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# International Criminal Law and Limits of Universal Jurisdiction in the Global South: A Critical Discussion on Crimes Against Humanity

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**International Criminal Law and Limits of Universal Jurisdiction in  
the Global South: A Critical Discussion on Crimes Against  
Humanity**

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A DISSERTATION SUBMITTED TO  
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## Abstract

What is the reason behind the current fascination with and heightened expectations from international legal accountability? Are we indeed faced with an unprecedented increase in the volume of egregious crimes committed, condoned, or initiated by states and high ranking officials, bureaucrats and soldiers, the kind of multiplication and spread that fundamentally challenges our faith in the capabilities of domestic jurisprudence? Is international criminal law, as it applies to categories of crimes such as war crimes and crimes against humanity, equipped to be a panacea for all ills of the recalcitrant nation-state system? Could we curtail mass assaults on human dignity, the kind of violence that flourished in myriad forms with the advance of late capitalism, through international courts alone? What is the ultimate aim of adjudicating the most egregious infractions of the internationally sanctioned human rights regime? Is it simply a matter of coming up with the newest methods and most efficient strategies of codification to punish the protagonists of organized political violence? Is international criminal law striving to develop a shared understanding of, and golden standards for, acceptable behaviour of states and governments, their agencies and institutions? Do these efforts not suffer terribly from the institutional idealism pertaining to current accountability regimes in public international law? Where do judges, activists, scholars, public intellectuals, NGOs and INGOs stand in a truthful appraisal of the complex amalgam of international criminal law and the dynamic processes of globalization? Do relations between the core and periphery, the Global South and the centres of traditional international law, post-colonial societies and neocolonial powers, matter at all in this state of euphoria concerning developments in international criminal law pertaining to universal jurisdiction?

I start this work by answering this last question in the affirmative. In Chapter I, I examine the emergence of a transnational regime of accountability in international law and reevaluate the claim that, at least in principle, universal jurisdiction overrides private legal norms. After introducing the debate on legal pluralism and *Third World Approaches to International Law* (TWAIL), I redefine the concept of international law as transnational law within the context of globalization, with particular emphasis on the situational qualities attributed to states and societies in the Global South. I then discuss distinguishing features of international accountability regimes and the mechanisms used by institutions such as the International Criminal Court (ICC) for the production of legal and jurisdictional certainty under diverse circumstances. I conclude this debate with a critical evaluation of accountability regimes in international law concerning universal jurisdiction. I use the premises of the third wave of legal pluralism and purport a theory of reflexive transnational law that could re-contextualize universal jurisdiction, an issue further debated in a later chapter on Hybrid Courts. In Chapter II, I analyze universal jurisdiction in international law with reference to debates on the State as a privileged legal actor. I rely on the body of work associated with critical international relations scholarship and look for alternative approaches to the static perception of the state in international law. In Chapter III, I strive to provide an inlet for universal jurisdiction in certain cases of criminality while identifying a framework that is not of dubious normative or legal validity. In effect, reformulating universal jurisdiction anew is a necessary shift of focus given the contested history of the very enterprise of international law in the Global South. To this end, I again look at TWAIL scholarship and other contesting voices emanating from the Global South that relate to international criminal law in

challenging ways. In Chapter IV, I examine the historical and political underpinnings of the legal definition of crimes against humanity. Crimes against humanity are supposed to have a collective legal dimension with respect to both their victims and their perpetrators. These crimes take place only in the context of a widespread or systematic attack, and in a societal setting that condones or supports their committal. Instead of a static interpretation of these crimes, I offer a historicized conception and propose a wider justification for their prosecution through locally adapted universal jurisdiction measures. This caveat has important implications as to which crimes could be justifiably prosecuted and punished by domestic, hybrid or international courts, as discussed in Chapter V on Hybrid Courts. I also contend that the scope of the area of international criminal justice that deals with basic human rights violations should be wider than is currently acknowledged, in that it should include violations that have a collective dimension. These arguments are then further developed in Chapter VI, on collective responsibility. The conclusion of the thesis offers a debate based on examples from transitional justice settings, and suggests that fragmentation in international law is not only a fact but also a necessity to overcome the impasse of its tainted legacy in the Global South. Crimes against humanity and the universal jurisdiction dictum pertaining to their adjudication constitute no exception to this state of affairs, and if we are to proceed with adjudication of the most egregious and heinous crimes, we must allow for localized and domesticated interpretation of these crimes rather than strict legislative dictation ordered by international institutions such as the ICC. As such, limitations to universal jurisdiction lead us to a reformulation of accountability from within international criminal law.

## Acknowledgements

This work's completion spanned over almost a decade, which was not at all how it was planned to be. When I first started Osgoode Hall Law School as a graduate student without a law degree, little did I know how much the whole experience would change me personally, politically and in intellectual terms. I was sure of the necessity of being thoroughly trained in legal theory, though at the time I was already a tenured scholar publishing and lecturing on forced migration, war crimes, trauma, and human suffering in its myriad forms that emanate from mass political violence. Back in the early days of my studentship at Osgoode, I remember one particular conversation I had with my former PhD supervisor in Social and Political Thought, Howard Adelman, who led the team for my first round of baptism by fire. We had a little escape walk along the shores of the Pacific Ocean, as we were working on a project together that took us away from Toronto. I told him I registered at Osgoode and was starting another doctorate, this time in law. He paused, looked at me very carefully, and muttered these words: "You don't need another degree to do what you have to do." I told him he was wrong, that I needed to be trained properly by legal scholars to really understand how this business of war crimes and crimes against humanity works at the level of international law. I argued back, as I always did, stating that I was tired of being this "social science scholar," or the "history of ideas person" when legal scholars always had the last word concerning mass crimes and state criminality. He then said, "you won't listen to me anyways, but we will continue arguing about this." In the spirit of a true debt regarding the guidance and companionship Howard Adelman provided over the past 26 years, this work is dedicated to him. He helped me the most when he agreed with me the least and that never changed. Mentorship, when handled with such grace and respect for the person who is at the receiving end, is a gift that lasts a lifetime. As an apt analogy, the Old Testament dictum states as much: he taught me how to catch fish rather than giving me rations at a time of need.

Once at Osgoode, my debt continued to accumulate. It is under the guidance of Craig Scott, Leora Salter, Ruth Buchanan, the late Michael Mandel, Les Jacobs, Allan Hutchinson, Leslie Green, Sharry Aiken and Harry Arthurs that I completed the course work, formulated my thesis proposal, and began to work on actual cases to put together the skeleton of my dissertation. In the meantime, I benefitted immensely from the scholarship and friendship of Ranabir Samaddar, Paula Banerjee and Nasreen Chowdhory in Calcutta, India; Galya Benarieh in Evanston, USA; Roberto Lopez and Beatriz Sanchaz Mojica in Bogota, Colombia; Loren Landau in South Africa; Chris Dolan in Kampala, Uganda; and Susan McGrath and Michele Millard in Toronto, Canada, all of whom shared their wisdom and insights with me on state criminality and dimensions of human suffering gone unacknowledged. We worked together on various projects pertaining to ethical, socio-political and legal dimensions of transitional justice in the Global South throughout the past decade.

At the non-Osgoode part of York University, I owe special thanks to colleagues and friends who encouraged me not to give up the "project" despite illnesses and deaths in the family and my own trials and tribulations with cancer and all that comes with it. I am especially marked by the gentle and yet assuring hand of Brenda Spotton, Lorne Foster, James Simeon, Dagmar Soennecken, Soren Frederiksen, David Mutimer, Elizabeth Dauphinee, Margo Baretto and Carolyn Cross. To me, they symbolize the pillars of strength and calm in an everchanging tide of life circumstances, steadying my racing mind and bringing back focus and concentration whence

memory and sense left me adrift. Finally, I owe special thanks to my former graduate student/colleague Jonathan Adjemian, who rendered this layered and at times convoluted dissertation accessible to the reader through his pristine sense of the totality of a text.

In Istanbul, Turkey, Turgut Tarhanlı has been both an inspiration and a true beacon of light as the darkness of oppression descended in the region. As the Dean of Bilgi University Law School, he encouraged and actively supported me to mount my own courses on international criminal law, transitional justice, state criminality and comparative administrative law. During my several short stays in Istanbul, teaching international law, I had a chance to share some of my findings with extremely courageous and well-read human rights lawyers who were doing their graduate degrees and I owe them all such gratitude for thinking together, identifying key problem areas concerning the applications of international criminal law in the Global South, and on the rare occasion solving very difficult legal puzzles, at least for future purposes when they will be able to openly engage with these issues without a genuine threat of incarceration.

Last but not the least, I owe so much to my committee members at Osgoode. I do not know where I would be today without the stern but always thoughtful and thorough interventions and, ultimately, supervision of Obiora Okafor. Not only did I already admire and respect him greatly prior to the supervisory relationship he agreed to take upon, I hope that I also succeeded in developing a deeper understanding of his commitment to TWAIL scholarship at the end of the process of becoming a student of his. I am ever so grateful that Obiora Okafor took this mammoth of a project in his able hands and pushed it in the direction of taking the shape of a dissertation manuscript with inner coherence and contemporary applicability. All the failings and shortcomings of this work are no doubt mine. Still, this work allowed me to fulfill a vital demand on my own conscience: to develop an “insider’s” understanding how law works when all else fails, and the limits of what one could expect from it thereof. While my Osgoode years robbed me of one big ideal and dream concerning mass human suffering, that is the possibility of reaching out to international criminal law as a panacea, it allowed me the space and tenacity to start thinking about what is really possible and workable on the ground while aspiring for a whole new sense of “humanity.” For that, I sincerely hope our children Josef Derya Canefe Wolanczyk and Ezra Witold Canefe Wolanczyk will forgive my long disappearances in the attic of our house for several years, reading and re-reading international criminal law cases and textbooks into the dark of the night only to descend in the morning still lost in thought rather than with newfound clarity. It is to them and their generation that the onus falls for developing a much stronger sense global responsibility, something our generation and the one before us tried but succeeded at only minimally.

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## Introduction

*Nam Sibyllam quidem Cumis ego ipse oculis meis  
vidi in ampulla pendere, et cum illi pueri dicerent:  
Σιβυλλα τί θέλεις ; respondebat illa: ἀπο θανείν θέλω.*

APRIL is the cruellest month, breeding  
Lilacs out of the dead land, mixing  
Memory and desire, stirring  
Dull roots with spring rain.  
Winter kept us warm, covering 5  
Earth in forgetful snow, feeding  
A little life with dried tubers.

What are the roots that clutch, what branches grow  
Out of this stony rubbish? Son of man, 20  
You cannot say, or guess, for you know only  
A heap of broken images, where the sun beats,  
And the dead tree gives no shelter, the cricket no relief,  
And the dry stone no sound of water. Only  
There is shadow under this red rock, 25  
(Come in under the shadow of this red rock),  
And I will show you something different from either  
Your shadow at morning striding behind you  
Or your shadow at evening rising to meet you;  
I will show you fear in a handful of dust.

T.S. Eliot (1888–1965). The Waste Land. 1922.

This work is a concerted attempt to achieve an informed interpolation between ethics, politics and legal scholarship on international law, with reference to the specific category of universal jurisdiction as it pertains to crimes against humanity. It posits that critical perspectives from the Global South, combined with a transnational understanding of international law and a committed inclusion of political judgment and collective responsibility for mass crimes, would create a radically different framework for the debate on the normative underpinnings and procedural qualities of universal jurisdiction in international criminal law.

In this vein, the dissertation in hand brings together three seemingly distinct areas of scholarly endeavour: jurisprudential debates on international criminal law, international relations and international law scholarship on state sovereignty, and applied political philosophy. It strives to offer a compelling view of the future of international legal reasoning and legal theory concerning the workings of accountability regimes in the Global South. It purports a critical analysis of the prescriptive norms and institutions of modern international criminal law in the area of universal jurisdiction, and argues with courage and caution that international law has the capacity to advance values concerning the sanctity of human life, as long as it is not regarded as a closed and rigid system leading to the perpetual victimization of states and societies in the Global South.

Numerous international lawyers approved of the 1999 bombing of Serbia by the members of the North Atlantic Treaty Organization, despite the fact that some felt it was not compatible with a strict reading of the UN Charter on matters of concern for state sovereignty.<sup>1</sup> The argumentative techniques through which international law scholars tried to abide by their moral intuitions despite the obvious legal incoherence pertaining to the case of Yugoslav wars signifies a general turn to ethics in legal theory, especially in the field of international criminal law. The shallow and often hazardous moralization involved in justifying *pro forma* application of jurisdictional maxims such as those present in crimes against humanity legislation constitutes a similar challenge. If we are to avoid the danger of international criminal law becoming a behemoth of an oppressive instrument, put to the service of the foreign policy choices of states

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<sup>1</sup> See Martti Koskeniemi, "‘The Lady Doth Protest Too Much’: Kosovo, and the Turn to Ethics in International Law" (2002) 65 *The Modern Law Review* 159.

and constituencies marked by power and privilege, it must assume the prowess of deliberation and persuasion rather than relying entirely on heavy-handed institutionalization and codification.

The question is, in the absence of widespread consent and with minimal threat of coercion, why sovereign states are expected to obey international law. This dissertation approaches the subject matter from a different angle: rather than why they *should*, I venture to ask why states *choose to* embrace certain core principles of international criminal law. In the following pages, the question of what compels domestic constituencies to owe allegiance to a higher set of rules, when each country has its own law of the land, will be treated with care, given the damning history of international law as seen from the Global South. The prevailing legal realist view holds that countries act simply out of self-interest, and that if they consent to international law, they only consent to norms and principles to regulate matters of common interest in which they are involved. Here, the emphasis remains squarely on the state as the ultimate unit of international law. This dissertation is written against such a presumption; it purports to understand international criminal law as a transnational phenomenon shaped by multiple legal actors, the state being only one of them. At the same time, international courts such as the International Criminal Court (ICC) should not be made into a modern-day messiah of international criminal law. This debate is very difficult to hold, more so even than questioning the sanctity of the state in international law, particularly in an area such as crimes against humanity, given their heinous nature. In the following pages, these two debates—namely, criticism of state-centric views of international law, and considerations of the limits of universal jurisdiction in international criminal law—inform each other and are brought together under the aegis of the concept of political judgment. Though rich in examples from the field of international law and international institutions pertaining to adjudication of crimes against humanity, the theoretical contribution of this work lies in the challenges it poses for received wisdom on the foundations of international criminal law, and its critique of the practical ambitions of the international legal system of accountability established since World War II.

In this vein, in the first half of the dissertation, the concept of state sovereignty and its derivatives in international law are unpacked using the tools of comparative politics and international relations scholarship, as well as pioneering work in the area of international law. The second half is allocated to the debate on adjudication of crimes against humanity in the post-

ICC era. The lens through which this composite analysis is achieved is the jurisprudential basis of crimes against humanity legislation in international law. Since 1945, the role played by political judgment in the deliverance of justice in international criminal law has assumed unprecedented proportions, given the extreme nature of the crimes listed under this body of laws. This dissertation, however, takes issue in this regard with both of the existing models, namely, the dualist and monist renditions of international law. Briefly, the dualist perspective claims international law to be alien to domestic law.<sup>2</sup> It characterizes international law as imposing and undemocratic, and thus only appropriations of it through internal deliberation are deemed acceptable. This approach is typical of the dominant trends in American and German jurisprudential thought, as well as some of the emergent critiques from the Global South, particularly among the Muslim-majority countries and East Asia. The monist perspective, on the other hand, is the darling of international law scholars with an institutionalist bent, particularly regarding the issue of universal jurisdiction. Monism advocates 'universal principles,' applicable in all contexts due to their claimed normative superiority. In this regard, the ICC's embrace of crimes against humanity constitutes a prime candidate for critical analysis, as the core crimes enlisted in the Court's enabling statute are indeed a colossal affront to the whole of humanity, and yet there are significant problems regarding the path followed by their adjudication. According to the monist perspective, particularly in international criminal law, no caveats should be accepted or even proposed, and the standards set by institutions such as the ICC are to be accepted as non-negotiable in their nature. Exceptions are made only due to procedural delays, and even then these are regarded a matter of providing sufficient evidence in due time, rather than affecting the normative and legal validity of the legislation itself.

In this context, the present work poses the question of whether a third perspective is possible—not as an in-between, but as one based on a more dynamic understanding of international criminal law. The discussion presented in each of the six chapters indicates that, especially in the Global South, if international criminal law's adjudication mechanisms and procedural aspects are emphasized at the expense of its core normative premises, the whole

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<sup>2</sup> See Harold Hongju Koh, "Transnational Legal Process" (1996) 75 *Neb. L. Rev.* 181, and Abram Chayes & Antonia Handler Chayes. *The new sovereignty* (Harvard University Press, 1998).

enterprise runs the risk of becoming suspect. Specifically, this work is constructed around two methodological investigations. The first one attempts to unpack the normative framework within which international law is commonly perceived. This effort guides the line of questioning framing the first three chapters of the thesis. The presumed alignment of international and domestic law in the area of universal jurisdiction constitutes the example on which such an inquiry is based. The second methodological investigation is built upon the Arendtian notion of political judgment, as opposed to the procedure-oriented understanding of international criminal law. Here, the aim is to shed light on how different interpretations of core jurisprudence could be reconciled without excessive dependency on an overarching institution such as the ICC. The case in point is again crimes against humanity legislation and its multiple reiterations at the level of *ad hoc*, regional, and hybrid courts. This latter methodological investigation is undertaken in the last three chapters of the present work.

All of the chapters of this dissertation deal with concerns about the larger debate on international law and problems of incongruity among the spheres of *domestic* and *international* law. This is done with a desire to move forward, as the case at hand is that of egregious and unforgivable crimes committed by states against their own people. To this end, the chapters on universal jurisdiction and hybrid courts present findings from criminal law trials and case law in order to showcase the interaction and fluidity connecting these two spheres of juridical action—the domestic and the international. Vis-à-vis the domestic sphere, one is forced to acknowledge the importance of national norms about the constitution of criminality, due to their socio-political effectiveness and long-term legitimacy. Meanwhile, when the frame of analysis is shifted to international [criminal] law, one has to deal with an uncomfortable reality that marks the field: it does *not* have a history of egalitarian decision-making, equal participation, or transparent and regulated relations.<sup>3</sup> Secondly, there appears to be a problem concerning the unaddressed nature of the divide separating international humanitarian and human rights law from other spheres of international law, in terms of whether and when one can put a caveat on value pluralism. Thus far, the question of whether jurisprudence pertaining to *erga omnes* crimes could be legitimately relativized—just as states negotiate trade or labor laws, for instance—has largely been avoided

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<sup>3</sup> See Jean Cohen, "Whose sovereignty? Empire versus international law" (2004) 18 *Ethics & International Affairs* 1.

due to the very nature of the violence embodied by these acts. There are certain absolutes in these select areas, absolutes that could go against demands emanating from local circumstances. On these issues, international criminal law avoids the notion of political deliberation like the plague, for fear of allowing future reversals or tempering with the unacceptability of crimes that fall under crimes against humanity legislation. What we are faced with on the ground, however, reveals a rather different reality of the adjudication of these egregious crimes.

At this point, Hannah Arendt's work is introduced in earnest to the debate on international criminal law. In Arendt's analysis of crimes against humanity, the Aristotelian notion of politics as engagement and the Kantian notion of reflectiveness in judgment are brought together to make sense of how to put the unforgivable to trial. Though Arendt's work on political judgment was left unfinished, as she was working on it at the time of her death, she left us enough to work with, especially when read alongside the work of Karl Jaspers and others on the notion of collective responsibility for societal and political crimes. Here, a distinction is made between the validity of all possible moral persuasions—the old-fashioned legal pluralism argument—versus adherence to an overall jurisprudential framework while remaining open to pluralistic participation and interpretation of legislation at the domestic and regional levels. Specifically, this dissertation posits that the Arendtian notion of political judgment allows for engagement, deliberation and involvement, and thus offers us a democratic promise for the global application of international criminal law. Its cutting-edge quality can be identified as that of politics of persuasion. Here, judgment would not allow for absolutes. In cases such as crimes against humanity, however, one is obliged to consider certain absolutes in order to establish criminality and thresholds of admissibility for evidence. The only way to resolve this dilemma is to claim that taking an absolute stance against such crimes is morally defensible. In other words, everyone would as a matter of the very basis of their humanity potentially agree that certain acts constitute egregious crimes. This is perhaps similar to the universal codification of murder—other than in proven instances of self-defense—as a crime within the domestic sphere. However, another difficulty emerges here: how to separate the jurisprudential approach that accepts differences in normative political judgments pertaining to the adjudication of crimes against humanity from the aforementioned monist defense of universal jurisdiction? This is the critical junction that the debate on universal jurisdiction has arrived at in the post-ICC era. As argued in the following

pages, formations such as hybrid courts in the Global South attending cases of war crimes and crimes against humanity point to possible new directions that could be taken.

The main practical concern fueling all of these inquiries is the following: one cannot force jurisprudential maxims of international organizations such as the ICC upon societies that are violating the basic principles framing crimes against humanity legislation unless there is a degree of value convergence in place. The issue then becomes how to find a normative common ground upon which domestic courts would willingly incorporate bodies of international law such as ICC-led legislation if and when the need arises, and also hand over criminals to venues like the ICC for trial if they are unable to pursue the case, without such cooperation being seen as yet another hegemonic intervention.<sup>4</sup> Instead of appearing as a stable set of normative demands, international law is better understood as an aspect of hegemony-building and maintenance, but which can also be used as a technique of articulating political claims in terms of legal rights and duties against the powers that be. Accordingly, the looming controversies in international law concerning the use of force, the law of peace, human rights, trade and globalization in effect reflect strategies through which political actors seek to make their preferences appear to be universal, or to confront the universality claims of others. However, how much purposive ending of life through organized political violence, and its justification by the very institutions responsible for protecting individuals and communities, could be open to negotiation? Thus, the question remains: how can one proceed from the Arendtian notion of the involved, negotiating, persuasive strategy/act of producing judgments to the adjudication of justice in cases of crimes against humanity? Unless one is open to institutional and dialogical interventions, building up normative commitments from the bottom up, how could international criminal law provide a genuinely common language of jurisprudence for egregious acts exemplified by crimes against humanity?

In a larger context, international law in general, and international criminal law in particular, is facing new challenges in the post 9/11 era, though only some of these are related to the emergence of the 'new terrorism' discourse in international politics. Reservations about the

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<sup>4</sup> On the issue of the hegemonic purchase of international law, see Detlev F. Vagts, "Hegemonic international law" (2001) 95 *Am. J. Int'l L.* 843; Martti Koskeniemi, "International law and hegemony: a reconfiguration" (2004) 17 *Cambridge Review of International Affairs* 197, and, Nico Krisch, "International law in times of hegemony: unequal power and the shaping of the international legal order" (2005) 16 *European Journal of International Law* 369.

role and function of international law in domestic affairs are on the rise. These range from marked skepticism about the authority and utility of international law vis-à-vis local conditions, to caution about how international law could be effected within the domestic sphere without undermining the foundations of the legal systems at the local level. The European Union is a case in point, showing how even the most elaborate regional efforts for juridical unification can backfire in unforeseen directions.<sup>5</sup> Across Europe, the debate about the relevance of international law is beginning to be conducted in such pointed language that a constant underlining of the dangers and limits of constitutional adjustments to ‘foreign law’ has become the tenor of domestic contestations.<sup>6</sup> Law that falls beyond the purview of domestic legislation is in effect characterized as fundamentally anti-democratic and top-down. This point of view is no doubt paralleled by a highly negative perception of the legitimacy of international law, as it is reduced to a mechanism that obligates states to justify their local/national practices if they deviate from a supposedly universally coded but relatively alien set of standards. National protectionism also propagates the already mentioned monism/dualism dichotomy in law, portraying international law either as an external body of law capable of penetrating the national legal order without democratic consent, or as a corpus of alien jurisprudence that must be rigorously filtered through the prism of national constitutional law if it is to accrue any benefit for local constituencies.<sup>7</sup>

In the face of mounting challenges to international law’s legitimacy—at least in select areas of jurisprudence such as crimes against humanity legislation—priority must be given not to prescriptions for an institutionally-mandated procedural straightjacket, but rather to elucidating minimal normative consensus and emphasizing political processes that hinge upon the persuasive

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<sup>5</sup> Concerns regarding the role of international law are particularly evident in contemporary, post-failed Constitution Europe. In Germany, for instance, the federal constitutional court has positioned itself as a bulwark between the national legal system and the two European legal orders the court is a part of—namely, the European Union and the European Court of Human Rights. In the United Kingdom, long before Brexit, the government sought to derogate from the relevant provisions of the European Convention on Human Rights in specific cases related to terrorism. See Karen Alter, *Establishing the supremacy of European law: The making of an international rule of law in Europe*. Oxford University Press, 2001; Lisa Conant, *Justice contained: law and politics in the European Union* (Cornell University Press, 2002); Alec Stone & Thomas Lloyd Brunell, *The judicial construction of Europe* (Oxford University Press, 2004), and, Rachel A. Cichowski, *The European court and civil society: litigation, mobilization and governance* (Cambridge University Press, 2007).

<sup>6</sup> See the debate presented in the Special Issue of American Journal of International Law, in particular Gerald Neuman, “The Uses of International Law in Constitutional Interpretation” (2004) 98 *American Journal of International Law* 82 and Roger Alford, “Misusing international sources to interpret the constitution” (2004) 98 *The American Journal of International Law* 57.

<sup>7</sup> See Jonathan Turley, “Dualistic Values in the Age of International Legisprudence” (1993) 44 *Hastings Law Journal* 185.



function of law and legal norms as political judgments. This alternative formulation could possibly result in the refashioning of international criminal law, not as dictated by an overriding and authoritative discourse, but as a normative enterprise and an evolving negotiation conditioned by legitimate and locally endorsed judgments. In this new framework, international and constitutional norms could be understood as contextually interrelated rather than as *conflicting* legal points of reference or frames of jurisprudential meaning.

According to the traditional dualist perspective, the ultimate legitimate source of legal norms is the democratic process itself. Accordingly, international norms—even those concerning human rights—are domestically enforceable only to the extent that they are incorporated into existing legal order through acts of statutory legislation.<sup>8</sup> As such, the relationship between public international law and domestic law is constructed as a tenuous interaction between two separate realms. This point of view is deeply affected by concern that international norms can have an immediate and/or unmediated effect on domestic legal structures and choices. When such interventions are allowed to take place, the argument goes, they will lead to the emergence of an unaccountable judiciary answering only to its own professional norms of conduct at the expense of domestic legal and political prerogatives. Hence we witness the equation of international law with the abdication and delegation of [national] sovereignty. Such an objection, often expressed in terms of the cultural or institutional incompatibility of international jurisprudence with local settings, assumes that norms of public international law potentially clash with local democratic commitments. This is a particularly sore point, which clouds the horizons of international human rights activism by challenging the local legitimacy of their demands and claims. Equally worrisome, however, is questioning of the status of the moral principles and political reasoning present in international criminal law. These bodies of law are perceived as falling outside the bounded community of the nation-state and thus lacking a proper grounding.<sup>9</sup> This deep-rooted suspicion of international law is commonly justified by means of a contractarian view of

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<sup>8</sup> See Gerald L. Neuman, "Human Rights and Constitutional Rights: Harmony and Dissonance" (2003) 55 *Stanford Law Review* 1863.

<sup>9</sup> Seyla Benhabib, "On the Alleged Conflict Between Democracy and International Law" (2005) 19 *Ethics and International Affairs* 85; Allen Buchanan, *Justice, legitimacy, and self-determination: moral foundations for international law* (Oxford University Press on Demand, 2007); Gregory Shaffer, "International law and global public goods in a legal pluralist world" (2012) 23 *European journal of international law* 669; Nico Krisch, "The decay of consent: international law in an age of global public goods" (2014) 108 *American Journal of International Law* 1; and Charles De Visscher, *Theory and reality in public international law* (Princeton University Press, 2015).

democratic legitimacy of law, vehemently defended both in the North and the Global South in the name of state sovereignty. Accordingly, the domain of constitutional law takes on an intrinsic epistemological priority over the purportedly uneven and unpredictable domain of international law. This position is based on the assumption that there is a high level of social and political convergence in the domestic sphere capable of providing a unique moral texture to domestic law.

Unfortunately, in contemporary international law discourse, this lack of ‘universal justification’ is hardly ever taken seriously and thus is only dealt with summarily, as a legal detail rather than a substantive issue. At this point, the following pages will argue, the plot thickens. It is true that the origins of international law are not based on consensus. The whole enterprise owes its existence to laws of war, treaty obligations, customary practices and unequal and yet binding contracts, always protecting the sanctity of the Westphalian state system. However, the resultant historical fragmentation of international law into parallel regimes such as trade, environment, human rights, international criminal law, *et cetera*, signify international law’s failure to become a panopticon-like structure.<sup>10</sup> This fragmentation could indeed be regarded as a result of law’s intimate relationship with power, politics, hegemony, discontent, indeterminacy and change. As such, international law could be portrayed, in opposition to the presumed purism of the domestic legal system that reflects a solid political contract among citizens, as a complex platform of conflicts, negotiations, and legal regime-building strategies. These issues are discussed in detail in the chapter on transnational law and fragmented regimes of accountability in international criminal law.

From international law's inception in the Grotian legal tradition onwards, international legal discourse has been shaped by a constitutive tension between a view of law as having a contractual genesis, and a view of law as reflecting conflictual moral claims dictated by the specific demands of contending parties.<sup>11</sup> This tension in turn feeds into two competing accounts not only of legitimation but also adjudication. The former account, which relies upon private law metaphors such as delegation and trusteeship, emphasizes the necessity of deference to the will of states as representatives of political communities. Its alternative, on the other hand, prioritizes the

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<sup>10</sup>Martti Koskeniemi & Pkivi Lein, “Fragmentation of International Law: Postmodern Anxieties” (2002) 5 *Leiden Journal of International Law* 556.

<sup>11</sup> Hersch Lauterpacht, “The Grotian Tradition in International Law” (1946) 23 *British Yearbook of International Law* 1.

emergence of common normative principles in the conduct of legal reasoning and delivery of justice.<sup>12</sup> The latter account also proposes the possibility of a common global legal enterprise of adjudication based on the juxtaposition of constitutional and international legal systems in select areas. In situations where legal standards differ, and where an international body might interpret an act in a way that runs counter to settled features of domestic constitutional law, international law is suggestive of adjustments to be made to the domestic constitutional realm. Examples of this could yield both positive and negative results for domestic constituencies, as is deliberated upon in critical debates on public international law. Ultimately, however, this scenario substantiates the dualists' ultimate fear: the erasure of the domestic legal order and its adjudicative *acquis*. As the present work suggests, international criminal law needs to rise to the challenge of surpassing these two opposing accounts of adjudication and to come up with a judgment-oriented model for the realization of an alignment between international and domestic legal spheres.

