “most responsible” for the commission of international crimes rather than “who most immediately causes the *actus reus*”²⁰⁴ and reflects the attempt of “portraying the interaction and cooperation between members of a group or organization and showing the dynamics of collective action [in committing international crimes]”.²⁰⁵ Therefore, certain modes of liability have loosened the requirement of individual guilt in prescribing international criminal responsibility by turning to the structural role of the individual in the collective system. For example, under the joint criminal enterprise doctrine, “a person can be convicted of specific intent crimes such as genocide even if that person did not have the relevant *mens rea* for that offence, but the crimes were a natural and foreseen incident of the enterprise he was involved in”.²⁰⁶

Commander/superior responsibility is another example that demonstrates a shift from an individual’s guilt mind to his functional role in the collective structure as the philosophical foundation of responsibility allocation. According to Reid, this shift is at least signified on two levels:

First, there are elements of the [commander/superior responsibility] doctrine that not only have no equivalent in municipal law, but are also inconsistent with fundamental principles that should underlie a regime that imposes criminal liability on persons qua individuals; and

Second, the obligations that are imposed on superiors by contemporary international criminal law, and on States by customary international law concerning certain obligations *erga omnes*, are functionally identical in their scope and content.²⁰⁷

²⁰³ Robert Cryer *et al.*, *An Introduction to International Criminal Law and Procedure*, Cambridge University Press, Cambridge, 2007, p. 301.

²⁰⁴ Slidregt, 2012, pp. 71–72, see *supra* note 24.

²⁰⁵ Wilt, 2009, p. 160, see *supra* note 152.

²⁰⁶ Cryer, 2007, p. 309, see *supra* note 203.

²⁰⁷ Natalie L. Reid, “Bridging the Conceptual Chasm: Superior Responsibility as the Missing Link between State and Individual Responsibility under International Law”, in *Leiden Journal of International Law*, 2005, vol. 18, no. 4, p. 822.

Development of these modes of liability under the concept of ICRI has certainly evoked concerns about the deviation of international criminal responsibility from general principles of criminal responsibility in domestic laws²⁰⁸ and overreaching application.²⁰⁹ While these are legitimate concerns, the deviation may well be inevitable and necessary due to the inherently collective nature of international crimes.²¹⁰ Although the concept of ICRI is about the responsibility of individuals rather than States or other collective entities, the allocation of ICRI in most cases implies criminality of the abstract entities in international law.

4.3.2. Are There Other Forms of International Criminal Responsibility? The Relationship Between Individual and Collective Responsibility

The previous section answers the question of *who* (or *whose* conduct) commits international crimes. Although individuals could commit certain international crimes as purely individualistic perpetrators,²¹¹ in most cases international crimes are simultaneously committed by both individuals and the collective systems they form. Individual guilt and collective criminality are inherently intertwined, as one cannot exist without the other. Individuals and the abstract entities are mutually dependent perceptions, and there is no basis in law, philosophy, or logic to give either one a metaphysical priority in responsibility allocation for international crimes.

Answers to the ‘whose’ question lead to the ‘whom’ question: upon *whom* should international criminal responsibility be imposed? It seems only reasonable to hold both the individuals and the collective systems criminally responsible under international law, since international crimes are committed by them both. So, is there international criminal responsi-

²⁰⁸ See, for example, Mirjan Damaška, “The Shadow Side of Command Responsibility”, in *American Journal of Comparative Law*, 2001, vol. 49, no. 3, pp. 455–96.

²⁰⁹ See, for example, Wilt, 2009, see *supra* note 152.

²¹⁰ As Nollkaemper and Wilt succinctly put, “it might be said that the very nature of system criminality obliterates the piecemeal approach of criminal law”, André Nollkaemper and Harmen van der Wilt, “Conclusions and Outlook”, in Harmen van der Wilt and André Nollkaemper (eds.), *System Criminality in International Law*, Cambridge University Press, Cambridge, 2009, p. 344.

²¹¹ This has been characterised by scholars as ‘ordinary crime’ (as opposed to crime of obedience) or ‘individual criminality’ (as opposed to ‘system criminality’), Kelman, 2009, pp. 26–27, see *supra* note 188; Roling, 1976, pp. 11–12, see *supra* note 169.

bility for the collective systems such as States? This section approaches this question from two aspects: (1) the acceptability of ICRI as a form of international criminal responsibility for collective systems ('ICRCS'); and (2) other potential forms of ICRCS.

The following analysis will focus on the collective systems of State in the discussion of ICRCS. This does not mean States are the only collective systems in the commission of international crimes²¹² but only results from certain considerations of this author. First, laws and practices of international responsibility have been so far most developed in the realm of State responsibility. Legal regimes of international responsibility to other collective entities (even in the case of international organisations) might still be too embryotic to sustain a realistic discussion of ICRCS. Second, States provide a good point of reference in formulating ICRCS.²¹³ Certain international crime such as aggression and crime against peace are formulated as State crimes, and the actual commission of most international crimes "often suggests State involvement"²¹⁴ and requires a complicated coordinating and operating system tantamount to State structures. Third, there has been a significant overlap between the concept of collective criminality and that of 'State crimes' in the codification and progressive development of international law.²¹⁵ The discussion of ICRCS on States can also contribute to the topical debates on 'State criminal responsibility' in international law.

²¹² As this author has emphasised, collective criminality can be found in various forms of collective system as long as the commission of international crimes "serves the system, and is caused by the system", see *supra* Section 4.3.1.2 (Roling, 1975, pp. 138, see *supra* note 171).

²¹³ As Kleffner noted, "similarities between States and organised armed group suggest that the rules on State responsibility may provide a useful starting point for developing a legal framework of the responsibility of organised armed groups", Jann K. Kleffner, "The Collective Accountability of Organized Armed Group for System Crimes", in Harmen van der Wilt and André Nollkaemper (eds.), *System Criminality in International Law*, Cambridge University Press, Cambridge, 2009, p. 260.

²¹⁴ Sliedregt, 2012, p. 5, see *supra* note 24.

²¹⁵ Andreas Zimmermann and Michael Teichmann, "State Responsibility for International Crimes", in Harmen van der Wilt and André Nollkaemper (eds.), *System Criminality in International Law*, Cambridge University Press, Cambridge, 2009, pp. 298–99.

4.3.2.1. Individual Criminal Responsibility as a Form of Collective Criminal Responsibility

Since there is clearly a collective dimension in both the conceptualisation of international crimes and the allocation of responsibility under the concept of ICRI, one might ask if individual criminal responsibility per se is a form of collective criminal responsibility in the international legal order, or in Nina Jørgensen's words, "whether the punishment of individuals [who commit international crimes as the agents of State] is a form of punishment of the State itself".²¹⁶ In this author's opinion, the answer should be in the affirmative.

Just as an individual's conduct could be legally perceived as the act of abstract entities under international law, criminal penalties imposed on individuals could also be legally perceived in international law as a punishment for both individual perpetrators and the collective systems they form. This perception is particularly plausible and powerful when the individuals "held responsible are the heads of State" if we think about examples of Kaiser Wilhelm II, Radovan Karadžić and Slobodan Milošević.²¹⁷ As Jennings and Watts eloquently argued with respect to war crimes, the rules of ICRI "afford [an] instance of the recognition of criminal responsibility of States, for war criminals are, as a rule, guilty of acts committed not in pursuant of private purposes but on behalf of and as organs of the State".²¹⁸

4.3.2.2. Other Potential Forms of Collective Criminal Responsibility

A major worry about perceiving ICRI as a form of ICRCS is that doing so may "hide [the] guilt [of collective systems] behind the punishment of individuals" by limiting the scope of ICRCS to individual criminal responsibility.²¹⁹ Such a worry is unnecessary, for the confirmation of ICRI as a form of ICRCS does not imply at all that ICRI is (or should be) the

²¹⁶ Nina H.B. Jørgensen, *The Responsibility of States for International Crimes*, Oxford University Press, Oxford, 2000, p. 154.

²¹⁷ *Ibid.*, pp. 154–55. See also BAI Guimei, *International Law* (in Chinese), 2nd edition, Peking University Press, Beijing, 2010, p. 228.

²¹⁸ Jennings and Watts, 1992, p. 536, see *supra* note 1.

²¹⁹ Jørgensen, 2000, p. 155, see *supra* note 216.

only form of ICRCs. On the contrary, it implicates that international law *de lege lata* has already recognised criminal responsibility for collective systems by means of ICRI and rejects the out-dated arguments that there simply is no ‘criminal’ responsibility that can be inflicted on collective entities by international law.²²⁰

So, what are other potential forms of collective criminal responsibility under international law? The difficulty lies in the concept of ‘criminal’ when it comes to international responsibility for abstract entities. The distinction between civil and criminal responsibility in domestic legal systems does not seem to easily find a clear counterpart in international law. As Alain Pellet pointed out, “analogies with domestic law are rarely helpful and usually misleading. International responsibility is neither civil nor penal, it is simply ‘international’”.²²¹ Based on the unitary approach to State responsibility, it has been argued that international crimes are “no more than very serious internationally wrongful acts”²²² and add no new forms of responsibility that “is already available in traditional ideas of State responsibility”.²²³ And there have been objections to the terminologies such as ‘State crime’ due to “the difficulties in applying criminal law [in its traditional sense] to a collective entity”.²²⁴

International reality, on the other hand, suggests that certain sanctions indeed have the aim and effect of ‘criminalising’ collective entities on the international plane. Sanctions placed on Nazi Germany and Saddam Hussein’s Iraq could be perceived as penalties of the international community to render Nazi Germany and Iraq “criminal States”.²²⁵ And in recent decades, “the outlawry of whole States became a favored technique of international administration in Serbia, in Afghanistan, and in relation to Iraq”.²²⁶ These international practices seem to provide a more plausible

²²⁰ For an example of such arguments, see Julio Barboza, “International Criminal Law”, in *Recueil des cours*, 1999, vol. 278, pp. 73–83.

²²¹ Alain Pellet, “Can a State Commit a Crime? Definitely, Yes”, in *European Journal of International Law*, 1999, vol. 10, no. 2, p. 433.

²²² Geoff Gilbert, “The Criminal Responsibility of States”, in *International and Comparative Law Quarterly*, 1990, vol. 39, no. 2, p. 368.

²²³ *Ibid.*, p. 367.

²²⁴ Slidregt, 2012, p. 7, see *supra* note 24.

²²⁵ Pellet, 1999, p. 433, see *supra* note 221.

²²⁶ Simpson, 2009, p. 85, see *supra* note 147.

approach to conceptualise ICRSC by linking the essential component of ‘criminal’ responsibility – the “consequences/sanctions of a punitive character exceeding the limits of mere reparation”²²⁷ – to the deprivation of or restriction on fundamental rights and freedoms of the ‘outlawed’ entity as is conferred by the community. As certain leading Chinese scholars have pointed out as early as 1981, restriction on sovereignty is the most severe consequence of State responsibility for the most severe violations of international law, that is, international crimes.²²⁸ Such a conceptualisation of criminal responsibility is also reconcilable with the traditional understanding of domestic criminal responsibility. Under domestic criminal law, imprisonment is the most typical form of criminal responsibility that deprives or restricts individual criminals of their fundamental rights and freedoms that are conferred by the domestic community, usually through constitutional law, to its individual members. Analogously, in the international legal order, ICRCs materialises by depriving wholly or partially a collective entity of its fundamental rights and freedoms that are conferred by the international community through international law. For States, international criminal responsibility means confinement or deprivation of State sovereignty.

Here a friction occurs between State sovereignty – a foundational promise of the international legal order – and the legitimacy of State criminal responsibility.²²⁹ As Manfred Mohr has noted three decades ago, “the very idea of punishing States is (indeed) completely alien to the contemporary international legal order based on the sovereignty of States”.²³⁰ Although the imposition of State criminal responsibility might be legitimised by specific mechanisms such as the resolution of United Nations Security Council,²³¹ there is still a deep incompatibility between the long-term operation of the international legal order and certain States being

²²⁷ Barboza, 1999, p. 73, see *supra* note 220.

²²⁸ WANG Tiewa *et al.*, *International Law* (in Chinese), Law Press, 1981, pp. 130–31.

²²⁹ Such a friction may not occur when international criminal responsibility is imposed in non-State entities such as transnational terrorist groups.

²³⁰ Manfred Mohr, “The ILC’s Distinction Between ‘International Crimes’ and ‘International Delicts’ and Its Implications”, in Marina Spinedi and Bruno Simma (eds.), *United Nations Codification of State Responsibility*, Oceana Publications, New York, 1987, p. 139.

²³¹ For a detailed envisioning of the institutional and procedural mechanisms for imposing State criminal responsibility, see Jørgensen, 2000, pp. 208–30, see *supra* note 216.

deprived of certain aspects of their sovereignty. Although military occupation of a State (the occupation of Germany after the Second World War as an apt example) and international “surveillance and oversight”²³² may be acceptable as a temporary arrangement at a given time, they are at odds with the fundamental principle of sovereign equality.²³³ International law promises State’s right to exist²³⁴ and to enjoy full sovereignty.²³⁵ Enforcing ICRCs in forms of ‘outlawing’ certain States from the international community²³⁶ would undermine this fundamental promise of the international legal order. This dilemma remains a serious obstacle to legitimising forms of international criminal responsibility for States other than ICRI and may well explain why a specific system for punishing States is still lacking under current international law.²³⁷

4.4. International Law in the Dilemma of Transformation: The Example of Foreign Immunity for Torture

Since the Nuremberg and Tokyo trials, the concept of international criminal responsibility for individuals has played a significant role in the foundational transformation of international law. In this transformation, sovereign States and their consent are no longer the sole philosophical and normative foundation of international law. The emphasis on the individual/human being has become increasingly important in transforming international law from inter-State law to the law of the international community. Now individuals have fundamental rights and freedoms under interna-

²³² Simpson, 2009, p. 85, see *supra* note 147.

²³³ The principle of sovereign equality of States has been affirmed in Article 2(1) of the UN Charter, 26 June 1945 (<http://www.legal-tools.org/doc/6b3cd5/>), and the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations, 24 October 1970 (‘Declaration on Principles of International Law’) (<http://www.legal-tools.org/doc/e6c77e/>).

²³⁴ Kleffner, 2009, p. 260, see *supra* note 213.

²³⁵ According to the Declaration on Principles of International Law, the principle of sovereign equality entails that “[e]ach State enjoys the rights inherent in full sovereignty; [t]he territorial integrity and political independence of the State are inviolable; [and] [e]ach State has the right freely to choose and develop its political, social, economic and cultural systems”, see *supra* note 233.

²³⁶ For the history of outlawing States in international law, see Gerry Simpson, *Great Powers and Outlaw States: Unequal Sovereigns in the International Legal Order*, Cambridge University Press, Cambridge, 2004, pp. 227–316.

²³⁷ Jørgensen, 2000, p. 208, see *supra* note 216.

tional law, and individual criminal responsibility serves as the most important legal guarantee that “the most serious crimes of concern to the international community as a whole must not go unpunished”²³⁸ in the international legal order.

These individual-oriented philosophical foundations of international law, however, cannot completely supersede State-oriented philosophical foundations of international law, for the simple reason that sovereign States are still the most influential actors in international realities. Although States are no longer the exclusive subjects of international law, they remain undoubtedly the primary focus of the international legal order.²³⁹ Tensions between individual-oriented and State-oriented philosophical foundations of international law have resulted in norm conflict, exposing the international legal order to fragmentation in its unfinished transformation.

Foreign immunity for acts of torture is an apt example to demonstrate the stark conflicts in the philosophical and normative foundations of international law. On the one hand, torture has been characterised as an international crime and international criminal responsibility for individuals could be applied to lift the immunity of individual perpetrators. On the other hand, international law defines torture as an official act and therefore the rationale that torture is committed by individuals, not abstract entities is hardly justified. A recent Supreme Court of Canada decision *Kazemi Estate v. Iran*²⁴⁰ is a testament to this dilemma and may serve as a useful starting point in the following discussion on the confusions and fragmentation that the concept of international criminal responsibility for individuals has brought into the international legal order.

4.4.1. The Supreme Court of Canada’s *Kazemi* Judgment: Clash of Rationales regarding Foreign Immunity for Torture in Civil Suits

The core legal issue in *Kazemi* is whether a foreign State and its officials can be sued in civil proceedings in Canada for acts of torture that took

²³⁸ ICC Statute, Preamble, see *supra* note 6.

²³⁹ Shaw, 2008, p. 197, see *supra* note 40.

²⁴⁰ Supreme Court of Canada, *Kazemi Estate v. Islamic Republic of Iran*, 2014 SCC 62, [2014] 3 S.C.R. 176, 10 October 2014 (*‘Kazemi’*) (<http://www.legal-tools.org/doc/ca8a2e/>).

place outside Canada. The key domestic law is the State Immunity Act²⁴¹ ('SIA'), and *Kazemi* raised important questions as to the interpretation of key provisions in SIA and its interaction with customary international law about immunity.

In *Kazemi*,²⁴² the applicant Stephan Hashemi sued Iran, its head of State, and two Iranian government officials on behalf of himself and his mother's estate for damages relating to the acts of torture that took place in Iran and had led to the death of his mother Zahra Kazemi. Both the torture and death took place in Iran. Hashemi instituted a civil suit in Canada and named Saeed Mortazavi (the Chief Public Prosecutor of Tehran) and Mohammad Bakhshi (the former Deputy Chief of Intelligence of the Evin Prison) together with Iran and its head of State as defendants. The defendants, unsurprisingly, brought a motion to dismiss based on State immunity.

Section 3(1) of SIA provides that "[e]xcept as provided by this Act, a foreign State is immune from the jurisdiction of any court in Canada". The applicant argued against the defendants' motion to dismiss both by relying on the exception provided in Section 6(a)²⁴³ of SIA and challenging the constitutionality of certain provisions of SIA.²⁴⁴ In applying SIA to *Kazemi*, the Supreme Court of Canada found it necessary to examine whether customary international law on foreign immunity should inform the interpretation of SIA and whether an exception to foreign immunity in domestic civil proceedings for individual violators of torture has crystallised as customary international law. The majority and dissenting opinion of the Court answered these two questions in the opposite ways.

4.4.1.1. The Majority Opinion

According to the majority opinion:

²⁴¹ State Immunity Act, RSC 1985, c S-18 ('SIA') (<http://www.legal-tools.org/doc/a8da4d/>).

²⁴² The following summary of facts and judicial history of the case is based on *Kazemi*, paras. 1–30, see *supra* note 240.

²⁴³ SIA, Section 6, see *supra* note 241. It provides that:

A foreign state is not immune from the jurisdiction of a court in any proceedings that relate to (a) any death or personal or bodily injury, or (b) any damage to or loss of property that occurs in Canada.

²⁴⁴ *Kazemi*, para. 13, see *supra* note 240.

An overarching question, which permeates almost all aspects of this case, is whether international law has created a mandatory universal civil jurisdiction in respect of claims of torture which would require States to open their national courts to the claims of victims of acts of torture that were committed outside their national boundaries.²⁴⁵

The answer to this question determines the following three issues: (1) if international law requires Canadian laws to be interpreted as implicitly including an exception to foreign immunity in civil proceedings in cases of torture; (2) if exception in Section 6(a) of SIA is applicable; and (3) if Mortazavi and Bakhshi are entitled to immunity under SIA as individual perpetrators of torture.²⁴⁶

As for the first issue, the majority found that “SIA is a complete codification of Canadian law [...] relat[ing] to State immunity from civil proceedings”²⁴⁷ and “reliance need not, and indeed cannot, be place on the common law, *jus cogens* norms or international law to carve out additional exceptions to immunity granted to foreign States pursuant to Section 3(1) of SIA”.²⁴⁸

As for the second issue, Section 6(a) of SIA provides that:

A foreign State is not immune from the jurisdiction of a court in any proceedings that relate to any death or personal or bodily injury [...] that occurs in Canada.

The majority found Section 6(a) inapplicable to *Kazemi* because “the impugned events, or the tort causing the personal injury or death, did not take place in Canada”.²⁴⁹ Although the words of Section 6(a) in a plain reading does not seem to rule out its applicability to scenarios where “the injury manifest itself in Canada, even where the acts causing the death or injury occurred outside Canada”,²⁵⁰ such an interpretation was not tenable because “[it] would put the foreign State’s decisions and actions in its own

²⁴⁵ *Ibid.*, para. 32.

²⁴⁶ *Ibid.*, paras. 33(1)–(3). The other two issues summarised in paragraphs 33(4)–(5) are not discussed in this chapter, as they are issues of Canadian constitutional law rather than international law.

²⁴⁷ *Ibid.*, para. 54.

²⁴⁸ *Ibid.*, para. 56.

²⁴⁹ *Ibid.*, para. 73.

²⁵⁰ *Ibid.*, para. 69.

territory directly under the scrutiny of Canada’s judiciary – the exact situation sovereign equality seeks to avoid”.²⁵¹

As for the third issue, the majority confirmed that “public officials, being necessary instruments of the State, are included in the term ‘government’ as used in SIA” and therefore “benefit from State immunity when acting in their official capacity”.²⁵² Given the “State-sanctioned or official nature of torture”,²⁵³ the alleged acts of torture committed by Mor-tazavi and Bakhshi are shielded under foreign immunity and therefore cannot be sued in Canadian civil courts.

4.4.1.2. The Dissenting Opinion

The dissenting Justice Abella did not challenge the majority opinion on the first two issues,²⁵⁴ but disagreed with the majority on the third issue on whether lower-level government officials are entitled to foreign immunity under SIA. Based on the wording of Section 2²⁵⁵ of SIA in which the definition of ‘foreign State’ makes no explicit reference to public officials except for the heads of State,²⁵⁶ Justice Abella found that:

At the very least, the silence creates an ambiguity as to whether SIA applies to lower-level officials. Resolving that ambiguity is assisted by reference to customary international law.²⁵⁷

²⁵¹ *Ibid.*, para. 70.

²⁵² *Ibid.*, para. 93.

²⁵³ *Ibid.*, para. 95.

²⁵⁴ The dissenting opinion did not touch upon the exception to immunity under Section 6(a) of SIA and found that SIA “only addresses the circumstances in which Canadian courts are procedurally barred from taking jurisdiction over a foreign state in proceedings outside the criminal context”, see *Kazemi*, para. 181, see *supra* note 240.

²⁵⁵ SIA, Section 2, see *supra* note 241. It provides that:

In this Act [...] foreign state includes: (a) any sovereign or other head of the foreign state or of any political subdivision of the foreign state while acting as such in a public capacity, (b) any government of the foreign State or of any political subdivision of the foreign state, including any of its departments, and any agency of the foreign state, and (c) any political subdivision of the foreign state; *political subdivision* means a province, state or other like political subdivision of a foreign state that is a federal state.

²⁵⁶ *Kazemi*, para. 184, see *supra* note 240.

²⁵⁷ *Ibid.*, para. 186 (internal reference omitted).

By citing academic commentaries, a Permanent Court of International Justice decision, an Inter-American Court of Human Rights decision, human rights treaties, United Nations General Assembly resolutions, and Commission on Human Rights reports,²⁵⁸ Justice Abella found that:

[A]n individual's right to a remedy against a State for violations of his or her human rights is now a recognised principle of international law.²⁵⁹

Despite acknowledging that international practice is equivocal about whether “State immunity denies victims of torture access to a civil remedy”,²⁶⁰ she determined the status of customary international law as follows:

[W]hile it can be said that customary international law permits States to recognise immunity for foreign officials, as evidenced in *Jones v. United Kingdom*, it also does not preclude a State from denying immunity for acts of torture, as exemplified in *Pinochet No. 3* and *Samantar II*.²⁶¹

Based on the reasoning that “customary international law no longer requires that foreign State officials who are alleged to have committed acts of torture be granted immunity *ratione materiae* from the jurisdiction of Canadian courts”,²⁶² Justice Abella opined that SIA should not apply to Mortazavi and Bakhshi to shield individual perpetrators of torture under foreign immunity.²⁶³

4.4.1.3. The Clash of Philosophy and Rationales

In *Kazemi*, the majority of the Court and the dissenting judge reached the opposite conclusions regarding foreign immunity of individual perpetrators of torture in Canadian civil courts. But their contrary conclusions were based on the consensus about both the international legal characterisation of torture and relevant facts of the case. Both the majority and the dissenting opinions confirmed that torture constitutes a violation of *ius*

²⁵⁸ *Ibid.*, paras. 190–98.

²⁵⁹ *Ibid.*, para. 199.

²⁶⁰ *Ibid.*, para. 200.

²⁶¹ *Ibid.*, para. 211.

²⁶² *Ibid.*, para. 228.

²⁶³ *Ibid.*, para. 231.

cogens in international law²⁶⁴ and that the alleged acts committed by Mor-tazavi and Bakhshi were carried out in their official capacity.²⁶⁵

Therefore, the opposite positions taken demonstrated a clear clash of legal philosophy and rationales between the majority and the dissenting judge. The clash of philosophy first appeared as to the role of customary international law in statutory interpretation. The statutory language in Section 2 of SIA is admittedly not entirely unequivocal, as it does not explicitly refer to public officials other than the heads of State. This left the Court with some interpretative space. The process of interpretation certainly reveals legal philosophy of the interpreters, although interpreters are always careful to mask their philosophy behind seemingly neutral techniques of statutory/treaty interpretation. In *Kazemi*, the majority relied on the techniques of contextual and teleological interpretation to find that “public officials must be included in the meaning of ‘government’ in section 2 of SIA”.²⁶⁶ In contrast, the dissenting judge also employed the technique of contextualised interpretation – together with a reference to the legislative history – to reach the contrary conclusion.²⁶⁷ Here the real conflict is not about the interpretative techniques, because they “are not a set of simple precepts that can be applied to produce a scientifically verifiable result”²⁶⁸ in the first place and legal systems seldom stipulate a clear hierarchy among different interpretative techniques. The real clash points to the result of interpretation and the fundamental perception of ‘individual and abstract entity’. According to the majority:

The reality is that governmental decisions are carried out by a State’s servants and agents. States are abstract entities that can only act through individuals.²⁶⁹

But the dissenting judge aims to detach individuals from the State by referring to the legislative history that stated that “this proposed Act

²⁶⁴ *Ibid.*, paras. 47 (majority), 172 (dissenting).

²⁶⁵ *Ibid.*, paras. 94 (majority), 173 (dissenting).

²⁶⁶ *Ibid.*, para. 85.

²⁶⁷ *Ibid.*, para. 184.

²⁶⁸ Richard Gardiner, *Treaty Interpretation*, 2nd edition, Oxford University Press, Oxford, 2015, p. 7.

²⁶⁹ *Kazemi*, para. 85, see *supra* note 240.

deals with States, not with individuals”.²⁷⁰ It is the clash of philosophy on the relation between individual and abstract entity – the question that gave birth to ICRI yet still haunts international law to this very day – that resulted in the opposite findings on whether customary international law should inform the interpretation of SIA in *Kazemi*.

The clash of philosophy is also revealed in the contrary understandings of the status of customary international law regarding foreign immunity of individual torturers in domestic civil proceedings. The majority of the Court and the dissenting judge approached this issue with different legal philosophies. Based on evidence of State practice and *opinio juris* that Justice Abella provided in her dissenting opinion, Justice LeBel on behalf of the majority of the Court stated:

As far as the right to reparation is concerned, I find no evidence in the cases reviewed by my colleague [Justice Abella] demonstrating the existence of a rule of customary international law to the effect that courts have universal civil jurisdiction to hear civil cases alleging acts in violation of *jus cogens*. On the contrary, most of these cases have affirmed State immunity in civil proceedings alleging acts of torture.²⁷¹

The dissenting judge, on the other hand, characterised the status of customary international law as:

while it can be said that customary international law permits States to recognise immunity for foreign officials, as evidenced in *Jones v. United Kingdom*, it also does not preclude a State from denying immunity for acts of torture, as exemplified in *Pinochet No. 3* and *Samantar II*.²⁷²

The majority and the dissenting judge employed drastically different philosophies to approach customary international law. The majority approached customary international law with a traditional positivist philosophy, requiring widespread State practice and *opinio juris* to identify

²⁷⁰ *Minutes of Proceedings and Evidence of the Standing Committee on Justice and Legal Affairs*, No. 60, 1st session, 32nd parliament, 4 February 1982, at p. 32, cited in *Kazemi*, para. 184, see *supra* note 240.

²⁷¹ *Ibid.*, para. 101.

²⁷² *Ibid.*, para. 211.

customary rules.²⁷³ The dissenting judge, however, emphasised the evolutionary process of customary international law, arguing that there is a “palpable, albeit slow trend in international jurisprudence”²⁷⁴ to lift foreign immunity for individual perpetrators of torture.

This clash of philosophy in *Kazemi* strikingly resembles that in the Nuremberg trial regarding the existence of ICRI in customary international law. In both cases, evidence of State practice and *opinio juris* were severely lacking, yet there were judicial efforts to find customary rules despite the status of State practice and *opinio juris*. The ultimate rationale shared by the Nuremberg Tribunal and the dissenting opinion in *Kazemi* is that if there was no law that fits, then new law should be made. In this way, the issue of foreign immunity for torture signifies another critical point in the transformation of international law, and the rationales of both sides need to be scrutinised.

4.4.2. The Dilemma of Fragmentation: *Jus Cogens* Prohibition of Torture v. Customary International Law on Immunity

The legal dilemma of foreign immunity for individual perpetrators of torture presents strong tensions in the transformation of international law. On the one hand, prohibition of torture is deemed as *jus cogens* in international law. Acts of torture violate legal goods that are fundamental to the international community as a whole. On the other hand, foreign immunity has been a time-honoured rule of customary international law based on the equality of States.²⁷⁵ The conflicts between *jus cogens* prohibition of torture and customary international law on immunity can be seen as a proxy for the deep conflicts between international law’s two identities – international law as the law of the international community versus international law as inter-State law.

While the new identity of international law, as the law of the international community, has been increasingly emphasised by international

²⁷³ This traditional positivist approach is reflected in Article 38 of the ICJ Statute which defines customary international law as “evidence of a general practice accepted as law”.

²⁷⁴ *Kazemi*, para. 208, see *supra* note 240.

²⁷⁵ For an analysis of the relation between State equality and the origin of State immunity in international law, see Ernest K. Bankas, *The State Immunity Controversies in International Law: Private Suits Against Sovereign States in Domestic Courts*, Springer, Berlin, 2005, pp. 1–12.

lawyers in the recent decades, the old identity of international law, as inter-State law, has not been abandoned. Rules and principles based on the old identity of international law, such as State immunity, are not automatically annulled simply because *jus cogens* – legal norms protecting the fundamental interests of the international community as a whole – are involved. As the ICJ has reasoned in *Jurisdictional Immunities of the State*:

To the extent that it is argued that no rule which is not of the status of *jus cogens* may be applied if to do so would hinder the enforcement of a *jus cogens* rule, even in the absence of a direct conflict, the Court sees no basis for such a proposition. A *jus cogens* rule is one from which no derogation is permitted but the rules which determine the scope and extent of jurisdiction and when that jurisdiction may be exercised do not derogate from those substantive rules which possess *jus cogens* status, nor is there anything inherent in the concept of *jus cogens* which would require their modification or would displace their application.²⁷⁶

Given the well-established customary international law on State immunity, it is plausible to reason – as the majority of the Supreme Court of Canada did in *Kazemi* – that the scope of State immunity should extend to public officials for their acts on behalf of the State. As the majority aptly pointed out in *Kazemi*,

The reality is that governmental decisions are carried out by a State’s servants and agents. States are abstract entities that can only act through individuals.²⁷⁷

The above dictum conceptualises a unitary identity of individuals and the abstract entity which is drastically different from the perception in the Nuremberg dictum that “crimes against international law are committed by men, not by abstract entities”. The unitary identity is apparently more plausible than the Nuremberg perception in cases of torture, because in the international legal order torture is defined as an official act of the State. According to Article 1 of the Convention Against Torture, torture is defined as:

any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such pur-

²⁷⁶ *Jurisdictional Immunities of the State*, para. 95, see *supra* note 143.

²⁷⁷ *Kazemi*, para. 85, see *supra* note 240.

poses as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, *when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity* (emphasis added).

Although this definition “is without prejudice to any international instrument or national legislation which does or may contain provisions of wider application”,²⁷⁸ it is without a doubt the most widely accepted definition of torture in international law and the most important source of States’ international obligation to prevent and punish acts of torture. The involvement of State authority via the hands of “public official[s] or other person[s] acting in an official capacity” is an essential component to the grave “evilness” of torture, because “torture, as the most serious violation of the human right to personal integrity, presupposes a situation of powerlessness of the victim which usually means deprivation of personal liberty”.²⁷⁹ As was eloquently pointed out in the majority opinion of *Kazemi*, “it is the State-sanctioned or official nature of torture that makes it such a despicable crime”.²⁸⁰ Therefore, it makes sense to portray a unitary picture of individual perpetrators and the State in cases of torture: the State tortures through individuals and individual perpetrators act on behalf of the State.

However, there have been legal attempts of detaching individuals from the State in order to lift their foreign immunity for acts of torture. In *Yousuf v. Samantar*²⁸¹ before the United States Fourth Circuit, one of the most important and well-cited domestic decision that denied foreign immunity to individual perpetrators of torture in civil suits,²⁸² it was con-

²⁷⁸ CAT, Article 1(2), see *supra* note 23.

²⁷⁹ Manfred Nowak and Elizabeth McArthur, *The United Nations Convention Against Torture: A Commentary*, Oxford University Press, Oxford, 2008, p. 76.

²⁸⁰ *Kazemi*, para. 95, see *supra* note 240.

²⁸¹ United States Court of Appeals for the Fourth Circuit, *Yousuf v. Samantar*, 2 November 2012, 699 F.3d 763 (4th Cir. 2012) (*‘Samantar’*).

²⁸² *Samantar* was also cited and relied upon by Justice Abella in her dissenting opinion of *Kazemi*, see *Kazemi*, paras. 201–202, see *supra* note 240.

cluded that “under international and domestic law, officials from other countries are not entitled to foreign official immunity for *jus cogens* violations, even if the acts were performed in the defendant’s official capacity”.²⁸³ The reasoning for such a conclusion needs particular attention. According to the Fourth Circuit:

Unlike private acts that do not come within the scope of foreign official immunity, *jus cogens* violations may well be committed under color of law and, in that sense, constitute acts performed in the course of the foreign official’s employment by the Sovereign. However, as a matter of international and domestic law, *jus cogens* violations are, by definition, acts that are not officially authorised by the Sovereign.²⁸⁴

The rationale, simply put, is that *jus cogens* violations such as torture cannot be perceived as the acts of, or authorised by, the States because international law has made such acts illegal. As Justice Abella has succinctly summarised in her dissenting opinion of *Kazemi*, the philosophical foundation and rationale behind the decision of *Samantar* are essentially that “[b]ecause *jus cogens* violations are not legitimate State acts, the performance of such an act does not qualify as an ‘official act’ justifying immunity *ratione materiae*”.²⁸⁵

The purpose of this argument is to detach the identity of individual perpetrators from the State by characterising the acts in question as ‘unofficial’ ergo purely private acts in international law. Such an argument is only a present-time variation of the Nuremberg dictum that international crimes are committed by “men, not abstract entities”. Therefore, the argument that torture as *jus cogens* violations of international law cannot be an official act of the State²⁸⁶ suffers equally if not more from the conceptual weakness behind the Nuremberg dictum. As Part II of this chapter has demonstrated, to detach the identity of individual perpetrators of international crimes from States would be to turn a blind eye to the paramount

²⁸³ *Samantar*, p. 777, see *supra* note 281.

²⁸⁴ *Ibid.*, pp. 775–76.

²⁸⁵ *Kazemi*, para. 201, see *supra* note 240.

²⁸⁶ Variations of this argument have been more frequently employed by domestic courts in dealing with foreign immunity of individual perpetrators of *jus cogens* violations in criminal proceedings, see Weatherall, 2015, pp. 303–306, see *supra* note 121.

role of abstract entities and collective criminalities in the commission of the most heinous violations of international law. Torture is by definition an act of State agents in their official capacity. It would be “manifestly absurd and unreasonable”²⁸⁷ to interpret torture as an unofficial act irrelevant to the State simply because the issue of immunity is involved. Such an interpretation – as was employed in *Samantar* – is not only wrong but would also “constitute a remedy more harmful than the wrong it was intended to remedy”,²⁸⁸ because it eliminates the possibility of asserting State responsibility for torture by denying torture as the acts of State. As Nina Jørgensen has eloquently put, “[j]ust as individuals are unable to hide their guilt behind the State, the State should not be permitted to hide its guilt behind the punishment of individuals”.²⁸⁹ Therefore, the argument that torture cannot be official acts of the State must be rejected. It is inherently flawed to assert that *jus cogens* violations cannot be official acts of the State, because it presupposes that States do not violate peremptory norms of international law. The reality, however, is that States *do* violate international law. And it is precisely because violations of certain norms severely threaten the international community as a whole that these norms are defined as *jus cogens* in the first place.

The line of arguments in *Samantar* and other like-minded decision-makers have demonstrated a dangerous trend of legal thinking which links the most severe violations of international law exclusively to individuals and denounces the role of collective entities in such violations. This category of ‘most severe violations of international law’ is usually characterised as ‘international crimes’ or ‘*jus cogens* violations’. In international legal theory, ‘international crimes’ and ‘*jus cogens* violations’ are usually perceived as mutually definitional or highly overlapping concepts. In practice, the two concepts are generally treated as interchangeable.²⁹⁰

²⁸⁷ According to Articles 31 and 32 of VCLT, an interpretation would not be acceptable when it is “manifestly absurd or unreasonable” even if the interpretation results from the application of the general rule of treaty interpretation, see *supra* note 13.

²⁸⁸ Marina Spinedi, “State Responsibility *v.* Individual Responsibility for International Crimes: *Tertium Non Datur?*”, in *European Journal of International Law*, 2002, vol. 13, no. 4, p. 897.

²⁸⁹ Jørgensen, 2000, p. 155, see *supra* note 216.

²⁹⁰ Weatherall, 2015, pp. 270-1, see *supra* note 121. “Although it has been suggested that *jus cogens* constitutes a broader legal category than that of international crimes, jurisprudence has not borne out of this position in practice”.

Therefore, for the proponents of a universal (criminal and civil) jurisdiction on the violations of peremptory norms of international law, it is convenient to transplant the Nuremberg dictum and argue that *jus cogens* violations of international law are committed by individuals but not abstract entities. Some commentators have even argued that individuals are “the primary subject of peremptory norms in international law” and “the sole bearer of criminal responsibility for violations of *jus cogens*”.²⁹¹ Such a line of arguments must be rejected for ignoring the roles of collective entities and their collective criminality in the conceptualisation of international crimes and ICRI. As the example of torture has clearly demonstrated, the involvement of abstract entities such as States is usually present and sometimes even required for violations of peremptory norms of international law. Therefore, violations of *jus cogens* in international law can also be legally perceived as the acts of abstract entities (such as States) and incur their responsibility under international law.

With regard to foreign immunity of the individual perpetrators of torture, there is clearly a ‘conflict’, that is, “a situation where two rules or principles suggest different ways of dealing with a problem”.²⁹² One approach suggests that immunity be lifted based on the significant interests of the international community protected by *jus cogens*, whereas the other approach relies on State immunity to uphold the immunity of acts perpetrated on behalf of the State. There is no middle ground between these two positions. As *Samantar* and like-minded jurisprudence have demonstrated, attempts to reconcile these two irreconcilable positions would inevitably lead to the absurd interpretation that torture is not an official act of State.

Therefore, international law is fragmented as regards foreign immunity of individual perpetrators of torture. The fragmentation leads to a *non liquet* in international law since it cannot be convincingly asserted that international law commands either the grant or the lift of immunity under such circumstances. This means whatever domestic courts decide to do – granting or lifting foreign immunity of individual torturers in domestic suits – is their own choice rather than, despite what they usually claim, the command of international law. The status of fragmentation is even more highlighted when domestic courts of the same State consciously

²⁹¹ *Ibid.*, p. 266.

²⁹² Fragmentation of International Law, para. 25, see *supra* note 120.

choose to lift foreign immunity of the individual perpetrators of torture in criminal yet not civil proceedings. For example, in *Pinochet*,²⁹³ the United Kingdom House of Lords confirmed that immunity does not apply for acts of torture in criminal proceedings because “*jus cogens* violations could not be considered ‘official acts’ under international law”.²⁹⁴ However, in the civil proceedings of *Jones*,²⁹⁵ the House of Lords drew the opposite conclusion to uphold immunity *ratione materiae* of the alleged acts of torture. In *Jones* Lord Bingham stated that “it is [...] clear that a civil action against individual torturers based on acts of official torture does indirectly implead the State since their acts are attributable to it”.²⁹⁶

There is no basis in international law for domestic courts to distinguish civil and criminal cases and treat the issue of foreign immunity for torture differently. As the ILC Special Rapporteur Roman Anatolevich Kolodkin noted in his Second report on immunity of State officials from foreign criminal jurisdiction:

[...] as to whether it can in principle be said that the consequences for immunity of prohibiting grave international crimes by *jus cogens* norms may be different depending on what kind of jurisdiction is being exercised – civil or criminal[,] [n]either practice nor logic appear to show that such consequences would differ.²⁹⁷

It is the choice of domestic decision-makers to decide if foreign immunity is to be upheld. An artificial distinction between civil and criminal proceedings cannot sustain as a convincing international law argument, because “[i]f a peremptory norm prevails over immunity, then immunity from which jurisdiction – civil or criminal – is of no account. And vice versa”.²⁹⁸ It is clear that States are making different and often incon-

²⁹³ UK House of Lords, *Regina v. Bow Street Metropolitan Stipendiary Magistrate and Others, Ex parte Pinochet Ugarte (No. 3)*, 24 March 1999, [2000] 1 AC 147 (<http://www.legal-tools.org/doc/c57811/>).

²⁹⁴ Weatherall, 2015, p. 303, see *supra* note 121.

²⁹⁵ UK House of Lords, *Jones v. Ministry of the Interior of Saudi Arabia and others*, 14 June 2006, [2006] UKHL 26 (<http://www.legal-tools.org/doc/dd4908/>).

²⁹⁶ *Ibid.*, para. 31.

²⁹⁷ Second report on immunity of State officials from foreign criminal jurisdiction, UN Doc. A/CN.4/631, 10 June 2010, p. 41, para. 66 (<http://www.legal-tools.org/doc/f43326/>).

²⁹⁸ *Ibid.*, footnote 159.

sistent choices between the old and new identity of international law.²⁹⁹ The status of fragmentation is the reality of today's international legal order and is here to stay as long as inter-State structures remain in the world system. As for foreign immunity of individual torturers, it is the choice of domestic decision-makers rather than the implausible perception that torture is committed by "men, not abstract entities" that leads to the lift of immunity.

4.4.3. Stuck in the Transformation: The Tension between States and the 'International Community as a Whole'

The transformation of international law seems to promise a linear process: international law transforms from inter-State law to the law of the international community, and at the end 'international community as a whole' shall replace sovereign States as the basic structure of the world system. However, such a linear perception must be rejected. If the 'international community as a whole' in its complete form only exists after sovereign States cease to exist, then the 'international community' would lose its 'international' character. If structures of the "State system"³⁰⁰ no longer exist, 'international' law would lose its inter-State foundations and become a body of 'global domestic law'. Therefore, the continuing existence of international law requires itself to remain stuck in the transformation in which States and the 'international community as a whole' coexist and interact with one another. This is also how the 'international community as a whole' is conceptualised in contemporary international law.

The definition of *jus cogens* in international law might be the most important point of reference about the interaction between States and the 'international community as a whole'. According to Article 53 of the VCLT:

²⁹⁹ Another example of inconsistent choices that is analogous with the civil-criminal distinction is the distinction between immunity *ratione personae* and immunity *ratione materiae*. In *Samantar*, for example, the Fourth Circuit determined that "American courts have generally [...] conclud[ed] that *jus cogens* violations are not legitimate official acts and therefore do not merit foreign official immunity but still recognizing that head-of-state immunity, based on status, is of an absolute nature and applies even against *jus cogens* claims", *Samantar*, p. 776, see *supra* note 281.

³⁰⁰ Henkin, 1995, pp. 7–25, see *supra* note 49.

a peremptory norm of general international law (*jus cogens*) is a norm accepted and recognised by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.

This definition links the ‘international community as a whole’ with States by prescribing the acceptance and recognition of the ‘international community of States as a whole’ as the key normative criterion for identifying *jus cogens*. The ‘of States’ qualification stresses the central role of sovereign States in conceptualising the ‘international community as a whole’ and reinforces “the traditional tenets of international law, especially the primary role of States in the production of international rules, including rules of *jus cogens*”.³⁰¹ But on the other hand, the concept of ‘international community as a whole’ should not equalise the sum of all sovereign States, because doing so would render the idea of ‘international community as a whole’ redundant. As the Chairman of the Drafting Committee of VCLT clarified on 21 May 1968,

by inserting the words “as a whole” [...] the Drafting Committee had wished to stress that there was no question of requiring a rule to be accepted and recognised as peremptory by all States. It would be enough if a very large majority did so; that would mean that, if one State in isolation refused to accept the peremptory character of a rule, or if that State was supported by a very small number of States, the acceptance and recognition of the peremptory character of the rule by the international community as a whole would not be affected.³⁰²

This explanation seems to introduce a quantitative criterion: ‘international community as a whole’ needs to include ‘a very large majority’ of States. There has also been suggestion of a qualitative criterion that the ‘international community as a whole’ needs to include “not only by some particular group of States, even if it constitutes a majority, but by all the

³⁰¹ Ragazzi, 2002, p. 55, see *supra* note 132.

³⁰² Official Records of the United Nations Conference on the Law of Treaties, First Session (Summary records of the plenary meetings and of the meetings of the Committee of the Whole), 80th meeting of the Committee of the Whole, UN Doc. A/CONF.39/C.1/SR.80, 21 May 1968, p. 472, para. 12.

essential components of the international community”³⁰³ such as “western and eastern States, developed and developing countries, and States of different continents”.³⁰⁴

The essence of *jus cogens* is to create international norms binding on all the actors and participants in the international legal order in order to protect certain fundamentally important interests of the ‘international community as a whole’. Therefore, the identification of peremptory norms must go beyond traditional positivism to require the consent of all the States. But at the same time, traditional foundations of international law based on State consent is respected, as the consent of a (both qualitative and quantitative) majority of States is required to identify the existence of *jus cogens*.

Here the question arises as to which and how many States are qualified to represent the ‘international community as a whole’ – or in Prosper Weil’s words “who or what is this community”³⁰⁵ – in the making and enforcement of international law. Because there is no answer to this question, there is a real danger that the concept of the ‘international community as a whole’ might be exploited as a self-serving rhetoric to mask hegemony and abuse of power in international relations. As Weil has warned as early as 1978:

since a State’s membership in this club of “essential components” [of the international community] is not made conspicuous by any particular distinguishing marks – be they geographical, ideological, economic, or whatever – what must happen in the end is that a number of States (not necessarily in the majority) will usurp an exclusive right of membership and bar entry to the others, who will find themselves not only blackballed but forced to accept the supernormativity of rules they were perhaps not even prepared to recognise as ordinary norms.³⁰⁶

³⁰³ Yearbook of the International Law Commission 1976, vol. 2, part II, UN Doc. A/CN.4/SER.A/1976/Add.1 (Part 2), p. 119, para. 61 (emphasis added) (<http://www.legal-tools.org/doc/75f3bc/>).

³⁰⁴ Robert Ago, *Droit des traités à la lumière de la Convention de Vienne*, in *Recueil des Cours*, 1971, vol. 134, p. 323.

³⁰⁵ Weil, 1983, p. 426, see *supra* note 63.

³⁰⁶ *Ibid.*, p. 427.

The paradox of *jus cogens* lies in the conflicts between its mandate to create universal rules beyond strict positivism and the traditional philosophical foundation of international law that State consent is the ultimate source of international law's normativity. When the principal sources of international law, treaty and custom, still reflect the philosophy of traditional positivism and its requirement of State consent, it would be hard to logically explain where a peremptory norm comes from if some States have not consented to it. It would be especially hard to justify – without every State's consent – how a treaty provision can stipulate the mechanism of *jus cogens* to prescribe universally non-derogatory binding norms without violating the general principle that “[a] treaty does not create either obligations or rights for a third State without its consent”.³⁰⁷ Therefore, although the concept of *jus cogens* seems to escape the hold of traditional positivism by its definition and links with the ‘international community as a whole’, its existence depends heavily on the traditional positivist philosophical foundations of international law. As Martti Koskeniemi elegantly put:

Initially, *jus cogens* seems to be descending, non-consensualist. It seems to bind States irrespective of their consent. But a law which would make no reference to what States have consented to would seem to collapse into a natural morality. It would appear as an indemonstrable utopia – a matter of subjective, political opinion. Hence the reference to recognition by “the international community of States”. To that extent, *jus cogens* becomes ascending, consensualist. Moreover, every State's subjective consent seems necessary as [Article 53 of VCLT] speaks of the community as a whole and not just some representative part of it. Indeed, any other position would seem to violate sovereign equality.³⁰⁸

In order to make this conceptual fallacy behind *jus cogens* appear less blatant, the identification of peremptory norms has shifted from a

³⁰⁷ VCLT, Article 34, see *supra* note 13. Alfred Verdross stressed that “[a]t first glance all treaties encroaching upon the rights of third States seem to be contrary to *jus cogens*. In fact such treaties are illegal if the third States do not give their consent”. Verdross, 1966, p. 60, see *supra* note 120.

³⁰⁸ Koskeniemi, 2005, pp. 323–24, see *supra* note 109 (internal citation omitted).

test-based process to a value-based approach.³⁰⁹ Instead of asking what norms have indeed been accepted by all the States as non-derogatory, the identification of *jus cogens* becomes a search for moral values and ethical principles. Instead of taking on the difficult task of “find[ing] the practice and *opinio juris* that has given any particular content to [*jus cogens*]”,³¹⁰ international lawyers look elsewhere for “fundamental values”³¹¹ or “fundamental ethical principles”³¹² to justify their identification of peremptory norms.

Such a value-based approach cannot solve the conceptual problems behind *jus cogens*, and instead only complicates it. The first problem is that there are many values that can be deemed as fundamental to the international legal order. According to different writers, these fundamental values may include, but are not necessarily limited to, State sovereignty (and its corollaries such as State equality, non-intervention, territorial integrity and so on),³¹³ non-use of force in international relations,³¹⁴ international peace and security,³¹⁵ humanity,³¹⁶ human rights,³¹⁷ and human dignity.³¹⁸ In international practice, as Ragazzi has observed:

³⁰⁹ Such a swift to value-based approach is also reflected in the ICJ’s identification of obligations *erga omnes* in international law, see Ragazzi, 2002, pp. 43–73, see *supra* note 132.

³¹⁰ Henkin, 1995, p. 39, see *supra* note 49.

³¹¹ *Ibid.*

³¹² Lepard, 2010, p. 244, see *supra* note 135.

³¹³ Henkin characterised these concepts as a part of “constitutional international law” whose “constitutional” normative character is derived directly from the international system itself. Henkin, 1995, pp. 31–32, see *supra* note 49. See also Declaration on Principles of International Law, 1970, see *supra* note 233.

³¹⁴ See Cassese, 2005, p. 202, see *supra* note 3; Oscar Schachter, *International Law in Theory and Practice*, Martinus Nijhoff Publishers, 1991, p. 343; Henkin, 1995, pp. 38–39, see *supra* note 49; Ian Brownlie, *Principles of Public International Law*, 7th edition, Oxford University Press, Oxford, 2008, pp. 510–11.

³¹⁵ See Verdross, 1966, p. 60, see *supra* note 120; Mahmoud Cherif Bassiouni, “International Crimes: *Jus Cogens* and *Obligatio Erga Omnes*”, in *Law and Contemporary Problems*, 1996, vol. 59, no. 4, pp. 69–70.

³¹⁶ *Ibid.*; International Court of Justice, *Corfu Channel (United Kingdom of Great Britain and Northern Ireland v. Albania)*, Judgment, 9 April 1949, p. 22 (<http://www.legal-tools.org/doc/861864/>).

³¹⁷ See Ragazzi, 2002, p. 48, see *supra* note 132.

³¹⁸ Myres S. McDougal, *International Law, Power, and Policy: A Contemporary Conception*, in *Recueil des Cours*, 1953, vol. 82, pp. 165–91.

[t]he ICJ, and some of its members in their individual opinions, have referred to *jus cogens* in the context of areas of the law as varied as the rights of passage through a territory, the protection of fundamental human rights, humanitarian law, the law of the sea, self-determination, and the prohibition of the unlawful use of force.³¹⁹

Under this value-based (rather than consent-based) approach to *jus cogens*, the identification of peremptory norms becomes dangerously subjective and uncertain. As Birgit Schlütter reminded us:

[t]hough international law is not a neutral law, absent any value judgments or value-based norms and principles, value judgments alone do not provide the hard and fast and, above all, revisable basis for the formation of legal norms.³²⁰

The existence of *jus cogens* depends on the acceptance and recognition of the ‘international community as a whole’, and States will always attempt to identify peremptory norms on behalf of the international community by claiming values that fit their interests to be fundamental. It is not unimaginable that in the conflict between two States, both States can claim certain fundamental values and accuse the other of violating *jus cogens*. In scenarios like this, the ‘international community as a whole’ ends up being “reduced to a convenient term of art”³²¹ that are doomed to be exploited in subjective, self-serving, and opportunist manners.

The value-based approach to *jus cogens* has a second problem: although States can hardly object to certain norms being pronounced as *jus cogens* because of the “unimpeachable moral concerns”³²² behind these norms, their commitment to the enforcement of peremptory norms is not necessarily prioritised over other legal and political considerations.

Prohibition of torture is an apt example. On the one hand, it is hardly possible for States to oppose to identifying torture – one of the most heinous and severe violation of human dignity – as violation of *jus cogens* in international law. But on the other hand, as *Kazemi* and the majority of

³¹⁹ Ragazzi, 2002, p. 46, see *supra* note 132.

³²⁰ Birgit Schlütter, *Developments in Customary International Law: Theory and the Practice of the International Court of Justice and the International Ad Hoc Tribunals for Rwanda and Yugoslavia*, Martinus Nijhoff Publishers, 2010, p. 58.

³²¹ Weil, 1983, p. 430, see *supra* note 63.

³²² *Ibid.*, p. 424.

international practice at the present time show,³²³ domestic decision-makers do not feel that the enforcement of *jus cogens* in the sense of providing a civil remedy to victims of torture must be prioritised over the consideration of State immunity. As the majority opinion of *Kazemi* made clear, the Court's decision to "give[] priority to a foreign State's immunity over civil redress for citizens who have been tortured abroad" does not indicate that "Canada has abandoned its commitment to the universal prohibition of torture".³²⁴ While "Canada does not condone torture, nor are Canadian officials permitted to carry out acts of torture",³²⁵ the policy choice of prioritising foreign immunity is "an indication of what principles Parliament has chosen to promote given Canada's role and that of its government in the international community".³²⁶

In deciding whether the immunity is granted to violations of *jus cogens* in which the interests of the 'international community as a whole' is at stake, it is also reasonable and legitimate for a State to take into account consequences of its decision to inter-State relations. The consequences to inter-State relations are carefully evaluated even when domestic courts decide to lift the immunity. For example, Lord Phillips who favoured lifting of immunity in the civil proceedings of *Jones* reasoned that:

If civil proceedings are brought against individuals for acts of torture in circumstances where the State is immune from suit *ratione personae*, there can be no suggestion that the State is vicariously liable. It is the personal responsibility of the individuals, not that of the State, which is in issue. The State is not indirectly impleaded by the proceedings.³²⁷

Once again, the 'international community as a whole' does not have the authority to triumph the traditional State-oriented foundations of international law. At the present time, it is still primarily the States and their

³²³ See European Court of Human Rights, *Jones and Others v. The United Kingdom*, Judgment, 14 January 2014, applications nos. 34356/06 and 40528/06, para. 34 (<http://www.legal-tools.org/doc/7307f8/>).

³²⁴ *Kazemi*, para. 46, see *supra* note 240.

³²⁵ *Ibid.*, para. 53.

³²⁶ *Ibid.*, para. 46.

³²⁷ UK Supreme Court of Judicature, Court of Appeal, *Jones v. Ministry of the Interior of Saudi Arabia and Lieutenant Colonel Abdul Aziz*, Judgment, 28 October 2004, [2004] EWCA Civ 1394, para. 128 (<http://www.legal-tools.org/doc/6de5e5/>).

own decisions that are shaping the concept of the ‘international community as a whole’, and “[t]he question of if and to what extent national law should be trumped by a peremptory norm of international law would depend on a careful weighing of all the interests affected”.³²⁸ At the end of the day, it is States that call the shots.

4.5. Concluding Remarks

The international legal order has witnessed an ongoing transformation: States cease to be the exclusive subjects in international law, and the dependence of international law’s legitimacy on State consent has loosened to some extent. Since the Nuremberg trials, the concept of international criminal responsibility for individuals has played a significant part in this foundational transformation by propelling the pluralisation of subjects in the international legal order. Moreover, it helped develop legal mechanisms to punish the most severe violations of international law, and materialise the philosophical dimension of international law as the law of the international community as a whole.

As international criminal responsibility for individuals has firmly established as a principle of international criminal law in particular and public international law in general, it is high time that its philosophical foundations and practical implications be carefully evaluated.

The dictum that “crimes against international law are committed by men, not by abstract entities”, which once provided a legitimising foundation of international criminal responsibility for individuals in the “decisive and rare legislative moment”³²⁹ in the Nuremberg trial, is problematic and has led to some unconvincing and undesirable interpretation of international law. The most important legacy of the Nuremberg trial is establishing that international law can impose responsibility directly on the individual perpetrators of international crimes by introducing international criminal responsibility for individuals to the international legal order. But it would be both wrong and unwise to exclude the involvement of abstract

³²⁸ Erika de Wet, “The Prohibition of Torture as an International Norm of *Jus Cogens* and Its Implications for National and Customary Law”, in *European Journal of International Law*, 2004, vol. 15, no. 1, p. 121.

³²⁹ Mettraux, 2011, p. 7, see *supra* note 84.

entities and collective criminality from the commission of international crimes.

The element of collective criminality is inherent in the concept of international criminal responsibility for individuals. In most cases, international crimes are committed by abstract entities like States as much as (if not more) by the individual perpetrators. Both the conceptualisation of international crimes and the modes of liability reflect the inseparable intertwinement between individual guilt and collective criminality and acknowledge the essential and pervasive role of abstract entities in the commission of international crimes. While individual criminal responsibility should remain a foundational principle of international criminal law, international criminal responsibility for collective system should be developed in the international legal order.