Needless to say, constitutions do more than merely provide legal guarantees for the individual by protecting her freedoms against the interventions of public authority, i.e. the state, or other individuals, communities and corporate bodies. Constitutions also indicate that the state has a protective function regarding the rights spelled out by the constitution, including guaranteeing equal access to their use. Meanwhile, the programmatic and open-ended content of fundamental rights cannot be determined by or derived from the traditions of constitutional or administrative law *sui generis*. Furthermore, excessive widening of the province of judicial action could lead to courts outgrowing their role as catalysts of justice provision, and their becoming political actors themselves at the expense of actual politics. Consequently, they could become drawn into the very center of political conflicts and controversies. Tackling interpretive disagreements, in this context, could no longer be considered simply a matter of debating the inner meanings of law itself. Once constitutional adjudication is involved in the resolution of political-epistemic conflicts, the integrative portal of constitutional law is faced with the impossible task of replacing political dialogue. In legal theory, the dualist perspective rejects the validity of international law based on a similar logic. The dualists insist that within a

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<sup>12</sup> It is true that international norms are bound by contractual regimes. Meanwhile, legal codes such as those exemplified by crimes against humanity legislation indicate absolute terms as a result of which they are expected to be endorsed in *statu nascendi*.

heterogeneous and morally divided society—whether defined in domestic or international terms—law should mainly assume the function of establishing a stable framework of rules of interaction, and nothing more. Law, then, is to reveal itself *qua* law. Consequently, judicial discretion built into the process of adjudication is limited to clarifying the antecedent meaning of law and monitoring compliance. This kind of unabashed extrapolation from domestic constitutional law debates to the workings of international law is a commonly used strategy. Though the argument merits attention, it hides the essentially hegemonic nature of legal systems in the domestic realm, as well. This issue is particularly critical for developing a deeper understanding of state criminality, both within the domestic sphere and from a transnational point of view.<sup>13</sup>

Another key dimension of this larger debate on law's legitimacy pertains to voluntary compliance with law.<sup>14</sup> No doubt visible guarantees of institutional and third-party enforcement cannot be identified as the only reasons for why such compliance occurs. In democratic constitutional regimes, the absence of morally reprehensible means for ensuring compliance to law, such as torture, rape or slavery, implies (at least in principle) that members of the constituent political community are bound by a common ideal of justice, above and beyond particularistic factors such as ethnic, religious, historical and cultural identities. Could there not be a similar, underlying agreement concerning a common ideal of justice in international criminal law? As already stated, the difficulty about international law is that a contractual ideal of justice cannot be claimed as the origin of existing legal systems beyond the confines of the modern nation-state.<sup>15</sup> In this specific context, evolving standards of international law are regarded as subject to mechanisms of structurally 'incomplete' approval processes exemplified by treaty and customary law. As such, legal institutional practices such as the adjudication of crimes against humanity are considered lacking in legitimacy. Their adoption requires a common agreement about their normative framing. However, since they are triggered at the behest of aggrieved individuals and as *ex post facto* developments in de-nationalized or hybrid settings, involved states tend to detest

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<sup>13</sup> See Gregg Barak, ed. *Crimes by the capitalist state: An introduction to state criminality* (SUNY Press, 1991); Nina Jørgensen, *The responsibility of states for international crimes* (Oxford University Press, 2000); Rothe, Dawn L. *State criminality: The crime of all crimes* (Lexington Books, 2009); David Luban, "State criminality and the ambition of international criminal law" in *Accountability for collective wrongdoing* (2011): 61-91.

<sup>14</sup> See Frank Michelman, "Reasonable Umbrage: Race and Constitutional Antidiscrimination Law in the United States and South Africa" (2004) 117 *Harvard Law Review* 1378.

<sup>15</sup> See Thomas Nagel, "The Problem of Global Justice" (2005) 33 *Philosophy and Public Affairs* 113.

platforms of adjudication such as those required by crimes against humanity legislation. Contrary to the assertions of contractarian or dualist models of international law, rights and rulings that are defined above and beyond the state are intrinsically political rather than procedural. If perceived as such, international law neither seeks nor depends on full adoption of its codes by constitutional regimes, otherwise known as the expectation of law's working itself pure.<sup>16</sup> The Hayekian values of certainty, stability, and efficiency are no doubt as important for the workings of international law as they are for domestic law; however, conflation of the boundaries of political communities such as those purportedly represented by contemporary states with ethical prerogatives is a dangerous fiction for all concerned. Such a conception of a institutionally closed, historically self-referential and normatively sealed system of domestic law as a coherent and self-reliant legal edifice stands in direct opposition to the production of legal norms concerning state criminality exemplified by crimes against humanity legislation.

In conclusion, if international criminal law is re-introduced as an engaged practice of aligned adjudication and, in *tandem*, as a persuasion-based strategy of new norm production rather than the emphasis being placed on criminalization of select states, its potential for re-contextualizing international law and introducing a new dynamism to local understandings of justice may readily unfold. International criminal law is normative by necessity, and it requires the active usage of political judgment at a systemic level. Wishing otherwise only leads to disastrous results, as seen in the widespread reactions to ICC indictments across the Global South. Normative conduct with legal legitimacy cannot be limited to the domestic constitutional realm. The remaining question is whether such a reflective and involved account of legal legitimacy presents us with the required ability to rise above particular frames of meaning in such a way as to enable valid cross-communal judgments concerning mass criminality. Here, justice as an ideal endorsed by international criminal law would have to operate as a competing template that shows the limitations of our own local intuitions. Would this perspective allow for certain acts to be ruled out universally, such as those coded by crimes against humanity legislation? No matter how the ideal of justice is perceived and ethically patterned—in the case of international criminal law, reference has to be made to the Eurocentric historical background of the emergent legal regimes—singularly violent moral commitments cannot be justified as the cornerstone of a

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<sup>16</sup> See David Dyzenhaus, "The Genealogy of Legal Positivism" (2004) 24 *Oxford Journal of Legal Studies* 39.

normative structure within which valid political judgments can be reached. In other words, legal actors who have committed crimes against humanity cannot justify their actions based on the perceived needs of a given constitutional order, whether European, post-colonial, or otherwise. Vis-à-vis crimes against humanity legislation, the line of demarcation in terms of normative legitimacy cannot be addressed within the confines of how political communities govern themselves. In this regard, this dissertation posits that salvation for international criminal law in this particular area would come from a ‘thin’ rather than a ‘thick’ universalism. Ultimately, a substantive theory of judgment is required to combat the excesses of universalism, institutionalism, legal realism, legal positivism, contextualism and relativism. Understanding *the role of genuine politics* in the formation of legal judgment is an essential part of this endeavor. Indeed, it is this particular aspect of legal judgment that determines the path of both its making and its application in divergent contexts. The world of international criminal law outside the confines of the Hague calls for genuine exploration as a conceptual project as well as a moral imperative.

## **I. METHODOLOGY**

This dissertation uses applied legal theory and comparative international law as its two prime methodological tools in the building and exposition of its main arguments and findings about global applications of crimes against humanity legislation. Its chronological focus is the post-WWI period of adjudication of international crimes, with a particular emphasis on post-2002 developments following the entering into force of the Rome Statute. The overall theoretical framework guiding the present debate on universal jurisdiction and crimes against humanity is indebted to the approach to international law developed and articulated by third generation of legal pluralism and TWAIL [Third World Approaches to International Law] scholarship. The particular debate on collective responsibility, on the other hand, uses concepts utilized in applied political philosophy as they pertain to international criminal law. The examples referenced throughout the text are drawn from international criminal law jurisprudence and case material related to state criminality exhibited in both the global North and the Global South. However, the critical lens used to analyze the overall developments in international criminal law and related accountability regimes prioritizes the experiences of societies in the Global South.

International law's discontents and excesses have always been exhibited at their starkest along its peripheries, a realm that has otherwise come to be known as the Global South.<sup>17</sup> The relationship between the peripheries and the core of international law has been historically captured by TWAIL scholarship. However, as TWAIL scholars readily attest, the Global South is not solely defined by victimhood but by hegemonic and counter-hegemonic relations, shifting and changing class alliances, and regional hubs of power and accumulation, rather than being the southern part of a globe neatly divided into two. The complexity and multiple tensions within the Global South are symptomatic of the general state of affairs in late capitalism. And yet, this is not simply a case of the periphery mirroring what happens at the core. There are voices, forces and opportunities that emanate from the Global South that take issue with, challenge and alter the very enterprise of international law as it is shrouded on a pedestal at the core.

In response to the growth of international law's involvements in the global management of resources, movements of goods and people, and sustaining and embellishing accumulation regimes across the Global South, there emerged a strong call against some of the key tenets of international law since the 1990s. For instance, alter-globalization activists found their voice in alternative governance models built upon North-South and red-green alliances, bringing together organized labor, environmental groups, women's groups, and indigenous groups. Similarly, different genres of protest movements began to propose alternative frames of reference both for seeking justice and challenging traditional limits of adjudication in areas devastated by organized violence, both political and economic. These distinct, albeit overlapping, responses to international law, coming from legal scholars and in particular human rights lawyers linked with the Global South, as well as activists and civil society groups, are indicative of a new conceptual model for how we work with, translate, undo and redo international law.

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<sup>17</sup> Balakrishnan Rajagopal, "International Law and Its Discontents: Rethinking the Global South" (2012) 106th American Society of International Law Proceedings, p. 176, March 2012. Available at <http://ssrn.com/abstract=2304309> [25.04.2017]

### ***A. TWAIL: Both Methodology and Theory***<sup>18</sup>

In this dissertation, I apply the rich and layered conceptual framework inherited from TWAIL scholarship, combined with the activism and scholarship nexus in the Global South, to a very specific area of international criminal law, that of universal jurisdiction as it pertains to crimes against humanity. My point of departure is *not* the implications of the global application of crimes against humanity legislation in international public law since the end of the Cold War. Rather, I strive to elucidate the limitations of this particular legal construct's applicability in a rigid and ahistorical frame of reference dictated by centralized institutions such as international courts. As a conceptual counterpoint to such an absolutist take, I argue that normative strategies centered on the twin concepts of culpability/collective responsibility and human dignity could offer a conceptually coherent and politically buoyant alternative. Furthermore, I argue that there is an urgent need for a new frame of reference concerning *erga omnes* crimes and *jus cogens* norms in order for international criminal law to speak to the realities of societies in the Global South. This cannot be achieved through a simple reiteration of the conceptual precision of crimes against humanity legislation, or the threat of universal jurisdiction pointing to trial at any court in any constituency as seen fit. Indeed, there is an *impasse* concerning applications of international criminal law, but in particular concerning crimes against humanity legislation in the Global South. In this regard, critiquing state-centric notions of sovereign power or underlining the hegemonic role played by international law in calcifying inherent power relations across the globe only provides the beginnings of a critical conversation. In the following pages, I argue that we need to go much further and dare to imagine a different path, leading to adjudication of crimes against humanity much closer to where these crimes are committed. I also suggest that, on the normative plane, the dictum of universal jurisdiction must be domesticated through acceptance of collective responsibility for mass crimes and state criminality.

Critically navigating through the prevailing perspectives on international law, legal pluralism, transitional justice, and legal ethics, this dissertation suggests that the current global restructuring of legal regimes of accountability is reproducing subjectivities of marginalized, dispossessed and deinstitutionalized groups in such a way that the terrain of political struggles are

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<sup>18</sup> See Obiora Chinedu Okafor, "Critical Third World approaches to international law (TWAIL): theory, methodology, or both?" (2008) 10 *International Community Law Review* 371.



reduced to symbolic trials and formulaic sentencing. Here I propose an alternative outlook, obliging the spirit of facing our own demons in the Global South and asking substantive ethical questions about culpability, legal accountability, and societal responsibility concerning egregious crimes that states and societies commit against their own people.

A major consequence of the global restructuring of economies, societies and states in the Global South has been the twin processes of further market integration and privatization of what were once common or public goods, on the one hand, and unprecedented social exclusion, precariousness, and dispossession on the other.<sup>19</sup> These processes naturally resulted in further growth of the marginalized, displaced and deinstitutionalized subaltern classes, who often became the natural targets for mass political violence at times of societal crises linked with internal or regional conflicts. Standard international law debates on post-conflict legal regimes and transitional justice measures barely touch base with this reality of structural inequalities that preceded mass political violence.<sup>20</sup> In this spirit, this dissertation seeks to understand and transform the way in which legal regimes of accountability affecting the Global South are studied in international criminal law. The emphasis is on the larger historical context surrounding these legal regimes and the limitations faced when law is used as the only or supreme tool for the identification and remedy of injustices.

Ultimately, I remain concerned with institutional formalization of ideals such as universal jurisdiction for societal and political mass crimes in international criminal law. Similarly, the emergence of set forms of punishment for crimes falling under the purview of crimes against humanity legislation, as enshrined by the Rome Statute of the International Criminal Court (ICC), deserves critical questioning. In this vein, this work strives to provide an account of interpretations of crimes against humanity legislation against the terrain of self-realization, self-organization and genuine political engagement with the past in the Global South. It is written against apocalyptic and dystopian narratives detailing the usurping and hegemonic monstrosity of international law as much as against the universalistic preaching of it. This constitutes a vital challenge to dominant narratives of international criminal law both from within the *status quo*

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<sup>19</sup> Asef Bayat, "From Dangerous Classes' to Quiet Rebels' Politics of the Urban Subaltern in the Global South" (2000) 15 *International sociology* 533.

<sup>20</sup> Anne Orford et al. *The Oxford Handbook of the Theory of International Law* (Oxford University Press, 2016)

and, to a degree, from the trenches of critical legal studies scholarship. There are inherent limits, as well, to the standard readings of legal pluralism as the savior for all ills of international law.

Conceptually speaking, the Global South is one of the many “gray spaces” positioned between the “whiteness” of legality/certainty, and the “blackness” of irregularity/destruction/death. The vast expansion of such gray spaces in contemporary geographies of conflict reflects the emergence of new types of power relations, which are facilitated and managed by regimes in the Global South themselves. Traditional uses of international law have been a lynchpin of this order, providing tools and methodologies to classify, contain and manage deeply unequal societies. As a possible corrective horizon enabling analytical and normative interventions, I propose focusing on the notion of societal/collective responsibility as a counter-weight to the oppressive dilemmas marking the current discourse and practice of international law as it pertains to crimes against humanity, the most universal of all crimes defined under its aegis.

Overall, in this work I propose two kinds of upheaval. First and foremost, I insist that the story about post-Nuremberg embodiments of crimes against humanity should no longer be told as one where the states and societies in the Global South are striving hard to establish or operationalize accountability regimes, yet have only a few “success stories.” Nor should the accent remain on the universalistic analysis of international criminal law with its focus on the core legal institutions, since their authoritative take on crimes against humanity has proven to be inadequate, inappropriate, or incomplete. My findings imply that as a new generation of TWAIL scholars, we must identify the potential, and the limits, of an external imposition of international criminal law without serious contextualization in both historical and normative terms. Crimes against humanity legislation, and their domestication, are sorely needed by the societies in the Global South—but not in the format in which they have been offered thus far.

### ***B. The Neverland of International Law, or, Searching for the Global South***<sup>21</sup>

How is the concept of the “Global South” to be understood in the context of international (criminal) law? Though this is not the main focus of the present work, it is a very important part of the methodological framework utilized throughout this work. This question is also central for dealing with gross and egregious crimes committed in the Global South, ones that cannot currently be addressed within the domestic legal setting in which the crimes were committed. Applications of the existing dominant conceptual framework of international law to such cases only produce more of the same: repeat scenarios of the universalization of international human rights and humanitarian law, despite the opposing histories of these bodies of jurisprudence and their meaning in the North and in the South. As a conceptual counterpoint to neutralized universalization, and as an activist strategy towards rights protection and demands for accountability, the need for greater conceptual precision in the analysis of international criminal law should be reiterated. Chronologically speaking, the term “Global South” began to be used to overcome the hierarchical or ideological implications of designations such as the Third World.<sup>22</sup> It is also preferred if one refuses to attach epistemological privileges to adjectives of “developing” or “developed” as both are applied to the Global South. In the context of international law, the term owes its legitimacy mainly to TWAIL scholarship. This poses the risk, then, of the Global South becoming a moniker for people who engage in “alternative approaches” to international law. In other words, just as revolutions eat their own children, the very coinage of

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<sup>21</sup> *Neverland* is a fictional location featured in the works of J. M. Barrie, a Scottish children’s literature writer. It was first introduced as “the Never Never Land” in the theatre play titled *Peter Pan, or the Boy Who Wouldn’t Grow Up*, staged in 1904. It is thus commonly known as the home of Peter Pan, who refused to grow up; the concept connotes eternal childhood, hence my reference to it in this specific context.

<sup>22</sup> The idea of the Third World dates back to the late 1940s or early 1950s. In the aftermath of the Second World War, it was increasingly used to try and generate unity and support among an emergent group of nation-states whose governments were reluctant to take sides in the Cold War. These leaders and governments thus displaced the “East–West” conflict with the “North–South” conflict. The rise of Third Worldism as an ideology, on the other hand, coincides with the 1950s and 1960s, and was closely connected to national liberation projects and forms of regionalism in the erstwhile colonies of Asia and Africa, the former mandates and new nation-states of the Middle East, and the “older” nation-states of Latin America. Exponents of Third Worldism in this period linked it to Pan-Asianism, Pan-Arabism, Pan-Africanism and Pan-Americanism. The weakening or demise of the first generation of Third Worldist regimes in the 1960s and 1970s was followed by the emergence of a second generation of Third Worldist regimes that articulated a more radical, explicitly socialist, vision. By the 1980s, however, Third Worldism was in dramatic decline. As a world-historical movement, Third Worldism emerged out of the activities and ideas of anti-colonial nationalists and their efforts to bring together interpretations of pre-colonial traditions and cultures with the utopianism embodied by Marxism and socialism, to sustain post-independence projects. On the history of the term Third World, see Mark Berger, “After the Third World? History, destiny and the fate of Third Worldism” (2004) 25 *Third World Quarterly* 9.

the term Global South introduced the risk of marginalizing the political and intellectual niche it demarcates. Still, it is not only TWAIL scholars who hold onto it, and persistently so. Marxist and neo-Marxist critics of contemporary international legal regimes have long pointed out that the grid of international law is determined by the distribution of political and economic power, which in turn created the phenomenon of Global South in the first place.<sup>23</sup> Accordingly, contrary to what the term “international” implies, there is not and never was substantive equality across the contemporary canvas of nation-states. Nor is there a reason to believe that a global regime of universal justice could be built upon or sustained within the existing system, due to the multiple layers of historical injustice that have gone perpetuated, unattended or unresolved for centuries. The Global South thus emerges as a domain at least partially paralyzed by the zealous plans for its recuperation and neocolonial re-incorporation via the laws, politics, economies, and cultures of the North.

This kind of nihilism concerning the reach and potency of international law is not exhausted by the debates on the North-South divide. The issue assumes even darker tones and more complicated dimensions in terms of South-South relations. Since present work’s focus is on problems and concerns addressed from within the states and societies in the Global South, this is of utmost significance here. Unequal relations within the Global South are often left unattended, only touched upon in terms of the common resistance to the hegemonic nature of North-South relations. Despite this tendency, and if such ruminations on neo-imperialist/post-colonial law can be set aside momentarily, another perspective on international law as it relates to the Global South emerges. This new vista relates to the “internal potential” of adaptations of international law in the Global South, without removing the necessary emphasis on power relations or historical contingencies.

Across the Global South, depending on our choice of delimiting or defining criteria, there exist patterns of injustice and abuse that do not only stem from the historic or current interventions of the North. Equally important is the admission that there is indeed law in the

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<sup>23</sup> For an interdisciplinary historical account of the flirtatious relationship between Marxism, the Left in general, and legal theory, see Roberto Mangabeira Unger, *The Critical Legal Studies Movement: Another Time, a Greater Task* (Verso Books, 2015); Wesley Gould & Michael Barkun, *International law and the social sciences* (Princeton University Press, 2015); Barbara Stark, ed., *International Law and its Discontents: Confronting Crises* (Cambridge University Press, 2015).

Global South, rather than its being a lawless place, or its legalities simply being a simulacrum of “Western Law.”<sup>24</sup> The key issue in this changed context is to decipher variant forms of legality above and beyond the classic legal pluralism debate. Taking into consideration tensions endemic to fragmented and overlapping legal regimes is a good starting point for the task at hand.<sup>25</sup> Secondly, the Global South encompasses a rich canopy of political entities including not just post-colonial nation-states, but also autonomous regional governance structures, federal frameworks, overseeing public bodies such as regional courts and regulatory institutions, civil society organizations, social and political movements, and embedded transnational actors such as INGOs.<sup>26</sup> In other words, it is not a mass of ex-colonial semi-states without teeth to bite, or a sea of non-descript societies totally subservient to the interests of the North.<sup>27</sup> Societies in the Global South are not replicas of a post-colonial or post-imperial master model. Rather, they harbour their own class structures, variant patterns and regimes of capital accumulation and labor control, and different strategies of extraction and amassing of wealth. They also exhibit a wide range of regional alliance-building trends and a canopy of constitutional arrangements that regulate the relations between state and society. Consequently, it is apt to suggest that the Global South possesses a multitude of “unique characteristics” as an object of international law and administration, in particular international criminal law, rather than being a derivative of legal realities emanating elsewhere, in the proverbial North.

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<sup>24</sup> Abram Chayes & Antonia Handler Chayes, *The new sovereignty* (Harvard University Press, 1998).

<sup>25</sup> Legal pluralism has become common currency in many contemporary debates on law, globalization and post-coloniality since the 1980s. Its most recent proponents claim that a new form of global legal pluralism represents both the most accurate description of law in a global context and the best normative option. At the descriptive level, transnational legal pluralism is indeed considered more reliable than state-based accounts. At the normative level, legal pluralism is similarly trusted to open up spaces for previously unheard voices. On the issue of the limitations of legal pluralism, however, see Mariano Croce & Marco Goldoni, “A sense of self-suspicion: global legal pluralism and the claim to legal authority” (2015) 8 *Ethics & Global Politics* 1; Jiří Přibáň, “Asking the Sovereignty Question in Global Legal Pluralism: From “Weak” Jurisprudence to “Strong” Socio-Legal Theories of Constitutional Power Operations” (2015) 28 *Ratio Juris* 31; Mireille Delmas-Marty, *Ordering pluralism: A conceptual framework for understanding the transnational legal world* (Bloomsbury Publishing, 2009).

<sup>26</sup> For an all-encompassing debate on non-state actors in international law, see Math Noortmann, August Reinisch & Cedric Ryngaert, eds., *Non-state actors in international law* (Bloomsbury Publishing, 2015).

<sup>27</sup> On the methodology of writing through the prism of the Global South, see the seminal work of Boike Rehbein, *Critical Theory After the Rise of the Global South: Kaleidoscopic Dialectic*. Vol. 5 (Routledge, 2015). Also see R. Connell, *Southern Theory: The global dynamics of knowledge in social science* (Polity Press, 2007); G. Therborn, “Entangled Modernities” (2003) 6 *European Journal of Social Theory* 293; S. Randeria, “Entangled Histories of Uneven Modernities: Civil Society, Caste Solidarities and Legal Pluralism in Post-Colonial India” in: Yehuda Elkana, et al. (eds.) *Unraveling Ties: From Social Cohesion to New Practices of Connectedness* (Campus Verlag: 2002) at 284-311; S. N. Eisenstadt, “Multiple Modernities” (2002) 129 *Daedalus* 1; Anthony Giddens, “Living in a Post-Traditional Society” in Ulrich Beck, Anthony Giddens & Scott Lash, *Reflexive Modernization: Politics, Tradition and Aesthetics in the Modern Social Order* (Polity Press, 1994).

Most of all, the Global South is understood as a politico-economic designation broadly indicating the contours of the uneven development patterns of historical capitalism.<sup>28</sup> The term contains all necessary references for histories of colonization, de-colonization, and post-coloniality, as well as structurally conditioned material and political inequalities cozily coupled up with state-induced injustices. However, these factors by themselves do not explain how international criminal law works or how it could work. Uneven development does not suffice as a shortcut to societal accountability and collective responsibility. With these convictions in mind, in the rest of this chapter debates on universal jurisdiction in international criminal law are addressed, not from the vantage point of a North imposing law and order onto the Global South, but from the angle of mitigation and litigation in the context of emergent hybrid regimes of accountability within the Global South itself. In particular, the possibility of a regime of “common but differentiated responsibilities” regarding crimes against humanity committed by states against their own citizenry will be brought into focus.<sup>29</sup> The over-used dichotomies of North/South, developed/developing and First World/Third World offer no new or substantive clues here. Urgent questions persist, but we must look for answers elsewhere. For instance, how could we think through, rather than simply think about, unequal distributions of material wealth and political power at a global scale, vis-à-vis their effects on the Global South? How do we deal with societal crimes committed within the Global South by regimes themselves? Could specific

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<sup>28</sup> The critical literature on the subject includes Anthony Anghie, *Imperialism, sovereignty and the making of international law*. Vol. 37. (Cambridge University Press, 2007); Mark Goodale and Sally Engle Merry, eds. *The practice of human rights: Tracking law between the global and the local* (Cambridge University Press, 2007); Bhupinder S. Chimni, "Third World approaches to international law: a manifesto" (2006) 8 *Int'l Comm. L. Rev.* 3; Boaventura de Sousa Santos & César A. Rodríguez-Garavito, eds., *Law and globalization from below: towards a cosmopolitan legality* (Cambridge University Press, 2005); Obiora Chinedu Okafor, "Newness, imperialism, and international legal reform in our time: a TWAIL perspective" (2005) 43 *Osgoode Hall LJ* 171; Balakrishnan Rajagopal, *International law from below: Development, social movements and third world resistance* (Cambridge University Press, 2003); and Boaventura de Sousa Santos, *Toward a New Legal Common Sense: law, globalization, and emancipation* (Cambridge University Press, 2002).

<sup>29</sup> For international criminal law regimes, the importance of the notion of crimes against humanity (CAH) is two-fold. These are offensive acts *against human dignity* committed as *part of widespread or systemic attack* against *civilian populations*. They can be a series of events or a one-time event, planned and committed by state or non-state organized groups, supported by a distinct policy or ideology. As such, they are not context-bound. Secondly, they signify a sense of justice that hinges upon dictates of the public conscience. See Eveylon Mack & Corrie Westbrook, "Does Customary International Law Obligate States to Extradite or Prosecute Individuals Accused of Committing Crimes against Humanity" (2015) 24 *Minn. J. Int'l L.* 73; Leila N. Sadat, "Codifying the 'Laws of Humanity' and the 'Dictates of the Public Conscience': Towards a New Global Treaty on Crimes Against Humanity" in *On the Proposed Crimes Against Humanity Convention*, Morten Bergsmo & Song Tianying, eds. (Torkel Opsahl Academic EPublisher 2014) at 17-46; Cherif M. Bassiouni, "Crimes against humanity: the case for a specialized convention" (2010) 9 *Wash. U. Global stud. l. rev.* 575.

needs of criminal justice, as they pertain to universal jurisdiction, be served within existing domestic legal frameworks, but via novel forms of collaboration facilitated through hybrid mechanisms—through which the South can use international criminal law or international human rights law jurisprudence for its own internal purposes?

Ultimately, neither supporters of the universal jurisdiction paradigm, nor the group of scholars whom we might call “international law universalists,” can be trusted with the task of articulating an adequate notion of justice pertaining to most egregious crimes committed by states against their own people. Both offer solutions that don’t fit, and insist on priorities and methods that don’t deliver. Once all is said and done in some criminal court, the work of creating a more just society has only begun.<sup>30</sup> Furthermore, the biggest obstacle to developing a more nuanced and grounded approach to mass crimes is already an erosion of the North/South divide. The greatest impediment to reaching a substantive understanding of the legitimacy, efficacy, or even possibility of international law in both the Global North and the Global South is the ascription of preconceived consequences to democratic constitutionalism, which owes its crowned position to the persistence of the statist paradigm in international law. Viewed in its lens, anything “international” looks suspect due to its presumed lack of legitimacy. Accordingly, legal practices emerging under the UN Charter, or courts such as the International Criminal Court (ICC), the European Court of Human Rights (ECHR), or general customary international law, are declared to be troubled by unique problems of coherence, efficacy and legitimacy, problems which national domestic law supposedly does not suffer from. Statist constitutional thinking distorts the assessment of multifocal, transnational, and in general pluralist legal practices. It exaggerates the value of domestic constitutional practices, to the point of casting a thick cloud of suspicion over any form of legal normativity beyond state-made law. Last but not the least, statism—particularly the kind that is coupled with international law universalism—neglects the connection between domestic legitimacy and efficacy and the wider regional or global contexts in which public law practices unfold. This is yet another instance of misguided separation. National and transnational legal and political practices are much more closely connected than conventional legal wisdom of

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<sup>30</sup> There are myriad examples of universalist international law scholarship, as it dominates the theoretical debates in this field. Suffice it to say, some make a stronger case than others, and they therefore constitute worthy interlocutors for the ongoing debate on the applications of universal jurisdiction as seen from the perspective of the Global South. See for instance the overviews provided by Dennis Patterson, “Cosmopolitanism and Global Legal Regimes” (2015) 67 *Rutgers UL Rev.* 7; and Cedric Ryngaert, *Jurisdiction in international law* (Oxford University Press, 2015).

either kind allows us to acknowledge.

To summarize, the statist paradigm of democratic constitutionalism, along with its idealist distortions leading to the presumption of absolute legitimacy of state law (and the *faux* realism of rejecting all law beyond the state-made kind), constitute the framework within which international law is most commonly imprisoned. The efficacy of domestic constitutionalism is so exaggerated that, especially in the area of human rights law, it reaches dangerous proportions. The standard reason given is a quotidian argument about the lack of domestic constitutional provisions for international human rights law, with repeated references to the enactment of emergency measures at times of breakdown of civil order and civil war. Meanwhile, law remains fragile and vulnerable to social and political forces both inside and outside the domestic sphere. In addition, national domestic law is often conditioned by and dependent upon the wider legal and political context in which it takes shape. Legal scholars of the TWAIL persuasion know this all too well. Perhaps one may go so far as to argue that the statist framing of international law, in the form of a renewed devotion to democratic constitutionalism, is just another Westphalian fantasy *par excellence*, albeit replaying itself some 400 years later and in a distinctly post-colonial context.

At this point, a cautionary note is necessary. The limited scope of universal jurisdiction for select crimes such as crimes against humanity, and its careful application through institutions such as hybrid courts, as discussed in the upcoming pages of this dissertation do not constitute proof that international law is inherently legitimate. An ethically cloaked international legalism suggesting that we all have an innate disposition to appreciate law in select areas of criminality and violence, otherwise known as the common sense approach to law, is not a requirement for endorsing hybrid courts, either. Nonetheless, it is apt to insist that the statist paradigm suggests falsely that state-level law concerning restorative justice for political violence and mass crimes must or can be framed solely at the domestic level. The presumption that there is a fundamental difference or an unsurpassable separation between state law and law beyond the state, at least in the realm of public law, is itself not only false but also anathema to the very history of human rights struggles. In this vein, horizontal connections among burgeoning international, regional and hybrid adjudication mechanisms, as well as vertical relations between international courts and domestic ones, are the axes upon which universal jurisdiction in the Global South must be



scrutinized.

Since the foundation of the ICC, there have been substantial changes in the ethos as well as the methods underlying the operationalization of international criminal law in the Global South. Whereas the norm that once informed international adjudication was the top-town imposition of legal precepts, there is now a growing body of hybrid jurisprudence, as well as an emergent class of national jurisprudence conversant in international criminal law. Indeed, a close look at the contemporary international judicial landscape would quickly draw our attention to the role of national courts in applying international law, *despite* the myriad jurisdictional and normative conflicts and compliance problems pertaining to universal jurisdiction in select areas such as crimes against humanity. This seems to be the way South for top-down approaches to international law, a predicament that I intend to stand against throughout this work.

## ***Chapter I. Beware the Gift of a White Elephant<sup>31</sup>: Topographies of Universal Jurisdiction in International Law, Legal Pluralism and the Curious Case of the International Criminal Court***

### **INTRODUCTION**

Legal theory has long accentuated the institutional distinctiveness of law from other areas of society, portraying law as discrete, internally coherent and thus self-referential and almost autonomous.<sup>32</sup> To distinguish law from other normative elements in society, one does not need to

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<sup>31</sup> The White Elephant refers to a valuable possession whose cost, and in particular the cost of its upkeep, exceeds its supposed usefulness; it is regarded as a metaphor signifying an elegant liability. The term derives from the sacred white elephants kept by traditional Southeast Asian monarchs in Burma, Thailand, Laos, and Cambodia. To possess a white elephant was historically regarded as a sign that the monarch was ruling with justice and the kingdom was blessed with peace and prosperity. However, since the animals were considered sacred and laws protected them from labour, receiving the gift of a white elephant from a monarch was both a blessing and a curse: a blessing because of the animal's sacred nature, and a curse because the animal could not be put to practical use and was very costly to look after and keep alive.