While international law has been increasingly emphasised as the law of the international community, its traditional identity of inter-State law remains important. The set of concepts and mechanisms that stress the community dimension of the international legal order – *jus cogens*, international crimes, and international criminal responsibility for individuals – should not mislead us into believing that the transformation of international law would or should end with the ‘international community as a whole’ or individuals replacing sovereign States as the only structural and philosophical foundation of the international legal order.

International Criminal Responsibility as a Founding Principle of International Criminal Law

Javier Dondé-Matute*

5.1. Introduction

The notion of international criminal responsibility is what makes international criminal law work. The possibility of holding individuals accountable for international law violations requires examining the acts and the circumstances which are necessary for such accountability. These questions are answered in national jurisdictions by criminal law. Since international criminal responsibility is the starting point for all these questions, it can be affirmed that it is a founding principle of international criminal law.

The rules of international criminal law establish the conditions by which international criminal responsibility can be imposed and, conversely, international criminal responsibility sets out the conditions under which international criminal law rules exist.

In this chapter, the previous statement will be explained and arguments will be presented to uphold this proposition. It will be argued that international criminal responsibility has its historical origin at the Nuremberg trials, and once it materialised, it created a need to generate rules of international criminal law. In turn, this new concept can be distinguished from State responsibility and national criminal responsibility. This is a fundamental part of the argument because it could be asserted that international criminal responsibility derives from these previously conceived forms of accountability. If, however, they are clearly distinguished, then the case for fundamental principle becomes more credible.

* **Javier Dondé-Matute** is Research Professor at the National Institute of Criminal Sciences, Mexico. He holds a Ph.D. from the University of Aberdeen. He is a member of the National Research System Level II, National Council for Science and Technology (CONACYT).

Once these distinctions are explained, a concept and definition of international criminal responsibility will be suggested. First, this proposal will have a formal and material perspective. Second, the elements that make up this new concept will be described, mainly, the culpability requirement and the group element.

To prove that international criminal responsibility is a founding principle of international criminal law, two examples will be provided: the mental element as it is understood in the Rome Statute, and massive violence as it pertains to international crimes.

Before moving on, however, a note on methodology is necessary. This chapter is normative. This means that the nature and elements of international criminal responsibility will be derived from positive law. This does not mean that this is based on pure theory of law. Nevertheless, it does mean that an inductive method will be used to identify international criminal responsibility as a general principle of law.¹ Additionally, the Rome Statute of the International Criminal Court ('ICC') will be the basis of this inquiry. It could be argued that international criminal law includes other sources of law, including not only treaties but also customary international law. However, the Rome Statute is a reflection of earlier developments in this area since the inception of the International Criminal Tribunal for the former Yugoslavia ('ICTY').²

5.2. The Nuremberg Precedent

The Nuremberg Charter and the subsequent Judgment³ can be criticised for several reasons.⁴ However, what is less questionable is that it consti-

¹ See Rolando Tamayo y Salmorán, *Razonamiento y Argumentación Jurídica: El Paradigma de la Racionalidad y la Ciencia del Derecho*, Universidad Nacional Autónoma de México, México City, 2003, pp. 83–85.

² See M. Cherif Bassiouni, *Crimes Against Humanity in International Criminal Law*, 2nd ed., Kluwer Law International, The Hague, 1999, pp. 446–447; Francisco Muñoz Conde, "Rethinking the Universal Structure of Criminal Law", in *Tulsa Law Review*, vol. 39, no. 4, 2004, p. 942.

³ International Military Tribunal, *United States of America et al. v. Hermann Wilhelm Göring et al.*, Judgment, 1 October 1946, in *The Trial of German Major War Criminals: Proceedings of the International Military Tribunal sitting at Nuremberg, Germany*, Part 22 (22 August 1946 to 1 October 1946) ('Nuremberg Judgment') (<http://www.legal-tools.org/doc/45f18e/>).

tuted the first legal foundation of international criminal responsibility. Even though there were previous attempts to put individuals on trial for international law violations, especially war crimes,⁵ none of these had enough momentum to start the development of international criminal law. Therefore, it is important to review the Judgment's reasoning in upholding the existence of international criminal responsibility.

We should start with some context. The Nuremberg Tribunal's reasoning seeks to uphold the existence of crimes against peace before the Nuremberg Charter came into force.⁶ The reasoning starts by stressing that the Tribunal has jurisdiction over crimes against peace for the mere fact that the Nuremberg Charter so stated, and the Tribunal's only mandate is to apply the Charter – it does not have the power to question its founding document. However, it seems that the judges saw through the weakness of this statement because they chose to further explain why they believed crimes against peace preceded the Tribunal's creation. It is in this setting that the discussion regarding international criminal responsibility takes place – as it was necessary to ascertain its existence before arguing that crimes against peace preceded the Charter.

The Tribunal starts out by asserting that at least since the Treaty of Paris of 1928, there has been an express rejection of war as an instrument of State policy and a way to solve international conflicts by the Contracting Parties. However, the Judgment also acknowledges that an internationally wrongful act does not necessarily entail criminal responsibility.

The Judgment goes on to explain that international law does not have a legislature, so treaties only recognise certain general principles. The Tribunal argues that the prohibition contained in the Treaty of Paris is the reflection of international customary law at the time, but since then, there have been further developments that have transformed the prohibition into an international crime. To support this reasoning, the Tribunal

⁴ Among the more prevalent criticisms are the violation of the principle of legality, particularly the *ex post facto* rule, and the fact that it was an *ad hoc* tribunal that represented victor's justice.

⁵ See, generally, Edoardo Greppi, "La evolución de la responsabilidad penal individual bajo el derecho internacional", in *Revista Internacional de la Cruz Roja*, 1999, no. 835.

⁶ The analysis in this section is based on the *dictum* included in the Nuremberg Judgment, p. 52, see *supra* note 3.

mentions several international instruments that criminalise the unlawful use of force:

- The 1923 draft Treaty on Mutual Assistance of the League of Nations;
- The Preamble to the 1926 Protocol for the Peaceful Resolution of International Disputes;
- The unanimous resolution adopted by the Sixth Pan-American Conference in Havana dated 18 February 1928; and
- Articles 227 and 228 of the Treaty of Paris that ordered the trial of Kaiser William II for the violation of international morality and the sanctity of treaties.

The rest of the section deals with the very narrow point of the possibility of indicting heads of State. Since this discussion is not relevant to the current topic, it will not be addressed here.

We must accept that the Tribunal's reasoning is flawed since there is no logical connection or evolution from State responsibility to the existence of international crimes. The aforementioned instruments do not seem to support the proposition that crimes against peace had already developed into an international crime by the time the Nuremberg Charter was drafted. The first two documents were proposals that never came into force, and the third is only a regional resolution, which, at most, will only have effect in the Americas. The Treaty of Paris provisions are limited to one person and do not entail the creation of international courts and procedures – at most Kaiser William II would have been tried locally.

Regardless, the Nuremberg Tribunal reached the conclusion that these precedents were enough to establish the existence of international criminal responsibility for crimes against peace. In doing so, the Tribunal confuses State responsibility with international criminal responsibility for individuals. It justifies the efficiency of international law by instituting criminal sanctions. This is summarised in its famous phrase: “Crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced”.⁷

⁷ Nuremberg Judgment, p. 55, see *supra* note 3.

While the reasoning is clearly defective, the Judgment can be cited as the starting point in international criminal law, since the conclusion reached became a precedent and the recognition of the founding principle of ‘international criminal responsibility’.⁸

The weak argument required a more solid legal basis so that it would not be lost in the criticisms of the Nuremberg Tribunal. This is why the General Assembly of the United Nations decided to give the core findings of the Nuremberg Charter and Judgment more legitimacy. Hence, it drafted the Nuremberg Principles.⁹ Later on, the General Assembly instructed the International Law Commission to codify these principles.¹⁰ In short, the Nuremberg Principles recognise the existence of international criminal responsibility and the basic conditions which must be met for criminal sanctions.

This resolution starts out by giving a definition of international criminal responsibility, stating that, “[a]ny person who commits an act which constitutes a crime under international law is responsible and therefore liable to punishment” (Principle I). Other very rudimentary aspects of criminal liability are also included, such as the international crimes that can incur punishment (Principle VI), and a very basic notion of complicity (Principle VII).

Other elementary conditions are also mentioned. International criminal responsibility is not dependent on national jurisdictions – essentially setting out the building blocks for international criminal adjudication (Principle II). It also excluded heads of State and government immunities (Principle III) as well as conditioning the defence of superior orders (Principle IV). Additionally, it mentions that any person accused should

⁸ See International Court of Justice, *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia-Herzegovina v. Serbia and Montenegro)*, Judgment, 26 February 2007, para. 172. (‘Bosnia-Herzegovina v. Serbia and Montenegro Case, Judgment’) (<http://www.legal-tools.org/doc/5fcd00/>). It recognizes that the origin of international criminal responsibility can be found in the Nuremberg Charter and Judgment.

⁹ United Nations General Assembly (‘UNGA’), Resolution 95 (I), UN Doc. A/64/Add.1, p. 188, 11 December 1946 (<http://www.legal-tools.org/doc/bb7761/>).

¹⁰ UNGA, Resolution 177 (II), UN Doc. A/519, p. 111, 21 November 1947 (<http://www.legal-tools.org/doc/57a28a/>).

be subject to a fair and impartial trial (Principle V). These principles started to set the limits and standards of international criminal responsibility.

The Nuremberg Principles are the basis of international criminal law. They have not changed over time, although they have evolved and have become more sophisticated. Even today, the Rome Statute is broadly based on these first rules.¹¹

In conclusion, although the origins of international criminal responsibility were erratic, the concept has thrived and developed since its introduction. The actual conditions that must be met to establish liability are still open for debate, but this can be seen as part of the natural evolution of any branch of international law.

5.3. Core Differences Between State Responsibility and International Criminal Responsibility

To establish that individuals can be liable for international crimes, it is necessary to overcome the classic proposition that only States and international organisations are subjects of international law. While this proposition has been true for a long time, there are two notable exceptions: international human rights law and international criminal law.¹²

In international human rights law, treaties such as the American Convention on Human Rights¹³ and the European Convention on Human Rights¹⁴ contain duties for States Parties. Individuals have standing to seek relief before the regional tribunals set up to enforce States' obligations contained in these treaties.

¹¹ See, for an analysis of the evolution and current state of the Nuremberg Principles, Javier Dondé-Matute, *Principios de Núremberg: Desarrollo y Actualidad*, Instituto Nacional de Ciencias Penales, Mexico City, 2015.

¹² Cf., Steven R. Ratner and Jason S. Abrams, *Accountability for Human Rights Atrocities in International Law: Beyond the Nuremberg Legacy*, Oxford University Press, Oxford, 2001, pp. 10 ff. It can be argued that international humanitarian law should be included in this list. However, individuals have not been afforded standing to ask for relief when a State violates these norms. States are responsible before other States for compliance with this area of law. In any case, some aspects of this discipline may amount to human rights violations or war crimes.

¹³ American Convention on Human Rights, adopted 22 November 1969, entry in force 18 July 1978 (<http://www.legal-tools.org/doc/1152cf/>).

¹⁴ European Convention on Human Rights, adopted 4 November 1950, entry in force 3 September 1953 (<http://www.legal-tools.org/doc/8267cb/>).

Something similar happens in international criminal law. Before we can entertain the notion of international criminal responsibility for international crimes, we must first recognise as a premise that individuals are international law subjects. That idea is now widely accepted.¹⁵

We can now identify two forms of international responsibility. It is important to distinguish between State responsibility and individual (criminal) responsibility. The first is the duty of a State to redress another State or international organisation for a violation of international law. The second is more akin to a sanction and it entails punishment and reparations for certain violations of international law which amount to international crimes.¹⁶

However, these two forms of responsibility are not mutually exclusive. The same conduct can be a violation of international law or human rights law, which in both cases would result in State responsibility. Additionally, the person who carries out the action would be internationally responsible, subject to the rules of liability as direct perpetrator or participant, including the notion of command responsibility.

The International Court of Justice supported the co-existence of both forms of responsibility in the *Bosnia-Herzegovina v. Serbia and Montenegro* case concerning genocide.¹⁷ In the relevant part of the Judgment, it stated that although the Convention on the Prevention and Punishment of the Crime of Genocide was designed to establish criminal responsibility of individuals that commit this crime, States could also be held responsible for the same acts.

Moreover, this duality is also present in Article 25(4) of the Rome Statute, which states that “[n]o provision in this Statute relating to indi-

¹⁵ See Malcolm N. Shaw, *International Law*, Oxford University Press, Oxford, 2003; Matthias Herdegen, *Derecho Internacional Público*, Universidad Nacional Autónoma de México, México City, 2005.

¹⁶ See International Court of Justice, *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia)*, Judgment, 3 February 2015, para. 129 (‘Croatia v. Serbia, Judgment’) (<http://www.legal-tools.org/doc/1f2f59/>).

¹⁷ International Court of Justice, *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia-Herzegovina v. Yugoslavia)*, Preliminary Objections, Judgment, 11 July 1996, para. 32 (<http://www.legal-tools.org/doc/356fe2/>).

vidual criminal responsibility shall affect the responsibility of States under international law”.¹⁸

To reinforce the notion of international criminal responsibility before international tribunals in a more modern context, it is important to note that the Rome Statute recognises this idea in paragraphs 5 and 6 of its Preamble. In the body of the treaty, it is also mentioned in Article 1 that the International Criminal Court (‘ICC’) “shall have the power to exercise its jurisdiction over persons for the most serious crimes of international concern”. In turn, Article 25(1) emphasizes that “[t]he Court shall have jurisdiction over natural persons pursuant to this Statute”. At this point, it is only relevant to mention the norms that recognise individual responsibility in a contemporary context. These will be further developed in the following sections.

So far, we have looked at the co-existence of State responsibility and international criminal responsibility as two separate but complementary ways to confront international law violations. For example, a State can be held responsible for torture, and the State officials who actually commit the conduct can be criminally responsible for the individual act or, possibly, as a crime against humanity or a war crime.

However, there are other differences. International criminal responsibility has to be more ‘human’ since it is aimed at individuals. This is achieved primarily, although not exclusively, by requiring a mental element to avoid strict liability offences.¹⁹ The mental element requirement has become an important part of responsibility in international criminal law, but it will be further argued that blameworthiness is also present as a component of international criminal responsibility. While this would

¹⁸ See also *Bosnia-Herzegovina v. Serbia and Montenegro Case*, Judgment, para. 173, see *supra* note 8. This part of the Judgment builds on the Rome Statute to support the co-existence of these two forms of responsibility.

¹⁹ See International Law Commission, Draft Articles on Responsibility of States for Internationally Wrongful Acts, With Commentaries, Yearbook of the International Law Commission, 2001, Vol. II, Part Two, Article 2, Commentary 10 (<http://www.legal-tools.org/doc/e174dd/>). State responsibility only requires two elements: the act must be attributed to the State, and it must constitute a breach of international obligations by the State. The commentaries further explain that no mental element is required. See *Croatia v. Serbia*, Judgment, paras. 132–142, see *supra* note 16. In this case, the mental element of genocide was looked into, but only because the elements of the crime of genocide include *dolus specialis*, that is, specific intent.

make international criminal responsibility similar to criminal responsibility in domestic jurisdictions, there are some differences that need to be pointed out.

5.4. International Criminal Responsibility v. Criminal Responsibility Before National Jurisdictions

The difference between these two types of criminal responsibility can be seen on several levels. Formally, provisions on international criminal responsibility can be found in treaties and generally in any source of international law. However, Article 21 of the Rome Statute lists as possible sources the general principles found in the legal systems of the world.²⁰ Although this is only a secondary source, it seems to suggest that there is no clear-cut distinction that can be found from the sources of law alone.

Another criterion that can be used are the legal interests that are protected by the international and the national systems. It could be argued that international criminal law protects interests that are only relevant to the international community, while each national system will look to protect interests relevant to its own legal order. In an earlier publication, I suggested that international legal interests can be found in the United Nations Charter, *jus cogens* norms, international human rights and in specific international criminal law treaties.²¹

This way, we can distinguish between international crimes that are based on international interests, and offences that are identified locally by States. While this distinction is grounded in material standards, it does not help distinguish between the different types of criminal responsibility, since it is only directly applicable to crimes and offences.

Bassiouni takes the view that the difference between both types of criminal responsibility is clearly established in the Rome Statute. According to this position, Articles 25 to 28 provide forms of liability which are unique to international criminal responsibility and which are clearly different from those found in national legal systems. Thus, the forms of liability, the exclusion of minors from criminal responsibility, the irrelevance

²⁰ Rome Statute of the International Criminal Court, adopted 17 July 1998, entry into force 1 July 2002, Article 21(1)(c) ('Rome Statute') (<http://www.legal-tools.org/doc/7b9af9/>).

²¹ See Javier Dondé-Matute, *Tipos Penales en el Ámbito Internacional*, Instituto Nacional de Ciencias Penales, Mexico City, 2012, pp. 21–39.

of official capacity and command responsibility are unique to international criminal law and help distinguish international from national criminal responsibility.²²

While Bassiouni's arguments are convincing, some calibration is in order. Article 25 of the Rome Statute includes forms of liability that are usually present in national jurisdictions such as direct perpetrator, co-perpetrator and indirect participation. Similarly, several jurisdictions do not punish under-aged persons.²³ Official capacity is not always an obstacle for national criminal prosecutions, although in some cases it must be justified by impeachment or a similar special procedure.²⁴

Nevertheless, Bassiouni was right in asserting that there are some forms of liability that are unique to international criminal law, and not common in national jurisdictions unless linked to international criminal law, such as group responsibility²⁵ and command responsibility.²⁶ It is interesting to note that both forms of liability entail group responsibility – this will be dealt with in the next section. The legal literature has already highlighted the idea that groups play an important role in international criminal law. For example, Ohlin notes two differences between international criminal responsibility and national criminal responsibility: in the former, crimes are usually committed by groups, and the leader does not execute the crime; neither is the case in national jurisdictions.²⁷

²² Bassiouni, 1999, pp. 370–373, see *supra* note 2.

²³ Convention on the Rights of the Child, UNGA Resolution 44/25, adopted 20 November 1989, entered into force 2 September 1990, Article 1 (<https://www.legal-tools.org/en/doc/f48f9e/>).

²⁴ See as an example the Constitución Política de los Estados Unidos Mexicanos (Political Constitution of the United Mexican States), 5 February 1917, Article 111 ('CPEUM') (<http://www.legal-tools.org/doc/b0da60/>).

²⁵ See Rome Statute, Article 25(3)(d), see *supra* note 20.

²⁶ See Rome Statute, Article 28, see *supra* note 20.

²⁷ See Jens D. Ohlin, "Co-Perpetration: German Dogmatik or German Invasion?", in Carsten Stahn (ed.), *The Law and Practice of the International Criminal Court*, Oxford University Press, Oxford, 2015, p. 6.

On a related note, part of the legal literature has found that international criminal law goes beyond what would be expected of national jurisdictions for criminal prosecutions, testing the limits of criminal law.²⁸

5.5. Group Responsibility

Group responsibility is not new to international criminal law. The relevant literature has explained this link from different angles. However, it must be stressed that this concept creates tension between the limits that have been set in modern criminal law, at least in European and American jurisdictions, based on the idea of punishing only individuals for crimes.²⁹ This is linked to the idea of culpability and blameworthiness, and its applicability in international criminal law. This will be discussed in the following section.

To prove that groups are indispensable to international criminal responsibility, a normative approach may be appropriate. This is mainly evident in the forms of liability recognised in the Rome Statute and applied by the ICC. This section will not include an analysis of the forms of liability, but will only highlight the ‘group element’ therein.³⁰

Since the Nuremberg Judgment, group responsibility has been evident and important to international criminal law. The Nuremberg Charter

²⁸ See Darryl Robinson, “International Criminal Law as Justice”, in *Journal of International Criminal Justice*, 2013, vol. 11, no. 1, p. 702.

²⁹ See George P. Fletcher, “Collective Guilt and Collective Punishment”, in *Theoretical Inquiries in Law*, 2004, vol. 5, no. 1, pp. 163–178 (accepting the existence of collective guilt which would go beyond the requirement that a person is only guilty of his or her own actions); Kai Ambos, *Fundamentos de la Imputación en el Derecho Internacional Penal*, Editorial Porrúa, Mexico City, 2009, pp. 69–70 (noting the double standards in international criminal law of collective context and traditional individual guilt); Mark Osiel, “Banality of Good: Aligning Incentives Against Mass Atrocity”, in *Columbia Law Review*, 2005, vol. 105, no. 6, pp. 1751–1862 (explaining the relationship between mass atrocities, criminal law and individual criminal responsibility); Darryl Robinson, “International Criminal Law as Justice”, in *Journal of International Criminal Justice*, September 2013, vol. 11, no. 3, p. 705; and Pamela J. Stephens, “Collective Criminality and Individual Responsibility: The Constraints of Interpretation”, in *Fordham International Law Journal*, 2014, vol. 37, no. 2, pp. 501–547.

³⁰ See Mark A. Drumbl, “Collective Violence and Individual Punishment: The Criminality of Mass Atrocity”, in *Northwestern University Law Review*, 2005, vol. 99, no. 2, pp. 39–40 (the tension between individual responsibility and group responsibility is more evident in forms of liability such as joint criminal enterprise, command responsibility and aiding and abetting).

included the possibility of prosecuting someone for membership in a criminal organisation.³¹

This idea gained momentum at the ICTY with the creation of joint criminal enterprise as a form of liability. Commentators have divided this form of liability into three categories. First, the basic form, in which co-perpetrators acts in accordance to a common plan with the same criminal intent. Hence, everyone involved in the common plan is guilty of the crime, whether they directly committed the act or not.³² The second category, known as systematic joint criminal enterprise, includes all the elements of the first category, but it takes place within a “system of repression”.³³ Consequently, the person prosecuted must know that there is a system and that she or he participates in that system.³⁴ The third category is known as the extended joint criminal enterprise. It shares the same elements of the first two since there is a common plan, which may or may not be part of the system of oppression, and the intent of the person to take part in the plan, without directly committing the crime. However, the main difference is the mental element, because the crimes are committed beyond the plan, but are a “natural and foreseeable consequence of the common plan”.³⁵

The Rome Statute does not include joint criminal enterprise.³⁶ However, the drafters included several modes of liability that entail the involvement of several individuals or group liability. Article 25 alone in-

³¹ Charter of the International Military Tribunal, 8 August 1945, Articles 9–11 (<http://www.legal-tools.org/doc/64ffdd/>).

³² International Criminal Tribunal for the former Yugoslavia (‘ICTY’), *Prosecutor v. Duško Tadić*, Appeal Chamber, Judgment, 15 July 1999, IT-94-1-A, para. 196 (‘Tadić Judgment’) (<http://www.legal-tools.org/doc/8efc3a/>).

³³ *Ibid.*, para. 202–203.

³⁴ ICTY, *Prosecutor v. Simić et al.*, Trial Chamber, Judgment, 17 October 2003, IT-95-9-T, para. 157 (<http://www.legal-tools.org/doc/aa9b81/>).

³⁵ ICTY, *Prosecutor v. Kvočka et al.*, Appeal Chamber, Judgment, 28 February 2005, IT-98-30/1-A, para. 83 (<http://www.legal-tools.org/doc/006011/>).

³⁶ See International Criminal Court (‘ICC’), Situation in the Democratic Republic of the Congo, *Prosecutor v. Thomas Lubanga Dyilo*, Pre-Trial Chamber I, Decision on the Confirmation of Charges, 29 January 2007, ICC-01/04-01/06-803, para. 335 (‘Lubanga Decision on the Confirmation of Charge’) (<http://www.legal-tools.org/doc/b7ac4f/>) (joint criminal enterprise was rejected at the Rome conference by the drafters).

cludes “ordering”³⁷ which implies that there is a group or organisation with some form of hierarchy involved and the contribution to a group.³⁸ Similarly, command responsibility implies the existence of an organisation, which in the case of the military commander requires “command and control” or “effective authority and control”.³⁹ In the case of non-military leaders, they may commit crimes perpetrated by their subordinates under their “effective authority and control”.⁴⁰

Although the Rome Statute does not include joint criminal enterprise, it has replaced it with other modes of liability that achieve the same policy result: co-perpetration and co-perpetration through organisations. What is interesting about these new forms of liability is that they are not included in the plain reading of Article 25, however, group responsibility has been incorporated by the Court’s case law.

Co-perpetration was the form of liability charged in the *Lubanga* case. According to the convicting chamber, co-perpetration has two objective elements: the existence of a common plan with a criminal component between at least two persons,⁴¹ and an essential contribution by each perpetrator to the commission of the crime.⁴² The Trial Chamber held that the

³⁷ See Rome Statute, Article 25(3)(b), see *supra* note 20.

³⁸ See ICC, *Prosecutor v. Sylvestre Mudacumura*, Situation in the Democratic Republic of the Congo, Pre-Trial Chamber II, Decision on the Prosecutor’s Application under Article 58, 13 July 2012, ICC-01/04-01/12-1-Red, para. 63 (<http://www.legal-tools.org/doc/ecfae0/>) (the first objective element is the position of authority, which is impossible without a well-organised group or organisation).

³⁹ Rome Statute, Article 25(3)(d), see *supra* note 20; ICC, Situation in the Democratic Republic of the Congo, *Prosecutor v. Thomas Lubanga Dyilo*, Trial Chamber I, Judgment Pursuant to Article 74 of the Statute, 14 March 2012, ICC-01/04-01/06-2842, para. 996 (‘Lubanga Judgment’) (<http://www.legal-tools.org/doc/677866/>) (“Both Articles 25(3) (a) and (d) address the situation in which a number of people are involved in a crime”); ICC, Situation in the Republic of Kenya, *Prosecutor v. William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang*, Pre-Trial Chamber II, Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, 23 January 2012, ICC-01/09-01/11-373, para. 351 (‘Ruto, Kosgey and Sang Decision’) (<http://www.legal-tools.org/doc/96c3c2/>).

⁴⁰ See Rome Statute, Article 28(b), see *supra* note 20.

⁴¹ Lubanga Judgment, para. 980, see *supra* note 39; ICC, *Prosecutor v. Thomas Lubanga Dyilo*, Situation in the Democratic Republic of the Congo, Appeals Chamber, Judgment on the Appeal of Mr. Thomas Lubanga Dyilo against his Conviction, 1 December 2014, ICC-01/04-01/06-3121-Red, paras. 469–473 (<http://www.legal-tools.org/doc/585c75/>).

⁴² Lubanga Judgment, para. 981, see *supra* note 39.

common plan is not necessarily criminal in nature, but there must be a substantial risk that a crime will be committed in the natural course of events.⁴³ On the other hand, the contribution must be essential, as to distinguish this form of liability from accomplice liability.⁴⁴ As for the mental element, the Trial Chamber held that co-perpetration requires that the person must have the intention to bring about the crime and to provide the essential contribution for the commission of the crime.⁴⁵ It should be noted that in the confirmation of charges decision, the Pre-Trial Chamber found another mental element that was not mentioned in the Trial Judgment but has been upheld by other chambers. The co-perpetrators must be aware and mutually accept that the implementation of the common plan will result in the commission of the crime.⁴⁶

Co-perpetration through an organisation is based on the simple form described above. Consequently, the confirmation of charges decision in *Katanga and Ngudjolo* started out by applying the pre-existing case law⁴⁷ and proceeded to explain how co-perpetration can be exercised through an organisation. The individual must have control over the organisation,⁴⁸ which can be proven by the existence of an organised group and a hierarchical structure. Therefore, it is important to have evidence that pertains to the leadership of the person charged and to the automatic obedience.⁴⁹

When taken together, it is easy to reach the conclusion that since Nuremberg, the main modes of liability which are unique to international criminal law entail the existence and participation of a group in the com-

⁴³ Lubanga Judgment, para. 984, see *supra* note 39.

⁴⁴ Lubanga Judgment, para. 997, see *supra* note 39.

⁴⁵ Lubanga Judgment, para. 1013, see *supra* note 39.

⁴⁶ Lubanga, Decision on the Confirmation of Charges, paras. 361–363, see *supra* note 36; see also ICC, Situation in the Central African Republic, *Prosecutor v. Jean-Pierre Bemba Gombo*, Pre-Trial Chamber II, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor against Jean-Pierre Bemba Gombo, 15 June 2009, ICC-01/05-01/08-424, para. 351 ('Bemba Decision') (<http://www.legal-tools.org/doc/07965c/>).

⁴⁷ ICC, Situation in the Democratic Republic of the Congo, *Prosecutor v. Germain Katanga and Ngudjolo Chui*, Pre-Trial Chamber I, Decision on the Confirmation of Charges, 30 September 2008, ICC-01/04-01/07-717, paras. 494, 519–539 ('Katanga and Ngudjolo Decision') (<http://www.legal-tools.org/doc/67a9ec/>).

⁴⁸ *Ibid.*, paras. 500–510.

⁴⁹ *Ibid.*, paras. 511–514.

mission of international crimes. Moreover, up to this point, there has only been one charge based on direct participation and another for inducing the commission of a crime before the ICC. However, in the case of direct participation, the accused was charged in the context of a military attack.⁵⁰ In the case of inducing, the accused was charged in the alternative to “ordering”, but was eventually proven with the same set of facts.⁵¹ So even in these cases, group responsibility was present.

5.6. Culpability

This concept is commonly used in Western legal systems, although there does not seem to be a unique definition or definite elements. For the purposes of this section, Luigi Ferrajoli’s model will be used, because it includes both the common and civil law approaches to the concept. Three elements are essential in understanding culpability:

- a link between the decision to commit the crime, the conduct (act or omission) and the result;
- the capacity of the person to understand and to wish to carry out the conduct; and
- the concrete conscience and will to carry out the crime.⁵²

The basis of culpability is free will since it is paramount in determining if the person could have acted in any other way.⁵³ Consequently, criminal sanction is not based on the status of the person, but on the over-

⁵⁰ See ICC, Situation in the Democratic Republic of the Congo, *Prosecutor v. Bosco Ntaganda*, Pre-Trial Chamber II, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor against Bosco Ntaganda, 9 June 2014, ICC-01/04-02/06-309, para. 137–143 (<http://www.legal-tools.org/doc/5686c6/>).

⁵¹ *Ibid.*, paras. 154–157.

⁵² See Luigi Ferrajoli, *Derecho y Razón: Teoría del Garantismo Penal*, Trotta, Madrid, 2001, pp. 489–490. This author derives the elements from the German ‘*Schuld*’ and the Anglo-American ‘*mens rea*’, even though they are usually distinguished by the legal literature. The common law term refers (narrowly) to the mental element, while the German dogmatic theory is closer to blameworthiness (although this is not a unanimous approach). In any case, this three-prong conceptualisation seems appropriate for the current chapter since it narrows the gap between both legal families.

⁵³ *Ibid.*, p. 493; see also Stephanie Bock, “The Prerequisite of Personal Guilt”, in *Utrecht Law Review*, 2013, vol. 9, no. 4, pp. 184–186. The individual responsibility concept has two basic elements: the psychological relation between the author and the act, and the moral blameworthiness.

all commission of the crime. Conversely, culpability is excluded when the person had no other choice but to carry out the criminal conduct.⁵⁴

If this premise is accepted, one must look at the elements that stress individual responsibility in international criminal law, that is, punish the individual for her or his actions. This would be contrary to what was held at Nuremberg where, according to its Statute, membership in an illegal organisation was a crime itself, regardless of the acts or omissions of the person. In line with the conceptual proposal mentioned above, and based on the notion of free will, a person can only be sanctioned if given the opportunity to make a decision and a moral choice to carry out the specific act or omission.

The ICTY took the first step in this direction. The Appeals Chamber first recognised in *Tadić* that culpability was part of international criminal responsibility, by stressing the need for a conduct (*actus reus*) and a mental element:

The basic assumption must be that in international law as much as in national systems, the foundation of criminal responsibility is the principle of personal culpability: nobody may be held criminally responsible for acts or transactions in which he has not personally engaged or in some other way participated (*nulla poena sine culpa*).⁵⁵

However, culpability was not mentioned in any subsequent decision of the *ad hoc* tribunals, so it is fair to ask if it is still present in international criminal law. Although culpability, as understood by Ferrajoli, is not mentioned in the Rome Statute or by the ICC, there is sufficient evidence to affirm that it is implicitly included. To reach this conclusion, it is necessary to look at several of its provisions.

First, individual responsibility is present in Article 25(2) which reads: “A person who commits a crime within the jurisdiction of the Court shall be individually responsible and liable for punishment in accordance with this Statute”. This clause sets the primary principle of culpability –

⁵⁴ *Ibid.*, p. 503.

⁵⁵ *Tadić* Judgment, para. 186, see *supra* note 32.

individual responsibility. Therefore, group responsibility and status crimes are excluded.⁵⁶

Article 25(3)(d) has rarely been studied in this context, but there are several words that point to a culpability element in international criminal responsibility:

In any other way contributes to the commission or attempted commission of such a crime by a group of persons acting with a common purpose. Such contribution shall be *intentional* and shall either:

- i. Be made with the *aim* of furthering the criminal activity or criminal purpose of the group, where such activity or purpose involves the commission of a crime within the jurisdiction of the Court; or
- ii. Be made in the *knowledge* of the intention of the group to commit the crime.⁵⁷

A careful analysis of this provision will lead to the conclusion that these are the same elements of joint criminal enterprise. However, diverse mental elements are included where, before, they were at best doubtfully established. It was actually this lack of mental elements that was the focus of the criticisms of the legal literature.⁵⁸ Clearly, the drafters of the Rome Statute took note of this reproach and made sure that culpability was incorporated in this new jurisdiction.⁵⁹

⁵⁶ See Alicia Gil and Ana E. Maculan, “Current Trends in the Definition of ‘Perpetrator’ by the International Criminal Court: From the Decision on the Confirmation of Charges in the Lubanga Case to the Katanga Judgment”, in *Leiden Journal of International Law*, 2015, vol. 28, no. 2, pp. 361–362. The *Lubanga* Judgment came dangerously close to establishing membership responsibility, since the accused leadership role was stressed over the individual conducts of his subordinates.

⁵⁷ Rome Statute, Article 25(3)(d) (emphasis added), see *supra* note 20.

⁵⁸ See Alicia Gil, “Principales Figuras de Imputación a Título de Autor en Derecho Penal Internacional: Empresa Criminal Conjunta, Coautoría por Dominio Funcional y Coautoría Mediata”, in *Cuadernos de Política Criminal*, 2013, vol. I, no. 109, Época II, pp. 117–118.

⁵⁹ For a more in-depth analysis of the differences and similarities between joint criminal enterprise and the new modes of liability, see Javier Dondé-Matute, “Reflexiones Sobre la Empresa Criminal Común, la Coautoría y las Formas de Imputación del Estatuto de la Corte Penal Internacional Desde la Política Criminal”, in José Guevara and Javier Dondé-Matute (eds.), *Ensayos sobre temas selectos de la Corte Penal Internacional*, Tiran Lo Blanch, Mexico City, 2016, pp. 81–86.

This is further confirmed by Article 30(1) of the Rome Statute, which reads: “Unless otherwise provided, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court only if the material elements are committed with intent and knowledge”. In explaining the meaning of “intent”, Article 30(2)(a)–(b) further reads:

For the purposes of this article, a person has intent where: (a) In relation to conduct, that person means to engage in the conduct; (b) In relation to a consequence, that person means to cause that consequence or is aware that it will occur in the ordinary course of events.

This phrasing is important because the requirement is not limited to the existence of a mental element, but to Ferrajoli’s third point, which is more closely linked to moral choice or blameworthiness since the person must weigh in the consequences of the action. This means that the Rome Statute has components of Ferrajoli’s minimal criminal law theory, at least as far as culpability is concerned.

These assertions find further footing in Article 31, which deals with grounds for excluding criminal responsibility. A close look at several of these grounds reveals that criminal responsibility is excluded when a mental element is absent or moral choice is not possible.

Culpability is also addressed in paragraph 4 of the general introduction to the Elements of Crimes:

With respect to mental elements associated with elements involving value judgement, such as those using the terms “inhumane” or “severe”, it is not necessary that the perpetrator personally completed a particular value judgement, unless otherwise indicated.

This paragraph acknowledges that an individual is usually faced with several moral choices. However, here an exception to the general rule is established. While moral choice will be irrelevant in the mentioned cases, it is still present in the other terms that involve a value judgment. This inference is in line with Article 30 that requires that the individual consider the commission of the crime.

There is another important observation that has to be made. The recognition of the culpability requirement is also part of human rights law, in particular, part of the principle of legality as incorporated in Article 22(1) of the Rome Statute: “A person shall not be criminally responsible

under this Statute unless the conduct in question constitutes, at the time it takes place, a crime within the jurisdiction of the Court”. Clearly, the use of the word “conduct” brings this provision in line with what has been said so far, since it implies that only acts or omissions can be criminalised by the ICC. This interpretation is consistent with the scope of the principle of legality before the Inter-American Court of Human Rights:

The assessment of the agent’s dangerousness implies the judge’s appreciation with regard to the possibility that the defendant will commit criminal acts in the future, that is, it adds to the accusation for the acts committed, the prediction of future acts that will probably occur. The State’s criminal function is based on this principle. In the end, the individual will be punished – even with the death penalty – not based on what he has done, but on what he is. It is not even necessary to weigh in the implications, which are evident, of this return to the past, absolutely unacceptable from the point of view of human rights. The prediction will be made, in the best of cases, based on the diagnosis offered by a psychological o[r] psychiatric expert assessment of the defendant.⁶⁰

It is important to remember at this point that international human rights law is part of the interpretation methods that the ICC must follow according to Article 21(3) of the Rome Statute.

Despite these arguments, some commentators believe that group responsibility and culpability are incompatible.⁶¹ This idea rests on the perception that modes of liability like joint criminal enterprise and co-perpetration give more weight to groups than to individual actions. However, cases like *Ntaganda* exemplify that while there is a tendency to use modes of liability which involve groups, in the end, what is recognised is the individual’s behaviour within the activities of the group. The individual’s acts within groups are only means describing the context in which

⁶⁰ Inter-American Court of Human Rights, *Case of Fermín Ramírez v. Guatemala*, Judgment on Merits, Reparations and Costs, 20 June 2005, Series C No. 126, para. 95 (<http://www.legal-tools.org/doc/c942e5/>).

⁶¹ See George P. Fletcher, “The Storrs Lectures: Liberals and Romantics at War – The Problem of Collective Guilt”, in *The Yale Law Journal*, 2002, vol. 111, no. 7, pp. 1499–1573. Fletcher proposes a theory by which an entire nation can be held responsible for international crimes through collective culpability.

international crimes occur. This is the way international criminal responsibility works.

This chapter concedes that liability is individual and subject to the culpability requirements of mental elements and value judgments, but these actions do not occur in a vacuum.⁶² However, culpability and group responsibility are mutually dependent, since international responsibility cannot take place outside of a group context, but culpability is a necessary requirement for punishment.

5.7. Relationship with Other Principles of International Criminal Law⁶³

In preceding sections, we have seen that international criminal responsibility is the starting point of international criminal law. As its cornerstone, there are other principles that derive from it. In particular, given the elements of group responsibility and culpability, two principles are directly relevant: ‘international *mens rea*’ and ‘mass violence’. In this section, it will be argued that these two principles of international criminal law derive from international criminal responsibility.

5.7.1. International *Mens Rea*

As previously explained, the mental element is one of the important differences between international criminal responsibility and State responsibility, as it is not present in the latter. Nonetheless, the way in which the mental element is regulated in the Rome Statute is different from national criminal law.

The mental element is present as a general requirement for crimes in Article 30 of the Rome Statute. However, unlike national criminal law, the requirement transcends the notion of international crimes and can be found in particular crimes, in the forms of liability and in the grounds for excluding criminal responsibility.

⁶² See Drumbl, 2005, pp. 32–33, see *supra* note 30 (the network of participation in international crimes is more complex than those present in national or transnational crimes, even in cases of collective wrongdoing like organised crime).

⁶³ This section is a summary of a broader study into general principles of international criminal law.

It is not novel to point out that some crimes have mental elements of their own. The most evident example is the intention to destroy a national, religious, ethnic or racial group in the crime of genocide.⁶⁴ Nevertheless, there is also the case of extermination as a crime against humanity that involves the “imposition of conditions of life [...] aimed at causing the destruction of part of the population”.⁶⁵ In addition, all crimes against humanity are subject to a specific mental state, governed by State or organisational policy. The ICC has established that the phrase “with knowledge of the attack” implies that the person must know that she or he takes part in the attack,⁶⁶ and should seek to carry out the policy or at least promote it. This means that the will of the individual must be to try to achieve an ultimate end.

The international *mens rea* is also relevant for the modes of responsibility. In general, all that is required as a mental element is intent and knowledge, and where appropriate, a specific element as in the material commission in “ordering” or “inducing”. However, in some cases, it is necessary that the person be aware of the circumstances that make him the author. This is the case of indirect perpetration, where the person must know the circumstances that allow her/him to exercise control over the crime.⁶⁷

Likewise, in indirect co-perpetration, in addition to the particular mental elements, all perpetrators must be aware that the common plan may result in the commission of the material elements of the crime in question, as well as the factual circumstances that allow each one to have joint control over the crime.⁶⁸ This logic is replicated in the indirect co-perpetration through an apparatus of power. In this particular case, it is necessary to know the character of the organisation, the person’s position

⁶⁴ Rome Statute, Article 6, see *supra* note 20.

⁶⁵ Rome Statute, Article 7(2)(b), see *supra* note 20.

⁶⁶ See Katanga and Ngudjolo Decision, paras. 401–402, 459, see *supra* note 47; Bemba Decision, paras. 87, see *supra* note 46.

⁶⁷ ICC, Situation in the Democratic Republic of the Congo, *Prosecutor v. Germain Katanga*, Trial Chamber II, Judgment Pursuant to Article 74 of the Statute, 7 March 2014, ICC-01/04-01/07-3436-tENG, para. 1399. (‘Katanga Judgment’) (<http://www.legal-tools.org/doc/f74b4f/>).

⁶⁸ Lubanga Judgment, paras. 980–1018, see *supra* note 39; Bemba Decision, paras. 350–351, see *supra* note 46.

of command in the organisation and the automatic fulfilment of the orders.⁶⁹

What is relevant to the present discussion is that group responsibility as a characteristic of international criminal responsibility is linked to the individual, by way of his or her state of mind. The awareness that a group exists and the relation that the individual keeps with it is what is essentially required in these cases.

It can be concluded that if international criminal responsibility depends on the existence of a mental element, then all the grounds for excluding criminal responsibility must be based on the same element. In almost all defences there is a mental element.⁷⁰ The element that connects the grounds for excluding criminal responsibility is the absence of the former.

International *mens rea* is present in the crimes in particular in the forms of liability and in the grounds for excluding criminal responsibility. This is the component that links the person to the group, and consequently, to group responsibility, a key element of international criminal responsibility.

5.7.2. Mass Violence

International criminal responsibility is an individual responsibility but it is always committed in a group context and, as stated before, one of its characteristics is group responsibility. High levels of violence are necessary for international jurisdiction to be activated.

In order to prove that international criminal law applies in contexts of mass violence, it is enough to look at previous situations that have triggered international criminal adjudication. World War II in the case of Nuremberg is a prototypical example, but also the ex-Yugoslav wars and the Rwandan genocide. Even in the cases of the Special Court for Sierra Leone, the Extraordinary Chambers in the Courts of Cambodia, and the Special Panels of East Timor, where international criminal law has been implemented by hybrid courts, the common denominator is mass violence.

⁶⁹ Katanga and Ngudjolo Decision, para. 534, see *supra* note 47.

⁷⁰ Jérémie Gilbert, “Justice Not Revenge: The International Criminal Court and the ‘Grounds to Exclude Criminal Responsibility’: Defences or Negation of Criminality?”, in *The International Journal of Human Rights*, 2006, vol. 10, no. 2, p. 4.

Only through groups can the mass violence associated with these situations take place. The criminally responsible persons act as members of the armed forces, police corporations or organised armed groups. A single person cannot create a context of massive violence. Undoubtedly, a single person may commit crimes such as torture or enforced disappearance, but without the context required they will not be prosecuted before international or hybrid tribunals.

Moreover, all international crimes in the Rome Statute have an element that links them with mass violence. The context that has to be proven in genocide, crimes against humanity, war crimes and aggression is the reflection of the principle of mass violence. In the case of genocide, at first glance, it seems that it is only necessary to commit any of the acts listed in Article 6 of the Rome Statute, provided they are carried out with the intention to destroy one of the protected groups. Nonetheless, after a careful analysis of each of the conducts listed in the genocide definition, it is clear that the violence is not directed at one person. The terms used imply a plurality of persons, “killing members of the group”,⁷¹ “causing serious bodily or mental harm to members of the group”,⁷² “deliberately inflicting on the group conditions of life calculated to bring about its physical destruction”,⁷³ “prevent births within the group”,⁷⁴ and “transferring children”.⁷⁵ There is no doubt that the conduct is violent, nevertheless, the plurality of victims shows the massiveness that is required for their commission.⁷⁶

The Elements of Crimes of the ICC confirm that genocide constitutes an act of mass violence. All genocidal conduct must be committed “in the context of a manifest pattern of similar conduct directed against that group or was conduct that could itself effect such destruction”.⁷⁷ This ‘contextual element’ excludes the possibility that the conduct could be an

⁷¹ Rome Statute, Article 6(a), see *supra* note 20.

⁷² Rome Statute, Article 6(b), see *supra* note 20.

⁷³ Rome Statute, Article 6(c), see *supra* note 20.

⁷⁴ Rome Statute, Article 6(d), see *supra* note 20.

⁷⁵ Rome Statute, Article 6(e), see *supra* note 20.

⁷⁶ Fletcher, 2002, p. 1524, see *supra* note 61 (genocide evidences a social conflict typical of a collective crime).

⁷⁷ ICC, Elements of Crimes, Article 6 (<http://www.legal-tools.org/doc/3c0e2d/>).

isolated event or action.⁷⁸ While it is possible that a single conduct may constitute genocide if committed with the intention of destroying a group, it should be part of an attack against this group. Even assuming that a single act can be enough to commit genocide, its destructive character must be such that it would be hard to deny its massiveness, at least in the results.

The next crime that shows the massive violence that accompanies the applicability of international criminal law is crimes against humanity. The heading of the Article 7 indicates that “[...] ‘crime against humanity’ means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack”.⁷⁹

It is important to analyse Article 7 *vis-à-vis* the definition of “attack directed against any civilian population”, which is defined in the Rome Statute as “a course of conduct involving the multiple commission of acts referred to in paragraph 1 against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack”.⁸⁰

It is crucial that the definition applies to both widespread and systematic attacks. While it is easy to see how a widespread attack can bring about massive violence, it is not as clear in the case of systematic attacks. However, even systematic attacks, which may be conceived as isolated acts, have to fulfil the contextual element.⁸¹ Hence, even these have to be carried out as part of a “multiple commission of acts”.⁸² Therefore, both

⁷⁸ This was the position of the *ad hoc* Tribunals. See ICTY, *Prosecutor v. Radislav Krstić*, Appeals Chamber, Judgment, 19 April 2004, IT-98-33-A, paras. 8–9 (<http://www.legal-tools.org/doc/86a108/>); ICTY, *Prosecutor v. Radoslav Brđjanin*, Trial Chamber, Judgment, 1 September 2004, IT-99-36-T, paras. 700–703 (<http://www.legal-tools.org/doc/4c3228/>); International Criminal Tribunal for Rwanda (‘ICTR’), *Prosecutor v. Bagosora et al.*, Trial Chamber I, Judgment and Sentence, 18 December 2008, ICTR-98-41-T, para. 2115 (<http://www.legal-tools.org/doc/6d9b0a/>); ICTR, *Prosecutor v. Sylvestre Gacumbitsi*, Appeals Chamber, Judgment, 7 July 2006, ICTR-2001-64-A, para. 44 (<http://www.legal-tools.org/doc/aa51a3/>).

⁷⁹ Rome Statute, Article 7, see *supra* note 20.

⁸⁰ Rome Statute, Article 7(2)(a), see *supra* note 20.

⁸¹ Ruto, Kosgey and Sang Decision, paras. 179, 210, see *supra* note 39. It is understood as systematic that the attack is planned, directed or organised, as opposed to spontaneous acts.

⁸² Katanga and Ngudjolo Decision, para. 397, see *supra* note 47.

attacks imply a multiplicity of victims,⁸³ which shows the mass violence character of these crimes.

It is important to explain the case of torture and enforced disappearance which are considered international crimes but can be committed without any context according to the treaties that prohibit these crimes.⁸⁴ These treaties are not aimed at international tribunals. The investigation, prosecution and sanction are to be carried out by national authorities.⁸⁵ Torture and enforced disappearance become crimes against humanity only when they are perpetrated in a context of mass violence.

The term ‘civilian population’ can further corroborate this argument. There are many efforts to distinguish the civilian population from the military population, as part of the contextual element of crimes against humanity.⁸⁶ However, a different reading confirms the principle of mass violence. The word ‘population’ implies that the attack cannot be limited in its scope.⁸⁷ Once again, we must speak of a considerable number of victims. Even the ICC has used terms like “humanitarian catastrophe” to establish the scope of the attack.⁸⁸ This does not happen when the acts are isolated. The civilian population is another element that confirms that crimes against humanity are committed in the context of mass violence.

⁸³ Katanga and Ngudjolo Decision, para. 398, see *supra* note 47.

⁸⁴ See, for a further study of legal interests protected by crimes against humanity, Dondé-Matute, 2012, pp. 97–109, see *supra* note 21.

⁸⁵ Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted 10 December 1984, entry into force 26 June 1987, Article 12 (<http://www.legal-tools.org/doc/713f11/>); International Convention for the Protection of All Persons from Enforced Disappearance, adopted 20 December 2006, entry into force 23 December 2010, Article 12 (<http://www.legal-tools.org/doc/0d0674/>); Inter-American Convention to Prevent and Punish Torture, adopted 9 December 1985, entry into force 28 February 1987, Article 8 (<http://www.legal-tools.org/doc/56bf3b/>); Inter-American Convention on Forced Disappearance of Persons, adopted 9 June 1994, entry into force 28 March 1996, Article 1 (<http://www.legal-tools.org/doc/7c67e0/>).

⁸⁶ Katanga Judgment, para. 1102, see *supra* note 69; Bemba Decision, para. 78, see *supra* note 46; ICTY, *Prosecutor v. Blaškić*, Appeals Chamber, Judgment, 29 July 2004, IT-95-14-A, para. 110–113 (<http://www.legal-tools.org/doc/88d8e6/>).

⁸⁷ Bemba Decision, para. 77, see *supra* note 46.

⁸⁸ ICC, Situation in the Democratic Republic of the Congo, *Prosecutor v. Callixte Mbarushimana*, Pre-Trial Chamber I, Decision on the Confirmation of Charges, 16 December 2011, ICC-01/04-01/10-465-Red, para. 246 (<http://www.legal-tools.org/doc/63028f/>).

War crimes are the clearest example of the mass violence principle, given the fact that it can only be committed in the context of an armed conflict, whether international or non-international. An armed conflict is the prototypical case of mass violence.

Furthermore, the Rome Statute states that situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence of other acts of a similar nature are not an armed conflict.⁸⁹ This shows that there must be a minimum degree of intensity in the use of force, namely, a minimum threshold of mass violence in order to talk about armed conflict.

The crime of aggression involves the closest link with the contexts indicated in the preamble. In United Nations General Assembly Resolution 3314 (XXIX) of 1974, which is the basis for the definition of the crime of aggression in the Rome Statute, it is stated that it seeks to contribute to the “prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace [...]”.

Likewise, Article 8*bis* of the Rome Statute limits the acts of aggression to those against “the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations”.

Actions such as bombing or use of arms against a State do not constitute the crime of aggression if they lack enough intensity to endanger, undermine or damage the State as mentioned in the *chapeau*. This establishes a threshold that proves that the violence exercised by one State against another must be of a great scale and, at a minimum, equivalent to a context of massive violence.⁹⁰

The conclusion reached is that international criminal responsibility can only be comprehended in a group context. On the other hand, the sheer magnitude of the crimes that are relevant to international criminal law can only be achieved in cases of mass violence. If mass violence is

⁸⁹ Rome Statute, Article 8(2)(d) and (f), see *supra* note 20.

⁹⁰ Giovanni Distefano, “Aggression, Self-Defence and the Legitimate Use of Force”, in Andrew Clapham and Paola Gaeta (eds.) *The Oxford Handbook of International Armed Conflict*, Oxford University Press, Oxford, 2014, pp. 550–551 (UNGA Resolution 3314 (XXIX) establishes thresholds of gravity, although it is possible to take joint incidents to establish such a threshold).

absent, then international criminal law is not applicable. Perhaps some of these crimes may be adjudicated nationally, but they are not relevant to international jurisdictions. This is why it can be considered a principle of international criminal law. Only groups, not individuals acting alone, can achieve this.

5.8. Conclusion

International criminal responsibility is a principle of international criminal law, which has the added characteristic of being a founding principle. Its first features can be found in the distinction between criminal responsibility and State responsibility. This principle is international since it derives from the protection of international interests, based on the international legal system. These are the formal and material elements of international criminal responsibility.

International criminal responsibility is based on a mental element, which is not required for State responsibility, but there is enough evidence to reach the conclusion that, culpability, understood as the need to make a moral choice (*blameworthiness*) is also part of this principle.

This was expressly mentioned in the *Tadić* appeals decision and can be inferred from the Rome Statute and the Elements of Crime. In this study, it has been shown that there are a number of Rome Statute's provisions that support this assessment. Culpability can be understood as the individual liability⁹¹ for a conduct⁹² committed with a minimal mental element⁹³ which must allow the person to make a moral choice.⁹⁴ Taken together, with the principle of legality and the guidance of the case law of the Inter-American Court of Human Rights, we can reach the conclusion that there is a recognition of culpability as understood in the minimal criminal law theory in the way international criminal responsibility is understood in the Rome Statute.

In the last section, it was shown, by way of example, that there are at least two principles of international criminal law which derive from

⁹¹ Rome Statute, Article 25(1), see *supra* note 20.

⁹² Rome Statute, Article 22(1), see *supra* note 20.

⁹³ Rome Statute, Articles 23(3)(d) and 30(1), see *supra* note 20.

⁹⁴ Rome Statute, Article 30(2), see *supra* note 20; ICC, Elements of Crimes, general introduction, paragraph 4, see *supra* note 77.

international criminal responsibility. This means that this principle is no ordinary general principle, but that it is the basis of other principles or at the very least from which basic characteristics of international criminal law derive.

Finally, we can suggest a definition of international criminal responsibility as a founding principle of international criminal law as “the possibility to punish individuals for violations of international law (understood both formally and materially), with the elements of a conduct (*actus reus*) and committed with intent (*mens rea*) and the possibility of moral choice; within a group context”.

Justifying International Criminal Punishment: A Critical Perspective

Barrie Sander*

6.1. Introduction

Is it justifiable to punish perpetrators of international crimes? It might be tempting to ignore this foundational question in light of the momentous suffering that tends to result from the commission of mass atrocities. The gravity of such crimes usually invites “intuitive-moralistic answers”,¹ making the debate about the proper justification for punishment seem of mere academic interest.² Yet, the importance of providing a justification for punishment should not be underestimated. Punishment may be defined as “the intentional incapacitation or infliction of pain by an authoritative institution on one who has been deemed liable to such treatment”.³ In the field of international criminal justice, punishment is generally equated with the kind of punishment that can be delivered by international criminal courts and tribunals, namely incarceration. Importantly, incarcerative

* **Barrie Sander** is a Postdoctoral Fellow at Fundação Getúlio Vargas in Brazil. He holds a Ph.D. in International Law from the Graduate Institute of International and Development Studies, Geneva. A version of this chapter was presented at the CILRAP conference *Philosophical Foundations of International Criminal Law* in New Delhi on 26 August 2017. The author thanks both the organisers and participants of the conference for their inputs. The author would also like to thank Antony Duff and Mark Drumbl for their comments on an earlier draft of this chapter. All errors remain the author’s own.

¹ Immi Tallgren, “The Sensibility and Sense of International Criminal Law”, in *European Journal of International Law*, 2002, vol. 13, no. 3, p. 564.

² Robert D. Sloane, “The Expressive Capacity of International Punishment: The Limits of the National Law Analogy and the Potential of International Criminal Law”, in *Stanford Journal of International Law*, 2007, vol. 43, p. 39.

³ Larry May and Shannon Fyfe, *International Criminal Tribunals: A Normative Defense*, Cambridge University Press, Cambridge, 2017, p. 50.

punishment is a form of violence,⁴ which, without justification, may constitute nothing more than the arbitrary imposition of pain and suffering.⁵

Against this background, this chapter seeks to critically examine the principal theories that have been advanced to justify the imposition of incarcerative punishment on individuals convicted of participating in the commission of international crimes. Adopting a critical perspective, the chapter begins by unveiling and questioning the assumptions that underlie the dominant justificatory theories of international criminal punishment – namely, retributivism (6.2), utilitarianism (6.3), and expressivism (6.4). The chapter then turns to provide some initial reflections on how post-conflict justice might be reimagined without the imposition of incarcerative punishment at its core (6.5), before offering some concluding remarks (6.6).

At the outset, it is important to clarify two definitional points. First, by ‘international crimes’, this chapter refers to the so-called ‘pure’ or ‘core’ international crimes – encompassing, at a minimum,⁶ crimes against humanity, genocide, serious war crimes, and the crime of aggression – which are distinguished by the fact that their criminal character originates in international rather than domestic law.⁷ Second, the present inquiry

⁴ David Luban, “Fairness to Rightness: Jurisdiction, Legality, and the Legitimacy of International Criminal Law”, in Samantha Besson and John Tasioulas (eds.), *The Philosophy of International Law*, Oxford University Press, Oxford, 2010, p. 575. See also, Robert Cover, “Violence and the Word”, in Martha Minow, Michael Ryan and Austin Sarat (eds.), *Narrative, Violence, and the Law: The Essays of Robert Cover*, University of Michigan Press, Michigan, 1993, p. 203 (“Legal interpretive acts signal and occasion the imposition of violence upon others: A judge articulates her understanding of a text, and as a result, somebody loses his freedom, his property, his children, even his life”).

⁵ See similarly, R.A. Duff and David Garland, “Introduction: Thinking about Punishment”, in R.A. Duff and David Garland (eds.), *A Reader on Punishment*, Oxford University Press, Oxford, 1994, p. 2 (“Punishment requires justification because it is morally problematic [...] because it involves doing things to people that (when not described as ‘punishment’) seem morally wrong”); and Kent Greenawalt, “Punishment”, in *Journal of Criminal Law and Criminology*, 1983, vol. 74, no. 2, p. 346 (“Since punishment involves pain or deprivation that people wish to avoid, its intentional imposition by the state requires justification”).