<sup>32</sup> In his *The Concept of Law* ([1961] 1994), Herbert L. A. Hart provided a canonical analysis of the relation between law, coercion, and morality, and addressed the question of whether and when law should be conceptualized as a coercive order or as a moral command. In Hart's view, there is no logically necessary connection between law and coercion or between law and morality. He also takes a stance against imposing a misleading appearance of uniformity on different kinds of laws and on different kinds of social functions that law may perform. Instead, he posits the existence of variety in the content, mode of origin, and range of application of law. Accordingly, laws that impose duties or obligations on individuals are described by Hart as "primary rules" of obligation. In order for a system of primary rules to function effectively, he then argues that "secondary rules" will be necessary to provide an authoritative statement of the primary rules. Secondary rules allow legislators to make changes in the primary rules if the primary rules are found to be defective or inadequate. They also enable courts to resolve disputes over the interpretation and application of the primary rules. The secondary rules of a legal system thus include rules of recognition, rules of change, and rules of adjudication. Meanwhile, secondary rules themselves, i.e. the formal qualities of law, do not guarantee delivery of justice in and of themselves. If the primary rules are not sufficiently clear or intelligible, then there may be uncertainty about the obligations that have been imposed on individuals. Neither are primary rules sufficient, in and of themselves, to establish a system of laws that can be formally recognized, changed, or adjudicated. Primary rules must be combined with secondary rules in order to establish a legal system. A second distinction Hart introduces is between "external" and "internal" points of view with respect to how the rules of a legal system may be described or evaluated. The external point of view is that of an observer who does not necessarily have to accept the rules of a given legal system. The internal point of view, on the other hand, is that of individuals who are governed by the rules of a given legal system and who accept these rules as standards of conduct. According to Hart, there are two minimum requirements that must be satisfied in order for a legal system to exist: private citizens must obey the primary rules of obligation, and public officials must accept the secondary rules of recognition, change, and adjudication as standards of official conduct. Finally, according to Hart, there is no necessary logical connection between the content of law and morality, and the existence of legal rights and duties may be devoid of any moral justification. For this debate, see HLA Hart, "Positivism and the Separation of Law and Morals" (1958) 71 *Harvard Law Review* 593. Hart's interpretation of the relation between law and morality significantly differs from that of Ronald Dworkin, who in his *Law's Empire* (1986) suggests that every legal action has a moral dimension. Dworkin rejects the concept of law as acceptance of conventional patterns of recognition, and describes law as an interpretive process combining jurisprudence and adjudication. In this general context, international law is seen as problem-laden by Hart, since it may not possess all of the elements of a fully developed

negate the fact that law is indeed a broad phenomenon. One immediate way in which law's multidimensionality, complexity, and lack of unity can be identified is to look at law beyond state boundaries. In this sense, looking at the contemporary legal landscape in the age of late capitalism and globalization is both challenging and rewarding for the attempt to capture the complexities of law. Meanwhile, the historical fact of the coexistence of multiple legal orders says nothing as to their moral worthiness or capacity for justice. In this sense, recognition of the complexity and plurality of contemporary legal regimes is only the starting point for present-day legal theory.

In this opening chapter, I will endeavour to answer the question of why we should care about the contemporary multiplicity of legal regimes, otherwise known as transnational law, in the specific context of accountability for state criminality. If state interests and domestic judiciary interpretations of international law are by and large coincident with preferences of national political leadership and local legislative concerns, what would be the point in reaching for a theory of international law that is not fixated on the Westphalian order of things? How are we to appreciate the consolidation of customary law and regulatory regimes that go above and beyond the direct mandate of the executive powers of states and domestic justice systems? State-centric accounts of international law no doubt entertain a rather rigid view of international law and of the actors who occupy the contemporary legal universe. In contradistinction, alternative accounts discussed in this chapter provide a depiction of international law as transnational law and, as a result, present us with a different topographical view of accountability regimes. In this changed context, international-cum-transnational law is seen as a complex deliberative process. Furthermore, international law is seen as a battleground for multifarious interests and actors, only one of which is the state, each trying to determine legal or semi-legal outcomes and judicial

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legal system. International law may lack secondary rules of recognition, change, and adjudication. International legislatures may not always have the power to enforce sanctions against nations who disobey international law. Finally, international courts may not always have jurisdiction over legal disputes between nations. In contradistinction, according to Dworkin legal theory does not merely identify the rules of a legal system, but also interprets and evaluates them. A complete legal theory must consider not only the relation between law and coercion (i.e. the force of law), but also the relation between law and rightfulness or justifiability (i.e. the grounds of law). On this issue, also see Herbert L.A. Hart, "The New Challenge to Legal Positivism (1979)" (2016) 36 *Oxford Journal of Legal Studies* 459 [the reprint of the original lecture delivered in 1979], and Andrzej Grabowski, "The Missing Link in the Hart–Dworkin Debate" (2016) 36 *Oxford Journal of Legal Studies* 476.

processes to their benefit at a global level.<sup>33</sup> This alternate take on international law acknowledges the inherently plural (though not necessarily pluralist) composition of law, and engages with the multiple processes involved in the making and utilization of such law. This determination, in turn, is crucial for fostering a systemic understanding of *jurispathic* and *jurisgenerative* dimensions of international law, and could lead to a fruitful expansion of theories of jurisprudence concerning state criminality beyond the domain of domestic legal regimes.<sup>34</sup>

The question that guides this chapter's discussion of the fragmented, plural and transnational nature of contemporary international law is whether the *nomos* (normative universe) of Robert Cover's jurisprudential account of law, when applied to a global context, is substantively different from what we are accustomed to dealing with in national, domestic contexts.<sup>35</sup> This discussion also lends itself to addressing the tension between ideas of monism and pluralism in legal scholarship. As I already outlined in the opening of this work, legal monism signifies a pervasive positivist understanding of law as a unified structure of valid rules and principles contained within a solid institutional framework.<sup>36</sup> Legal pluralism, on the other

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<sup>33</sup> For a promising and hopeful account of the making of international law in the era of transnational politics and global economy, see Janet Koven Levit, "A bottom-up approach to international lawmaking: the tale of three trade finance instruments" (2005) 30 *Yale J. Int'l L.* 125. Also see Ralf Michaels, "The re-state-ment of non-state law: the state, choice of Law, and the challenge from global legal pluralism" (2005) 51 *Wayne L. Rev.* 1209; Balakrishnan Rajagopal, "The role of law in counter-hegemonic globalization and global legal pluralism: lessons from the Narmada Valley struggle in India" (2005) 18 *Leiden Journal of International Law* 345; Paul Schiff Berman, "Global legal pluralism" (2006) 80 *Cal. L. Rev.* 1155; Ralf Michaels, "The true lex mercatoria: law beyond the state" (2007) 14 *Indiana Journal of Global Legal Studies* 447; Peer Zumbansen, "The law of society: governance through contract" (2007) 14 *Indiana Journal of Global Legal Studies* 191.

<sup>34</sup> Robert Cover theorizes "jurisgenesis" or the creation of legal meaning as a process that is not reliant on the state or any given central authority. Instead, the normative world or *nomos* within which *jurisgenesis* occurs is defined as the amalgamation of multiple social, historical, cultural and political factors, leading to various "interpretive commitments." In Cover's work, the pronouncements of judges and legislatures constitute only a particular *nomos* that cannot encompass all that is possible in terms of creation of legal meaning. In this sense, state law in its traditional definition is not considered the central or superior source of *jurisgenesis*. Cover's work on Talmudic traditions and other renditions of law provides examples of several religious communities inhabiting a distinct *nomos* in the context of their religious commitments. These traditions identify their own paradigms for lawful behaviour and reduce the state-made law and its impositions to one element in their normative environment. In other words, while each *nomos* is constituted in part by state or central law, each has a different interpretation of it. Amongst this plenitude or plurality of laws, Cover argues that the function of the state is *jurispathic*, or disciplinary and violence-prone, rather than engaged in norm creation. The function of the judge in this context is defined as suppressing the plurality of law by choosing one interpretation as the official and justiciable one. See Robert M. Cover, "Nomos and Narrative" (1983) 97 *Harv L Rev* 4.

<sup>35</sup> Robert M. Cover, *Nomos and Narrative*, *supra* note 21.

<sup>36</sup> The epistemological foundations of legal monism were most succinctly theorized by the Vienna School of Jurisprudence and its leading proponents, on the basis of its crucial elements: the *Grundnorm*, the hierarchy of norms, and the unity of the law. Subsequently, the theory of legal monism was developed and defended against both dualism and pluralism in terms of its explanatory power in describing the trigonal relationship between national law,

hand, emphasizes the multiplicity of legal practices and the hybridity of socio-political platforms upon which legal edifices are built in the forms of institutions, rule-based structures, and regimes. At least for the last two decades, legal pluralism has already become common currency in contemporary debates on law and globalization, its main claim being that a form of global legal pluralism represents both the most accurate description of law within globalization and the best normative option. At the descriptive level, global legal pluralism is considered more reliable than state-based accounts. At the normative level, global legal pluralism is understood as providing a platform for opening up the legal realm to previously unheard voices.<sup>37</sup>

In the following pages, I argue that in the area of international law, the transnationalist view allows current debates on legal pluralism to serve in the construction of a new understanding of law in a global context, albeit with important limitations. The still operational conservative emphasis in legal theory on the singularity, uniformity, harmonization, and totality of legal systems, depending on the context within which law is discussed, could be relaxed both empirically and normatively through the *ethos* of legal pluralism combined with a re-inscription of international law as transnational law.<sup>38</sup> In this case, the study of international law would no longer be circumscribed by inquiries about how we maintain the integrity of law as a system. It would also not be limited by the need to be socially responsive, adaptive, culturally inclusive and respectful of existing normative systems.<sup>39</sup> Instead, it would allow as much attention to injustice

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regional law, and public international law. On the philosophical foundations of monism, see Luke MacInnis, "Two Concepts of Monism: Axiomatic and Asymptotic" (2015) 77 *The Review of Politics* 603. For critiques of monism, see Roderick Macdonald, "Metaphors of multiplicity: civil society, regimes and legal pluralism" (1998) 15 *Ariz. J. Int'l & Comp. L.* 69; Mirjam Künkler and Yüksel Sezgin, "The unification of law and the postcolonial state: The limits of state Monism in India and Indonesia" (2016) 60 *American Behavioral Scientist* 987; Violeta Moreno-Lax and Paul Gragl, "Introduction: Beyond Monism, Dualism, Pluralism The Quest for a (Fully-Fledged) Theoretical Framework: Co-Implication, Embeddedness, and Interdependency between Public International Law and EU Law" (2016) 35 *Yearbook of European Law* 455.

<sup>37</sup> See Peer Zumbansen, "Transnational legal pluralism" (2010) 1 *Transnational Legal Theory* 141; and Emmanuel Melissaris, *Ubiquitous law: legal theory and the space for legal pluralism* (Routledge, 2016). No doubt, legal positivism's failure to adequately capture the complexity of contemporary legal orders makes legal pluralism all the more preferable as a descriptive theory of law. However, legal pluralism does not necessarily offer a normatively desirable view of law, unless it is supplemented by a theory of critical legal justice. On the limits of legal pluralism, see Sionaidh Douglas Scott, *Law after modernity* (Bloomsbury Publishing, 2013).

<sup>38</sup> See Margaret Davies, "The Ethos of Legal Pluralism" (2005) 27 *Sydney Law Review* 317. Also see Jonathan Crowe, "The limits of legal pluralism" (2015) 24 *Griffith Law Review* 314; and Margaret Davies, *Law Unlimited* (Routledge, 2017). This debate continues amongst legal theory scholars and remains loyal to the format that was originally defined by the Hart-Raz-Dworkin exchanges.

<sup>39</sup> This said, scholars such as John Griffiths make the point of distinguishing between "weak" and "strong" pluralism. Weak legal pluralism indicates that differences are recognized and managed by a dominant legal system. An example for this in the area of international law would be the ironing out of inconsistencies between laws of the state and laws

and discontent as to harmonization and consent. Indeed, the presumed conflict and perpetual conceptual tension between a depiction of a singular, all-controlling international law with universal applicability and one of co-existing legal orders within a complex web of relations is an outmoded view. Quasi-legal decision-making bodies (such as hybrid courts or regulatory bodies), the internal governance systems of large organizations, alternative modes of dispute resolution and arbitration, regulative systems with a global reach, and myriad other forms and settings that produce legal or law-like effects clearly indicate the multiplicity of legal regimes at the transnational level, encompassing the domestic, the international, and a third dimension that cannot be reduced to either of the first two, the global.<sup>40</sup> The critical issue is how to read this complexity within a historical context that includes state-based domestic jurisprudence without prioritizing it at the expense of all else.

The persistent focus on the singularity of legal discourse as an internally coherent system or on the institutional qualities of legal regimes, including the more recent version focusing on novel forms of constitutionalism, has become a source of frustration for a growing number of

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dictated by international bodies and covenants, a practice commonly known as harmonization. This definition, however, leaves out the importance of judiciary interpretation during and after the adaptation process. Perhaps better examples would be arbitration tribunals and alternative dispute resolution mechanisms operating within the parameters of existing national legal systems and in full regard of constitutional principles and premises. It should also be noted that the recognition of such normative/substantive differences, to the extent that they are contained and sealed within the realm of dominant law, does not constitute a threat to the doctrine of centralism. In contrast, “strong” legal pluralism is defined as the irreducibility of differences of legal doctrines and/or applications and procedures under the rubric of a singular institutional authority such as a state or an international court. Thus, in the context of strong legal pluralism, two or more legal regimes co-exist in tandem and there is endemic tension between different legal orders, and a dynamic and often conflictual relationship exists between the different bodies of law attending to same or similar realms. It is also important to note that this is not simply a matter of jurisdictional reach. The aforementioned tensions and conflicts may pertain to the substantive elements of the law, as well. In this latter context, the claims of singularity and centrality are inherently unstable and self-contradictory. See John Griffiths, “What is Legal Pluralism?” 24 *Journal of Legal Pluralism and Unofficial Law* 1 (1986). On varieties of legal pluralism without direct reference to international law, see *inter alia*, MB Hooker, *Legal pluralism: an introduction to colonial and neo-colonial laws* (Clarendon Press, 1975); Sally Engle Merry, “Legal pluralism” (1988) 22 *Law & Society Review* 869; Paul Ricoeur, “The Plurality of Sources of Law” (1994) 7 *Ratio Juris* 272; Martha-Marie Kleinhans and Roderick MacDonald, “What is a Critical Legal Pluralism?” (1997) 12 *Canadian Journal of Law and Society* 25; Brian Tamanaha, “A Non-Essentialist Version of Legal Pluralism” (2000) 27 *Journal of Law & Society* 296; and Christoph Eberhard, “Towards an Intercultural Legal Theory” (2001) 10 *Social & Legal Studies* 171 (2001). Meanwhile, in the area of theories of jurisprudence, whether Dworkin’s work delivers a legal pluralist ethos remains debatable, as he is often accused of reducing the pluralism of the community that bestows a meaning onto law into a singular entity with a definable set of moral values and normative choices. See Ronald Dworkin, *Law’s empire* (Harvard University Press, 1986).

<sup>40</sup> See Peer Zumbansen, “Transnational Law” in *The Encyclopedia of Comparative Law* (Edward Elgar 2006), 738-754.

legal scholars and legal practitioners.<sup>41</sup> State law by and large continues to be paraded as a superior enterprise, characterized by its coherence and internal consistency, and by its autonomy from other, non-state-related normative domains. In this context, the first question I will attempt to answer here is whether legal pluralism, when applied to international law, could produce the desired change of optics and allow for a focus on multiplicity, diversity, and conflict.<sup>42</sup> The next question is to what extent a legal pluralistic frame of reference would allow us to understand the inner dynamics of fragmented and sometimes overlapping accountability regimes in international law, particularly in relation to the phenomenon of state criminality. This latter inquiry will be undertaken through a discussion of universal jurisdiction.

## **I. APPLICATIONS OF LEGAL PLURALISM IN INTERNATIONAL LAW: A TOPOGRAPHICAL OUTLOOK**

The tenuous relationship between international law and theories of jurisprudence, as briefly touched on in the introduction to this chapter, has traditionally created a barrier to the establishment of a framework within which international law could be understood from the point of view of legal theory. To say the least, international law was posited as lacking the second order rules and regulations defined by H.L.A. Hart and thus lacking in substantive tenets of a genuine legal system.<sup>43</sup> In the nexus of international law and international politics, on the other hand, the relationship appears to be somewhat less troublesome. Often, international relations scholars would look for three elements in order to determine the existence of a legal system: a legal concept, a structure or framework capable of supporting its operationalization as law, and the political consensus to recognize it as law.<sup>44</sup> This mode of thinking promises to look beyond the debate over ‘legal norm creation’ in international law, and to expand analysis of the relationship

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<sup>41</sup> See Stephen Gill and A. C. Cutler, *New Constitutionalism and World Order* (Cambridge University Press 2014).

<sup>42</sup> The term “two optics” as a methodological approach was originally coined by Robert Keohane. See Robert Keohane, “International relations and International law: Two optics” (1997) 38 *Harvard International Law Journal* 487.

<sup>43</sup> See Jeffrey Danof, Steven Ratner & David Wippman, *International Law: Norms, Actors, Process* (Kluwer Law, 2015).

<sup>44</sup> See Paul F. Diehl, Charlotte Ku and Daniel Zamora, *The Dynamics of International Law: The Interaction of Normative and Operating Systems* 57 INT’L ORG 43 (2003). For introducing me to this literature first hand, I am indebted to Craig Scott’s and Ruth Buchanan’s graduate seminars on Transnational Law and Peer Zumbansen’s work on the subject undertaken at Osgoode Hall Law School.

between theories of jurisprudence and international law. Consequently, it dwells on international law's effectiveness and target constituencies. From this perspective, international law is not seen only as a coherent collection of rules, prescriptions, and aspirations governing the conduct of states and other international actors through legal processes and jurisdictional negotiations; it is described as a complex structure composed of norms, actors, processes and institutions. Interventions by international relations scholarship has also cut short the somewhat stale conversation on treaty implementation and compliance. In its place, their work invites us to turn our attention to institutional and system-wide normative characteristics of international law, as well as to the authority and governance structures endemic to its operations.

In order to achieve such an insight from within legal scholarship, and not only with reference to international relations theory pertaining to international law, a broader frame of analysis is needed around the nature of law and its internal and external meanings, as the scale is enlarged to global dimensions. In the following pages, I will provide a brief account of select debates in the history of legal pluralism scholarship and their applications to international law. The sequence starts with a broad overview of legal pluralism and the legacy of the New Haven School. It then proceeds with a specific branch of international law scholarship, TWAIL (Third World Approaches to International Law) and its effects on our thinking in terms of understanding international law. This short overview concludes with contemporary interjections made by legal theorists who strive to bridge the gap between jurisprudential scholarship and studies of international law from a radical, reflexive or critical legal pluralism perspective, otherwise known as third-generation legal pluralist scholarship. Although my very modest attempt at creating a topography of critical approaches to international law could no doubt include the rich and layered debates exemplified by the work of critical legal studies scholars, feminist legal theorists, critical race theorists, postcolonial debates on justice, and other very important schools of thought, these are not explicitly included. This is due to the limitations posed by my choice of focus, legal pluralism and what it can and cannot offer for rethinking accountability regimes in international law.

Until recently, legal pluralist scholarship was divided into two main debates. 'Classical' legal pluralism refers to anthropological and socio-historical analyses of legal systems of ex-colonial or post-colonial societies, which had dual or multiple legal systems derived from



indigenous pre-colonial folk, communal, or customary law on the one hand and imperial law on the other. In contrast, ‘second wave’ legal pluralism entertained the insight that all societies, formerly colonized or not, are composed of multiple ‘semi-autonomous’ fields of normative control and legal discourse. This latter position purported the co-existence of many forms of law, the majority of which are non-territorial, non-state, local, or international, and horizontal rather than hierarchical. Both schools of legal pluralism concentrate on legal plurality, and challenge the presumption that state law is singular or indeed a superior source for legal meaning or conduct. However, they have paid scant attention to the jurisprudential characteristics of the plurality of legal discourses, except in the debate initiated by the work of Robert Cover and continued by Gunther Teubner and David Trubek.<sup>45</sup> I will call this the ‘third wave’ of legal pluralism, whereby legal scholarship developed a rich analytical approach for the study of different modes of law and the struggle amongst them in terms of co-existence within a dynamic normative landscape embodying imminent tensions. In this context, the work of contemporary legal scholars such as Ruth Buchanan, Marti Koskeniemi, Rajagopal Balakrishnan, and Issa Shivji, among others, attends to the conundrums of international law. This latest debate does not assume that pluralism in law is merely exhibited in a multiplicity of ‘semi-autonomous’ systems separated by territory, culture, or history. Rather, an attempt is made to theorize law as a process in which legal actors, legal subjects and legal norms are interdependent and effected by power and politics at large. The third wave took the legal pluralist premise that law cannot be defined according to a fixed set of criteria one step further, and began to ask what ‘other’ criteria are to be used for the identification of different forms of law and legal regimes, distinct from those espoused by canonized theories of jurisprudence. As legal pluralism began to be reframed by critical international law scholarship from within the Global South, the establishment of a theoretical nexus between a plural view of law and the various manifestations of socio-economic and

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<sup>45</sup> See Gunther Teubner, “The Two Faces of Janus: Rethinking Legal Pluralism” (1992) 13 *Cardozo Law Review* 1443; Gunther Teubner, “The Anonymous Matrix: Human Rights Violation by ‘Private’ Transnational Actors” (2006) 69 *The Modern Law Review* 327; Gunther Teubner, *Constitutional fragments: societal constitutionalism and globalization* (Oxford University Press, 2012). Also see David Trubek, Yves Dezalay, Ruth Buchanan, and John R. Davis, “Global Restructuring and the Law: Studies of the Internationalization of Legal Fields and the Creation of Transnational Arenas” (1993) 44 *Case W. Res. L. Rev.* 407; David Trubek, Jim Mosher and Jeffrey S. Rothstein, “Transnationalism in the Regulation of Labor Relations” (2000) 25 *Law & Social Inquiry* 1187, and Andrew Lang, *World trade law after neoliberalism: Reimagining the global economic order* (Oxford University Press, 2011).

political power became manifest.<sup>46</sup>

Theoretically speaking, understanding legal plurality is conditional upon the recognition of irreducibly different accounts and experiences of law at a global scale. In this sense, there is a need for the legal pluralism debate to move beyond empirical descriptions of different legal regimes as straightforward socio-legal facts. Precisely in such a spirit, the third wave of legal pluralism attends to the conceptual complexities inherent in the production and maintenance of legal regimes in a world-historical context. This genre of thinking about law and legality is capable of attending to the ways normative systems are construed as discursive practices rather than mere products of institutions. In addition, the ideals of closure and order are coupled with an appetite for disorder, chaos, change, and exceptionalities that prove the rules. In this sense, as Brian Tamanaha redefines it, the central question of legal pluralism can no longer be the different forms that ‘law’ takes, but what law is in its multifarious definitions<sup>47</sup> Appreciation of incommensurably different conceptualizations of law can lead to a reflective analysis of the historical specificity of mainstream Western definitions of law, as seen in TWAIL scholarship.<sup>48</sup> Furthermore, by moving beyond descriptive recognition of the multitude of legal or law-like normative systems, a critically oriented pluralism could point to the inherent diversity of legal regimes at a global scale—and so allow for the discussion of plural sources, plural modes of reasoning, and complex and contradictory forms of interaction between different legal regimes.

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<sup>46</sup> By now, this particular school of critique has already progressed through two historical phases: TWAIL I and TWAIL II. While TWAIL I had a heavy focus on colonization and the hegemonic use of international law by powerful nations, TWAIL II was more engaged with international institutions and the impact of globalization as well as possibilities of resistance. Overall, TWAIL scholarship had to respond to a series of new challenges with the global rise of populism and oppressive conservative politics. Specifically, it needed to refocus on the inconsistent and untenable use of international law and the necessity to rethink our understanding of international law in terms of global injustices. See Madhav Khosla, "The TWAIL Discourse: The emergence of a new phase" (2007) 9 *International Community Law Review* 291, and Karin Mickelson, "Taking stock of TWAIL histories" (2008) 10 *International Community Law Review* 355.

<sup>47</sup> See Brian Z. Tamanaha, "The folly of the 'social scientific' concept of legal pluralism" (1993) 20 *Journal of Law and Society* 192; Brian Z. Tamanaha, "A Non-Essentialist Version of Legal Pluralism" (2000) 27 *Journal of Law and Society* 296.

<sup>48</sup> As discussed by Peer Zumbansen, Ruth Buchanan and others, there are strong connections between long-standing legal sociological insights into pluralistic legal orders and present concerns regarding the fragmentation of law outside of the nation-state. Within the nation state, legal pluralism was initiated by contestation of concepts of legal formalism, of the alleged unity of the legal order and institutionalized norms, despite the coexistence of different levels and sites of norm creation. Contemporary calls for a just, democratic and equitable global legal order, including debates on the "fragmentation of international law" or "global administrative law," take place in the same spirit. On this issue, see Ruth Buchanan, "Writing resistance into international law" (2008) 10 *International Community Law Review* 445, and Peer Zumbansen, "Transnational legal pluralism" (2010) 1 *Transnational Legal Theory* 141.

Finally, in terms of jurisprudential debates, law is incapable of grounding itself, and its conceptual foundations rest on other elements that are traditionally regarded as outside law. These elements also provide the contextual meaning of law in socio-political terms. Acceptance of the necessary relationship between internal and external elements of law is a foundational premise of legal pluralism.<sup>49</sup> Indeed, critiques of the autonomy and separateness of law began with questioning the internal coherence of law.<sup>50</sup> In this sense, the third wave of legal pluralism is of direct use for the study of international law in a global context, and more specifically for attending to what emerged as transnational law in the age of late capitalism and neo-colonialism.<sup>51</sup>

### ***A. The Legacy of the New Haven School***

During the roughly four decades in which the concept legal pluralism has been used in legal scholarship, it has become a subject of many a politically charged debate. Starting with Brian Tamanaha's article on the 'folly of legal pluralism' (1993), attention was drawn to the 'legal pluralist movement' associated with the *Commission on Folk Law and Legal Pluralism* and the *Journal of Legal Pluralism*. Tamahana argued that equalizing normative orders that are fundamentally different from each other and calling them all 'law' was a questionable practice. Still, reserving the concept of law for only state-made law leads to an essentialist and ahistorical conception of law, and legal pluralism was guilty as charged for being the first one pointing to the elephant in the room.<sup>52</sup>

Indeed, legal pluralism is an essential component of thinking about law above and beyond the state, both domestically and globally. In this section, I will discuss how, applied to the critical understanding of law developed by legal pluralism, these two frames, local and global, inform each other. The subject matter of this work is universal jurisdiction and accountability regimes

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<sup>49</sup> See Gunther Teubner, "Substantive and reflexive elements in modern law" (1983) *Law and society review* 239.

<sup>50</sup> See Gunther Teubner, *Law as an autopoietic system* (Oxford/Cambridge, Blackwell Publishers, 1993), Hugh Baxter, "Autopoiesis and the Relative Autonomy of Law" (1997) 19 *Cardozo L. Rev.* 1987, and Jennifer Nedelsky, *Law's relations: A relational theory of self, autonomy, and law* (OUP USA, 2011).

<sup>51</sup> I define neo-colonialism as colonialism stripped of its formal qualities but nonetheless producing the same set of effects, such as structural dependence, depletion of resources including human capital, and the subsuming of societies under the rubric of political alliances.

<sup>52</sup> See Gunther Teubner, "The two faces of Janus: Rethinking legal pluralism" (1991) 13 *Cardozo L. Rev.* 1443, and Franz von Benda-Beckmann, "Who's afraid of legal pluralism?" (2002) 34 *The Journal of Legal Pluralism and Unofficial Law* 37.

pertaining to state criminality. Therefore, my priority will be to understand the workings of law at the global scale, although in the latter half I will also engage with the debate on legal judgment as it relates to state criminality *in situ*. In this vein, transnational law provides a direct entry to the discussion of the relationship between globalization, historical capitalism and law. The scope of analysis and conceptual aspirations delivered by the term transnational law are markedly different from what pertains to traditional depictions of international law. As marked by the canonized Yale lectures of Philip Jessup, transnational law challenges the frame of thinking that long characterized international law, and supplements it with a framework that allows grasping the plurality of interactions among state and non-state actors as well as between states.<sup>53</sup> Yet these observations are far from having received general acceptance. Many still ask whether transnational law indeed promises a different conceptual framework than the one habitually utilized by scholars and practitioners of international law. A related question is whether transcendence of national frontiers is the main criteria for deeming forms of law and practices of regulation ‘transnational’ and, if so, whether this is enough to require a significant change of focus in legal scholarship. Does the observable increase in the multitude of norm-producing institutions and actors constitute a good enough reason for coming up with a different term for the legal universe that lies beyond the nation-state while also encapsulating it? What is the main impetus behind the uprooting of ‘dearly-held convictions of jurisdictional boundaries and competences’?<sup>54</sup> Would it not be better to refer to the phenomena under discussion as the ‘law of globalization’ rather than transnational law?

These questions have a relatively long history in the realm of legal scholarship and, what is more, they are not unique to the area of international law. As the debates examined in this section will reveal, the role of law within dispersed and fragmented spaces of norm production has been a familiar topic since the early days of legal pluralism and critical legal studies.<sup>55</sup> What is perhaps

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<sup>53</sup> Philip Jessup, *Transnational Law* (Yale University Press, 1956). As Peer Zumbansen argues as well, this chapter traces the development of the concept of transnational law to Philip Jessup's Storrs Lectures at the Yale Law School in 1955. Jessup famously challenged the doctrinal and conceptual boundaries of both public and private international law to suggest that another concept would be more adequately suited to capture the myriad normative and transactional relations across national borders. Transnational law has since become a promising perspective from which to assess the regulatory challenges arising in late capitalism. See Peer Zumbansen, "Law after the welfare state: Formalism, functionalism, and the ironic turn of reflexive law" (2008) 56 *American Journal of Comparative Law* 769.

<sup>54</sup> Jessup (1956) pp. 72–7, cited in Zumbansen (2008), *supra* note 38.

<sup>55</sup> See Andreas Fischer-Lescano and Gunther Teubner, "Regime-Collisions: The Vain Search for Legal Unity in the

new is the thorough consideration of the effects related to power and legitimacy of law at a global scale.<sup>56</sup> Yet again, this shift in focus constitutes a significant challenge to the state-centered view of not only international law, but also constitutional and regulatory law. Furthermore, the recognition of private actors' and organized interests' growing relevance for law and legal regimes allows for a much more nuanced and dynamic understanding of the relationship between state and non-state actors, among states, and, between various legal actors and institutions in general. The growing complexity of de-centered or multi-centric socio-legal and political discourses around transnational activities requires an equally diverse and flexible frame of reference. The term 'transnational,' conjoined with pluralism, is supposed to be that very panacea.<sup>57</sup> However, a change of terms alone by no means produces all-encompassing solutions to theoretical or practical problems. Besides, there is an ongoing debate within the field of transnational law over the characterization of this field, i.e. whether it is fluid, semi-structured and cooperative, or a mirror image of power inequalities, antagonistic relations, and anarchistic tendencies projected onto the area of law.<sup>58</sup> Transnational law, deemed neither domestic nor international but both and more, is thus equally important for constitutional and administrative law in a global context. For some, transnational law is where real change will emerge, dethroning the monstrosity of global capitalism and neo-liberal empires. For those who hold this viewpoint, transnational law, by way of providing a platform for new forms of governance, is expected to overcome the alleged separation of domestic and international realms and provide a global sense

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Fragmentation of Global Law" (2004) *Michigan Journal of International Law* 999.

<sup>56</sup> See Peer Zumbansen, "Defining the space of transnational law: legal theory, global governance, and legal pluralism" (2012) 21 *Transnat'l L. & Contemp. Probs.* 305.

<sup>57</sup> See Paul Schiff Berman, "From international law to law and globalization" (2004) 43 *Colum. J. Transnat'l L.* 485, and Paul Schiff Berman, "A pluralist approach to international law" (2007) 32 *Yale J. Int'l L.* 301.

<sup>58</sup> The former debate is best represented by Anne-Marie Slaughter's work. The latter viewpoint, on the other hand, is vividly discussed by Mary Kaldor, Anthony Anghie, James Tully and Robert Wai. See Anne-Marie Slaughter, "International Law in a World of Liberal States" (1995) 6 *European Journal of International Law* 1, and her "Judicial Globalization" (2000) 40 *Virginia Journal of International Law* 1103; James Tully, *Strange multiplicity: Constitutionalism in an age of diversity* (Cambridge University Press, 1995); Robert Wai, "In the Name of the International: The Supreme Court of Canada and the Internationalist Transformation of Canadian Private International Law" (2001) 34 *Canadian Yearbook of International Law* 117; Mary Kaldor, "Civil society and accountability" (2003) 4 *Journal of Human Development* 5 and her *Global civil society: An answer to war* (John Wiley & Sons, 2013); Antony Anghie et al, *The Third World and International Order: Law, Politics, and Globalization* (Martinus Nijhoff, 2003); Antony Anghie, *Imperialism, sovereignty and the making of international law* (Cambridge University Press, 2007).

of transparency for legal conflicts and clashes of interest.<sup>59</sup>

Against this introductory background on transnational law, and at the juncture of international law and legal pluralism scholarship that led to the debate on transnationalism, the New Haven School played a pivotal role. Its scholars, including Myers S. McDougal, Harold D. Lasswell and Michael Reisman, were among the most influential groups of legal thinkers in the field of international law since WWII.<sup>60</sup> In their spirited response to Cold War realism, they put their faith in legal processes, rules, and norms, at the expense of the might of naked power in world politics. Theirs was a choice made in the name of recognizing the transformative normative power of what they saw as international legal practices. Their departure both from legal positivism and political realism<sup>61</sup> saved them from the pitfalls of a doctrinal quest for ‘what law is’ in the international arena. Instead, they turned their gaze to issues concerning how non-state law is created, how it operates, how it affects domestic decisions, and how it influences the shaping of multiple forms of legal regimes. The legacy of the New Haven School is perhaps best summarized in two basic questions: What is international law made of, and, who makes it? Deriving from these two questions, other concerns emerged, such as determining whether international law is primarily a system of edicts or rather a complex process with indeterminate ends.

In their charting of the topography of international law, adherents of the New Haven School fundamentally challenged the foundational assumptions about the nature of law and legal regimes that had dominated legal scholarship until then. The School’s main impetus for engaging in this kind of critique was their belief in the possibility of ‘bottom-up international law making’ with respect to the codification of international rules and norms, as opposed to a top-down

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<sup>59</sup> See Gunther Teubner, "Global Bukowina: Legal pluralism in the world-society" (1996) and Boaventura de Sousa Santos and César A. Rodríguez-Garavito, eds. *Law and globalization from below: towards a cosmopolitan legality* (Cambridge University Press, 2005).

<sup>60</sup> As a sample of their work, see Myres S. McDougal, Harold D. Lasswell, and W. Michael Reisman, "Theories about international law: prologue to a configurative jurisprudence" (1967) 8 *Va. J. Int'l L.* 188; Myres S. McDougal, Harold D. Lasswell and W. Michael Reisman, "The World Constitutive Process of Authoritative Decision" (1967) 19 *Journal of Legal Education* 403; Myres S. McDougal and W. Michael Reisman, "The Prescribing Function in World Constitutive Process: How International Law is Made" (1980) 6 *Yale Studies of World Public Order* 249.

<sup>61</sup> See Lassa Francis Lawrence Oppenheim and Hersch Lauterpacht, *International law: a treatise* (Longmans Green, 1952) for classical legal positivist scholarship, and Hans Morgenthau, *Politics Among Nations* (Alfred Kopf, 1948) for a classical realist viewpoint in the immediate aftermath of WWII.

understanding of formal legal systems obsessed with state sovereignty.<sup>62</sup> They certainly did not regard the nation-state as the primary lawmaker. They also refused to privilege treaty law as the preeminent form of international law. They denied that international law was simply an elite-orchestrated process of hegemonic power-building under the cloak of legality. Instead, they saw it as an uneven and yet lively battlefield of variant stakeholders and interests. Consequently, it became possible to regard international law as a legal universe made up of multiple and semi-overlapping lawmaking communities. As such, a new account of it could be given. Almost fifty years after the School's protests against nationalist and power-centred conceptions of international law, an influential group of American law professors launched a new attack, but this time riding the tide of neo-conservatism in United States. Jack Goldsmith and Eric Posner, in particular, emerged as two of the leading spokespeople for the neo-conservative study of international law, though their followers come from what may be called a 'rainbow coalition' of ideologies within a growing international audience.<sup>63</sup> In the ensuing debates critiquing the isolationist US stance against international law and the current responses to neo-conservative, formalist, and doctrinal trends in legal scholarship, one could sense a strong resemblance to the stance taken by the New Haven School back in 1970s.<sup>64</sup> In this sense, there emerged a tradition of critique adjusting to the demands of the changing times. Along that trajectory, there are at least three other schools, namely TWAIL, Critical International Law and Radical Pluralism debates, which take issue with international law as it has been traditionally perceived and taught.<sup>65</sup> However, they take the inequalities and historical injustices endemic to the current state of world capitalism as their point of departure, rather than a mainly internal critique of how international law works within the West. These latter bodies of scholarship therefore have more kinship with the articulation of international law as globalization of law or transnational law, and are prone to overlook the nation-state much more readily. Though the legacy of the New Heaven School is indeed an important one, to globalize this kind of critique requires a vision that looks above and beyond the way things appear from the Global North alone.

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<sup>62</sup> See Levit, Janet Koven, "Bottom-up international lawmaking: reflections on the new haven school of international law" (2007) 32 *Yale J. Int'l L.* 393.

<sup>63</sup> See Jack L. Goldsmith and Eric A. Posner, *The limits of international law* (Oxford University Press, 2005).

<sup>64</sup> The foundational piece many refer to as the bedrock of legal pluralist debates is Robert M. Cover, "Nomos and Narrative"

<sup>65</sup> I am heavily indebted to Obiora Okafor for introducing me to the nuances of and vast literature on TWAIL scholarship, as one of the leading figures of the second/third generation of TWAIL scholars himself.

## ***B. TWAIL Scholarship and the Radical Pluralism Debate***

Third World Approaches to International Law (TWAIL) is a critical approach to international law that has assumed a distinguished status in the overall questioning of the history and legacies of international law, an endeavour that started with the first and second waves of legal pluralism discussed above. However, TWAIL comes with a marked distinction. It is an approach to law that is unified by a particular set of concerns endemic to the application and imposition of law in the Global South. It draws its methodology primarily from the history of the encounter between international law and colonized peoples and post-colonial societies. In this regard, TWAIL shares a common heritage and an arsenal of analytical tools with post-colonial studies, feminist theory, critical race theory, critical legal studies, and Marxism, as well as with legal pluralism. TWAIL scholarship prioritizes in its study the power dynamic between the largely Developed Core and the mostly Dependent Periphery in the world capitalist economy, following the terms used by world systems analysis.<sup>66</sup> Overall, it highlights the role of international law in legitimizing the subjugation and oppression of societies in the Global South. Although TWAIL scholars strive to avoid presenting the “Third World” as a unified, coherent place and instead put emphasis on the shared experiences of underdevelopment, imposed dependency, and marginalization, they also try to salvage at least some parts of the overall project of international law to aid struggles for justice in the Global South. Contemporary TWAIL scholarship has its origins in works of jurists such as Georges Abi-Saab, F. Garcia-Amador, R. P. Anand, Mohammed Bedhaoui and Taslim O. Elias. These were later joined by Antony Anghie, Bhupinder Chimni, Karin Mickelson, Obiora Chinedu Okafor, Wa Makau Mutua, Balkrishnan Rajagopal, and Issa Shivji, who are from post-colonial societies themselves.<sup>67</sup> In the remainder of this section, I will first discuss the TWAIL

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<sup>66</sup> See Immanuel Wallerstein, *The modern world-system I: Capitalist agriculture and the origins of the European world-economy in the sixteenth century, with a new prologue* (Univ of California Press, 2011).

<sup>67</sup> As references to the ongoing debates within the TWAIL scholarship, see *inter alia*, Anghie, Anthony, et al. *The Third World and International Order: Law, Politics, and Globalization* (Martinus Nijhoff, 2003); Obiora Chinedu Okafor, “Newness, imperialism, and international legal reform in our time: a TWAIL perspective” (2005) 43 *Osgoode Hall LJ* 171; Obiora Chinedu Okafor, “Critical Third World approaches to international law (TWAIL): theory, methodology, or both?” (2008) 10 *International Community Law Review* 371; Anthony Anghie, “TWAIL: Past and future” (2008) 10 *Int’l Comm. L. Rev.* 479; Opeoluwa Adetoro Badaru, “Examining the Utility of Third World Approaches to International Law for International Human Rights Law” (2008) 10 *International Community*



project and its significance for the debate on transnational law. I will then concentrate particularly on Koskeniemi's work and one of his most vocal critics within the larger context of legal pluralism, although he is not a TWAIL scholar himself.

As already stated, TWAIL is a legal theoretical discourse that offers an in-depth critique of the current international law regime from a Global South perspective. The frame of thinking used by scholars associated with TWAIL represents a distinct form of historical analysis concerning the development of international law. TWAIL scholarship adheres to the description of international law as a set of practices that lead to the continual subordination and marginalization of the experiences of Third World societies, in particular legal activists and scholars. Makau Mutua describes Bandung, Indonesia as the symbolic birthplace of the TWAIL discourse, although the school is heavily indebted to the Non-Alignment Movement as well.<sup>68</sup> Overall, TWAIL emerged as a response to repressive and disciplinary strategies of decolonization in the Global South. It was developed due to the urgent need for a historical approach to understand why liberation projects in the post-colonial world could hardly ever were able to deliver what they promised. TWAIL scholarship also attends to historical experiences in non-European and post-colonial societies that have given rise to a unique form of political consciousness about the law.

As such, TWAIL scholarship is dedicated to unpacking the uses of international law as a medium for the creation and perpetuation of racialized hierarchies, to historicizing the development and evolution of international law as a repressive universalist discourse, and to critically assessing its uses for the subordination of peoples and their realities across the Global South.<sup>69</sup> TWAIL claims to be counter-hegemonic, anti-hierarchal, and also coalition-prone. Keeping with the spirit of legal pluralism though not necessarily identifying with it, TWAIL discourse thus assumes a moral equivalence of cultures and peoples. It is in this light that it considers the current regime of international law as illegitimate, since what exists today is seen as

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*Law Review* 379; Ibrónke Odumosu, "Challenges for the (Present/) Future of Third World Approaches to International Law" (2008) 10 *International Community Law Review* 467; B. S. Chimni, "The world of TWAIL: Introduction to the special issue" (2011); James Thuo Gathii, "TWAIL: a brief history of its origins, its decentralized network, and a tentative bibliography" (2011) 3 *Trade L. & Dev.* 26; Luis Eslava and Sundhya Pahuja, "Between resistance and reform: TWAIL and the universality of international law" (2011) 3 *Trade L. & Dev.* 103.

<sup>68</sup> Makau Mutua, "What is TWAIL?" (2000) and Makau Mutua, "Savages, victims, and saviors: the metaphor of human rights" (2001).

<sup>69</sup> Anthony Carty, *Philosophy of International Law* (Edinburgh University Press, 2007).

being based almost entirely on the intellectual, historical, and cultural experiences of one particular region of the world—that is, Europe. Finally, TWAIL is positioned as a reconstructive project that aims at eradicating the conditions of underdevelopment in the Global South. Since international law has been instrumental in regulating encounters between Europe and the rest of the world through the rules of both sovereignty and self-determination, TWAIL scholars argue that international law has been used for the forced assimilation of non-European peoples into a legal regime that they had no voice within.<sup>70</sup> In order to build strong alliances to counter the position that post-colonial societies have been locked into, TWAIL scholarship has asserted itself through the formation of transnational movements committed to de-centering the European-North American domination of international law.

Despite this highly charged political stance, TWAIL scholars still express the need to be self-critical, aware of the limitations of the school and the voices it may have yet excluded. The emphasis of this discourse is on the international legal regime's complicity in the maintenance of colonial legacies during the post-colonial era. In this context, international law is depicted as neither neutral nor impartial. Rather, it is marked by its indifference to human suffering and to its own complicity with historical injustices. Mutua describes the relationship between the international legal regime and its players through the metaphor of savages-victims-saviours.<sup>71</sup> Accordingly, the state is depicted as the operational instrument of savagery in international law. The victim, on the other hand, is described as a human being whose dignity and worth have been violated by the savage. The victim is perceived as powerless, and thus in need of external intervention. Of course, the victim is non-white, highlighting the racial divide endemic particularly to human rights discourse in international law. The saviour, then, refers to the Eurocentric nature of the dominant international law paradigm, constructing Europe as normatively superior.

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<sup>70</sup> Seth Gordon, "Indigeneous Rights in Modern International Law from a Critical Third World Perspective" (2007) 31 *Am. Ind. LR* 401.

<sup>71</sup> Wa Makau Mutua, "Savages, Victims, and Saviors: The Metaphor of Human Rights" (2001) 42 *Harvard International Law Journal* 201. Also see Balakrishnan Rajagopal, "From Resistance to Renewal: The Third World, Social Movements, and the Expansion of International Institutions" (2000) 41 *Harv. Int'l. LJ* 529; Balakrishnan Rajagopal, *International law from below: Development, social movements and third world resistance* (Cambridge University Press, 2003); Balakrishnan Rajagopal, "Counter-hegemonic international law: rethinking human rights and development as a Third World strategy" (2006) 27 *Third World Quarterly* 767.

One of the most significant critiques of the international legal system offered by TWAIL scholarship is related to the fact that the pioneering roles played by non-Western activists, judges, legal scholars and human rights actors are not at all acknowledged in the universal human rights discourse. In this vein, Issa Shivji argues that a re-conceptualized rights regime is needed to challenge the hegemonic logic of international law by unpacking its imperialist and statist biases, while at the same time providing space for registering Third World people's abilities to resist hegemony.<sup>72</sup> Overall, TWAIL scholars take a decided stance against the promotion of a sense of naturalness of international law, and treat it as a political project of homogenization in its current form. They assert that the lack of attention to influences from the Global South within human rights law leads to a significant erasure of the legitimacy of the discourse, since problems are to be solved without reference to those involved and affected in the first place. The inconspicuous erasure of race and racial hierarchies within the human rights discourse and the international legal system in general is read as a pathology of self-redemption masking the international hierarchy of race and colour re-entrenched in the global system of capitalist relations. In this light, TWAIL scholars push for opening up the discourse of international law, and strive to create a balance between individual and group rights, giving more substance to social and economic rights, relating rights to duties, and addressing the relationship between the corpus of law and global economic systems.<sup>73</sup>

Although state sovereignty and the right to self-determination offer some tools through which one could assert the dignity that is so central to self-actualization, it is critical for the system to be reformed not only from the point of view of human rights applications but, more generally, from within the realm of international law. In this regard, TWAIL scholarship, although internally fragmented, thus far has iterated a strong argument concerning the importance of an in-depth understanding of the power dynamics and historical realities at play in international law. TWAIL discourse attacks widely accepted norms of international law that both victimize and blame the peoples of the Global South. As it invites more actors onto the stage, it

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<sup>72</sup> See Issa Shivji, "Constructing a New Rights Regime: Promises, Problems and Prospects" (1999) 8 SOC. & LEGAL STUDIES 243. Also see Amin, Samir. *Capitalism in the age of globalization: The management of contemporary society* (ZED Books, 2014).

<sup>73</sup> See Obiora Chinedu Okafor, "Is There a Legitimacy Deficit in International Legal Scholarship and Practice?" (1007) 13 International Insights 91, and his "Newness, Imperialism and International Legal Reform in our Time: A TWAIL Perspective" (2005) 43 Osgoode Hall LJ 172.

detests normative hierarchies in the construction of international law as a regime of hegemonic practices. For these reasons, although not formally included in the registers of legal pluralism scholarship, I believe there is a valid case to be made for TWAIL scholarship to be construed as part and parcel of what I call the third wave of legal pluralism.

### ***C. Radical Pluralism and Beyond***

In the remainder of this discussion of legal pluralism, I will concentrate specifically on Marti Koskenniemi and Ruth Buchanan's work on international law and globalization. This choice is by no means meant to suggest that the work of other legal scholars is not important in marking the contours of radical pluralism. Peer Zumbansen and Gunther Teubner's works, in particular, are far too influential to omit from any such discussion.<sup>74</sup> But for the purposes of this chapter, I choose this duo of legal scholars, as the second of them engages in a debate with the first from within legal pluralist discourse itself, while also utilizing many of the conceptual reference points of the latest phase of legal pluralism, including Teubner's work.

From the late 1980s onwards, Koskenniemi engaged in an embedded discussion on international law, the tenor of which was spelled out in his *From Apology to Utopia: The Structure of International Legal Argument* (first published in 1989). In this early work, Koskenniemi presented a critical view of international law as a discursive practice that attempts to remove the political from law as well as from international relations. If allowed to function this way, international law would be nothing more than either an irrelevant moralist utopia or an apology to global power politics. In his later work, including *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870-1960* (2001), Koskenniemi diversified his agenda on the discussion of international law. He first developed an intellectual history of international law, and then offered a critique of that history. This led to a highly pessimistic account of the content and

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<sup>74</sup> See Gunther Teubner, "The King's Many Bodies: The Self-Deconstruction of Law's Hierarchy" 31 L & SOC R 76 (1997), as well as his "The Two Faces of Janus: Rethinking Legal Pluralism" 13 CARDOZO LR 1443 (1992); and Gunther Teubner (ed), *Global Law Without a State* (1997). In his work, Teubner envisages that a better understanding of global law will need different conceptions of the "boundaries," "sources," "independence" and "unity" of law in legal scholarship. Also see his "Societal Constitutionalism: Alternatives to State-Centered Constitutional Theory?" in Joerges, Sand and Teubner, eds., *Transnational Governance and Constitutionalism* (Hart: Oxford, 2004) and "'Global Bukowina': Legal Pluralism in World Society" in Gunther Teubner ed., *Global Law Without a State* (Aldershot: Brookfield, USA, 1997).

workings of international law, wanting it to be more than what it now is. In this sense, Koskenniemi follows a similar trope to what one finds in Michael Mandel's, Tony Evans' or Steve Ratner's critiques of different branches of international law.<sup>75</sup> Overall, Koskenniemi seems to have finally given up on the formal, classical legal ideal of international law in search of a normatively endowed, Kantian ideal. This was perhaps to be expected, as he is an intellectual historian of the tradition of international law rather than a jurist. In fact, his critique of international law eventually led him to study even the methodology of the profession.<sup>76</sup> This new turn in his work is most observable in the International Law Commission (ILC) Report titled *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law* (2007), finalized by Martti Koskenniemi himself. The report organizes and synthesizes the various debates and discussions that relate to the breaking up of international law into several distinct regimes. It also presents practical suggestions for mitigating some of the problems often associated with increasing fragmentation.

At this point, I turn to Ruth Buchanan's critique of Koskenniemi's work and her reintroduction of legal pluralism, not as historical critique or background for policy suggestions but as a legal theoretical method of dealing with international law while critically addressing its contradictions. In her work, Buchanan provides both a critique of and a possible alternative to Koskenniemi's internal remedies for the failings of international law.<sup>77</sup> She argues that as long as globalization is reframed as an external problem for legal theory, the solutions envisaged will be determined by the limited parameters of already existing legal discourses. Global legal pluralism, on the other hand, could invoke or illustrate the multiple, diverse, and contested sources of law on a transnational plane and could allow us to think about law differently, rather than focusing on how to respond to globalization within existing frameworks of legality. Buchanan, like TWAIL scholarship, is squarely opposed to a positivist conception of law. She also refutes the reduction

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<sup>75</sup> See Steve Ratner, "Corporations and Human Rights: A Theory of Legal Responsibility" (2001) 111 *Yale L J* 443; Michael Mandel, *How America Gets Away with Murder: Illegal Wars, Collateral Damage and Crimes Against Humanity* (Pluto Press, 2004); Tony Evans, "International Human Rights Law as Power/Knowledge" (2005) 27 *Human Rights Quarterly* 1046.

<sup>76</sup> Marti Koskenniemi, "The Fate of Public International Law" (2007) 70 *Mod. LR* 1.

<sup>77</sup> See Ruth Buchanan, "Reconceptualizing Law and Politics in the Transnational: Constitutional and Legal Pluralist Approaches" (2008) 4 *Comparative Research in Law and Political Economy*; and Ruth Buchanan, "Legitimizing Global Trade Governance: Constitutional and Legal Pluralist Approaches" (2006) 57 *Northern Ireland Legal Quarterly* 1.

of legal plurality to descriptive claims and instead subscribes to it as an *ethos* and a form of critical theory. Her approach to legal pluralism takes as its starting point a critique of the tendency to think of law as a privileged domain of aspiration, responsiveness and precision. She thus endorses an understanding of legal forms and institutions as both contingent and revisable, to allow for opportunities for those whose interests are inadequately addressed by current institutions and legal regimes.

Specifically, Buchanan's critique of Koskenniemi is two-fold. She states that while law and politics are interrelated, legal discourses cannot be equated with political outcomes. Moreover, she argues that while a critical investigation of the politics of law can be quite helpful in revealing law's failures and exclusions, this kind of analysis does not shed light on the production of law, or on the capacities of legal subjects to contest, change, or add legal meanings. Although she appreciates Koskenniemi's attempt to imagine law as inherently plural, her emphasis is more on the plurality of law-creating subjects. In comparison to Koskenniemi's worries about diplomats, jurists and international lawyers, Buchanan would like to think of a much wider range of law-creating subjects. She also refuses recourse to a unifying image of a constitutional moment, and instead chooses to live with a "radically legal pluralist" topography of multiple and diverse subjects and regimes, and a transnational legality without a centre or normative hierarchy. The implication of her reframing of international law is that emergent transnational regulatory regimes need not be reduced to relations of superior/inferior based on the degrees of their "legal" or "constitutional" nature. Instead, echoing the work of Cover, Teubner, and Trubek<sup>78</sup> among others, Buchanan presents international law as an amalgamation of competing, interpenetrating, and mutually constitutive regimes at a transnational scale.<sup>79</sup> She hopes that by allowing such plurality to be perceived, public discussion about the emergence and evolution of transnational legal norms might include a much wider range of institutional and discursive mechanisms. In summary, in my view, Buchanan's unique contribution to the third wave of legal pluralism debate is her insistence that we give up our obsession with legal forms and start dealing with

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<sup>78</sup> See David Trubek and Louise G. Trubek, "Hard and Soft Law in the Construction of Social Europe: the Role of the Open Method of Co-ordination" (2005) 11 *European Law Journal* 343.

<sup>79</sup> See Ruth Buchanan and Louise G. Trubek, "Resistances and possibilities: A critical and practical look at public interest lawyering" (1992) 19 *New York University Review of Law and Social Change* 687; Ruth Buchanan and S. Pahuja, "Legal Imperialism: Empire's Invisible Hand" In *Empire's New Clothes*, (Routledge, 2004), pp. 73-95, and Ruth Buchanan, "Writing Resistance into International Law" (2008) 4 *International Community Law Review* 445.

matters of substance, content, and agency, and frame these in terms of processes rather than formal rules. For her, the lens of legal pluralism leads us to understand the construction and contestation of normative frameworks by legal subjects. This, in turn, is what is called the reflexive approach to the relationship between law and politics in the international realm, whereby competing normative claims are engaged, negotiated and compromised in the name of law.

## **II. TRANSNATIONAL NATURE OF ACCOUNTABILITY REGIMES IN INTERNATIONAL LAW AND MULTICENTRICITY OF LEGAL PRACTICES**

In this section, I will narrow down the debate on the applicability of legal pluralism to international law to the specific field of accountability regimes in international criminal law, the subject matter of this dissertation. A well-functioning accountability regime in international law may well be the ultimate dream of legal scholars and jurists. However, the crystallization of a unitary legal system is an elusive goal, still yet, if ever, to be realized.<sup>80</sup> Coherence and efficacy in the overall international legal order, with its fragmented and diversified legal regimes, could not be achieved by any given set of primary rules. The multitude of ‘secondary rules’ in international law—referring to Hart’s list of recognition, change and adjudication—is a constant force to be reckoned with. Nor could we do away with the proliferation of ‘third party forums’ or hybrid organs in international law, without the attached cost of eradicating variant forms of dispute settlement or domestic politics integral to both law-making and adjudication at the national or regional levels. If we follow the lead of Jonathan Charney, who gave up on the dream of a unitary regime of international law as early as 1988, clearly pronouncing so during his Hague Lectures, cross-fertilization and variegation are to be seen as improvements to the overall quality of international law, rather than a gradual undoing that must be opposed at all cost.<sup>81</sup> Observable changes in the global network of legal systems, indicative of a decisive move from an

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<sup>80</sup> See Karel Wellens, “Fragmentation of International Law and Establishing an Accountability Regime for International Organizations: The Role of the Judiciary in Closing the Gap” (2003) 25 *Michigan Journal of International Law* 1160; and his “Diversity in secondary rules and the unity of international law: some reflections on current trends” (1994) 25 *Netherlands Yearbook of International Law* 3.

<sup>81</sup> See Dinah Shelton, “International law and ‘relative normativity’” (2014) 2 *International law* 159; and René Provost, ed. *State responsibility in international law* (Routledge, 2017).

exclusive focus on state parties further, undo the majestic assumption of structural unity in international law. In this case, how could we pronounce an international “accountability regime that is far-reaching, flexible, adaptable, and yet does not amount to a cacophony of legal practices? Furthermore, is it desirable to have such a regime, and one that is based on synchronizations and alliances in the face of histories of discontent and injustice?

No doubt, this set of questions is of import not only for international criminal law, but have implications for all areas of international public law. However, these concerns are particularly troubling for international criminal law due to the heavy weight of *jus cogens* norms and *ergo omnes* obligations that dictate a regime of universal jurisdiction in areas such as crimes against humanity. Furthermore, in the institution of permanent courts such as the International Criminal Court (ICC), universal jurisdiction delivers the meaning of rules of legal codification through a model of diffusion from a central legal authority. The general understanding is that the Rome Statute providing the guidelines for this procedure is built upon a long history of treaty and customary international law and, as such, does not lack democratic accountability. However, the way it was designed to be ratified and embedded in the constitutional realm of individual states has thus far been far too positive law-oriented, and does not take into account the socio-political investment required for full adoption of the codification of international crimes that fall under the ICC’s mandate, the prime example being crimes against humanity. In this regard, while an increasing number of legal practitioners, observers, and scholars make observations about the hybridization, fragmentation and cross-fertilization of international law—and indeed opt for the term transnational law in its place—legal discourse in the field of international criminal law has gone in the other direction and become increasingly more focused on centralization and standardization, with the universal reach of a single institution and jurisgenerative conduct identified as its *raison d’être*. My argument here will be that institutions like ICC, when looked at under the lens of transnational law, in fact perform a double action. They engage in both *jurisgenerative* and *jurispathic* conduct, though which one of these practices is more important for the legacy and saliency of the institution, or indeed for the effectiveness of punishment of international crimes, remains undetermined. To put it differently, institutions such as the ICC engage in both primary and secondary rule-making in contemporary accountability regimes, though often their conduct is discussed almost entirely as one or the other.



### ***A. Fragmentation in International Law and the Fragile Balance of Primary and Secondary Rules in Accountability Regimes***

Concerns about the increasing diversity of secondary rules and the desired unity of primary rules of international law reveal themselves fully in the context of debates on the sources of international law, responsibilities of legal institutions, and normative conflicts. As suggested earlier in this chapter, the relative autonomy of a wide range of regimes co-existing in the area of international law is seen by some as a guarantee of its growing effectiveness in terms of its primary rules, rather than as jeopardizing the unity and coherence of the overall substantive structure of the international legal order.<sup>82</sup> In other words, diversification and differences in interpretation are seen as an integral part of the general enterprise, and hence secondary rules are not considered to constitute a threat to primary ones. Furthermore, the apparent coherence of the doctrines espoused by international courts and tribunals is taken as further proof that it is possible to talk about a single, unitary accountability regime in international criminal law that can accommodate the variations between judgments produced within international, domestic and regional legal regimes.<sup>83</sup> In this context, if we are to talk about an accountability regime in any branch of international law, there has to be an identifiable remedial potential of judicial functions. There is, of course, a significant difference between substantive and remedial law. The former is generally understood to stand for statutory or written law that governs the rights and obligations of those who are subject to it. Therefore, it defines the legal relationship of individuals and the society, or the relationship between society and the state. Remedial law, on the other hand, is a version of procedural law, and it comprises the rules by which a court hears and determines what

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<sup>82</sup>See Herbert L. A. Hart, *The Concept of Law*, supra note 21.

<sup>83</sup>The “fragmentation” of international law has been a topic of discussion for at least the last three decades. Interestingly, it is the increase in the number of international organizations, multilateral conventions, and bilateral investment treaties, as well as the growth of international courts and tribunals, that has led to concerns about the coherence and unity of international law. At issue, I presume, was the destabilization in some manner of a totalizing international legal order. International law, long confronted with questions regarding its very legality and legitimacy, then became a subject of worry due to the emergence of competing and overlapping regimes. On this issue, see Jonathan Charney, “The impact on the international legal system of the growth of international courts and tribunals” (1998) 31 *NYUJ Int’l L. & Pol.* 697; Pemmaraju Sreenivasa Rao, “Multiple international judicial forums: a reflection of the growing strength of international law or its fragmentation” (2003) 25 *Mich. J. Int’l L.* 929; William Burke-White, “International legal pluralism” (2003) 25 *Mich. J. Int’l L.* 963; and Geert-Jan Knoops, *An introduction to the law of international criminal tribunals: a comparative study* (Martinus Nijhoff Publishers, 2014).

happens in civil or criminal proceedings. In other words, procedural law—including remedial law—provides the method and means by which substantive law is made and administered. While substantive law defines rights and duties, procedural law is defined as the body of legal rules that provides the machinery for enforcing those rights and duties. The principle of delivering and promoting justice requires both substantive and procedural law. In Hart's language of jurisprudence, law has to embody a strong link between primary and secondary rules, which then necessitates both internal and external accountability in the area of international law. Organs of international law are not only fragmented, but they operate at multiple levels of jurisdiction and face a variety of claimants, the state constituting only one amongst many. These multiple *fora* entertain different procedural rules and substantive norms, and are thus likely to yield different results attending to the same case. Their limited *locus standi* and restrictive jurisdiction does affect their competency. However, if we go back to the debate on transnational law within legal pluralism, neither variations in procedures nor oscillations in competency stand as a death sentence against a nascent legal regime. Instead, it is possible to argue that in the area of international law, and specifically with regards to accountability regimes, work on primary and secondary rules is to be undertaken almost simultaneously. This is precisely what organs such as the ICC have embarked upon. In that sense, determination of the success of a regime of universal jurisdiction should not be undertaken solely in terms of whether domestic courts adapt the Rome Statute, or the depth and width of harmonization practices at a global scale. Equally important is the spirit of the laws endorsed by organs like the ICC. We must turn our attention to the primary rules of international criminal law falling under such legal bodies' mandate, and examine whether the Court initiated a process of transnational regime formation in this regard.

***B. The Project of International Law and the Jurisprudential Promise of ICC: Disciplining the Domestic Realm through International Criminal Law?***

Public international law is commonly viewed as oscillating between a Kantian cosmopolitan *ethos* and harmonized adjudication regarding conflict of laws and other

jurisdictional matters at the international level.<sup>84</sup> Regimes of trade law, human rights law, environmental law, and of course international criminal law are all testimony to the latter tendency, in varying degrees. The former, cosmopolitan impetus to manage and resolve “global problems,” on the other hand, often finds its best expression in the form of institution-building with an international reach and a purportedly global mandate. Traditional legal-political responses to institutional developments in the area of international legal regime formation—namely, constitutionalist defense tactics disputing the accountability of transnational institutions, or invitations extended by the legal pluralism of earlier decades celebrating institution-building as a possible platform for dialogue—seem inadequate to deal with the task at hand: defining the project of international law in the age of late capitalism, neo-colonialism, and globalization. Meanwhile, the knee-jerk reaction of reducing international public law to a phantom mechanism built to advance functional objectives of neo-liberal harmonization, and serving only the interests of the powerful, is also a somewhat misleading take on this issue. Surely, aspects of the managerial vocabularies of international regulatory and legal practices fit the definition of an overarching plan of neo-liberal global constitutionalism, as do the markedly negative implications for the Global South of acts committed by select international institutions. However, not all new formations in the area of public international law can be explained by these broad strokes.