⁶ It is a matter of contestation whether other crimes, such as piracy, slavery, terrorism, and torture fall within this definition. See, in this regard, Robert Cryer, Håkan Friman, Darryl Robinson and Elizabeth Wilmshurst, *An Introduction to International Criminal Law and Procedure*, 3rd edition, Cambridge University Press, Cambridge, 2014, p. 8.

⁷ Luban, 2010, p. 569–72, see *supra* note 4. See also, International Military Tribunal, *Trial of the Major War Criminals before the International Military Tribunal*, vol. 1, Nuremberg,

should be distinguished from two other theoretical questions of international criminal justice:⁸ first, the question of whether and how punitive power can exist at the supranational level without a sovereign;⁹ and second, the overall function or purpose of international criminal law.¹⁰ The first question concerns the identification of a supranational *ius puniendi*, while the second concerns the elaboration of a principled justification of international criminalisation. Without diminishing the importance of these questions, the present chapter focuses on the distinct, though related, inquiry of identifying the proper purpose of and justification for punishing international crimes.¹¹ Questions concerning the existence of a supranational *ius puniendi* and the justification for international criminalisation are only touched upon to the extent that they have been discussed in the context of the justificatory accounts of international criminal punishment that form the focus of this chapter.¹²

1947, p. 223 (“international law, in exceptional circumstances, ought to bypass the domestic legal order, and criminalise behaviour directly”). See similarly, Paola Gaeta, “International Criminalization of Prohibited Conduct”, in Antonio Cassese (ed.), *The Oxford Companion to International Criminal Justice*, Oxford University Press, Oxford, 2009, p. 65 (noting that “with regard to the core crimes the *jus puniendi* has ceased to be an exclusive state prerogative; furthermore, it is exercised at the international level on behalf of the international community as a whole” and that “[t]hese are crimes directly criminalized at the international level”); and Robert Cryer, “The Doctrinal Foundations of International Criminalization”, in M. Cherif Bassiouni (ed.), *International Criminal Law: Volume I, Sources, Subjects, and Contents*, Martinus Nijhoff Publishers, Leiden, 2008, p. 108 (noting that the fundamental point to understand about ‘core’ international crimes is that “the locus of the criminal prohibition is not the domestic, but the international legal order”).

⁸ For discussion, see generally, Kai Ambos, *Treatise on International Criminal Law: Volume I: Foundations and General Part*, Oxford University Press, Oxford, 2013, pp. 56–73.

⁹ See generally, Kai Ambos, “Punishment without a Sovereign? The *Ius Puniendi* Issue of International Criminal Law: A First Contribution towards a Consistent Theory of International Criminal Law”, in *Oxford Journal of Legal Studies*, 2013, vol. 33, no. 2, p. 293.

¹⁰ See generally, Kai Ambos, “The Overall Function of International Criminal Law: Striking the Right Balance Between the *Rechtsgut* and the Harm Principles: A Second Contribution Towards a Consistent Theory of ICL”, in *Criminal Law and Philosophy*, 2015, vol. 9, no. 2, p. 301.

¹¹ See similarly, May and Fyfe, 2017, p. 51, see *supra* note 3 (“Even if an international institution has the requisite authority to punish, there should still be an identifiable purpose or goal of punishment”).

¹² In particular, questions concerning whether it is possible to identify a legitimate source of authority to punish at the supranational level have been raised in the context of academic

6.2. Retributivism

The dominant accounts that initially emerged to justify the punishment of international crimes tended to mimic the theories of retributivism and utilitarianism initially devised to justify incarcerative punishment for domestic crimes.¹³ The automatic transposition of such theories to the international stage has generally encountered two challenges:¹⁴ first, these theories are accompanied by any weaknesses inherent to them at the domestic level; and second, the assumptions underlying these theories are not always appropriate when applied to the unique contexts in which international crimes typically occur.

Although encompassing several different strands of thought,¹⁵ the animating idea behind *retributive* theories of punishment is the notion of

critiques concerning whether it is possible to justify the imposition of punishment for international crimes.

- ¹³ These overarching categories have been recognised in the majority of case law before international criminal courts. See, for example, Ambos, 2013, p. 69, fn. 141, see *supra* note 8 (citing relevant references to the jurisprudence of the ICTY and ICTR that confirms that the principal purposes of punishment are retribution and deterrence). The recognition of the importance of retributivism and utilitarianism is also prevalent in both domestic and international criminal scholarship. See, for example, Michael S. Moore, *Placing Blame: A General Theory of the Criminal Law*, Oxford University Press, Oxford, 1997, pp. 91–92 (summarising the two pure theories of punishment with respect to domestic crime); and Naomi Roht-Arriaza, “Punishment, Redress and Pardon: Theoretical and Psychological Approaches”, in Naomi Roht-Arriaza (ed.), *Impunity and Human Rights in International Law and Practice*, Oxford University Press, New York, 1995, p. 13 (noting that, in the international criminal context, criminal justice theories “generally divide punishment rationales into two broad categories – utilitarian and retributive”).
- ¹⁴ David S. Koller, “The Faith of the International Criminal Lawyer”, in *New York University Journal of International Law and Politics*, 2008, vol. 40, no. 4, p. 1025. See also, Luban, 2010, p. 575, see *supra* note 4 (noting that “standard justifications [...] all raise familiar and difficult justificatory problems, which [...] take on different configurations in ICL than those familiar from domestic criminal justice”); Sloane, 2007, p. 40, see *supra* note 2 (“Justifications for punishment common to national systems of criminal law cannot be transplanted unreflectively to the distinct legal, moral, and institutional context of ICL”); and Mark A. Drumbl, *Atrocity, Punishment, and International Law*, Cambridge University Press, Cambridge, 2007, p. 32 (“the perpetrator of mass atrocity is qualitatively different than the perpetrator of ordinary crime [...] suggesting the need to judiciously contemplate a novel schematic of punishment for the extraordinary international criminal”).
- ¹⁵ For a useful overview of the different strands of retributivist thought, see generally, Thom Brooks, *Punishment*, Routledge, New York, 2012, pp. 15–34; Deirdre Golash, *The Case Against Punishment: Retribution, Crime Prevention, and the Law*, New York University Press, New York, 2005, at chaps. 3 and 4; R.A. Duff, *Punishment, Communication, and*

desert. Punishment is morally justified because criminals deserve to be punished, penal sanctions serving to give perpetrators their “just deserts”.¹⁶ As Michael Moore has put it, “Moral responsibility (‘desert’) in such a view is not only necessary for justified punishment, it is also sufficient”.¹⁷ Retributive theories that seek to *justify* punishment in this way are generally referred to as ‘positive’ retributive theories, to be distinguished from their ‘negative’ variety which seek more modestly to *set limits* on the criminal process leading up to punishment as well as the severity of punishment itself.¹⁸ Since positive retributivism is premised on a perpetrator suffering punishment as repayment for a past transgression, retributive theories have generally been referred to as “backward-looking”.¹⁹ Nonetheless, it should also be remembered that, in its depic-

Community, Oxford University Press, Oxford, 2001, pp. 19–30; and Michael S. Moore, *Placing Blame: A General Theory of the Criminal Law*, Oxford University Press, Oxford, 1997, at part I. See also, in the international criminal context, Alexander K.A. Greenawalt, “International Criminal Law for Retributivists”, in *University of Pennsylvania Journal of International Law*, 2014, vol. 35, no. 4, p. 969.

¹⁶ Duff, 2001, p. 21, see *supra* note 15 (“Retributivists assert a justificatory relationship between past crime and present punishment. That relationship is expressed by the idea of ‘desert’”).

¹⁷ Moore, 1997, p. 91, see *supra* note 15.

¹⁸ See, for example, Duff, 2001, p. 19, see *supra* note 15 (noting that “while a negative retributivist tells us only that we *may* punish the guilty, or that it would not be unjust to punish them, a positive retributivist holds that we *ought* to punish the guilty, or that justice *demand*s their punishment”) (emphasis in original). See also, in the international criminal context, Greenawalt, 2014, pp. 998–1001, see *supra* note 15 (discussing minimalist theories of retributivism).

¹⁹ See, for example, H.L.A. Hart, “Punishment and the Elimination of Responsibility”, in H.L.A. Hart (ed.), *Punishment and Responsibility: Essays in the Philosophy of Law*, Oxford University Press, Oxford, 2008, p. 160 (contrasting the “forward-looking Utilitarian approach” to justifying punishment with “two backward-looking requirements” closely associated with retributive theories); Duff and Garland, 1994, p. 8, see *supra* note 5 (“Consequentialist theories of punishment are instrumentalist and forward-looking [...] [while] [r]etributivist theories are intrinsicalist and backward-looking”); and George P. Fletcher, *Basic Concepts of Criminal Law*, Oxford University Press, Oxford, 1998, p. 33 (noting the debate between “those who believe that punishment should be imposed *retrospectively*, solely as an imperative of justice, as a way of addressing, negating, and overcoming the criminal act committed” and “[o]thers that hold that the aims of punishment are at least partly *prospective*: the purpose of imposing suffering on the offender should be to improve the welfare of society”) (emphasis in original).

tion of punishment as an intrinsic future good, retributivism may also be viewed in prospective terms.²⁰

An important feature of positive retributive theories is that they aim to treat individuals as rational moral agents, as ends in themselves and not merely as means for the promotion of other extrinsic purposes.²¹ Relatedly, the moral responsibility of the perpetrator also gives society the duty to punish,²² though this is usually understood more modestly to mean that society has “a duty to detect, convict, and punish the guilty – a duty that must compete with other duties and demands that might sometimes defeat it”.²³

With respect to international crimes, the positive retributivist position finds its clearest expression in the preamble to the Rome Statute of the International Criminal Court (‘ICC’), which affirms that “the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured”.²⁴ More broadly, Andrew Woods has argued that “the international criminal

²⁰ John Gardner, “Introduction”, in H.L.A. Hart (ed.), *Punishment and Responsibility: Essays in the Philosophy of Law*, Oxford University Press, Oxford, 2008, p. xv (Gardner notes that all justifications of punishments are forward-looking in the sense that “they explain how the justified thing promises to make the world a better place, or at least to avoid its getting any worse”. The distinctive feature of retributivism does not reside in any attempt to defy this axiom, but rather that “it finds some intrinsic – not merely instrumental – value in a certain type of suffering, namely in suffering that is deserved”).

²¹ See Immanuel Kant, *The Philosophy of Law: An Exposition of the Fundamental Principles of Jurisprudence as a Science of Right*, in William Hastie (trans.), Tandt Clark, Edinburgh, 1887, p. 195 (“Juridical punishment can never be administered merely as a means for promoting another Good either with regard to the Criminal himself or to Civil Society [...] For one man ought never to be dealt with merely as a means subservient to the purpose of another, nor be mixed up with the subjects of Real Right”) (emphasis added).

²² See, for example, Moore, 1997, p. 91, see *supra* note 15 (noting that, for a retributivist, “the moral responsibility of an offender also gives society the duty to punish”) (emphasis in original). This duty to punish has its roots in the Kantian conception of a “categorical imperative”. See, Kant, 1887, p. 195, see *supra* note 21 (“The penal law is a categorical imperative; and woe to him who creeps through the serpent-windings of Utilitarianism to discover some advantage that may discharge him from the Justice of Punishment”).

²³ Duff, 2001, p. 19, see *supra* note 15 (emphasis in original).

²⁴ Rome Statute of the International Criminal Court, adopted 17 July 1998, entry into force 1 July 2002, Preamble, para. 4 (‘ICC Statute’) (<http://www.legal-tools.org/doc/7b9af9/>).

regime in general – and its sentencing practice in particular – appear to be animated by a deep retributive impulse”.²⁵

Yet, notwithstanding its popularity, there are at least three challenges to retributive justifications of international criminal punishment. As will be seen, some of these challenges have more purchase than others.

6.2.1. The Selectivity Challenge

First, there is the challenge of selectivity.²⁶ According to Diane Amann, “as a result of selectivity and randomness, just deserts have been meted out inconsistently, in very few conflicts, and on only a few defendants”, thereby undermining the goal of retribution.²⁷ Selectivity in the imposition of international criminal punishment is rooted in a range of causes.²⁸ For example, there are a range of political impediments to the prosecution of international crimes, including legal limitations on the jurisdiction of international criminal courts as well as practical obstructions to the collection of evidence and enforcement of arrest warrants. In addition, the combined effect of the overwhelming scope of mass atrocity situations and the

²⁵ Andrew K. Woods, “Moral Judgments and International Crimes: The Disutility of Desert”, in *Virginia Journal of International Law*, 2012, vol. 52, no. 3, p. 638. See also, Drumbl, 2007, p. 150, see *supra* note 14 (“Retribution is the dominant stated objective for punishment of atrocity perpetrators at the national and international levels”); Ralph Henham, “Developing Contextualized Rationales for Sentencing in International Criminal Trials: A Plea for Empirical Research”, in *Journal of International Criminal Justice*, 2007, vol. 5, no. 3, pp. 757–58 (identifying a “pervading ideology of retributivism” within international criminal justice); and Allison Marston Danner, “Constructing a Hierarchy of Crimes in International Criminal Law Sentencing”, in *Virginia Law Review*, 2001, vol. 87, no. 3, pp. 449–50 (noting that retribution “may be considered the dominant sentencing model in international law”).

²⁶ On the selectivity challenge, see generally, Greenawalt, 2014, pp. 987–900, see *supra* note 15; Larry May, *Aggression and Crimes against Peace*, Cambridge University Press, Cambridge, 2008, pp. 330–31; Drumbl, 2007, pp. 151–54, see *supra* note 14; Diane Marie Amann, “Group Mentality, Expressivism, and Genocide”, in *International Criminal Law Review*, 2002, vol. 2, no. 2, pp. 116–17; and Bill Wringe, “Why Punish War Crimes? Victor’s Justice and Expressive Justifications of Punishment”, in *Law and Philosophy*, 2006, vol. 25, no. 2, pp. 163–71. On international criminal law’s selectivity more generally, see generally, Mirjan Damaska, “What is the Point of International Criminal Justice?”, in *Chicago-Kent Law Review*, 2008, vol. 83, no. 1, pp. 360–63; and Robert Cryer, *Prosecuting International Crimes – Selectivity and the International Criminal Law Regime*, Cambridge University Press, Cambridge, 2005.

²⁷ Amann, 2002, p. 117, see *supra* note 26.

²⁸ See similarly, Greenawalt, 2014, p. 987, see *supra* note 15.

limited resources of prosecuting institutions means that a degree of selectivity is to some extent unavoidable. As a result, only a small subset of perpetrators of international crimes are punished in practice. The result is what Mark Drumbl has referred to as “a retributive shortfall”,²⁹ with very few individuals or entities receiving their just deserts. Moreover, in several contexts, the concern has arisen that international criminal punishment amounts to little more than victors’ justice, discriminating amongst offenders on the basis of their allegiances, rather than implementing any notion of just deserts.³⁰

Despite its intuitive appeal, this challenge is in fact not fatal to the retributive justification of international criminal punishment. As Alexander Greenawalt has explained:³¹

[T]he fact that a great majority of the guilty escape punishment, does not by itself clarify which rationale guides the punishment of those who are prosecuted. If the guilty are punished because of their desert, then retributivism continues to supply a plausible account of international criminal justice, at least with respect to those suspects. [...] [T]he more pertinent question is not whether retributivism is compatible with conditions of selectivity, but instead how commitments to retributive justice are best reconciled with an international criminal justice system that, like all criminal justice systems, is necessarily selective.

In other words, while selectivity is not irrelevant to a retributivist’s views on international criminal justice,³² this challenge does not under-

²⁹ Drumbl, 2007, p. 153, see *supra* note 14.

³⁰ See, for example, Damaska, 2008, p. 361, see *supra* note 26 (“when international prosecutors bring to justice only, or mainly, criminals from weak nations, the result is that they discriminate among human rights abusers on the basis of their citizenship”); Drumbl, 2007, p. 153, see *supra* note 14 (noting that one problem with the retributive shortfall in the international criminal context is that “many powerful states and organizations are absolved of responsibility”); and Wringer, 2006, p. 164, see *supra* note 26 (noting the concern that the punishment of war criminals by international tribunals “does not represent the application of impartial moral principles to individuals on both sides of conflicts. Instead it typically only involves the inflicting of harsh treatment on selected members of the losing side”).

³¹ Greenawalt, 2014, pp. 989–90, see *supra* note 15.

³² See, for example, May, 2008, p. 331, see *supra* note 26 (“To say that there is a retributive shortfall is to commit one only to say that more needs to be done in this area of law than is

mine the theory's ability to justify the punishment that *is* inflicted in practice.³³

6.2.2. The Adequacy Challenge

Second, there is the challenge of adequacy. If retributive theories demand that punishment “fit” the crime committed, it becomes difficult to conceive of any punishment that could adequately match the gravity of international criminality.³⁴ As the Supreme Court of Israel in the *Eichmann*

currently being done”); and Damaska, 2008, p. 362, see *supra* note 26 (noting that the challenge of selectivity merely points to the need for international criminal courts “to make incremental headway toward a system unstained by the flaw of selectivity”). See also, Robert Cryer, “Sudan, Resolution 1593, and International Criminal Justice”, in *Leiden Journal of International Law*, 2006, vol. 19, no. 1, p. 218 (“it is best to accept that perfect compliance with rule of law standards remains some way off, but that it is better to ensure that some international crimes are prosecuted than to risk no prosecutions by too strict an application of the principle”).

³³ See, in this regard, Margaret M. deGuzman, “Choosing to Prosecute: Expressive Selection at the International Criminal Court”, in *Michigan Journal of International Law*, 2012, vol. 33, no. 12, p. 303 (“Even national systems do not punish all wrongdoers, but retribution can justify the punishment they do inflict”); and Drumbl, 2007, p. 151, see *supra* note 14 (“Selectivity is inevitable in the operation of law even in a robustly ordered and purportedly egalitarian domestic polity”).

³⁴ See, for example, Lawrence Douglas, “From IMT to NMT: The Emergence of a Jurisprudence of Atrocity”, in Kim C. Priemel and Alexa Stiller (eds.), *Reassessing the Nuremberg Military Tribunals: Transitional Justice, Trial Narratives, and Historiography*, Berghahn Books, New York, 2012, p. 289 (“the problem of adequate punishment [...] has vexed all atrocity trials”); Sloane, 2007, p. 81, see *supra* note 2 (“In a talionic sense, of course, no punishment can fit the most horrendous international crimes”); Mark J. Osiel, “Why Prosecute? Critics of Punishment for Mass Atrocity”, in *Human Rights Quarterly*, 2000, vol. 22, no. 1, p. 129 (noting the argument that since “we possess no punishment more severe than execution, we have none that captures and corresponds to the full severity of the wrongdoer’s acts in such cases. Because his evil is so “radical,” it mocks our efforts to punish it”); and Gary Jonathan Bass, *Stay the Hand of Vengeance – The Politics of War Crimes Tribunals*, Princeton University Press, Princeton, 2000, p. 13 (“There is no such thing as appropriate punishment for the massacres at Srebrenica or Djakovica; only the depth of our legalist ideology makes it seem so”) (emphasis in original). This sentiment is also reflected in empirical studies. See, for example, Janine Natalya Clark, “The Impact Question: The ICTY and the Restoration and Maintenance of Peace”, in Bert Swart, G. Alexander Zahar, and Göran Sluiter (eds.), *The Legacy of the International Criminal Tribunal for the Former Yugoslavia*, Oxford University Press, Oxford, 2011, p. 68 (noting the finding of her empirical study in Bosnia and Herzegovina that Bosnian Muslim interviewees “unanimously insisted that ICTY sentences are too lenient” with some accusing the ICTY of “rewarding war criminals”).

case put it, “Even as there is no word in human speech to describe deeds such as the deeds of [Eichmann], so there is no punishment under human law sufficiently grave to match [his] guilt”.³⁵

Again, however, this challenge is not fatal to the retributive justification of international criminal punishment. The challenge mistakenly assumes that retributivism demands a particular measure of punishment. As Michael Moore has clarified, while retributivists are “committed to the principle that punishment must be graded in proportion to desert [...] they are not committed to any particular scheme nor to any particular penalty as being deserved”.³⁶ The so-called “fit”, therefore, clearly refers to a particular *type* of proportionality.³⁷ Retributivism demands *ordinal* proportionality, which requires the scaling of punishment according to the gravity of the offence.³⁸ Ordinal proportionality entails three requirements:³⁹

³⁵ Supreme Court of Israel, *Attorney-General of the Government of Israel v. Adolf Eichmann*, 29 May 1962, in *International Law Reports*, 1968, vol. 36, p. 341. See also, Hannah Arendt, “Letter to Karl Jaspers of 17 August 1946”, in Lotte Köhler and Hans Saner (eds.), Robert Kimber and Rita Kimber (trans.), *Hannah Arendt/Karl Jaspers Correspondence: 1926-1969*, Harcourt Brace Jovanovich, New York, 1992, p. 54 (“It may well be essential to hang Göring, but it is totally inadequate. That is, this guilt, in contrast to all criminal guilt, oversteps and shatters any and all legal systems. That is the reason why the Nazis in Nuremberg are so smug”).

³⁶ Moore, 1997, p. 88, see *supra* note 15. A similar argument may be levelled at domestic crimes. See, for example, Osiel, 2000, p. 129, see *supra* note 34 (noting that this challenge is “true, but trivial” since “many ordinary offenders commit multiple offenses for which they cannot “repay” [...] in “fitting” measure, within their remaining life span”).

³⁷ On the distinction between different types of proportionality, see Andrew von Hirsch, “Censure and Proportionality”, in R.A. Duff and David Garland (eds.), *A Reader on Punishment*, Oxford University Press, Oxford, 1994, pp. 128–30. For a recent discussion in the international criminal context, see Greenawalt, 2014, pp. 981–84, see *supra* note 15.

³⁸ von Hirsch, 1994, p. 128, see *supra* note 37. On the application of ordinal proportionality in the international criminal context, see Sloane, 2007, p. 83, see *supra* note 2 (proposing reliance on ordinal proportionality as a means to “begin to calibrate crime and punishment in ICL sentencing in a non-arbitrary fashion notwithstanding that, emotively, virtually all of the relevant crimes seem to demand the harshest penalties”).

³⁹ von Hirsch, 1994, pp. 128–29, see *supra* note 37. On the challenges of meeting the demands of ordinal proportionality in the international criminal context, see Drumbl, 2007, pp. 154–63, see *supra* note 14 (Drumbl sets out “three realities” revealed by his review of the sentencing of international criminals which challenge the application of ordinal proportionality in practice: first, that sentences for international crimes are not generally longer than for serious ordinary domestic crimes; second, that sentences for international crimes before international tribunals are not generally longer than when pronounced by domestic courts despite international tribunals exercising jurisdiction over the most serious offenders;

first, *parity*, which requires that offenders convicted of crimes of similar gravity deserve penalties of comparable severity; second, *rank-ordering*, which requires that punishments should be ordered to ensure that their relative severity reflects the gravity-ranking of the crimes involved; and third, *spacing*, which requires that the spacing between different penalties reflects the comparative gravity of the offences. Ordinal proportionality is to be distinguished from *cardinal* proportionality, which refers to the ultimate *limits* of punishment that a criminal justice system may impose for any crimes.⁴⁰ It is perfectly consistent for a retributive theory to acknowledge constraints on the severity of punishment without undermining its central proposition that some form of punishment is justified based on an offender's desert.⁴¹

6.2.3. The 'Desert' Challenge

A final challenge to positive retributive theories of punishment is the most compelling: the need for retributivists to defend the role of 'desert' in providing the justificatory link between the commission of an international crime and the imposition of punishment.⁴² To meet this challenge, sev-

and third, significant disparity within and among international criminal institutions in terms of the severity of sentences, something which is not consistently explicable in terms of the gravity of the crime).

⁴⁰ von Hirsch, 1994, p. 129, see *supra* note 37. Cardinal constraints on punishment, typically imposed by human rights standards, are particularly important in the international criminal context in order to avoid punishments of an extraordinary nature. See, for example, Drumbl, 2007, p. 157, see *supra* note 14:

If the retributive value of punishing extraordinary international criminals truly were to be engaged, perhaps punishment would have to exceed anything ordinary. Truly proportionate sentences then might involve torture or reciprocal group eliminationism.

That is a terrifying path. In such a scenario, survivors would become as depraved as their tormentors.

⁴¹ See, for example, Kirsten J. Fisher, *Moral Accountability and International Criminal Law: Holding Agents of Atrocity Accountable to the World*, Routledge, Abingdon, 2012, p. 54 ("Punishment can be distributed on a sliding scale, recognizing that the harm inflicted by the punishing institution will not equal the harm caused by the crime but is deserved as some form of payback"). See, however, Lawrence Douglas, Austin Sarat and Martha Merrill Umphrey, "At the Limits of Law: An Introduction", in Lawrence Douglas, Austin Sarat and Martha Merrill Umphrey, *The Limits of Law*, Stanford University Press, Stanford, 2005, pp. 4–5 ("Legal responses to mass crimes are, then, at best symbolic gestures [...] [which] symbolize little besides their own impotence").

⁴² See, for example, Golash, 2005, p. 49, see *supra* note 15 ("the retributivist must demonstrate that the rightness of punishment derives directly from the wrongness of crime");

eral different accounts of positive retributivism have been put forward. Yet, whether applied with respect to domestic or international crimes, these accounts have generally been found wanting.⁴³ In the remainder of this section, two accounts will be examined: the moral intuitions theory; and the unfair advantage theory.

6.2.3.1. The Moral Intuitions Theory

According to Michael Moore's retributive account, reliance may be placed on *our moral intuitions* to justify punishment.⁴⁴ Moore conducts a Kantian thought experiment in which we are to imagine that we have committed a grave wrong, which causes us to feel the emotion of guilt in response.⁴⁵ The emotion of guilt that we feel in respect of our own wrongdoing is characterised as "virtuous" (in Moore's words, "the only tolerable response of a moral being") and therefore less suspect in its origins than emotions that may be incited in third persons by the wrongdoing.⁴⁶ Moore

Duff and Garland, 1994, p. 8, see *supra* note 5 (noting that a common criticism of retributive theories is that they fail to provide "any genuinely non-consequentialist account of the justificatory relationship between crime and punishment"); and Hugo Adam Bedau, "Retribution and the Theory of Punishment", in *Journal of Philosophy*, 1978, vol. 75, no. 11, p. 616. Bedau notes the central dilemma for the retributivist in the following terms:

Either he [the retributivist] appeals to something else – some good end – that is accomplished by the practice of punishment, in which case he is open to the criticism that he has a non-retributivist, consequentialist justification for the practice of punishment. Or his justification does not appeal to something else, in which case it is open to the criticism that it is circular and futile.

⁴³ See, for example, Dennis J. Baker, *Glanville Williams Textbook of Criminal Law*, Sweet and Maxwell, London, 2012, p. 40:

lawyers and philosophers are now practically unanimous in rejecting this proposition [...] that wrongdoing is a sufficient condition of punishment (they do not argue that all wrongdoers must be punished); they say only that it is a necessary condition (no one can properly be punished who is not a wrongdoer).

See also, Koller, 2008, p. 1025, see *supra* note 14 ("the retributive theory of punishment largely has been discredited in domestic criminal justice since the very beginnings of modern criminology"). For a comprehensive review of the various critiques that have been raised against different positive retributive accounts of punishment in the domestic context, see generally, Golash, 2005, see *supra* note 15.

⁴⁴ Moore, 1997, p. 99, see *supra* note 15 ("Most people react to [...] atrocities with an intuitive judgment that punishment (at least of some kind and to some degree) is warranted").

⁴⁵ *Ibid.*, pp. 145–49.

⁴⁶ *Ibid.*, pp. 147, 164 (describing "the virtue of our own imagined guilt" and noting that "when that emotion of guilt produces the judgment that one deserves to suffer because one

proceeds to argue that the virtuous nature of this emotion of guilt gives it “good epistemic credentials”,⁴⁷ which may serve to validate the judgment that we are guilty and ought to be punished.⁴⁸ From here, it is a small step for Moore to generalise this judgment about our own deserved punishment to others who commit like wrongs: “To refuse to grant [others] the same responsibility and desert as you would grant yourself is [...] an instance of what Sartre called bad faith, the treating of a free, subjective will as an object”.⁴⁹

Moore’s account is unpersuasive in two respects. First, by relying on intuitions, Moore’s account is vulnerable to the response that intuitions *to punish* may not be shared by all members of a community. This weakness is arguably exacerbated in the international context, given the plurality of systems and notions of justice within the international community.⁵⁰ Second, Moore’s account fails to justify why the State or the international community should act on moral intuitions that are incited by our own wrongdoing. It is entirely plausible that we could agree that such emotions are morally appropriate responses to certain forms of crime, whilst also maintaining that the State or the international community should not act on them and should instead find other less destructive means of expressing them.⁵¹

has culpably done wrong, that judgment is not suspect because of its emotional originals in the way that the corresponding third person judgment might be”).

⁴⁷ *Ibid.*, p. 147.

⁴⁸ *Ibid.*, pp. 147–48.

⁴⁹ *Ibid.*, p. 149.

⁵⁰ See, for example, deGuzman, 2012, pp. 304–05, see *supra* note 33 (noting that “[t]he claim that “intuitions of justice” derive from a moral organ shared by all humans has been convincingly attacked” and adding that “notions of justice are highly contested and depend on a range of social, political, and economic factors”); and Miriam J. Aukerman, “Extraordinary Evil, Ordinary Crime: A Framework for Understanding Transitional Justice”, in *Harvard Human Rights Journal*, 2002, vol. 15, p. 56 (“The problem with such intuition-based arguments for retribution is that not everyone shares the desire to punish; in fact, some victims plead for clemency for their tormentors”).

⁵¹ See, for example, Duff, 2001, p. 25, see *supra* note 15:

Moore’s argument appears to amount to little more than an appeal to the intuition (expressed in first-person cases through the emotion of guilt) that “the guilty deserve to suffer”: it does not tell us *why* they should suffer, or why guilt should generate the judgment that I ought to suffer, or *what* they ought to suffer, or why it should be a proper task for the *state* to inflict that suffering. (emphasis in original)

6.2.3.2. The Unfair Advantage Theory

A separate account, commonly referred to as *the unfair advantage theory*,⁵² asserts that punishment is justified on the basis of the principle of reciprocity.⁵³ This account is premised on the idea that the criminal law serves as both a provider of benefits (such as freedom and security) and an imposer of burdens of self-restraint on all individuals subject to it. By accepting the benefits that flow from law-abiding self-restraint, the principle of reciprocity holds that each individual in society must also accept the burden of obeying the law. When individuals break the law, they abandon the burden that others have assumed and thereby gain an unfair advantage. In such circumstances, punishment is justified to deprive criminals of the unfair advantage that they might otherwise retain.

Again, however, whether applied to domestic or international crimes, there are several difficulties with the unfair advantage justification of punishment. First, it is unclear how the unfair advantage that a wrongdoer purportedly gains from his offence may be eliminated by the imposition of punishment. As Andrew von Hirsch has queried:⁵⁴ “In what sense does his being deprived of rights *now* offset the extra freedom he has arrogated to himself *then* by offending?” Second, by equating the commission of crimes with the gain of an unfair advantage, the theory ends up distorting the essential character of crime.⁵⁵ In the domestic context, to

⁵² The theory is commonly traced to the work of Herbert Morris and Jeffrie Murphy based on the writings of Immanuel Kant. Both authors subsequently moved away from the theory. See von Hirsch, 1994, p. 130, fn. 2, see *supra* note 37. For a useful overview of the development of Jeffrie Murphy’s thoughts on retributivism, see generally, Jeffrie G. Murphy, “Legal moralism and retribution revisited”, in *Criminal Law and Philosophy*, 2007, vol. 1, no. 1, p. 5.

⁵³ For critical discussion of the unfair advantage theory, see generally, Golash, 2005, pp. 81–85, see *supra* note 15; Duff, 2001, pp. 21–23, see *supra* note 15; von Hirsch, 1994, pp. 116–18, see *supra* note 37; and Jean Hampton, “The retributive idea”, in Jeffrie G. Murphy and Jean Hampton, *Forgiveness and Mercy*, Cambridge University Press, Cambridge, 1988, pp. 114–17. For recent discussion of the theory in the international criminal context, see generally, Greenawalt, 2014, pp. 994–98, see *supra* note 15; and Sloane, 2007, pp. 80–81, see *supra* note 2.

⁵⁴ von Hirsch, 1994, p. 117, see *supra* note 37.

⁵⁵ See, for example, Duff, 2001, p. 22, see *supra* note 15 (“The criminal wrongfulness of rape, for instance, in virtue of which it merits punishment, does not consist in taking an unfair advantage over all those who obey the law”); and Hampton, 1988, pp. 116–17, see *supra* note

depict the punishment of murderers or rapists in terms of the removal of an *advantage* appears to presuppose our recognition that their actions, or the consequences that flow from them, are inherently desirable.⁵⁶ Yet, as Deirdre Golash has observed, in such cases “it is not so much the offender’s gain, as the victim’s loss, that seems most unfair, and which, moreover, seems to govern the retributive intuition that the penalty should be matched to the seriousness of the crime”.⁵⁷ This insight applies with even greater force in the international criminal context, which generally concerns offences that cause extraordinary harm to victims. As Robert Sloane has explained:

it would be bizarre to conceptualize the *génocidaire* as a freerider on the hypothetical social contract of others not to destroy national, ethnic, racial, or religious groups, or to regard a serious human rights abuser as arrogating to himself a benefit that others voluntarily relinquished in their common interest.⁵⁸

As the preceding examination reveals, retributivists have struggled to provide a convincing account of how the notion of ‘desert’ can provide the justificatory link between the commission of a crime and the imposition of punishment. It is this issue, more than questions that arise concerning the selectivity and inadequacy of international criminal punishment, that poses a particularly compelling challenge to retributive justifications of punishment for international crimes.

6.3. Utilitarianism

The animating idea behind utilitarianism is that a particular social practice is justified only if its consequences are sufficiently good to outweigh the

53 (“this theory of retribution fails in a fully adequate way to link our condemnation of a wrongdoer to that which makes his conduct wrong”) (emphasis in original).

⁵⁶ Hampton, 1988, p. 116, see *supra* note 53.

⁵⁷ Golash, 2005, p. 83, see *supra* note 15.

⁵⁸ Sloane, 2007, p. 80, see *supra* note 2 (Sloane also points out that the unfair advantage theory makes little sense in the international criminal context given the unique sociological conditions of mass atrocities, including State complicity in the commission of the crimes and the lack of deviance amongst lower-level offenders who tend to be conforming to societal norms when committing the crimes in question). For a critical discussion of Sloane’s critique, see Greenawalt, 2014, pp. 994–98, see *supra* note 15.

harm of its imposition.⁵⁹ In other words, utilitarian theories justify social practices by their “contingent, instrumental, contribution to some independently identifiable good”.⁶⁰

In the criminal law context, the primary good that has been identified to justify the imposition of punishment is social protection or crime

⁵⁹ See, for example, Duff, 2001, p. 3, see *supra* note 15 (noting that the “central slogan” of consequentialism is that “punishment can be justified only if it brings some consequential good”); and Greenawalt, 1983, p. 351, see *supra* note 5 (noting that utilitarian theories adhere to the idea that “likely consequences determine the morality of action”). Utilitarianism is usually rooted in Jeremy Bentham’s principle of utility. See Jeremy Bentham, *An Introduction to the Principles of Morals and Legislation*, in John Bowring (ed.), 1843, reprinted in Joshua Dressler, *Cases and Materials on Criminal Law*, 5th edition, Thomson Reuters, 2009, at p. 34:

By the principle of utility is meant that principle which approves or disapproves of every action whatsoever, according to the tendency which it appears to have to augment or diminish the happiness of the party whose interest is in question; or, what is the same thing in other words, to promote or to oppose that happiness.

⁶⁰ Duff, 2001, p. 6, see *supra* note 15. For retributivists, utilitarian accounts are open to the objection that they treat criminals as a means to an end rather than as an end in themselves. For a discussion of this troubling aspect of utilitarian accounts, see Bill Wringer, “War Crimes and Expressive Theories of Punishment: Communication or Denunciation?”, in *Res Publica*, 2010, vol. 16, no. 2, pp. 122–24; and Duff, 2001, pp. 13–14, see *supra* note 15. Some theorists have tried to overcome such difficulties by recourse to mixed-theories which combine utilitarian aims with retributive restraints on punishment. See, for example, H.L.A. Hart, “Prolegomenon to the Principles of Punishment”, in H.L.A. Hart, *Punishment and Responsibility: Essays in the Philosophy of Law*, Oxford University Press, Oxford, 2008, p. 9:

Much confusing shadow-fighting between utilitarians and their opponents may be avoided if it is recognized that it is perfectly consistent to assert *both* that the General Justifying Aim of the practice of punishment is its beneficial consequences *and* that the pursuit of this General Aim should be qualified or restricted out of deference to principles of Distribution which require that punishment should be only of an offender for an offence. (emphasis in original)

See also, John Rawls, “Two Concepts of Rules”, in *Philosophical Review*, 1955, vol. 64, no. 1, p. 5 (proposing that “utilitarian arguments are appropriate with regard to questions about practices, while retributive arguments fit the application of particular rules to particular cases”). H.L.A. Hart’s proposed reconciliation between retributive and utilitarian theories has also been picked up in international criminal literature. See, for example, Darryl Robinson, “A Cosmopolitan Liberal Account of International Criminal Law”, in *Leiden Journal of International Law*, 2013, vol. 26, no. 1, p. 132 (“while utilitarian arguments are relevant and important, we also require a *deontological* justification, showing that the punishment is ‘deserved’”) (emphasis in original).

prevention.⁶¹ In particular, two categories of crime prevention have generally been recognised by criminal law scholars:⁶² general deterrence; and specific deterrence. The distinction between these two categories centres on the intended target audience:⁶³ specific deterrence applies to individual offenders whereas general deterrence applies to society at large. Although specific deterrence has been referred to in passing by international criminal courts and tribunals,⁶⁴ it is generally accepted that it will rarely be

⁶¹ See, for example, Jeremy Bentham *et al.*, “Deterrence”, in Andrew von Hirsch, Andrew Ashworth and Julian V. Roberts (eds.), *Principled Sentencing: Readings on Theory and Policy*, Hart Publishing, Oxford, 2009, p. 39; George P. Fletcher, *The Grammar of Criminal Law: American, Comparative, and International: Volume One: Foundations*, Oxford University Press, Oxford, 2007, p. 248; and Duff, 2001, p. 4, see *supra* note 15.

⁶² Tallgren, 2002, p. 569, see *supra* note 1 (“The consequentialist or relativist theory of punishment bases its justification for punishing on the possibility of prevention by means of general or special prevention”). Other scholars have identified a broader range of crime prevention categories. See, for example, Fletcher, 2007, p. 248, see *supra* note 61 (noting four goals under the general heading of “social protection” as a purpose of punishment: general deterrence, special deterrence, rehabilitation, and isolation); Sloane, 2007, p. 69, see *supra* note 2 (including the following within the category of crime-control: “deterrence, specific and general; incapacitation, which can be conceived as an extreme form of specific deterrence insofar as, if successful, it obviates any recidivism concerns; and rehabilitation”); and Greenawalt, 1983, pp. 351–52, see *supra* note 5 (identifying a range of beneficial consequences that utilitarians have thought can be realised by punishment, including: general deterrence; norm reinforcement; individual deterrence; incapacitation; reform; and vengeance).

⁶³ Jeremy Bentham, “Punishment and Deterrence”, in Andrew von Hirsch, Andrew Ashworth, and Julian V. Roberts (eds.), *Principled Sentencing: Readings on Theory and Policy*, Hart Publishing, Oxford, 2009, p. 53 (“[T]he prevention of offences divides itself into two branches: *particular prevention*, which applies to the delinquent himself; and *general prevention*, which is applicable to all the members of the community without exception”) (emphasis in original).

⁶⁴ See, for example, ICTY, *Prosecutor v. Mucić et al.*, Trial Chamber, Judgment, 16 November 1998, IT-96-21-T, para. 1234 (“the accused should be sufficiently deterred by appropriate sentence from ever contemplating taking part in such crimes again”) (<http://www.legal-tools.org/doc/6b4a33/>); and ICTY, *Prosecutor v. Kordić and Čerkez*, Appeals Chamber, Judgment, 17 December 2004, IT-95-14/2-A, para. 1076 (“Both individual and general deterrence serve as important goals of sentencing”) (<http://www.legal-tools.org/doc/738211/>). See, however, Payam Akhavan, “Justice in The Hague, Peace in the Former Yugoslavia? A Commentary on the United Nations War Crimes Tribunal”, in *Human Rights Quarterly*, 1998, vol. 20, no. 4, p. 750 (noting that “it should not be concluded that specific deterrence is altogether irrelevant” and pointing to “evidence that suggests that targeting political and military leaders and subjecting them to a threat of punishment [...] can generate a form of immediate deterrence”).

necessary since most international criminal perpetrators are unlikely ever to replicate the circumstances in which they originally committed their crimes.⁶⁵

For the most part, therefore, international criminal courts,⁶⁶ as well as international criminal justice scholars,⁶⁷ have tended to focus on the

⁶⁵ See, for example, Fisher, 2012, p. 52, see *supra* note 41:

international crimes, such as genocide and crimes against humanity, are committed in unique environments that foster and promote particular criminal behaviour. It is unlikely that such an environment would present itself again to these individuals and therefore it is unlikely that punishment would be necessary to ensure non-recidivism.

See also, Luban, 2010, p. 575, see *supra* note 4 (“special deterrence will seldom be necessary, because the defendant in the dock of an international tribunal is unlikely ever again to be in the circumstances in which he committed his crime”); and Sloane, 2007, p. 85, see *supra* note 2 (noting the lack of concern about recidivism in the international criminal context). The unlikelihood of recidivism is also reflected by international criminal courts. See, for example, ICTY, *Prosecutor v. Kunarac et al.*, Trial Chamber, Judgment, 22 February 2001, IT-96-23-T and IT-96-23/1-T, para. 840 (“the likelihood of persons convicted here ever again being faced with an opportunity to commit war crimes, crimes against humanity, genocide or grave breaches is so remote as to render its consideration in this way unreasonable and unfair”) (<http://www.legal-tools.org/doc/fd881d/>).

⁶⁶ See, for example, Drumbl, 2007, p. 169, see *supra* note 14 (“the focus overwhelmingly is on general deterrence”); and “Developments in the Law: International Criminal Law”, in *Harvard Law Review*, 2001, vol. 114, no. 7, p. 1963 (“concern with general deterrence pervades the official and unofficial statements of tribunal insiders”). For references to the case law of the UN *ad hoc* tribunals, which generally identify deterrence as an important purpose of sentencing, see generally, Kai Ambos, “Crimes Against Humanity and the International Criminal Court”, in Leila Nadya Sadat (ed.), *Forging a Convention for Crimes Against Humanity*, Cambridge University Press, Cambridge, 2011, p. 299, fn. 99. It should be noted, however, that some international criminal courts have been more cautious in their reliance on general deterrence as a justification for punishment. See, for example, ICTY, *Prosecutor v. Duško Tadić*, Appeals Chamber, Judgment in Sentencing Appeals, 26 January 2000, IT-94-1-A and IT-94-1-A bis, para. 48 (noting that deterrence “must not be accorded undue prominence in the overall assessment of the sentences to be imposed on persons convicted by the International Tribunal”) (<http://www.legal-tools.org/doc/df7618/>).

⁶⁷ See, for example, Payam Akhavan, “Beyond Impunity: Can International Criminal Justice Prevent Future Atrocities?”, in *American Journal of International Law*, 2001, vol. 95, no. 1, p. 10 (“individual accountability for massive crimes is an essential part of a preventive strategy and, thus, a realistic foundation for a lasting peace”); Antonio Cassese, “Reflections on International Criminal Justice”, in *Modern Law Review*, 1998, vol. 61, no. 1, p. 2 (“the impunity of the leaders and organisers of the Armenian genocide [...] gave a nod and a wink to Adolf Hitler and others to pursue the Holocaust some twenty years later”); and Richard J. Goldstone, “Justice as a Tool for Peace-Making: Truth Commissions and International Criminal Tribunals”, in *New York University Journal of International Law and Politics*, 1996, vol. 28, no. 3, p. 490 (“If political and military leaders believe they are like-

general deterrent effect of international criminal punishment. Notable in this regard, is the utopian tone of international criminal punishment's general deterrent aspirations. For instance, drawing on several preambulatory references in the ICC, International Criminal Tribunal for former Yugoslavia ('ICTY') and International Criminal Tribunal for Rwanda ('ICTR') Statutes,⁶⁸ Darryl Robinson has observed how international criminal punishment has been accorded ambitiously high expectations, aspiring to *end* impunity, as compared to domestic criminal law, which appears to aim more modestly to *manage* crime by reducing or at the very least visibly responding to criminality.⁶⁹

In order to justify these deterrent credentials, it has been asserted that the imposition of punishment may serve as a means for increasing the costs or reducing the benefits of perpetrating international crimes in the future.⁷⁰ In other words, punishment is considered to serve as a credible threat or warning to potential offenders that future wrongdoing will be sanctioned. Once such individuals realise that they cannot escape sanction for committing atrocities, they will be less likely to carry out such crimes.⁷¹

ly to be brought to account by the international community for committing war crimes, that belief in most cases will have a deterrent effect"). Interestingly, Jeremy Bentham argued that general prevention "ought to be the chief end of punishment" since "[i]f we could consider an offence which has been committed as an isolated fact, the like of which would never recur, punishment would be useless" and "[i]t would be only adding one evil to another". See Bentham, 2009, p. 54, see *supra* note 63.

⁶⁸ See ICC Statute, para. 5, see *supra* note 24 (stating a determination "to put an *end* to impunity") (emphasis added); UN Security Council Resolution 827 (1993), UN Doc. S/RES/827, 25 May 1993, Preamble, para. 5 (stating a determination "to put an *end* to such crimes") (emphasis added) (<http://www.legal-tools.org/doc/dc079b/>); and UN Security Council Resolution 955 (1994), UN Doc. S/RES/955, 8 November 1994, Preamble, para. 6 (stating a determination "to put an *end* to such crimes") (emphasis added) (<http://www.legal-tools.org/doc/f5ef47/>).

⁶⁹ Darryl Robinson, "The Identity Crisis of International Criminal Law", in *Leiden Journal of International Law*, 2008, vol. 21, no. 4, p. 944.

⁷⁰ ICTR, *Prosecutor v. Kambanda*, Trial Chamber, Judgment and Sentence, 4 September 1998, ICTR 97-23-S, para. 28 (referring to deterrence as a means for "dissuading for good those who will attempt in future to perpetrate such atrocities") (<http://www.legal-tools.org/doc/49a299/>).

⁷¹ See, for example, Julian Ku and Jide Nzelibe, "Do International Criminal Tribunals Deter or Exacerbate Humanitarian Atrocities?", in *Washington University Law Review*, 2006, vol. 84, no. 4, pp. 789–90:

Despite the simplicity of its logic, this account has been subject to significant scrutiny in the international criminal context. Beyond the difficulty of empirically measuring the deterrent effect of punishment in any context,⁷² a number of challenges have been identified within international criminal scholarship that question the deterrent capacity of *international criminal* punishment more specifically.⁷³

6.3.1. The Probabilities Challenge

First, there is the challenge of probabilities. According to economic models of crime, effective deterrence requires three components: certainty, severity and celerity of punishment.⁷⁴ Punishment will act as a general deterrent to the extent that the penalties are certain to be imposed, sufficiently severe, and imposed sufficiently soon after the offence takes

the assumption that ICTs [international criminal tribunals] can deter future atrocities by ending a culture where offenders escape sanctions for committing humanitarian atrocities. By subjecting such offenders to the credible threat of an ad hoc ICT or ICC prosecution, such a culture of impunity would slowly be undermined. Realizing that an ICT prosecution is possible, offenders would be more likely to refrain from committing atrocities.

⁷² See, for example, deGuzman, 2012, p. 307, see *supra* note 33 (noting “the difficulty of proving the counterfactual – that criminal conduct would have occurred but for the existence of particular legal rules”); Carsten Stahn, “Between ‘Faith’ and ‘Facts’: By What Standards Should We Assess International Criminal Justice?”, in *Leiden Journal of International Law*, 2012, vol. 25, no. 2, pp. 265–66 (“Hardly any empirical study has managed to demonstrate impact credibly and to trace clear patterns of causation and weigh intermediate causes”) and Tallgren, 2002, p. 569, see *supra* note 1 (noting that “any criminal justice system operates in a world of likelihoods, possibilities and beliefs that does not easily submit itself to ‘empirical truths’ or ‘clear analysis’” and adding that “the assessment of prevention is one of the most difficult and controversial issues in criminal law theory”).

⁷³ Aspects of the sections that follow draw on passages first elaborated in Barrie Sander, “International Criminal Justice as Progress: From Faith to Critique”, in Morten Bergsmo, CHEAH Wui Ling, SONG Tianying and YI Ping (eds.), *Historical Origins of International Criminal Law: Volume 4*, Torkel Opsahl Academic EPublisher, Brussels, 2015, pp. 799 ff (<http://www.toaep.org/ps-pdf/23-bergsmo-cheah-song-yi>).

⁷⁴ von Hirsch, 2009, p. 40, see *supra* note 61. Other scholars have narrowed this list to two components, severity and certainty of punishment. See, for example, Drumbl, 2007, pp. 169–70, see *supra* note 14; Ku and Nzelibe, 2006, p. 792, see *supra* note 71; Tallgren, 2002, p. 575, see *supra* note 1; and Akhavan, 1998, p. 796, see *supra* note 64.

place.⁷⁵ Each of these components has proven challenging to satisfy in the international criminal context.

In terms of *severity*, perpetrators of mass atrocity tend to operate in environments where pre-existing sanctions, including possible death and imprisonment from the conflict itself, provide a level of severity far greater than any threat of punishment likely to be meted out by any criminal institution in the future.⁷⁶

With respect to *certainty* and *celerity* of punishment, the reality of international criminal justice is that there is an extremely low probability of prosecution or arrest of offenders.⁷⁷ Whether as a result of the restrictive jurisdictional mandates of criminal courts that limit the scope of prosecutions,⁷⁸ or the dystopian realities that hinder securing arrests or evi-

⁷⁵ Of these components, statistical research in the domestic criminal law context has confirmed that severity is the least important, with associations between severity of punishment and crime rates being fairly weak. See, for example, Andrew von Hirsch, Anthony E. Bottoms, Elizabeth Burney and Per-Olov Wikström, “Deterrent Sentencing as a Crime Prevention Strategy”, in Andrew von Hirsch, Andrew J. Ashworth and Julian V. Roberts (eds.), *Principled Sentencing: Readings on Theory and Policy*, Hart Publishing, Oxford, 2009, p. 57.

⁷⁶ See, for example, Ku and Nzelibe, 2006, p. 807, see *supra* note 71 (indicating that perpetrators of humanitarian atrocities “routinely face sanctions which are likely to be more severe and certain than any meted out by an existing or future [ICL court or tribunal]”); and Tallgren 2002, pp. 589–90, see *supra* note 1 (noting that, by contrast to domestic systems, where “criminal law is the most concrete and severe means to intervene in the legal status and life of an individual”, in the international system a range of other sanctions that target the State directly and individuals indirectly are greater in severity meaning that criminal law is not “the *ultima ratio* for the international community”).

⁷⁷ See, for example, Fisher, 2012, p. 52, see *supra* note 41 (“so few international criminals are brought to trial that the slight possibility of capture and punishment is unlikely to weigh heavily as a deterrent”); Leslie P. Francis and John G. Francis, “International Criminal Courts, the Rule of Law, and the Prevention of Harm: Building Justice in Times of Injustice”, in Larry May and Zachary Hoskins (eds.), *International Criminal Law and Philosophy*, Cambridge University Press, Cambridge, 2014, p. 70 (“The conditions and opportunities that lead people to commit atrocities are often distant in time, in space, and in the probability of getting caught”); and Drumbl, 2007, p. 169, see *supra* note 14 (noting “the very low chance that offenders ever are accused or, if accused, that they ever are taken into the custody of criminal justice institutions”).

⁷⁸ See, for example, Theodor Meron, “Does International Criminal Justice Work?”, in Theodor Meron, *The Making of International Criminal Justice: A View from the Bench: Selected Speeches*, Oxford University Press, Oxford, 2011, p. 142 (“there are whole swathes of the world that remain out of the jurisdiction of any international criminal tribunal”).

dence,⁷⁹ criminal courts have been hindered from delivering a “credible and authoritative communication of a threatened sanction”.⁸⁰

Yet, despite the force of these observations, it remains a matter of contestation whether the low probability of international criminal punishment that characterises international criminal justice in the present is surmountable. For some, the low probability is merely a temporary state of affairs on the road to a system of truly global justice free from State interference.⁸¹ Theodor Meron, for example, has argued that rather than “despairing over the prospects of deterrence, the international community should enhance the probability of punishment”.⁸² The challenge with this response is that it is based on a faith in the evolutionary potential of the field of international criminal justice that lacks any empirical grounding.⁸³ As several critical scholars have observed, the accommodation of international criminal law to State power seems to be “the constitutive condition” for its existence and operation.⁸⁴ Grietje Baars, for example, has argued that it is important not to overlook the fact that the so-called “impunity gap” that exists within international criminal justice today is created by the power relations that exist within the field.⁸⁵ As such, a bet-

⁷⁹ See, for example, Robinson, 2008, p. 944, see *supra* note 69 (noting “the dystopian realities faced by ICL”, namely “the severity and scale of the crimes and the extreme difficulty of securing arrests”).

⁸⁰ Sloane, 2007, p. 72, see *supra* note 2. See also, Koller, 2008, p. 1027, see *supra* note 14 (“deterrence theory is generally assumed to require a credible threat of prosecution, but prosecutions of more than a handful of perpetrators of major atrocities appear unlikely”); and Aukerman, 2002, p. 67, see *supra* note 50 (“the fact that in the wake of mass atrocities only a small number of those implicated will ever be prosecuted undermines the logic of the deterrence argument”).

⁸¹ Robert Cryer, *Prosecuting International Crimes: Selectivity and the International Criminal Law Regime*, Cambridge University Press, Cambridge, 2005, pp. 230–31. For a critique of this argument, see Sarah M.H. Nouwen, “Legal Equality on Trial: Sovereigns and Individuals before the International Criminal Court”, in *Netherlands Yearbook of International Law*, 2012, vol. 43, p. 179.

⁸² Theodor Meron, “From Nuremberg to The Hague”, in *Military Law Review*, 1995, vol. 149, pp. 110–11.

⁸³ Nouwen, 2012, p. 179, see *supra* note 81.

⁸⁴ Adam Branch, *Displacing Human Rights: War and Intervention in Northern Uganda*, Oxford University Press, Oxford, 2011, p. 206.

⁸⁵ Grietje Baars, “Making ICL history: on the need to move beyond prefab critiques of ICL”, in Christine Schwöbel (ed.), *Critical Approaches to International Criminal Law: An Introduction*, 2014, Routledge, Abingdon, p. 208.

ter term to characterise this gap would be “planned impunity”, the recognition of impunity’s planned nature serving as an acknowledgement that the low probability of punishment cannot simply be “corrected”.⁸⁶ Similarly, Sara Kendall has argued for greater recognition of the fact that the ultimate constituents of international criminal punishment are not conflict-affected communities but States, who constitute the “shareholders” of global justice and therefore limit its “material conditions of possibility”.⁸⁷

Regardless of which of these divergent outlooks one considers more persuasive, the fact remains that under present conditions, the slow pace and uncertain enforcement of international criminal law is enough to render the deterrent effect of international criminal punishment highly questionable.

6.3.2. The Non-Deterrability Challenge

Second, there is the challenge that the unique character of most international crimes is such that the logic of general deterrence appears to be inapplicable to them. The logic of general deterrence is premised on the ability of punishment to deter future offenders through rational and prudential dissuasion.⁸⁸ The dissuasive message of punishment is *rational* to the extent that it seeks to provide potential offenders with reasons to renounce crime, and *prudential* to the extent that it appeals to potential offenders’ self-interest (as opposed to their conscience) in avoiding punishment.⁸⁹ As Payam Akhavan has put it, deterrence presupposes “the existence of identifiable or determinate causes of criminal behavior that are the

⁸⁶ *Ibid.* See also, Grietje Baars, “Law(yers) Congealing Capitalism: On the (Im)possibility of Restraining Business in Conflict through International Criminal Law”, PhD thesis, University College London, 2012, pp. 307–08 (advocating a move “away from *legal* emancipation and toward *human* emancipation”) (emphasis in original).

⁸⁷ Sara Kendall, “Commodifying Global Justice: Economies of Accountability at the International Criminal Court”, in *Journal of International Criminal Justice*, 2015, vol. 13, no. 1, p. 134.

⁸⁸ Antony Duff, 2001, p. 4, see *supra* note 15. Some scholars refer to this problem in terms of whether or not certain crimes or criminals are “deterable”. See, for example, Aukerman, 2002, p. 68, see *supra* note 50; and Jan Klabbers, “Just Revenge? The Deterrence Argument in International Criminal Law”, in *Finnish Yearbook of International Law*, 2001, vol. 12, p. 253.

⁸⁹ Duff, 2001, p. 4, see *supra* note 15. See similarly, Tallgren, 2002, pp. 572–73, see *supra* note 1.

targets of punishment”.⁹⁰ Yet, assumptions of perpetrator rationality and prudence are ill-fitting in many mass atrocity contexts.

With respect to perpetrator *rationality*, Mark Drumbl has provocatively questioned whether “genocidal fanatics, industrialized into well-oiled machineries of death, make cost-benefit analyses prior to beginning their work”.⁹¹ According to Drumbl, there are two unsettling realities that undermine the assumption of perpetrator rationality in mass atrocity contexts:⁹² first, the fact that many perpetrators desire to belong to violent groups; and second, the fact that joining a violent group may be the only viable survival strategy. Moreover, in many mass atrocity situations, governments and society may condone the atrocities being committed so that perpetrators do not view their actions as ones that require deterrence.⁹³ Rather, violence may be seen as normal or even politically or morally justified.⁹⁴ Indeed, several situationist social psychological studies have confirmed that various characteristics of the social environments in which mass atrocities tend to occur, including the role played by authority figures and peer pressure, are likely to complicate the ability of international criminal courts to deter future atrocities.⁹⁵

⁹⁰ Akhavan, 1998, p. 741, see *supra* note 64.