The establishment of the permanent International Criminal Court is one area that has a double promise vis-à-vis the post-WWII history of public international law. Strictly speaking, the ICC does not allow legal pluralist renditions of criminality in its chosen areas of authority. Despite the worries about it being an integral part of the neo-liberal agenda of forcing post-colonial and post-imperial societies into submission for further capitalist expansion and deeper forms of accumulation, its nexus lies in the area of what may be called ‘disciplining practices’ emanating from a normative standpoint regarding egregious crimes such as war crimes, genocide, slavery, and crimes against humanity.<sup>85</sup> Its existence also owes much to widespread NGO movements both within Europe and from the Global South, as these actors struggled for decades

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<sup>84</sup> See Charles De Visscher, *Theory and reality in public international law* (Princeton University Press, 2015); and Jean d'Aspremont, *Epistemic Forces in International Law* (Edward Elgar Publishing, 2015).

<sup>85</sup> See Nicole Deitelhoff, “The Discursive Process of Legalization: Charting Islands of Persuasion in the ICC Case” (2009) 63 *International Organization* 33.

and made alliances to counter the US hegemonic position in the area of international criminal law prior to the foundation of a permanent criminal court.<sup>86</sup> This aspect of the ICC's history gave the institution an unusual degree of legitimacy for an institutional organ with such outreach potential—or at least this was the case at the outset. Last but not the least, the regime of international criminal law envisaged by the ICC cannot be grasped merely through the language of sovereign acts of states culminating in customary practices or treaty obligations. This signals a “transnational” quality concerning the ICC's mandate. The institution is designed to resolve cases of state criminality within the parameters of a legally identified exercise of international public authority based on the principle of universal jurisdiction. As such, the subject matter of international crimes such as crimes against humanity does not refer to disputes arising between states or states and high-ranking individuals. Rather, it primarily concerns the criminal acts of states against their own societies.

In terms of its jurisdictional reach, the ICC operates on the principle of complementarity/subsidiarity. Thus, the first choice for adjudication of crimes falling under its jurisdiction is identified as domestic courts acting in accordance with domestic law, or specialized hybrid tribunals subject to supervision by domestic courts. However, the founding document of the ICC—the Rome Statute—clearly indicates that in cases when such remedies are deemed not available or not realizable, general international consent authorizes the adjudication of such crimes by the ICC itself. Whether resolved by resort to domestic or international courts, international crimes falling under the ICC's mandate are therefore squarely identified as matters of international law. The criminal law regime attending to them is to be distinguished from reciprocal and consensual adjudication as dictated by treaty law. Furthermore, the ICC is a court of prosecution, and not a civil court. In this context, international criminal law as codified by the ICC is not based on the regulation of a relationship between juridical equals. Following the standard criminal law format, it accrues a privileged position to the party representing public authority, whether this is the ICC or a domestic court, and calls upon those who allegedly committed crimes against the society. In this case, the latter party is in principle defined as the

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<sup>86</sup>On the history of the ICC in terms of activist politics, see Meghan Zacher, Hollie Nyseth Brehm, and Joachim J. Savelsberg, “NGOs, IOs, and the ICC: Diagnosing and Framing Darfur” (2014) 29 *Sociological Forum* 1; Todd Jonathan Ebling, “History, Violence, and Legitimacy in Uganda: An Anthropological Analysis of Post-Colonial Politics and ICC Intervention” (2015) 7 *Journal of Collegiate Anthropology* 20; and also William Schabas, *The International Criminal Court: a commentary on the Rome statute* (Oxford University Press, 2017).

whole of humanity. If so, the ICC, as one of the prime institutional embodiments of what may be deemed transnational law, acts as a semi-autonomous international adjudicative body that reviews and passes judgment upon individual conduct in the international public sphere.

The ICC is semi-autonomous because its decisions are insulated from higher court supervision or judicial review mechanisms, and its ties with the UN are symbolic rather than legislative. It is international because its authority derives from a treaty, the Rome Statute, as well as customary understanding of the crimes listed under its jurisdiction. Constituted at the transnational level, the ICC embraces the role of disciplining the governmental actions of states and individuals committing crimes against societies and communities, as defined by the conceptual architecture of international criminal law. In this context, what makes the ICC a noteworthy specimen of transnational law is not its reach *per se*. Nor is it the ICC's inevitable exposure to and yet determined resistance against forces of legal fragmentation and hybridity in the global realm. The ICC's capacity for legal norm and conduct building is worthy of attention. Owing to the transnational dictate of the ICC's mandate, tribunals established under the law of individual states are invested with authority to try crimes defined by the ICC on the basis of the principle of universal jurisdiction. As such, the ICC produces and perpetuates a legal discourse, even when it does not try a given case itself. Based on the principle of universal jurisdiction, although the ICC is uniquely removed from the domestic legal system of any given state, its codes are to be integrated into the domestic enforcement structures of all states. As a result, the power of this institution to make and enforce legal claims of criminality stands apart from its predecessors such as the Nuremberg and Tokyo military trials, or other international courts such as the International Court of Justice. Mainly for this reason, the regime of international criminal law as embodied by the ICC should be recognized as constituting an exceptionally important and powerful manifestation of transnational law. No other system of court-based international adjudication has as much sway in terms of substantiating forms of criminality and enforcing methods of adjudication within a global compass. Even if a given state has not signed and ratified the Rome Statute, the dictate of universal jurisdiction obliges its articles to be considered as positive international law, and thus to be taken into direct consideration in the domestic realm. In this context, it would be apt to identify ICC-based codification of international crimes as the full-fledged exercise of a disciplinary regime with transnational qualities. This is symptomatic of a

certain strand of institutional developments in the area of public international law readily identified by the third wave of legal pluralist scholarship. In order to understand the workings of the regime of international criminal law, the manner in which ICC operates needs to be examined closely. This includes topics such as the court's determination of the exhaustion of all local remedies, leading to the establishment of hybrid tribunals based on the principal of universal jurisdiction, and the adaptation of the Rome Statute by domestic courts, with the implications of this process for national criminal law. While all of these issues clearly invite further inquiry, the remainder of this chapter will only focus on the politico-legal reasoning upon which the ratification of the Rome Statute in the realm of domestic law has been envisaged, and how this process relates to the "international law as transnational law" debate.

### ***C. International Criminal Court and the Ideal of Complementarity in International Law***

A key statement that defines the ICC's ideal role in public international law was uttered in 2003, just after the Court's founding, by none other than Luis Moreno-Ocampo, Chief Prosecutor of the Court. As he was sworn into office, he declared that "the absence of trials before this Court, as a consequence of the regular functioning of national institutions, would be a major success."<sup>87</sup> The legal reference here is to the Rome Statute's complementarity principle,<sup>88</sup> which permits the Court to exercise its jurisdiction over a serious international crime only if no State is willing and able to prosecute the crime itself. The determination of the likelihood that defendants will receive due process in national proceedings is part and parcel of this legal stipulation<sup>89</sup> The

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<sup>87</sup>Statement by Luis Moreno-Ocampo, June 16, 2003, Ceremony for the Solemn Undertaking of the Chief Prosecutor, quoted in ICC Office of the Prosecutor, Informal Expert Paper (2003), cited in Kevin Jon Heller, "The Shadow Side of Complementarity: The Effect of Article 17 of the Rome Statute on National Due Process" (2006) 17 *Criminal Law Forum* 255.

<sup>88</sup>Article 1 of the Rome Statute provides that the ICC's jurisdiction "shall be complementary to national criminal jurisdictions." Article 17(1), in turn, specifies the four situations in which the Court must defer to a national proceeding, along with their exceptions. These are the following: (a) The case is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution; (b) The case has been investigated by a State which has jurisdiction over it and the State has decided not to prosecute the person concerned, unless the decision resulted from the unwillingness or inability of the State genuinely to prosecute; (c) The person concerned has already been tried for conduct which is the subject of the complaint, and a trial by the Court is not permitted under Article 20, paragraph 3; (d) The case is not of sufficient gravity to justify further action by the Court. Citation from Statute of the International Criminal Court, UN Doc. A/CONF.183/9 (1998), art. 1 and art. 17.

<sup>89</sup>In principle, the ICC guarantees defendants all of the procedural protections required by the International Covenant on Civil and Political Rights (ICCPR). It cannot, however, impose these principles upon national courts whereby

fact that most national criminal justice systems may not provide such guarantees in states where atrocities have been committed, or where a civil war ensued, no doubt renders this idealistic picture somewhat incomplete. In some instances, ICC deferrals may in fact expose the alleged perpetrators of atrocities to national judicial systems that may not be interested in or capable of providing them with due process. This in turn may increase the likelihood of wrongful convictions, which in turn would erode the ICC's legacy, if not credibility. Furthermore, the ICC was never envisaged as an appellate body to review decisions of domestic courts or indeed as a human rights monitoring organ. In this regard, making decisions about the legality of procedural matters in domestic courts in cases related to international crimes does not fall within its mandate. At best, the Court has the authority to determine the unwillingness or inability of a state party to prosecute on a case-by-case basis, inquiring whether national proceedings were fair given the totality of the circumstances in each particular setting. However, if a trial proceeds in a national court, the ICC has no authority to vacate a national conviction resulting from a trial deemed not to have been conducted independently or impartially in accordance with the norms of due process that the court itself embraces.<sup>90</sup> In other instances, the ICC's identification of specific crimes may never be fully approved by the domestic courts that claim jurisdiction over the criminal trial of alleged individuals. A case in point is that of Augusto Pinochet, and the "Bermuda triangle" that formed between the Spanish Judge who claimed universal jurisdiction to try the retired dictator for crimes against humanity, the British House of Lords that erred, at least to an extent, on the side of diplomatic immunity, and the domestic courts that were at best hesitant to try the case.<sup>91</sup> Similar examples can be found in cases of the ICC's direct or indirect

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alleged perpetrators are to be tried. On this issue, see Mark S. Ellis, "The international criminal court and its implication for domestic law and national capacity building" *Fla. J. Int'l L.* 15 (2002): 215; Jann Kleffner, "The impact of complementarity on national implementation of substantive international criminal law" (2003) 1 *Journal of International Criminal Justice* 86; Dwight Newman, "The Rome Statute, Some Reservations Concerning Amnesties, and a Distributive Problem" (2004) 20 *Am. U. Int'l L. Rev.* 293; Carsten Stahn, "Complementarity, amnesties and alternative forms of justice: some interpretative guidelines for the International Criminal Court" (2005) 3 *Journal of International Criminal Justice* 695; Simeon Sungi, "Is it pragmatism or an injustice to victims? The use of plea bargaining in the International Criminal Court" (2015) 7 *Journal of Theoretical & Philosophical Criminology* 21; and Yitiha Simbeye, *Immunity and international criminal law* (Routledge, 2017).

<sup>90</sup> See Marta Bo, "The Situation in Libya and the ICC's Understanding of Complementarity in the Context of UNSC-Referred Cases" (2014) 25 *Criminal Law Forum* No. 3-4; Minhas Majeed Khan and Abbas Majeed Khan Marwat, "International Criminal Court (ICC): An Analysis of its Successes and Failures and Challenges Faced by the ICC Tribunals for War Crimes" (2016) 11 *Dialogue* 243.

<sup>91</sup> On the Pinochet trial, see Cath Collins, Katherine Hite, and Alfredo Joignant, eds., *The Politics of Memory in Chile: From Pinochet to Bachelet* (Lynne Rienner Publishers, 2013); and Accatino, Daniela, and Cath Collins,

involvement in Sierra Leone, Cambodia, Lebanon and Iraq. Therefore, the issue of complementarity could be said to provide more questions than answers in the area of public international law. However, if we shift our lens from public international law to transnational law, another picture emerges.

#### ***D. The Mandate of International Criminal Court: Jurisprudential versus Political Realities***

In reality, the discrepancies observable in the application of universal jurisdiction of the ICC's codification of international crimes are indicative of the gap between the jurisprudential and political dimensions of accountability regimes in international law. The issues and concerns articulated above are informed by my conviction that in order to make a categorical observation about international legal institutions with a transnational mandate, we must first attend to the underpinnings of their legal operations as well as the symbolic and political value of their jurisdictional characteristics. Determining of the significance of ICC-like institutions with respect to the grand project of launching a post-Westphalian era in international law is a crucial step in this direction. Indeed, the ICC has commonly been presented as a *tour de force* heralding a new age, wherein state interests are trumped by universal, transnational, and of course humanitarian ones. Similarly, from a jurisprudential point of view, the Rome Statute is considered to have made a marked change in the attribution of responsibility and the curtailment of impunity for crimes of grave nature and wide scope. Historically speaking, the trend that started with the Nuremberg and Tokyo trials significantly lost steam during the Cold War years.<sup>92</sup> Following the cascade of developments in international criminal law, including the endorsement of the International Military Tribunals of Nuremberg and Tokyo in 1946, the charting of the Genocide

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"Truth, Evidence, Truth: The Deployment of Testimony, Archives and Technical Data in Domestic Human Rights Trials" (2016) 8 *Journal of Human Rights Practice* 81.

<sup>92</sup> On the trajectory of developments linking the Nuremberg and Tokyo trials to the emergence of the ICC, see *inter alia*, Steven Fogelson, "The Nuremberg Legacy: An Unfulfilled Promise" (1989) 63 *S. Cal. L. Rev.* 833; Robert Wolfe, "Flaws in the Nuremberg Legacy: An Impediment to International War Crimes Tribunals' Prosecution of Crimes Against Humanity" (1998) 12 *Holocaust and Genocide Studies* 434; Steven Ratner, Jason S. Abrams, and James L. Bischoff, *Accountability for human rights atrocities in international law: beyond the Nuremberg legacy* (Oxford University Press, 2009); Hans-Peter Kaul, "The Nuremberg Legacy and the International Criminal Court-Lecture in Honor of Whitney R. Harris, Former Nuremberg Prosecutor" (2013) 12 *Wash. U. Global Stud. L. Rev.* 637; Benjamin Ferencz, "A Nuremberg Legacy: The Crime of Aggression" (2016) 15 *Wash. U. Global Stud. L. Rev.* 555.



Convention in 1948, the Geneva Convention on armed conflict in 1949, and the attached Code of Offenses against Peace and Security of Mankind, and subsequent UN covenants related to human rights law, not much more was done. Until the unfolding of the catastrophic events in the former Yugoslavia and Rwanda, the constitution of a stable system of substantive international law to attend to human rights atrocities committed during war or peace was not a priority for UN bureaucratic and legal circles. This was despite the fact that crimes against humanity were not at all absent from the international scene, including a wide range of disturbing developments in the former Soviet Union and Eastern bloc, Latin America, the Middle East, Asia, and Africa.

In summary, the unique area of intersection that the international tribunals of the 1990s came to embody—signifying a calculated overlap between international human rights law, humanitarian law, and international criminal law—was perhaps intimated and yet by no means fully articulated by the immediate post-war trials and the trajectory that followed from them in international criminal law. Even the International Law Commission resumption of work in 1983, after a long hiatus of almost 35 years, was tainted by the debate among states concerning how to define “aggression” committed by states.<sup>93</sup> It took another 13 years to reach a state of semi-resolution in the form of a Draft Code. The culmination of these efforts finally came in the form of the constitution of a permanent International Criminal Court in 2002. Yet, for jurisdiction-related matters, whether this should be regarded as a watermark remains far from obvious. What could be argued with much greater comfort is that the ICC is part and parcel of a sea change in norm creation and norm inducement at the transnational level. Its internal logic may be at odds with the traditional operations of international law, and from that angle, universal jurisdiction lacks jurisdictional certainty. If, however, universal jurisdiction is taken as a discursive tool honed to circumscribe domestic variations in the determination of criminality in categories delineated by the ICC, then the matter will assume novel dimensions, as will be discussed in the last two chapters of this work.

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<sup>93</sup> For details of this process, see Antonio Cassese and Paola Gaeta. *Cassese's international criminal law* (Oxford university press, 2013).

## CONCLUSION

The purpose of this chapter has been to provide a conceptual map (hence the use of “topography” in its title) of select examples of existing scholarship on the workings of international law as it pertains to the dictum of universal jurisdiction. Though the review presented here is by no means comprehensive, it is symptomatic of most pronounced trends in the current reconfiguration of the debate on the nature and reach of international law. In this context, I analyzed the merits and failings of the model of centrifugal diffusion in international law in the context of accountability regimes particularly in light of the claims made by select schools of thought related to legal pluralism. Beginning from the foundational premises of the third wave of radical legal pluralistic scholarship, I commenced an examination of the normative boundaries of the applicability of international criminal law codified by a transnational body such as the International Criminal Court (ICC) in local and national settings. This examination will be continued throughout the rest of this thesis. With particular reference to crimes against humanity, and attending to the institutional, normative and political aspects of universal jurisdiction, the following chapters will analyze the context and efficacy of attempts at their adjudication in the Global South. The aim of this opening chapter was to foreground this debate in legal theory.

The history of politico-legal practices leading to the foundation of a permanent court is primarily Europe-bound, though its emergence involved a strong component of Global South and non-state participation. As is, ICC’s mandate defined by the Rome Statute has far-reaching global implications. Indeed, a crucial part of its operations and the principle of universal jurisdiction embraced by the court depend on the unassailable equation of morality and law, particularly in the case of crimes against humanity. Meanwhile, studies of international politics indicate the absence of a widespread ethics of responsibility or societal engagement to provide international criminal law with a final say in this area. Hence we witness a clearly identifiable contradiction between the mandate of a transnational legal institution and the realities of the application and adaptation of international law produced or endorsed by it. This is a delicate disjuncture, and one that cannot be handled solely by legal pluralism in its early or later versions.

The original concern behind the debate on the ICC presented in this opening chapter was to determine whether international tribunals and courts indeed embody a new kind of relationship between socio-political, substantive/normative, and legal aspects of public international law and

thus constitute an exemplary case for transnational law. A related query was whether international criminal law has achieved the status of a transnational legal regime and assumed a position above and beyond the interests and immediate involvement of the states and societies affected by it. If so, could it indeed sustain the kind of criticism that was raised by schools of thought such as TWAIL scholarship? The answers to both lines of questioning proved to be highly conditional. Here, the issue is no longer the codification of law or even juridification processes themselves. In public international law, codification customarily refers to the articulation of binding legal rules, otherwise known as “positive law.” The “codification movement” in legal conduct emerged out of the post-Enlightenment context, and took root in European societies during the late 18<sup>th</sup> century in the form of civil and criminal codes. It reached its high point with the enactment of the French Napoleonic Code in 1804.<sup>94</sup> No doubt the relationship between domestic and international criminal codes, and in particular the embedding of international law within constitutional or domestic criminal law is a complex one. However, the applicability of transnational law in domestic contexts is only a small part of the problem. Legal pluralism scholarship reveals that the substantive meaning of law in changed contexts and scales is a much more significant issue in the workings of transnational law.

In the specific case of international criminal law, this body of law has long been considered an “autonomous branch” of criminal law, as it only deals with “international crimes.” Similarly, the institutions within which such crimes are to be adjudicated have been designated courts and tribunals, set up to try legal and natural persons who have incurred an international criminal responsibility. This is a distinct category in comparison to criminal responsibility as it has been defined within the domestic context, or later on, in cases of crimes against humanity and genocide that impose upon any given constituency the obligation of universal jurisdiction. In the context of the ICC, international criminal law clearly departs from the classical understanding of international law as an amalgamation of treaties and conventions regulating relations amongst states. Yet it never comes close enough to domestic jurisdiction in terms of having the expansiveness to deal with crimes that are the business of the state or society within which they

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<sup>94</sup> The *Corpus Iuris Civilis* was the formal compilation of Roman law commissioned by the sixth-century Roman emperor Justinian. Alongside scripture and Greek philosophy, it no doubt ranks as one of the major classical texts studied or cited by medieval and modern political theorists including Thomas Aquinas, Marsilius, Bodin, Grotius, Hobbes, Montesquieu, Rousseau, Kant, Hegel, Tocqueville, and Weber. See Neil MacCormick, Robert S. Summers, and Arthur L. Goodhart, eds., *Interpreting precedents: a comparative study* (Routledge, 2016).

were committed, or upon whom costs and damages were inflicted. Neither does it entirely manage to become transnational, as the court's emergence was predicated upon state consent and the continuation of its operations also demand long-term state support. Herein lies the conundrum for legal scholars and international jurists alike. Although the ICC and similar transnational organs are not predicates of a unified legal system whereby national laws would be deemed second-order unless evidently on par with the Court's mandate, they nonetheless strive for the establishment of universal rules of adjudication for crimes codified under their aegis. Consequently, they push for the enforcement of standard practices via public international law. However, the way they go about implementing this "project" matches the definition of transnational law, due to the nature of fragmented, overlapping regimes held together through persuasion, disciplining strategies, harmonization practices and at times brutal force.

The notion of a global order is highly contested amongst scholars of international law. Global disorder, a multiplicity of regimes, and polycentric systems concepts are much more readily embraced in describing the *status quo* in this field of law.<sup>95</sup> The unique offer of radical legal pluralism and reflexive legal theory scholarship is that such disorder is not to be seen as symptomatic of chaos. On the contrary, it is regarded as the expression of clashes of interest, conflicts of norms, and different articulations of the desire for socio-political change.<sup>96</sup> In this positioning of diversification as a necessary feature of transnational legal regimes, the tensions endemic to institutions such as the ICC and their mandates begin to appear *pro forma*. However, the real question about the viability of universal jurisdiction in international criminal law remains unattended to. The issue is not how to make domestic courts and legal systems adapt the ICC's definition of criminality, and adjust their codes of legal conduct according to what the Court dictates as proper adjudication. Whether individual accountability provides meaningful sanction and could deter governments and societies from committing gross human rights violations is not the issue here, either. Even in the presence of a comprehensive criminal code substantiated by an enforcement architecture, limitations exist and will continue to exist. Diverse norms entertained by different domestic constituencies as to what constitutes a crime against humanity, the power

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<sup>95</sup> See Jeffrey Dunoff, Steven R. Ratner, and David Wippman, *International Law: Norms, Actors, Process* (Wolters Kluwer Law & Business, 2015).

<sup>96</sup> See Alexis Galán and Dennis Patterson, "The limits of normative legal pluralism: Review of Paul Schiff Berman, *Global Legal Pluralism: A Jurisprudence of Law beyond Borders*" (2013) 11 *International journal of constitutional law* 783.

dynamics affecting the identification of problem cases, as well as the determination of the venue and form of trials directly influence both the scope of international criminal law and the set of mechanisms available for its practice. In other words, the Rome Statute ratification package is imbued with structural variations that are regarded as permanent features of transnational law in other instances. The grand project of selective and targeted erosion of state sovereignty in the name of a higher common good for global society may well be an esteemed legal prescription; its socio-political validation, however, is an entirely different matter.<sup>97</sup> As the practices of public international law evolved, they did so in the context of conflicts of interest, wars, negotiations, and partial ramifications under the shadow of global power struggles and historically embedded forms of domination. Therefore, appraisal of the attainability of the goal of institutionalizing accountability for crimes against humanity requires that legal scholarship expand beyond the realm of criminal liability and setting up evidence-based fair trials.

Transnational law, as tackled by recent debates within legal pluralism debates, is one venue within which we may be able to link accountability regimes to other areas of law in a global context. This would not only reduce the burden of the ICC's exceptional status regarding the application of the principle of universal jurisdiction. It could also bring us closer to the substantiation of injurious acts exemplified by crimes against humanity legislation in local contexts through domestic absorption of the normative address of this specific category of crimes exemplifying state criminality. In conclusion, as I have highlighted, the historical use of notions of universality and objectivity in international law first and foremost served First World socio-economic and political interests. One of its end results has been the codification of conditions that sustain old and new forms of dispossession across the Global South. As evidenced by analysis of the premises upon which the ICC operates, these interests have now taken on a transnational character and are being pursued through an elaborate network of meta-regulatory regimes beneficial to emergent transnational capitalist classes cutting across the North and the South.<sup>98</sup>

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<sup>97</sup> For an interesting counter-argument, see Holmes, Pablo, "The politics of law and the laws of politics: The political paradoxes of transnational constitutionalism" *Indiana Journal of Global Legal Studies* 21.2 (2014): 553-583. Holmes subscribes to the view that transnational constitutionalism could be achieved in a fragmented manner and through local politicization of core principles of justice. On this issue, also see Turkuler Isiksel, "Global legal pluralism as fact and norm" (2013) 2 *Global Constitutionalism* 160.

<sup>98</sup> As a former graduate student of Immanuel Wallerstein and Giovanni Arrighi and a research fellow of Fernand Braudel Center, I am indebted to the vision of historical capitalism they developed back in the 1980s. In particular, I am very much at home with the late Arrighi's take on global class formations, not just in economical but also in

Transnational legal regimes are most often used to diffuse neoliberal economic reforms on a global scale, resulting in the embedding of various legal precepts in domestic political and socio-economic settings. Critical international law scholars appear somewhat ambivalent in their efforts to craft disciplinary proposals for revealing this dark underbelly of the global legal order, with the exception of the approaches of TWAIL and post-Marxist legal pluralism. While a reflective type of global legal pluralism recognizes the legitimacy of lawmaking as executed by non-institutional actors, the field of legal theory remains perplexed as to how we reconcile the pursuit of legal accountability in a highly stratified and unjust world.<sup>99</sup>

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legal-political terms. See Giovanni Arrighi, *The long twentieth century: Money, power, and the origins of our times* (Verso, 1994); Giovanni Arrighi, "Lineages of empire" (2002) 10 *Historical Materialism* 3; Giovanni Arrighi, "Hegemony unravelling-2" (2005) 33 *New Left Review* 83, and Giovanni Arrighi, "Spatial fixes, switching crises, and accumulation by dispossession" *Global social change: Historical and comparative perspectives* (2006): 201-212.

<sup>99</sup> See Nancy Fraser, *Scales of justice: Reimagining political space in a globalizing world* (Columbia University Press, 2009).

## ***Chapter II. In the Beginning, there was the State? A Critical Review of Compliance to International Law regarding Universal Jurisdiction***

### **INTRODUCTION**

The last hundred years have given us at least three attempts at the creation of an institutionalized system of international criminal law. The key issue involved in this idea's prominence is that of universal jurisdiction. The notion of a universally enforceable criminal law dates back to the Treaty of Versailles in 1919.<sup>100</sup> This was also when the idea of an international criminal court first emerged;<sup>101</sup> the realization, implementation, and application of such a court, however, were not tried until after World War II. To address the crimes committed under the National Socialist regime in Germany, an international military tribunal was erected in Nuremberg, based on the London Charter of the International Military Tribunal, which was followed by the Tokyo Tribunal.<sup>102</sup> Later, after the Cold War, the United Nations decided to establish *ad hoc* courts against the backdrop of gross humanitarian law violations in the former Yugoslavia and Rwanda. Then in 1998 the Rome Statute of the International Criminal Court (ICC) was adopted, which came into effect on July 1, 2002. The ICC was followed by various internationalized and hybrid courts, set up *inter alia* to cope with the conflicts in Kosovo, Sierra Leone, East Timor, and Cambodia. All of these post-ICC institutions sought the ideal of a standardized legal frame of reference for international crimes. Alas, this did not alleviate the problem of the state-centric nature of international criminal law.

In this chapter, I will concentrate on the issue of causes of compliance (or lack thereof) to international law in the larger context of the debate concerning the emergence of a standardized frame of reference for universal jurisdiction. This is a continuation of the questioning developed in the first chapter concerning the nature of the transnational law as it applies to the condition of

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<sup>100</sup> See the classic work of Ian McTaggart Sinclair, *The Vienna Convention on the law of treaties* (Manchester University Press, 1984). Also see Mark Eugen Villiger, *Customary international law and treaties: a study of their interactions and interrelations, with special consideration of the 1969 Vienna Convention on the Law of Treaties* Vol. 7. (Brill Publishers, 1985).

<sup>101</sup> See Gerry Simpson, *Law, war and crime: war crimes, trials and the reinvention of international law* (Polity, 2007).

<sup>102</sup> For the actual text of the Charter, see <http://avalon.law.yale.edu/imt/imtconst.asp> [25.03.2017].

states and societies in the Global South, During the last few decades, the long-standing divide between those who believed that international rules have an effect on shaping state behavior and those who saw such rules as epiphenomenal or, worse, as imposed, has given way to an increasingly complex debate. The proliferation and evolution of international legal agreements, organizations, and judicial bodies in the aftermath of the Cold War years (1947-1991) provided the background for the heightened attention paid to the role of international law in determining interstate and transnational politics. In particular, the phenomenon of legalization and adjudication of state criminality under the aegis of international criminal law raised several new questions. What factors affect the choice to resort to international law? When is such a recourse a choice and when is it imposed? Upon whom is international law imposed and under which circumstances? Does the use of international law make a difference in how states behave when faced with their own criminal conduct? What issues emerge from critiques emanating from the post-colonial world and the Global South at large concerning the use and abuse of international criminal law? These are just a few of the rather troubling concerns emerging in the post-ICC landscape of international criminal law.

In this chapter, I will present a survey of some of the recent developments in the study of compliance to international law in both international relations (IR) and international law (IL) literature with a specific emphasis on universal jurisdiction. Here, compliance is distinguished from the related but distinct concepts of implementation and effectiveness.<sup>103</sup> Broadly speaking, the focus of the present discussion is not compliance with treaties, but rather with the broader category of rules that constitute “customary international law.” Based on a critical review of some of the major theories advanced by IR and IL scholars from 1980s onwards, my aim is to identify a number of common questions that guide the debates in both fields concerning the nature of international criminal law, in particular with reference to the notion of universal jurisdiction. In studies on international criminal law, comparatively little attention has been paid to theoretical questions pertaining to universal jurisdiction. This chapter focuses less on the lawfulness of universal jurisdiction and more on the way the basic concept is treated by these two bodies of scholarship in the context of how they relate to the state as the basic unit of

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<sup>103</sup> Kal Raustiala & Anne-Marie Slaughter, "International law, international relations and compliance" in Carlsneas, Risse & Simmons, eds. *Handbook of International Relations* (Sage, 2002).



international law. This is of utmost importance in terms of developing a robust framework for furthering the debate on state criminality and identifying the limits of international criminal law for introducing, operationalizing or enforcing criminal jurisdiction measures based on an overarching, formulaic regime of accountability.

## **I. NEMO ME IMPUNA LACESIT? THE ETHOS OF UNIVERSAL JURISDICTION<sup>104</sup>**

Universal jurisdiction is a specific legal doctrine dictating that domestic courts try and punish perpetrators of a select set of crimes so heinous that they amount to crimes against the whole of humanity, regardless of where they occurred or the nationality of the victim or perpetrator, which otherwise constitute the standard nexus requirements in international law. Under its purview fall piracy, slavery, crimes against humanity, war crimes, torture, and genocide.<sup>105</sup> Universal jurisdiction thus constitutes a significant departure from the traditional

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<sup>104</sup> This Latin phrase, literally meaning “no one assails me with impunity,” was the motto of the Royal Stuart Dynasty of Scotland from the reign of James VI onwards (1578-1580). It was also adopted as the motto of the Scottish regiments in British Army. See Norren Burrows, “Nemo Me Impune Lacesit: The Scottish Right of Access to the European Courts” (2002) 8 *Eur. Pub. L.* 45.