⁹¹ Drumbl, 2007, p. 171, see *supra* note 14. See similarly, Tallgren, 2002, p. 584, see *supra* note 1; Frédéric Mégret, “Three Dangers for the International Criminal Court: A Critical Look at a Consensual Project”, in *Finnish Yearbook of International Law*, 2001, vol. 12, p. 203; and Martha Minow, *Between Vengeance and Forgiveness: Facing History After Genocide and Mass Violence*, Beacon Press, Boston, 1998, p. 50. But see Sloane, 2007, p. 73, see *supra* note 2 (cautioning that “it would be misguided to assimilate all war criminals and *genocidaires* to a single psychological profile”).

⁹² Drumbl, 2007, pp. 171–72, see *supra* note 14.

⁹³ Roht-Arriaza, 1995, p. 14, see *supra* note 13.

⁹⁴ Branch, 2011, p. 203, see *supra* note 84.

⁹⁵ For useful overviews of the relevant social psychological literature, see generally, Saira Mohamed, “Deviance, Aspiration, and the Stories We Tell: Reconciling Mass Atrocity and the Criminal Law”, in *Yale Law Journal*, 2015, vol. 124, no. 5, pp. 1642–48; Mikaela Heikkilä, *Coping with International Atrocities through Criminal Law: A Study into the Typical Features of International Criminality and the Reflection of these Traits in International Criminal Law*, Åbo Akademi University Press, Turku, 2013, pp. 38–70; Deirdre Golash, “The Justification of Punishment in the International Context”, in Larry May and Zachary Hoskins (eds.), *International Criminal Law and Philosophy*, Cambridge University Press, Cambridge, 2014, pp. 211–17; and Laurel E. Fletcher and Harvey M. Weinstein, “Violence and Social Repair: Rethinking the Contribution of Justice to Reconciliation”, in *Human Rights Quarterly*, 2002, vol. 24, no. 3, pp. 603–17.

With respect to perpetrator *prudence*, the ability of punishment to deter will generally be most effective on individuals motivated by narrow self-interest, rather than sacrificing such interests for broader goals.⁹⁶ In mass atrocity situations, however, it is common to find instigators of international crimes acting for what they perceive to be a cause beyond narrow self-interest or even out of blind hatred.⁹⁷ In such circumstances, the deterrent effect of punishment may be minimal.

Moreover, even in contexts where it *is* possible to maintain that the politically elite instigators of mass atrocities are acting rationally and instrumentally to retain power,⁹⁸ it is nonetheless equally plausible that such politicians may knowingly accept the risk of prosecution, rationally concluding that international crime does in fact pay.⁹⁹ Indeed, at least one empirical study seems to support this position, concluding that, rather than deterring future atrocities, the threat of international criminal punishment may serve to exacerbate them by reducing incentives for political settlements.¹⁰⁰

As these challenges indicate, assertions proclaiming the instrumental value of international criminal punishment to deter the commission of international crimes appear to be out of touch with the realities of societies afflicted by mass atrocities. As Immi Tallgren puts it:

It seems that in the current project of international criminal justice, the special circumstances of the criminality in question and thereby also the additional difficulties in affecting

⁹⁶ Golash, 2014, p. 211, see *supra* note 95.

⁹⁷ See similarly, *ibid.*, p. 217; and Klabbers, 2001, pp. 253 and 266, see *supra* note 88.

⁹⁸ Akhavan, 1998, pp. 753–65, see *supra* note 64.

⁹⁹ See similarly, Ku and Nzelibe, 2006, p. 807, see *supra* note 71; Koller, 2008, p. 1028, see *supra* note 14; Aukerman, 2002, p. 69, see *supra* note 50. See also, Judith N. Shklar, *Legalism – Law, Morals, and Political Trials*, Harvard University Press, Cambridge, 1964, p. 187.

¹⁰⁰ Ku and Nzelibe, 2006, pp. 817–31, see *supra* note 71. See similarly, Benjamin Schiff, “The ICC’s Potential for Doing Bad When Pursuing Good”, in *Ethics and International Affairs*, 2012, vol. 26, no. 1, p. 78; Meron, 2011, p. 151, see *supra* note 78; and Anonymous, “Human Rights in Peace Negotiations”, in *Human Rights Quarterly*, vol. 18, no. 2, 1996, p. 258.

the behaviour of the potential criminals addressed are largely ignored or, rather, intentionally passed over in silence.¹⁰¹

6.4. Expressivism

As the preceding sections have demonstrated, traditional retributive and utilitarian justifications of punishment have proven difficult to transpose to the international criminal context. At least partially in response to such challenges, the past decade has witnessed a turn by a range of scholars and practitioners towards *expressivist* justificatory theories of punishment.¹⁰²

Although expressivism encompasses a range of ideas from different disciplines,¹⁰³ the animating assumption behind most stands of expressivist thought is simple: social practices, including but by no means limited to punishment,¹⁰⁴ carry meanings and transmit messages quite apart from

¹⁰¹ See similarly, Tallgren, 2002, pp. 571–72, see *supra* note 1.

¹⁰² See, for example, Ambos, 2015, p. 324, see *supra* note 10 (noting “the *centrality* of the concept of ‘expressivism’ focusing on the (possible) communicative function of punishment” in the international criminal context) (emphasis added); Timothy William Waters, “A Kind of Judgment: Searching for Judicial Narratives After Death”, in *George Washington International Law Review*, 2010, vol. 42, no. 2, pp. 293–94 (noting a “recent turn to expressive theories to justify ICL”); and deGuzman, 2012, p. 313, see *supra* note 33 (noting that “[a] growing number of scholars have turned to expressive theories to justify international criminal law processes and punishment”). A similar turn towards expressive theories also occurred in domestic criminal law scholarship some decades ago. This turn has traditionally been rooted in a seminal article by Joel Feinberg: Joel Feinberg, “The Expressive Function of Punishment”, in Joel Feinberg, *Doing and Deserving: Essays in the Theory of Responsibility*, Princeton University Press, New Jersey, 1970, p. 95, reprinted in *A Reader on Punishment*, in R.A. Duff and David Garland (eds.), Oxford University Press, Oxford, 1994, p. 73. See, for example, Leo Zaibert, *Punishment and Retribution*, Ashgate Publishing, Aldershot, 2006, p. 45 (referring to expressivism as “the latest fad in the philosophy of punishment”); and Carol S. Steiker, “Foreword: Punishment and Procedure: Punishment Theory and the Criminal-Civil Procedural Divide”, in *Georgetown Law Journal*, 1997, vol. 85, no. 4, p. 803 (crediting Joel Feinberg with “inaugurating the “expressionist” turn in punishment theory”).

¹⁰³ See, for example, Tim Meijers and Marlies Glasius, “Expression of Justice or Political Trial? Discursive Battles in the Karadžić Case”, in *Human Rights Quarterly*, 2013, vol. 35, no. 3, p. 724 (noting that expressivism is “not a uniform approach”); and Amann, 2002, pp. 117–18, see *supra* note 26 (“The term “expressivism” comprehends ideas put forward by a number of scholars, who draw from disciplines that include law and economics, semiotics, philosophy, and sociology”).

¹⁰⁴ See, in this regard, David Garland, *Punishment and Modern Society: A Study in Social Theory*, Clarendon Press, Oxford, 1990, p. 255:

their consequences.¹⁰⁵ As David Garland observes in his seminal study on punishment and modern society, any social practice can be viewed either as a form of *social action*, namely “in cause-and-effect terms as an institution which ‘does things’”, or as a form of *cultural signification*, namely “in interpretative what-does-it mean terms as an institution which ‘say things’”.¹⁰⁶ Yet, as Garland later elaborates, this analytical distinction between the instrumental and the symbolic is of little use in the criminal law context where “the social act of punishment, however mundane, is at the same time an expression of cultural meaning”.¹⁰⁷ It is this notion of punishment as an expression of meaning that lies at the core of expressivist theories of punishment.

In order to critically examine expressivist justifications of international criminal punishment, our point of departure is to recognise two distinctions.

First, it is important to distinguish the expressive *character* of punishment (a *descriptive* claim) from an expressive *justification* for punishment (a *normative* claim).¹⁰⁸ It is entirely plausible to assert that punish-

[T]he important thing to realize is that *all* practices, of whatever kind, are potentially signifying practices. Whatever else it does, even the most mundane form of conduct in the social world is also a possible source of expression, of symbolization, and of meaningful communication – every action is also a gesture.

¹⁰⁵ Cass R. Sunstein, “On the Expressive Function of Law”, in *East European Constitutional Review*, 1996, vol. 5, no. 1, p. 66. See also, David Luban, “State Criminality and the Ambition of International Criminal Law”, in Tracy Isaacs and Richard Vernon (eds.), *Accountability for Collective Wrongdoing*, Cambridge University Press, Cambridge, 2011, p. 71 (“Expressive theories [...] rest on the premise that actions can express attitudes and send messages, quite apart from their consequences”); and Dan M. Kahan, “What Do Alternative Sanctions Mean?”, in *The University of Chicago Law Review*, 1996, vol. 63, no. 2, p. 597 (“Actions have *meanings* as well as consequences”) (emphasis in original).

¹⁰⁶ Garland, 1990, p. 250, see *supra* note 104.

¹⁰⁷ *Ibid.*, p. 255. See also, Kahan, 1996, p. 653, see *supra* note 105 (“What punishments *say* [...] is an irreducible component of what they *do*”) (emphasis in original).

¹⁰⁸ See, for example, Duff and Garland, 1994, p. 14, see *supra* note 5 (distinguishing the “expressive character of punishment” from the question “why should [...] censure be expressed by means of penal sanctions which inflict hard treatment and suffering on the offender”); Michael Davis, “Punishment as Language: Misleading Analogy for Desert Theorists”, in *Law and Philosophy*, 1991, vol. 10, no. 3, p. 313 (distinguishing between “(a) ‘descriptive expressionism’, which offers a definition of punishment or a description of punishment’s function, and (b) ‘normative expressionism’, which offers a rationale or justification of punishment”); Igor Primoratz, “Punishment as Language”, in *Philosophy*,

ment has an expressive function, without making the further normative claim that punishment is justified by virtue of its expressive character.¹⁰⁹ As Michael Davis has put it, “No particular function of punishment *necessarily* has a role in its justification”.¹¹⁰ Our focus here is on the different *normative* theories of expressivism that have been advocated to *justify* punishment. Nonetheless, it should also be recognised that most of these theories share the underlying assumption that punishment has a symbolic significance that distinguishes it from other types of penalties.¹¹¹

Second, it is also important to distinguish between two different types of normative expressivism: on the one hand, *intrinsic* expressivist theories justify punishment in retributive terms as an expressive end that is valuable in and of itself;¹¹² on the other, *extrinsic* expressivist theories

1989, vol. 64, no. 248, p. 188 (distinguishing “the definition of punishment” from “*normative* expressionism”) (emphasis in original); Feinberg, 1970, p. 75, see *supra* note 102 (distinguishing “the *definition* of legal punishment” from “the *justification* of legal punishment as a general practice”) (emphasis in original).

¹⁰⁹ See, for example, Matthew D. Adler, “Expressive Theories of Law: A Skeptical Overview”, in *University of Pennsylvania Law Review*, 2000, vol. 148, no. 5, p. 1414 (“the fact that the institution we call “punishment” is essentially expressive [as a descriptive matter] hardly makes out the normative claim that punishment is justified in virtue of its expressive cast”).

¹¹⁰ Davis, 1991, p. 313, see *supra* note 108.

¹¹¹ This insight is commonly traced to the work of Joel Feinberg. See, Feinberg, 1970, p. 74, see *supra* note 102 (“Punishment, in short, has a *symbolic significance* largely missing from other kinds of penalties”) (emphasis in original). For recognition of the expressive function of punishment in the international criminal context, see, for example, Meijers and Glasius, 2013, p. 724, see *supra* note 103 (recognising the expressive value of punishment); Connor McCarthy, “Victim Redress and International Criminal Justice: Competing Paradigms, or Compatible Forms of Justice?”, in *Journal of International Criminal Justice*, 2012, vol. 10, no. 2, p. 366 (“individual punishment is the conventional means by which recognition or denunciation may be given expression”); Sloane, 2007, p. 42, see *supra* note 2 (defending an expressive account of punishment by international criminal courts); Drumbl, 2007, p. 174, see *supra* note 14 (discussing the ways in which “punishment [...] has significant messaging value”); and Danner, 2001, p. 490, fn. 380, see *supra* note 25 (citing relevant jurisprudence supporting the expressive function of punishment).

¹¹² See, for example, R.A. Duff and David Garland, “Preface: J. Feinberg, ‘The Expressive Function of Punishment’”, in R.A. Duff and David Garland (eds.), *A Reader on Punishment*, Oxford University Press, 1994, p. 71 (referring to expressivism “in *intrinsicist* terms (it is intrinsically right that criminals should suffer condemnation [...])”) (emphasis in original); Davis, 1991, p. 315, see *supra* note 108 (referring to “intrinsic expressionism” as possessing “the backward-looking virtues of traditional retributivism”, requiring “an “internal” connection between the crime to be punished and the punitive response”); Primoratz, 1989, pp. 201–02, see *supra* note 108 (referring to “[i]ntrinsic expressionism”,

justify punishment in utilitarian terms as an expressive means to achieving certain beneficial consequences.¹¹³ Given their close proximity to retributive and utilitarian theories, it is often queried whether expressive accounts are sufficiently distinct from traditional justifications of punishment.¹¹⁴ For present purposes, it is not important whether expressivist accounts can be conceptually disconnected from retributive and utilitarian justifications of punishment; instead, the pertinent question is whether expressivist theories are able to render more sophisticated and persuasive accounts of these traditional justifications.¹¹⁵

which “does not construe the expression of moral condemnation that is punishment as a means to an end external to it, but as intrinsically right and proper”); H.L.A. Hart, “Postscript: Responsibility and Retribution”, in H.L.A. Hart, *Punishment and Responsibility: Essays in the Philosophy of Law*, 2nd edition, Oxford University Press, 2008, p. 235 (referring to one form of expressivism, pursuant to which “the public expression of condemnation of the offender by punishment of his offence may be conceived as something valuable in itself”).

¹¹³ See, for example, Duff and Garland, 1994, p. 71, see *supra* note 112 (referring to expressivism “in *consequentialist* terms (the state should impose expressive punishments because they will or might bring about certain beneficial consequences)”) (emphasis in original); Davis, 1991, pp. 313–14, see *supra* note 108 (referring to “extrinsic expressionism” as “fundamentally utilitarian”, pursuant to which “[p]unishment must be valuable primarily because of its effect on society, not because of what punishment is “in itself””); Primoratz, 1989, pp. 192 and 202, see *supra* note 108 (referring to “extrinsic expressionism” as “a variety of utilitarianism”, pursuant to which “[p]unishment is seen as valuable not in itself, but as a means”); and H.L.A. Hart, “Postscript: Responsibility and Retribution”, in H.L.A. Hart, *Punishment and Responsibility: Essays in the Philosophy of Law*, Oxford University Press, Oxford, 2008, p. 235 (referring to one form of expressivism as “trembling on the margin of a Utilitarian theory”, pursuant to which the public expression of condemnation of the offender by punishment “is valuable only because it tends to certain valuable results, such as the voluntary reform of the offender, his recognition of his moral error, or the maintenance, reinforcement, or ‘vindication’ of the morality of the society against which the person punished has offended”).

¹¹⁴ See, for example, Brooks, 2012, p. 122, see *supra* note 15 (“The biggest challenge then for expressivists is not that their theory of punishment is ultimately not compelling, but that it is not satisfactorily distinctive”); Aukerman, 2002, p. 86, see *supra* note 50 (“because other approaches to criminal justice rely on the communication of particular messages, like those of deterrence or moral reformation, the communicative paradigm is intertwined with, though conceptually distinct from, [such other approaches]”); and Kahan, 1996, p. 601, see *supra* note 105 (conceding that “[i]t might be the case that any plausible conception of the expressive view can be fit into the framework of deterrence or retributivism”).

¹¹⁵ Sloane, 2007, p. 71, see *supra* note 2 (“insofar as deterrent and retributive theories of punishment can be transposed to the ICL context notwithstanding flaws in the national law

6.4.1. Intrinsic Expressivism

Intrinsic expressivist accounts seek to justify punishment by identifying some internal or inherent connection between crime and the symbolic character of punishment. In other words, the expressive character of punishment is used to inform the retributive notion of desert.¹¹⁶ In the international criminal context, two intrinsic accounts have been relied upon to justify the punishment of perpetrators of international crimes.

6.4.1.1. Victim-Based Expressivism

The first account is the victim-based expressivist theory of domestic criminal law theorist Jean Hampton,¹¹⁷ a theory that has garnered support from a range of international criminal scholars not only as a means to justify punishment,¹¹⁸ but also as a means to determine the degree of culpability

analogy, it is largely because of the expressive dimensions of punishment”); Danner, 2001, p. 490, see *supra* note 25 (“Expressive theory can inform both retributive and utilitarian philosophies of punishment”); Kahan, 1996, p. 604, see *supra* note 105:

[T]he question should not be whether expressive condemnation can be successfully disconnected from deterrence and retribution, but whether it’s possible to develop sensible conceptions of the latter theories without reference to the expressive view. I believe that it isn’t; punishment theorizing that disregards the expressive view is necessarily incomplete.

¹¹⁶ See, for example, *ibid.*, p. 602 (“On this account, an individual deserves punishment when he engages in behavior that conveys disrespect for important values. The proper retributive punishment is the one that appropriately expresses condemnation and reaffirms the values that the wrongdoer denies”).

¹¹⁷ See generally, Jean Hampton, “Correcting Harms Versus Righting Wrongs: The Goal of Retribution”, in *UCLA Law Review*, 1992, vol. 39, no. 6, pp. 1659 ff.; and Hampton, 1988, pp. 122–43, see *supra* note 53. For critical discussions of Hampton’s theory, see generally, Nathan Hana, “Say What? A Critique of Expressive Retributivism”, in *Law and Philosophy*, 2008, vol. 27, no. 2, pp. 139–42; Golash, 2005, pp. 52–60, see *supra* note 15; Adler, 2000, pp. 1422–25, see *supra* note 109; and David Dolinko, “Some Thoughts About Retributivism”, in *Ethics*, 1991, vol. 101, no. 3, pp. 549–54.

¹¹⁸ See, for example, Shachar Eldar, “Exploring International Criminal Law’s Reluctance to Resort to Modalities of Group Responsibility: Five Challenges to International Prosecutions and their Impact on Broader Forms of Responsibility”, in *Journal of International Criminal Justice*, 2013, vol. 11, no. 2, p. 345 (relying on Hampton’s theory to justify the imposition of international criminal punishment on individuals); Luban, 2011, pp. 71–72, see *supra* note 105 (relying on Hampton’s victim-based expressive account); Aukerman, 2002, p. 55, fn. 80, see *supra* note 50 (referring to victim-based expressive theories as “attractive” for providing a useful way to distinguish between retribution and vengeance); and Roht-Arriaza, 1995, pp. 17–21, see *supra* note 13 (discussing the victim-centred view of punishment which characterizes the criminal sanction “as a form of redress”). For critical

of individuals, and hence the severity of sentences, for particular offences.¹¹⁹ Hampton's account is based on the expressive character of both wrongdoing and punishment. For Hampton, the actions of a wrongdoer contain a message about their value relative to that of their victims.¹²⁰ By their actions, wrongdoers create the *appearance* of degrading their victims,¹²¹ something Hampton refers to as "diminishment".¹²² By representing their victims as worth far less than their actual value, wrongdoers represent themselves as elevated, thereby according themselves a value they do not have.¹²³ In this way, the conduct of a wrongdoer causes "a moral injury" to their victim, which constitutes an expressive harm to the acknowledgement and realisation of the victim's value.¹²⁴ Hampton's justification of punishment is founded on this conception of wrongdoing.

For Hampton, a retributive response – whether punitive or otherwise – is one that aims to "vindicate the value of the victim denied by the wrongdoer's action".¹²⁵ Such a response must strive "first to re-establish

remarks in the international criminal context, see generally, Pablo de Greiff, "Deliberative Democracy and Punishment", in *Buffalo Criminal Law Review*, 2002, vol. 5, no. 2, pp. 396–97.

¹¹⁹ See, for example, Amy J. Sepinwall, "Failures to Punish: Command Responsibility in Domestic and International Law", in *Michigan Journal of International Law*, 2009, vol. 30, no. 2, pp. 286–302 (relying on Hampton's account to argue that the failure to punish form of superior responsibility entails an "expressive injury" that makes the superior a party to the underlying offence); and Adil Ahmad Haque, "Group Violence and Group Vengeance: Toward a Retributivist Theory of International Criminal Law", in *Buffalo Criminal Law Review*, 2005, vol. 9, no. 1, p. 310 (arguing that the "expressive harm" of genocidal intent, which not only denies the equal moral worth of victims but also seeks "to create a social world in which that denial is an operating principle in society", warrants enhancing punishment for genocidal acts compared to other international crimes).

¹²⁰ Hampton, 1988, p. 124, see *supra* note 53.

¹²¹ Hampton, 1992, pp. 1672–73, see *supra* note 117 (Hampton's theory is based on a Kantian theory of value, pursuant to which "human beings *never* lose value as ends-in-themselves, no matter what kind of treatment they receive". Consequently, Hampton emphasises that a wrongful act can only ever give "the appearance" of degradation) (emphasis in original).

¹²² *Ibid.*, p. 1673.

¹²³ *Ibid.*, p. 1677. See also, Luban, 2011, p. 72, see *supra* note 105 (noting that expressive theories "are not committed to the idea that perpetrators intend their actions to communicate their expressive messages [...] The robber's contemptuous attitude toward the victim is built into the action regardless of whether the robber consciously thinks contemptuous thoughts or means to communicate them").

¹²⁴ Hampton, 1992, p. 1685, see *supra* note 117.

¹²⁵ *Ibid.*, p. 1686.

the acknowledgement of the victim's worth damaged by the wrongdoing, and second, to repair the damage done to the victim's ability to realize her value".¹²⁶ Such a response must constitute a means of planting the flag of morality, thereby annulling the appearance of the wrongdoer's superiority.¹²⁷ According to this perspective, it is not so much the victim's value that is elevated by the imposition of a retributive response; rather, it is the wrongdoer's claim to elevation over the victim that is denied or countered.¹²⁸ Interestingly, Hampton's account does not require that the response take the form of incarcerative punishment to count as retribution.¹²⁹ Nonetheless, Hampton argues that incarcerative punishment is "uniquely suited" to this task of vindicating the victim's relative worth.¹³⁰ Moreover, Hampton also asserts that the way in which a society responds to particular instances of wrongdoing is a reflection of how that society values its individuals.¹³¹ A failure to punish can send the message that society also denies the value of a victim and thereby contribute further to his or her diminishment.¹³²

Hampton's victim-focused theory is particularly appealing in the international criminal context given the increasing attention paid to the

¹²⁶ *Ibid.*

¹²⁷ Hampton, 1988, pp. 130–31, see *supra* note 53 (Hampton argues that her theory provides a coherent explanation for Georg Wilhelm Friedrich Hegel's assertion that punishment "annuls the crime", noting that while the imposition of punishment "can't annul the act itself, [...] it can annul the false evidence seemingly provided by the wrongdoing of the relative worth of the victim and the wrongdoer") (emphasis in original). See further, Georg Wilhelm Friedrich Hegel, *Philosophy of Right*, in T.M. Knox (trans.), Clarendon Press, Oxford, 1942 (1820). For critical discussion of Hegel's theory, see generally, Golash, 2005, pp. 50–52, see *supra* note 15; and Larry May, *Crimes Against Humanity: A Normative Account*, Cambridge University Press, Cambridge, 2005, pp. 222–24.

¹²⁸ Hampton, 1988, p. 138, see *supra* note 53.

¹²⁹ Hampton, 1992, p. 1694, see *supra* note 117; and Hampton, 1988, p. 126, see *supra* note 53.

¹³⁰ Hampton, 1992, p. 1695, see *supra* note 117; and Hampton, 1988, p. 128, see *supra* note 53.

¹³¹ Hampton, 1992, p. 1691, see *supra* note 117 (noting that, by imposing punishments that are too lenient with respect to particular instances of wrongdoing, "the punisher ratifies the view that the victim is indeed the sort of being who is low relative to the wrongdoer").

¹³² *Ibid.*, p. 1692.

needs of victims by international criminal courts.¹³³ However, as a justification for punishment, the theory faces two challenges.

First, it is not clear how the imposition of incarcerative punishment is able to express the equality of value that exists between victim and wrongdoer. As Deirdre Golash has observed, “just as the offender seeks a competitive victory over her victim, punishment represents a competitive victory over the offender”.¹³⁴ Rather than expressing equality of value, it is arguably more intuitive to think of incarcerative punishment as representing that the wrongdoer is of lower value than the victim.¹³⁵ In other words, punishment seems to diminish the wrongdoer, just as crime diminishes the victim.¹³⁶

Second, even if the previous challenge can be overcome, it is not clear that incarcerative punishment represents a particularly distinctive or effective way to vindicate the victim’s status.¹³⁷ Hampton’s account seems more suited to justifying victim redress and compensation rather than incarcerative punishment.¹³⁸ Indeed, Hampton even acknowledges that,

¹³³ See generally, Barrie Sander, “The Expressive Limits of International Criminal Justice: Victim Trauma and Local Culture in the Iron Cage of the Law”, in *European Society of International Law Conference Paper Series*, 2015, no. 5.

¹³⁴ Golash, 2005, p. 53, see *supra* note 15.

¹³⁵ *Ibid.*

¹³⁶ *Ibid.*, p. 55. See also, Dolinko, 1991, p. 552, see *supra* note 117 (“it is surely not true that whatever would correct (or “nullify”) a mistaken moral claim is *ipso facto* morally permissible”).

¹³⁷ Adler, 2000, p. 1424, see *supra* note 109 (“it is only contingently true that the best way for government to reverse this status harm is to *communicate* something”) (emphasis in original).

¹³⁸ See, for example, Hana, 2008, p. 142, see *supra* note 117 (“Many non-punitive techniques [...] can, with the right conventions in place, be used to express the criticism, beliefs, attitudes and so on that are needed to affirm equal worth on Hampton’s view”); Golash, 2005, p. 55, see *supra* note 15 (noting that the vindication of the victim’s status “can be made by requiring compensation for the harm done, thus shifting the consequences of the wrongdoer’s behavior back to him, as is regularly done in the context of civil suits”); and Adler, 2000, p. 1424, see *supra* note 109 (noting that “governments might more effectively achieve equality of status between victim and wrongdoer by coercing the payment of reparations from one to the other”). See also, Martti Koskeniemi, “From Impunity to Show Trials”, in *Max Planck Yearbook of United Nations Law*, 2002, vol. 6, p. 11 (noting that often victims “do not so much expect punishment [...] but rather a recognition of the fact that what they were made to suffer was “wrong”, and that their moral grandeur is symbolically affirmed”).

according to her account, “retribution is actually a form of compensation to the victim”.¹³⁹ With this in mind, it is perhaps unsurprising that Conor McCarthy recently relied on Hampton’s account to justify the regime of victim redress at the ICC.¹⁴⁰ Victim redress mechanisms as well as civil suits more generally are arguably more suited to vindicating the victim’s value, as required by Hampton’s account.¹⁴¹

6.4.1.2. The Communicative Theory

The second intrinsic expressivist theory that has been advanced in the international context is a *communicative* account. The principal exponent of this account is Antony Duff, based on his extensive work on criminal punishment in the domestic context.¹⁴² Interestingly, Duff’s communicative account is not confined to justifying the imposition of incarcerative

¹³⁹ Hampton, 1992, p. 1698, see *supra* note 117.

¹⁴⁰ McCarthy, 2012, p. 351, see *supra* note 111.

¹⁴¹ *Ibid.*

¹⁴² See generally, Antony Duff, “Authority and Responsibility in International Criminal Law”, in Samantha Besson and John Tasioulas (eds.), *The Philosophy of International Law*, Oxford University Press, Oxford, 2010, p. 589; Antony Duff, “Can We Punish the Perpetrators of Atrocities?”, in Thomas Brudholm and Thomas Cushman (eds.), *The Religious in Responses to Mass Atrocity: Interdisciplinary Perspectives*, Cambridge University Press, Cambridge, 2009, pp. 79–104; Antony Duff, “Punishment, Retribution and Communication”, in Andrew von Hirsch, Andrew J. Ashworth and Julian V. Roberts (eds.), *Principled Sentencing: Readings on Theory and Policy*, Hart Publishing, Oxford, 2009, p. 126; R.A. Duff, *Punishment, Communication, and Community*, Oxford University Press, Oxford, 2001; R.A. Duff, “Punishment, Communication, and Community”, in Matt Matravers (ed.), *Punishment and Political Theory*, Hart Publishing, Oxford, 1998, pp. 48 ff.; and R.A. Duff, “Response to von Hirsch”, in Matt Matravers (ed.), *Punishment and Political Theory*, Hart Publishing, Oxford, 1999, pp. 83 ff. For critical discussion of Duff’s communicative account of punishment, see generally, Wringer, 2010, see *supra* note 60; Golash, 2014, pp. 220–23, see *supra* note 95; Hana, 2008, pp. 142–48, see *supra* note 117; de Greiff, 2002, pp. 390 ff., see *supra* note 118; Golash, 2005, see *supra* note 15, chap. 6; Andrew von Hirsch, “Punishment, Penance, and the State”, in Matt Matravers (ed.), *Punishment and Political Theory*, Hart Publishing, Oxford, 1999, pp. 69 ff.; Duncan Ivison, “Justifying Punishment in Intercultural Contexts: Whose Norms? Which Values?”, in Matt Matravers (ed.), *Punishment and Political Theory*, Hart Publishing, Oxford, 1999, pp. 88 ff.; and Thomas Baldwin, “Punishment, Communication, and Resentment”, in Matt Matravers (ed.), *Punishment and Political Theory*, Hart Publishing, 1999, pp. 124 ff.

punishment; it also attaches an independent, non-instrumental significance to criminal trials and convictions.¹⁴³

According to Duff's account, criminal trials play a distinctive role in engaging the defendant in "a communicative enterprise".¹⁴⁴ Rather than serving merely as a means for identifying individuals to be punished, trials serve as *fora* in which defendants are "called to account" by the State whose laws they are alleged to have broken.¹⁴⁵ The trial represents a process through which defendants are answerable for their actions.¹⁴⁶ Duff stresses that his approach is "communicative",¹⁴⁷ addressing the defendant as a responsible agent, and giving him or her "a central, active role in the process".¹⁴⁸ If, by the end of the trial, the defendant is found guilty, the verdict that follows serves not merely to initiate the imposition of punishment, but also as a formal, public message of censure owed to the offender, the victims, and society as a whole.¹⁴⁹ The conviction of the offender is important for communicating the censure that the offender deserves for the crime committed.¹⁵⁰ Specifically, the offender is expected to understand and accept that he has committed a wrong for which society now censures him.¹⁵¹ Moreover, this public censure is important for con-

¹⁴³ Duff, 2010, p. 593, see *supra* note 142. See generally, Duff, 2001, pp. 35–72 and 80–82, see *supra* note 15.

¹⁴⁴ Duff, 2010, p. 593, see *supra* note 142.

¹⁴⁵ *Ibid.*, p. 594.

¹⁴⁶ *Ibid.*

¹⁴⁷ *Ibid.*, p. 593 (referring to "communication rather than expression, since whereas expression is an essentially one-way activity that requires only an audience or object, communication is (at least in intention) a two-way process that seeks actively to engage the other"). See also Duff, 2001, p. 79, see *supra* note 15 (preferring the term "communication" because it involves "a reciprocal and rational engagement") (emphasis in original).

¹⁴⁸ Duff, 2010, p. 594, see *supra* note 142.

¹⁴⁹ See, Duff, 2001, pp. 28–29, see *supra* note 15. Noting that censure of conduct declared to be wrong is owed to:

its victims, as manifesting that concern for them and for their wronged condition that the declaration itself expressed[;] [...] the society whose values the law claims to embody, as showing that those values are taken seriously[;] [...] [and] the offenders themselves, since an honest response to another's wrongdoing, a response that respects him as a responsible moral agent, is criticism or censure of that wrongdoing.

See generally, *ibid.*, pp. 112–15.

¹⁵⁰ *Ibid.*, p. 80.

¹⁵¹ *Ibid.*

veying the message that society takes crime seriously and is committed to holding the wrongdoings of responsible agents to account.¹⁵² An important aspect of Duff's account of trials and convictions, therefore, is that it treats and addresses individuals as responsible members of society, seeking to *persuade* offenders to refrain from criminal wrongdoing rather than *compelling* them to do so.¹⁵³

It does not automatically follow from Duff's account of the communicative nature of criminal trials and convictions that the subsequent imposition of incarcerative punishment is justifiable.¹⁵⁴ For this purpose, Duff characterises punishment as "a species of secular *penance*" that is able to communicate the censure that offenders deserve.¹⁵⁵ Specifically, Duff advocates the "three Rs" of punishment, it being hoped that through the burden of hard treatment, an offender will come "to *repent* his crime, to begin to *reform* himself, and thus *reconcile* himself with those he has wronged".¹⁵⁶ Such an account is retributive in the sense that it justifies punishment as the communication of deserved censure, but also shares the forward-looking purpose of Duff's account of criminal trials and convictions in seeking to persuade wrongdoers to repent for their crimes.¹⁵⁷

Duff's account is attractive to the extent that it captures the dialogical nature of the criminal law process. Nonetheless, as a justification of incarcerative punishment, it runs into a number of difficulties.

First, the account is premised on the defendant being called to account "to their fellow citizens (in whose name the courts act) for public wrongs committed, *in virtue of their shared membership of the political*

¹⁵² *Ibid.*, p. 72 (noting that "to mean what we say in condemning some conduct as wrong is to be committed to censuring those engaged in it (assuming that we have the standing to do so)").

¹⁵³ *Ibid.*, p. 81.

¹⁵⁴ *Ibid.*, p. 82 (noting that "censure can be expressed by a formal conviction, or by a purely symbolic punishment that burdens the offender only insofar as she takes its message of censure seriously").

¹⁵⁵ *Ibid.*, p. 30.

¹⁵⁶ *Ibid.*, pp. 106–12.

¹⁵⁷ *Ibid.*, p. 30.

community".¹⁵⁸ In other words, in order to ensure a moral dialogue between the punishing institution and the defendant, this account requires that wrongdoers belong to the same community as those who punish them.¹⁵⁹ The challenge in the international criminal context lies in determining whether a shared community exists to which perpetrators of international crimes belong and to which they may therefore be called to account for their actions.¹⁶⁰ As Duff readily acknowledges, the answer to this question may differ depending on the type of community that is considered to be required for this purpose.¹⁶¹

If a shared *political* community is required, then, given the implausibility of portraying humanity as a political community,¹⁶² punishment is only likely to be justifiable for international crimes in two scenarios. First, where the case involves a domestic court holding to account its own citizens, the perpetrators may be held to answer to the political community within and against which they committed their international crimes.¹⁶³ Second, an international court may also claim legitimate authority to act as a surrogate in the name of such a community, though only where it has been delegated jurisdiction by the relevant political commu-

¹⁵⁸ Duff, 2010, p. 595, see *supra* note 142. For useful discussions of this requirement, see generally, Greenawalt, 2014, pp. 991–94, see *supra* note 15; and Wringer, 2010, see *supra* note 60.

¹⁵⁹ Alan Norrie, "Justice on the Slaughter-bench: The Problem of War Guilt in Arendt and Jaspers", in *New Criminal Law Review*, 2008, vol. 11, no. 2, pp. 196–97.

¹⁶⁰ Duff, 2010, p. 597, see *supra* note 142. Alexander Greenawalt has recently noted that Duff's challenge is in fact a broad one that:

implicitly calls into question much broader developments in international law, such as the rise of human rights law, which is premised on the idea that the international community as a whole has a stake in how individual states treat their own citizens, [...] [as well as] the institutional mechanisms underlying ICL [...] by which states limit their sovereignty more broadly.

See Greenawalt, 2014, p. 992, see *supra* note 15.

¹⁶¹ See Duff, 2010, pp. 597–604, see *supra* note 142.

¹⁶² See, for example, Duff, 2010, p. 600, see *supra* note 142 (noting the implausibility of trying "to portray humanity as a *political* community") (emphasis in original); Larry May, "Reply to the Critics: Humanity, International Crime, and the Right of Defendants", in *Ethics and International Affairs*, 2006, vol. 20, no. 3, p. 374 (conceding that "there is no political community to which all humans belong"); and David Luban, "A Theory of Crimes Against Humanity", in *Yale Journal of International Law*, 2004, vol. 29, no. 1, pp. 124–41.

¹⁶³ Duff, 2010, p. 598, see *supra* note 142.

nity for this purpose.¹⁶⁴ The challenge in each of these scenarios lies in the fact that in mass atrocity contexts, where communities are literally ripped apart, there may not be a surviving political community to which the perpetrator should answer.¹⁶⁵

Yet, as Duff observes, it may not be necessary to identify a shared *political* community to justify the imposition of punishment: a shared *moral* community may be sufficient.¹⁶⁶ Nonetheless, even the identification of a shared moral community poses distinct challenges. Given that conceptions of right and wrong tend to be inverted in mass atrocity situations, it may be difficult to identify a moral commonality between the punishing institution and the defendant in the international criminal context.¹⁶⁷

To illustrate the difficulties involved, we may usefully recall the challenges faced by Hannah Arendt in her attempt to justify the punishment of Adolf Eichmann.¹⁶⁸ Arendt began her account by claiming that Eichmann had committed “a crime against mankind”, in which “an altogether different order is broken and an altogether different community is violated”.¹⁶⁹ Yet, having initially invoked the possibility of an “order of mankind” in this way,¹⁷⁰ Arendt then proceeded to undermine the existence of such an order by contending that Adolf Eichmann’s death sen-

¹⁶⁴ *Ibid.*, p. 599.

¹⁶⁵ *Ibid.*

¹⁶⁶ *Ibid.*, p. 600. See also, Damaska, 2008, p. 347, see *supra* note 26 (“this species of justice presupposes that acts which it threatens with punishment are contrary to existing and reasonably clear moral fundamentals, or, alternatively, that they flout agreements on basic protections – even if those do not spring from a common theoretical source”). On the challenges of identifying a shared moral community of humanity, see generally, Craig Reeves, “Exploding the Limits of Law’: Judgment and Freedom in Arendt and Adorno”, in *Res Publica*, 2009, vol. 15, no. 2, p. 137; and Norrie, 2008, see *supra* note 159.

¹⁶⁷ See similarly, Reeves, 2009, p. 139, see *supra* note 166 (noting “the problem of how to make sense of *judgment across morally contrastive backgrounds*”) (emphasis in original); and Norrie, 2008, p. 208, see *supra* note 159 (“Where right and wrong have been turned upside down, where lies the commonality between judge and judged that makes a finding of guilt possible?”).

¹⁶⁸ These insights are based on those raised by Craig Reeves and Alan Norrie in two papers. See, Reeves, 2009, p. 137, see *supra* note 166; and Norrie, 2008, see *supra* note 159.

¹⁶⁹ Hannah Arendt, *Eichmann in Jerusalem: A Report on the Banality of Evil*, revised and enlarged edition, Penguin Books, 1994, p. 272.

¹⁷⁰ *Ibid.*

tence was justifiable on the sole basis that “no one, that is, no member of the human race, can be expected to want to share the earth with [him]”.¹⁷¹ In other words, Eichmann deserved his punishment, not as a member of a shared moral community of humanity, but as an outcast.¹⁷² Interpreting this passage, Alan Norrie has observed that Arendt’s contention seems to be that “punishment must step outside the terms of a common humanity, grounded in the possibility of common moral values and responses, judgments and responsibilities, in order to hang Eichmann”.¹⁷³ Yet, it is precisely such a shared normative space that is required for punishment to be justifiable.¹⁷⁴

Even if it is not possible to identify a shared moral community of humankind in an empirical sense, it may be possible to establish such a community in a transcendent sense.¹⁷⁵ In this vein, Alan Norrie has recently relied on Karl Jaspers’ conception of “metaphysical guilt”, understood as “an unconditional relation between all human beings”, to justify the imposition of punishment for international crimes.¹⁷⁶ Duff seems to argue along similar lines,¹⁷⁷ positing that such a community may find its

¹⁷¹ *Ibid.*, p. 279.

¹⁷² Norrie, 2008, p. 203, see *supra* note 159.

¹⁷³ *Ibid.*, pp. 203 and 223 (noting that “Arendt’s solution to the problem of how one punishes an Eichmann is to treat him as one who lacks the full moral capacities of the human being, but this acknowledges the lack of moral community that otherwise makes justice possible”). See also, Reeves, 2009, p. 142, see *supra* note 166 (noting the contradiction in Arendt’s account between on the one hand suggesting that “the community that exists by virtue of the capacity to judge includes Eichmann because that capacity is attributable to all” and on the other hand suggesting that “since Eichmann and all of those like him *failed* to judge, they had stepped outside of that community, placing them seemingly beyond the pale of judgment after all”) (emphasis in original).

¹⁷⁴ *Ibid.*, pp. 139 (noting “the need for a standpoint capable of constituting a shared normative space that had better not rely on the peculiarities of particular moral communities”) and 159 (noting that “Arendt’s perspectival theory [...] threatens to undermine any normative standpoint capable of grounding valid judgments across morally contrastive empirical communities”).

¹⁷⁵ See, for example, Norrie, 2008, pp. 223–24, see *supra* note 159.

¹⁷⁶ *Ibid.*, p. 224. See also, Reeves, 2009, pp. 160–62, see *supra* note 166 (relying on Adorno’s idea of “a human solidarity that transcends all individual interests” as a basis for an objective community, grounded by “the basic natural-historic commonality which unites all as subjects who experience [...] freedom as a suppressed potential”).

¹⁷⁷ Duff also notes, however, that “the existence of a community is often *a matter more of aspiration* than of achieved fact, and a recognition of human community could be a recog-

roots in “our shared humanity”,¹⁷⁸ the recognition that others are fellow human beings deserving of our respect and concern, as well as our “shared life”,¹⁷⁹ the fact that our lives consist of certain shared human concerns and needs. Indeed, from this perspective, the creation of the ICC may be considered to represent “one of the ways in which the moral ideal of a human community might be given more determinate and effective institutional form”.¹⁸⁰ Similar sentiments have also found favour with several other scholars in the international criminal context.¹⁸¹

Even if the challenge of identifying a relevant community is overcome, Duff’s account still shoulders the heavy burden of making plausible the claim that punishment in the form of incarceration is conducive to setting in motion a process of self-reflection and repentance on the part of the wrongdoer.¹⁸² As Nietzsche famously observed, “punishment makes

nition of what we should aspire to create”. See, Duff, 2010, p. 601, see *supra* note 142 (emphasis added). See similarly, Haque, 2005, p. 297, see *supra* note 119 (“International tribunals may [...] strive to *constitute* an international moral community rather than reflect one that already exists”) (emphasis in original).

¹⁷⁸ Duff, 2010, p. 601, see *supra* note 142.

¹⁷⁹ *Ibid.*

¹⁸⁰ *Ibid.*, p. 601. For further discussion, see Duff, “Can We Punish the Perpetrators of Atrocities?”, 2009, pp. 93 ff., see *supra* note 142. See also, Salif Nimaga, “An International *Conscience Collective*? A Durkheimian Analysis of International Criminal Law”, in *International Criminal Law Review*, 2007, vol. 7, no. 4, p. 617 (noting that the ICC trial of Thomas Lubanga Dyilo may be considered as “an attempt to contribute to the establishment and confirmation of the international community’s normative foundations”).

¹⁸¹ See, for example, Greenawalt, 2014, p. 993, see *supra* note 15 (offering his support for the view that there does exist “a sufficient shared sense of common humanity” to justify the application of international criminal law); and Ambos, 2013, p. 314, see *supra* note 9. Ambos argues that:

[a] supranational *ius puniendi* can be inferred from a *combination* of the incipient stages of *supranationality* of a value-based world order and the concept of a world society composed of world citizens whose law – the ‘*world citizen law*’ (*Weltbürgerrecht*) – is derived from universal, indivisible and interculturally recognised human rights predicated upon a Kantian concept of human dignity.

¹⁸² de Greiff, 2002, p. 397, see *supra* note 118. See also, Golash, 2014, pp. 222–23, see *supra* note 95 (noting that “[t]o the extent that the message of condemnation can be sent in other ways, the justification for using punishment to do so [...] is weakened”); Hana, 2008, p. 145, see *supra* note 117 (arguing that Duff “underestimates the psychological complexities attending criticism and punishment” and that “generating remorse and repentance [...] have no straightforward connection with one of punishment’s essential elements [...]: the aim to impose suffering”); Baldwin, 1998, pp. 125–27, see *supra* note 142 (disputing

men harder and colder, it concentrates, it sharpens the feeling of alienation; it strengthens the power to resist”.¹⁸³ It is here that the lack of a shared *political* community between wrongdoer and punishing institution may prove problematic. According to Judith Shklar, international criminal trials tend to be ones in which “the most fundamental moral and political values [are] the real personae”.¹⁸⁴ Consequently, any punishment that follows from conviction by an international criminal court is more likely to be interpreted by the wrongdoer as the continuation of political struggle or even as a form of political victimisation.¹⁸⁵ This perspective is supported by the political character of most international crimes. David Luban, for example, has characterised crimes against humanity as crimes against our status as political animals: first, “by perverting politics”,¹⁸⁶ since the commission of such crimes by States or State-like organisations reveals them to be not just horrible crimes but “horrible *political* crimes, crimes of politics gone cancerous”;¹⁸⁷ and second, “by assaulting the individuality and sociability of the victims in tandem”.¹⁸⁸ The political character of international criminality often creates an intimate connection between the acts and intentions of the defendant on the one hand and their political beliefs on the other; in such contexts, *who* is subject to punishment be-

whether the imposition of hard treatment can generate repentance on the part of wrongdoers as Duff suggests); and H.L.A Hart, *Law, Liberty, and Morality*, Stanford University Press, 1963, p. 66 (noting that “it is not clear, if denunciation is really what is required, why a solemn public statement of disapproval would not be the most “appropriate” or “emphatic” means of expressing this”).

¹⁸³ Friedrich Nietzsche, *On the Genealogy of Morality*, 2nd edition, in Keith Ansell-Pearson (ed.), Carol Diethe (trans.), Cambridge University Press, 2006, p. 54.

¹⁸⁴ Shklar, 1964, p. 155, see *supra* note 99. See also, Gerry J. Simpson, *Law, War and Crime: War Crimes Trials and the Reinvention of International Law*, Polity Press, 2007, p. 13 (characterizing war crimes trials as “the proceduralized clash of competing ideologies”).

¹⁸⁵ Golash, 2014, p. 221, see *supra* note 95.

¹⁸⁶ Luban, 2004, p. 120, see *supra* note 162.

¹⁸⁷ *Ibid.*, p. 117 (emphasis in original).

¹⁸⁸ Luban, 2004, p. 120, see *supra* note 162. See also, Devin O. Pendas, *The Frankfurt Auschwitz Trial, 1963–1965: Genocide, History, and the Limits of the Law*, Cambridge University Press, Cambridge, 2006, p. 303 (noting that, with regard to the Holocaust, “what is at stake is not simply a state-sponsored breach of social order but a *state-enacted negation of the very possibility of social order*. The Holocaust was not simply the murder of millions of individuals; *it was the abolition of the very principle of social solidarity*”) (emphasis added).

comes inseparable from *what* is being punished.¹⁸⁹ With this in mind, the emotional attachment between the defendant and the punishing institution that is typically required for the message of punishment to be effectively transmitted is usually lacking in the international criminal context, particularly since justice tends to be imposed by a distant and elusively defined international community.¹⁹⁰ As Deirdre Golash has argued, “faced with a choice between their own value attachments and attachments to those they see as punishing them, [international criminals] will readily choose the former”.¹⁹¹ In such circumstances, the plausibility of justifying the imposition of punishment as a means of instigating a form of secular penance is difficult to maintain.

In response to this challenge, Duff maintains that the moral possibility of punishment does not depend on its actual success in bringing wrongdoers to answer for, to repent or to make amends for their crimes, it being necessary that we address wrongdoers as people who *could* respond appropriately. Yet, as Golash has argued, if Duff’s account is to convincingly claim to treat persons as valuable in their own right, “we must at a minimum show that there is some reason to think that [punishment] will have the intended effect, even if we are for other reasons precluded from promising its efficacy”.¹⁹²

¹⁸⁹ See, for example, Scott Veitch, “Judgment and Calling to Account: Truths, Trials and Reconciliations”, in R.A. Duff, Lindsay Farmer, Sandra Marshall and Victor Tadros (eds.), *The Trial on Trial Volume 2: Judgment and Calling to Account*, Hart Publishing, 2006, p. 165 (noting that, in the case of criminals trials of political dissidents, “*who* is being tried does not seem separable from the question of *what* is being tried”) (emphasis in original).

¹⁹⁰ Golash, 2014, p. 221, see *supra* note 95. On the difficulties of Duff’s communicative account in intercultural contexts more generally, see Ivison, 1999, p. 88, see *supra* note 142.

¹⁹¹ Golash, 2014, p. 221, see *supra* note 95.

¹⁹² Golash, 2005, p. 130, see *supra* note 15. See, in this regard, Duff, 2009, p. 91, see *supra* note 142 (“we must address the wrongdoer as someone who *could* respond appropriately, else there is no sense in seeking a response from him; but the value and importance of the attempt to engage him in a penal dialogue does not depend on its actual or likely success.”) (emphasis in original). See also, Ivison, 1999, p. 106, see *supra* note 142 (submitting that Duff’s claim “disconcerts” by suggesting that “we can insulate ourselves from the moral discomfort of punishment, by fulfilling certain justificatory conditions so as to locate ourselves somehow beyond moral reproach”).

6.4.2. Extrinsic Expressivism

In contrast to intrinsic expressivist accounts of punishment, extrinsic expressivist accounts seek to justify punishment in terms of its beneficial consequences. As such, extrinsic expressivist accounts are utilitarian in character, punishment deemed valuable not in itself, but only as a means to securing societal benefits. In the international criminal context, two extrinsic expressivist accounts have found favour amongst scholars.¹⁹³

6.4.2.1. The Moral Education Theory

The first account depicts punishment as a form of moral education or positive prevention.¹⁹⁴ This account seeks to provide a more convincing argument for the deterrent effect of punishment than traditional utilitarian accounts; rather than viewing punishment as a threat that deters through fear, it is argued that punishment plays a role in shaping and restoring societal values, and thereby encourages the development of habitual conformity with international criminal norms.¹⁹⁵ Payam Akhavan, a strong

¹⁹³ Aspects of the sections that follow draw on passages first elaborated in Sander, 2015, p. 749, see *supra* note 73.

¹⁹⁴ See, for example, Ambos, 2013, p. 71, see *supra* note 8 (noting that “German scholar Hans-Heinrich Jescheck identified ideas of general prevention in a positive (supporting the respect of the law) and negative (detering) sense in the Nuremberg judgments”); Fisher, 2012, p. 56, see *supra* note 41 (referring to punishment as “a moral educator”); Luban, 2011, p. 71, see *supra* note 105 (referring to the German criminological theory of “positive prevention”); Drumbl, 2007, p. 174, see *supra* note 14 (referring to punishment operating as “moral educator”); Georg Schwarzenberger, “The Eichmann Judgment: An Essay in Censorial Jurisprudence”, in Gerry J. Simpson (ed.), *War Crimes Law Volume II*, Ashgate, 2004, p. 255 (noting, with respect to criminal law, that “[i]n its deterrent and corrective aspects it fulfils social functions of an essentially educational nature”); and Johannes Andenaes, “The General Preventive Effects of Punishment”, in *University of Pennsylvania Law Review*, 1966, vol. 114, no. 7, p. 950 (referring to “the moral or socio-pedagogical influence of punishment”) (emphasis in original).

¹⁹⁵ Sloane, 2007, p. 75, see *supra* note 2. See also, Ambos, 2013, p. 73, see *supra* note 8 (noting that international criminal punishment serves the purpose of “creating a universal legal consciousness, in the sense of positive general and integrating prevention calling for reconciliation and reparation”); Allison Zuckerman, “The Expressive Necessity of Gender-Based Violence Prosecutions”, in *International Law Studies*, 10 May 2013, pp. 9–10 (noting that “ICL prosecutions and punishments are thus an effort to cement ideas that certain acts are undeniably wrong” and that “ICL both represents and reinforces the expressive power of international law in action”); Damaska, 2008, p. 345, see *supra* note 26 (noting that international criminal courts “should aim their denunciatory judgments at strengthening a sense of accountability for international crime by exposure and stigmatization of

advocate of this account, has explained how criminal justice systems are accustomed to producing “a flow of moral propaganda” such that the imposition of punishment on a wrongdoer is transformed into “a means of expressing social disapproval”.¹⁹⁶ By transforming popular conceptions of right and wrong,¹⁹⁷ this moral propaganda may ultimately contribute to a process whereby such values are internalised by members of society and habitual conformity with the law is thereby fortified.¹⁹⁸ In this way, crimi-

these extreme forms of inhumanity”); Drumbl, 2007, p. 174, see *supra* note 14 (“Punishment internalizes – and even reinforces – social norms among the public and, thereby, from the expressivist perspective proactively promotes law-abiding behavior”); Aukerman, 2002, p. 73, see *supra* note 50 (“prosecutions reinforce moral norms and contribute to a shared understanding that certain behavior is wrong”); “Developments in the Law: International Criminal Law”, 2001, p. 1966, see *supra* note 66 (noting the aim of international criminal courts “to inculcate the norms of international humanitarian law so thoroughly that the credible threat of external punishment is no longer necessary to prevent offenses”); Kahan, 1996, p. 603, see *supra* note 105 (noting that “the expressive theory might reinforce deterrence [...] through preference formation”, pursuant to which “[t]he law can discourage criminality not just by “raising the cost” of such behavior through punishments, but also through instilling aversions to the kinds of behavior that the law prohibits”); and T. Mathiesen, “General Prevention as Communication”, in R.A Duff and David Garland (eds.), *A Reader on Punishment*, Oxford University Press, Oxford, 1994, p. 221 (“punishment may be viewed as a *message* from the state”: “First, punishment is a message which intends to say that crime does not pay (deterrence). Secondly, it is a message which intends to say that you should avoid certain acts because they are morally improper or incorrect (moral education). Thirdly, it is a message which intends to say that you should get into the habit of avoiding certain acts (habit formation)”).

¹⁹⁶ Akhavan, 1998, p. 746, see *supra* note 64. See also, Andenaes, 1966, p. 950, see *supra* note 194 (noting how “from law and the legal machinery there emanates a flow of propaganda which favors such respect [for the values which the law seeks to protect]”).

¹⁹⁷ It is a point of contention amongst scholars whether punishment is able to convey both the values of a community *and* the moral reasons behind them, or whether it is limited to only expressing the former. For a useful discussion, see Fisher, 2012, pp. 59–60, see *supra* note 41 (concluding that punishment is best characterised “as an educative tool for the promotion of values: it communicates the values of the community; it reinforces them and emphasizes the community’s commitment to these values. It may not, however, be capable of expressing why the community holds the values that it does”).

¹⁹⁸ Akhavan, 1998, p. 747, see *supra* note 64. See also, Andenaes, 1966, p. 951, see *supra* note 194 (noting that “with fear or moral influence as an intermediate link, it is possible to create unconscious inhibitions against crime, and perhaps to establish a condition of habitual lawfulness”). For criticism of Akhavan’s viewpoint, see Mégret, 2001, p. 203, see *supra* note 91 (noting that his “argument subtly assumes what it was supposed to prove”).

nal courts can influence future behaviour through punishment by altering the underlying norms of a society.¹⁹⁹

Although the moral education account has principally been recognised by international criminal courts in the context of justifying the imposition of punishment,²⁰⁰ it should be noted that this account is also applicable to other social practices within the criminal law process. For instance, criminal *trials* are also powerful vehicles for norm projection. As Bill Wringer has explained, “[t]he best way to express a commitment to the rule of law is to subject to it even those who might otherwise think that they were likely to escape it”.²⁰¹ Moreover, the principle of complementarity at the ICC has triggered several States to reform their domestic criminal justice systems so as to incorporate the substantive law of the ICC Statute. As David Luban has noted, through such processes “new norms get spliced into the DNA of domestic law”, a form of norm projection potentially having far greater impact for altering the political values of society than the broadcast of a small number of international trials.²⁰²

Underpinning the moral education account is the recognition that punishment has both retrospective and prospective dimensions.²⁰³ Accord-

¹⁹⁹ See, for example, Fisher, 2012, p. 59, see *supra* note 41 (noting the deterrent power of criminal courts “by changing norms rather than invoking incentives”); and Damaska, 2008, p. 345, see *supra* note 26 (arguing that “it seems more appropriate for international courts to place greater emphasis on suasion than on threats as their main preventive strategy”).

²⁰⁰ See, for example, ICTY, *Prosecutor v. Kordić and Čerkez*, Appeals Chamber, Judgment, 17 December 2004, IT-95-14/2-A, para. 1080, see *supra* note 64 (“The sentencing purpose refers to the educational function of a sentence and aims at conveying the message that rules of international humanitarian law have to be obeyed under all circumstances. In doing so, the sentence seeks to internalize these rules and the moral demands they are based on in the minds of the public”); and ICTY, *Prosecutor v. Blaškić*, Appeal Chamber, Judgment, 29 July 2004, IT-95-14-A, para. 678 (noting the following purpose of sentencing: “individual and general affirmative prevention aimed at influencing the legal awareness of the accused, the victims, their relatives, the witnesses, and the general public in order to reassure them that the legal system is being implemented and enforced”) (<http://www.legal-tools.org/doc/88d8e6/>).

²⁰¹ See, for example, Wringer, 2006, p. 184, see *supra* note 26.

²⁰² David Luban, “After the Honeymoon: Reflections on the Current State of International Criminal Justice”, in *Journal of International Criminal Justice*, 2013, vol. 11, no. 3, p. 511.

²⁰³ See, for example, Fisher, 2012, p. 57, see *supra* note 41 (noting how “punishment can communicate that the society renounces and condemns certain behaviour rather than condones it” and also “reaffirms the authority and strength of particular laws”); Mark J. Osiel, *Mass Atrocity, Collective Memory, and the Law*, Transaction Publishers, 1997, p. 148 (not-

ing to this account, the imposition of punishment represents a moment of “appropriation and disappropriation, of avowal and disavowal, of symbolic loss and gain”.²⁰⁴

With respect to the *retrospective* dimension, the infliction of punishment censures past transgressions of wrongdoing.²⁰⁵ In this sense, the imposition of punishment marks the final act of what Harold Garfinkel famously referred to as a “status degradation ceremony”, contributing to the expression of moral indignation at the crimes of the accused through a public denunciation.²⁰⁶ In this context, the importance of punishment lies

ing that courts “do not merely pass judgment upon the past, but articulate social norms in ways designed to be binding upon the future”); Ruti G. Teitel, *Transitional Justice*, Oxford University Press, Oxford, 2000, p. 217 (noting that, in the transitional justice context, “punishment [is] informed by a mix of retrospective and prospective purposes”); and Roht-Arriaza, 1995, p. 17, see *supra* note 13 (noting that expressivism is “both backward looking, in that moral criticism is based on an offender’s past acts, and forward looking, in that its goal is to change future behavior by establishing clear societal standards against which such behavior may be measured”). See also, Robert Cryer, Håkan Friman, Darryl Robinson and Elizabeth Wilmshurst, *An Introduction to International Criminal Law and Procedure*, 2nd edition, Cambridge University Press, Cambridge, 2010, p. 29 (noting that the international criminal process is designed both to make offenders “understand what was wrong with what they have done”, whilst also “reaffirming the norm in the community”).

²⁰⁴ Teitel, 2000, p. 67, see *supra* note 203.

²⁰⁵ See, for example, Fisher, 2012, p. 56, see *supra* note 41 (discussing how the infliction of punishment “aims to communicate to the perpetrator and the broader community a particular message of condemnation for specific behaviour that has been prohibited by that society and promulgated as law”); deGuzman, 2012, p. 313, see *supra* note 33 (noting that expressivists “view crime as an expressive act and consider punishment justified when it counters the wrongful expression inherent in the criminal act”); Diane Marie Amann, “Assessing International Criminal Adjudication of Human Rights Atrocities”, in *Third World Legal Studies*, 2003, vol. 16, p. 175 (noting that the international criminal adjudication provides “a forum for enunciating societal condemnation of atrocities”); and Teitel, 2000, p. 50, see *supra* note 203 (noting how the process of exposing wrongs can have “transformative dimensions” for “affirmatively construct[ing] past wrongs in the public sphere and relegat[ing] them to a predecessor regime”).

²⁰⁶ Harold Garfinkel, “Conditions of Successful Degradation Ceremonies”, in *American Journal of Sociology*, 1956, vol. 61, no. 5, pp. 420–21. See also, Sloane, 2007, p. 71, see *supra* note 2 (“By punishing the perpetrators of serious international crimes [...] the international community attempts authoritatively to disavow that conduct, [and] to indicate symbolically its refusal to acquiesce in the crimes”); and Diane F. Orentlicher, “‘Settling Accounts’ Revisited: Reconciling Global Norms with Local Agency”, in *International Journal of Transitional Justice*, 2007, vol. 1, no. 1, p. 15 (By condemning past crimes through the strongest sanction used by the institutions of government to condemn them, exemplary trials could send a message to the future: This will not be tolerated again”).

in its ability to inflict “shame, sanction, and stigma upon the antagonists”.²⁰⁷ The infliction of punishment on the wrongdoer conveys a powerful message that the violation of criminal norms is wrong and that wrongdoers must accept responsibility for their actions.²⁰⁸ The importance of this condemnatory message is heightened in the mass atrocity context given the gravity of the crimes in question and the large numbers of victims that tend to be affected.²⁰⁹ Consequently, it is perhaps unsurprising that references to the denunciatory function of punishment can be found in the sentencing judgments of several international criminal courts. For instance, the ICTY Trial Chamber in *Erdemović* described “public reprobation and stigmatisation by the international community” as one of the “essential functions” of punishment.²¹⁰ Similarly, in *Aleksovski*, the ICTY Appeals Chamber confirmed that one of the purposes of sentencing is “expressing the outrage of the international community at these crimes [...] [and] the condemnation of the international community of the behaviour in question”.²¹¹

²⁰⁷ Drumbl, 2007, p. 175, see *supra* note 14. See also, Teitel, 2000, p. 50, see *supra* note 203 (“Simple exposure of wrongs stigmatizes and can disqualify the affected persons from entire realms of the public or private spheres, positions of political leadership, or comparable authority in the successor regime”).

²⁰⁸ See, for example, Aukerman, 2002, p. 87, see *supra* note 50 (“the prosecution of those who commit genocide, war crimes, and other atrocities indisputably conveys a powerful message of condemnation”); and Akhavan, 1998, p. 749, see *supra* note 64 (noting that it is the “expression of disapproval by the world community that is at the core of the ICTY’s mandate”). See also, David Luban, “Beyond Moral Minimalism”, in *Ethics and International Affairs*, 2006, vol. 20, no. 3, pp. 354–55 (noting that international criminal courts “declare, in the most public way possible, that the condemned deeds are serious transgressions [...] through the dramaturgy of the trial process”) (emphasis added).

²⁰⁹ See, for example, Golash, 2014, pp. 217–18, see *supra* note 95 (noting that “it is important to express condemnation of these crimes, because they are so serious and because they affect so many people”).

²¹⁰ ICTY, *Prosecutor v. Erdemović*, Trial Chamber, Sentencing Judgment, 29 November 1996, IT-96-22-T, para. 65 (<http://www.legal-tools.org/doc/eb5c9d/>); ICTY, *Prosecutor v. Blaškić*, Trial Chamber, Judgment, 3 March 2000, IT-95-14-T, para. 763 (<http://www.legal-tools.org/doc/e1ae55/>); and ICTY, *Prosecutor v. Furundžija*, Trial Chamber, Judgment, 10 December 1998, IT-95-17/1-T, para. 289 (<http://www.legal-tools.org/doc/e6081b/>).

²¹¹ ICTY, *Prosecutor v. Aleksovski*, Appeals Chamber, Judgment, 24 March 2000, IT-95-14/1-A, para. 185 (<http://www.legal-tools.org/doc/176f05/>). See also, SCSL, *Prosecutor v. Sesay et al.*, Trial Chamber, Sentencing Judgment, 8 April 2009, SCSL-04-15-T-1251, para. 15 (“the punishment of the offender must also adequately reflect the revulsion of the international community to such conduct, and denounce it as unacceptable”) (<http://www.legal->

Without diminishing the importance of the retrospective dimension, the moral education account emphasises that punishment need not only be viewed in negative terms as “an historically oriented vengeance for the past”,²¹² but may also be characterised in positive terms as “the assertion and vindication of that which the condemned act denied”.²¹³ This *prospective* dimension of punishment encompasses the *reaffirmation* of existing community sentiments,²¹⁴ as well as the *creation* of new community values.²¹⁵

tools.org/doc/fcc685/); and ICTY, *Prosecutor v. Kordić and Čerkez*, Trial Chamber, Judgment, 26 February 2001, IT-95-14/2-T, para. 852 (“Offences of this level of barbarity could not be more grave and those who participate in them must expect sentences of commensurate severity to mark the outrage of the international community”) (<http://www.legal-tools.org/doc/d4fedd/>).

²¹² Edward M. Morgan, “Retributory Theater”, in *American University Journal of International Law and Policy*, 1988, vol. 3, no. 1, p. 6.

²¹³ *Ibid.* See also, Danner, 2001, p. 489, see *supra* note 25 (“punishment simultaneously expresses society’s authoritative disavowal of a criminal act and its adherence to the values the perpetrator flouted by committing the act”).

²¹⁴ See, for example, Meijers and Glasius, 2013, p. 724, see *supra* note 103 (noting that, according to one perspective, “the law simply is an expression of dominant moral attitudes in society”); Fisher, 2012, pp. 58 (noting that the goal of punishment is “to express the community’s values and its commitment to them”) and 65 (noting that “punishment is necessary to reaffirm the whole order to a society shattered by the atrocity”), see *supra* note 41; deGuzman, 2012, p. 313, see *supra* note 33 (noting that norm expression through criminal law can function “as a means for communities to affirm their common identities”); Cryer, Friman, Robinson and Wilmschurst, 2010, p. 29, see *supra* note 203 (noting the role played by international criminal law in “reaffirming [...] norm[s] in the community”); and Aukerman, 2002, p. 85, see *supra* note 50 (noting the view that punishment functions “as a collective response that demonstrates and reaffirms the real force of the common moral order. By punishing, a society expresses its shared moral outrage, strengthening and reinforcing the norms of social life”).

²¹⁵ See, for example, Aukerman, 2002, p. 85, see *supra* note 50 (noting the role played by punishment in “reaffirming, or even creating, social identity and/or social solidarity”) (emphasis added). See also, deGuzman, 2012, p. 313, see *supra* note 33 (noting that international criminal courts have a role in “both crafting law to express valued social messages and employing law as a mechanism for *altering* social norms”) (emphasis added); and Teitel, 2000, p. 220, see *supra* note 203 (noting “law’s distinctive feature is its mediating function, as it preserves a threshold level of formal continuity while instantiating transformative discontinuity”).

The notion of criminal courts *reaffirming* existing community values is rooted in a Durkheimian conception of punishment.²¹⁶ According to this conception, all societies possess an already-existing common moral order, which Durkheim famously referred to as the “conscience collective”.²¹⁷ In light of this moral consensus, Durkheim considered punishment to have “a dualistic character”:²¹⁸ on the one hand, the imposition of punishment is motivated by a shared emotional reaction to the transgressions committed by the wrongdoer;²¹⁹ on the other hand, these emotional outbursts of common sentiment serve a particular function, namely the reinforcement and maintenance of social solidarity within the community.²²⁰ As Durkheim put it:²²¹

²¹⁶ For a Durkheimian analysis of international criminal law, see generally, Nimaga, 2007, p. 561, see *supra* note 180.

²¹⁷ See Émile Durkheim, *The Division of Labor in Society*, Macmillan, New York, 1933, p. 79 (describing the “conscience collective” as “the totality of beliefs and sentiments common to average citizens of the same society”).

²¹⁸ Garland, 1990, p. 34, see *supra* note 104.

²¹⁹ Émile Durkheim, *Moral Education: A Study in the Theory and Application of the Sociology of Education*, Free Press of Glencoe, 1961, p. 176 (referring to punishment as a “palpable symbol through which an inner state is represented” and as “a notation, a language, through which [...] the feeling inspired by the disapproved behaviour [is expressed]”). See also, de Greiff, 2002, p. 389, see *supra* note 118 (describing the expressive account of punishment as encompassing “theories that take the evil inflicted on the person punished to be the expression of an important social message, or in other words, talk about “punishment as language”); Kahan, 1996, pp. 594–95, see *supra* note 105 (referring to several commentators who have concluded that it makes sense to conceive of punishment as a language); Primoratz, 1989, pp. 187 (noting the view that “evil inflicted on the person punished is not an evil *simpliciter*, but rather the expression of an important social message – that punishment is a kind of language”) and 200 (arguing that punishment serves to translate society’s condemnation of an offender’s misdeed into “the one language they are sure to understand: the language of self-interest”), see *supra* note 108; and James Boyd White, “Making Sense of What We Do: The Criminal Law as a System of Meaning”, in James Boyd White, *Heraclides’ Bow: Essays on the Rhetoric and Poetics of the Law*, University of Wisconsin Press, 1985, p. 205 (“The law, of which legal punishment is a part, is a system of meaning; it is a language and should be evaluated as such”).

²²⁰ See Garland, 1990, p. 33, see *supra* note 104 (noting that, for Durkheim, “it is the common expression of outrage that turns out to have a spontaneously functional effect. These outbursts of common sentiment – concentrated and organized in the rituals of punishment – produce an automatic solidarity, a spontaneous reaffirmation of mutual beliefs and relationships which serve to strengthen the social bond”).

²²¹ Durkheim, 1933, p. 90, see *supra* note 217. See also, Garland, 1990, p. 76, see *supra* note 104 (noting that the “major effect” or “main social function” of this Durkheimian concep-

Although [punishment] proceeds from a quite mechanical reaction, from movements which are passionate and in great part non-reflective, it does play a useful role. [...] Its true function is to maintain social cohesion intact, while maintaining all its vitality in the common conscience.

Scholars disagree whether punishment is a *conventional* device for expressing certain attitudes of criticism, resentment and indignation within the community,²²² or, as Durkheim seems to suggest, the *natural embodiment* of such attitudes.²²³ In either case, however, punishment is characterised as a symbolic language for expressing *existing* shared community values.

tion of punishment is “to enhance social solidarity by reaffirming the force of collective sentiments”).

²²² See, for example, Kahan, 1996, pp. 593 (“Punishment is *not* just a way to make offenders suffer; it is a special social convention, that signifies moral condemnation”) (emphasis in original), and 599, see *supra* note 105 (“the reason that only imprisonment and not conscription is regarded as punishment is that against the background of social norms only imprisonment expresses society’s authoritative moral condemnation”); Feinberg, 1970, pp. 74 (“punishment is a *conventional device* for the expression of attitudes of resentment and indignation, and of judgments of disapproval and reprobation”) (emphasis added), and 76 (“To say that the very physical treatment itself expresses condemnation is to say simply that certain forms of hard treatment have become the *conventional* symbols of public reprobation”) (emphasis added), see *supra* note 102. See also, Hugo Adam Bedau, “Feinberg’s Liberal Theory of Punishment”, in *Buffalo Criminal Law Review*, 2001, vol. 5, no. 1, p. 115 (noting that according to Joel Feinberg’s definition of punishment “[p]unishment just is the “conventional” device for that purpose [of expressing moral condemnation of offenders], whatever the intentions of a political society or of its relevant officials may be”) (emphasis in original).

²²³ See, for example, Primoratz, 1989, p. 199, see *supra* note 108 (supporting the view that “punishment is a *natural expression* of condemnation, repudiation, and similar feelings and attitudes, rather than a conventional device for expressing them”) (emphasis added); A.J. Skillen, “How to Say Things with Walls”, in *Philosophy*, 1980, vol. 55, no. 214, p. 517 (noting that punishment is “hardly purely conventional” and that “Feinberg vastly underestimates the *natural appropriateness*, the non-arbitrariness, of certain forms of hard treatment to be the expression or communication of moralistic and punitive attitudes. Such practices *embody* punitive hostility, they do not merely ‘symbolize’ it”) (emphasis added); and James Fitzjames Stephens, *A History of the Criminal Law of England*, Macmillan, London, 1883, vol. 2, pp. 80–82, reprinted in Dressler, 2009, p. 41, see *supra* note 59 (noting that “the sentence of the law is to the moral sentiment of the public in relation to any offence what a seal is to hot wax” and that “the infliction of punishment by law gives definite expression and a solemn ratification and justification to the hatred which is excited by the commission of the offence”).

Beyond reaffirming existing community values, punishment may also *create* new social values. As David Garland has explained, penal sanctions “do not simply ‘express’ [...] sentiments – they also seek to transform and reshape them in accordance with a particular vision of society”.²²⁴ There are two aspects to Garland’s observation that warrant further elaboration.

First, Garland recognises that Durkheim’s account neglects a “major axis of social life and social conflict – namely the relationship between competing groups”.²²⁵ While Durkheim is correct that some level of common conscience or sentiment may find its expression in punishment, he fails to acknowledge that deeply held sentiments are usually the product of a historical process of political struggle.²²⁶ Rather than refer to the “conscience collective”, the terms “dominant ideology” or “hegemony” may more accurately reflect the fact that we are dealing with “a dominant moral order, which is historically established by particular social forces”.²²⁷

Second, Garland also recognises that punishment is not only a product of underlying community sentiments, but also an active participant in the shaping of such sentiments.²²⁸ As Garland observes, it is “a two-way process”.²²⁹

²²⁴ Garland, 1990, p. 54, see *supra* note 104.

²²⁵ *Ibid.*, p. 51.

²²⁶ *Ibid.*, p. 54.

²²⁷ *Ibid.*, p. 53.

²²⁸ See also, more generally, James Cockayne, “Hybrids or Mongrels? Internationalized War Crimes Trials as Unsuccessful Degradation Ceremonies”, in *Journal of Human Rights*, 2005, vol. 4, no. 4, p. 458 (“The very *raison d’être* of international(ized) criminal trials is the *transformation of the affected community*, aligning it morally and legally with the international community”) (emphasis added); and Teitel, 2000, p. 67, see *supra* note 203 (noting “the criminal law’s potential not merely as an instrument of stability but also as one of *social change*”) (emphasis added).

²²⁹ Garland, 1990, p. 249, see *supra* note 104 (emphasis added). See also, Kirsten Campbell, “Reassembling International Justice: The Making of ‘the Social’ in International Criminal Law and Transitional Justice”, in *International Journal of Transitional Justice*, 2014, vol. 8, no. 1, p. 58 (noting that Durkheimian approaches tend to “mask the difficulty of capturing the role of international criminal justice in transitional contexts, in which mass crimes were intended to destroy the social collective, and criminal law attempts to remake it”); and Teitel, 2000, p. 67, see *supra* note 203 (noting that “what distinguishes transitional criminal measures is their attempt to instantiate and reinforce normative change”). For a

Like any social institution, punishment is *shaped by* broad cultural patterns which have their origins elsewhere, but it also *generates* its own local meanings, values and sensibilities which contribute – in a small but significant way – to the *bricolage* of the dominant culture. Penal institutions are thus ‘cause’ as well as ‘effect’ with regard to culture.

It is through this ongoing reciprocal process that punishment may serve not only to reaffirm but also to reshape and construct new social values of a particular community.²³⁰

With its focus on norm projection and identity creation, three aspects of the moral education account of punishment have proven particularly attractive in the international criminal context.²³¹

First, by focusing on the symbolic significance of punishment, the moral education account is able to make sense of the high degree of selectivity that characterises international criminal institutions. For instance, international criminal courts can still carry out an array of symbolic functions even if they only punish a small number of individuals.²³² Since

critical perspective of this position, see Pierre Schlag, “The dedifferentiation problem”, in *Continental Philosophy Review*, 2009, vol. 42, no. 1, p. 37 (arguing that “if law and culture are not separable, then we really should not be asserting any relation between the two at all”).

²³⁰ Garland, 1990, p. 276, see *supra* note 104 (“punishment does not just restrain or discipline ‘society’ – punishment helps create it”).

²³¹ See, for example, deGuzman, 2012, pp. 314–17, see *supra* note 33 (identifying several reasons why expressivism is “particularly appropriate for the ICC”); and Sloane, 2007, p. 71, see *supra* note 2 (summarising the descriptive and normative advantages of expressivist thinking in the international criminal context).

²³² See, for example, deGuzman, 2012, p. 315, see *supra* note 33 (noting that “the ICC may effectively promote important moral norms with a small number of illustrative prosecutions”); Stahn, 2012, p. 280, see *supra* note 72 (noting that expressive theories “seek to mitigate existing ‘selectivity’ and ‘enforcement’ problems, by relying on the power of transparency and persuasion of international criminal courts to denounce the wrong and reinforce society’s norms”); Stephanos Bibas and William W. Burke-White, “International Idealism Meets Domestic-Criminal-Procedure Realism”, in *Duke Law Journal*, 2010, vol. 59, no. 4, p. 652 (“international criminal justice, which can use a few cases to send messages, is better than domestic criminal justice at the more symbolic function of punishing, vindicating victims, teaching, healing, and reconciling”); Nimaga, 2007, p. 616, see *supra* note 180 (“a trial that is thoroughly prepared, sensitively executed, well publicized, and globally discussed might have a large effect, for the reason that it is not seriously harmed by the limitations resulting from the relatively small numbers of cases that can handled in such a manner”); Martti Koskeniemi, “From Impunity to Show Trials”, in *Max Planck*

institutions such as the ICC are not expected to respond to all serious violations of international criminal law, a failure to prosecute particular situations is far less likely to be viewed as acquiescing in any criminal conduct that has been committed than would be the case at the domestic level.²³³ An international criminal institution that declines to prosecute may simply be recognising that a non-prosecutorial justice mechanism is able to adequately express the condemnation of wrongdoing and affirmation of community values that would otherwise be achieved through the criminal law process.²³⁴

Second, some scholars have argued that the global reach of international criminal courts makes them well equipped to become “the kinds of ‘popular trials’ that define a debate, remind us of the content and value of law, or serve as intergenerational ‘signposts’ in history”.²³⁵ In other words, the imposition of punishment by international criminal institutions may be characterised as a high-profile public performance, able to spark the attention of global media organisations and broadcast their messages to a global audience.

Finally, given the gradual nature of the norm-nurturing process, the moral education account also invites criminal courts to view their work as part of a longer-term process rather than to expect immediate impact.²³⁶

Yearbook of United Nations Law, 2002, vol. 6, p. 10 (“[I]n order to attain the symbolic, community-creating effect it is supposed to have, criminal law need not be applied to everyone. It is sufficient that a few well-published trials are held”); and Minow, 1998, p. 122, see *supra* note 91 (noting the dependence of international criminal institutions on “symbolism rather than effectuation of the rule of law” given that, at best, such institutions can try only “a small percentage of those actually involved in collective violence”).

²³³ See, for example, deGuzman, 2012, p. 315, see *supra* note 33; and Golash, 2014, p. 219, see *supra* note 95 (noting that a failure to punish is less likely to be taken as condonation of wrongful behaviour in the international context “because the convention of punishing international crimes is not yet so deeply ingrained as to imply condonation by its absence”).

²³⁴ deGuzman, 2012, p. 316, see *supra* note 33.

²³⁵ Drumbl, 2007, p. 175, see *supra* note 14. See also, Stahn, 2012, p. 279, see *supra* note 72 (noting that international criminal courts tend to have “a more ‘attentive public’ than most other judicial entities” and “a ‘global reach’ and ‘audience’”); and deGuzman, 2012, p. 316, see *supra* note 33 (noting that “the ICC global platform and scope make it an especially effective mechanisms for expressing shared social norms”).

²³⁶ See, for example, Sloane, 2007, p. 71, see *supra* note 2 (noting that “expressivism self-consciously focuses less on the *immediate* instrumental value of punishment [...] and more on the *long-term* normative values served by any system of criminal law”) (emphasis added); and Johannes Andenaes, “General Prevention Revisited: Research and Policy Implica-

As a consequence, the moral education account seemingly offers a more realistic appraisal of how criminal courts may contribute to crime prevention. As Mark Drumbl has observed:²³⁷

Whereas it seems problematic to deter – through fear of distant and deferred punishment – violence once it is imminent or has already begun, it seems somewhat more plausible to inhibit the mainstreaming of hatemongering as politics owing to the consolidation, through law and punishment, of a social consensus regarding the *moral unacceptability* of such politics.

Yet, despite its attractive qualities, the moral education account of punishment nonetheless faces a number of challenges that should give scholars and practitioners pause for thought.

First, the moral education account of punishment faces a sociological legitimacy challenge.²³⁸ In order for punishment to have the didactic impact suggested by this account, it is necessary that the criminal courts charged with imposing penal sanctions be perceived as authoritative by members of the local communities where the mass atrocities took place. Although it is often asserted that courts possess “a formal authority”,²³⁹ “a

tions”, in *The Journal of Criminal Law and Criminology*, 1975, vol. 66, no. 3, p. 341 (noting that “the consideration of moral effects call for a long-term perspective” and that “[i]f a substantial part of the impact of the law is believed to lie in its power to support and reinforce social norms, one would not expect rapid changes in crime rates as a result of less than drastic changes in law or law enforcement”).

²³⁷ Drumbl, 2007, p. 174, see *supra* note 14 (emphasis in original). See also Fiona O’Regan, “Prosecutor vs. Jean-Pierre Bemba Gombo: The Cumulative Charging Principle, Gender-Based Violence, and Expressivism”, in *Georgetown Journal of International Law*, 2012, vol. 43, no. 4, p. 1354 (noting that expressivism “is designed to speak to [...] those ordinary people who have not yet been exposed to the risk of becoming assimilated into violence, and strengthen their respect for the rule of law”).

²³⁸ See Allen Buchanan and Robert O. Keohane, “The Legitimacy of Global Governance Institutions”, in *Ethics and International Affairs*, 2006, vol. 20, no. 4, p. 405 (defining “sociological legitimacy” as whether a court “is widely *believed* to have the right to rule” as compared with “normative legitimacy”, defined as whether a court “has *the right to rule*”) (emphasis in original). See also, Marlies Glasius and Tim Meijers, “Constructions of Legitimacy: The Charles Taylor Trial”, in *International Journal of Transitional Justice*, 2012, vol. 6, no. 2, p. 229 (utilising expressivism to theorise the connection between normative and sociological legitimacy of international criminal courts).

²³⁹ Waters, 2010, p. 287, see *supra* note 102 (noting “[t]he formal legal authority that attaches to a court judgment is different from mere opinion”).

special prestige”,²⁴⁰ or “a semantic authority”,²⁴¹ such authority cannot be presumed in the international criminal context.²⁴² As Lawrence Douglas has explained, any act of judging “implicitly involves a gesture of self-

²⁴⁰ Michael R. Marrus, “History and the Holocaust in the Courtroom”, in Ronald Smelser (ed.), *Lessons and Legacies V: The Holocaust and Justice*, Northwestern University Press, 2002, p. 228 (noting that “[u]nlike other sources, trials benefit from special prestige in most societies; attended with ceremony, they are widely considered in liberal, democratic countries to be means by which the collectivity allocates responsibility for criminal acts and registers its abhorrence of them”).

²⁴¹ Ingo Venzke, *How Interpretation Makes International Law: On Semantic Change and Normative Twists*, Oxford University Press, Oxford, 2012, p. 147 (referring to the power of legal precedents in international law and noting in particular that “[t]he working of precedents underlies international courts’ remarkably strong semantic authority in international legal discourse”). See also, Armin von Bogdandy and Ingo Venzke, “In Whose Name? An Investigation of International Courts’ Public Authority and Its Democratic Justification”, in *European Journal of International Law*, 2012, vol. 23, no. 1, p. 18 (defining “authority” as “the legal capacity to determine others and to influence their freedom, i.e., to shape their legal or factual situation”).

²⁴² See, for example, Meijers and Glasius, 2013, p. 751, see *supra* note 103 (noting that the manner of the establishment of international criminal institutions “always leaves space, although to different degrees, for an argument that they were imposed on a people, and hence lack democratic legitimacy”); Bogdandy and Venzke, 2012, p. 8, see *supra* note 241 (characterising international courts more generally as “autonomous actors wielding public authority [...] [whose] actions require a genuine mode of justification that lives up to basic tenets of democratic theory”); and Colleen Murphy, “Political Reconciliation and International Criminal Trials”, in Larry May and Zachary Hoskins (eds.), *International Criminal Law and Philosophy*, Cambridge University Press, Cambridge, 2014, p. 241 (noting that “[i]nternational personnel are not always welcome in transitional contexts, nor are international or hybrid trials necessarily viewed as legitimate”). On the alleged democratic deficit of international criminal institutions, see Marlies Glasius, “Do International Criminal Courts Require Democratic Legitimacy?”, in *European Journal of International Law*, 2012, vol. 23, no. 1, p. 45 (concluding that “there is no sound theoretical basis for the demand that international criminal courts should be democratically accountable to populations affected by crimes in order to be legitimate”); Bogdandy and Venzke, 2012, p. 40, see *supra* note 241, setting out several propositions to legitimise international courts:

expanding roles for the public to play in judicial elections and in judicial proceedings, extending complementary political procedures, clearly marking the goal of systemic integration in judicial interpretation as well as in the dialogue between courts, and stressing the responsibility that municipal constitutional organs retain in implementing international decisions

See also, Aaron Fichtelberg, “Democratic Legitimacy and the International Criminal Court: A Liberal Defence”, in *Journal of International Criminal Justice*, 2006, vol. 4, no. 4, p. 765 (advocating a liberal conception of institutional legitimation and submitting that so long as the ICC respects the rights of the accused to a fair trial, it is a legitimate institution).

legitimation”, a justification of their right to perform the judicial function.²⁴³ In the international criminal context, criminal courts are often characterised by their remoteness, both in terms of geographical location as well as personnel,²⁴⁴ a factor which has served to undermine their sociological legitimacy in the localities where mass atrocities have taken place. For example, local communities lack any emotional attachment with international criminal courts, often perceiving them as imposing foreign forms of justice,²⁴⁵ ignorant of the local history of the conflicts on which

²⁴³ Lawrence Douglas, *The Memory of Judgment: Making Law and History in the Trials of the Holocaust*, Yale University Press, 2001, pp. 113–14. See also, Jaya Ramji-Nogales, “Designing Bespoke Transitional Justice: A Pluralist Process Approach”, in *Michigan Journal of International Law*, 2010, vol. 32, no. 1, p. 8 (“For legal institutions to successfully perform an expressive function, the community whose norms are at issue must trust those who aim to alter these norms, and individuals with authority in the message-receiving community must participate in the process of clarifying and establishing new social norms”); Damaska, 2008, p. 345, see *supra* note 26 (noting that “there exists a necessary condition for their success in performing this socio-pedagogical role: they should be perceived by their constituencies as a legitimate authority”, something which “hangs almost entirely on the quality of their decisions and their procedures”); Sloane, 2007, p. 76 see *supra* note 2 (“Deterrent mechanisms that rely on internal restraints, habituation to moral and legal norms, require a criminal justice system perceived as authoritative and legitimate”); “Developments in the Law: International Criminal Law”, 2001, p. 1967, see *supra* note 66 (noting that “the logical prerequisite to moral education is a threshold level of social consensus that the prosecution process is itself legitimate”); and Andenaes, 1975, p. 342, see *supra* note 236 (“To exert a moral influence the law and the machinery for enforcement of it must be looked upon as wielding legitimate authority”).

²⁴⁴ The benefits of the remoteness of international criminal courts have also been well-documented. See, for example, Antonio Cassese and Paola Gaeta, *Cassese’s International Criminal Law*, 3rd edition, Oxford University Press, 2013, p. 267 (“international criminal courts proper may be *more impartial* than domestic courts, for they are made of judges having no link with the territory or the state where the crimes were perpetrated”) (emphasis in original); and Jose E. Alvarez, “Rush to Closure: Lessons of the Tadić Judgment”, in *Michigan Law Review*, 1998, vol. 96, no. 7, p. 2095 (noting that advocates of international prosecutions generally submit that “international fora are preferable and require jurisdictional primacy because international tribunals are more legitimate – that is, less susceptible to accusations of bias or vengeance”).

²⁴⁵ See, for example, McCarthy, 2012, p. 370, see *supra* note 111; Janine Natalya Clark, “From Negative to Positive Peace: The Case of Bosnia and Hercegovina”, in *Journal of Human Rights*, 2009, vol. 8, no. 4, p. 374 (noting that “[a]s a Tribunal that is geographically removed from the former Yugoslavia, that does not operate in the local languages of Bosnian/Croatian/Serbian, and that leans towards the unfamiliar adversarial common law system, the ICTY was always going to struggle to reach out to and engage local people”); and Tzvetan Todorov, “The Limitations of Justice”, in *Journal of International Criminal Justice*, 2004, vol. 2, no. 3, p. 713.

they adjudicate,²⁴⁶ and insensitive to local cultural practices.²⁴⁷ This deficit of sociological legitimacy severely inhibits the ability of these courts to transmit didactic messages that are perceived as authoritative.²⁴⁸

Second, the ability of criminal courts to reawaken a collective conscience or even create new unifying social values within a local community is particularly challenging in post-conflict environments. Specifically, the notion of “shared moral intuitions” or “moral sentiments universally felt within society” is notably absent in societies that have been ripped apart by conflict.²⁴⁹ Episodes of mass atrocity tend to disrupt any notion

²⁴⁶ See, for example, Waters, 2010, p. 292, see *supra* note 102 (noting that international criminal courts and tribunals operate with “an almost total abstraction from and ignorance of the local communities whose conflicts the court must adjudicate”); and Lawrence Douglas, “The Didactic Trial: Filtering History and Memory into the Courtroom”, in *European Review*, 2006, vol. 14, no. 4, p. 518 (noting the structural failings of the ICTY as “a geographically remote tribunal lacking an organic connection to the history of the region”).

²⁴⁷ See, for example, Alison Dundes Renteln, “Cultural Defenses in International Criminal Tribunals: A Preliminary Consideration of the Issues”, in *Southwestern Journal of International Law*, 2011, vol. 18, no. 1, p. 267; Maria Eriksson, *Defining Rape: Emerging Obligations for States under International Law?*, Martinus Nijhoff, 2011, pp. 507 ff.; Fabián O. Raimondo, “For Further Research on the Relationship between Cultural Diversity and International Criminal Law”, in *International Criminal Law Review*, 2011, vol. 11, no. 2, p. 299; Tim Kelsall, *Culture under Cross-Examination: International Justice and the Special Court for Sierra Leone*, Cambridge University Press, Cambridge, 2009; JIA Bing Bing, “Multiculturalism and the development of the system of international criminal law”, in Sienho Yee and Jacques-Yvan Morin (eds.), *Multiculturalism and International Law: Essays in Honour of Edward McWhinney*, Martinus Nijhoff, 2009, p. 629; Jessica Almqvist, “The Impact of Cultural Diversity on International Criminal Proceedings”, in *Journal of International Criminal Justice*, 2006, vol. 4, no. 4, p. 746; and Ida L. Bostian, “Cultural Relativism in International War Crimes Prosecutions: The International Criminal Tribunal for Rwanda”, in *ILSA Journal of International and Comparative Law*, 2006, vol. 12, no. 1, p. 1.

²⁴⁸ For a useful summary of various attempts to improve the sociological legitimacy of international criminal courts and tribunals, see Stuart K. Ford, “A Social Psychology Model of the Perceived Legitimacy of International Criminal Courts: Implications for the Success of Transitional Justice Mechanisms”, in *Vanderbilt Journal of Transnational Law*, 2012, vol. 45, no. 3, pp. 406–09 (noting that according to existing international criminal scholarship, the following factors can be adjusted to improve the sociological legitimacy of international criminal courts: “(1) the process by which the court is created, (2) the location of the court, (3) the composition of the staff, (4) the institutional structure, (5) the procedures used during the trials, and (6) the court’s outreach efforts”).

²⁴⁹ Osiel, 1997, p. 36, see *supra* note 203.

of a collective conscience that may previously have existed,²⁵⁰ and members of society tend to lose the trust they may previously have placed in each other.²⁵¹ Indeed, as Michael Ignatieff has remarked, such a task faces hurdles even in times of peace:²⁵²

[N]ations are not like individuals: they do not have a single identity, conscience or responsibility. National identity is a site of conflict and argument, not a silent shrine for collective worship. Even authoritarian populist democracies like Serbia and Croatia never speak with one voice or remember the past with a single memory.

With this in mind, the capacity of the occasional punishment of a particular offender to create a new moral consensus within societies recently afflicted by mass atrocities seems implausible.

Finally, the moral education account is also undermined by empirical evidence that suggests that the internalisation of norms is insufficient to prevent atrocities.²⁵³ In this regard, the International Committee of the Red Cross's ('ICRC') *People on War Project* is particularly enlightening.²⁵⁴ The project, launched in 1999 to mark the 50th anniversary of the modern Geneva Conventions, entailed a worldwide consultation to provide the general public with the opportunity to give their wide-ranging perspectives on various facets of war.²⁵⁵ ICRC staff conducted empirical research in 12 countries, including in-depth interviews, group discussions

²⁵⁰ *Ibid.* ("prosecution of [...] perpetrators cannot hope to establish collective memory upon shared moral intuitions already deeply felt and culturally encoded, requiring only an occasion for their easy evocation").

²⁵¹ *Ibid.*, p. 37 (noting that "[b]ecause social antagonists do not trust one another, they are strongly tempted to prefer alternatives to deliberation").

²⁵² Michael Ignatieff, "Articles of Faith", in *Index on Censorship*, 1996, vol. 25, no. 5, p. 116. See also, Jonathan Doak, "The Therapeutic Dimension of Transitional Justice: Emotional Repair and Victim Satisfaction in International Trials and Truth Commissions", in *International Criminal Law Review*, 2011, vol. 11, no. 2, p. 265 ("it seems inappropriate to view a community or society as 'healed' as though it were an individual with a conscience, identity and memory").

²⁵³ David Wippman, "Atrocities, Deterrence, and the Limits of International Justice", in *Fordham International Law Journal*, 1999, vol. 23, no. 2, p. 483 ("the internalization of norms is not sufficient to prevent atrocities").

²⁵⁴ See Greenberg Research, Inc., *Country report: Bosnia-Herzegovina: ICRC worldwide consultation on the rules of war*, November 1999.

²⁵⁵ *Ibid.*

and national public opinion surveys.²⁵⁶ On the basis of the consultation conducted in Bosnia-Herzegovina, the resulting country report summarised one of its findings as follows:²⁵⁷

The high-profile breakdown of the rules of war in Bosnia-Herzegovina is all the more striking because both combatants and civilians are highly aware of the Geneva Conventions and fully supportive of norms that protect civilians in war. The limits did not give way because the Conventions or the norms were unknown or foreign to the participants. They broke down under the pressure of nationalist passions and hatred. They also broke down because a range of other wartime considerations diminished and superceded them. The rules of war have not been repudiated in the minds of those who have experienced this conflict. They were overwhelmed in large part by the rules on the ground, which created powerful exceptions, amendments or suspensions whereby millions of civilians joined the front lines.

This finding seems to suggest that the internalisation of the rules of war, even if successfully achieved through the punishment of international criminals, may not be effective in preventing their breakdown in the types of circumstances that tend to give rise to mass atrocity situations.

6.4.2.2. The Gratifying Victim Hatred Theory

Turning to the second extrinsic expressivist account, some scholars argue that by punishing the perpetrators of international crimes,²⁵⁸ criminal

²⁵⁶ *Ibid.*

²⁵⁷ *Ibid.*, p. iv.

²⁵⁸ Some scholars classify this function as a particular type of retributive theory. See, for example, Baker, 2012, p. 39, see *supra* note 43 (“Retributive justice can be explained as a refinement of the primitive urge to take revenge for injury”); Sloane, 2007, p. 78, see *supra* note 2 (“One prevailing legal-anthropological model of retribution [...] views it as a socially condoned substitute for vengeance”); and Minow, 1998, p. 12, see *supra* note 91 (“Retribution can be understood as vengeance curbed by the intervention of someone other than the victim and by principles of proportionality and individual rights”). However, since the emphasis is placed on the *consequences* of punishment for the emotions of victims, it is better classified as utilitarian. See, for example, Moore, 1997, p. 89, see *supra* note 15 (noting that “[r]epresentativism is not the view that punishment of offenders satisfies the desires for vengeance of their victims” nor is it “the view that punishment is justified because without it vengeful citizens would take the law into their own hands”); and Greenawalt, 1983, p. 352, see *supra* note 5 (noting that “[t]he utilitarian [...] does not suppose that

courts can terminate,²⁵⁹ or at the very least regulate,²⁶⁰ ongoing cycles of vengeance amongst victims of mass atrocities. In particular, it is claimed

wrongful acts intrinsically deserve a harsh response, but he recognizes that victims, their families and friends, and some members of the public will feel frustrated if no such response is forthcoming” so “[s]atisfying these desires that punishment be imposed is seen as one legitimate aim in punishing the offender”).

²⁵⁹ See, for example, Sloane, 2007, p. 78 see *supra* note 2 (noting that punishment “is the means by which the state terminates the otherwise escalating cycles of retaliatory violence within its community”); Austin Sarat, “When Memory Speaks: Remembrance and Revenge in *Unforgiven*”, in Martha Minow (ed.), *Breaking the Cycles of Hatred: Memory, Law, and Repair*, Princeton University Press, 2002, p. 237 (noting that “[m]odern legality is founded on the belief that revenge must and can be repressed, that legal punishment can be founded on reason, that due process can discipline passion, and that these categories are both knowable and distinct”); Aukerman, 2002, p. 55, see *supra* note 50 (noting the view that “[l]aw serves to channel vengeance, thereby both discouraging less controlled forms of victims’ justice, such as vigilantism, and restoring the moral and social equilibrium that was violently disturbed by the offender”); “Developments in the Law: International Criminal Law”, 2001, p. 1967, see *supra* note 66 (noting that punishment is “a controlled substitute for vigilantism”); Ruti Teitel, “Bringing the Messiah Through the Law”, in Carla Hesse and Robert Post (eds.), *Human Rights in Political Transitions: Gettysburg to Bosnia*, Zone Books, 1999, p. 183 (noting “the expectation that international criminal justice would establish a form of individual accountability that would break “old cycles of ethnic retribution” and thus advance ethnic “reconciliation””); Moore, 1997, p. 89, see *supra* note 15 (noting that, according to this perspective, “the harm that is punishment is justified by the good it does psychologically to the victims of the crime, whose suffering is thought to have a special claim on the structuring of the criminal justice system”); and Carlos Santiago Nino, *Radical Evil on Trial*, Yale University Press, 1996, pp. 146–47 (noting that trials “lessen the impulse toward private vengeance”, “substitute institutional justice for private revenge”, and thereby avoid “a possible blood bath”).

²⁶⁰ See, for example, Harvey M. Weinstein and Eric Stover, “Introduction: conflict, justice and reclamation”, in Eric Stover and Harvey M. Weinstein (eds.), *My Neighbour, My Enemy: Justice and Community in the Aftermath of Mass Atrocity*, Cambridge University Press, Cambridge, 2004, p. 14 (noting the perspective that “views justice as largely a means of taming vengeance (but not necessarily excising it) by transferring the responsibility for apportioning blame and punishment from victims to a court that acts according to the rule of law”) (emphasis in original); Nancy L. Rosenblum, “Justice and the Experience of Injustice”, in Martha Minow (ed.), *Breaking the Cycles of Hatred*, Princeton University Press, 2002, p. 78 (noting that “[w]ild revenge cannot be tamed but it can be outlawed and suppressed. [...] Where systems of justice are absent or when the application of laws and remedies is biased or undependable, personal revenge and organized vengeance will out”); and Judith N. Shklar, *The Faces of Injustice*, Yale University Press, 1990, p. 94 (noting that “[i]f effective justice pre-empts, neutralizes, dilutes, and all but replaces revenge, it cannot abolish it, either as an emotion or as an active response available to us, especially in personal relations. For most people retributive justice *is* justice, but it remains a frustrating substitute for revenge, neither eliminating nor satisfying its urging”) (emphasis in original).

that criminal courts can dissipate calls for revenge in two ways. First, it is argued that, by establishing individual responsibility over the collective assignation of guilt, criminal courts can assist victims to relinquish feelings of collective responsibility that may otherwise potentially degenerate into feelings of resentment and ultimately lead to further conflict.²⁶¹ Second, it is asserted that, by punishing wrongdoers, victims are able to see those who have wronged them pay for their crimes.²⁶²

Punishment on this account is characterised as a means for gratifying “feelings of hatred” that have been stirred within victims of crime.²⁶³ By the act of punishing an offender, these feelings of revenge and resentment are rendered justifiable, punishment serving as a “definite expression” and “solemn ratification” of such sentiments.²⁶⁴ One scholar who

²⁶¹ Annual Report of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, U.N. Doc. A/49/342, S/1994/1007, 29 August 1994, para. 16 (<http://www.legal-tools.org/doc/cacdb7/>):

If responsibility for the appalling crimes perpetrated [...] is not attributed to individuals, then whole ethnic and religious groups will be held accountable for these crimes and branded as criminal. [...] [H]istory [...] clearly shows that clinging to feelings of “collective responsibility” easily degenerates into resentment, hatred and frustration and inevitably leads to further violence and new crimes.

See also, Fletcher and Weinstein, 2002, p. 598, see *supra* note 95 (noting that “[t]he stated claim is that holding individuals accountable for these acts alleviates collective guilt by differentiating between the perpetrators and innocent bystanders, thus promoting reconciliation”); Alvarez, 1998, p. 2033, see *supra* note 244 (noting that “[t]ribunal advocates [...] generally assume that only individual, not collective, attribution of responsibility can terminate historical cycles of inter-group bloodletting”); and Minow, 1998, p. 40, see *supra* note 91 (noting that “[t]he emphasis on individual responsibility offers an avenue away from the cycles of blame that lead to revenge, recrimination, and ethnic and national conflicts”).

²⁶² See, for example, Cassese, 1998, p. 6, see *supra* note 67 (noting that “*justice dissipates the call for revenge*, because when the Court metes out to the perpetrator his just deserts, then the victims’ calls for retribution are met” and that “by dint of dispensation of justice, victims are prepared to be *reconciled*, with their erstwhile tormentors, because they know that the latter have now paid for their crimes”) (emphasis in original).

²⁶³ James Fitzjames Stephen, *Liberty, Equality, Fraternity*, in R.J. White (ed.), Cambridge University Press, Cambridge, 1967, p. 152, cited in Moore, 1997, p. 89, see *supra* note 15 (submitting that punishment should be exacted “for the sake of gratifying the feeling of hatred – call it revenge, resentment, or what you will – which the contemplation of such [criminal] conduct excites in healthily constituted minds”).

²⁶⁴ Stephens, 1883, pp. 80–82, see *supra* note 223, cited in Dressler, 2009, pp. 41–42, see *supra* note 59:

has given considerable thought to this aspect of punishment is Jeffrie Murphy, who coined the term “retributive hatred” to refer to the way punishment represents a response to sentiments of revenge and ill-will on the part of victims of crime.²⁶⁵ Specifically, Murphy argues that when a crime has been perpetrated, it generates “feelings that another person’s current level of well-being is undeserved or ill-gotten (perhaps at one’s own expense) and that a reduction in that well-being will simply represent his getting his just deserts”.²⁶⁶ Murphy argues that such desires are “understandable, natural, and appropriate to the harm done” and that “although in most cases [such hatred] should be overcome, it still deserves a certain amount of respect”.²⁶⁷ On this view, therefore, punishment is in principle motivated by retributive hatred, serving as a means to restore “the proper moral balance”.²⁶⁸ Anthony Duff has summarised this account of punishment as follows:²⁶⁹

[We should] see such emotions not as nonrational passions, but as expressions of moral *understanding* of crime and its implications [...] Such emotions could then *in principle* motivate a system of criminal punishment that aims precisely to satisfy them by depriving criminals of their undeserved well-being.

In short, the infliction of punishment by law gives definite expression and a solemn ratification and justification to the hatred which is excited by the commission of the offence [...] The criminal law thus proceeds upon the principle that it is morally right to hate criminals, and it confirms and justifies that sentiment by inflicting upon criminals punishments which express it.

²⁶⁵ See Jeffrie G. Murphy, “Hatred: a qualified defense”, in Jeffrie G. Murphy and Jean Hampton, *Forgiveness and Mercy*, Cambridge University Press, Cambridge, 1988, p. 90.

²⁶⁶ See *Ibid.*, p. 89.

²⁶⁷ See *Ibid.*, p. 90.

²⁶⁸ See *Ibid.*, pp. 89 (emphasis added) and 95 (noting that “[r]etributive hatred is thus in principle vindicated as a permissible, if not mandatory, response of a victim to wrongdoing”). It should be noted that Murphy goes on to question the acceptability of relying on retributive hatred *in practice* (pp. 96–108), concluding that the arguments against hatred “constitute a body of reasons so profound that instances where it is acceptable to proceed in spite of them are, in my judgment, rare” (p. 108).

²⁶⁹ Duff, 2001, p. 24, see *supra* note 15. See also Sloane, 2007, p. 78 see *supra* note 2 (noting that “[t]he institutions of criminal justice must [...] enable the discharge of instinctual desires for vengeance in an orderly, socially palatable manner”). See generally, Jeffrie G. Murphy and Jean Hampton, *Forgiveness and Mercy*, Cambridge University Press, Cambridge, 1988.

This account has also found favour in the international criminal context. For instance, Antonio Cassese, in his role as then President of the ICTY, asserted that the “only civilized alternative to this desire for revenge is to render justice” and that the failure to provide a fair trial would cause “feelings of hatred and resentment seething below the surface [...] [to] erupt and lead to renewed violence”.²⁷⁰

Despite the support that this account has garnered, it nonetheless faces a number of challenges in its attempt to justify punishment for international crimes.

First, the assertion that the imposition of punishment is able to terminate cycles of revenge by attributing individual responsibility over the collective assignation of guilt fails to account for an important social psychological dimension of many mass atrocity situations. In the aftermath of episodes of mass violence, members of local communities tend to identify strongly with particular sides to the underlying conflict and consequently possess deeply entrenched internal narratives denying responsibility for any crimes committed by their social group.²⁷¹ This has generally been referred to as the myth of individual and collective victimhood that members of particular groups tend to pull over themselves as a means of group survival and protection in the aftermath of mass atrocity situations.²⁷² In such circumstances, the conviction and imposition of punishment on an individual is likely to be interpreted as a verdict on the responsibilities of the community and political group to which that individual belongs.²⁷³

²⁷⁰ Annual Report of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, 1994, para. 15, see *supra* note 261.

²⁷¹ See, for example, Eric Stover, *The Witnesses: War Crimes and the Promise of Justice in The Hague*, University of Pennsylvania Press, 2005, p. 143; Miklos Biro, Dean Ajdukovic, Dinka Corkalo, Dina Djipa, Petar Milin and Harvey M. Weinstein, “Attitudes toward justice and social reconstruction in Bosnia and Herzegovina and Croatia”, in Eric Stover and Harvey M. Weinstein (eds.), *My Neighbour, My Enemy: Justice and Community in the Aftermath of Mass Atrocity*, Cambridge University Press, Cambridge, 2004, p. 195; Michelle Parlevliet, “Considering Truth: Dealing with a Legacy of Gross Human Rights Violations”, in *Netherlands Quarterly of Human Rights*, 1998, vol. 16, no. 2, p. 159; and Ignatieff, 1996, p. 114, see *supra* note 252.

²⁷² See, for example, Stover, 2005, p. 5, see *supra* note 271; Ignatieff, 1996, p. 116, see *supra* note 252; See also, Fletcher and Weinstein, 2002, p. 589, see *supra* note 95.

²⁷³ Frédéric Mégret, “What Sort of Global Justice is ‘International Criminal Justice’?”, in *Journal of International Criminal Justice*, 2015, vol. 13, no. 1, p. 90.

The consequences are twofold: first, as numerous empirical studies have confirmed,²⁷⁴ the imposition of punishment on particular defendants is likely to cause cognitive dissonance amongst members of that defendant's social group, leading to a rejection of the attribution of responsibility by the criminal court in question;²⁷⁵ and second, rather than condensing responsibility on the shoulders of the individual on trial, convictions are likely to be treated by the members of political or social group of the accused as an attack on their social identity.²⁷⁶ In such circumstances, the imposition of punishment is less likely to pacify than aggravate relations within local communities already torn apart by episodes of mass violence.

²⁷⁴ See, for example, Janine Natalya Clark, "The ICTY and Reconciliation in Croatia: A Case Study of Vukovar", in *Journal of International Criminal Justice*, 2012, vol. 10, no. 2, p. 414 (qualitative empirical study in Croatia); Clark, 2011, p. 77, see *supra* note 34 (qualitative empirical study in Bosnia-Herzegovina); Laurel E. Fletcher and Harvey M. Weinstein, "A world unto itself? The application of international justice in the former Yugoslavia", in Eric Stover and Harvey M. Weinstein (eds.), *My Neighbour, My Enemy: Justice and Community in the Aftermath of Mass Atrocity*, Cambridge University Press, Cambridge, 2004, p. 44 (qualitative empirical study of thirty-two judges and prosecutors with primary or appellate jurisdiction for national war crimes trials in three areas of Bosnia-Herzegovina); and Biro, Ajdukovic, Corkalo, Djipa, Milin and Weinstein, 2004, p. 183, see *supra* note 271 (two surveys of attitudes and beliefs of inhabitants of three cities – Vukovar, Mostar, and Prijedor – in Croatia and Bosnia and Herzegovina in 2000 and 2001). However, see Timothy Longman, Phuong Pham and Harvey M. Weinstein, "Connecting justice to human experience: attitudes towards accountability and reconciliation in Rwanda", in Eric Stover and Harvey M. Weinstein (eds.), *My Neighbour, My Enemy: Justice and Community in the Aftermath of Mass Atrocity*, Cambridge University Press, Cambridge, 2004, pp. 223–24 (concluding from an empirical study of reconciliation in four communities in Rwanda that "although ethnic identity continues to divide Rwanda's population, it is important to note, that with the exception of the social justice scale, it is not a significant factor in determining openness to reconciliation").

²⁷⁵ See, for example, Ford, 2012, pp. 427–30, see *supra* note 248 (explaining the effect of cognitive dissonance on ethnic Serbians with respect to indictments and convictions at the ICTY); Biro, Ajdukovic, Corkalo, Djipa, Milin and Weinstein, 2004, p. 195, see *supra* note 271 (drawing on numerous experiments in social psychology to show that in the process of the formation of a group identity, there is an important role played by categorising people as 'us' and 'them'); Eric Stover and Harvey M. Weinstein, "Conclusion: a common objective, a universe of alternatives", in Eric Stover and Harvey M. Weinstein (eds.), *My Neighbour, My Enemy: Justice and Community in the Aftermath of Mass Atrocity*, Cambridge University Press, Cambridge, 2004, p. 332; Fletcher and Weinstein, 2002, p. 588, see *supra* note 95; and Ignatieff, 1996, p. 114, see *supra* note 252.

²⁷⁶ See similarly, Ford, 2012, p. 458, see *supra* note 248.

Second, the assertion that punishment is able to quench the desire of victims for revenge is questionable, particularly in the international context, in light of the plurality of cultures and notions of just deserts that exist within the international community.²⁷⁷ In fact, empirical studies have confirmed that although victims of human rights abuses tend to favour recourse to criminal prosecution,²⁷⁸ incarcerative punishment tends to offer only a very narrow response to their plight.²⁷⁹ In particular, the imposition of incarcerative punishment is usually inadequate to alleviate the experience of injustice that victims have suffered.²⁸⁰

As the preceding analysis reveals, expressivism encompasses a variety of different strands of thought that have been relied upon to justify

²⁷⁷ See, for example, Sloane, 2007, p. 77, see *supra* note 2 (noting that “retributivism – with its characteristic discourse of “just deserts,” blameworthiness, and the restoration of some moral balance – remains strongly redolent of religious notions of justice ill-suited to a diverse international community of states and peoples”); and Aukerman, 2002, p. 56, see *supra* note 50 (noting that “[t]he problem with such intuition-based arguments for retribution is that not everyone shares the desire to punish; in fact, some victims plead for clemency for their tormentors”).

²⁷⁸ See, for example, Ernesto Kiza, Corene Rathgeber, Holger-Christoph Rohne, *Victims of War: An Empirical Study on Victimization and Victims’ Attitudes towards Addressing Atrocities*, Hamburger Edition, 2006, p. 97 (In this study, 79% of interviewees, comprising victims from conflicts in Afghanistan, Bosnia and Herzegovina, Cambodia, Croatia, the Democratic Republic of the Congo, Israel, Kosovo, Federal Republic of Macedonia, Palestinian Territories, Philippines, and Sudan, were in favour of prosecution for past atrocities).

²⁷⁹ See, for example, Clark, 2011, p. 70, see *supra* note 34 (noting that interviewees from all three ethnic groups in Bosnia-Herzegovina “perceived ‘justice’ as encompassing far more than just the trial and punishment of war criminals”); Nicola Henry, *War and Rape: Law, Memory and Justice*, Routledge, 2011, p. 125 (noting that “[j]ustice is much broader than the prosecution of a few offenders; it involves not simply legal justice, but social and political justice, including both practical and symbolic forms of security, safety and stability”); and Stover and Weinstein, 2004, pp. 323–24, see *supra* note 275:

for survivors of ethnic war and genocide the idea of “justice” encompasses more than criminal trials [...] It means returning stolen property; locating and identifying the bodies of the missing; capturing and trying *all* war criminals, from the garden-variety killers in their communities all the way up to the nationalist ideologues who had poisoned their neighbours with ethnic hatred; securing reparations and apologies; leading lives devoid of fear; securing meaningful jobs; providing their children with good schools and teachers; and helping those traumatized by atrocities to recover.

²⁸⁰ See, for example, Rosenblum, 2002, p. 79, see *supra* note 260 (noting that “we should not imagine that formal justice, cool and cognitive, quenches survivors’ desire for revenge. Or that victims and their sympathizers find a fair trial and reasonable punishment an adequate response to the harm they have suffered”).

the imposition of punishment for international crimes. Whilst these theories have generally been better attuned to the particular contexts in which mass atrocities typically occur than traditional retributive and utilitarian accounts, a number of challenges remain which question the capacity of expressivism to provide a general justification of international criminal punishment.

6.5. Pluralising Post-Conflict Justice

By raising critical questions of the principal theories that have been advanced to justify international criminal punishment, this chapter does not suggest that these challenges are necessarily insurmountable or that incarcerative punishment cannot be justified in any context. Rather, this chapter more modestly casts doubt on the plausibility of advancing a general justification for international criminal punishment that transcends context. As Mark Drumbl has argued:

The modalities of international criminal law, in particular those related to punishment and sentence, tend to universalize through ideological preference instead of through an independent assessment of the social psychology of the violence, comparative reflection about how diverse justice traditions might punish, and development of multilateral interinstitutional conversations.²⁸¹

By probing the underlying assumptions of retributive, utilitarian and expressivist theories of punishment, this chapter raises the prospect that incarcerative punishment for international crimes may be inappropriate in certain contexts. To raise this prospect is not to suggest that it is appropriate to ignore the commission of international crimes, but rather to argue in favour of an openness to pluralise how local and international communities respond to mass atrocity situations in practice.

Against this background, this section examines two alternative visions of post-conflict justice, which, if pursued by societies emerging from episodes of mass violence in particular contexts, would mark a shift away from the model of incarcerative punishment that currently dominates the field.

²⁸¹ Drumbl, 2007, p. 184, see *supra* note 14.

6.5.1. Criminal Justice Without Incarcerative Punishment

One alternative vision for post-conflict justice is *reformist* in nature, retaining the core tenets of international criminal justice in its present form, but relying on *non-incarcerative measures* to communicate and redress the wrongfulness of an individual's acts and omissions.²⁸²

The starting point for this vision is to recall that international criminal justice is already situated within a broader set of post-conflict justice options that include truth commissions, compensation and rehabilitation schemes, commemorations, and restorative justice measures.²⁸³ With this in mind, it is not necessary to demonstrate that international criminal justice offers the optimal possible response to mass atrocity situations, but more modestly show that it contributes *something* to post-conflict situations that other measures do not achieve.²⁸⁴ In this light, a reformist vision would emphasise that the contribution of a criminal court to post-conflict justice is rendered more through *the criminal process* rather than the punitive measure of incarceration that typically flows from a guilty verdict.²⁸⁵ As Meijers and Glasius have recently explained:²⁸⁶

Consider the several expressive functions of punishment that Joel Feinberg identifies: disavowal of the crime (it should not have happened); nonacquiescence (we were not a part of it); vindication of the law (the law should be honoured and

²⁸² See similarly, in the domestic criminal context, *ibid.*, pp. 161 ff. (advocating communicating censure and providing a degree of redress for domestic crimes through a range of mechanisms including formal condemnation, requiring compensation, and providing an opportunity for voluntary reconciliation and the making of amends).

²⁸³ See generally, Teitel, 2000, see *supra* note 203.