<sup>105</sup> At present, there are two main approaches to universal jurisdiction. The first seeks to apply the procedures of domestic criminal justice to violations befitting international criminal law standards. This is done with reference to legal codes embodied in United Nations conventions, or via authorization by national prosecutors to bring offenders into their jurisdiction through extradition from third countries. The second approach is endorsed by the ICC and is in accordance with its founding treaty of Rome Statute. The closest analogous historical concept to the contemporary notion of universal jurisdiction is *hostes humani generis* [enemies of the human race]. However, this particular term has only been applied to pirates, hijackers, and outlaws whose crimes were typically committed outside the territory of any state. A state engaged in adjudicating crimes based on universal jurisdiction backs its claim on the grounds that the crime committed is considered an international crime. The best example of this to date was Belgium’s 1993 law of universal jurisdiction, though it was amended to reduce its scope in 2003. The creation of the ICC did *not* reduce the need to create further domestic universal jurisdiction laws, since the Court is not entitled to judge crimes committed before 2002. For further debate on the intricacies of the concept of universal jurisdiction, see Slaughter, Anne-Marie, and William Burke-White, “An international constitutional moment” (2002) 43 *Harv. Int’l LJ* 1; William Burke-White, “A community of courts: toward a system of international criminal law enforcement” (2002) 24 *Mich. J. Int’l L.* 1; William Burke-White, “International legal pluralism” (2003) 25 *Mich. J. Int’l L.* 963; William Burke-White, “Regionalization of International Criminal Law Enforcement: A Preliminary Exploration” (2003) 38 *Tex. Int’l LJ* 729; David Wallach, “The Irrationality of Universal Civil Jurisdiction” (2014) 46 *Geo. J. Int’l L.* 803; Abhimanyu George Jain, “Universal civil jurisdiction in international law” (2015) 55 *Indian Journal of International Law* 209; Aisling O’Sullivan, *Universal jurisdiction in international criminal law: the debate and the battle for hegemony* (Routledge, 2017); and Erik Voeten, “Competition and Complementarity between Global and Regional Human Rights Institutions” (2017) 8 *Global Policy* 119.

approach to international criminal law that requires a direct connection between the prosecuting state and the particular crime. States could enact national legislation granting domestic courts the power to assert universal jurisdiction over particular crimes as well as international courts such as the ICC having the power to litigate. However, the scope and content of universal jurisdiction laws vary significantly among states. Although domestic implementing legislation may be necessary for national courts to exercise universal jurisdiction, the contemporary framework of international conventions and international customary norms provide the legal grounds for the exercise of universal jurisdiction by states parties even without such a prerequisite.

The doctrine of universal jurisdiction asserts that for a select body of “international crimes,” the perpetrators in question should not escape trial by invoking doctrines of either sovereign immunity of states that is used as a standard defense of domestic capabilities, or, the sacrosanct nature of national frontiers again based on the principle of state sovereignty. Proponents of universal jurisdiction further argue that it is not always possible to prosecute crimes by the states in which they were committed. For example, after a devastating conflict or war, states may lack the necessary legal infrastructure and resources to carry out an investigation and prosecution. Alternatively, governments may intentionally fail or refuse to prosecute a crime that occurred within their territory. Crimes and conduct subject to prosecution may have been sanctioned or supported by the state itself, or the perpetrators of such crimes may be serving as government officials or could have allies within the ruling regime. Thus, there may be a lack of political will to pursue investigations, preventing the prosecution of alleged crimes. At least in theory, in the absence of accountability, other states may seek to initiate prosecutions on the basis of universal jurisdiction in order to prevent impunity and provide justice for victims of such crimes. At least some states may feel that they have a common interest, if not obligation, to punish perpetrators of serious crimes subject to universal jurisdiction.<sup>106</sup> States may also be under pressure to pursue prosecutions due the presence of a perpetrator within their borders, led by the

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<sup>106</sup> Recent examples of universal jurisdiction cases include: the prosecution and conviction of Nikola Jorgic, a former leader of a paramilitary Serb group, and Novislav Djajic, a Serbian soldier, by German courts for acts of genocide committed in Bosnia and Herzegovina (1997); the extradition request by a Spanish Court seeking to try former Chilean President Augusto Pinochet for crimes such as torture, murder, illegal detention, and forced disappearance (1998); the prosecution and conviction of two Rwandan nuns, Sister Maria Kisito and Sister Gertrude, by a domestic court in Belgium for war crimes committed during the 1994 Rwandan genocide (2001); and the investigation and indictment of the former president of Chad, Hissène Habré, by a Belgium court for crimes against humanity, torture, war crimes and other human rights violations committed during his presidency in Chad (2005).

desire for their territory not to be a safe haven for criminals. Generalizing this stance to the entire system of states as an absolute rule, however, is a different matter.

Indeed, I would posit that universal jurisdiction remains a controversial principle and practice in international law due to the state-centric nature of the very enterprise, as well as the power dynamics that shape the relations between states, regions and international courts. In this context, there are three instances that need to be re-examined to provide full background to this peculiar body of jurisprudence. With the Treaty of Versailles in 1919, President Woodrow Wilson's new agenda for Europe led to the development of the League of Nations, and the emergence of the Permanent Court of International Justice.<sup>107</sup> As a result, this court was seen as a victor's court. In 1945, the allied powers replaced the (by then defunct) League with the United Nations, which was followed by the establishment of Nuremberg and Tokyo military trials.<sup>108</sup> These too have been generally named as trials that led to victor's justice, despite the very valid reasons for which they tried war criminals, albeit one-sidedly. The UN Security Council itself proved heavily problem-laden in terms of misuse of its powers during the Cold War years. Following the collapse of the Soviet Union in November 1989, for instance, the permanent members of the Security Council cooperated in the unprecedented UN-backed strike against Iraq's invasion of Kuwait in August 1990. This is commonly cited—both positively and negatively—as the beginning of a “new world order.”<sup>109</sup> The Iraq decision was followed by the establishment of two *ad hoc* tribunals for the prosecution of crimes against humanity regarding the former Yugoslavia (1993) and Rwanda (1994). Considerations of the desirability and sustainability of emergent institutionalized organs of international law such as the International Criminal Court (ICC)—which is widely considered as the third call for the adjudication of universal jurisdiction—developed against this background. The ICC has also been under heavy attack from states in the Global South, as well as some in the West, who claim that it delivers justice based on very selective criteria and picks its cases according to political reasons rather

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<sup>107</sup> See Yves Beigbeder, *International justice against impunity: Progress and new challenges* (Martinus Nijhoff Publishers, 2005); and Bill Bowring, *The degradation of the international legal order?: the rehabilitation of law and the possibility of politics* (Routledge, 2008).

<sup>108</sup> See the historical piece by Robert Walkinshaw, "The Nuremberg and Tokyo trials: another step toward international justice" (1949) 35 *American Bar Association Journal* 299.

<sup>109</sup> See Mara Bustelo, *Whose new world order: what role for the United Nations?* (Wm Gaunt & Sons, 1991); Maz Singer & Aaron B. Wildavsky, *The real world order: Zones of peace, zones of turmoil* (Chatham House Pub, 1996); Stephen Gill, *Power and Resistance in the New World Order: Fully Revised and Updated* (Springer, 2008); and Anne-Marie Slaughter, *A new world order* (Princeton University Press, 2009).

than purely justice-related ones.<sup>110</sup> In this “new world order,” which is the historical context for the full-fledged embrace of the doctrine of universal jurisdiction, the state is not disappearing. Instead, it may be apt to argue that it is unbundling into separate, functionally distinct parts. In addition, regional hubs of economic activity, political alignment, power, and hegemony are becoming more pronounced. In such a multifaceted environment, courts, regulatory agencies, executives, and legislatures are networking with their counterparts across the globe, espousing a transnational system of governance and regulation.<sup>111</sup> This has been the reality of neoliberalism since the 1990s. And yet, curiously, both international law and international relations scholarship on international criminal law lag somewhat behind and lack answers to many of the most pressing challenges of the 21st century. Dominant schools of thought in this field continue to hold the state so dear that all else fades into the background. In my opinion, this is the real tragedy of the debate on universal jurisdiction, more so than the letter of the law itself or the uncertainties concerning its application.

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<sup>110</sup> On critiques of ICC, see Shadrack Gutto, “Created and Limited by Politics: A view of the ICC from Africa” (2003) 12 *African Security Studies* 127; Emmanuel Saffa Abdulai, “The Standoff between ICC and African Leaders Debate Revisited” *The Foundation for Law, Justice and Society* (ed.), *Oxford Transitional Justice Research: Debating International Justice in Africa* (2010); Wendy Laverick, *Global injustice and crime control* (Routledge, 2016).

<sup>111</sup> See Mark Rupert, *Ideologies of globalization: contending visions of a new world order* (Routledge, 2012). According to Rupert, the impoverishment of mainstream International Relations (IR) scholarship, especially in the bastions of academic power and respectability in the Global North, led to a willful conceptual blindness as to mutually constitutive relations of governance/resistance at work in the production of global politics. This is happening despite the rise of powerful transnational social movements seeking to reform or transform global capitalism. Critical scholars of world politics have developed conceptual vocabularies with which to reconstruct aspects of these governance/resistance relations. However, they have very limited influence over the mainstream of IR scholarship. For Rupert, Stephen Gill and others, Marxian theory provides critical leverage for understanding the structures and dynamics of late capitalism, its relationship to the modern state, and class-based power dynamics. These works no doubt offer a conceptual vocabulary suitable for articulating a transformative form of politics. Here, however, my focus is limited to analysis of the damaging effects of the mainstream arguments, as they often set the tone for both academic training and the politics of international law. See for instance, the classic work of Stephen Gill and David Law, “Global hegemony and the structural power of capital” (1993) 26 *Cambridge Studies in International Relations* 93.

## II. TWO SHIPS PASSING AT NIGHT? INTERNATIONAL LAW AND INTERNATIONAL RELATIONS<sup>112</sup>

International law and international relations scholarship, as two interrelated and yet separate disciplinary forms of knowledge, have traditionally approached the phenomenon of universal jurisdiction from different and sometimes opposing perspectives.<sup>113</sup> Consequently, their understandings of the establishment of the ICC and its juridification of international crimes exemplify rather contradictory treatments of universal jurisdiction. This is only partly due to a conception of international law—seen as the study of the kind of law that governs states and other international actors in their relations with each other—as prescriptive and heavily normative. In effect, international relations scholars have long self-identified their field as the analysis of the behaviour of states, and have been descriptive or explanatory but rarely openly prescriptive. Following the emergence of regime theory, theories of institutionalism and institutional realism, and in particular with the revival of liberal international relations theories, a rapprochement began during the 1990s.<sup>114</sup> As a result, a select but well-respected group of political scientists posited that the development of international law should be regarded as an explanatory factor in the analysis of state behavior. Similarly, an increasing number of influential legal scholars have become increasingly interested in understanding the workings of international politics in order to make full sense of the context out of which legal developments emerged, and later on were sustained or negated. In the IL field, scholars such as Anne-Marie Slaughter and Robert Keohane identified at least three ways that international lawyers and international law

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<sup>112</sup> I owe this analogy to the influential article by Philip Alston, "Ships passing in the night: the current state of the human rights and development debate seen through the lens of the Millennium Development Goals" (2005) 27 *Human rights quarterly* 755. Needless to say, Alston's take on the millennium goals is less than enthusiastic.

<sup>113</sup> See Craig Barker, *International law and international relations* (A&C Black, 2000); and David Armstrong, Theo Farrell, and Hélène Lambert, *International law and international relations* (Cambridge University Press, 2012). In the second decade of the 21<sup>st</sup> century, scholars of international law and international relations seem to have rediscovered one another. The result is a burgeoning "IR/IL" literature, in which international law scholars employ IR theories in the analysis of international law and institutions. They also challenge IR theories by reasserting the distinctive role of law in global politics. The most substantive examples of these come from TWAIL scholarship. See Karin Mickelson, "Rhetoric and rage: Third World voices in International Legal discourse" (1997) 16 *Wis. Int'l LJ* 353; David Fidler, "Revolt against or from within the West-TWAIL, the Developing World, and the Future Direction of International Law" (2003) 2 *Chinese J. Int'l L.* 29; Antony Anghie & Bhupinder S. Chimni "Third World Approaches to International Law and Individual Responsibility in Internal Conflicts" (2003) 2 *Chinese J. int'l L.* 77; Obiora Chinedu Okafor, "Newness, imperialism, and international legal reform in our time: a TWAIL perspective" (2005) 43 *Osgoode Hall LJ* 171; Branwen Jones, *Decolonizing international relations* (Rowman & Littlefield, 2006); and Bhupinder Chimni, "Third World approaches to international law: a manifesto" (2006) 8 *Int'l Comm. L. Rev.* 3.

<sup>114</sup> See Gerry Simpson, "Two liberalisms" (2001) 12 *European Journal of International Law* 537.

scholars could use IR theories: to diagnose international problems and formulate better legal solutions; to explain the structure and function of particular international legal institutions; and to examine and re-conceptualize particular institutions of international law as well as international law as a domain in its own right.<sup>115</sup> Despite the rapprochement of the recent years, it is worth noting that the legacy of past divisions, not only between these two disciplines but also within each of them, continues to cast a shadow on the study of international law in general, and universal jurisdiction in particular. For instance, there are several conflicting versions of what IR or IL scholars consider the international political system that provides the foundations for international law. First and foremost, there is the classical international relations conception of a world composed of regulated states, a vision that makes very little distinction between the process of international legalization and the creation of international institutions. According to this approach, the process of legalization is seen as the impetus behind institutionalization and regulated practice of rules.<sup>116</sup> In this context, distinct formations such as the ICC are accepted as simply reflecting enduring sets of rules and norms in international politics. Accordingly, decision-making processes in international law and their potential to shape the future expectations, interests, and behaviour of international actors is a natural continuation of international politics.

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<sup>115</sup> Along with Kenneth Abbott, Anne-Marie Slaughter and Robert Keohane develop an empirically based conception of international legalization to show how law and politics are intertwined across a wide range of institutional forms. Their theory of international legalization has three dimensions: obligation, precision, and delegation. For them, obligation connotes that states are legally bound by rules or commitments and therefore subject to the general rules and procedures of international law. Precision means that rules are definite, unambiguously defining the conduct they require, authorize, or proscribe. The last dimension, that of delegation, grants authority to third parties for the implementation of rules, including their interpretation and application, dispute settlement, and further rule-making. They argue that these dimensions are conceptually independent, and that their various combinations produce a variety of international legalization projects. Accordingly, the spectrum extends from “hard” legalization associated with domestic legal systems to “soft” legalization where written law is largely absent. This is a heavily instrumentalist reading of international law. Alas, it dominates the IR scholarship on international law. See Kenneth Abbott, Anne-Marie Slaughter & Robert Keohane, “The concept of legalization” (2000) 54 *International organization* 401. Also see Robert Keohane, *Power and governance in a partially globalized world* (Routledge, 2002) as well as Anne Marie Slaughter’s earlier work, “The New World Order” (1997) 76 *Foreign Affairs* 183.

<sup>116</sup> See Judith Goldstein, M. Kahler, Robert Keohane, & Anne Marie Slaughter, “Introduction: Legalization and world politics” (2000) 54 *International organization* 385. Also see Judith Goldstein, *Legalization and world politics* (MIT Press, 2001). For a critique of this approach, see Martha Finnemore & Stephen J. Toope, “Alternatives to “legalization”: richer views of law and politics” (2001) 55 *International Organization* 743. Finnemore and Toope argue that the legalization approach to the politics of international law is unnecessarily narrow. They posit, and I agree, that law is a broad social phenomenon that is deeply embedded in the practices, beliefs, and traditions of societies. Understanding its role in politics requires attention to the legitimacy of law, to custom and law’s congruence with other social practices, to legal rationality, and to the framework within which adherence to legal processes finds articulation.

On this issue, of whether legalization is simply a reiteration of the political *status quo* or whether it offers and reflects something more, international law theorists harbour a rather different set of opinions. At least in critical IL scholarship, international legal institutions are not at all seen as equal units. Furthermore, they are attributed a *jurisgenerative* function.<sup>117</sup> Particularly from the perspective of global legal pluralism, IL scholars emphasize the inevitability and even desirability of multiple legal and quasi-legal systems purporting to regulate and direct legal actors in international law.<sup>118</sup> No doubt, the resulting plurality creates conflict between norms embraced by different actors. However, it is presumed that legal systems must be equipped to address how best to respond to the realities of conflicting demands and normative frameworks. In this sense, and contrary to mainstream IR literature, in the context of critical IL studies law is described as a platform for struggle. This line of inquiry also has a constitutional dimension, as it questions the constitutive character of communities and their relationships with other communities, be they international, transnational, national, or subnational. In this regard, international law is not to be solely *jurispathic*, and bodies of law such as universal jurisdiction are not juridified to silence all other and competing interpretations of what constitutes an international crime. The idea is to bring different voices into the debate on what international law ought to be, thereby creating at least the possibility that past injustices may be addressed if not remedied. In mainstream IR scholarship, as already discussed, the degree to which a legal institution's rules are obligatory, the precision of these rules, and the delegation of legal authority to third parties to interpret, implement, and monitor these rules determine the strength of a legal institution.<sup>119</sup> According to these criteria, the ICC appears as an exceptionally effective institution in international law, and the same applies to the process of universal jurisdiction. The ICC applies and promotes a codified set of laws reified by the principle of *jus cogens*, and it is an independent international court with a consent-based statute that is in turn expected to be enshrined within the domestic legislation of signatory states parties. As such, it constitutes a

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<sup>117</sup> See Ingo Venzke, "The role of international courts as interpreters and developers of the law: working out the jurisgenerative practice of interpretation" (2011) 34 *Loy. LA Int'l & Comp. L. Rev.* 99.

<sup>118</sup> See Paul Schiff Berman, "Jurisgenerative Constitutionalism: Procedural Principles for Managing Global Legal Pluralism" (2013) 20 *Indiana Journal of Global Legal Studies* 665.

<sup>119</sup> See for instance, Friedrich Kratochwil, *Rules, norms, and decisions: on the conditions of practical and legal reasoning in international relations and domestic affairs* (Cambridge University Press, 1991). For a critique of mainstream scholarship on this point, see John Agnew, "The territorial trap: the geographical assumptions of international relations theory" (1994) 1 *Review of international political economy* 53.

prime case for affirming that international rules and norms have a causative effect on the behavior of states and societies, rather than merely being an outcome of already established consent or brokered arrangements.<sup>120</sup> This is an interesting point of convergence between the liberal institutionalist theorists of IR and the normative theorists of IL. Indeed, the work done under the banner of liberal institutionalism has a close affinity with that of idealist/normative legal scholarship on international law, though the former may go so far as to wish for a conception of a morality-based politics and a widespread mode of transgovernmentality in international relations.<sup>121</sup> The idealist perspective holds that human nature is both desiring and capable of mutual aid and collaboration. Furthermore, states are considered only as one group of actors in the international community, along with nongovernmental organizations, regional organizations, transnational corporations, and of course individuals, who are seen as the constituent units of the international system. Therefore, the idealist/normative stance emphasizes the importance of international law's confronting the state as well as other international actors, in the name of moral norms and principles aspiring to the sustenance of the common good.<sup>122</sup> The spirit of such a take on international law is enthusiastically shared by liberal institutionalist scholarship in IR.<sup>123</sup> The result is an amorphous project of intellectual zeal, characterized by a maximum degree of expectation from international law with a minimum degree of cynicism.

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<sup>120</sup> The international law literature on the merits of the ICC, and in particular on the importance of the juridification of crimes against humanity is expansive and still growing. However, as foundational pieces, see Paul Kahn, "Speaking Law to Power: Popular Sovereignty, Human Rights, and the New International Order" (2000) 1 *Chi. J. Int'l. L.* 1; Immi Tallgren, "The sensibility and sense of international criminal law" (2002) 13 *European Journal of International Law* 561; Mark Drumbl, "Collective violence and individual punishment: The criminality of mass atrocity" (2004) 99 *Nw. UL Rev.* 539; Jürgen Habermas, "The constitutionalization of international law and the legitimation problems of a constitution for world society" (2008) 15 *Constellations* 444; Gerry Simpson, *Law, war and crime: war crimes, trials and the reinvention of international law* (Polity, 2007); Sara Kendall & Sarah Nouwen, "Representational practices at the International Criminal Court: The gap between juridified and abstract victimhood" (2013) 76 *Law & Contemp. Probs.* 235.

<sup>121</sup> See Anne-Marie Slaughter & Jose E. Alvarez "A liberal theory of international law" (2000) 94 *The American Society of International Law* 24; Jose Alvarez, "Hegemonic international law revisited" (2003) 97 *The American Journal of International Law* 873; Jose Alvarez, "International organizations as law-makers" (2005) 31 *Suffolk Transnational Law Review* 3.

<sup>122</sup> For a historical critique of this perspective, see Martti Koskeniemi, *The gentle civilizer of nations: the rise and fall of international law 1870–1960*. Vol. 14 (Cambridge University Press, 2001). For its political critique, see Balakrishnan Rajagopal, *International law from below: Development, social movements and third world resistance* (Cambridge University Press, 2004).

<sup>123</sup> On the history of this school of thought, see Charles Kegley, *Controversies in international relations theory: Realism and the neoliberal challenge* (St. Martin's Press, 1995); Jeffrey Checkel, "The constructive turn in international relations theory" (1998) 50 *World politics* 324; Andrew Moravcsik, *Liberal international relations*



The history of the idealist-realist debate in IR theory shows that it was initially framed by the realist camp, who constructed a unified “idealism” as a straw man to justify their theories of global politics. The paradigm of idealism turned out to be very close to the staged antagonism embodied in the *sovereignty/anarchy* discourse of the interwar years.<sup>124</sup> Either way, the winner-takes-all approach that shaped the traditional IR theories readily found a counterpart in IL scholarship. At the same time, the darker conception of international law characterized by realist discourse, amounting to an account of a world of self-interested states with calculative goals, never entirely disappeared. Historically, this vision was endorsed and promoted by the core academic institutions of IR in the Global North.<sup>125</sup> Ultimately, it provided sustenance to the view that the state is and will remain the inviolable actor in both international politics and international law. Realist, and later on neo-realist, perspectives also insisted that states act solely in their own self-interest, and that any international intrusion challenging state sovereignty is unjustifiable.<sup>126</sup> This take on state sovereignty has been upheld with reference to Article 2(7) of the UN Charter,

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*theory: a social scientific assessment*. No. 1-2. Weatherhead Center for International Affairs (Harvard University, 2001).

<sup>124</sup> Here, the aim of academic scholarship was defined as understanding dynamics of international cooperation and discord. Theories of how international institutions work were developed in this context. The assumption of substantive rationality has proved a valuable tool in pursuing such knowledge. From the 1990s onwards, the intellectual predominance of the rationalistic approach has been challenged by a reflective approach, stressing the embedding of contemporary international institutions in the larger socio-political realm. See Mark Neufeld, "Reflexivity and international relations theory" (1993) 22 *Millennium-Journal of International Studies* 53; Ted Hopf, "The promise of constructivism in international relations theory" (1998) 23 *International security* 171; Stefano Guzzini, "The ends of International Relations theory: Stages of reflexivity and modes of theorizing" (2013) 19 *European Journal of International Relations* 521.

<sup>125</sup> See Peter Spiro, "A Negative Proof of International Law" (2005) 34 *Ga. J. Int'l & Comp. L.* 445; Jack Goldsmith & Eric A. Posner, "The new international law scholarship" (2005) 34 *Ga. J. Int'l & Comp. L.* 463, and Andrew Guzman, *How international law works: a rational choice theory* (Oxford University Press, 2008). According to Guzman, for instance, one of the key reasons that lead states to comply with international law in the absence of coercive enforcement mechanisms is a concern for their reputation for compliance with international legal rules. Guzman believes that such a reputation is valuable precisely because it allows states to make credible commitments to one another in various areas of international law. In true form as a realist theorist, he considers the strategic decisions states make as a reflection of *realpolitik* in the area of international law.

<sup>126</sup> Neorealism or structural realism is a theory of international relations that identifies power as the most important factor for analysis of interstate relations. Although it was first outlined by Kenneth Waltz back in 1979 [reprinted as *Theory of international politics* (Waveland Press, 2010)], it made a strong comeback in the first decade of the twenty-first century. Alongside neoliberalism, neorealism continues to be one of the most influential contemporary approaches to international relations. Neorealism reformulates the classical realist tradition of E.H. Carr, E. H. Morgenthau and Reinhold Niebuhr in such a way that it is adapted to most recent developments in transnational politics. See Hans Morgenthau, *Politics Among Nations* (Alfred Knopf, 1948); Richard Ashley, "The poverty of neorealism" (1984) 38 *International organization* 225; Robert Keohane, *Neorealism and its Critics* (Columbia University Press, 1986); David Baldwin, *Neorealism and neoliberalism: the contemporary debate* (Columbia University Press, 1993); Hedley Bull, *The anarchical society: a study of order in world politics* (Palgrave Macmillan, 2012).

prohibiting interference in the domestic affairs of a sovereign state barring specified circumstances.<sup>127</sup> Supporters of this view thus posit that international rules and norms are of consequence only if they are in the self-interest of the states implicated by them. The resulting opposition between idealist/normative and realist views of international law affected both disciplines, but is particularly explicit in IR scholarship. Meanwhile, the difference between “instrumentalist” versus “normative” lenses for examining international politics and international law led to a foundational crisis in both fields. As an alternative, Robert Keohane made the observation that international [legal] institutions are a crucial site for the alignment of interests with norms. As such, he argued, a composite approach, bridging realism with idealism, is called for.<sup>128</sup> Indeed, this debate between realists and idealist-cum-liberals has reemerged as an axis of contention multiple times since the Cold War years. In its latest form, the debate is concerned about the extent to which state action is influenced by structures as opposed to process and institutions.

It is in this context that liberal institutionalism came to define the golden medium between realism and idealism (though it stands closer to the latter than the former). Historically, there have been both normative and positivist versions of liberalism, and thus liberal takes on international law have produced both descriptive and prescriptive scholarship. The most current version of liberal scholarship is built on the assumption that the “international community” comprises a range of actors both within and across state boundaries, and accepts that state interests are to be regarded as a complex product of the interests of actors within each state, as well as among states and other actors. Liberal scholarship of late also assumes a variety of regime types. Yet it openly privileges the liberal state, for the simple reason that it looks at trends in warfare and extended internal strife. In that sense, this model also has widespread currency among scholars of democratic development, human rights, and, of course, international law.<sup>129</sup>

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<sup>127</sup> Article 2 (7) of the UN Charter reads: “[j]urisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII.” For the full document, see UN Codification Division Publications at [http://legal.un.org/repertory/art2\\_7.shtml](http://legal.un.org/repertory/art2_7.shtml) [25.03.2017].

<sup>128</sup> See Robert Keohane, “International institutions: Can interdependence work?” (1998) *Foreign policy* 82; Robert Keohane, *After hegemony: Cooperation and discord in the world political economy* (Princeton University Press, 2005), and, Robert Keohane, “Neoliberal Institutionalism” in *Security Studies: A Reader* (Routledge, 2011).

<sup>129</sup> See Anne-Marie Slaughter, “Liberal international relations theory and international economic law” (1994) 10 *Am. UJ Int’l L. & Pol’y* 717; Stephen Krasner, “International Law and International Relations: together, apart, together” (2000) 1 *Chi. J. Int’l L.* 93.

Still, liberal institutionalism hardly provides all the answers, or even manages to ask all the critical questions. Yet another venue for the debate regarding the role played by international law in international politics, and the possibility of universal jurisdiction in select areas such as crimes against humanity, has been post-conflict versus process-oriented understandings of international institutions. The former is based on the assumption that it is only in the aftermath of a major conflict, such as a world war or regional catastrophe, that actors in international politics would cooperate and use incentive to come up with common solutions. These attempts, however, are not regarded as having an accumulative effect. In this sense, the post-conflict model of international law's emphasis on "crisis periods" is very much in line with realist and neo-realist schools of thought in international relations scholarship. Inherent in the post-conflict model is the observation that the display of collective or even consultative will tends to dissipate within a limited period of time, and states as well as other relevant actors return to their self-interest guided motivations. What is left is the memory of cooperation calcified in international treaties and institutions, which can become relics if they do not cater to the changing interests of their framers. This model, needless to say, fails to pay attention to the fact that stability and lack of war, in many cases, have enough appeal to be pursued afterward in the name of self-interest. In contrast, the process-oriented model of developments in international law emphasizes continuity rather than rupture, and is favourable to the idea of cumulative effects. For instance, according to this perspective, the emergence of institutions such as the ICC is directly linked to a series of evolving practices since the founding of the League of Nations.<sup>130</sup> Just as the clash between normative and instrumentalist optics identified by Keohane and others reflects paradigmatic differences about how to understand international law in general and universal jurisdiction in particular, so too does the more friendly-looking debate between conflict-related versus process-oriented approaches to international institutions, as each produces a radically different kind of scholarship with practical implications. In the following pages, a select set of specific debates influenced by these currents of scholarship will be examined. Here, only brief attention will be paid to the specificities of crimes against humanity legislation and how it relates to international relations and international law scholarship. The basic premises of how universal jurisdiction is

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<sup>130</sup> See Vesselin Popovski, "International Criminal Court: A necessary step towards global justice" 2000 31 *Security Dialogue* 405.

defined in international law and international relations scholarship constitutes the first step towards an all-encompassing analysis of the legal-juridical conception of crimes against humanity.

### **III. THE INSIDE/OUTSIDE AND DOMESTIC/INTERNATIONAL DICHOTOMIES IN INTERNATIONAL LAW**

Since H.L.A. Hart's seminal work *The Concept of Law* (1961), international law has been commonly described as embryonic, and often treated as quasi- or soft law.<sup>131</sup> This is mainly due to the state-centric conception of law itself. The question of what makes international law "legal," and international relations' inquiries about international order (moral as well as political) and what sustains or undoes it, are interrelated.<sup>132</sup> Whether it is possible to make this relation within the dominant paradigms in either IR or IL scholarship, however, is highly questionable. Perhaps, then, the job of the legal theorist who is at also home with international relations theories is to examine how political communities behave in response to international legal predicaments, while vehemently refuting the assumption that each community exists in isolation from the rest of the world. Kenneth Waltz, a well-known representative of traditional international law scholarship, long insisted that international relations and international law are both akin to a complete system, composed of an overarching structure and interacting units. In Waltz' work, structures define the relations of units based on an ordering principle, referring to the way in which the units of the system relate to each other. Specifically, Waltz spoke of two kinds of ordering principles: those characterized by relations of equality and those characterized by relations of superiority and subordination. At the state level, in the corresponding domain of domestic law, Waltz depicted a hierarchy within which select actors had legitimate power to command. International relations, however, is based on the concept of sovereign equality and therefore, at least to him, seemed

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<sup>131</sup> See Herbert Lionel Adolphus Hart, "Positivism and the Separation of Law and Morals" (1958) *Harvard law review* 593; Ronald Dworkin, ed. *The philosophy of law* (Oxford University Press, 1977); Herbert Lionel Adolphus Hart, *The concept of law* (Oxford University Press, 2012).

<sup>132</sup> See Randall Schweller, "The problem of international order revisited: A review essay" (2001) 26 *International Security* 161.

much more open to anarchy than the domestic realm.<sup>133</sup>

Half a century later, although there is a growing body of work in international relations scholarship dealing with the issue of international law including debates on human rights, humanitarian intervention, environmental issues, and international organizations, international law as a concept is still defined primarily in a positivist and practice-oriented manner, with the underlying sense of its propensity for anarchy. In IR theories on international law, either assumptions of anarchy constitute the ordering principle of interstate relations as Waltz once theorized, or discourses of hegemony and empire are seen as sustained through the edifice of international law. Both are posed in opposition to a desirable social order based on justice and fairness at the global level, which is of course the cosmopolitan call. In other words, according IR analysis, international law either cannot sustain true legitimacy, or when it does, it cannot provide a common language to promote justice and equality. For the “anarchy” school, international law is devoid of an enforcing authority, while for the “hegemony” school, it is structurally incapable of limiting excessive exercises of power or correcting injustices, defined both in historical and contemporary terms.<sup>134</sup> As already mentioned, this state of affairs in international relations theory stands in stark opposition to the claims of traditional legal scholarship on international law, as the latter attribute an independent force to norms, legal rules and, of course, international legal institutions and organizations.<sup>135</sup> If state behaviour is driven primarily by immediate material interests, then normative factors and rules would have no significant impact on international politics in the absence of an enforcement agency or a hegemonic power structure.<sup>136</sup> On this issue, liberal institutionalist and realist camps of IR theories converge. While liberal

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<sup>133</sup> See Kenneth Waltz, *Man, the state, and war: A theoretical analysis* (Columbia University Press, 1959). Also see his later work, including Kenneth Waltz, "The stability of a bipolar world" (1964) *Daedalus* 881; Kenneth Waltz, "The emerging structure of international politics" (1993) 18 *International security* 44; as well as Kenneth Oye, "Explaining cooperation under anarchy: Hypotheses and strategies" (1985) 38 *World politics* 1.