²⁸⁴ Tim Meijers and Marlies Glasius, "Trials as Messages of Justice: What Should Be Expected of International Criminal Courts?", in *Ethics and International Affairs*, 2016, vol. 30, no. 4, p. 434. See also, Golash, 2014, p. 218, see *supra* note 95 ("To the extent that trials are essential to narrative and understanding, it is thus more important to conduct trials and to condemn the guilty parties for international crimes than for ordinary domestic crimes").

²⁸⁵ See, for example, Luban, 2010, p. 575, see *supra* note 4 (noting that, in international criminal contexts, "the centre of gravity often lies in the proceedings"); deGuzman, 2012, p. 300, see *supra* note 33 ("the rationales of international criminal law often relate as much to the processes of investigation, indictment, trial, and judgment as to the result of punishment"); and Duff, 2010, p. 597, see *supra* note 142 (agreeing that "the trial [...] [is] central to international criminal law").

²⁸⁶ Meijers and Glasius, 2016, p. 435, see *supra* note 284 (emphasis in original).

we take it seriously); and the absolution of others (it was this person, no one else). All of these appear to be realised *by the trial and the verdict* in themselves, *not by the punishment*.

The expressive effects of criminal trials, for example, have been proclaimed by a range of scholars. Mark Osiel, for instance, has argued that trials represent didactic opportunities for hostile parties to engage each other in a civil manner and thereby begin to develop a measure of mutual trust, the drama of trials being akin to the “theater of ideas”.²⁸⁷ In addition, numerous scholars and practitioners have argued that trials provide significant opportunities for victims to be heard, serving as *fora* to restore their sense of dignity and worth,²⁸⁸ as well as sites through which they can contribute to the construction of historical narratives.²⁸⁹ Where trials culminate in judgments, these may also be understood as expressive mechanisms through which judges can construct historical narratives concerning the mass atrocity situation under examination,²⁹⁰ as well as formally communicate and condemn the wrongfulness of a defendant’s conduct if found guilty of the crimes charged.²⁹¹ Even the preliminary public

²⁸⁷ Osiel, 1997, p. 290, see *supra* note 203. See also, Drumbl, 2007, p. 175, see *supra* note 14 (“trials can educate the public through the spectacle of theater – there is, after all, pedagogical value to performance and communicative value to dramaturgy”).

²⁸⁸ See, for example, Nino, 1996, p. 147, see *supra* note 259 (“trials enable the victims of human rights abuses to recover their self-respect as holders of legal rights” based on “the fact that their suffering is listened to in the trials with respect and sympathy”); and Redress Trust, *The Participation of Victims in International Criminal Court Proceedings: A Review of the Practice and Consideration of Options for the Future*, 2012, p. 5 (noting that victim participation in international criminal trials constitutes an important mechanism “to formally recognise their suffering and to foster their agency and empowerment”).

²⁸⁹ See, for example, Stover, 2005, p. 110, see *supra* note 271 (“Trials enable “the truth to come out” and provide a forum where the suffering of victims can be heard and acknowledged”); and Doak, 2011, p. 275, see *supra* note 252 (“It is said that truth-finding may serve to vindicate the victim’s status as an innocent party and encourage perpetrators to accept responsibility; that it assists in reducing feelings of anger; and even that it constitutes a “psychological premise” that must be fulfilled in order to obtain justice and reconciliation for individual victims”).

²⁹⁰ See generally, Richard Ashby Wilson, *Writing History in International Criminal Tribunals*, Cambridge University Press, Cambridge, 2011.

²⁹¹ See, for example, May, 2008, p. 334, see *supra* note 26; William A. Schabas, “Sentencing by International Tribunals: A Human Rights Approach”, in *Duke Journal of Comparative and International Law*, 1997, vol. 7, no. 2, p. 516 (noting that “[i]n international justice, the finding of guilt will be far more important than the actual sentence which is meted out”); and Bedau, 2001, p. 117, see *supra* note 222 (arguing that “a stronger case can be

events of arrest and formal charging have been shown to have expressive effects. Frédéric Mégret, for example, has argued that being charged by the ICC is in a sense a “double stigma”, carrying the stigma attached to the substantive charge as well as the fact that one is being tried by a centralised institution of the international community.²⁹²

A reformist vision of post-conflict justice could even be taken a step further to include inquiries into various forms of collective responsibility, as well as the structural causes of extreme violence. Kirsten Ainley, for example, has proposed the establishment of “responsibility and truth commissions”, which would have the authority to hold to account not just individuals but political, military, media and private sector groups through a combination of “naming of offenders (under carefully defined conditions) to generate condemnation of their acts, [...] the removal of certain persons from office, the restructuring or destruction of public or private institutions that facilitated atrocity, sanctions, reparations programs, and acts of atonement”.²⁹³

To these reformist visions of post-conflict justice, two objections may be raised. First, it may be contended that dispensing with incarcerative punishment entirely would remove an important avenue for victims to obtain acknowledgement that they have been subjected to unwarranted harm. In this vein, Meijers and Glasius have argued that “trial without punishment could too readily be interpreted as empty rhetoric”, adding that “some kind of punishment remains inevitable because of the value that is conventionally attached to it: not punishing a criminal will be understood as not taking the crime seriously”.²⁹⁴ Yet, while this may be true within some societies – particularly, in the West – the convention of using incarcerative punishment to condemn wrongful behaviour may not hold as

for the guilty *verdict*, rather than the punitive *sentence*, as the conventional vehicle for public expressions of moral condemnation of offenders for their wrongdoing”) (emphasis in original).

²⁹² Frédéric Mégret, “Practices of Stigmatization”, in *Law and Contemporary Problems*, 2013, vol. 76, nos. 3–4, p. 310.

²⁹³ Kirsten Ainley, “Excesses of Responsibility: The Limits of Law and the Possibilities of Politics”, in *Ethics and International Affairs*, 2011, vol. 25, no. 4, pp. 425–26.

²⁹⁴ Meijers and Glasius, 2016, p. 436, see *supra* note 284. See also, Golash, 2014, p. 219, see *supra* note 95 (“Where punishment is the conventional vehicle for conveying deep social condemnation, not to punish can be taken as condonation of wrongful behavior”).

much weight in societies where traditions of compensation and reconciliation continue to have resonance.²⁹⁵ In addition, as Deirdre Golash has noted, it is arguable that in the international context “the convention of punishing international crimes is not yet so deeply ingrained as to imply condonation by its absence”, particularly in light of the inevitable selectivity of international criminal prosecutions that results from a combination of political obstacles, resource constraints and the large number of possible indictees.²⁹⁶ Finally, to the extent that a failure to impose incarceration *is* conventionally taken as condonation of wrongful behaviour, it is open to the international community to try to alter such a convention.²⁹⁷ A criminal justice process that includes a platform for the voices of victims to be heard and a judgment for the history of the events under examination to be narrated and the wrongful acts of individuals to be condemned can also show sincerity, particularly if complemented by other justice mechanisms such as preventative intervention, assistance to victims, and orders to make compensation.²⁹⁸ Moreover, as Mark Drumbl has recently argued, it is also possible to unmoor our understanding of punishment from “the iconic preference for jailhouses” to encompass a broader range of non-incarcerative measures such as “recrimination, shame, consequence, and sanction”.²⁹⁹

Second, even if the first objection is surmountable, it may be argued that the expressive effects of criminal trials and judgments are also limited by many of the same obstacles encountered by incarcerative punishment, including the selectivity of international criminal prosecution and the detachment of criminal processes from local communities. Whether these limits are so problematic as to undermine having recourse to criminal justice processes is a matter of debate.³⁰⁰ However, it is important to recognise two points in response to this objection: first, criminal trials and

²⁹⁵ *Ibid.*

²⁹⁶ *Ibid.*

²⁹⁷ Golash, 2005, p. 163, see *supra* note 15 (“It is important to remember, however, that the use of punishment as recognition of wrong done is largely conventional, and conventions can be changed – not overnight, but eventually”).

²⁹⁸ Golash, 2014, p. 219, see *supra* note 95.

²⁹⁹ Mark A. Drumbl, “Impunities”, *Washington and Lee Public Legal Studies Research Paper Series*, Accepted Paper no. 2017–17 (2017), p. 21–22.

³⁰⁰ See generally, Sander, 2015, p. 749, see *supra* note 73.

judgments raise comparatively less serious moral issues than those raised by the imposition of incarcerative punishment on individuals, thereby rendering the bar that needs to be passed to justify their adoption relatively lower than for incarceration;³⁰¹ and second, it is possible to acknowledge the expressive limits of a social practice, such as a criminal trial or judgment, without rejecting the value of the entire enterprise.³⁰² In this regard, it should be emphasised that this vision of post-conflict justice is offered not as a universal model, but more modestly as one option that may be deemed appropriate by particular communities in particular contexts.

6.5.2. From Criminal to Political and Social Justice

A more *radical* vision for post-conflict justice would entail a fundamental shift away from criminal justice towards political and social justice.³⁰³ Such a vision has recently been elaborated by Mahmood Mamdani in a paper contrasting the post-conflict justice processes implemented in the aftermath of the Second World War and post-apartheid South Africa.³⁰⁴

Mamdani's point of departure is to critique the contemporary human rights movement for relying upon Nuremberg as "a template with which to define responsibility for mass violence".³⁰⁵ For Mamdani, the logic of Nuremberg is "to think of [extreme] violence as criminal and of responsibility for it as individual".³⁰⁶ Such a model is also "zero sum", defining individuals in binary terms as innocent or guilty, victims or perpetrators.³⁰⁷ The particular circumstances that enabled and framed this neoliberal understanding of criminal justice at the time of Nuremberg were twofold:³⁰⁸ first, the termination of an inter-State conflict, which

³⁰¹ See similarly, Golash, 2005, p. 161, see *supra* note 15 ("The formal processes that we now use as a prelude to criminal punishment themselves serve many of the purposes ascribed to punishment, *without raising the same serious moral issues*") (emphasis added).

³⁰² See generally, Sander, 2015, see *supra* note 133.

³⁰³ On "radical critique", see generally, Baars, 2014, p. 196, see *supra* note 85.

³⁰⁴ Mahmood Mamdani, "Beyond Nuremberg: The Historical Significance of the Post-apartheid Transition in South Africa", in *Politics and Society*, 2014, vol. 43, no. 1, p. 61.

³⁰⁵ *Ibid.*, p. 62.

³⁰⁶ *Ibid.*, pp. 62 and 80.

³⁰⁷ *Ibid.*, p. 80.

³⁰⁸ *Ibid.*, pp. 64–66 and 80.

concluded with a clear victor under whose power justice could be administered; and second, the physical separation of the victims and perpetrators into different political communities that no longer need to live together in the post-conflict environment.

Moving away from the Nuremberg model of criminal justice, Mamdani advocates a shift towards political justice, as exemplified by the political process known as Convention for a Democratic South Africa ('CODESA'). As Mamdani explains, CODESA signifies "the larger political project that chartered the terms that ended legal and political apartheid and provided the constitutional foundation to forge a post-apartheid political order".³⁰⁹ Importantly, CODESA responded to a different set of circumstances than Nuremberg:³¹⁰ first, the conflict in South Africa had not ended; and second, it was clear that the victims and perpetrators of the conflict would have to live in the same country going forward. Set in this context, CODESA prioritised the promotion of *political* justice, which is distinct from criminal justice in two respects:³¹¹ first, political justice affects groups rather than targeting individuals; and second, the object of political justice is political reform rather than criminal punishment. By shifting from the criminal to the political, both sides to the conflict in South Africa were decriminalised and legitimised – former enemies transformed into political adversaries.³¹² Moreover, the aim of the process was not to punish individuals for crimes, but "a change of rules that would bring them and their constituencies into a reformed political community".³¹³ In this light, Mamdani refers to political justice as "survivors' justice", where survivors are understood to include "all those who had survived apartheid: yesterday's victims, yesterday's perpetrators, and yesterday's beneficiaries".³¹⁴

Mamdani argues that a CODESA-style inclusive political process constitutes a more appropriate response to the intra-State civil wars that typify contemporary episodes of mass violence in various African coun-

³⁰⁹ *Ibid.*, p. 63.

³¹⁰ *Ibid.*, p. 67.

³¹¹ *Ibid.*

³¹² *Ibid.*

³¹³ *Ibid.*, pp. 67–68.

³¹⁴ *Ibid.*, p. 68.

tries. Criminal justice ill fits these contexts, which tend to be characterised by cycles of violence in which victims and perpetrators trade places.³¹⁵ In such circumstances, criminal justice's tendency to demonise the agency of the perpetrator and diminish the agency of the victim can result in a freezing of their identities, "leading to the assumption that the perpetrator is always the perpetrator and the victim is always the victim".³¹⁶ By contrast, political justice is able to recognise the political nature of extreme violence and acknowledge that such violence requires not merely criminal agency but a political constituency held together and mobilised by an underlying issue.³¹⁷ As Mamdani explains, by focusing on cycles of violence and the underlying issues that threaten the foundation of the political community, political justice dares to reimagine a new community "in which yesterday's victims, perpetrators, bystanders, and beneficiaries may participate as today's survivors".³¹⁸

Beyond political justice, Mamdani also advocates social justice in the aftermath of extreme violence. Although some have criticised CODESA for evading issues of social justice, Mamdani argues that such criticisms are unreasonable since "[t]he political prerequisite for attaining social justice would have been a social revolution, but there was no revolution in South Africa".³¹⁹ In these circumstances, the most that could have been expected was for a non-binding process, such as South Africa's Truth and Reconciliation Commission, to have centre-staged *the need for* social justice in the future by "highlighting both beneficiaries and victims of apartheid as groups" and educating the population about "the structural horrors and social outcomes of apartheid as a mode of governing society".³²⁰ Unfortunately, in South Africa, the Truth and Reconciliation Commission interpreted its mandate narrowly, evading issues of social justice in the process.

In response to Mamdani's vision of post-conflict justice, it may be objected that circumstances may arise where an inclusive political re-

³¹⁵ *Ibid.*, pp. 80–81.

³¹⁶ *Ibid.*, p. 81.

³¹⁷ *Ibid.*, p. 63.

³¹⁸ *Ibid.*, pp. 81–82.

³¹⁹ *Ibid.*, p. 71.

³²⁰ *Ibid.*, pp. 78 and 82.

sponse to a conflict is simply not viable or appropriate. Yet, it is important to emphasise that Mamdani does not promote political post-conflict justice in universal terms. For Mamdani, a CODESA-style political process is less an alternative to Nuremberg than “a response to a different set of circumstances” and, as such, “a statement that Nuremberg cannot be turned into a universally applicable formula”.³²¹

6.6. Conclusion

This chapter has critically examined the principal theories that have been put forward to justify the imposition of punishment for international crimes and offered some initial reflections on how post-conflict justice might be reimagined without incarcerative punishment at its core. In forging this path, the underlying ambition of the chapter has been to demonstrate that the choices facing post-conflict societies are not binary – namely, either to implement the received wisdom of incarcerative punishment, on the one hand, or the vacuum of impunity, on the other. Rather, it is possible to imagine a more plural set of visions of post-conflict justice, stretching far beyond the imposition of incarceration to include diverse conceptions of criminal, political and social justice. Of course, which of these visions is implementable in any given context will be highly contingent on the power relations that exist both within the society that has experienced the atrocities in question as well as between States within the international community more generally. Nonetheless, what emerges from the different visions of post-conflict justice put forward in this chapter is a recognition that justice holds no singular definition and a realisation that it is entirely possible to imagine a world in which the failure to incarcerate is not characterised as the principal adversary in the aftermath of situations of mass atrocity.³²²

³²¹ *Ibid.*, p. 67.

³²² See similarly, Karen Engle, “A Genealogy of the Criminal Turn in Human Rights”, in Karen Engle, Zinaida Miller and D.M. Davis (eds.), *Anti-Impunity and the Human Rights Agenda*, Cambridge University Press, Cambridge, 2016, p. 49.

Impunity: A Philosophical Analysis

Max Pensky*

7.1. Introduction

This exploration of the content and implications of the concept of impunity in international criminal law begins with a quote from Justice Robert Jackson’s famous statement at the opening of the Nuremberg trials on 21 November 1945, a moment when, for all practical purposes, international criminal law in the modern sense of that term began. The enduring fame of Jackson’s opening statement rests on his appeal to law as a higher and better response to massive wrongdoing by wielders of political power than the sheer demand for retribution directed against the gallery of horrible men assembled that day. That the victorious allied powers would not simply have these men summarily shot – which both Churchill and Stalin thought was the obvious option – but rather, as Jackson famously put it, would choose to “[...] stay the hand of vengeance and voluntarily submit their captive enemies to the judgment of the law is one of the most significant tributes that Power has ever paid to Reason”.¹

It is a noble and enduring sentiment. But it is not the quote I referred to above, which comes just a few moments later. Turning to the assembled accused, Jackson continued:

In the prisoners’ dock sit twenty-odd broken men. Re-proached by the humiliation of those they have led almost as bitterly as by the desolation of those they have attacked, their personal capacity for evil is forever past. It is hard now to perceive in these men as captives the power by which as Nazi leaders they once dominated much of the world and terrified most of it. Merely as individuals their fate is of little

* **Max Pensky** is Professor of Philosophy and Co-Director of the Institute for Genocide and Mass Atrocity Prevention, Binghamton University.

¹ Robert Jackson, “Opening Statement Before the International Military Tribunal”, 21 November 1945 (www.legal-tools.org/doc/bbc82b/).

consequence to the world. [...] What makes this inquest significant is that these prisoners represent sinister influences that will lurk in the world long after their bodies have returned to dust. We will show them to be living symbols of racial hatreds, of terrorism and violence, and of the arrogance and cruelty of power. They are symbols of fierce nationalisms and of militarism, of intrigue and war-making which have embroiled Europe generation after generation, crushing its manhood, destroying its homes, and impoverishing its life. They have so identified themselves with the philosophies they conceived and with the forces they directed that any tenderness to them is a victory and an encouragement to all the evils which are attached to their names. Civilization can afford no compromise with the social forces which would gain renewed strength if we deal ambiguously or indecisively with the men in whom those forces now precariously survive.²

Like so much about the Nuremberg legacy, this benediction at the moment of birth of international criminal law is deeply ambiguous.³ For the spirit of modern positive criminal law that Jackson appeals to – its capacity for reasonable judgment, a core element of its normative basis – is that individual persons are to be held accountable for acts they committed, not for the norms or groups they symbolise or represent.⁴ Subjecting them to legal attention, and imposing punitive sanctions on them in the event of a criminal conviction, must be compatible with their status as equal subjects before the law. Justifying their treatment in terms of anything else than this status is facially a violation of the rule of law itself, the same set of values Jackson holds out as the only rational alternative to mere vengeance and the reproduction of violence.

² *Ibid.*

³ See Patricia M. Wald, “Running the Trial of the Century: The Nuremberg Legacy”, in *Cardozo Law Review*, 2006, vol. 24, no. 7, pp. 1559–1597.

⁴ Obviously, the status of individual criminal responsibility in international law is contested – it is merely the fact that it is rightly contested that concerns us here and not whether there is a single correct answer to this question. For a recent general treatment, see Elies van Sliedregt, *Individual Criminal Responsibility in International Law*, Oxford University Press, Oxford, 2012.

At the same time, Jackson is inaugurating an *international* criminal tribunal, tasked with charting a course for what amounted to an open legal terrain. Familiar justifications for the legal authority to try and punish, and the crimes that individuals can be punished for could not be assumed. In many cases, they had to be invented (as subsequent accusations of retroactivity of the law emphasised). Jackson knew that the effort to transplant the norms and practices familiar to modern, Western domestic legal systems into the world of international relations, especially in the emerging constellation of a bipolar world order, would be neither direct nor tidy. It would need the slow, piecemeal and tentative development characteristic of well-functioning legal systems – a process for which there was, at that moment, no time.

The International Military Tribunal at Nuremberg was tasked with prosecuting acts that were inherently collective and political in nature, singling out the gravest of abuses by highly-placed wielders of political power. It could not help but make new law in the attempt to impose existing law – with the risk of contradicting the very procedural legal values Jackson appealed to.

Jackson was possessed of a legal intelligence both subtle and capacious. Despite a profoundly pragmatic cast of mind, he also understood the depth of the matter before him. The quote above expresses that understanding, and the range of unsatisfactory compromises and qualifications he saw as necessary. We might call this range of compromises ‘Jackson’s Hedge’. At the same time as he appealed to familiar rule of law values as a bulwark against the politicisation of legal matters in the wake of genocidal and atrocity violence, he offered, at least implicitly, a very substantial qualification of just that appeal, hedging the bet that this contradiction could be kept within acceptable bounds.

When violent crime is inherently political and collective, then the moral weight usually attached to the prosecution of crimes as public harms loses its familiar rationale. The legal authority of the victorious allied powers was clearly a violation of judicial impartiality: the introduction of new classes of international crimes risked violating the core principle of *nullem crimen, nullem ponem sine lege*. The presumption of innocence, and of punishment for acts and acts alone, were undermined by the open declaration of the extra-legal ambitions of the prosecution. The description of the aim of prosecution as expressing moral condemnation of an ideology, rather than the legal attention to individual actions, risked

reducing law to scapegoating. The justification for legal punishment could not plausibly be identical to whatever argument might appear most convincing in the domestic case.

Jackson appealed to rule of law values while also, with the left hand so to speak, tacitly acknowledging the risks implicit in a prosecution that did not also remain clear about the substantial differences between international and domestic criminal law.

In one form or another, ‘Jackson’s Hedge’ has remained a definitive feature in the development of international criminal law since its re-activation in the middle of the 1990s, though rarely expressed with Jackson’s directness. It has remained a practice poised between a narrowly legalistic self-understanding derived from familiar norms of the rule of law, on the one side, and a broader political vision for the role of universal normative values in reining in the abuses of sovereign State power on the other. But unresolved questions at the heart of international criminal law continue to reduce its effectiveness, prestige and prospects. One such unresolved question – what is international criminal law *for*, what is its ‘general justifying aim’ in contrast to the domestic case – crystallises in the question of the status of *impunity* in international criminal law’s developmental arc. It is that question in international criminal law that this chapter explores.

The remarkable rise in prominence and influence of international criminal law over the past near quarter-century cannot be denied. Since national, regional and global actors began offering institutional responses to mass crimes in the former Yugoslavia and Rwanda, and continuing through the emergence of the International Criminal Court (‘ICC’), international criminal law has seen dramatic growth in the creation of new formal courts and tribunals, and in new or re-oriented civil society institutions. This flowering of international criminal law has also had profound effects on the academic study of law and international relations, recasting a host of older standard topics concerning the proper role and extent of criminal legal procedure, questions of individual and group responsibility for moral catastrophes, and the nature and proper limits of traditional State sovereignty.

Yet despite this dramatic twenty-five-year arc of growth and development in international criminal law, numerous signs now point in troubling direction for all those who welcome this arc as one of increased justice and protections for vulnerable persons and groups. Opinions about

the legitimacy, efficacy and prospects for the ICC have of course always been decidedly mixed. The United Nations ('UN') backed international and mixed tribunals too have frequently come under pointed criticism, not only for their slow pace but also for the mismatch between (high) expectations and (low) prosecutorial results. As the world experiences a resurgence of 'neo-sovereigntist', often overtly nationalist and protectionist reactions to the broader cosmopolitan project of which international criminal law was one relatively small part, international criminal law too has begun to experience a notable slackening and possibly even a reversal of its arc of development.

In part, the roadblocks and slippages of the project of international criminal law can and should be taken as growing pains, as foreseeable features of a multi-sided, difficult, and long-term realignment of very deeply entrenched attitudes about the (relatively) new category of international crime. In part, international criminal law institutions, notably the ICC, have not infrequently caused, or at least unnecessarily intensified, opposition by States and blocs. Irritated by real or imagined neo-colonialist or neo-realist features of international criminal law, many State actors have intensified their opposition to its border-crossing features such as universal jurisdiction. Others show waning interest in financial and political support for ongoing or new international criminal law initiatives, discouraged by the glacial pace and relatively high cost of criminal justice as a response to mass political violence.

As David Luban wrote over five years ago, in other words, the honeymoon period for international criminal law has, without doubt, come to an end.⁵ The intervening years have not been any more encouraging. And while it is too soon to begin to speak of divorce, the major motivation for this chapter is the claim that some more deliberate reflection is needed on how international criminal law's arc of progress can regain momentum – or possibly be saved from crashing.

As a very small contribution to that larger project, this chapter asks whether one part of the problem that international criminal law faces in motivating the continued commitment of its various State and non-State participants is lack of clarity in the most basic justifying aim of interna-

⁵ David Luban, "After the Honeymoon: Reflections on the Current State of International Criminal Justice", *Journal of International Criminal Justice* 11 (3), 2013, pp. 505–515.

tional criminal law – what the pursuit of international criminal law is for. The project as large, costly, and potentially lengthy as the development of international criminal law requires at the very least a coherent and compelling set of justificatory reasons to convince its range of shareholders to continue it.

Such a large project cannot be justified by appeal to a single norm, reason, or aim. International criminal law seeks a plurality of goods. But those various goods must be compatible with one another, and placed in some reasonable hierarchy so that even critics can identify which among them is plausibly the most significant motivating aim or compelling norm that international criminal law is trying to realise. Without clarity about what international criminal law is *for*, defending the arc of development of international criminal law becomes significantly more difficult and, ultimately, unlikely.

7.2. Impunity as the Principal Norm of International Criminal Law

The prime candidate for the position of the principal norm or aim of international criminal law – at least if we are to take our lead from international criminal law’s most visible founding documents and apologists – is the *battle against impunity*. Formulations like “combating” impunity, countering or reducing impunity, closing an “impunity gap”, ending a “culture of impunity” or similar formulations are so frequent in contemporary international criminal law that it is worth exploring how this particular goal – henceforth the ‘anti-impunity norm’⁶ – has emerged as a general justifying aim situated at the top of a hierarchy of international criminal law’s reasons to exist.

The UN Office of the High Commissioner for Human Rights understands “battling impunity” as the core of the organisation’s mission of human rights protection.⁷ The Rome Statute’s Preamble declares the ICC to be “[d]etermined to put an end to impunity for the perpetrator of [inter-

⁶ The author has earlier made reference to the “impunity norm”, however, the formulation ‘anti-impunity norm’ is used here in the interest of clarity. See Max Pensky, “Two Cheers for the Impunity Norm”, in *Philosophy and Social Criticism*, 2016, vol. 42, no. 4–5, pp. 487–499.

⁷ Office of the United Nations High Commissioner for Human Rights, “Combating Impunity and Strengthening Accountability and the Rule of Law” (www.legal-tools.org/doc/02a241/).

national] crimes and thus to contribute to the prevention of these crimes”.⁸ The United Nations has adopted an anti-impunity norm as a yardstick in the global effort to enforce and protect basic human rights.⁹ In other documents, the UN defines the work of the International Criminal Tribunal for Rwanda as motivated by the “global fight against impunity”,¹⁰ and documents the legacy of the International Tribunal for the former Yugoslavia as the “end of impunity”.¹¹

Outside of the UN and its related legal and diplomatic bodies, the identification of impunity as the primary antagonist for international criminal law is also now virtually standard. Legal working groups such as the Brussels Group for International Justice have formulated various versions of principles to combat impunity in the prosecution of international justice and human rights enforcement.¹² A broad range of legal scholarship has sought to articulate and advocate for the goal of combating impunity as the clearest expression of the legal version of human rights protection.¹³

Perhaps just as influentially, a range of large, well-funded international human rights organisations have also been caught up in this norm shift. Non-governmental organisations such as Amnesty International, Human Rights Watch, and International Crisis Group (to name only a few), which had until the end of the millennium generally sought to pressure rights-abusing States through the medium of public naming and shaming and other political processes, pivoted sharply toward a criminal-

⁸ Rome Statute of the International Criminal Court, adopted 17 July 1998, entry into force 1 July 2002, Preamble, para. 5 (‘ICC Statute’) (www.legal-tools.org/doc/7b9af9/).

⁹ United Nations Commission for Human Rights, “Report of the Independent Expert to Update the Set of Principles to Combat Impunity: 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, 8 February 2005 (www.legal-tools.org/doc/639fa9/).

¹⁰ International Criminal Tribunal for Rwanda (available on the legacy web site of the International Criminal Tribunal for Rwanda).

¹¹ International Tribunal for the Former Yugoslavia (available on the legacy web site of the International Tribunal for the former Yugoslavia).

¹² Brussels Group for International Justice, “Brussels Principles Against Impunity and for International Justice”, November 2002 (www.legal-tools.org/doc/7205b9/).

¹³ See, for instance, Diane Orentlicher, “Settling Accounts: The Duty to Prosecute Human Rights Violators of a Prior Regime”, in *Yale Law Journal*, 1991, vol. 100, no. 8, pp. 2537–2615; Naomi Roht-Arriaza (ed.), *Impunity and Human Rights in International Law*, Cambridge University Press, Cambridge, 1995.

legal mission as the anti-impunity norm won wide acceptance.¹⁴ In this sense, the anti-impunity norm has not only become hegemonic in international criminal law but has migrated to adjacent areas of international law and advocacy, such that now human rights enforcement has largely become a matter of criminal law.

As legal scholar Karen Engle has recently put it:

[s]ince the beginning of the twenty-first century, the human rights movement has been almost synonymous with the fight against impunity. Today, to support human rights means to favor criminal accountability for those individuals who have violated international human rights or humanitarian law. It also means to be against amnesty laws that might preclude such accountability.¹⁵

¹⁴ A representative sampling would include Amnesty International, “Absolute Impunity: International Law and the Conduct of Militias in Iraq” October 2014 (www.legal-tools.org/doc/12cbe5/); Human Rights Watch, “Afghanistan: Crisis of Impunity” July 2001 (www.legal-tools.org/doc/614a93/); International Crisis Group, “The Politics of Ending Impunity”, 24 February 2009 (www.legal-tools.org/doc/0d08d9/); and Impunity Watch.

¹⁵ Karen Engle, “Anti-Impunity and the Turn to Criminal Law in Human Rights”, in *Cornell Law Review*, 2015, vol. 100, pp. 1069–1129. Engle analyses, in particular, the dramatic change in the conduct of Amnesty International (‘AI’) once the anti-impunity norm becomes definitive for its organisational mission over the course of the years on either side of the turn of the millennium. Engle quotes AI’s updated mission statement from 1991:

AI believes that the phenomenon of impunity is one of the main contributing factors to [gross human rights violations]. Impunity, literally the exemption from punishment, has serious implications for the proper administration of justice...International standards clearly require states to undertake proper investigations into human rights violations and to ensure that those responsible are brought to justice.

Engle notes the potentially negative implications of the pivot to international criminal prosecution as the central justifying aim of AI and other large human rights non-governmental organisations:

[A]s criminal law has become the enforcement tool of choice, it has negatively affected the lens through which the human rights movement and the international law scholars who support it view human rights violations. In short, as advocates increasingly turn to international criminal law to respond to issues ranging from economic injustice to genocide, they reinforce an individualised and de-contextualised understanding of the harms they aim to address, even while relying on the state and on forms of criminalization of which they have long been critical. (p. 1071).

7.3. Narrow and Broad Conceptions of Impunity

Surprisingly, given the wide and rapid dissemination and adoption of the anti-impunity norm, the actual *content* of that norm, the precise meaning of the term ‘impunity’, and why battling it (whatever that entails) is of such paramount value, remains strikingly under-examined. This next section offers such an analysis, distinguishing between a narrow and a broad conception of impunity. This section will show that these narrow and broad conceptions of the concept have frequently been used interchangeably, even though their meanings and implications are distinct, and where the distinctions bear substantive implications.

Briefly, a *narrow* conception of impunity equates impunity with the wrongful *failure to punish* individual perpetrators of international crimes by a legal body with jurisdiction, whereas a *broad* conception of impunity defines impunity as a *lack of accountability*, where ‘accountability’ is understood to refer potentially to sanctions (whether legal or otherwise) imposed on persons (whether convicted criminals or not) or alternatively to the application of other, usually less well-defined sorts of political or social norms.¹⁶ As will be argued later in the chapter, a failure to punish can indeed be *one* form that a lack of accountability can take. But it is hardly the only one. And while a ‘lack of accountability’ is a very vague complaint, international criminal law should make this broader conception of impunity determinate enough to show why criminal law, in particular, is suited to remedy it. While these conceptions may coincide where punishment itself is taken as a legal mechanism for delivering accountability to individual perpetrators of international crimes, there are clearly multiple avenues for the two senses of impunity to separate. Conflating them

¹⁶ The use of the term “conception” to refer to the broad and narrow versions of the impunity norm is meant to appeal to the distinction between concepts and conceptions familiar from Rawls. See John Rawls, *A Theory of Justice*, Harvard University Press, Cambridge, Massachusetts, 1999. In the present context, it is assumed that the concept of impunity is capable of explication and application according to (at least) two different conceptions, and the range of shortcomings and lack of clarity that this chapter tries to identify in each of the two conceptions are meant to be taken as internal to the conceptions themselves, that is, that they fail to make the entailments of the impunity norm sufficiently determinate according to their own internal criteria. At the same time, conflating these two conceptions is the source of significant confusion, so the task is to determine in what sense the two conceptions can be seen as compatible, and in which senses not.

unreflectively has led to a costly lack of clarity concerning what international criminal law is actually for.

Beginning with the most influential legal documents, any attempt to determine the current definition of impunity should start with UN Special Rapporteur Louis Joinet's report to the UN Social and Economic Council on the 'Question of Impunity for Perpetrators of Human Rights Violators', which determined the meaning of impunity as:

the impossibility, de jure or de facto, of bringing the perpetrators of human rights violations to account - whether in criminal, civil, administrative or disciplinary proceedings - since they are not subject to any inquiry that might lead to their being accused, arrested, tried and, if found guilty, convicted, and to reparations being made to their victims.¹⁷

Other influential legal writings offering definitions of impunity include the more recent Brussels Principles Against Impunity and for International Justice, defining impunity as "failing to investigate, prosecute and try natural and legal persons guilty of serious violations of human rights and international humanitarian law".¹⁸

Black's Law Dictionary defines impunity pithily as simply "the exemption or protection from penalty or punishment"; while Amnesty International defines it more broadly, if vaguely, as "convey[ing] a sense of wrongdoers escaping justice or any serious form of accountability for their deeds". Further, in a review of various uses of the term, Christopher Joyner has defined impunity as "exemption or freedom from punishment and connotes the lack of effective remedies for victims of crimes. Within the context of human rights law, impunity implies the lack of or failure to apply remedies for victims of human rights violations".¹⁹ Charles Harper, meanwhile, defines impunity in a broader yet also more determinate sense:

¹⁷ United Nations Commission for Human Rights, "Question of the Impunity of Perpetrators of Human Rights Violations (Civil and Political)", UN Doc. E/CN.4/Sub.2/1997/20, 26 June 1997 (www.legal-tools.org/doc/5f81bd/).

¹⁸ Brussels Group for International Justice, 2002, see *supra* note 12.

¹⁹ Christopher C. Joyner, "Redressing Impunity for Human Rights Violations: The Universal Declaration and the Search for Accountability", in *Denver Journal of International Law and Policy*, 1998, vol. 26, pp. 591–624.

Impunity is the means by which persons accused of crimes against humanity escape being charged, tried and punished for criminal acts committed with official sanction in time of war or dictatorial rule. Impunity can be achieved through amnesty laws passed or decreed by governments under whose authority the crimes were committed or by a successive government. It can result from presidential pardons given convicted criminals who thus remain unpunished. Impunity can also occur by default - the deliberate lack of any action at all.²⁰

Even this abbreviated selection of definitions from legal texts and scholarship illustrates a distinction between a *narrow* and a *broad* conception of impunity. According to the narrow conception, impunity is the lack of the due imposition of legal sanction, that is, of *punishment*. Punishment, in turn, is taken either explicitly or implicitly as the rightful harming (whether in a permissive or obligatory sense) of an individual person as a response to that person's criminal wrongdoing; as a deliberate and proportional setback of interests that could reasonably be ascribed to a convicted criminal, where the mechanism of such a setback is generally assumed to be a period of confinement by the State.²¹

7.3.1. The Narrow Conception of Impunity

According to this narrow conception, impunity occurs just when those who ought to be punished for serious violations of international law go unpunished. It implies, but does not specify, some *external* cause for the missing punishment, and entails the normative claim that such a failure is a serious wrong, both procedurally (wronging the otherwise legitimate and obligatory application of criminal law) and morally (wronging facially a range of distinct moral agents including victims, perpetrators, and citizens in general).²²

This lack of specificity in the narrow conception concerning the underlying causes of a wrongful absence of punishment is significant. We

²⁰ Charles Harper, "From Impunity to Reconciliation", in Charles Harper (ed.), *Impunity: An Ethical Perspective*, WCC Publications, Geneva, 1996, p. viii.

²¹ For a standard account, see Joel Feinberg, *The Moral Limits of the Criminal Law Volume I: Harm to Other*, Oxford University Press, Oxford, 1988.

²² See Pensky, 2016, see *supra* note 6.

must infer that such causes rest outside of the normal operation of a system of criminal legal justice. As a normative concept, wrongful absence of punishment implies a prior wrong, of which impunity is the result. This suggests that impunity, however serious a disvalue or wrong it may be intrinsically, is also evidence of a prior wrong (and not a mere failure of legal procedure), and that a demand to battle impunity may also be taken as an indictment of the wrongs that generate it. A mistrial due to prosecutorial incompetence, for instance, would not qualify as an instance of impunity, any more than, say, a duly convicted perpetrator whose punishment does not take place due to his death prior to its imposition, or an earthquake that destroys the only available prison. Impunity as wrongfully missing punishment implies that wrong of missing punishment itself is traceable back to a prior wrong in which the normal operation of criminal justice is wrongfully interfered with. While prosecutorial incompetence would not generally be taken as a cause of impunity (but would indicate some other kind of failure), bribing a judge, intimidating witnesses, or tampering with evidence would, as would using political power in more diffuse ways to ensure that one would not come under legal attention in the first place.

The narrowness of the narrow conception – defining impunity as missing punishment of individual perpetrators – does not succeed in capturing the distinctiveness of international criminal law in contrast to the domestic analogue. The reason for the shortcoming of the narrow conception is already implicit in the idea of its narrowness. Due to the inherently collective and political nature of the kind of crimes that international criminal law seeks to punish and prevent, and given that the impunity norm has become the principle formulation of that distinctive legal mission, the *mere* lack of punishment of individual perpetrators is too small a normative wrong to serve as international criminal law's general justifying aim, and the distinction between that aim and the broader social goals of domestic criminal legal systems. We would not regard it as an instance of impunity for a dreadfully immoral person to be acquitted on the basis of a procedurally good-enough prosecution. Though we may have good reason to regret that the bad man will not be rightfully harmed, we cannot see it as wrong that he is not, if his trial is fair. Sometimes (we hope infrequently) criminal law works this way. That is the cost of commitment to the rule of law – even in the special case of international criminal law, where accused perpetrators, as former wielders of political power, may

have once openly boasted about the deeds for which they may subsequently be acquitted.

As the *wrongful* absence of punishment subsequent to a procedurally correct criminal conviction, impunity is certainly an injustice, quite possibly a very harmful one, and in many ways indeed a grave one. But if narrow impunity is equated with impunity *simpliciter*, then the impunity norm – the general justifying norm of international criminal law – would say only that the “battle against impunity”, or “combating impunity” or indeed “fighting a culture of impunity” – calls only for the confinement, for some period of months or years, of a small number of men. Why would that be important enough to justify the developmental arc of international criminal law? This is one of the problems, I think, that Jackson’s Hedge refers to.

This question may lead us into a relatively familiar set of arguments on the general topic of the justification for international criminal law punishment – that is, whether the arguments for the justification of criminal punishment familiar from the domestic case apply when transferred to the international level, and whether the relative weightiness of reasons for and against punishment change once we scale up from municipal to international criminal law.

On the domestic level, legal philosophers have dealt with the question of the sovereign State’s *permission or obligation* to punish criminals through a range of by-now well-worn arguments. Insofar as the narrow conception has any convincing power, its defenders will need to take some position on this well-worn philosophical debate as well. Here we need only register the familiar distinctions among retributivist arguments (that the State must punish a criminal because justice demands it), the consequentialist argument (that punishing criminals generates social benefits and reduces social ills more effectively than other available remedies), and the expressivist argument (that the State has a legitimate interest, even an obligation, in punishment as a means to communicate disapprobation for public wrongs).

This chapter takes no particular position on which of these options for justifying the State’s coercive power to rightfully harm citizens is the strongest, in the sense of offering the best defence for the narrow conception. The appraisal of the relative strengths and weaknesses of arguments like these is not likely to translate from the domestic context to that of international criminal law without significant differences. This too is a

part of Jackson's Hedge: the idea that international criminal law is a *near* match or analogue to the domestic case, and so a defence of the State's right or duty to punish that goes through on the domestic level will perforce go through for international criminal law as well, even with the tacit reservation (the hedge) that the difference between domestic and international criminality is not ultimately a matter of gravity alone but also refers to the political and collective nature of international crimes.²³ This hedge – as in Jackson's equivocation regarding whether the punishment of individual perpetrators ultimately matters *for them* or rather for the collective movements or ideologies they *symbolise or represent* – seems to offer a retributivist argument with one hand, while withdrawing it, and replacing it with an expressivist or consequentialist alternative with the other.

Whatever else one can say about its intuitive appeal in the case of international crime, in particular, retributivism presents difficulties as the basis for justifying international prosecutions. The reasons for this lie uncomfortably close to the core distinctive feature of international criminal law, the assignment of individual moral and legal responsibility to individual persons for acts with an irreducibly collective dimension. The same distinctiveness of international criminal law – the collective and political nature of international crimes, and (frequently) the status of accused as former wielders of political power – can be interpreted both as aggravating or mitigating factors in the individual moral responsibility of perpetrators: aggravating, since political power wielders are those who bear a special status as trustees of the law and of the welfare of those under their authority and betrayed that trust and used that same political power to victimise their own population. And yet the collective nature of international crimes can also be taken as a serious consideration for mitigation, both on the part of 'small fish' and even for political and military leaders whose distance from the actual work of killing can often be considerable.

On the other hand, retribution as a justification for international criminal law punishment does have one feature powerful than other available alternatives. This feature lies less in the demand for proportionate rightful harming of individual persons than in the *obligatory* character of

²³ For a parallel discussion, see the familiar argument from Mark Drumbl, *Atrocity, Punishment, and International Law*, Cambridge University Press, Cambridge, 2007.

hard or strong retributivist accounts.²⁴ Emphasising the obligatory character of retribution shifts the weight of justification from the harm the perpetrator deserves to what the legal authority must do to discharge *its own* duties.

Consequentialist defences of international criminal law punishment focus naturally on the question of general deterrence, and here indeed there would seem to be a close match between the arguments' pros and cons on the international and domestic levels. In both contexts, the question of deterrence through punishment is empirical, and hence shares the challenges characteristics of under-supported empirical claims. After all, for the consequentialist defence of the narrow conception of impunity to succeed, one would have to show that the failure to punish is a serious disvalue in its own right, and not a mere proxy or indirect indicator of other disvalues such as a lack of legal certainty or physical security, or seriously reduced prospects of a successful democratic transition, or loss of trust in State authority. Further, one would also have to prove that the available means for reducing the disvalue of impunity to an acceptable level are themselves available, at an acceptable cost, without identifiable alternatives. International criminal law has always asserted, as a sort of promissory note never (yet) redeemed, that threatened sanctions deter would-be perpetrators of international crimes.²⁵ It has not sufficiently responded to the openness of the empirical question of deterrence.

²⁴ The author has developed a fuller account of a form of hard *pro tanto* retributivism in Max Pensky, "Jus Post Bellum and Amnesties", in Larry May and Elizabeth Edenberg (eds.), *Jus Post Bellum and Transitional Justice*, Cambridge University Press, Cambridge, 2013, pp. 152–177.

²⁵ See the Rome Statute, Preamble, see *supra* note 8: "Determined to put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes[...]". See also, the Brussels Principles Against Impunity, see *supra* note 12: "Impunity holds disastrous consequences: it allows the perpetrators to think that they will not have to face the consequences of their actions, it ignores the distress of the victims and serves to perpetuate crime. Impunity also weakens state institutions, it denies human values and debases the whole of humanity". Of this list, certainly the last two, as claims without any need of empirical support, may stand. The rest are empirically testable, but the Principles do not refer to any data supporting the claim. See Payam Akhavan, "Beyond Impunity: Can International Criminal Justice Prevent Future Atrocities?", in *American Journal of International Law*, 2001, vol. 95, no. 1, pp. 7–31; David Wippman, "Atrocities, Deterrence, and the Limits of International Justice", in *Fordham International Law Journal*, 1999, vol. 23, no. 2, pp. 473–488; Dan Saxon, "The International Criminal Court and the Deterrence of Crimes", in Serena Sharma and Jennifer Welsh (eds.), *The Responsibility*

Perhaps sensitive to this, most international criminal law scholars who have addressed this issue have adopted some version of an expressivist or communicative approach for justifying the punishment of international crimes.²⁶ While this is not the place for an extended discussion, the expressivist defence of international punishment is not particularly promising, despite its widespread least-worst popularity as a defence of the narrow conception. International punishment cannot reasonably be expected to communicate rule of law or other values with anything like the force and clarity that would justify international criminal law as worth the price. While domestically the law expresses the voice of the State authority, no such clarity of voice is available in the international arena, where courts derive their authority in highly indirect ways and must appeal to abstractions – the shocked conscience of humanity and similar formulations – to explain the bases of their expressive prerogative. Further, expressivist arguments for international punishment suffer from the same weakness as their domestic analogues. They assert, but do not argue for, the claim that punishment is the all-things-considered best medium of expression for rule of law values.²⁷

to Prevent: Overcoming the Obstacles of Atrocity Prevention, Oxford University Press, Oxford, 2016. For a contrasting view on this question see Kathryn Sikkink, “Explaining the Deterrence Effect for Human Rights Prosecutions for Transitional Societies”, in *International Studies Quarterly*, 2010, vol. 54, pp. 939–63.

²⁶ For the most developed of these, see Bill Wringer, “Why Punish War Crimes? Victor’s Justice and Expressive Justifications of Punishment”, in *Law and Philosophy*, 2006, vol. 25, pp. 159–191. See also Robert D. Sloane, “The Expressive Capacity of International Punishment: The Limits of the National Law Analogy and the Potential of International Criminal Law”, in *Stanford Journal of International Law*, 2007, vol. 39, pp. 39–94.

²⁷ As a thought experiment to test this, suppose a State authority has a budget of one million Euros in order to respond to committed atrocities. It has two choices: either spend the money in prosecution and, if the prosecution results in convictions, the imposition of punishment, in the form of long prison sentences for a small number of high-level perpetrators; or, it can spend the same million Euros on a weeklong public event, gathering the nation’s political figures, entertainers, sports heroes and so on, all with the goal of expressing strong moral disapprobation – publicly expressing the collective rejection of the atrocity crimes, disapproval of the perpetrators, and resolve to make its utmost efforts for non-recurrence. A consistent expressivist should have no preference between these two options provided both adequately and equally express general moral disapprobation. This makes expressivism into something other than a theory of *punishment*, until some additional premise grounds the presumption that punishment is an apt response to wrongdoing inde-

7.3.2. The Broad Conception of Impunity

In contrast to the narrow conception, a *broad* conception of impunity extends the meaning of the wrong of impunity beyond the mere absence of due punishment to some wider legal failure, including (but not necessarily limited to) investigation, indictment, and prosecution. In fact, we may wonder why the broad conception of the impunity norm limits itself to criminal procedure at all, in favour of other social goals including reconciliation, security, reparations, memory policies, and so on. Broad impunity implies that perpetrators lack accountability for their actions, and subjection to criminal law is but one form that accountability may take.

This broad impunity conception certainly has the advantage over its narrow counterpart of opening up the possible sites of wrongfulness beyond the mere lack of punishment. Unfortunately, the price paid for this broadness is vagueness regarding just where the wrong of impunity is best located. For example, is the lack of an entire criminal procedure broad impunity? That seems implausible, given that we would not ordinarily see impunity as arising, say, from a legal procedure where a competent investigation resulted in a prosecutorial decision not to indict due to the poor quality of evidence or unavailability of witnesses, just as we could not speak of impunity applying to an acquittal following a procedurally good-enough criminal trial.

If impunity is taken as a sort of proxy measure for a range of other related but distinct undesirable legal or political outcomes, how should we think about the appropriate and reasonable tasks of law to address them? How should we think about ways of striking appropriate balances or making tough choices when legal and extra-legal values cannot be pursued together? Why think about desired outcomes such as healing of victims and survivors, enacting and funding reparations programs, reforming damaged institutions, or finding common ground between former political adversaries in terms of criminal law at all? And why should perpetrators and their fates, in particular, be the preferred site for realising these values?

The trouble with the broad conception, in other words, is that by defining impunity (merely) as the absence of accountability, it is unable to

pendent of its expressive power – since expressive power is a capacity that may attach to many things, of which punishment is merely one.

provide guidance on what minimally must occur, legally speaking, to an alleged perpetrator of international crimes in order for the legal authority to discharge its obligations; for the victims to have their right to legal remedy fulfilled; and for the perpetrator to get what he legally deserves. This broadness-as-vagueness is what makes the broad definition of impunity as ‘lack of accountability’ so inadequate, since the definition leads nowhere for the question of what (minimally) must be done, legally, to and with the perpetrator for the desired but undefined quality of accountability to be the result. The primary reason for this broadness-as-vagueness is that the concept of ‘accountability’ – which serves as a rough opposite to that of impunity – is also under-defined. Like impunity, accountability exhibits substantially different conceptions, whose unreflective conflation lies beneath much of the confusion of the anti-impunity norm. If the narrow impunity conception is too narrow, the broad conception must be made broad-but-determinate, and this requires that we subject the concept of accountability to analysis as well.

How can we make the broad conception of the anti-impunity norm determinate enough to provide us with a clear alternative to the overly narrow conception? And further, how can we make the broader anti-impunity norm express determinate features of international criminal *law*, rather than, say, international, regional or domestic politics and public policy, reconciliation programs, reparations initiatives, or other aspects of State or civil society responses to international crimes? If punishment is too narrow, what offers itself as an alternate conception that is *broad but legal*, in the sense of appealing to norms, institutions and practices that distinguish law from policy and politics?

7.4. Sanction Accountability and Deliberation Accountability

A preliminary conception of accountability would define it as a more or less institutionalised mechanism or procedure for the non-violent constraint of the exercise of power.²⁸ In this sense, a power-wielder is ac-

²⁸ The conception of accountability developed here draws on the work of Robert Keohane and collaborators. See, in particular, Ruth W. Grant and Robert O. Keohane, “Accountability and Abuses of Power in World Politics”, in *American Political Science Review*, 2005, vol. 99, no. 1, pp. 29–43. Keohane’s work focuses on how global governance institutions freed from national politics can still operate in ways that are accountable to those whom they affect. While Keohane focuses primarily on international financial institutions, the

countable just in case there is some established mechanism – a set of norms or institutions, a spectrum of established practices – that effectively identifies, determines and counters abuses of power – exercises of power exceeding the already established limits of the power-wielder’s permissive authority.²⁹

This marks a difference in principle between accountability mechanisms and related practices of bargaining or negotiation. It is also why accountability must include some specification of the *sanctioning mechanism* attached to the accounting agent. To be accountable, a power wielder must not only be liable to have its policies and decisions measured against a pre-determined public standard by a pre-established and distinct agent.³⁰ That agent must also have a pre-determined sanctioning power of its own, known to both parties, a power that will be brought to bear in case of an illegitimate use of power. Accountability is a procedure for the imposition of a pre-determined sanction as an institutional response to transgressed limits of a power-wielder’s established authority, imposed by the shareholder or stakeholders from which the power wielder’s legitimate authority is derived. Let us call this conception of accountability, which focuses on the pre-determined imposition of sanction as a function of transgressed limits of established power, ‘sanction accountability’.

Sanction accountability focuses attention on the consequences or outcome of an accountability procedure – the sanction is apt or due only in reference to the limits already placed on the power of any power-wielding agent. But in itself, the sanction-based conception says little if anything about what that procedure is. Now contrast this with another

question is equally germane to international courts in general and the International Criminal Court in particular.

²⁹ For good, though now already dated, overviews see Matthew Flinders, *The Politics of Accountability in the Modern State*, Ashgate, Burlington, 2001; Michael W. Dowdle (ed.), *Public Accountability: Designs, Dilemmas, and Experiences*, Cambridge University Press, Cambridge, 2006.

³⁰ Flinders similarly defines political accountability as:

[...] modalities of oversight and constraint on the exercise of state power. It refers to the capacity of citizens to keep in check those who possess public authority through mechanisms compelling these office-holders to give reasons for their actions and, when performance is deemed unsatisfactory, to sanction them by media-enabled protest, legal challenges, or, more routinely, the withdrawal of electoral support for the governing party. *Ibid.*, p. 3.

conception of accountability that foregrounds the *kind of procedure* that accountability is, rather than the *kind of outcomes* that the procedure generates.

A political power-wielder is accountable to shareholders just in case there is a settled relationship in which potential illegitimate uses of power must be *answered or accounted* for; that is, in which the accounting power *may duly demand justifications*. This distinguishes accountability from foreseeable negative consequences resulting from an abuse of power.³¹

Justifications – giving accounts – take the form of communicated reasons for actions. The power-wielder in an accountability relationship is accountable where and to the degree that it is liable to provide justifying reasons, of the right kind, to the relevant accounting agent where appropriately demanded, the reasons in question being ones that propose to justify the claim that a given policy or decision does not overstep the power-wielder's legitimate authority.

Call this second, process-based conception 'deliberation accountability'.³² Deliberation refers to the irreducibly inter-subjective process of

³¹ On the basis of this distinction, the author disagrees with theories of democratic accountability, for instance in the work of Craig T. Borowiak, whose position on accountability as public answerability he largely shares. For Borowiak, an elected public official is accountable to her electorate in the sense that she can be removed from office in periodic elections should they see her representation as inadequate. (Or a corporation is accountable to consumers insofar as they can "punish" it by refusing to buy its products.) The process conception of accountability developed here is not *this* broad, since properly speaking a negative consequence such as losing one's political office is not a sanction, which implies the conscious imposition of harm as a result of a misdeed. Public officials are accountable to their electorates in other ways – for instance, they can be required to testify before parliamentary committees, can be censured or condemned, and in extreme cases removed for office for misdeeds or abuses of power. But voters vote for or against politicians for a variety of motives, so it is not plausible to see an elected official turned out of office as purely an instance of accountability. See Craig T. Borowiak, *Accountability and Democracy: The Pitfalls and Promise of Popular Control*, Oxford University Press, Oxford, 2011.

³² See David Held and Mathias Koenig-Archibugi, "Introduction", in David Held and Mathias Koenig-Archibugi (eds.), *Global Governance and Public Accountability*, Blackwell, Malden and Oxford, 2005, p. 3. David Held and Mathias Koenig-Archibugi provide a lucid definition of (political) stakeholder accountability, and in doing so make an elegant bridge between what is termed here sanction accountability and deliberation accountability:

Accountability refers to the fact that decision-makers do not enjoy unlimited autonomy but have to justify their actions *vis a vis* affected parties, that is, stakeholders. These stakeholders must be able evaluate the actions of the decision-makers and to sanction

the giving and accepting (or refusing) of justifying reasons as a core requirement for assigning accountability to a power-wielder. It also captures the commonsense intuition that being accountable to someone or something means being prepared to give an account of yourself – of what you did and why you did it, and why such actions or choices fell within your prerogative; why they did not extend beyond the established limits of your authority. This deliberative conception of accountability asserts that to be accountable is, at bottom, not a passive imposition of consequences alone, but an active, indeed an interactive relationship characterised by the public use of reasoning.

Clearly, this deliberative conception can and often does enter into tension with the sanction conception. In fact, this tension, in an untheorised form, has generated a great deal of unnecessary confusion in the theoretical literature. The deliberative conception rests on the core intuition that an agent is accountable if it must *answer for* its acts. But ‘answerability’ is all too quickly conflated with ‘liability to be sanctioned’, while in fact the demand to answer, if it is coherent, has to entail the *possibility of answering satisfactorily*, that is, of giving justifying reasons and having those reasons accepted. (This distinction parallels that in law between prosecution and punishment.) This means that deliberation accountability is achievable independently of sanction accountability – provided that the reasons one gives are accepted.³³ But the converse, of course – due sanctioning if reasons are accepted – would *not* even in prin-

them if their performance is poor, for instance by removing them from their positions of authority. Thus, effective accountability requires mechanisms for steady and reliable information and communication between decision-makers and stakeholders as well as mechanisms for imposing penalties.

³³ In this sense the idea of deliberation accountability bears obvious strong connections to what Rainer Forst means by a “context” or an institution of justification, and in fact it may be helpful to see accountability in the deliberative sense developed here as a version of a Forstian account of public practices of justification tracing back to a basic norm of justification or a version of the all-affected principle: those likely to be significantly affected by a policy have their status as moral persons duly respected only insofar and to the extent that the policy creator meets its obligation to provide them with justifying reasons for the policy and its foreseeable effects. See Rainer Forst, *The Right to Justification. Elements of a Constructivist Theory of Justice*, Columbia University Press, New York, 2012. The author has developed an alternative version of this interpretation of the all-affected principle in Max Pensky, “Two Cheers for Cosmopolitanism: Cosmopolitan Solidarity as Second-Order Inclusion”, in *Journal of Social Philosophy*, 2007, vol. 38, no. 1, pp. 165–184.

ciple be justifiable. Hence the two forms of accountability presented here are *not symmetrical*. Sanction accountability *does* presuppose and require the satisfaction of deliberation accountability; it cannot be had in the absence of the latter.

Criminal law provides an illustration of this point. To be legally accountable is to be answerable to a due legal authority, in the sense that one must answer a criminal charge. Criminal defence requires presenting reasons of fact or law meant to justify a judgment of legal innocence. A successful legal defence, and hence an acquittal, is not at all a lack of accountability. If it is procedurally correct, then *deliberation* accountability has been achieved, so that the question of sanction accountability or its lack has no proper place.

7.5. Conclusion

If this distinction between accountability as sanction imposition, and accountability as deliberation or reason-giving, has any plausibility, then we can now use it to help clarify the relation between accountability and its opposite, broad-but-vague impunity.

International criminal law is a mechanism for bringing accountability to those power wielders who have overstepped the due or authorised limits of their use of political power. The publicity and determinacy of international criminal law offer procedural instructions that individual power-wielders – political and military leadership – can consult if they want to know what uses of their power will predictably elicit legal responses, including possible punishment. On the consequentialist premise of general deterrence, the hope is that such power wielders as rational choosers will factor the cost of possible punishment into their calculations regarding attractive versus unattractive alternatives of policy.

The narrowness of the narrow conception of impunity is the conflation of *sanction* accountability with *all* accountability, falsely assuming that punishing perpetrators of international crimes will satisfy the demand for accountability in the wake of atrocity violence. But there is in principle and practice no reason to think that it will. Legal sanction accountability – punishment – only arises subsequent to a procedurally correct conviction. While criminal trials have an essential forensic and empirical dimension – establishing the relevant facts surrounding an alleged criminal act – the moment of judgment, the determination of whether the facts as established fulfil the definition of a criminal statute – is what *creates*

rather than discovers an individual person's status as a criminal perpetrator. This is why the presumption of innocence is more than a mere procedural safeguard. Legal judgment responds to the act; it creates that act as a crime. This core principle, in fact, is precisely the point where Jackson's Hedge is at its most dangerous, if not openly self-contradictory, when it *assumes* that the 'broken men in the dock' are perpetrators of international crimes in a legal sense. No such assumption – unless it is a mere rhetorical gesture – is compatible with the rule of law.

The narrow anti-impunity norm is the imposition of one special kind of sanction accountability, tailored to individual persons. Sanction accountability of course extends beyond the focus on individual offenders in criminal law. *Collective* actors from States, to rebel groups, to corporations, can also be sanctioned – not by legal punishment, which applies only to individual natural persons, but by a range of various approaches ranging in severity from fines for mandatory reparations to compulsory disbanding. Many programs demanding mandatory changes in the structure or capacity of miscreant corporate actors have a sanctioning as well as a reforming intent. It is not hard to imagine cases where the realisation of sanction accountability for collective actors, and countering impunity for individual members of those collectives, come into conflict, as when prosecutors may rely on testimony in exchange for individual immunity. International criminal law has, at present, no clear way to adjudicate such scenarios, which on the whole have been settled *ad hoc* and have not left much record in the relevant case law or jurisprudence.

At the same time, criminal trials are capable of delivering at least some significant degree of *deliberation* accountability as well, captured in the very notion of an accused being compelled to give an account of himself in public, to answer the charges against him. A good deal of legal philosophy, especially in the work of the great legal theorist Antony Duff, has explored in detail how criminal trials can also be understood as public exercises of reason-giving and reason-taking. Duff remains skeptical about the vagueness of the authority of the stakeholders in international criminal trials in particular. But he supports the view that such trials can –

with some qualifications – be taken as exercises in what this chapter terms deliberation accountability.³⁴

But we ought not to over-estimate the amount of deliberation accountability that the trial procedure alone is capable of generating. Whether adversarial or inquisitorial, trials are exercises to determine criminal guilt or innocence, not public catechisms of deliberative democracy. They are strategic, not consensus-driven. The interests of the accused cannot be expected to align with that of the legal authority. Those on trial for international crimes will rarely, if ever, make good participants in processes of public deliberation, which they will subvert if they can.³⁵ Inclusion in deliberation accountability is after all in part a kind of restoration to membership in a deliberating public, an acknowledgement of a kind of deliberative parity. This makes the expressivity of prosecution a complex matter. But international defendants are notoriously good at exploiting the legal structure to their advantage; as criminal defendants, they remain quite dangerous as participants in a public discourse. Jackson's Hedge, assuring us that the 'broken men' sitting in the dock no longer represent any real threat to a recovering State, was in this sense pure bluff.

But crucially, if criminal legal deliberation accountability can be complete in itself – in the event of an acquittal – then defenders of the anti-impunity norm must at least contemplate the prospect that a trial can provide satisfactory accountability, and hence counter (broad) impunity, independently of the (narrow impunity) question of punishment. Satisfaction of deliberation accountability – again, if the defendant is acquitted – is complete in itself, and this fact serves to emphasise the unacceptable narrowness of the narrow anti-impunity norm. *Sanction* accountability would only arise in the case of a correct conviction receiving no punishment due to a wrong either within or external to the legal procedure – threats, corruption, general incompetence, and so on.

So we now know that the problem with narrowness in the narrow impunity conception is that it conflates one kind of accountability (sanc-

³⁴ See, for instance, Antony Duff, "Authority and Responsibility in International Criminal Law", in Samantha Besson and John Tasioulas (eds.), in *The Philosophy of International Law*, Oxford University Press, Oxford, 2010, pp. 589–604.

³⁵ See Michael Scharf, "Chaos in the Courtroom: Controlling Disruptive Defendants and Contumacious Counsel in War Crimes Trials", in *Case Western Reserve Journal of International Law*, 2007, vol. 39, pp. 155–170.

tion) with accountability as such. What about the problem of indeterminacy or vagueness in the broad impunity conception?

A more helpfully determinate conception of broad impunity would consist in a coordinated legal and political approach whose policies consciously aim to maximise accountability in both the deliberative and (where appropriate) the sanction-based meanings of the term. This implies that tough choices will arise where the prospects for sanction accountability are low enough, at a likely high enough cost to the chances for deliberation accountability, as to forgo the one in order to maximise the other where they cannot be pursued together. It implies that prosecutorial strategies will frequently demand political considerations and discretion regarding issues of security, or reconciliation, or the provision of forensic truth, considerations that have little or no precise counterparts in domestic criminal law. It means that there will be times when subjecting former power-wielders to demands to give accounts of themselves – with all the attendant risks – must be justifiable independently of retribution-based desires for desert or payback.³⁶ Crucially, it may require that international criminal law part company from the domestic analogue in its capacity to foresee the provision of accountability through means far broader than the

³⁶ As David Luban writes:

The curious feature about international criminal law (ICL) is that in it the emphasis shifts from punishments to trials. Thus, it is often said that the goal of ICL lies in promoting social reconciliation, giving victims a voice, or making a historical record of mass atrocities to help secure the past against deniers and revisionists. The legitimacy of these goals can be questioned, because they seem extrinsic to pure legal values. But what is often overlooked is that, legitimate or not, they are the goals of trials, not punishments. Indeed, the punishment of the guilty seems almost an afterthought (not to them, of course). Perhaps that is because, as one often says, no punishment can fit crimes of such enormity; or because compared with their trial, their punishment lacks didactic and dramatic force. Whatever the reason, it is remarkable that the centre of gravity so often lies in the proceedings rather than in their aftermath. That is not an objection to the trials, if they are conducted fairly. But the use of the trial as political theatre puts pressure on its fairness; furthermore, international trials have at best a spotty track record of promoting social reconciliation, giving victims a voice, and making a record. Under some circumstances, truth and reconciliation commissions may do a better job, without the need for punishment; if so, the question of what justifies punishments in international criminal trials becomes even more compelling.

David Luban, “Fairness to Rightness: Jurisdiction, Legality, and the Legitimacy of International Criminal Law”, in Samantha Besson and John Tasioulas (eds.), *The Philosophy of International Law*, Oxford University Press, Oxford, 2010, pp. 575–576.

formal procedures of the criminal trial, and experiment with new deliberative accountability procedures.

This kind of institutional imagination and experimentation has not been lacking in international criminal law ever since the ‘new wave’ of the middle of the 1990s – think, for instance, of the mixed or hybrid domestic/international criminal tribunal, or the division of labour between international, domestic, and reworked ‘traditional’ procedures such as the *gacaca* in post-genocide Rwanda. This chapter cannot go into these kinds of experiments in any detail. But in general, it can be said that they have had only very modest success, and relatively little effect in motivating the institution and practice of international criminal law toward more deliberative practices. More promising in this area is the rise of so-called “positive complementarity” between the Office of the Prosecutor of the ICC and the legal and political authorities of States Parties, where matters of jurisdiction, prosecutorial strategy, the “interests of justice” and the overall role of criminal law in peacemaking and democratic transitions looks less like a legal version of foreign development aid, and more like a substantive dialogue.³⁷

Still, these experiments leave the core problems of the anti-impunity norm untouched. They occur at the periphery of international criminal law when reform is needed at its centre. Legal theorists still occasionally use the term *lex ferenda* to express the view that adjudication often is based on the legal authority’s perception of a gap between what the law is and what the law should be – and perhaps what it will one day be. Thus, it can be suspected that Jackson’s Hedge – the attempt to see international criminal law as both staunchly traditional in its focus on individual criminal guilt, and opening up to a new world of international

³⁷ On the by-now voluminous literature on positive or active complementarity, see, in particular, William Burke-White, “Proactive Complementarity: The International Criminal Court and the National Courts in the Rome System of Justice”, in *Harvard International Law Journal*, 2008, vol. 49, pp. 53–108; Michael A. Newton, “The Quest for Constructive Complementarity”, in *Vanderbilt University Law School Public Law and Legal Theory Working Paper* 10–16; Carsten Stahn, “Taking Complementarity Seriously: On the Sense and Sensibility of ‘Classical’, ‘Positive’ and ‘Negative’ Complementarity”, in Carsten Stahn and Mohamed el Zeidy (eds.), *The International Criminal Court and Complementarity: From Theory to Practice*, Cambridge University Press, Cambridge, 2011, pp. 262–270; Morten Bergsmo (ed.), *Active Complementarity: Legal Information Transfer*, Torkel Opsahl Academic EPublisher, Brussels, 2011 (www.legal-tools.org/doc/2cc0e3/).

politics at the same time – is best interpreted as an oblique appeal to that view.

Truth, Testimony, and Epistemic Injustice in International Criminal Law

Shannon E. Fyfe*

8.1. Introduction

International criminal courts rely on the best evidence principle, which requires fact-finders to produce the best evidence available in order to reconstruct the truth about the relevant events. When a fact-finder asserts that a defendant is guilty or innocent, we assume that the fact-finder ‘knows’ the truth about whether the defendant is guilty or innocent. But the epistemic position of the fact-finder depends on the quality of the evidence presented, and fact-finders must rely on the testimony of others in seeking the truth.

Epistemology can help us ground the relationship between truth and testimony in international criminal law, and also understand the danger of perpetrating further injustices on survivors of mass atrocities. In situations where crimes were not well-documented, witness testimony is the most crucial aspect of obtaining evidence. In any criminal court, fact-finders must balance the goals of presenting the most relevant, truth-apt testimonies, with the goal of obtaining justice for all of the relevant parties. International criminal courts share these goals, but they face additional language and cultural barriers that can frustrate the aims of ensuring accurate fact-finding and voicing the experiences of witnesses. For instance, the

* **Shannon E. Fyfe** is Assistant Professor of philosophy at George Mason University and Fellow at its Institute for Philosophy and Public Policy. She holds both a Ph.D. in philosophy and a J.D. from Vanderbilt University. Her prior work includes an internship with the International Criminal Tribunal for Rwanda’s Office of the Prosecutor, the American Society of International Law’s Arthur C. Helton Fellowship for international human rights law in Tanzania, and a fellowship with the Syria Justice and Accountability Centre. She recently published *International Criminal Tribunals: A Normative Defense*, Cambridge University Press, Cambridge, 2017 (co-author with Larry May). The author thanks Salim A. Nakhjavani, Milinda Banerjee, Morten Bergsmo and Alexander Heinze for valuable comments.

preference for live testimony in international criminal courts is supported by the epistemological assertion that in-person testimony will allow fact-finders better access to the truth. Yet social epistemology can help explain why international criminal institutions are at risk of perpetrating testimonial injustice on international witnesses, which both frustrates the truth-seeking mission and perpetrates further harms on victims.

I begin the chapter by exploring the epistemological foundations of truth and testimony in criminal law. I analyse the concept of knowledge, focusing on the different accounts of truth and the credibility of testimony. I then introduce the concepts of epistemic and testimonial injustice, and present a plausible account of how hearers can avoid perpetrating these injustices on speakers. Next, I turn to criminal law and consider how truth and testimony function under different procedural systems and contribute to the legal goals of truth and justice. In the final section, I assess the susceptibility of international criminal courts and tribunals to the two harms of testimonial injustice. I argue that the overwhelming variety of social identities in international criminal courtrooms renders them particularly susceptible to perpetrating testimonial injustice, but fact-finders and other actors can mitigate the harms to victims and the truth-seeking mission by practising testimonial justice. I conclude that while truth and justice are crucial goals of international criminal law, they are not the only goals, and thus we should not abandon international criminal law in favour of alternative justice mechanisms.

8.2. Truth and Knowledge

Aristotle observes, in the *Metaphysics*, that all human beings desire to know.¹ As an empirical matter, this is likely untrue. Alternatively, a modest interpretation of this claim is that we take ourselves to know a lot, and we do not want to be wrong about the things we claim to know.² In other words, we want to have *true beliefs*. Aristotle also observes that we are

¹ Aristotle, *Metaphysics*, in Richard McKeon ed. and W. D. Ross trans., *The Basic Works of Aristotle*, New York, Random House, 1941, Book I.1, 980a22.

² There are several different types of knowledge, including *propositional knowledge*, that is, knowing that a statement is true; *acquaintance knowledge*, that is, being familiar with a topic or things through personal experience; and *how-to knowledge*, that is, knowing how to perform a particular action or task. Because we are concerned about knowledge insofar as we care about truth, we will be focused only on propositional knowledge.

naturally political creatures, and that we rely on one another in order to live in community with one another.³ We also rely on each other epistemically, in that we cannot possibly independently verify everything we claim to know. Thus, our beliefs are informed by data and testimony⁴ we receive from other people, and we depend on the quality of this information to ensure that our beliefs are true beliefs. In this section, I consider the broad conceptual foundations of truth and knowledge in general.

8.2.1. Knowledge

One definition of knowledge that has been generally accepted⁵ is a justified, true belief. In Plato's *Theaetetus*, Socrates considers several different possibilities for the definition of knowledge.⁶ He rejects the idea of knowledge as examples in geometry or astronomy,⁷ noting that we are looking for characteristics that help us explain the concept of knowledge, not *instances* of knowledge.⁸ Next, Socrates rejects the idea of knowledge as perception.⁹ Perception can provide evidence for true beliefs, but it would be absurd to think that our perceptions are always accurate, and there are also instances of knowledge that cannot be captured by perception.¹⁰ The next definition Socrates considers is the idea of knowledge as "true belief".¹¹ He rejects this on the basis that while someone may have true beliefs, if they are for the wrong reasons, we reject the true beliefs as instances of knowledge.¹² Accidentally true beliefs cannot be

³ Aristotle, *Politics*, J.A. Sinclair trans., Harmondsworth, Penguin, 1962, 1253a2.

⁴ I use the term 'testimony' in two senses. First, to refer to the general practice of a speaker saying, telling, or asserting something. See John Searle, *Speech Acts*, Cambridge, Cambridge University Press, 1969. When I refer to testimony in the legal context, the general definition still applies, but I intend to refer more specifically to the practice of a speaker saying, telling, or asserting something as evidence in a criminal trial.

⁵ For criticism of this definition, see Edmund L. Gettier, "Is Justified True Belief Knowledge?", in *Analysis*, 1963, vol. 23, no. 121. See also Alvin I. Goldman, *Epistemology and Cognition*, Harvard University Press, Cambridge, 1986.

⁶ Plato, *Theaetetus*, in Paul Moser and Arnold vander Nat (eds.), *Human Knowledge: Classical and Contemporary Approaches*, Oxford University Press, New York, 2003.

⁷ *Ibid.*, 146a–c.

⁸ *Ibid.*, 146d–147e.

⁹ *Ibid.*, 151e–187a.

¹⁰ *Ibid.*

¹¹ *Ibid.*, 200e.

¹² *Ibid.*, 200d5–201c7.

knowledge.¹³ Finally, Socrates settles on the definition of knowledge as “true belief with an account of the reason why the true belief is true”.¹⁴ In other words, a true belief that is justified. I consider each of these three elements in turn.

8.2.1.1. Beliefs

With respect to propositional knowledge, most contemporary philosophers characterise a belief as a “propositional attitude”, or “a mental state of someone with a proposition for its object”.¹⁵ A propositional attitude is a relationship that holds between a person and a thing that she asserts.¹⁶ Someone who seriously doubts whether a given proposition is true, or who has not even considered or entertained the proposition, could not be said to have knowledge of the proposition. Thus, the belief aspect of knowledge excludes ignorance.¹⁷ A belief is generally thought to be “relatively unrestricted acceptance” of a proposition, which is more than just an opinion or an acceptance of a proposition merely for the sake of argument.¹⁸

8.2.1.2. Justification

Justification matters because we do not want to have beliefs that are merely true by luck. We already saw this in Plato’s *Theaetetus*, but he makes the point more explicitly in the *Meno*.¹⁹ There, Socrates distinguishes between true beliefs and knowledge by revealing justification as what makes

¹³ *Ibid.*

¹⁴ *Ibid.*, 207c.

¹⁵ Ernest Sosa, “The Raft and the Pyramid”, in Ernest Sosa *et al.* (eds.), *Epistemology: An Anthology*, Blackwell, 2008, p. 147. See also W.V. Quine, “Quantifiers and Propositional Attitudes”, in *The Journal of Philosophy*, 1956, vol. 53, no. 5, p. 187: “Now of all examples of propositional attitudes, the first and foremost is belief [...]”.

¹⁶ See Saul A. Kripke, *Naming and Necessity*, Harvard University Press, Cambridge, 1980; see also Scott Soames, “The Necessary Aposteriori”, in *Philosophical Analysis in the Twentieth Century, Volume 2: The Age of Meaning*, Princeton University Press, Princeton, p. 373.

¹⁷ Michael Williams, *Problems of Knowledge: A Critical Introduction to Epistemology*, Oxford University Press, Oxford, 2001, p. 18.

¹⁸ *Ibid.*

¹⁹ Plato, *Meno*, in John M. Cooper ed. and G.M.A. Grube trans., *Plato: Five Dialogues*, 2d. ed., Hackett Publishing, 2002.

knowledge more valuable than merely true beliefs.²⁰ He acknowledges that we might be inclined to think that true beliefs are of as much practical use as knowledge, that is, both will get us to Larissa (or wherever we are going).²¹ However, as Socrates tells Meno, “true opinions, as long as they remain, are a fine thing and all they do is good, but they are not willing to remain long, and they escape from a man’s mind, so that they are not worth much until one ties them down by (giving) an account of the reason why”.²² He goes on to conclude that true beliefs are “tied down” when they become knowledge, and that this is why we value knowledge more than correct opinion.²³ The way that we “tie down” truth is through the giving of reasons.

There are different ways to think about the relationship between evidence and the proposition it supports. If we adhere to infallibilism, the strength of justification required for a true belief to constitute knowledge is incredibly high. The potential knower must be in an optimal epistemic position in order to have justification sufficient for knowledge, such that she could not go wrong in her belief.²⁴ Descartes subscribes to a form of infallibilism, in which knowledge must involve belief in an “indubitable truth”.²⁵ Infallibilism lends itself toward scepticism about the possibility of acquiring knowledge about almost anything.²⁶ If we want to avoid scepticism, as we should, we must weaken the justification condition. Thus, fallibilism does not require that one be in an optimal epistemic posi-

²⁰ *Ibid.*, 98a.

²¹ *Ibid.*, 97a–c.

²² *Ibid.*, 98a–b.

²³ *Ibid.*, 98a–b.

²⁴ See René Descartes, “Meditations on First Philosophy”, in John Cottingham *et al.* eds. and trans., *Descartes: Selected Philosophical Writings*, rev. ed., Cambridge University Press, New York, 1988.

²⁵ René Descartes, “To Regius 24 May 1640”, in John Cottingham *et al.* (eds.), *The Philosophical Writings of Descartes: Volume 3, The Correspondence*, Cambridge University Press, 1984, p. 147: “[K]nowledge is conviction based on a reason so strong that it can never be shaken by any stronger reason”. That is, “a conviction so firm that it is quite incapable of being destroyed; and such a conviction is clearly the same as the most perfect certainty”.

²⁶ *Ibid.* Cartesian Knowledge, given the Infallible Justification Condition, is demanding. Indeed, it is hard to think of any beliefs about physical objects that Descartes could claim to know. All our evidence concerning the external world is, it seems, defeasible. For example, you might be dreaming, or you might be a brain in a vat.

tion. Instead, the potential knower could be wrong in her belief without being excluded from the possibility of having knowledge.²⁷ Locke, for instance, adopts a form of fallibilism because he recognises the value of knowledge and he wants to be able to utilise the concept in the real world.²⁸ A fallible justification involves defeasible evidence, thus it could be undermined by later evidence, but it is necessary to accept fallible justification at some point in order to avoid collapsing into scepticism.

The evidence that supports true beliefs can come through several sources, including perception, reasoning, memory, and testimony. A perceptual belief is one that has been justified through personal sensation, as well as an understanding of the relationship between the object being perceived and the sensory experience of the perceiver.²⁹ Reasoning is a form of self-evidence, in that it corresponds with:

truths such that (1) if one (adequately) understands them, then by virtue of that understanding one is justified in (hence has justification for) believing them, and (2) if one believes them on the basis of (adequately) understanding them, then one thereby knows them.³⁰

Analytic propositions, which Kant and others claim can be known by reason alone, are one example of self-evidence.³¹ Memory builds on the justification provided by perception by preserving “important infor-

²⁷ See John Locke and P.H. Nidditch, *An Essay Concerning Human Understanding*, in *The Clarendon Edition of the Works of John Locke*, Oxford University Press, New York, 1979, Bk. 4:2:14:

The certainty of things existing [in the nature of things] when we have the testimony of our senses for it is not only as great as our frame can attain to, but as our condition needs. For, our faculties being suited no to the full extent of being, nor to a perfect, clear, comprehensive knowledge of things free from all doubt and scruple; but to the preservation of us, in whom they are; and accommodated to the use of life: they serve to our purpose well enough, if they will but give us certain notice of those things, which are convenient or inconvenient to us.

²⁸ *Ibid.*

²⁹ See Robert Audi, *Epistemology – A Contemporary Introduction to the Theory of Knowledge*, 3d ed., Routledge, New York, 2011, pp. 16–17.

³⁰ *Ibid.*, p. 106; see also Robert Audi, “Self-Evidence”, in *Philosophical Perspectives*, 1999, vol. 13, pp. 205–28.

³¹ See Immanuel Kant, *Critique of Pure Reason*, in Paul Guyer and Allen W. Wood eds. and trans., *The Cambridge Edition of the Works of Immanuel Kant*, Cambridge University Press, Cambridge, 1998.

mation we acquire through the senses”, but also information about our mental states and attitudes.³² Testimony, on the other hand, is evidence that we acquire from other people, rather than our own mental processes of perception, remembering, and reasoning. As a source of justification, testimony involves the kind of reliance on other people that Aristotle considers part of what allows us to live as human beings in societies.³³ Testimony is our primary source of “social” evidence.³⁴ We return to more specific questions about the reliability of evidence in Section 8.3., but for now, I note that all of these sources of justification can be more or less reliable, and all can be fallible.

We turn to the most important element of knowledge for our purposes, truth, in the next sub-section.

8.2.2. Truth

Recall that for a justified belief to count as knowledge, it must be true. The concept of ‘truth’ is a challenge to define, as many attempts to do so inevitably collapse into circularity.³⁵ As Frege said, “it is probable that the content of the word ‘true’ is unique and indefinable”, which would make it impossible to analyse.³⁶ Donald Davidson sees truth as a “primitive concept”, “beautifully transparent compared to belief and coherence”.³⁷ Nonetheless, in this sub-section, I consider three of the most prominent attempts to theorise about truth. Since the purpose of this chapter is to explore issues about truth and testimony in a real-world setting, the courtroom, I consider both epistemological and metaphysical issues.

8.2.2.1. Theories of Truth

The most significant theories of truth today, correspondence, coherence, and pragmatist theories assume that there are truths and attempt to explain their nature. I describe each in turn.

³² Audi, 2011, see *supra* note 29, p. 62.

³³ Aristotle, 1962, see *supra* note 3.

³⁴ See Audi, 2011, see *supra* note 29, pp. 150–151.

³⁵ Gottlob Frege, “The Thought – A Logical Inquiry”, in *Mind*, 1956, vol. 65, no. 259, p. 291.

³⁶ *Ibid.*

³⁷ Donald Davidson, “A Coherence Theory of Truth and Knowledge”, in *Subjective, Inter-subjective, Objective*, Oxford University Press, Oxford, 2001, p. 139.

8.2.2.1.1. Correspondence Theories

The traditional view about truth, that a proposition is true when reality corresponds with what the proposition says, is a view known as a *correspondence theory*. Haig Khatchadourian defines the “traditional” correspondence theory as one that “claims that (a) the nature or definition of truth, and (b) the criterion of contingent truth, lies in or consists of ‘correspondence’ or ‘agreement’ of a contingent or factual statement or proposition with reality or fact”.³⁸ Aristotle’s claim that “[o]n the one hand, the false is to say that what is, is not or that what is not, is; on the other hand, the true is to say that what is, is and what is not, is not, so that the one saying that it is or is not is either speaking the truth or is false”³⁹ is emblematic of a correspondence theory of truth. Correspondence theories can also be thought of as realist views. A realist view locates truth in the world, and not in the individuals who hold beliefs.⁴⁰ Thus for the realist, truth is objective, and it does not rely on what anyone believes.⁴¹

I consider three metaphysical aspects of correspondence theories in turn. The first aspect of a correspondence theory is the truth-bearer, or the thing that has the property of obtaining truth. Some correspondence theorists, such as Bertrand Russell, see beliefs as the primary bearers of truth.⁴² Russell claims that beliefs are truth-bearers, and facts are what make beliefs either true or false.⁴³ Other versions of correspondence theories consider propositions⁴⁴ or sentences⁴⁵ to be the primary bearers of truth. All correspondence theories see the role of truth-bearer as a meaningful one, because they rely on the realist view that the truth-bearers say something about reality.

³⁸ Haig Khatchadourian, *Truth: Its Nature, Criteria and Conditions*, Ontos Verlag, Frankfurt, 2011, p. 1.

³⁹ Aristotle, 1941, see *supra* note 1, Book IV.7, 1011b25–29.

⁴⁰ Michael Lynch, “Realism and the Nature of Truth”, in Michael Lynch (ed.), *The Nature of Truth: Classic and Contemporary Perspectives*, The MIT Press, Cambridge, 2001, p. 10.

⁴¹ *Ibid.*

⁴² Bertrand Russell, “Truth and Falsehood”, in Michael Lynch (ed.), *The Nature of Truth: Classic and Contemporary Perspectives*, The MIT Press, Cambridge, 2001, p. 17.

⁴³ *Ibid.*

⁴⁴ Scott Soames, *Understanding Truth*, Oxford University Press, Oxford, 1999, Ch. 1.

⁴⁵ J.L. Austin, “Truth”, in Michael Lynch (ed.), *The Nature of Truth: Classic and Contemporary Perspectives*, The MIT Press, Cambridge, 2001, pp. 25–26.

The second aspect of a correspondence theory is the truth relation (or correspondence) between the proposition and reality. Russell explains this relationship as one of congruence. Objects with this truth relation form what he calls a “complex unity”, where a belief is a uniting relation between a subject and object, and the subject and object are “arranged in a certain order by the ‘sense’ of the relation of believing”.⁴⁶ A belief is true, according to Russell’s view, when it corresponds to a certain complex unity, or a fact, and the belief is false when it does not.⁴⁷ Russell has also described this truth relation as follows: “[T]he difference between a true belief and a false belief is like that between a wife and a spinster”.⁴⁸ J.L. Austin, on the other hand, adopts a truth relation of correlation.⁴⁹ For Austin, a statement or interpreted sentence is true when it correlates with facts or “particular states of affairs”.⁵⁰ Other correspondence theories see the truth relation as a causal relation, where an interpreted sentence truthfully represents reality if and only if the component parts of the sentence stand in an appropriate causal relation with certain objects in the world.⁵¹

Finally, the last aspect of correspondence theory is the truth-maker, or the reality to which the proposition is meant to correspond. Facts, or states of affairs that actually obtain, are the truth-makers for most correspondence theories.⁵²

8.2.2.1.2. Coherence Theories

The *coherence theory* provides one alternative view of truth. These kinds of theories claim that a true proposition is one that “coheres with the most

⁴⁶ Russell, 2001, p. 23, see *supra* note 42.

⁴⁷ *Ibid.*

⁴⁸ Bertrand Russell, *Human Knowledge: Its Scope and Limits*, Allen and Unwin, London, 1948, p. 165.

⁴⁹ Austin, 2001, pp. 27–28, see *supra* note 45.

⁵⁰ *Ibid.*, pp. 28, 36.

⁵¹ See Hartry Field, “Tarski’s Theory of Truth”, in Michael Lynch (ed.), *The Nature of Truth: Classic and Contemporary Perspectives*, The MIT Press, Cambridge, 2001; see also Michael Devitt, “The Metaphysics of Truth”, in Michael Lynch (ed.), *The Nature of Truth: Classic and Contemporary Perspectives*, The MIT Press, Cambridge, 2001.

⁵² See Russell, 2001, p. 33, see *supra* note 42; see also Michael Pendlebury, “Facts as Truth-makers”, in *Monist*, 1986, vol. 69, pp. 177–188.

comprehensive system of beliefs whose members imply each other”.⁵³ The early versions of coherence theory were associated with German and then British idealists.⁵⁴ Idealism lends itself to the idea that reality is just the realisation of a system of judgments, rather than facts about the world.⁵⁵ For a coherence theorist, truth comes in degrees, rather than as a binary judgment about truth or falsity, because the assessment of truth is about the degree of realisation of a system.⁵⁶ H.H. Joachim noted that truth is about “the systematic coherence which characterized a significant whole”,⁵⁷ as distinguished from the correspondence theory view of truth as a relation between a proposition and reality. It is the coherence itself that is the truth-bearer, not the proposition, even assuming the proposition coheres with the system as a whole.⁵⁸ Accordingly, the truth conditions of propositions consist in the other propositions in a given system.

The standard for what constitutes ‘coherence’ varies between different versions of coherence theory. R.C.S. Walker notes that for some it is simple consistency, while for others it involves “mutual entailment by all the propositions in question”,⁵⁹ and still others do not even attempt to define a standard for the term.⁶⁰ Coherence is generally thought to be more than “mere consistency”,⁶¹ but it does not require perfection. Brand Blanshard argues that we judge the truth of particular propositions “by the amount of coherence which in that particular subject-matter it seems reasonable to expect”.⁶² Because the systems of judgments will change, what coheres with a system “at one time may not cohere with it at another; thus

⁵³ Richard L. Kirkham, *Theories of Truth: A Critical Introduction*, The MIT Press, Cambridge, 2001, p. 114.

⁵⁴ Michael Lynch, “Coherence Theories: Introduction”, in Michael Lynch (ed.), *The Nature of Truth: Classic and Contemporary Perspectives*, The MIT Press, Cambridge, 2001, p. 10.

⁵⁵ *Ibid.*

⁵⁶ *Ibid.*; see also F.H. Bradley, *Essays on Truth and Reality*, Clarendon Press, Oxford, 1914.

⁵⁷ H.H. Joachim, *The Nature of Truth*, Clarendon Press, Oxford, 1906, p. 79.

⁵⁸ Ralph C.S. Walker, “The Coherence Theory”, in Michael Lynch (ed.), *The Nature of Truth: Classic and Contemporary Perspectives*, The MIT Press, Cambridge, 2001, p. 124.

⁵⁹ *Ibid.*, p. 127.

⁶⁰ *Ibid.*

⁶¹ Brand Blanshard, “Coherence as the Nature of Truth”, in Michael Lynch (ed.), *The Nature of Truth: Classic and Contemporary Perspectives*, The MIT Press, Cambridge, 2001, p. 107.

⁶² *Ibid.*, p. 108.

in practice we shall be justified in accepting at one time what later we must reject”.⁶³ This does not result in any inconsistency, according to Blanshard, because the truth itself is not changing, just our systems of beliefs.⁶⁴ Walker claims that “the system will itself determine what coherence with it amounts to”.⁶⁵

Coherence theorists do not rely on realism, as their concept of truth is not dependent upon facts about the world. Rather, as argued by Blanshard, “the degree of truth of a particular proposition is to be judged in the first instance by its coherence with experience as a whole, ultimately by its coherence with that further whole, all-comprehensive and fully articulated, in which thought can come to rest”.⁶⁶ However, Linda Martin Alcoff argues that coherence theories have “the potential to explain how realism can coexist with a political self-consciousness about human claims to know”,⁶⁷ and thus are not necessarily anti-realist, while Davidson actually argues that any acceptable coherence theory of truth must be consistent with correspondence theory about the way things are in the world.⁶⁸

8.2.2.1.3. Pragmatist Theories

The *pragmatist theories* of truth are focused on inquiry. C.S. Peirce defined truth as “the opinion which is fated to be ultimately agreed to by all who investigate”.⁶⁹ Scientists, according to Peirce, “are fully persuaded that the processes of investigation, if only pushed far enough, will give one certain solution to every question to which they can be applied”.⁷⁰ As Peirce admits, this definition of truth relies on humans insofar as it can only be determined through investigation, and humans make decisions

⁶³ *Ibid.*, p. 114.

⁶⁴ *Ibid.*, p. 114

⁶⁵ Walker, 2001, p. 127, see *supra* note 40.

⁶⁶ Blanshard, 2001, p. 107, see *supra* note 61.

⁶⁷ Linda Martín Alcoff, “The Case for Coherence”, in Michael Lynch (ed.), *The Nature of Truth: Classic and Contemporary Perspectives*, The MIT Press, Cambridge, 2001, p. 160.

⁶⁸ Davidson, 2001, see *supra* note 37, pp. 139–140.

⁶⁹ C.S. Peirce, “How to Make Our Ideas Clear”, in Michael Lynch (ed.), *The Nature of Truth: Classic and Contemporary Perspectives*, The MIT Press, Cambridge, 2001, p. 206.

⁷⁰ *Ibid.*

about what to investigate.⁷¹ William James understands truth as ideas “that we can assimilate, validate, corroborate and verify”, while “[f]alse ideas are those that we can not”.⁷² Thus for both James and Peirce, truth is not a “stagnant property”, but instead occurs as part of a process of verification.⁷³

On Peirce’s understanding of this process of verification, truth is determined via consensus when scientific inquiry has been completed.⁷⁴ His view is that “investigation is destined to lead, at last, if continued long enough, to a belief in it”.⁷⁵ Peirce defends the scientific method as the only way to ensure that all truth-seekers will reach a consensus about truth, in line with reality, because it is the only method that can avoid the influence of our individual beliefs.⁷⁶ James does not share Peirce’s view about the necessity of consensus for truth. He notes that “true is the name of whatever proves itself to be good in the way of belief, and good, too, for definite assignable reasons”.⁷⁷ This allows James to defend different kinds of truth, outside the realm of scientific truths, and it allows him to include the experiences of individuals in what is sufficient for verification.⁷⁸

I return to aspects of these three theories about truth in Sections 8.3. and 8.4., and consider how they play out in terms of truth and the law.

8.2.3. Social Epistemology

Now that we have an understanding of the foundations of truth and knowledge, I want to address a specific branch of epistemology that will prove helpful in analysing some challenges that we face in light of our

⁷¹ *Ibid.*, p. 207.

⁷² William James, “Pragmatism’s Conception of Truth”, in Michael Lynch (ed.), *The Nature of Truth: Classic and Contemporary Perspectives*, The MIT Press, Cambridge, 2001, pp. 212–213.

⁷³ *Ibid.*, p. 213.

⁷⁴ Peirce, 2001, p. 207, see *supra* note 69; see also Susan Haack, “The Pragmatist Theory of Truth”, in *The British Journal for the Philosophy of Science*, 1976, vol. 27, no. 3, pp. 232–233.

⁷⁵ Peirce, 2001, p. 207, see *supra* note 69.

⁷⁶ Haack, 1976, p. 233, see *supra* note 74.

⁷⁷ William James, *Pragmatism: A New Name for some Old Ways of Thinking*, Harvard University Press, Cambridge, 1975, p. 42.

⁷⁸ James, 2001, pp. 215–216, see *supra* note 72.

practical reliance on other people in order to obtain the truth. Social epistemology, for our purposes, refers to “the norms governing the social mechanisms and practices that inculcate belief”.⁷⁹ While the field initially sprang up in opposition to traditional epistemology,⁸⁰ much of contemporary social epistemology seeks the truth, like traditional epistemology, but arguably with an expanded set of resources.⁸¹ There are three main branches of social epistemology: *revisionism*, *preservationism*, and *expansionism*.⁸² I begin this section by distinguishing between these three branches as a way of explaining the relationship between social epistemology and truth. I go on to discuss testimony as a crucial feature of social epistemology, and the concept of epistemic injustice, which occurs when someone is wronged in her capacity as a source of knowledge.

8.2.3.1. Branches of Social Epistemology and Truth

As already mentioned, the field of social epistemology initially emerged in opposition to traditional epistemology.⁸³ The first branch of social epistemology, *revisionism*, reflects the views of some of the field’s early proponents, but contemporary revisionists rarely employ the label of ‘social epistemology’ to describe their work.⁸⁴ Revisionists “reject the existence of objective norms of rationality, and reject truth as the goal of our intellectual and scientific activities”.⁸⁵ Their study of social phenomena prompt revisionists to reject truth and norms of rationality.⁸⁶ Revisionists often use the term ‘knowledge’, but they “don’t understand it to be a truth-entailing, or factive, state. In their lexicon knowledge is simply

⁷⁹ Ronald J. Allen and Brian Leiter, “Naturalized Epistemology and the Law of Evidence”, in *Virginia Law Review*, 2001, vol. 87, no. 8, p. 1498.

⁸⁰ See, for example, Thomas Kuhn, *The Structure of Scientific Revolutions*, University of Chicago Press, Chicago, 1962.

⁸¹ See Alvin I. Goldman, “Introduction”, in Adrian Haddock *et al.* (eds.), *Social Epistemology*, Oxford University Press, New York, 2010.

⁸² *Ibid.*, pp. 1–5.

⁸³ See Goldman, 2010, see *supra* note 81.

⁸⁴ *Ibid.*, p. 3.

⁸⁵ Matthias Steup, “Epistemology in the Twentieth Century”, in Dermot Moran (ed.), *The Routledge Companion to Twentieth Century Philosophy*, Routledge, New York, 2008, pp. 508–509.

⁸⁶ Goldman, 2010, p. 3, see *supra* note 81.

whatever is believed, or perhaps ‘institutionalised’ belief’.⁸⁷ Richard Rorty argues that our goal should be to “keep the conversation going rather than to find objective truth”.⁸⁸ Other theorists in this camp adopt the view of truth as a social construction.⁸⁹

The second field of social epistemology is *preservationism*. This branch studies doxastic decision-making, in light of social evidence, by individual agents, as well as the gathering of social evidence and certain kinds of speech and communication.⁹⁰ Social evidence is evidence possessed by a doxastic agent that “concerns acts of communication by others”, or “other people’s doxastic states that become known to the agent”.⁹¹ Testimony is, therefore, a central feature of preservationism, as we will see in Section 8.2.3.2. Notably, preservationists retain norms of objectivity and rationality, and many see truth as the goal of epistemic endeavours.⁹²

The final branch of social epistemology is *expansionism*, which studies collective doxastic agents and social systems.⁹³ It seeks to expand the application of social epistemology without straying too far from traditional epistemology.⁹⁴ For our purposes, the most important feature of expansionism is how it has been used to study legal adjudication systems, with an aim of understanding which trial systems are able to generate the

⁸⁷ *Ibid.*

⁸⁸ Richard Rorty, *Philosophy and the Mirror of Nature*, Princeton University Press, Princeton, 1979, p. 377.

⁸⁹ Goldman, 2010, p. 3, see *supra* note 81; see also Bruno Latour and Steve Woolgar, *Laboratory Life: The Construction of Scientific Facts*, Princeton University Press, Princeton, 1986; Steven Shapin, *A Social History of Truth*, The University of Chicago Press, Chicago, 1994, p. 6.

⁹⁰ Goldman, 2010, pp. 5–6, see *supra* note 81.

⁹¹ Alvin I. Goldman, “A Guide to Social Epistemology”, in Alvin I. Goldman and Dennis Whitcomb (eds.), *Social Epistemology: Essential Readings*, Oxford University Press, New York, 2011, pp. 14–15.

⁹² See Alvin I. Goldman, “Foundations of Social Epistemics”, in *Synthese*, 1987, vol. 73, no. 1.

⁹³ Goldman, 2010, pp. 15–25, see *supra* note 81.

⁹⁴ *Ibid.*, p. 1.

most accurate outcomes and verdicts.⁹⁵ Section 8.3. of this chapter will focus on this part of expansionism in social epistemology.

8.2.3.2. Testimony

Testimony is a crucial source of social evidence for preservationists and expansionists. Austin claims that a “statement of an authority makes me aware of something, enables me to know something, which I shouldn’t otherwise have known. It is a source of knowledge”.⁹⁶ Austin’s statement is about an authority, someone who we may not see as infallible, but someone in whom we likely put a lot of trust as someone whose testimony will help us in a truth-seeking endeavour. However, we rely on testimony as social evidence from many doxastic agents, and some of these speakers will be insincere or have relied on poor evidence themselves. Thus, testimony may or may not be a reliable source of justification for beliefs.

Reductionists argue that testimony cannot stand alone as a source of epistemic authority, but that hearers “must have sufficiently good positive reasons for accepting a given report, reasons that are not themselves ineliminably based on the testimony of others”.⁹⁷ These reasons involve inductive reasoning about the reliability of a source of testimony based on the observation of a “general conformity between facts and reports” of a speaker.⁹⁸ Reductionists like David Hume recognise the practical necessity of testimony, as he notes that “there is no species of reasoning more common, more useful, and even necessary to human life, than that which is derived from the testimony of men, and the reports of eye-witnesses and spectators”.⁹⁹ Yet the value of testimony can only be established by our own assessment “of the veracity of human testimony, and of the usual conformity of facts to the reports of witnesses”.¹⁰⁰

⁹⁵ *Ibid.*

⁹⁶ J.L. Austin, *Philosophical Papers*, 3rd ed., Oxford University Press, Oxford, 1979, pp. 81–82.

⁹⁷ Jennifer Lackey, “Introduction”, in Jennifer Lackey and Ernest Sosa (eds.), *The Epistemology of Testimony*, Oxford University Press, New York, 2006, p. 5.

⁹⁸ *Ibid.*

⁹⁹ David Hume, *An Enquiry Concerning Human Understanding and Other Writings*, Stephen Buckle ed., Cambridge University Press, New York, 2007, Bk. 10 (“Of miracles”), 10.5, p. 98.

¹⁰⁰ *Ibid.*

Anti-reductionists, on the other hand, see testimony as a source of justification, just like the other sources (discussion in Section 8.2.1.2.). They claim that “one is *prima facie* justified in trusting someone’s testimony even without prior knowledge or justified belief about the testifier’s competence and sincerity, and without prior knowledge of the competence and sincerity of people in general”.¹⁰¹ The reliability of testimony can be challenged if there are defeaters, or evidence that a speaker’s belief is “either false or unreliably formed or sustained” due to the presence of “an experience, doubt, or belief” that the speaker has or should have, given the available evidence.¹⁰² Thomas Reid advocates for anti-reductionism, as he claims that “in the matter of testimony, the balance of human judgment is by nature inclined to the side of belief; and turns to that side of itself when there is nothing put into the opposite scale”.¹⁰³

Thus, the debate with respect to testimony is whether speakers should be seen as *prima facie* reliable, absent specific evidence to the contrary, or whether we need to establish the reliability of a speaker through the weighing of other evidence before we can trust the substance of the speech. I return to issues of testimony in the context of a criminal trial in Section 8.3.

8.2.3.3. Epistemic Injustice

A final point about social epistemology concerns the concept of epistemic injustice. Epistemic injustice is a phenomenon that occurs when one’s knowledge is not seen as reliable when it should be, especially due to social, cultural, or historical prejudice.¹⁰⁴ Miranda Fricker acknowledges that this phenomenon exists when there is a “mismatch between rational authority and credibility – so that the powerful tend to be given *mere* cred-

¹⁰¹ Goldman, 2011, pp. 14–15, see *supra* note 91.

¹⁰² Lackey, 2006, p. 4, see *supra* note 97.

¹⁰³ Ronald Beanblossom and Keith Leher, *Thomas Reid’s Inquiry and Essays*, Hackett, Indianapolis, 1983, p. 95.

¹⁰⁴ The most well-known account of the concept of epistemic injustice is: Miranda Fricker, *Epistemic Injustice: Power and Ethics in Knowing*, Oxford University Press, Oxford, 2007. I take a somewhat broader view of the term in this chapter, since the social dynamics in an international criminal law courtroom are even more complex than in a domestic community.

ibility and/or the powerless tend to be wrongly denied credibility”.¹⁰⁵ When we recognise this imbalance of social power, we can see how individuals with less power (often women) are excluded “from the class of those who fully function as knowers”.¹⁰⁶ Elizabeth Anderson asserts that we should be required to use all of society’s epistemic resources, ensuring epistemic diversity and not ignoring any voices for prejudicial reasons.¹⁰⁷ She sees this as a requirement of democracy,¹⁰⁸ but it also seems necessary for accurate truth-seeking.

Testimonial injustice is a form of epistemic injustice that “occurs when prejudice causes a hearer to give a deflated level of credibility to a speaker’s word”.¹⁰⁹ The speaker is treated unjustly when she receives this deflated credibility from the hearer, based on what Fricker calls “identity prejudice”.¹¹⁰ Identity prejudice results from the power imbalance between social agents, and an agent maintains a prejudice due to a feature (or features) of social identity of the other agent.¹¹¹ The prejudice leads to stereotyping, which in turn results in the hearer making unwarranted assumptions about the speaker based on her social identity.¹¹² Much of the work on testimonial injustice centres around social identities of race and gender, but identity prejudice occurs with respect to many other aspects of one’s social identity, including culture, social class, language, and age.

¹⁰⁵ Miranda Fricker, “Rational Authority and Social Power: Towards a Truly Social Epistemology”, in Miranda Fricker and Jennifer Hornsby (eds.), *The Cambridge Companion to Feminism in Philosophy*, Cambridge University Press, Cambridge, 2006, p. 62.

¹⁰⁶ Rae Langton, “Feminism in Epistemology: Exclusion and Objectification”, in Miranda Fricker and Jennifer Hornsby (eds.), *The Cambridge Companion to Feminism in Philosophy*, Cambridge University Press, Cambridge, 2006, p. 132, citing Fricker, “Rational Authority and Social Power: Towards a Truly Social Epistemology”, in *Proceedings of the Aristotelian Society*, 1998, vol. 98, 159–77.

¹⁰⁷ Elizabeth Anderson, “The Epistemology of Democracy”, in *Episteme*, 2006, vol. 3, p. 11.

¹⁰⁸ *Ibid.*

¹⁰⁹ Fricker, 2007, p. 1, see *supra* note 104.

¹¹⁰ *Ibid.*, p. 4.

¹¹¹ *Ibid.*, p. 28. Fricker also discusses the positive form of identity prejudice, in which social agents are given “excess credibility”, which is unwarranted because it is based merely on their relative social power. See *ibid.*, pp. 17–20, 28. I focus here only on the negative form of identity prejudice.

¹¹² *Ibid.*, p. 30.

The views of Fricker and Anderson reveal that instances of epistemic injustice result in at least two harms. First, there is a direct harm to the individual whose testimony is discounted. But there is also a harm to the truth-seeking endeavour as a whole when a relevant, reliable piece of social evidence is excluded from the set of evidence that serves as justification for a particular belief. Fricker claims that the identity prejudice “presents an obstacle to truth, either directly by causing the hearer to miss out on a particular truth, or indirectly by creating blockages in the circulation of critical ideas”.¹¹³ As Gaile Pohlhaus explains, “epistemic practices and institutions may be deployed and structured in ways that are simultaneously infelicitous toward certain epistemic values (such as truth, aptness, and understanding) and unjust with regard to particular knowers”.¹¹⁴ Broadly, we do not want to engage in practices that harm members of our social community, nor do we want to prevent our communities from accessing all of the epistemic resources possible in service of gaining knowledge. We will see in Sections 8.3 and 8.4. how concerns about the harm of epistemic injustice function in criminal law settings.

Fricker argues that we should not permit social pressure to force our norms of credibility to mirror the social distribution of power.¹¹⁵ She suggests that the virtue of *testimonial justice* can only occur in light of testimonial responsibility on the part of the hearer of testimony.¹¹⁶ For Fricker, testimonial responsibility demands a “distinctly *reflexive* critical social awareness” on the part of the hearer.¹¹⁷ This requires the hearer to assess the credibility judgment she might be inclined to make, and then factor the identity power imbalance into the final credibility judgment.¹¹⁸ Such a recognition does not require that the hearer cease to assess credibility. It does require that the hearer “respect [the speaker], respect his word, so long as he merits it, and only so long as he merits it”.¹¹⁹ As Fricker notes, “[i]n testimonial exchanges, for hearers and speakers alike, no party is

¹¹³ *Ibid.*, p. 43.

¹¹⁴ Gaile Pohlhaus, Jr., “Varieties of Epistemic Injustice”, in Ian James Kidd *et al.* (eds.), *The Routledge Handbook of Epistemic Injustice*, Routledge, New York, 2017, p. 13.

¹¹⁵ Fricker, 2006, p. 62, see *supra* note 104.

¹¹⁶ Fricker, 2007, p. 91, see *supra* note 104.

¹¹⁷ *Ibid.*

¹¹⁸ *Ibid.*

¹¹⁹ *Ibid.*, p. 123.

neutral; everybody has a race, everybody has a gender”.¹²⁰ But it is the responsibility of the hearer with the relative social power, not the speaker, to practice the virtue of testimonial justice.

It is also in the hearer’s interest to avoid testimonial injustice, in terms of her own epistemic interest in obtaining the truth.¹²¹ Failing to neutralise identity prejudice makes a hearer more likely to fail to obtain truths.¹²² The upshot of the virtue of testimonial justice, then, is that it furthers our goal of achieving both justice *and* truth at the same time.¹²³ A hearer who possesses testimonial justice “reliably avoids epistemically undermining others, and she avoids missing out on truths offered too”.¹²⁴ It is plausible, then that a hearer in search of justice and/or truth should be motivated to assess a speaker’s credibility with an awareness of social power relations and the potential for prejudice.¹²⁵

In the next section, I turn to the subset of social epistemology that specifically focuses on truth and the law.

8.3. Truth and Legal Epistemology

When we turn to the realm of law, specifically criminal law, we understand the abstract concepts of truth and knowledge in a slightly different way. First, there are three locations for truth. The first is in discrete propositional statements given by witnesses or defendants as testimonial evidence at the trial. Some of these propositional statements may not be truth-apt, but others will have a truth value of ‘true’ or ‘false’. The second location for truth is broader and speaks to whether or not someone is guilty of the crimes with which she has been charged. Yet this question also seems like something that could be formulated as a truth-apt propositional statement. The third location is broader still, involving questions about what happened during a given event (or non-event) of criminal behaviour. It is the second location, and possibly the third, that are the focus of our inquiry.

¹²⁰ *Ibid.*, p. 91.

¹²¹ *Ibid.*

¹²² *Ibid.*, p. 122.

¹²³ *Ibid.*, p. 120.

¹²⁴ *Ibid.*, p. 120.

¹²⁵ *Ibid.*, p. 127.

The broad field of legal epistemology, or “epistemological work relevant to issues that arise in the law”,¹²⁶ includes a wide range of investigations into knowledge and the law. As a form of applied epistemology, legal epistemology studies whether legal systems of investigation that claim to be seeking the truth are actually structured in such a way as to lead to justified, true beliefs.¹²⁷ I limit my inquiry to legal epistemology in the context of criminal adjudication, and I focus on criminal law as a social system. In this section, I explore the application of our epistemological concepts of truth and testimony within the realm of criminal law.

8.3.1. Issues of Criminal Law and Truth

8.3.1.1. Theories of Truth and Criminal Law

Most theorists of epistemology and the law argue that it is not necessary to consider anything more than a common sense definition of the concept of truth in order to analyse a legal system’s ability to seek the truth.¹²⁸ While I agree that it is not necessary to choose one appropriate theory of truth to the exclusion of the others (and thus I do not defend one view), the various theories considered in Section 8.2.2.1. can each play a role with respect to different aspects of legal systems. I do not simply presume a basic, universally-accepted concept of truth, and I consider where these influences might appear in the courtroom.

The first cut to make regarding truth in criminal law is between the concepts of objective and subjective truth. We might think there is one accurate account that can be given with respect to an event or series of events, and this means the court’s role is to determine that one account.¹²⁹ This objective view of truth will likely correspond with a realist or correspondence conception of truth, in which the truth is determined by the way things are in the world, but this is not necessary. Alternatively, we

¹²⁶ Susan Haack, *Evidence Matters: Science, Proof, and Truth in the Law*, Cambridge University Press, New York, 2014, p. 6.

¹²⁷ Larry Laudan, “Thinking About Error in the Law”, in Goldman, 2011, p. 272, see *supra* note 91.

¹²⁸ See, for example, HO Hock Lai, *A Philosophy of Evidence Law: Justice in the Search for Truth*, Oxford University Press, New York, 2006, p. 56; Susan Haack, “Truth, Truths, “Truth” and “Truths” in the Law”, in *Harvard Journal of Law and Public Policy*, 2003, vol. 26, p. 19.

¹²⁹ See Mirjan Damaška, “Truth in Adjudication”, in *Hastings Law Journal*, 1998, vol. 49.

might adopt a subjective view of truth, in which there are multiple accounts that could each accurately explain an event or series of events. We could also adopt a sceptical view like that of Jeremy Bentham, that historical truth is a fictitious entity in the law, and we can only hope to determine “*legal* truth on the facts of the matter”, which is determined by the “outcome of reasonable legal procedures”.¹³⁰

Legal systems do focus on facts, and thus the correspondence theory of truth will often be the most useful tool. This sort of Aristotelian view is, in fact, largely what theorists have in mind when they imagine a straightforward theory of truth. A proposition is true “if and only if it corresponds to reality, has objective existence in the external world, independently of what we say or believe”.¹³¹ HO Hock Lai accepts this sort of view but goes on to qualify that the “verification of correspondence” can hardly be the general criterion we should use for whether something should be accepted in a court as fact.¹³² Rather, he notes that many different theories are compatible with the correspondence theory of truth and can thus be useful with respect to trial deliberation.¹³³ Mirjan Damaška suggests that the correspondence theory may be insufficient for truth-seeking in adjudication because “most facts we seek to establish in adjudication are ‘social’ facts rather than phenomena intrinsic to nature”.¹³⁴

Coherence theory can be used to assess whether the explanations of an event or series of events is plausible, based on the coherence of witness statements and other evidence.¹³⁵ Amalia Amaya defends a coherence theory of law, arguing that “[a] hypothesis about the events being litigated is justified only if it coheres with a body of background beliefs and the

¹³⁰ Henrik Kaptein, “Burdens of Evidence and Proof: Why Bear Them? A Plea for Principled Opportunism in (Leaving) Legal Fact-Finding (Alone)”, in Henrik Kaptein *et al.* (eds.), *Legal Evidence and Proof: Statistics, Stories, Logic*, Ashgate, Farnham, 2009, p. 17 (emphasis added); see Damaška, 1998, see *supra* note 129, for responses to these sceptical views.

¹³¹ HO, 2006, pp. 56–57, see *supra* note 128.

¹³² *Ibid.*, p. 57.

¹³³ *Ibid.*

¹³⁴ Damaška, 1998, p. 291, see *supra* note 129.

¹³⁵ See Ronald Allen, “Rationality, Algorithms, and Juridical Proof”, in *International Journal of Evidence and Proof*, 1997, vol. 1.

evidence at trial”.¹³⁶ But if we accept the concept of objective truth, coherence theories present a problem. As Damaška notes, “for any adjudicative event, there may be several coherent sets of statements, or several consistent theories. That a set of statements cohere in adjudicative practice is not a sufficient reason to believe that these statements are true”.¹³⁷

Susan Haack advocates for a pragmatist theory of truth in the law.¹³⁸ Her view is that truth is not relative, but that legal inquiry cannot proceed in the same way as scientific inquiry.¹³⁹ The American (adversarial) legal system, at least, is not aimed at trying to find the “truth” but rather is explicitly trying to meet a standard of proof in establishing a pre-determined conclusion.¹⁴⁰ I return to Haack’s discussion of the adversarial legal system and its limitations in Section 8.3.1.2.

8.3.1.2. Adversarial v. Inquisitorial Systems and Truth

Inquisitorial legal systems place the main responsibility for fact-finding and evidence introduction on professional judges, while the lawyers “guide and limit the judicial inquiry in important ways”.¹⁴¹ In the German criminal courts, for instance, the Code of Criminal Procedure states that “In order to establish the truth, the court must, ex officio, extend the taking of evidence to all facts and means of proof relevant to the decision”.¹⁴² The “quintessential goal of inquisitorial justice”, therefore, is to “ascertain the truth”.¹⁴³ The procedures in the inquisitorial system presume that there

¹³⁶ Amalia Amaya, “Justification, Coherence, and Epistemic Responsibility in Legal Fact-Finding”, in *Episteme*, 2008, vol. 5, no. 3, p. 307.

¹³⁷ Damaška, 1998, pp. 291–292, see *supra* note 129.

¹³⁸ See, for example, Haack, 2014, see *supra* note 126; Haack, 1976, see *supra* note 74.

¹³⁹ Haack, 2014, ch. 4, see *supra* note 126.

¹⁴⁰ *Ibid.*, ch. 2.

¹⁴¹ John H. Langbein, “Historical foundations of the law of evidence: A view from the Ryder sources”, in *Columbia Law Review*, 1996, vol. 96, no. 5, p. 1168; see also John H. Wigmore, *A Treatise on the Anglo-American System of Evidence in Trials at Common Law*, 3d ed., 1940, § 1364, p. 11.

¹⁴² See German Code of Criminal Procedure, 1950, sec. 244, para. 2 (www.legal-tools.org/doc/19df38/), cited in Markus D. Dubber and Tatjana Hörnle, *Criminal Law: A Comparative Approach*, Oxford University Press, Oxford 2014, p. 511.

¹⁴³ Stephen C. Thaman, “Two Faces of Justice in the Post-Soviet Legal Sphere”, in John Jackson *et al.* (eds.), *Crime, Procedure and Evidence in a Comparative and International Context - Essays in Honour of Professor Mirjan Damaška*, Hart Publishing, Oxford, 2008, p. 101; see also Alexander Heinze, *International Criminal Procedure and Disclosure*,

is one account of objectively true facts, and that it is possible for a third party to obtain this truth.¹⁴⁴ The trial is then aimed at establishing those facts through inquiry,¹⁴⁵ and the professional judge or judges play the role of determining what constitutes the true account of facts.