<sup>134</sup> See John Mearsheimer, "The false promise of international institutions" (1994) 19 *International security* 5. Meanwhile, the latest wave of liberal institutionalist scholarship asserts that, although international anarchy impedes cooperation among states, it can nevertheless affirm the central tenets of the liberal institutionalist tradition that states can achieve cooperation and that international institutions can help them work together. For a diametrically opposed critique of the order despite anarchy argument, see Stephen Gill, *Power and Resistance in the New World Order* (Springer, 2008).

<sup>135</sup> For a critical history of the field, see Karen Alter, *The New Terrain of International Law: Courts, politics, rights* (Princeton University Press, 2014).

<sup>136</sup> See Ian Brownlie, *International Law and the Use of Force by States* (Clarendon Press, 1963); Christine Gray, *Judicial Remedies in International Law* (Oxford University Press, 1990); as well as Christine Gray, *International Law and the Use of Force* (Oxford University Press on Demand, 2008).

institutionalist scholars differ from realists in their emphasis on states' ability to cooperate, they nevertheless rely on the same basic assumptions about the self-interested nature of states.<sup>137</sup> As such, it is argued that states follow legal rules only when there is a clear and tangible incentive.

Consequently, at least two of the dominant schools in IR theory treat international law as an exogenous phenomenon eliciting context-dependent degrees of compliance. In other words, international law is posited in fundamentally instrumentalist terms vis-à-vis international politics. Of course there are other schools of international relations, such as constructivist and poststructuralist scholarship, which have long challenged the basic assumptions of both realist and liberalist renditions of international law.<sup>138</sup> Of these, constructivists tend to emphasize the relational nature of all things international, and put emphasis on the importance of norms and their institutionalization in relation to the identities and interests of states.<sup>139</sup> Still, they rarely engage in debates on the nature of international law. This is because international relations and political science are primarily constituted as disciplines premised on the Hobbesian opposition of anarchy and order. If this opposition could be rejected, it would become possible to account for pervasive asymmetries in international politics and law. However, this kind of dichotomous thinking rarely emerges from the registers of traditional IR scholarship. Consequently, while norms such as sovereignty or human rights are given extensive exposure in constructivist

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<sup>137</sup> See José Alvarez, "International organizations as law-makers" (2005) 31 *Suffolk Transnational Law Review* 3; José Alvarez, "International organizations: Then and now" (2006) 100 *The American Journal of International Law* 324. Alvarez is best known for his claim that international organizations with a global reach have changed the mechanisms and reasoning behind the making, implementation, and enforcement of international law. He is dismayed by the disappearance of faith in law and underlines the multilateral approach that was characteristic of legal culture among those who designed the international law institutions back in the late 1940s.

<sup>138</sup> In the context of an unfolding process of neo-liberalization, these alternative schools of thought strive to identify new terrains of resistance that crystallize as a result of the struggles of subaltern groups who contest the marginalizing consequences of this process. They decipher law-making as a complex and contradictory practice that seeks to negotiate a compromised equilibrium. The struggle is between, on the one hand, subaltern groups vulnerable to marginalization and yet capable of mobilization, and, on the other, the dominant classes and groups whose economic interests are linked to the exploitation of spaces of accumulation. See for instance, Douglas Litowitz, "Gramsci, hegemony, and the law" (2000) 2 *Brigham Young Uni. L. Rev.* 515. Also see Jeffrey Checkel, "The constructive turn in international relations theory" (1998) 50 *World politics* 324, and Emanuel Adler, "Constructivism in international relations: sources, contributions, and debates" (2013) 2 *Handbook of international relations* 112.

<sup>139</sup> See Friedrich Kratochwil, "The Challenge of Security in a Changing World" (1989) 43 *Journal of International Affairs* 119; Nicholas Onuf and Frank F. Klink, "Anarchy, authority, rule" (1989) 33 *International Studies Quarterly* 149; Alexander Wendt, "Anarchy is what states make of it: the social construction of power politics" (1992) 46 *International organization* 391; Ian Hurd, "Legitimacy and authority in international politics" (1999) 53 *International organization* 379; Nicholas Onuf, *World of our making: rules and rule in social theory and international relations* (Routledge, 2012).

scholarship, there has been little regard to actual mechanisms and procedures linking the idea of legitimate statehood to norms and institutions belonging to the realm of international law.<sup>140</sup> Instead, the focus on norms and common identity construction led constructivist analysts to develop a neo-Kantian kind of utopianism.<sup>141</sup> In this regard, their interventions proved similar to those entertained by liberal institutionalist or idealist IR scholarship, praising increased legalization and institutionalization while blocking a view that would reveal the dysfunctional aspects of norm development and implementation. In contrast, poststructuralists analyze and criticize underlying structures and concepts such as sovereignty and statehood, and intentionally blur the distinction between domestic and international politics. In their work, law becomes a means and never an end in and of itself.<sup>142</sup> And yet, while the deconstruction of taken-for-granted categories is a valuable undertaking, poststructuralist approaches in IR have been either reluctant or simply unable to develop an alternative framework to understand international law in its relation to international politics.<sup>143</sup> Thus, it is apt to suggest that they did not radically diverge from the IR convention of neglecting international law. Indeed, despite theoretical and methodological differences, most IR approaches to international law regard it essentially as a constraint on state behavior. Law is treated as a construct that defines legitimate forms of violence. Meanwhile, this perspective totally misconceives the role international law plays in both the making and sustaining of state identities and state legitimacy. It also perpetuates the dichotomy of domestic and international domains identified by poststructuralist analysis. Though

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<sup>140</sup> See, specifically, Christian Reus-Smit, "The constitutional structure of international society and the nature of fundamental institutions" (1997) 51 *International Organization* 555. Reus-Smit argued that modern states have constructed a multiplicity of issue-specific regimes, and that these led to new institutional practices that structured modern international society, such as contractual international law and multilateralism. He further posited that international legal institutions and their practices transcend the balance of power motivations in international politics.

<sup>141</sup> See Samuel Barkin, "Realist constructivism" (2003) 5 *International Studies Review* 325; Patrick Thaddeus Jackson, "Bridging the Gap: Toward A Realist-Constructivist Dialogue" (2004) 6 *International Studies Review* 337; Samuel Barkin, *Realist constructivism: Rethinking international relations theory* (Cambridge University Press, 2010).

<sup>142</sup> See Richard Ashley, "The geopolitics of geopolitical space: toward a critical social theory of international politics" (1987) 12 *Alternatives* 403; Mark Hoffman, "Critical theory and the inter-paradigm debate" (1987) 16 *Millennium* 231; James Der Derian, "Introducing Philosophical Traditions in International Relations" (1988) 17 *Millennium* 189; Rob BJ Walker, *Inside/outside: international relations as political theory* (Cambridge University Press, 1993); Martin Griffiths, Steven C. Roach & M. Scott Solomon, *Fifty key thinkers in international relations* (Routledge, 2008).

<sup>143</sup> See a detailed critique of this point in Kimberly Hutchings, *International political theory: Rethinking ethics in a global era* (Sage, 1999). Also see Molly Cochran, *Normative theory in international relations: a pragmatic approach* (Cambridge University Press, 1999); Richard Shapcott, *Justice, community and dialogue in international relations* (Cambridge University Press, 2001); Janna Thompson, *Justice and world order: A philosophical inquiry* (Routledge, 2013).

plenty of work is done in IR on the legitimacy of sovereign states and their use of force leading to systemic political violence, institutionalized forms of exercise of power via international regulatory regimes are rarely included in this matrix, nor is the international legal system and its workings. If attention could be shifted, from the classical problems concerning the legitimacy of the sovereign state and its relations with other states and international actors to the intersection between domestic and inter/supra-national politics, the question of the relationship between law, legitimacy and normative consensus building would gain traction.

Returning to the canon of IR theory, an interesting figure is worthy of note, as one of the most vocal critics of the modern system of law, domestic or otherwise. This is Carl Schmitt.<sup>144</sup> Schmitt criticizes international law's regulatory character, due to his fear that it undermines the political nature of international relations. This view suggests that law does not work merely through sanctioning, but also through the normalization and neutralization of contention in an existing political order. If so, law is to be seen as a product of social practices and political relations, rather than an external and calcified imposition based on the threat of force. Furthermore, what distinguishes law from other discourses is that it provides the basis for social organization and political order across the whole spectrum of modern societies, liberal or otherwise.<sup>145</sup> Meanwhile, in order to fulfill its functions, law must be perceived as distinct from the social order it is embedded in and the conflicts it is meant to regulate. It is also posited as different from traditions and habits.<sup>146</sup> The result is the positing of a theory concerning the self-referential nature of law and its distance from abstract morality.<sup>147</sup> This definition of law has been taken apart, not only by international relations scholars but within the domain of legal scholarship

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<sup>144</sup> See Carl Schmitt, *Political theology: Four chapters on the concept of sovereignty* (University of Chicago Press, 1985); Carl Schmitt, *The concept of the political: Expanded edition* (University of Chicago Press, 2008); Carl Schmitt, *Political theology II: The myth of the closure of any political theology* (John Wiley & Sons, 2014).

<sup>145</sup> See Brunnée, Jutta, and Stephen J. Toope, "International law and constructivism: elements of an interactional theory of international law" (2000) 39 *Colum. J. Transnat'l L.* 19. Here, the authors criticize the standard definition of "legalization" in terms of the degree of obligation, precision, and delegation that a given international institution possesses. They argue that this definition is unnecessarily narrow. Instead, similar to Schmidt, they posit law as a broad social phenomenon that is deeply embedded in the practices, beliefs, and traditions of societies. If so, understanding law's role in politics requires attention to be paid to the legitimacy of law, to law's congruence with social practices, to the role of legal rationality, and to participation in law's construction. The authors believe, and I concur, that such a fuller consideration of law's role in politics can produce concepts that are more robust in yielding an understanding of how law works in the "real world."

<sup>146</sup> See Alan Watson, "Society's Choice and Legal Chance" (1980) 9 *Hofstra L. Rev.* 1473.

<sup>147</sup> See Martti Koskeniemi, Walter Rech, and Manuel Jiménez Fonseca, eds., *International Law and Empire: Historical Explorations* (Oxford University Press, 2017).



itself, as well. Scholarship associated with the critical legal studies movement is exemplary in this regard.<sup>148</sup> Indeed, the links established in the realm of domestic/municipal law between power, law, and sovereignty are also present in the context of international law. Furthermore, while law is generally understood to limit as well as legitimize the use of force, the international legal system relies heavily on another function of law: its ability to define targets and regions for legitimate political action that performs a regulative function. In other words, the authorization of acts that lead to the regulation of political actors (both state and non-state) is an equally important aspect of international law.<sup>149</sup> In this sense, public international law bears quite a few similarities to domestic administrative law. Still, the international legal system seems to critically depend on the maintenance of domestic sovereignty, as this guarantees the internal consolidation of power.<sup>150</sup> As a result, international law first and foremost regulates the division of the world into sovereign territorial units, as well as dividing oceans, airspace, and natural resources, and added to this list are law's direct and indirect involvements in the management of the world economy.<sup>151</sup>

In other words, international law has unique functions that cannot be discussed solely in the language of municipal/domestic law, but cannot be totally separated from it, either. No matter how contested the validity and power of international legal regimes may be, international law symbolizes the institutionalization of mores, norms, and practices at a scope larger than the domain of the state itself. The effectiveness of a legal system in an international context cannot be measured only or primarily in terms of its enforcement capacity. Rather, the whole arsenal of means it deploys for deterring violations of its rules, as well as unique techniques in developing

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<sup>148</sup> See, *inter alia*, Roberto Mangabeira Unger, "The critical legal studies movement" (1983) *Harvard Law Review* 561; Alan Freeman and Richard Delgado, "Critical Legal Studies Movement" (1988) 23 *Harvard Civil Rights-Civil Liberties Law Review*; Mari Matsuda, "Looking to the bottom: Critical legal studies and reparations" (1987) 22 *Harv. Crl L. Rev.* 323; Mark Tushnet, "Critical legal studies: A political history" (1991) *Yale Law Journal* 1515; and Duncan Kennedy, and Karl E. Klare, "A bibliography of critical legal studies" (1984) *Yale Law Journal* 461.

<sup>149</sup> As argued by Martti Koskenniemi, reducing international law to a set of mechanisms to advance functional objectives of states is a very short-sighted view of it. See Martti Koskenniemi, "The fate of public international law: between technique and politics" (2007) 70 *The Modern Law Review* 1.

<sup>150</sup> See Alexander Wendt, "Anarchy is what states make of it: the social construction of power politics" (1992) 46 *International organization* 391.

<sup>151</sup> See Eyal Benvenisti & George W. Downs, "The empire's new clothes: political economy and the fragmentation of international law" (2007) 60 *Stanford law review* 595; Andreas Fischer-Lescano & Gunther Teubner, "Regime-collisions: the vain search for legal unity in the fragmentation of global law" (2003) 25 *Mich. J. Int'l L.* 999; Robert Gilpin, *The political economy of international relations* (Princeton University Press, 2016).

and legitimizing these rules, must be taken into consideration.<sup>152</sup> Contemporary international law requires the allocation of authority within a complex system of legal prescriptions. As international law has extended to areas as diverse as the management of global commons, migration, trade, environmental regulation and human rights, the consequences of breach of international legal obligations have become increasingly complex to determine. There are special secondary rules within general international law concerning state responsibility in these areas. However, states do not constitute self-contained international legal regimes. International legal regimes are larger than the sum total of states they potentially bind, and possess different qualities. The next question in this context is to determine whether the function of international law with regard to statehood is merely “declaratory,” or, whether it is “constitutive.” If it is the latter, obligation would be the determinant of the legal character of international law. If the former, force would win the day. As IR scholar Louis Henkin (1979) pointed out many years ago, even in domestic societies individuals obey law out of fear of extra-legal consequences. In so many words, punitive mechanisms are not always necessary.<sup>153</sup> Legality is to be defined as an ongoing process that involves institutions and practices as well as rules and enforcement mechanisms. Indeed, as already mentioned, particular criteria are adopted, such as those proposed by the contributors of the influential special issue of *International Organization* (2000) regarding how to define international legal institutions, which include precision and delegation as crucial dimensions of legal regimes.<sup>154</sup> Still, such criteria do not automatically give a definitive normative value to international law, nor do they guarantee that increasing international legalization would lead to the betterment of the world, whichever way progress may be defined. This is yet another point of critical exchange between international law and international relations scholarship. Adherents of critical international legal studies have already pointed out how law can and does reinforce existing social structures and tendencies towards violence and injustice

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<sup>152</sup> On the issue of the criteria used for determining effectiveness of international legal regimes, see Bruno Simma and Dirk Pulkowski, "Of planets and the universe: self-contained regimes in international law" (2006) 17 *European Journal of International Law* 483.

<sup>153</sup> See Louis Henkin, *How nations behave: law and foreign policy* (Columbia University Press, 1979).

<sup>154</sup> See Kenneth Abbott & Duncan Snidal, "Hard and soft law in international governance" (2000) 54 *International organization* 421. On this particular issue, the authors examine why international actors—including states, transnational firms, and NGOs/INGOs—seek different types of legalized arrangements to solve political and substantive problems in international politics. They argue that particular forms of legalization provide superior institutional solutions in different circumstances.

through its capacity for reification, mystification and legitimation.<sup>155</sup> At this point, the necessity of establishing bridges between domestic and international understandings of law becomes all the more apparent. To be more specific, international law establishes criteria for membership for both state and non-state actors in international legal systems, as well as identifying the rights and duties of involved actors.<sup>156</sup> As such, it legitimizes and reproduces certain kinds of relationships while forbidding or chastising others. International law is thus engaged in the creation, legitimation and regulation of relations in both the domestic and non-domestic spheres.<sup>157</sup> What has so far been emphasized excessively is its inter-state dimensions. This is despite the fact that, through its institutions and practices, international law has a direct involvement not just in the regulation of state behavior but also in the very production of the definition and norms of statehood. International law does not only endorse and stabilize the parameters within which actors engage with each other. It also establishes the criteria by which to distinguish legitimate actors, and how they are to be constituted within the system at large.

Here, the language of constraints adds an interesting dimension to the debate on the relationship between international law and statehood. The liberal institutionalist school of international relations theory generally equates international law with external constraints—that is, norms and norm enforcement mechanisms to control behaviour of actors in terms of specific rights and obligations.<sup>158</sup> The choice between compliance and non-compliance, especially in the

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<sup>155</sup> See, *inter alia*, David Held, "Violence, law, and justice in a global age" (2002) 9 *Constellations* 74; David Held, "Law of states, law of peoples" (2002) 8 *Legal theory* 1; Balakrishnan Rajagopal, *International law from below: Development, social movements and third world resistance* (Cambridge University Press, 2003); Gerry Simpson, *Great powers and outlaw states: unequal sovereigns in the international legal order* (Cambridge University Press, 2004); Obiora Chinedu Okafor, "Newness, imperialism, and international legal reform in our time: a TWAIL perspective" (2005) 43 *Osgoode Hall LJ* 171; Allen Buchanan, *Justice, legitimacy, and self-determination: moral foundations for international law* (Oxford University Press on Demand, 2007); Anthony Anghie, *Imperialism, sovereignty and the making of international law* (Cambridge University Press, 2007); Thomas Blom Hansen and Finn Stepputat, eds. *Sovereign bodies: Citizens, migrants, and states in the postcolonial world* (Princeton University Press, 2009).

<sup>156</sup> See Anthony Clark Arend and Robert J. Beck, *International law and the use of force: beyond the UN Charter paradigm* (Routledge, 2014).

<sup>157</sup> See Stephen Kocs, "Explaining the Strategic Behavior of States: International Law as System Structure" (1994) 38 *International Studies Quarterly* 535; Anthony Clark Arend, "Do Legal Rules Matter--International Law and International Politics" (1997) 38 *Va. J. Int'l L.* 107; Karsten Nowrot, "Legal consequences of globalization: The status of non-governmental organizations under international law" (1999) *Indiana Journal of Global Legal Studies* 579.

<sup>158</sup> See Gráinne De Búrca, Robert O. Keohane, and Charles Sabel, "Global experimentalist governance" (2014) 44 *British Journal of Political Science* 477, and Terry Macdonald, "Institutional facts and principles of global political legitimacy" (2016) 12 *Journal of International Political Theory* 134.

absence of an enforcing authority, is a problem, but only to a limited degree, as this argument posits that states and other international actors cannot exist in isolation from each other and therefore they ought to comply. Meanwhile, the identity of an actor is substantively affected by its involvement in the making and acceptance of international law as well as the specific forms of its appropriation in the domestic sphere.<sup>159</sup> To this end, in their work on the power of international organizations, Michael Barnett and Martha Finnemore (2014) claimed that international legal structures are actually essential in the creation of the very actors they implicate.<sup>160</sup> For instance, international bureaucracies specify responsibilities, set and diffuse norms, and classify and organize information and knowledge. Similarly, international treaties, conventions, and organizations invent, standardize or redefine legal, social and political categories. International law, in this context, is not simply an abstract code but is constitutive of the political, social and economic structures that it seemingly relies on.<sup>161</sup> In other words, the legality of international law does not spring from its centralization or from developing mechanisms for its authoritative enforcement. Force-based formulation of law fails to account for how international law works. It is the inter-relational and constitutive characteristics of international law that provide it widespread legitimacy with hegemonic undercurrents. In summary, law in general is not an autonomous field of norms and coded practice. In the same manner, international law specifically cannot be understood without particular moralities and normative frames of reference dispensed by the actors upon which it exerts influence. Even the positivists' requirement to base legal obligation in consent or custom instead of normative notions of justice does not alleviate this condition of interdependency. According to Martti Koskeniemi (1990), law must demonstrate its distance from politics in order to be able to set normative standards applying to all subjects regardless of their political preferences, and, in equal measure, in order to avoid being degraded into an instrument of apology for the state's interests. These two requirements are ultimately self-contradictory, a problem which is reproduced at the level of international law. Even the celebrated notions of collaboration or compliance in

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<sup>159</sup> See Thomas Risse, ed. *Governance without a state?: policies and politics in areas of limited statehood* (Columbia University Press, 2013), and Stephen Krasner and Thomas Risse, "External actors, state-building, and service provision in areas of limited statehood: Introduction" (2014) 27 *Governance* 545.

<sup>160</sup> See Michael Barnett and Martha Finnemore, *Rules for the world: International organizations in global politics* (Cornell University Press, 2004). Also see Martha Finnemore, "Dynamics of global governance: Building on what we know" (2014) 58 *International Studies Quarterly* 221.

<sup>161</sup> See Michael Hardt and Antonio Negri, *Empire* (Harvard University Press, 2001).

international law depend on sufficient prior knowledge of the rules, with clear normative content and significance. The disciplinary practices of international organizations, institutions, and regimes play a crucial role in this process of learning, choosing and interpreting. They help international law present norms as derived from and justified by necessity or consent, often both. As such, international law obtains its meaning in relation to the practice of interpretation performed by the very actors subjected to it, who are not limited to the state. Dividing this process of interaction into external and internal, inside and outside, and then treating each part as autonomous makes no sense if one is to understand how international law operates.

#### IV. INTERNATIONAL LAW VERSUS THE STATE? THE TEST CASE OF UNIVERSAL JURISDICTION

Thus far, I have discussed what constitutes international law within an interdisciplinary framework. Here, I will take this debate one step further and unpack the dominant conceptualization of international law further in the specific context of universal jurisdiction. This is in order to identify the pattern that underlies the application of the principle at a global scale and to assess the state of scholarship and critical thinking regarding its operationalization. As already stated, international law is traditionally defined as the body of law that regulates the activities of entities accepted as possessing “international personality.”<sup>162</sup> Historically, such entities were defined as states, whether nation-states or imperial states.<sup>163</sup> Contemporary renditions of international law include the affairs of international organizations (both IGOs and NGOs) and multi- and transnational corporations, as well as individuals engaged in certain kinds

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<sup>162</sup> Here, it should be mentioned that the term “public” international law is often used to distinguish state-centric international law from private international law, as the latter regulates the relations between persons or entities in different states and does not have an international mandate. See Cedric Ryngaert, *Jurisdiction in international law* (OUP Oxford, 2015); and Alina Kaczorowska-Ireland, *Public international law* (Routledge, 2015).

<sup>163</sup> According to the *Montevideo Convention on the Rights and Duties of States* (1933), the state is defined as a person in international law that should possess the following qualifications: (a) a permanent population; (b) a defined territory; (c) government; and (d) capacity to enter into relations with other states. This definition, contrary to the one developed later by the United Nations requiring recognition by the existing body of states, is based on a declarative theory of statehood as opposed to a constitutive one. While the Montevideo Convention was a regional American convention and has no legal effect outside the Americas, it is nonetheless often regarded as an accurate statement of customary international law as far as the definition of statehood is concerned. See the full text of the Montevideo Convention available at <https://www.ilsa.org/jessup/jessup15/Montevideo%20Convention.pdf> [25.04.2017].

of acts considered the business of international law.<sup>164</sup> International organizations established by treaties, for instance, are deemed subjects of international law and thus capable of entering into agreements among themselves and with states. Despite this well-constructed façade of formal legal principles, scholars outside the legal domain tend to argue that international law has been and remains a singularly normative regime. In the same spirit, the question of whether international law is harnessed to the achievement of common values, or instead serves the function of protecting the *status quo* that keeps powerful states powerful, if not rendering them more powerful, also remains open to lively debate, as witnessed in the case of TWAIL scholarship. Although traditional legal scholarship purports that the necessity of international law arises from the need to ensure a process that can regulate competing demands and establish a framework for predictable and agreeable behavior by recognized political entities, non-legal, Marxist, post-colonial or legal pluralist renditions of international law clearly argue that all states are *not* equal and they do *not* benefit equally from international law.<sup>165</sup> Finally, while international law sets the criteria for a legal system that has a say over, and beyond, the states and other legal entities it encompasses, it is also constricted by the very entities—in particular the state—which it claims to have a mandate upon. This sub-section takes up precisely this last point: the endemic difficulty in international law vis-à-vis how to address the state in the context of

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<sup>164</sup> See Karen Alter, *The New Terrain of International Law: Courts, politics, rights* (Princeton University Press, 2014); and Math Noortmann, August Reinisch, and Cedric Ryngaert, eds., *Non-state actors in international law* (Bloomsbury Publishing, 2015).

<sup>165</sup> In large brushstrokes, legal international law scholars such as Michael Byers, Christopher Hardin, Rosalyn Higgins, Martti Koskeniemi, Janne Nijman, and Maurizio Ragazzi among others have argued for something unique about international law as linked but definitely separate from international relations and politics. On the other hand, critical and Marxist/post-Marxist international relations scholars such as Andrew Carty, Antonio Cassese, Daniel Drache, J. S. Hsiung, David Kennedy, Robert Keohane, Frederick Kratochwil, Oran Young, John Vasquez and Alexander Wendt invested their energy in dismantling the edifice of international law supposedly standing on its own rights and providing a higher plane of truth if not morality or order. Finally, scholars of interdisciplinary background and/or inclination including Kenneth Abbott, Emanuel Adler, Robert Beck, Jonathan Charney, Anthony D'Amato, Richard Falk, Louis Henkin, Morton Kaplan, Stephen Krasner, Charlotte Ku, Anne-Marie Slaughter, John Ruggie, Gery Simpson, and Thomas Weiss tried to create a middle ground and they thus engaged in insistent attempts of interdisciplinary dialogue. The list provided here is not exhaustive by any means, though it is representative of key schools of thought. For further discussion on the unfolding of this debate, see Martha Finnemore and Judith Goldstein, eds., *Back to basics: State power in a contemporary world* (Oxford University Press, 2013); David Lake, "Theory is dead, long live theory: The end of the Great Debates and the rise of eclecticism in International Relations" (2013) 19 *European Journal of International Relations* 567; Tim Dunne, Lene Hansen, and Colin Wight, "The end of International Relations theory?" (2013) 19 *European Journal of International Relations* 405; and Ken Booth and Toni Erskine, eds., *International relations theory today* (John Wiley & Sons, 2016). For a general critique of the apolitical and foundational accounts in legal theory, see Allan Hutchinson and Patrick Monahan, eds. *The Rule of Law: Ideal or Ideology* (Carswell, 1987); Richard Posner, "The problematics of moral and legal theory" (1998) *Harvard Law Review* 1637; Akbar Rasulov, "CLS and Marxism: A History of an Affair" (2014) 5 *Transnational Legal Theory* 622.

universal jurisdiction.

The following pages are thus devoted to analysis of the relationship between the state and (international) law, as it has been canvassed by legal scholarship on the issue of universal jurisdiction. Although the general call of international law is not limited to issues related to the state, the state occupies a rather central position in both legal and practical aspects of this domain of jurisprudence. To start with, as the existence of a state presupposes control of and jurisdiction over a well-defined (i.e. bordered) territory, international law naturally deals with the acquisition of territory, state immunity, and the legal responsibilities of states in their conduct with each other. It is also concerned, by derivation, with the treatment of individuals within state boundaries, based on the assumption that there must be a comprehensive regime dealing with group rights, treatment of aliens, rights of refugees and migrants, and human rights, as well as international crimes. Also included within its mandate are the maintenance of international peace and security, arms control, settlement of disputes and regulation of the use of force in inter-state relations. In the event of the outbreak of a war, there are historically referenced principles of international law concerning how to govern the conduct of hostilities and the treatment of prisoners. Finally, international law is utilized in attempts to govern issues relating to the global environment, the global commons such as international waters, global communications, global labor migrations, and of course, world trade. Consequently, a large canopy of supranational organizations and international bodies has been created to provide mechanisms through which disputes between states and other international entities can be resolved through arbitration and mediation. This wide spectrum of dictates provided by and discharged under the rubric of international law certainly seems to provide enough justification for the assumption of a self-sufficient and well-established legal system. Still, when a country is recognized as a *de jure* state with a sovereign right to exist, it also has the right to refuse to engage or participate in any of the activities of supranational bodies, or to declare the decisions made by a conglomeration of states to be non- or selectively binding.

In other words, so far as international law promotes treaty obligations, or refers to customary law understanding of the historically defined obligations of states, one could speak of a minimum degree of normative unity. Meanwhile, no matter how powerful international courts, regulatory bodies, and other non-state organs may have become, the extent to which their rulings

or judgments can be enforced is limited by and dependent upon the cooperation of concerned states and other international actors, and thus pertains to the domain of international politics.<sup>166</sup> The relationship between national sovereignty and international legality has direct implications for the debate on international jurisprudence, as well.<sup>167</sup> Since they do not possess independent enforcement mechanisms, other than in cases related to humanitarian intervention and select cases of humanitarian law, international organizations associated with practices of international public and criminal law, as well as international courts and tribunals, have to co-ordinate their activities with national courts. As these two sets of bodies by and large do not have concurrent jurisdiction, their relationship is primarily based on the principle of complementarity. If the jurisdiction of these two sets of bodies is regarded as concurrent, however, or if international law is to supersede nation-state-based law, problems arise. Although the concept of universal jurisdiction is inherently important to the operations the ICC as an international body with a global mandate, its power to enforce its decisions and judgments is almost entirely dependent upon the endorsement of the very actors whose behaviour it seeks to affect. Of course, as witnessed in the cases of European Union or the African Union, groups of states can create politico-legal bodies at the regional level with overlapping provisions for juridical authority, thus challenging the model that prioritizes domestic or nation-state based jurisprudence.<sup>168</sup> In such cases the aim is the regulation and harmonization of judicial relations amongst member states under the rubric of transnational institutions with declared legislative and, though limited, judicial powers. For instance, within the domain of European Union, the European Court of Justice assumes jurisdiction as the ultimate appeal court for member states' understanding and implementation of European law.<sup>169</sup> Its authority can only be denied if a member state withdraws

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<sup>166</sup> See Andrea Bianchi, ed., *Non-state actors and international law* (Routledge, 2017).

<sup>167</sup> See the canonical article, Anthony D'amato, "Trashing customary international law" (1987) 81 *The American Journal of International Law* 101.

<sup>168</sup> See Manisuli Ssenyonjo and Saidat Nakitto, "The African Court of Justice and Human and Peoples' Rights 'International Criminal Law Section': Promoting Impunity for African Union Heads of State and Senior State Officials?" (2016) 16 *International Criminal Law Review* 71.

<sup>169</sup> Both scholarly debates and empirical evidence about the normative legitimacy of one of the oldest, busiest and most powerful international courts in the world, the Court of Justice of the European Union (CJEU), show the Court thus far fulfilled the criteria that courts should be fair and unbiased, that their rulings should be politically acceptable and legally sound, and that they should operate openly and transparently. While the CJEU has historically enjoyed a high degree of normative legitimacy, recent decades have witnessed charges of bias, of undue judicial activism, and poor legal reasoning, concerning the Court. As such, the Court has been caught up in a broader crisis of EU legitimacy. See Mauro Cappelletti, "Is the European Court of Justice" running wild?" (2015) 3 *European Law Review* 311.



from the European Union itself. However, to assume that international law in general operates based upon similar principles is naïve at best, and illusionist at worst.<sup>170</sup> Although there may be exceptions, most states enter into legal commitments to other states or other international entities with reference to historical relations, and often as a result of subtle or overt coercion, rather than out of adherence to a body of law claimed to be of higher normative status than their own both in its essence and in its mandate. Thus it is absolutely necessary to state that international law cannot exist in isolation from the domain of international politics and history. What is curious is how this could have escaped the vision of international law scholars for almost a century. The presumptions surrounding the workings of the principle of universal jurisdiction are a clear case in point in this regard.