In adversarial systems, the procedural rules can arguably serve to limit the ability to seek an objective truth. In these systems, the roles of fact-finding are shared between the professional judge, the lawyers for the parties, and the jurors.¹⁴⁶ The lawyers in adversarial systems take on the greatest burden in “gathering, sifting, and presenting evidence of the facts”,¹⁴⁷ but the lawyers each aim to establish the truth of their respective side’s account of the truth. Haack, Bentham, and Peirce all criticise the exclusionary rules of adversarial system. Peirce challenges the adversarial model on the basis that it is more focused on “victory rather than truth”,¹⁴⁸ and that in this system, “the truth for him is that for which he fights”.¹⁴⁹ Bentham claims that the adversarial system prevents relevant evidence from being presented, and thus can prevent the fact-finders from reaching the objective truth.¹⁵⁰ Haack gives a more nuanced criticism of the adversarial system, defending it as “a reasonable substitute for the ideal”, where the ideal would be a legal inquiry that could be conducted like a scientific inquiry.¹⁵¹ However, she argues that:

the adversarial process will enable thorough evidential search and scrutiny only if, for example, the resources available to each side for seeking out and scrutinizing evidence

Duncker and Humblot, Berlin, 2014, p. 107; Thomas Weigend, “Should We Search for the Truth, and Who Should Do It”, in *North Carolina Journal of International Law and Commercial Regulation*, 2011, vol. 36, no. 2, pp. 389–415.

¹⁴⁴ Kaptein, 2009, p. 124, see *supra* note 129; see also Mirjan Damaška, *Evidence Law Adrift*, Yale University Press, New Haven, 1977.

¹⁴⁵ Kaptein, 2009, p. 124, see *supra* note 129; see also Damaška, 1977, see *supra* note 144.

¹⁴⁶ Langbein, 1996, p. 1168, see *supra* note 141; see also Heinze, 2014, pp. 117 ff., see *supra* note 143.

¹⁴⁷ Langbein, 1996, p. 1168, see *supra* note 141.

¹⁴⁸ Haack, 2014, p. xvii, see *supra* note 126.

¹⁴⁹ C.S. Peirce, *Collected Papers*, Charles Hartshorne, Paul Weiss, and Arthur Burks eds., Harvard University Press, Cambridge, 1878.

¹⁵⁰ See Haack, 2014, see *supra* note 126, citing Jeremy Bentham, *Rationale of Judicial Evidence*, vol. 1, Garland, New York, 1978, p. 22.

¹⁵¹ See Haack, 2014, p. 35, see *supra* note 126.

are adequate and comparable, if juries are willing and able to decide cases on the basis of the evidence, etc.¹⁵²

Thus, for Haack, an adversarial system will not work if it is not actually an efficient way of legal truth-seeking.

8.3.1.3. Truth and Testimony as Evidence

We can now go a bit further into the relationship between testimonial evidence and the truth. I consider testimonial reliability and relevance, as well as the exclusion of testimonial evidence. A legal trial uses testimony as part of an attempt to find the truth of what occurred, but it is “not expected to provide an exact reproduction of what is alleged to have occurred”.¹⁵³ Thus not all testimony that is available to the parties to a legal trial will be appropriate as actual testimonial evidence.

If we assume that a criminal trial seeks to establish both that a crime was committed and the defendant committed the crime, then according to Larry Laudan, the only relevant evidence is “testimony or physical evidence that would make a reasonable person either more inclined or less inclined to accept either of these hypotheses”.¹⁵⁴ Further, a piece of evidence is thought to be reliable “when there is reason to believe it to be true or at least plausible”.¹⁵⁵ Testimony should be both reliable and relevant for it to play a role in helping the fact-finder of a given trial determine the truth. In an adversarial trial, testimony may be excluded, even when it is both reliable and relevant, for reasons other than truth-seeking. Hearsay and spousal privilege, for example, leave certain testimonies out of information amassed by the fact-finder.

Thus, would-be testifiers can be prevented from speaking in a trial if their testimony is deemed irrelevant, unreliable, or prejudicial. Even when they are permitted to testify, their testimony may be discounted if it is deemed unreliable, confusing, or vague. There will certainly be cases in which the testimony would detract from the ability of the fact-finder to

¹⁵² *Ibid.*, pp. 35–36.

¹⁵³ D.S. Greer, “Anything But the Truth? The Reliability of Testimony in Criminal Trials”, in *The British Journal of Criminology*, 1971, vol. 11, no. 2, p. 140.

¹⁵⁴ Larry Laudan, *Truth, Error, and Criminal Law: An Essay in Legal Epistemology*, Cambridge University Press, New York, 2006, pp. 17–18.

¹⁵⁵ *Ibid.*

seek the truth, especially in cases where these assessments are objectively accurate. But as Bentham and Peirce argue, there are significant drawbacks to the exclusion of evidence.¹⁵⁶ With respect to testimonial evidence in particular, it can be said that “[n]either complainants nor the accused necessarily benefit from each other’s misfortune when testimonial voices are silenced”.¹⁵⁷

This quotation captures the danger of the two harms, discussed in Section 8.2.3.3., that can result from epistemic injustice. First, the exclusion or discounting of testimony can constitute an individual harm to a testifier. We will need a better understanding of what a criminal trial owes individuals other than the accused in order to properly assess the responsibility of the criminal justice system with respect to testifiers. But second, the exclusion or discounting of testimony risks threatening the accuracy of the truth-seeking process, and this harm certainly falls within the purview of the criminal justice system. Accordingly, we need a better conception of how to understand and balance the competing concerns we have identified so far in this section.

8.3.1.4. Truth and Justice in Criminal Legal Systems

In order to understand the foregoing sub-sections, we must complicate the picture thus far presented, and ask what the goal of a criminal justice system should be. If the only goal is to seek the truth, then it seems that the inquisitorial system is superior. HO sees this goal as obvious, stating that “it cannot be gainsaid that the ‘basic purpose of a trial is the determination of truth’”.¹⁵⁸ According to Larry Laudan, we assess whether our criminal trial procedures are “genuinely truth-conducive” because a criminal trial is “first and foremost an epistemic engine, a tool for ferreting out the truth from what will often initially be a confusing array of clues and indicators”.¹⁵⁹

¹⁵⁶ See Haack, 2014, see *supra* note 126.

¹⁵⁷ Paul Roberts and Jill Hunter, “Introduction—The Human Rights Revolution in Criminal Evidence and Procedure”, in Paul Roberts and Jill Hunter (eds.), *Criminal Evidence and Human Rights: Reimagining Common Law Procedural Traditions*, Hart Publishing, Oxford, 2012, p. 21.

¹⁵⁸ HO, 2006, p. 52, see *supra* note 128, quoting *Tehan v. United States ex rel Shott*, 1966, 382 US 406, 416.

¹⁵⁹ Laudan, 2006, p. 2, see *supra* note 154.

But we also care about *justice* in a criminal legal system. Bentham uses the metaphor of “Injustice, and her handmaid Falsehood”¹⁶⁰ to make the point that application of the law demands both truth and justice. Laudan notes that “[w]ithout ascertaining the facts about a crime, it is impossible to achieve justice, since a just resolution crucially depends on correctly figuring out who did what to whom. Truth, while no guarantee of justice, is an essential precondition for it”.¹⁶¹ Haack claims that:

substantive justice requires not only just laws, and just administration of those laws, but also factual truth—objective factual truth; and that in consequence the very possibility of a just legal system requires that there be objective indications of truth, i.e., objective standards of better or worse evidence.¹⁶²

Damaška acknowledges that “the criminal process also serves a variety of needs and values that are independent from and potentially in conflict with the drive toward fact-finding accuracy”.¹⁶³ In large part, the other objectives of the criminal process are related to social forces that influence the criminal justice system, such as the need to protect human rights from abuses of power, social peace, or cost.¹⁶⁴ When we think about these so-called ‘justice’ considerations, and recognise that they are related to social goods, the role of social epistemology in legal systems becomes more distinct. We cannot evaluate testimony or truth without identifying the influence of social processes within the courtroom, nor can we properly balance the goals of truth and justice in criminal proceedings.

For the accused, the alleged victims, and any other interested parties, it is important to think about the status we attach to a ‘truth’ determination made by a fact-finder during a trial. A verdict could either be seen as a statement about what happened (or did not happen), or it could be seen

¹⁶⁰ See Bentham, 1978, see *supra* note 150.

¹⁶¹ Laudan, 2006, p. 2, see *supra* note 154.

¹⁶² Haack, 2014, p. 27, see *supra* note 126.

¹⁶³ Damaška, 1977, p. 305, see *supra* note 144; Mirjan Damaška, “Epistemology and Legal Regulation of Proof”, in *Law, Probability and Risk*, 2003, vol. 2, p. 118.

¹⁶⁴ Damaška, 1977, p. 305, see *supra* note 144; Damaška, 2003, p. 118, see *supra* note 163.

only as a statement about the evidence presented at trial.¹⁶⁵ There are social interests that run in both directions. If the verdict is presented as being about what happened, then fact-finding will be seen as an accurate endeavour and the public will be more inclined to follow the law.¹⁶⁶ However, if the verdict is presented as being about the evidence presented at trial, this serves a social good as well, by reflecting the limitations of legal truth and not further entrenching those affected by the verdict in unequal power dynamics with the State. Henry Chambers argues for this view, that “what is true is what the [trial] evidence indicates is true”,¹⁶⁷ while Laudan accepts the former.¹⁶⁸ Laudan claims that “nothing that a judge or jury later determines to be the case changes any facts about the crime”, and that “evidence does not define what is true and false about the crime”.¹⁶⁹ Yet Laudan acknowledges that verdicts can be false, based on unrepresentative evidence.¹⁷⁰

Along these lines, we can distinguish between the “reliability” of a verdict and its “accuracy”.¹⁷¹ The accuracy view is linked with truth-seeking as a goal, but it presumes that truth exists on a spectrum, and that a verdict can be more or less true.¹⁷² The term “reliability” presumes that truth is an all-or-nothing sort of enterprise, which better reflects the idea that a verdict is capturing the likelihood of its truth, but then it might seem that a trial is about probabilities rather than facts.¹⁷³ HO claims that the recognition of justice considerations does not defeat the goal of truth-seeking: “Since the claim is that the pursuit of truth is the main goal, and

¹⁶⁵ HO, 2006, p. 58, see *supra* note 128, citing Charles Nesson, “The Evidence or the Event? On Judicial Proof and the Acceptability of Verdicts”, in *Harvard Law Review*, 1958, vol. 98.

¹⁶⁶ *Ibid.*

¹⁶⁷ Laudan, 2006, p. 12, see *supra* note 154, citing Henry Chambers, “Reasonable Certainty and Reasonable Doubt”, in *Marquette Law Review*, 1998, vol. 81, p. 668.

¹⁶⁸ Laudan, 2006, p. 12, see *supra* note 154.

¹⁶⁹ *Ibid.*, pp. 12–13.

¹⁷⁰ *Ibid.*

¹⁷¹ HO, 2006, p. 66, see *supra* note 128.

¹⁷² *Ibid.*

¹⁷³ *Ibid.*

not that it is the absolute or all-overriding end, it involves no contradiction to admit to the legitimacy of ‘side-constraints’ on that enterprise”.¹⁷⁴

The precise balance between seeking truth and justice will vary depending on the criminal legal system in question, which will become clear in Section 8.4., when we finally reach international criminal law. This will occur by system, rather than by individual case, because a criminal legal system cannot boast of unfairness in order to achieve either truth or justice. The upshot of this section has been to acknowledge social influence on a criminal legal trial, and the corresponding need for social epistemology to help mitigate the harms that can occur as a result. Thus, as H.L.A. Hart and J.T. McNaughton explain, a legal system:

deliberately sacrifices some aids to the ascertainment of truth which might be useful in particular cases in order partly to satisfy the practical exigencies of the needs for an immediate and definite decision and partly to serve what are deemed to be more nearly ultimate social values.¹⁷⁵

8.4. Truth and Epistemic Justice in International Criminal Law

In this final section, I reach the crux of my argument about truth and epistemic justice, and apply the concepts previously outlined to the international criminal legal system. I begin by considering the unique goals and structures of the international criminal legal system, before analysing the tension between truth and epistemic justice in the international criminal courtroom. I end with a brief discussion of less formal justice mechanisms like truth and reconciliation commissions, and assess whether these institutions might be more responsive to concerns about truth-seeking and epistemic injustice. Ultimately, I conclude that international criminal courts and tribunals are better suited to serve range of goals of international criminal law.

8.4.1. Goals of International Criminal Law

There is an abundance of goals of international criminal law, several of which necessarily conflict with one another, leading some to argue that

¹⁷⁴ *Ibid.*, p. 70.

¹⁷⁵ Greer, 1971, p. 142, see *supra* note 153, citing H.M. Hart, and J.T. McNaughton, “Evidence and Inference in the Law”, in *Daedalus*, 1958, vol. 87, p. 67.

there are too many goals to ensure consistency in the legal system.¹⁷⁶ Seeking justice and seeking the truth are clearly two of these goals.¹⁷⁷ The Rome Statute of the International Criminal Court ('ICC Statute') states that it has been created in order to "put an end to impunity for the perpetrators of [the most serious crimes of concern to the international community as a whole] and thus to contribute to the prevention of such crimes", and to "guarantee lasting respect for and the enforcement of international justice".¹⁷⁸ The ICC Statute also contains provisions ensuring protection of defendants and witnesses, and an explicit charge for the Prosecutor to "establish the truth" in her investigations.¹⁷⁹ The International Criminal Court ('ICC') Pre-Trial Chamber has also explicitly indicated that "the search for truth is the principal goal of the Court as a whole".¹⁸⁰ There is, however:

a tension between all the boxes that international criminal procedure seek to tick: they want to do justice for the victims, and to do so in an expedient manner, whilst ensuring the safety of the witnesses and respect for the interests of the international community in the outcomes of their trials.¹⁸¹

The aim of this section is to more precisely identify the locations of this conflict as it pertains to truth and epistemic justice, and to establish that the conflict is not pernicious.

¹⁷⁶ See Eric Stover, *The Witnesses: War Crimes and the Promise of Justice in The Hague*, University of Pennsylvania Press, Philadelphia, 2007, p. 14; see also Mirjan R. Damaška, "What is the Point of International Criminal Justice?", in *Chicago Kent Law Review*, 2008, vol. 83, p. 329.

¹⁷⁷ I do not address the prominent goals of international criminal justice with respect to punishment here, although I note here that the imposition of punishment is related to the goals of seeking justice and seeking the truth.

¹⁷⁸ Rome Statute of the International Criminal Court, adopted 17 July 1998, entry into force 1 July 2002 ('ICC Statute') (www.legal-tools.org/doc/7b9af9/).

¹⁷⁹ ICC Statute, Articles 54(1)(a), 68.

¹⁸⁰ International Criminal Court ('ICC'), Situation in the Central African Republic, *Prosecutor v. Jean-Pierre Bemba Gombo*, Pre-Trial Chamber III, Decision on the Evidence Disclosure System and Setting a Timetable for Disclosure between the Parties, 31 July 2008, ICC-01/05-01/08-55, para. 11 (www.legal-tools.org/doc/15c802/).

¹⁸¹ Yvonne McDermott, *Fairness in International Criminal Trials*, Oxford University Press, New York, 2016, p. 126.

8.4.2. Structure of International Criminal Procedure

International criminal courts and tribunals are mostly constructed based on the adversarial system model, although there are some aspects of the trial processes that include elements of the inquisitorial system model, such as the duty of the prosecutor to seek the truth through the investigation of “incriminating and exonerating circumstances equally”.¹⁸² It has been argued by some that the international criminal courts and tribunals should adopt a more realistic model of admitted evidence, and that the so-called adversarial/inquisitorial distinction is not the most useful way to model their procedural systems.¹⁸³ Rather, the important question should be whether a procedural system “assists the Tribunals in accomplishing their tasks and whether it complies with fundamental fair trial standards”.¹⁸⁴ Another view is that international criminal judges utilise managerial powers, thus maintaining the general adversarial system but giving judges the power to insert themselves at times in order to speed up the trial process.¹⁸⁵ Judges serve many purposes when they take on a managerial role: “cleaning up the record; clarifying testimony; supplementing, eliciting, and testing testimony, as well as challenging the credibility of witnesses”.¹⁸⁶ For the purposes of this chapter, I retain the distinction between adversarial and inquisitorial models as a shorthand for the general practices of each system with respect to truth and justice, as outlined in Section 8.3.1.2., but I acknowledge that these models do not represent the only ways of thinking about international criminal procedure.

¹⁸² See Michele Caianiello, “Law of Evidence at the International Criminal Court: Blending Accusatorial and Inquisitorial Models”, in *North Carolina Journal of International Law and Commercial Regulation*, 2011, vol. 36; ICC Statute, Article 54(1)(a), see *supra* note 178.

¹⁸³ Kai Ambos, “International Criminal Procedure: ‘Adversarial’, ‘Inquisitorial’ or Mixed?”, in *International Criminal Law Review*, 2003, vol. 3, p. 1; Heinze, 2014, p. 193, see *supra* note 143.

¹⁸⁴ Ambos, 2003, p. 1, see *supra* note 183.

¹⁸⁵ See Máximo Langer and Joseph Doherty, “Managerial Judging Goes International, but Its Promise Remains Unfulfilled: An Empirical Assessment of the ICTY Reforms”, in *Yale Journal of International Law*, 2011, vol. 36, p. 241; see also Heinze, 2014, p. 124, see *supra* note 143.

¹⁸⁶ Rosemary Byrne, “Drawing the Missing Map: What Socio-Legal Research Can Offer to International Criminal Trial Practice”, in *Leiden Journal of International Law*, 2013, vol. 26, no. 4, p. 1002.

8.4.3. Truth and Testimony in International Criminal Law

While all criminal legal systems aim at least somewhat at seeking the truth, international criminal legal systems that have been established to respond to mass atrocity have a special responsibility with respect to the truth. Not only are they trying to establish the truth of the proposition about whether a defendant committed the crimes with which he has been charged, but international criminal courts and tribunals are charged with establishing an accurate historical record.¹⁸⁷ When we take the multiple aims of truth in international criminal courts and tribunals into account, we can see how the correspondence, coherence, and pragmatist theories might each contribute something useful to establishing the truth. The focus on “fact-finding” in international criminal law is a straightforward endorsement for correspondence theories of truth, and the judges’ interest in obtaining evidence that corresponds with reality. Yet the idea of establishing a historical record, as a story about the atrocities that were committed against a group of people, suggests that coherence theories could play a role in constructing a coherent narrative. And pragmatist theories support the idea that the corroboration of accounts through multiple pieces of evidence will lend itself to a truthful verdict, and also a truthful narrative for the historical record.¹⁸⁸

¹⁸⁷ Statement of Judge Claude Jorda, United Nations Security Council, 4161st meeting, U.N. Doc. S/PV.4161, 20 June 2000, p. 3 (www.legal-tools.org/doc/365c3f/); Emmanouela Mylonaki, “The relevance and application of empirical research methods to the study of international crimes”, in Ilias Bantekas and Emmanouela Mylonaki (eds.), *Criminological Approaches to International Criminal Law*, Cambridge University Press, Cambridge, 2014, p. 55; Stephan Parmentier, “Global Justice in the Aftermath of Mass Violence: The Role of the International Criminal Court in Dealing with Political Crimes”, in *International Annals of Criminology*, 2003, vol. 41, p. 203; Jens David Ohlin, “Meta-Theory of International Criminal Procedure: Vindicating the Rule of Law”, in *UCLA Journal of International Law and Foreign Affairs*, 2009, vol. 14, p. 96; Mirjan Damaška, “Negotiated Justice in International Courts”, in *Journal of International Criminal Justice*, 2004, vol. 2, p. 1031; Heinze, 2014, p. 218, see *supra* note 143.

¹⁸⁸ John Jackson, for example, argues in favour of the possibility that “procedures that maximize the volume of relevant evidence and provide opportunities for testing its probative value are likely to achieve higher levels of accuracy than procedures which limit the flow of relevant information and do not provide opportunities for testing it”. J.D. Jackson, “Finding the Best Epistemic Fit for International Criminal Tribunals: Beyond the Adversarial–Inquisitorial Dichotomy”, in *Journal of International Criminal Justice*, 2009, vol. 7, no. 1, p. 23.

Witness testimony is the most crucial aspect of obtaining evidence that helps establish the truth, especially when crimes have not been well-documented. As Nancy Combs argues:

Eyewitnesses have a story to tell about certain events relevant to the defendant's criminal culpability, and, through counsel's questioning, they are able to tell that story in a way that not only is comprehensible to the fact finder but that provides the fact finder sufficient information to draw reasonable conclusions about the defendant's liability.¹⁸⁹

International criminal courts and tribunals have a general preference for live testimony by witnesses rather than written statements. ICC Statute Article 69(2) "provides for the testimony of witnesses to be given in person at the seat of the Court, which is imperative for the examination and cross examination of witnesses".¹⁹⁰ The ad hoc tribunals have also expressed a preference for live testimony where possible.¹⁹¹ Live testimony permits the accused to face her accuser, and it also allows the judges to better assess witness credibility.¹⁹² Recall from Section 8.3.1.3. that testimony should be both reliable and relevant for it to play a role in helping

¹⁸⁹ Nancy Combs, *Fact-Finding without Facts: The Uncertain Evidentiary Foundations of International Criminal Convictions*, Cambridge University Press, Cambridge, 2010, p. 21.

¹⁹⁰ ICC Statute, Article 69(2), see *supra* note 178.

¹⁹¹ Extraordinary Chambers in the Courts of Cambodia ('ECCC'), Internal Rules, adopted 12 July 2007, Rule 26 (www.legal-tools.org/doc/a95fce/) provides that "[t]he testimony of a witness or expert during a judicial investigation or at trial shall be given in person, whenever possible". In *Kupreškic et al.* the International Criminal Tribunal for former Yugoslavia ('ICTY') Appeals Chamber described as a "fundamental principle" that "witnesses shall as a general rule be heard directly by the Judges of the trial Chambers", ICTY, *Prosecutor v. Kupreškic et al.*, Appeals Chamber, Decision on Appeal Against Ruling to Proceed by Deposition, 15 July 1999, IT-95-16, para. 18 (www.legal-tools.org/doc/ab8371/); see also Mark Klamberg, *Evidence in International Criminal Trials: Confronting Legal Gaps and the Reconstruction of Disputed Events*, Martinus Nijhoff Publishers, Leiden, 2013, p. 365.

¹⁹² Sylvia Ntube Ngane, "Witnesses Before the International Criminal Court", in *The Law and Practice of International Courts and Tribunals*, 2009, vol. 8, p. 433, citing ICTY, *Prosecutor v. Zejnir Delalic et al.*, Trial Chamber, Decision on the Motion to Allow Witnesses K, L, and M to give their testimony by Means of Video-Link Conference, 28 May 1997, IT-96-21, para. 15 (www.legal-tools.org/doc/c362a7/); ICTY, *Prosecutor v. Tadic*, Trial Chamber, Decision on the Defence Motions to Summon and Protect Defence Witnesses, and on the Giving of Evidence by Video-Link, 25 June 1996, IT-94-1-T, para. 19 (www.legal-tools.org/doc/adfc52/); see also Larry May and Shannon Fyfe, *International Criminal Tribunals: A Normative Defense*, Cambridge University Press, Cambridge, 2017, p. 154.

the fact-finder of a given trial determine the truth. I now turn to some of the ways in which testimony is either discounted or excluded altogether in international criminal legal systems. I draw heavily on the work of Combs, who has done extensive work in documenting problems in fact-finding in international criminal law.

8.4.3.1. Excluded Testimony

While evidence is not often excluded in international criminal law, live testimony can be excluded for several reasons. First, situations can arise in which the “personal safety and security of the witness, or other costs to the tribunal or the witness”, are weighed as more important than the right of the accused to in-person cross-examination, or the value of the live testimony for obtaining the truth.¹⁹³ The International Criminal Tribunal for former Yugoslavia, for instance, provides for the admission of written witness statements in such situations, when the evidence in question speaks to the “proof of a matter other than the acts and conduct of the accused as charged in the indictment”, and when “other witnesses will give or have given oral testimony of similar facts”.¹⁹⁴

Testimony can also be excluded based on relevance. In this case, if testimony will not serve to make the guilt of the accused more or less likely to be true, it may be excluded. Combs claims that international witnesses are “frequently unable to provide the court with details that *are* relevant to their testimony”.¹⁹⁵ It may be that a witness is expected to produce relevant information during her testimony, but the witness testifies about something completely outside the scope of the trial’s inquiry. Sometimes the counsel is clearly trying to obtain relevant information from a witness and is nonetheless unable to do so.¹⁹⁶ A Special Panel for Serious Crimes, East Timor prosecutor complained about this problem to the judge, stating: “Your Honor, this witness does not want to answer ques-

¹⁹³ May and Fyfe, p. 154, 2017, see *supra* note 192.

¹⁹⁴ ICTY, Rules of Procedure and Evidence, revision 50, adopted 11 February 1994, amended 8 July 2015, Rule 92 *bis* (www.legal-tools.org/doc/30df50/).

¹⁹⁵ Combs, 2010, p. 38, see *supra* note 189.

¹⁹⁶ *Ibid.*, p. 56.

tions, he just wants to tell a story”.¹⁹⁷ However, it seems that international criminal courts and tribunals will often err on the side of deeming evidence relevant to the truth-seeking endeavour, and admit the evidence.¹⁹⁸

Testimony can also be excluded in international criminal law based on a determination that the witness is not credible, and thus the testimony lacks probative value. Again, this is not common, as the courts seem to want to give witnesses the benefit of the doubt, and often assume that the appearance of credibility issues can be explained by cultural, educational, or language differences.¹⁹⁹ Trial Chambers, according to Combs, will admit that there are plenty of issues with testimony, but “they often unquestioningly attribute those problems to innocent causes that do not impact the witness’s credibility”.²⁰⁰ Cases of clearly perjured testimony are likely to be excluded, but these cases are rare, despite the fact that “there is a great deal of lying taking place at (some) international tribunals”.²⁰¹

8.4.3.2. Discounted Testimony

Despite the willingness of the courts to give international witnesses the benefit of the doubt with respect to meeting relevance and credibility requirements, these witnesses are much more likely to have their testimony discounted for reasons *other than* that the evidence can be reasonably deemed irrelevant or not credible. The social dynamics in international criminal law are conducive to misunderstandings that result in discounted testimony. Nearly every international criminal trial proceeds in several languages simultaneously, requiring the participation of multiple transla-

¹⁹⁷ *Ibid.*, p. 98, citing Special Panel for Serious Crimes, East Timor, *Prosecutor v. Joao Franca da Silva et al.*, Judicial System Monitoring Programme, Case Notes, 24 March 2003, p. 7–8.

¹⁹⁸ Peter Murphy argues that international criminal law is too permissive in admitting evidence that is likely irrelevant: “The indiscriminate admission of any and all material the parties claim to be evidence, far from being the only means of promoting a successful search for the truth, buries the genuinely probative evidence in a vast accumulation of evidential debris, frustrating rather than facilitating the task of judges trying to establish the truth”. Peter Murphy, “No Free Lunch, No Free Proof. The Indiscriminate Admission of Evidence is a Serious Flaw in International Criminal Courts”, in *Journal of International Criminal Justice*, 2010, vol. 8, p. 540.

¹⁹⁹ Combs, 2010, pp. 177–178, see *supra* note 189.

²⁰⁰ *Ibid.*, p. 189.

²⁰¹ *Ibid.*, p. 130.

tors. The result is that “every statement made by anyone in the room, be it witness, defendant, judge, or attorney, must be simultaneously translated into the other languages”.²⁰² Not only does this make the trial process incredibly slow, but it also introduces numerous possibilities for poor translations, and the likelihood that a witness will be misunderstood, and the probative value of evidence will be compromised. Sometimes misunderstandings are not identified, or a frustrated counsel decides to “abandon a line of questioning without having received a responsive reply”, and in both scenarios, the fact-finding mission is impaired.²⁰³

Differences in culture can also create misinterpretations, such as what occurred during the International Criminal Tribunal for Rwanda’s (‘ICTR’) *Akayesu* trial with respect to the term “rape”.²⁰⁴ In this case, interpreters translated several words as “rape” that did not seem to convey the force inherent in “rape”, yet the Trial Chamber determined that this was correctly done given the cultural taboos that may have prevented witnesses from testifying more clearly about a private and delicate issue.²⁰⁵ This is also an instance where gender dynamics may have played a role in obscuring the testimony,²⁰⁶ since even in communities with a shared culture, “men and women communicate differently, as do people of higher and lower social standing”.²⁰⁷

There are other cultural differences in communication practices that can result in confusion and subsequent discounting of testimony. Witnesses who come from communities that rely on oral traditions, they “frequently report events that were recounted to them as though they personally saw them”.²⁰⁸ In an adversarial system, such reports would likely be discounted or excluded as hearsay. Yet many international witnesses consider the fact that an event was recounted to them by someone who wit-

²⁰² May and Fyfe, p. 155, 2017, see *supra* note 192.

²⁰³ Combs, 2010, p. 62, see *supra* note 189.

²⁰⁴ *Ibid.*, p. 74, citing International Criminal Tribunal for Rwanda (‘ICTR’), *Prosecutor v. Akayesu*, Trial Chamber, Judgment, 2 September 1998, ICTR-96-4-T, paras. 152–154 (www.legal-tools.org/doc/b8d7bd/).

²⁰⁵ *Ibid.*

²⁰⁶ See generally Doris E. Buss, “Knowing Women: Translating Patriarchy in International Criminal Law”, in *Social and Legal Studies*, 2014, vol. 23, no. 1.

²⁰⁷ Combs, 2010, p. 79–80, see *supra* note 189.

²⁰⁸ *Ibid.*, p. 94.

nessed the event in person as warranting their own testimony about the event.²⁰⁹ Thus witnesses will share information with the rest of the community, and then the information is seen as shared knowledge.²¹⁰ The ICTR's *Musema* Trial Chamber explained that in Rwanda, there is a "tradition that the perceived knowledge of one becomes the knowledge of all".²¹¹ In another ICTR case, *Ndindabahizi*, a witness asserted that "[w]hen someone asserts that [an incident] is a true fact, you yourself will take it to be the truth".²¹² Fact-finders from different traditions (and probably Aristotle, as well) would likely see this absolute acceptance of the testimony of others as going too far in terms of epistemic reliance.

There are also often discrepancies between the witnesses and the courtroom staff in terms of education that can contribute to the discounting of testimony.²¹³ Illiteracy and lack of education can impair the ability of international witnesses to answer questions.²¹⁴ Witnesses who do not have significant formal schooling and are not in the habit of estimating distance or time with numbers will likely be unable to provide certain important details in their testimony, and this may come across to well-educated courtroom staff as an indication that the testimony is not beneficial.²¹⁵ Combs recounts that those witnesses who can provide numerical details are sometimes "obviously inaccurate", which is what happened when the ICTR's *Kamuhanda* Trial Chamber discredited witness GEM's testimony in part because she estimated that there were one million Tutsi

²⁰⁹ *Ibid.*

²¹⁰ *Ibid.*; see also ICTR, *Prosecutor v. Kamuhanda*, Trial Chamber II, Transcript of 22 January 2003, ICTR-99-54A-T, p. 41 (www.legal-tools.org/doc/05a34c/).

²¹¹ Combs, 2010, p. 94, see *supra* note 189, citing ICTR, *Prosecutor v. Musema*, Trial Chamber, Judgement and Sentence, 27 January 2000, ICTR-96-13-A, para. 103 (www.legal-tools.org/doc/1fc6ed/).

²¹² Combs, 2010, p. 95, see *supra* note 189, citing ICTR, *Prosecutor v. Ndindabahizi*, Trial Chamber, Transcript of 22 September 2003, Case No. ICTR-01-71-T, p. 19–20 (www.legal-tools.org/doc/b26b96/).

²¹³ Combs, 2010, p. 5, see *supra* note 189.

²¹⁴ *Ibid.*, p. 64.

²¹⁵ *Ibid.*, ch. 2.

taking refuge at the Gikomero Parish, while other witnesses placed the number of Tutsi refugees in the thousands.²¹⁶

8.4.4. Epistemic Injustice in International Criminal Law

The previous sub-section reveals that there are multiple opportunities for the unwarranted discounting of testimony to occur in international criminal law. As already noted, many of these instances in which testimony is excluded or discounted are proper, as the testimony does not aid the fact-finder in establishing the truth, or the testimony will put the testifier at risk of harm. There is no epistemic injustice²¹⁷ when testimony is given adequate and fair consideration, and it is nonetheless determined that it is not suitable for influencing the fact-finding objective. A witness who commits perjury or who does not have any knowledge (personal or second-hand) about a relevant incident is not wronged. We must also distinguish epistemic injustice from victim's rights with respect to participation in the trial, as a possible goal of international criminal justice. The exclusion of live testimony, in favour of written testimony, may result in harm to the witness if she feels very strongly about testifying in person. But we can distinguish this harm from the harm she might experience if her testimony is excluded altogether or discounted on an unreasonable basis. Epistemic justice does not guarantee a particular method of having your voice heard – it just means your voice and your knowledge cannot be discounted based on your social position. So, a witness who is permitted to provide written testimony, which is then assigned probative value, has not necessarily experienced epistemic injustice.

Yet the examples listed above suggest that international criminal law introduces significantly more opportunities for epistemic injustice than a domestic criminal trial. In the *Akayesu* case, when witnesses avoided the term “rape”, the women could have been completely misunderstood if their words had been translated literally. Female witnesses, in general, can have their testimony discounted based on their communication style. Combs notes the following in a footnote:

²¹⁶ *Ibid.*, p. 35, citing ICTR, *Prosecutor v. Kamuhanda*, Trial Chamber, Transcript of 11 February 2002, ICTR-99-54A-T, para. 106 (www.legal-tools.org/doc/288c7f/).

²¹⁷ There may be epistemic *harm* that occurs, even where there is no injustice, but this inquiry is beyond the scope of the chapter.

Research indicates, for instance, that female witnesses and witnesses of low social status more frequently engage in what has been termed “powerless” speech. That is, they use more “hedgies,” such as “I think” or “it seems as though”; they use more modifiers, such as “kind of” or “sort of,” and they use more appended phrases such as “you know”. They also use more hesitation forms, such as “well” and “um,” and they more frequently state their declarations with a rising inflection, which makes the declarations sound more like questions. Research indicates that fact finders are less favorably disposed to witnesses who use a “powerless” style of testimony.²¹⁸

In Section 8.2.3.3., I showed how epistemic injustice occurs in the face of social inequality, and thus women are often the victims of the phenomenon. As international witnesses, poor women who have survived violence might possess multiple social liabilities that could result in their testimony being heard as “powerless”. Of course, I identified various other social imbalances that might result in testimony being heard as “powerless” or “weak”, and thus the danger of epistemic injustice is clearly not limited to female witnesses.

We might think that one goal of international criminal courtrooms is to give victims of violence some measure of power over their assailants, or at least the historical narrative. If a court fails with respect to this goal, a victim might experience harm. But this is distinct from the harm that occurs when a witness’s testimony is discounted based on the way in which it is provided. When an international witness is not respected as someone with knowledge, as someone who has something to contribute to the fact-finding mission, she experiences epistemic injustice. And as I demonstrated in Section 8.2.3.3., the virtue of testimonial justice on the part of hearers is a plausible way to mitigate the effects of epistemic injustice.

²¹⁸ Combs, 2010, p. 80, see *supra* note 189; see Robin Tolmach Lakoff, “Women’s Language”, in *Language and Style*, 1977, vol. 10, pp. 222, 225–28; Robin Lakoff, *Language and Women’s Place*, Oxford University Press, Oxford, 1975, pp. 14–17; John M. Conley *et al.*, “The Power of Language: Presentation Style in the Courtroom”, in *Duke Law Journal*, 1978, pp. 1375, 1380, 1385–86; see generally, Monica Hersh Khetarpal Sholar, “Jurors’ Perceptions of Gender-Based Linguistic Differences”, in *William and Mary Journal of Women and the Law*, 2003, vol. 10, p. 91.

My claim is not that judges, investigators, and other hearers in the international criminal courtroom have failed to exhibit the virtue of testimonial justice. There are, in fact, quite a few examples of judges who have engaged in activism to try to salvage the testimony of speakers with relatively low social capital.²¹⁹ Rather, my claim is that the virtue must be intentionally pursued, and it must be grounded in respect for the speaker, not in feelings of pity. Hearers must be in a position to responsibly assess testimony by recognising the potential for prejudice in a credibility judgment. So, my claim is that judges and other hearers in the international criminal courtroom should actively pursue testimonial justice in furtherance of the aims of both justice and truth.

8.4.5. Alternative Justice Mechanisms

Given all of the issues that can arise with testimony in international criminal trials, we should be inclined to consider whether alternative justice mechanisms might better serve the goals of international criminal justice, particularly the two I have focused on in this chapter. Often, alternative justice mechanisms are more focused on giving a voice to victims and establishing a historical record. Mechanisms that are more focused on restorative justice, societal healing and reconciliation are able to provide a more accurate historical narrative of mass atrocity.²²⁰ If we think that victims have a “right to know the truth”,²²¹ then taking the possibility of punishment off the table can be useful in encouraging the forthright testimony of perpetrators. Arguably, they also can provide a less structured opportunity for truth-telling on the part of victims, where testimony is encour-

²¹⁹ See generally, Combs, 2010, ch. 7, see *supra* note 189.

²²⁰ See Alice H. Henkin, “State Crimes: Punishment or Pardon (Conference Report)”, in Neil J. Kritz (ed.), *Transitional Justice: How Emerging Democracies Reckon with Former Regimes*, United States Institute of Peace Press, Washington D.C., 1995, pp. 184, 186; Harvey M. Weinstein and Eric Stover, “Introduction: Conflict, Justice and Reclamation”, in Harvey M. Weinstein and Eric Stover (eds.), *My Neighbor, My Enemy: Justice and Community in the Aftermath of Mass Atrocity*, Cambridge University Press, Cambridge, 2004, pp. 1, 13–14; see also Neha Jain, “Between the Scylla and Charybdis of Prosecution and Reconciliation: The Khmer Rouge Trials and the Promise of International Criminal Justice”, in *Duke Journal of Comparative and International Law*, 2010, vol. 20, p. 267.

²²¹ See Laudan, 2006, see *supra* note 154; see also Edgar R. Aguilera, “Truth and Victims’ Rights - Towards a Legal Epistemology of International Criminal Justice”, in *Mexican Law Review*, 2013, vol. 6, no. 1, p. 124.

aged as part of constructing a narrative, rather than supporting a previously-determined narrative about an accused individual.

However, although I have not focused on the other goals of international criminal justice in this chapter, it is perhaps time to acknowledge their importance. Establishing the truth is important for establishing a historical record, but also because we do not want to have a practice of reaching erroneous verdicts in a criminal trial. But we *do* want to reach verdicts in criminal trials. We care about desert, and while alternative justice mechanisms may be well-suited for some communities, and perhaps for restorative justice, they do not necessarily result in everyone receiving what they deserve. Accordingly, we care about truth as a way of ensuring that victims and defendants get what they deserve, in the form of accurate criminal verdicts, and appropriate punishment for defendants who have been found guilty. An assessment of the value of punishment in international criminal law is far outside the scope of this paper, but retributive justice is seen by many as a crucial goal of international criminal institutions. A shift away from this understanding of international criminal law would require much more than the foregoing analysis. What I have done, I hope, is shown the need for the international criminal legal system to continue to identify potential locations for epistemic justice to occur, and take responsibility for pursuing epistemic justice.

8.5. Conclusion

I have argued that because we rely on each other epistemically for the truth of our beliefs, and particularly in the case of criminal trials, we need to engage in practices that ensure proper assessment of the credibility of speakers. We cannot evaluate testimony, inside or outside the courtroom, without identifying the influence of our social identities on our assessments. The influence of prejudice on our assessment of testimony risks testimonial injustice, which harms individuals by discounting them as epistemic agents, and also the quality of our search for the truth. International criminal courts and tribunals represent a unique site for social inequalities, and thus the testimony of international witnesses is likely to be discounted (or privileged) based on social identities, rather than on credibility. Judges and other hearers in the international criminal courtroom should practice testimonial justice in order to best seek the goals of truth and justice.

INDEX

A

- Abella, Rosalie, 119, 120, 122, 125, 126
actus reus, 26, 101, 106, 109, 154, 166
Afghanistan, 113
Ainley, Kirsten, 235
Akhavan, Payam
 moral propaganda flowing from core
 crimes punishment, 209
 on deterrence, 189
Alcoff, Linda Martin, 279
Allied Powers, 46
Amann, Diane, 173
Amaya, Amalia, 289
American Bar Association, 37
American Convention on Human Rights,
 144
Amnesty International, 247, 250
Anderson, Elizabeth, 285
Arendt, Hannah, 204
Aristotle
 Metaphysics, 270, 277
Augusto Pinochet, 40
Aust, Anthony, 92
Austin, J.L., 277
 on testimony, 283

B

- Baars, Grietje
 on impunity gap, 188
Bakhshi, Mohammad, 117
Bangladesh, 56
Barma, Panchanan, 48
Bassiouni, Cherif, 82, 134, 140, 169
 on modes of liability, 148
Belgium, 40, 77
Bengali intellectual genealogy, 47
Bentham, Jeremy
 on legal truth, 289
Bingham, Tom, 129
Blanshard, Brand, 278
Bodin, Jean
 on absolute sovereign, 28

- on sovereign with absolute power, 24
Bosnia-Herzegovina, 225
Brussels Group for International Justice,
 250

C

- Canada, 42, 117, 136
 State Immunity Act, 117, 118, 119, 120,
 121, 122
Cassese, Antonio, 229
Chambers, Henry, 295
Chattopadhyay, Bankimchandra, 48
Chile, 40
China, 24, 40
Churchill, Winston, 241
Cohen, Jean L., 43
Cold War, 23
collective criminality, 68, 97, 98, 101, 102,
 103, 104, 105, 107, 108, 110, 111, 128,
 138
Combs, Nancy
 on importance of witness testimony,
 300
 on powerless testimony, 305
Control Council Law No. 10, 103
Convention for a Democratic South Africa,
 238
Crawford, James
 on international legal personality, 67
 on subjects of international law, 77
crime of aggression, 36, 37
 the role of United Nations Security
 Council, 38
crimes against humanity, 41, 52, 56, 74,
 84, 93, 101, 105, 108, 159, 161, 162,
 163, 168, 184, 207, 251
crimes against peace, 36, 74, 83, 84, 101,
 141, 142
Cryer, Robert, 169
customary international law, 109, 117, 119,
 120, 121, 122, 123, 124, 140

D

- Damaška, Mirjan
on correspondence theory, 289
- Damgaard, Ciara
on IMT's reliance on *ex parte Quirin*, 87
on individual criminal responsibility, 71
- Davidson, Donald
on truth as a primitive concept, 275
- Davis, Michael, 194
- de lege lata*, 113
- Del Ponte, Carla, 40, 41
- deliberation accountability, 260, 261, 262, 263, 264, 265
- Derrida, Jacques, 52
- Descartes, René
infallibilism, 273
- deterrence, 34
general deterrence, 30, 183, 184, 189, 255, 262
specific deterrence, 30, 183
- domestic law, 70, 73, 74, 79, 80, 83, 101, 106, 113, 117, 126, 130, 168, 211
- Douglas, Lawrence, 221
- Drumbl, Mark A.
deterrence through moral unacceptability, 220
on perpetrator rationality, 190
on punishment for international crimes, 170
on retributive shortfall, 174
- Duff, Antony, 263
communicative theory of punishment, 200
- Durkheim, Emile, 215

E

- East Bengal, 56
- Engel, Karen, 248
- English East India Company, 53
- European Convention on Human Rights, 144
- expressivism, 168, 192, 194, 195, 212, 218, 219, 220, 231, 256
- Extraordinary Chambers in the Courts of Cambodia, 160, 300

F

- fact-finding, 269, 290, 291, 294, 295, 299, 301, 303, 305, 306
- Farmer, Lindsay, 16
- Ferrajoli, Luigi, 153, 154, 156
- First World War, 57
- Fitzmaurice, Gerald, 79
- Fletcher, George, 106, 107
- Flick KG, 103
- Flick, Friedrich, 103
- foreign immunity for torture, 69, 70, 116, 117, 118, 119, 120, 122, 123, 125, 126, 128, 129, 130, 136
- Frege, Gottlob, 275
- Fricker, Miranda
identity-prejudice, 285
rational authority and credibility, 284
testimonial responsibility on hearer, 286
- Friedrich, Nietzsche
on power to re-interpret, 18
on punishment, 17
- fundamental rights, 114, 115

G

- Gaeta, Paola
on *ius puniendi* for core crimes, 169
- Garfinkel, Harold, 212
- Garland, David
expressivism theory of punishment, 217
social act of punishment, 193
general principle of law, 140
genos, 106
- Germany, 1, 12, 13, 33, 68, 86, 95, 101, 102, 115, 140
Code of Criminal Procedure, 290
- Gladius, Marlies, 233
- Golash, Deirdre, 199
on unfair advantage theory, 181
- Graeber, David
on anarchist principles, 57
- Greenawalt, Alexander
on retributivism and selectivity, 174
- Grotius, Hugo, 70, 88, 89

H

Haack, Susan
 on adversarial system, 291
 on pragmatist theory of truth, 290
 on the need of factual truth, 294

Hague Academy of International Law, 81

Hampton, Jean
 victim-based expressivist theory, 196

Harper, Charles
 defining impunity, 250

Hart, H.L.A.
 on utilitarian approach to punishment,
 171

Hashemi, Stephan, 117

hearsay, 292

Henkin, Louis, 75
 on State consent, 81

Hiroshima, 50

Ho, Hock Lai, 289

Hobbes, Thomas
 on sovereign, 28

Holy See, 74

House of Representatives
 United States of America, 36

human dignity, 134, 135, 206

human rights law, 66, 144, 145, 156, 157,
 203, 250, 269

Human Rights Watch, 247

Hume, David
 importance of testimony, 283

Hussein, Saddam, 113

I

IG Farben, 103

immunity *ratione materiae*, 120, 126, 129,
 130

impunity, 244, 246, 247, 250
 broad conception of impunity, 249,
 251, 257
 narrow conception of impunity, 249,
 251, 255, 262

incarcerative punishment, 168, 170, 198,
 199, 201, 202, 231, 232, 235, 236, 240

India, 56

Inter-American Court of Human Rights,
 120
 Fermín Ramírez v. Guatemala, 157

International Committee of the Red Cross,
 224

International Court of Justice
Barcelona Traction, 77
 Bosnia-Herzegovina v. Serbia and
 Montenegro, 143, 145, 146
Jurisdictional Immunities of the State,
 95, 124
Reparation for Injuries, 76

International Criminal Court
 allocation of resources, 13
 coercive powers, 6
 complementarity, 35
 Elements of Crimes, 156, 161, 165
 interest of justice, 14
 interests of justice, 40, 266
 jurisdiction over natural persons, 146
 Office of the Prosecutor, 13, 42, 266,
 269
 principle of complementarity, 211
 Prosecutor, 40, 42
 Prosecutor v. Germain Katanga and
 Ngudjolo Chui, 152, 159, 160, 162,
 163
 Prosecutor v. Jean-Pierre Bemba
 Gombo, 297
 Prosecutor v. Omar Hassan Ahmad Al
 Bashir, 7
 Prosecutor v. Thomas Lubanga Dyilo,
 13, 151
 Rome Statute, 14, 33, 39, 66, 93, 105,
 106, 140, 144, 146, 147, 148, 149,
 150, 151, 154, 155, 156, 157, 158,
 159, 161, 162, 164, 165, 172, 246,
 247, 255, 297
 situation in Colombia, 14
 withdrawal, 6

international criminal justice
 as a social contract, 31
 complications, 11
 government interaction, 39
 group responsibility, 148, 149, 151,
 153, 155, 157, 158, 160, 244
 justificatory pluralism, 2, 21, 22
 normative closure, 2, 4, 16, 18, 20, 21,
 22
 open normativity, 2, 3, 5, 7, 14, 15, 16,
 20, 21
 theory of criminal procedure and
 punishment, 9

theory of criminalisation, 8
international criminal law, 68
international criminal responsibility for
individuals, 67, 68, 69, 70, 71, 72, 73,
74, 78, 79, 80, 82, 83, 84, 85, 86, 87,
88, 90, 95, 96, 97, 98, 99, 100, 101,
103, 104, 107, 108, 110, 111, 112, 113,
115, 116, 122, 123, 128, 137, 138, 142
International Criminal Tribunal for
Rwanda, 40
Prosecutor v. Alfred Musema, 304
Prosecutor v. Emmanuel Ndinabahizi,
304
Prosecutor v. Jean de Dieu Kamuhanda,
304
Prosecutor v. Jean-Paul Akayesu, 303
International Criminal Tribunal for the
former Yugoslavia, 37, 40, 140, 301
Prosecutor v. Dražen Erdemović, 213
Prosecutor v. Duško Tadić, 9, 13, 154,
165, 184
Prosecutor v. Goran Jelisić, 106
Prosecutor v. Zlatko Aleksovski, 213
International Crisis Group, 247
international law
State consent, 66, 67
subjects, 65
International Law Commission, 36, 37, 38,
94, 95, 97, 98, 114, 129, 143
Draft Articles on State Responsibility,
95
Draft Articles on the Responsibility of
International Organizations, 97
International Military Tribunal, 12, 33, 46,
67, 68, 70, 71, 72, 74, 75, 76, 78, 82,
84, 88, 90, 96, 99, 100, 101, 103, 107,
115, 123, 124, 126, 128, 137, 139, 140,
141, 142, 143, 144, 149, 152, 154, 160,
168, 175, 176, 188, 209, 237, 238, 240,
241, 242, 243
Charter, 68, 74, 82, 83, 84, 86, 87, 101,
102, 108
International Military Tribunal for the Far
East, 45, 67, 70, 72, 78, 82, 84, 90, 101,
115
Charter, 68, 84, 87, 101, 108
international responsibility, 71, 94, 98,
111, 113, 145, 158
Iran, 117
Iraq, 113

ius puniendi, 169, 206

J

Jackson, Robert, 241, 242, 243, 244
Jackson's Hedge, 243, 244, 253, 254,
263, 264, 266
Jahrreiss, Hermann, 85
James, William
finding truth through verification, 280
Japan, 46, 55, 61, 101
Jaspers, Karl, 205
Jennings, Robert, 112
Jo, Hyeran, 33
Joachim, H.H., 278
Joinet, Louis, 250
joint criminal enterprise, 108, 109, 149,
150, 151, 155, 157
Jørgensen, Nina, 112, 127
Joyner, Christopher, 250
judicial impartiality, 243
jus cogens, 25, 67, 68, 78, 82, 91, 92, 93,
94, 95, 118, 121, 122, 123, 124, 126,
127, 128, 129, 130, 131, 132, 133, 134,
135, 136, 138, 147
jus dispositivum, 91, 94

K

Kant, Immanuel
on juridical punishment, 172
on reason, 274
Karadžić, Radovan, 112
Kelsen, Hans, 49, 84, 85
Kendall, Sara, 189
Khatchadourian, Haig
correspondence theory, 276
Klabbers, Jan, 81
Kolodkin, Roman Anatolevich, 129
Koskeniemi, Martti
on *jus cogens*, 133
Krauch, Carl, 103
Krupp Holding, 103
Krupp, Alfred, 103

L

Lauterpacht, Hersch, 49
League of Nations, 142

LeBel Louis, 122
 Lepard, Brian, 93
lex ferenda, 266
lex lata, 84
 Liberia, 40
 Locke, John, 274
 Luban, David
 challenges faced by international
 criminal justice, 245
 impact of domestic prosecutions, 211
 on crimes against humanity, 207

M

Machiavelli, Niccolò
 on sovereign as a virtuous prince, 29
 Mahony, Christopher
 on case selection independence, 25
 on international justice cascade, 25, 27
 Mamdani, Mahmood, 237
 McCarthy, Conor, 200
 Mégret, Frédéric, 235
 Meijers, Tim, 233
mens rea, 26, 99, 100, 108, 109, 153, 158,
 159, 160, 166
 Meron, Theodor, 188
 Milošević, Slobodan, 112
 modes of liability, 107
 Mohr, Manfred, 114
 Moore, Michael
 on moral intuitions to justify
 punishment, 178
 on moral responsibility, 171
 on proportionality of punishment, 176
 Moreno-Ocampo, Luis, 42
 Morgenthau, Henry, 101
 Mortazavi, Saeed, 117
 Murphy, Jeffrie
 retributive hatred, 228

N

Nagasaki, 50
 natural law, 45, 46, 47, 54, 60, 67, 70, 73,
 82, 88, 89, 90, 92, 94
 Nazi Germany, 113
 neo-sovereignist, 245
 Nietzsche, Friedrich
 on effect of punishment, 206

non liquet, 128
 non-state actors
 mass crimes, 54
 Norrie, Alan, 205
 North Atlantic Treaty Organization, 14, 40
 aerial bombardment of Serbia, 40, 42
nulla poena sine culpa, 154
nullum crimen sine lege, 76, 90, 243

O

obligations *erga omnes*, 68, 78, 95, 109,
 134
opinio juris, 122, 123, 134
 Orakhelashvili, Alexander, 81
 organised armed groups, 104, 111, 161
 Osiel, Mark, 234

P

Pakistan, 56
 Pal, Radhabinod, 45
 on Asian–African co-operation, 51
 on international community, 46
 on justice, 62
 on national sovereignty, 55
 on sovereignty and law, 55
 on the role of law in world peace, 61
 on the state of the world in 1950s, 51
 on vedic law, 59
 on victor's justice, 49
 Pan-American Conference, 142
 Paulus, Andreas, 79
 Peirce, C.S.
 finding truth through investigation,
 279
 Pellet, Alain, 113
 peremptory norms. *See jus cogens*
 Permanent Court of International Justice,
 120
 The Case of the S.S. 67
 Peters, Anne, 81
 Phillips, Nicholas Addison, 136
 Plato
 Meno, 272, 273
 Theaetetus, 271, 272
 Pohlhaus, Gaile, 286
 positive law. *See positivism*

positivism, 66, 67, 70, 73, 74, 82, 84, 86,
88, 89, 90, 91, 94, 96, 132, 133
post-conflict stabilisation, 100
Potsdam Declaration, 102
presumption of innocence, 243, 263
prohibition on torture, 69

R

racial discrimination, 50, 78
Ragazzi, Maurizio, 134
Reid, Natalie L., 109
Reid, Thomas
 anti-reductionism, 284
reparation, 114, 122, 209
retributivism, 168, 170, 171, 172, 173,
174, 176, 178, 180, 194, 195, 231, 254,
255
Ricoeur, Paul, 35
Rigveda, 58, 62
Ristroph, Alice, 16
rita, 58, 59, 60
Robinson, Darryl
 expectations from international crimes
 punishments, 185
Röling, Bert, 104
Rorty, Richard, 282
Rosseau, Jean-Jacques
 on general will as common good, 28
 on sovereign, 28
Roy, Rammohun, 47
Russell, Bertrand
 complex unity, 277
 on beliefs and facts, 276
Rwanda, 40, 41, 160
 civil war, 40
 gacaca, 266
Rwandan Patriotic Front, 40, 41

S

sanction accountability, 259, 260, 261,
262, 263, 265
Schlüter, Birgit, 135
Schwarzenberger, Georg, 71, 209
Scott, James, 58
Second World War, 56, 67, 70, 71, 72, 74,
82, 84, 87, 90, 91, 100, 115, 237
Sellars, Kirsten

 on Radhabinod Pal's dissent, 46
Serbia, 113
Shklar, Judith, 207
Sikkink, Kathryn
 on justice cascade, 25
Simmons, Beth A., 33
Simpson, Gerry, 101
slavery, 78
Sloane, Robert
 on unfair advantage theory, 181
social contract, 30
 transnational construction, 31
social epistemology
 expansionism, 281, 282, 283
 preservationism, 281, 282
 revisionism, 281
South Africa, 238
 Truth and Reconciliation Commission,
 239
South Asia, 56
sovereign equality, 115, 119, 133
sovereignty
 relinquishment due to failure to protect,
 28
 Westphalian conceptions, 24
Spain, 40
Special Court for Sierra Leone, 160, 223
Special Panel for Serious Crimes, East
 Timor, 160, 301
specific intent, 109, 146
spousal privilege, 292
Stalin, Joseph, 241
State consent, 133
State practice, 122, 123
State responsibility, 111, 113, 114, 127,
139, 142, 145, 146, 158, 165
State sovereignty, 23, 25, 43, 45, 54, 58,
59, 60, 82, 91, 114, 134, 244
statehood, 67
Stern, Philip, 53
Suárez, Francisco, 89
Supreme Court of Canada
 Kazemi Estate v. Iran, 116, 117, 118,
 120, 122, 123
Supreme Court of Israel
 Israel v. Adolf Eichmann, 175
system criminality, 101, 104, 110

T

Tallgren, Immi, 191
 Taylor, Charles, 40
 Taylor, Telford, 103
terra nullius, 55
 terrorists groups, 104
 Testimonial injustice, 285
 testimonial justice, 270, 286, 287, 306, 307, 308
 theories of truth
 coherence theory, 277, 278, 279, 289
 correspondence theory, 276, 277, 278, 279, 289
 pragmatist theories, 275, 279, 299
 Tokyo Trial. *See* International Military Tribunal for the Far East
 Totani, Yuma
 on Radhabinod Pal's dissent, 45
 Treaty of Versailles, 85, 86
 Treaty of Westphalia, 23
 Tutsi, 304

U

United Kingdom, 42
 United Kingdom House of Lords
 Ex parte Pinochet Ugarte (No. 3), 129
 Jones, 129
 United Nations, 47, 76, 91
 Charter, 38, 105
 Commission on Human Rights, 120
 conflict prevention, 32
 Convention Against Torture, 124, 125
 General Assembly, 143
 Genocide Convention, 143, 145
 legal personality, 77
 Office of the High Commissioner for Human Rights, 246

Security Council, 41, 114, 299
 Social and Economic Council, 250
 United Nations General Assembly, 36, 37, 143, 148, 164
 United Nations Security Council, 37
 United States of America, 36, 37, 41
 adversarial legal system, 290
 universal jurisdiction, 40
 Yousuf v. Samantar, 125, 126, 127
 United States Supreme Court
 ex parte Quirin, 85, 86
 universal jurisdiction, 39, 68
 Upanishads, 58
 utilitarianism, 168, 170, 181, 195

V

Vattel, Emer de, 70, 88
 Vienna Convention on the Law of Treaties, 67, 91, 92, 93, 94, 127, 130, 131, 133
 Vitoria, Francisco de, 88
 von Hirsch, Andrew
 on unfair advantage theory, 180

W

Walker, R.C.S., 278
 war crimes, 33, 41, 49, 50, 52, 74, 93, 101, 104, 105, 107, 108, 112, 141, 144, 161, 168, 184, 185, 207, 213, 230
 Watts, Arthur, 112
 Weatherall, Thomas, 93
 Weber, Max, 52
 Weil, Prosper, 78, 132
 William II, 86
 Woods, Andrew, 172
 World Bank
 conflict prevention, 32
 Wringe, Bill, 211

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