## CONCLUSION

Do international law and international politics scholarship cohabit the same or at least cognate conceptual spaces when it comes to the discussion on international law, and in particular, the state? How does each articulate the reality of an “international system” commonly identified as the bedrock for universal jurisdiction?<sup>171</sup> In this chapter, I made the case that, although it makes little sense to study these two fields of inquiry independently, an integrated theory of international law and international relations is yet to come into full existence.<sup>172</sup> It is true that starting with the efforts of Myres McDougal and Harold Lasswell, the progenitors of the New Haven School’s studies in international law, an important niche was carved out to this end.<sup>173</sup> Their use of theories of national politics and domestic law to rethink the nature and definition of international law produced some noteworthy results. Here one should also cite the international

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<sup>170</sup> For a long duree analysis of the effects of regional courts, see Lauren Benton, *Law and colonial cultures: Legal regimes in world history, 1400-1900* (Cambridge University Press, 2002).

<sup>171</sup> Anne Burley and Marie Slaughter, "New directions in legal research on the European Community" (1993) 31 *JCMS: Journal of Common Market Studies* 391.

<sup>172</sup> See Nicholas Quinn Rosenkranz, "Intellectual Diversity in the Legal Academy" (2014) 37 *Harv. JL & Pub. Pol'y* 137; and Oona Hathaway, Larry Johnson, and Fionnuala Ni Aoláin, "An Introduction: The Effectiveness of International Law" (2014) *Proceedings of the ASIL Annual Meeting* Vol. 108.

<sup>173</sup> See their later work, such as Harold Lasswell and Abraham Kaplan, *Power and society: A framework for political inquiry* (Transaction Publishers, 2013), in addition to their canonical work published back in 1943: Harold Lasswell and Myres S. McDougal, "Legal education and public policy: Professional training in the public interest" (1943) 52.2 *The Yale Law Journal* 203-295. I personally use this latter piece in class today, in the year 2017, and students still relate to it with interest. Supporting my opinion on this particular issue, see Martha Minow, "Archetypal Legal Scholarship: A Field Guide" (2013) 63.1 *Journal of Legal Education* 65-69. Minow was a long-serving dean of Harvard Law School when she published this piece.

Legal Process School pioneered by the work of Abram Chayes, Antonia Handler Chayes and Louis Henkin. These scholars keenly sought to explore the impact of international legal rules on international political processes.<sup>174</sup> Their task was to determine the extent to which law influences and shapes how societies behave. Both of these approaches were developed in tandem with ongoing work in the domain of international relations at the time. Back in the 1970s, the young discipline of international relations disdained what the dominant group of realist scholars saw as the moralism of international law. It is in this context that select international legal scholars attempted to offer a theoretically articulate response concerning the nature of international law—a response that set the tone of the debate presented in this chapter.

As already discussed, during the 1990s a third approach emerged among legal scholars who claimed to study law in its full context. Rather than canvassing political dimensions of select international legal problems, this new body of scholarship attempted to re-think international law vis-à-vis the entire system of international relations. Members of this school such as Anne-Marie Slaughter strongly believe that international relations theories have much to offer in terms of conceptualizing the basic architecture of “the international legal system.” They thus encouraged a significant degree of congruence between the framing of international law and the models used by international relations theorists. In this new context, we saw the emergence of a shared analytical framework between international lawyers and legal scholars, and political scientists and international relations theorists. Liberalism and realism entertain fundamentally different assumptions about international politics, such as those related to the identity of primary actors, the relationship of non-state actors to state institutions, and determinants of inter-state and transnational relations. Still, the pages above have demonstrated that, overall, the most prominent aspect of IR theory pertaining to international law, regardless of the particular leanings of the authors, has been its emphasis on different types of states, based on domestic political structures and ideological dispositions. Ultimately, the framework of classical international law scholarship is predominantly based on the premise of sovereign equality rather than differences amongst states.

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<sup>174</sup> See Louis Henkin, “International law as law in the United States” (1983) 82 *Mich. L. Rev.* 1555; Louis Henkin, *International law: politics, values and functions: general course on public international law* M. Nijhoff, 1989; Abram Chayes and Antonia Handler Chayes, “Compliance without enforcement: state behavior under regulatory treaties” *Negotiation Journal* 7.3 (1991): 311-330; Abram Chayes and Antonia Handler Chayes, *The new sovereignty* (Harvard University Press, 1998).

Is it possible to re-imagine international law by looking at it through the critical lens of IR theory? This is exactly what some of the younger generation of international legal scholars have been aspiring to do. Gerry Simpson's work constitutes a remarkable example of such an endeavor.<sup>175</sup> Whether this kind of scholarship can achieve a re-charting of the field of international law remains to be seen. What is rather obvious, however, is that the debate on universal jurisdiction reveals the underbelly of traditional international law scholarship, which is characterized by its overreliance on the state as a unit of analysis, combined with a methodological avoidance of a theory of the state. About a century ago, Lassa Oppenheim argued that (legal) scholarship can and should separate the tasks of presenting an analytic report of legal practice and engaging in a critique of the deficiencies of existing rules or institutions.<sup>176</sup> Indeed, many of the challenges for IL scholarship have proved also to be enduring ones—the issue of state sovereignty constituting a paramount example. The current tendency to overload international law with expectations results at least in part from shunting transnational norms, private standards and national regulations under the rubric of the state, without paying due attention to their interconnections as well as separate logics. A systematic study of the relations between different normative and prescriptive structures in international law also remains absent, barring debates on transnational law. In this larger context, dealing with the state in a historical and conceptual manner rather than in a calcified way is essential for understanding the workings of international law.

This chapter is written to provide a critical examination of key themes in contemporary legal studies on international law in relation to the work done by international relations scholars, with a specific focus on universal jurisdiction. Its central question was how the conceptualization of the state shapes the context as well as the contents of studies of international law across disciplines. The issue here is not whether legal scholarship on international law lacks awareness of debates on the state outside of its field. At least in the Anglo-American tradition, theorists of international law openly attack legal positivism and its heavy reliance on state-made law from within the discipline. Canonical volumes in this regard include the deconstructivist understanding

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<sup>175</sup> See in particular his *Great powers and outlaw states: unequal sovereigns in the international legal order* (Cambridge University Press, 2004).

<sup>176</sup> See Lassa Oppenheim, *The Future of International Law*. Vol. 1. (Library of Alexandria, 1921). Also see Lassa Oppenheim and Hersch Lauterpacht, *International law: a treatise*. Vol. 2. (Longmans Green, 1952).

of international law exemplified by the work of D. Kennedy in his *International Legal Structures*; Martti Koskenniemi's *From Apology to Utopia*, which criticizes the liberal political discourse within which traditional studies of law is situated; and the work of Frederick Kratochwil on norms.<sup>177</sup> These texts have made it clear that the assumption of an Archimedean point from which one can impartially judge the common good for all states has long been null and void. Nor can inter-state consent as the foundational process of customary law be taken for granted.

In this case, could we conclude that despite the lack of a common lexicon between IL and IR scholarship on the issue of international law, this field of inquiry has moved well beyond the excessive normative and isolationist dispensation that once characterized it? For students of international law of all persuasions, it has now become basic knowledge that normative principles in international law, as elsewhere, receive definitive meanings only in the context of social and political practices. This does not mean that legal scholarship has totally and unconditionally given up its “transcendental” aspirations for the realization of an international legal system and the practice of universal jurisdiction in select areas. Still, there is growing awareness of conflicting traditions and political trajectories, which leads to questioning of the very principles upon which the edifice of international law is built. Similarly, it seems that current scholarship from within the field has finally managed to trivialize the old and tired controversy of natural law versus legal positivism, and to an extent also the jargon of soft versus hard law. Still, we continue to struggle with the difficulty of finding an objective legal standard to define justice in the context of international criminal law. Questions such as how binding normative decisions are made for the entire community of international actors on the basis of presumed or partial consent continue to haunt the field. Similarly, the very idea of a self-imposed obligation is in contradiction with the implication that *pacta sunt servanda* or *jus cogens* were originally defined in relation to one actor's interaction with others. As a result, the question of whether, when and how international law is to be considered binding is perpetually deferred, along with the Janus-

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<sup>177</sup> See David Kennedy, *International legal structures* (Nomos-Verlag-Ges., 1987); David Kennedy, "A new stream of international law scholarship" (1988) 7 *Wis. Int'l LJ* 1; Friedrich Kratochwil, "Of systems, boundaries, and territoriality: An inquiry into the formation of the state system" (1986) 39 *World Politics* 27; Friedrich Kratochwil, *Rules, norms, and decisions: on the conditions of practical and legal reasoning in international relations and domestic affairs* (Cambridge University Press, 1991); Martti Koskenniemi, *From apology to utopia: the structure of international legal argument* (Cambridge University Press, 2006).

faced, absent but always present referent of the state.<sup>178</sup>

Consequently, in the study of international law and, in particular, of universal jurisdiction, we witness a decisive conflation of the subject and the object of analysis, the state. In some circles, the possibility of the emergence of an external normative order representing an autonomous system of legality may still be all the.<sup>179</sup> As a counter-measure, I have argued here that the current grammar of legal theory pertaining to international law must address the state from a critical distance, as already suggested by IR scholarship.<sup>180</sup> These two distinct disciplines have long been striving in parallel, although for different reasons, to show how international legal institutions emerge, change, work and fail. As demonstrated in this chapter, varied efforts, particularly since the 1980s, have brought IR and IL scholars together through collaborations in scholarship, the trading of ideas, and the formation of new journals open to crossing the once-solid divide. Yet even when studying the same phenomenon, the state for example, these two fields often seem unaware of, if not indifferent to, the insights available on the other side of the disciplinary divide.<sup>181</sup> As I have proposed here, as far as the state is concerned the academic analysis of universal jurisdiction constitutes a subset of scholarship on international law, and is subsumed under the general premises of how international law is understood to be working. Although comparatively little attention has been paid to the question of universal jurisdiction in opinions and declarations on international law by IL and IR scholarship, conclusions as to the “lawfulness” of universal jurisdiction bring us back to critical issue of the state. Conflation of states’ jurisdiction to prescribe their criminal law and the manner of that law’s enforcement renders the permissibility of the enforcement of universal jurisdiction rather suspect. State

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<sup>178</sup> The general principles of law, cited as one of the sources of international law under Article 38(1) of the ICJ Statute, are drawn provided they are uniformly applied and felt as obligatory and necessary. As such, one could argue that principles such as *jus cogens* denationalised international law by making them subject to general principles of law or to a combination of such principles with national law. However, international law is a historical construct, and the phase that emerged after the ending of colonial empires clearly indicates the progressive recovery of sovereignty by states, or at least an ongoing struggle to this end.

<sup>179</sup> See, *inter alia*, Anne-Marie Slaughter, *A new world order* (Princeton University Press, 2009), and her most recent work, Anne-Marie Slaughter, *The Chessboard and the Web: Strategies of Connection in a Networked World* (Yale University Press, 2017).

<sup>180</sup> See David Armstrong, Theo Farrell, and Hélène Lambert, *International law and international relations* (Cambridge University Press, 2012); Emilie M. Hafner-Burton and David G. Victor, "Interdisciplinary Perspectives on International Law and International Relations: The State of the Art" (2014) 108 *AJIL* 597; Karin Fierke and Knud Erik Jorgensen, *Constructing International Relations: the next generation* (Routledge, 2015).

<sup>181</sup> See Dinah Shelton, "International law and ‘relative normativity’" (2014) 2 *International Law* 159.

practices in favour of universal jurisdiction over crimes that fall under general international law cannot be explained by the state itself. Neither can they be understood through a state-centric conception of international law. A systemic approach is required, one that takes into account all the nuances addressed in the previous chapter that underline the transnational characteristics of international law.

### ***Chapter III: The Long Road from State Sovereignty to Jus Cogens and Back Again: Travels in the Global South***

#### **INTRODUCTION**

This chapter is a situated critique of interpretations of the phenomenon of fragmentation as it is manifested in international law. The issues addressed here specifically deal with collisions between international law and state sovereignty, and incompatibilities between the various international law regimes in terms of their effects in the Global South. This debate has direct repercussions concerning the merits and applicability of crimes against humanity legislation under the purview of universal jurisdiction principle. The expansion and diversification of international law has been possible partly through the rise of specialized regimes that have no clear relationship to each other, are not subject to coordination, and are not based on anything other than power-related hierarchical relations. In this sense, assuming harmony and internal unity to be the foundational characteristic of international criminal law is a prescriptive suggestion more than a historical reality. Furthermore, conflicts between these regimes present problems of overlap, uncertainty, and divergence in public international law. Similarly, specialized bodies of international law come into conflict over what international law means, and how to define compliance. They also often disagree on the meaning of particular treaties or rules in international law, the relationship between these, and who should have the authority or jurisdiction to interpret them with certainty. These disagreements lead to increasingly divergent decisions concerning international law obligations. Last but not the least, such conflicts have their origins in the long history of the post-imperial and post-colonial roots of international law and, as such, traditional rules of resolution have proven to be most unsatisfactory. While some of the self-contained and regional regimes claim exceptionalism or primacy over other rules of international law, we also have international legal bodies such as the ICC that claim to be the harbinger of truth in adjudication. In view of these problems, this chapter seeks to highlight select kinds of interaction between these multiple regimes of accountability that provide actual political, legal, and historical content to the long-debated fragmentation of international law. The chapter concludes with the suggestion that the plurality of regulatory institutions, normative values, and

adjudication *fora* in international law is in fact a very necessary component of the existing system of accountability.<sup>182</sup> Seeking unity and coherence of international law without addressing the violent histories it represents and through the application of traditional legal techniques to harmonize adjudication is a futile exercise at its best, and a very antagonistic one at its worst.

As already discussed in the opening chapter of this work, the fragmentation of international law is a substantial enough issue to have merited even an official recognition. To this end, back in 2000, the International Law Commission decided to add to its program of work the topic “Risks ensuing from the fragmentation of international law.”<sup>183</sup> The proliferation of international criminal courts and tribunals is part of this much larger debate on fragmentation. In this context, theories of fragmentation and constitutionalization have traditionally been presented as antagonistic accounts of the global legal order. While fragmentation theorists posit a non-hierarchical set of relations between general and specialized areas of international law, adherents of constitutionalization theory depict a grand transformation from horizontal and consent-based roots of law towards a hierarchal structure built upon commonly shared fundamental principles.<sup>184</sup> The proliferation of international courts and tribunals has been recognized as a factor that muddies the perfect picture of constitutionalization, supporting the fragmentation thesis in international law. Indeed, the development of a series of specialist or regional regimes of legal accountability is often perceived as posing a risk to the coherence and presumed homogeneity of international law.<sup>185</sup> On the reverse side of the coin, institutional fragmentation is also seen as a key factor that has strengthened the role of specialized regimes including the WTO, EU, regional human rights and environmental regulation bodies, and so on. In such a varied landscape of legal accountability and regulation, the question of what to do with normative

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<sup>182</sup> In this vein, see Ibrahim Gassama’s work, including Ibrahim Gassama, “Dealing with the world as it is: Reimagining collective international responsibility” (2013) 12 *Wash. U. Global Stud. L. Rev.* 695; Ibrahim Gassama, “The Incoherence and Functional Incompetence of International Law: Toward a New Paradigm of Human Relationship” (2013) 37 *Fordham Int’l LJ* 53; and also Thane Rosenbaum, “Essay: the romance of Nuremberg and the tease of moral justice” (2005) 27 *Cardozo L. Rev.* 1731.

<sup>183</sup> See Andreas Fischer-Lescano and Gunther Teubner, “Regime-collisions: the vain search for legal unity in the fragmentation of global law” (2003) 25 *Mich. J. Int’l L.* 999. Also see Gerhard Hafner, “Pros and cons ensuing from fragmentation of international law” (2003) 25 *Mich. J. Int’l L.* 849 in the same, canonical, issue.

<sup>184</sup> See Collin Murray and Aoife O’Donoghue, “A path already travelled in domestic orders? From fragmentation to constitutionalisation in the global legal order” (2017) *International Journal of Law in Context* 1. Murray and O’Donoghue actually argue that proliferation of international legal bodies enhances the trend towards constitutionalization.

<sup>185</sup> For a counter-argument, see Christian Leathley, “An institutional hierarchy to combat the fragmentation of international law: Has the ILC missed an opportunity” (2007) 40 *NYUJ Int’l L. & Pol.* 259.



conflicts between co-existing regimes is no longer an abstract one. The Chairman of the ILC Study Group on Fragmentation of International Law, Martti Koskenniemi, was thus almost forced to emphasize the maxim of *lex specialis* in his report in order to address the relation between these seemingly self-contained regimes and general international law. Meanwhile, *lex specialis* suffers from a marked degree of conceptual vagueness. The fragmentation of international law made new types of conflicts visible, namely those between different and antagonistic normative orders, and heightened some of the old ones concerning historical injustices. As such, *lex specialis* may not be enough to address the current challenges faced by international law. As argued in the opening chapter of this work, a transnational approach may be able to soothe at least some of these anxieties. Combined with the double forces of reflexive legal pluralism on the one hand, and TWAIL scholarship on the other, it may indeed be possible to chart a different trajectory for understanding the present and future of international law in its heavily fragmented *modus operandi*.<sup>186</sup>

Interestingly, in the area of international criminal law (ICL), much of the recent worry over fragmentation originated from the collision between the ICJ and the ICTY (International Criminal Court for the former Yugoslavia) over the “overall control-test” in the Tadić case, where the ICTY departed from settled ICJ law on the attribution of liability and the qualification of the nature of an armed conflict, employing instead a standard of “effective control.”<sup>187</sup> Twenty years after the establishment of the ICTY, the fragmentation/pluralism debate proliferated to yet

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<sup>186</sup> For a political economy-based understanding of fragmentation, see Eyal Benvenisti and George W. Downs, “The empire’s new clothes: political economy and the fragmentation of international law” (2007) 60 *Stanford Law Review* 595. Also see Eyal Benvenisti, “Reclaiming democracy: the strategic uses of foreign and international law by national courts” (2008) 102 *American Journal of International Law* 241. Benvenisti’s work is exemplary for her willingness to critique, and yet also to usurp international law for causes of social justice, locally and globally.

<sup>187</sup> In its related genocide judgment, the International Court of Justice addressed the question of whether the acts of genocide carried out at Srebrenica by Bosnian Serb armed forces must be attributed to the Federal Republic of Yugoslavia (FRY), as claimed by Bosnia. It applied the “effective control” test set out in Nicaragua, thus reaching a negative conclusion. The Court also held that the broader “overall control” test enunciated by the International Criminal Court for the former Yugoslavia (ICTY) in Tadić did not apply, on grounds of inefficient basis for claiming state responsibility. ICTY had to establish in Tadić whether the armed conflict in Bosnia was internal or international. However, as no rules of international humanitarian law were of assistance in this case, the Tribunal had to rely on international rules on state responsibility. The ICTY thus advanced the “overall control” test as a criterion valid for imputation of conduct of organized armed groups to a particular state. The test was based on judicial precedents and state practice. For a detailed analysis of these two conflicting interpretations of the Tadić case, see Antonio Cassese, “The Nicaragua and Tadić tests revisited in light of the ICJ judgment on genocide in Bosnia” (2007) 18 *European Journal of International Law* 649. For an entirely opposing argument on the case, see Davis Tyner, “Internationalization of War Crimes Prosecutions: Correcting the International Criminal Tribunal for the Former Yugoslavia’s Folly in Tadic” (2006) 18 *Fla. J. Int’l L.* 843.

new heights. With a well-developed body of *ad hoc* tribunal case law, an emerging body of case law at the ICC, hybrid systems like the Cambodia Tribunal, and increasing number of domestic prosecutions under the dictate of universal jurisdiction, the co-existence of fragmentation and pluralism has become a serious matter for legal realists, legal positivists, and monists alike. While there are still those who express concern over heterogeneity in ICL, many branches of recent scholarship acknowledge international criminal law's pluralistic nature and, instead of striving for unity, call for ways of addressing this plurality.<sup>188</sup> All the same, ICL continues to hover between cosmopolitan ethos and technical specialization while effectively attempting to displace all other possible routes to attaining justice.<sup>189</sup> This is despite the fact that questions of illegitimacy, discrimination, and asymmetry in its application, as well as the conflicts lying at the roots of its formation, cannot be wished away.<sup>190</sup> As argued by the latest generation of TWAIL scholars, notwithstanding ICL's historically troubling past and violent track record, international criminal justice is still embraced, at least in some parts of the Global South, as a potentially emancipatory project. And yet, the main impediment to the fulfillment of such a desire remains ICL's continuing operational selectivity and geopolitical bias. Is ICL indeed capable of overcoming deficiencies in national legal systems? When a state is incapable or unwilling to punish, could there be a reliable and impartial agent such as an international or hybrid court to do

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<sup>188</sup> See Martti Koskenniemi and Päivi Leino, "Fragmentation of international law? Postmodern anxieties" (2002) 15 *Leiden Journal of International Law* 553. As Koskenniemi and Leino argue, successive International Court of Justice presidents have expressed concern about the proliferation of international tribunals and the resultant substantive fragmentation of international law. Yet international law has always lacked a clear normative or institutional hierarchy. The problem thus appears to be about how new institutions began to use international law to further their interests, especially interests that were not pronounced in traditional domestic law settings. I fully agree with the authors that jurisdictional conflicts indeed reflect divergent political priorities, and that they cannot be done away with the sheer force of administrative co-ordination. As such, these types of anxieties perhaps signal an increased awareness of the realities of international law.

<sup>189</sup> On this issue, see the excellent analytical monograph of Robert Cryer, *Prosecuting International Crimes: Selectivity and the International Criminal Law Regime* (Cambridge University Press, 2005). Also see Robert Cryer, et al. *An Introduction to International Criminal Law and Procedure* (Cambridge University Press, 2014). Also see the amicus brief prepared by him and three other legal scholars and submitted before the Extraordinary Chambers in the Courts of Cambodia, on the issue of whether large-scale atrocities directed against members of a state or organization's own armed forces can constitute crimes against humanity: Robinson, Darryl, et al, "Amicus Brief of Professors Robinson, De Guzman, Jalloh and Cryer on Crimes Against Humanity (Cases 003 and 004)" (2016). In my view, Cryer's work stands out in the standard canon of international criminal law texts, *inter alia*, Fabian Raimondo, *General Principles of Law in the Decisions of International Criminal Courts and Tribunals* (Brill, 2008); Ciara Damgaard, *Individual Criminal Responsibility for Core International Crimes: Selected Pertinent Issues* (Springer, 2008); Birgit Schlütte, *Theory and Practice of the ICJ and the International ad hoc Tribunals for Rwanda and Yugoslavia* (Martinus Nijhoff, 2010); and M. Cherif Bassiouni, *Crimes against Humanity: Historical Evolution and Contemporary Application* (Cambridge University Press, 2011).

<sup>190</sup> See John Reynolds and Sujith Xavier, "'The Dark Corners of the World' TWAIL and International Criminal Justice" (2016) 14 *Journal of International Criminal Justice* 959.

the job? Is ICL capable of offering pragmatic solutions to the partiality and/or ineffectiveness of national legal systems *sans* politics?

In this chapter, I answer these questions firmly in the negative.<sup>191</sup> In particular, I argue that ICL in and of itself cannot provide a panacea for the partiality, lack of accountability, and/or ineffectiveness of national legal systems concerning mass political crimes.<sup>192</sup> This leads us to yet another set of questions. If ICL and the values it promotes are provided by international entities, what sort of legitimacy could these legal organs claim by virtue of the letter of the law they purport to adhere to? In my view, this is another embodiment of the constitutionalization argument *par excellence*. For the protagonists of ICL as a universalist enterprise, this is called “robust internationalism.”<sup>193</sup> As such, the international character of the courts and tribunals tasked with applying ICL is seen as sufficient to successfully fulfill their mission. This argument is implicitly recognized by the institutional founders of ICL, and is also reflected in its key doctrines. Meanwhile, neither of the principal legal responses to the current multiplicity of legal regimes is adequate. Pluralism divides too much and isolates unnecessarily and perhaps dangerously, while constitutionalism unites even where there are no grounds for the presumption of universality in international law. The emergence of multiple regimes of accountability perhaps resembles the rise of nation-states at the dusk of the European Empires. As nations were imagined into being, so are legal regimes.<sup>194</sup> Reducing international law to a mechanism for

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<sup>191</sup> In this vein, see Sujith Xavier, *False Universalism of Global Governance Theories: Global Constitutionalism, Global Administrative Law, International Criminal Institutions & the Global South*. Diss. (Osgoode Hall Law School Toronto, Ontario, 2015).

<sup>192</sup> The controversies arising from International Criminal Court interventions in Africa are a case in point. The deployment of the powers to refer and defer ICC cases central to Article 16 of the Rome Statute and the manner in which the UN Security Council has employed this power has led critics to conclude that geopolitics has severely undermined the judicial independence of the ICC. It is also argued that the drafting history of Article 16 of the Rome Statute reveals the political origins of the law and the manner in which historical inequalities were woven into the very fabric of this foundational document. If so, violence and inequality live on through international law, and contemporary ontologies of international criminal law cannot escape the politics of its making. Acknowledgement of root causes of current forms of violence in postcolonial states remains a necessity. What is needed most, at this point, is a rethinking and reworking of how complementarity and cooperation might work more effectively for the future of international criminal law, knowing its history. See Kamari Maxine Clarke and Sarah-Jane Koulen, “The Legal Politics of the Article 16 Decision: The International Criminal Court, the UN Security Council and Ontologies of a Contemporary Compromise” (2014) 7 *African Journal of Legal Studies* 297.

<sup>193</sup> See Miriam Gur-Arye and Alon Harel, “Taking Internationalism Seriously: Why International Criminal Law Matters” In Jens David Ohlin, ed. *Oxford Handbook of International Criminal Law*, Hebrew University of Jerusalem Legal Research Paper No. 16-21 (2017).

<sup>194</sup> See the classic text, Benedict Anderson, *Imagined communities: Reflections on the origin and spread of nationalism* (Verso Books, 2006).

advancing the functional objectives of a universal mega-state, or to an instrument for powerful states' policy implementations at a global scale, is far too simplistic.<sup>195</sup> Debates over pluralism and fragmentation suggest alternative accounts of how international law works. Regional legal bodies, quasi-legal regimes, sub-national rights struggles, hybrid criminal tribunals, restorative justice projects, societal reconciliation mechanisms, global social and political movements for substantive legal reforms are not to be considered as a complement to international law. They are part and parcel of it.

## **I. LEGITIMACY OF INTERNATIONAL LAW: LINGERING QUESTIONS**

The regime of international law is illegitimate.

Makau Mutua<sup>196</sup>

In this section, I will focus on perceptions of the legitimacy of international law in the Global South. This is an essential discussion for understanding the limits of universal jurisdiction in terms of its global application. In this specific context, as was the case with the overall critique of international law, I will turn my attention to TWAIL scholarship. Almost two decades ago, James Thuo Gathii published a critical overview of the Special Symposium Issue of the *Harvard International Law Journal* titled "Alternative and Critical: The Contribution of Research and Scholarship on Developing Countries to International Legal Theory."<sup>197</sup> There, he stated that what began as a lecture series during the 1990s at the Harvard School of Law has grown into a noteworthy enterprise worthy of international law scholars' attention. This special issue on "international law and the developing world" was planned as a flagship publication to alert the world of legal scholarship to a renewal in interest, research, and publication in the area of Third World contributions to the field. Gathii noted with pride that the articles included in the issue explored important and novel ways of understanding the most urgent themes in international law affecting "developing countries" over the last several decades, and the challenges these societies face in the new millennium. The articles listed here were penned by a broad range of scholars with varied experiences, perspectives, and national backgrounds, though with a common focus on

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<sup>195</sup> See Elies van Sliedregt and Sergey Vasiliev, eds., *Pluralism in International Criminal Law* (OUP Oxford, 2014).

<sup>196</sup> Citation from Makau Mutua, "What Is TWAIL?" (2000) 94AM. SOC'Y INT'L L. PROC. 31.

<sup>197</sup> Thuo James Gathii, "Alternative and critical: the contribution of research and scholarship on developing countries to international legal theory" (2000) 41 *Harvard International Law Journal* 263.

the interaction between international law and the Global South.<sup>198</sup> They fit into roughly three distinct theoretical frameworks in terms of their contributions to international legal theory. The first set of articles provided an explanation of international law as culturally constitutive and historically contingent. Obiora Okafor's work in the collection, for instance, underlined the frailty of the nation-state model in Africa, as a legacy of the impositions of Eurocentric notions of legitimacy on culturally heterogeneous landscapes, which in turn led sub-state groups to view it as illegitimate.<sup>199</sup> Similarly, Balakrishnan Rajagopal's piece engaged in an alternative reading of international legal history, showing how Third World resistance was an important factor, often totally overlooked or underestimated in the expansion, consolidation, and renewal of international institutions.<sup>200</sup> These pieces signaled the coming trend of critical historical analysis of international law as seen, perceived, and experienced in the Global South. For the purposes of this dissertation, this approach constitutes the main pillar of the methodologies used to decipher perceptions and formulations of international criminal law from within the Global South.

The other two theoretical frameworks celebrated in the aforementioned special issue are also of great significance. The second called for international law to play a mediating role in addressing some legal gaps in the global restructuring of capitalism, while the third one was built on the premise that notions of international law, development policy, or even local customary practices do not have predetermined outcomes. These are themes and departure points that have

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<sup>198</sup> Adding further clout to the issue was the fact that the keynote address of the symposium was delivered by the former Vice-President of the International Court of Justice, Christopher G. Weeramantry, who is widely respected for his sense of justice, fairness, and historical perspective when addressing international law. Exemplary of the tenor of his work, see Weeramantry, Christopher Gregory *Universalising international law*. Vol. 48. (Martinus Nijhoff Publishers, 2014).

<sup>199</sup> See Obiora Chinedu Okafor, "After martyrdom: international law, sub-state groups, and the construction of legitimate statehood in Africa" (2000) 41 *Harv. Int'l. LJ* 503. Also see Obiora Chinedu Okafor, "Newness, imperialism, and international legal reform in our time: a TWAIL perspective" (2005) 43 *Osgoode Hall LJ* 171; Obiora Chinedu Okafor, "Critical Third World approaches to international law (TWAIL): theory, methodology, or both?" (2008) 10 *International Community Law Review* 371. Okafor's later work rendered TWAIL scholarship a widely acceptable alternative to mainstream methodologies in international law. In all the cited interventions, he directly engages with the question of whether TWAIL is a theory, a methodology, or both, and who has the right to define and determine the meaning of these terms other than the legal positivist school of thought. Accordingly, TWAIL offers both theories of, and methodologies for, analyzing international law and institutions as a broad and historically conscious approach.

<sup>200</sup> See Balakrishnan Rajagopal, "From Resistance to Renewal: The Third World, Social Movements, and the Expansion of International Institutions" (2000) 41 *Harv. Int'l. LJ* 529, as well as Balakrishnan Rajagopal, *International law from below: Development, social movements and third world resistance* (Cambridge University Press, 2003) and Balakrishnan Rajagopal, "Counter-hegemonic international law: rethinking human rights and development as a Third World strategy" (2006) 27 *Third World Quarterly* 767.

been developed significantly over the last fifteen years, particularly under the aegis of legal pluralism and transnational law. Overall, it would be accurate to suggest that TWAIL scholarship achieved its initial goal, securing growing number of followers as a school of thought. It has been able to drive home the point that international law's claims to universality must be replaced with an acceptance of legal and normative pluralism, and that international law squarely bears the imprint of the hegemonic architecture of North-South relations starting with European imperialism, colonialism, and now neo-colonialisms. It is also true that new generations of African, Middle Eastern and Indian international law scholars have produced increasingly subtle readings of how international law functions across the North-South divide. Within this first generation of international law scholars from the Global South, thinkers like Elias Olawale Taslim and Sinha Prakash had already argued that Africa in particular, and the Global South in general, had participated in creating the civilizational pluralism from which international law was created.<sup>201</sup> Scholars like U.O. Omozurike, S.B.O. Gutto and Mohammed Bedjaoui, however, insisted that despite all its potential for plurality, international law continues to reflect the structural and economic inequalities produced by former colonial rule.<sup>202</sup>

By the time the third generation of scholars joined this conversation, new debates were already unfolding within TWAIL itself. The work of Antony Anghie and Siba Grovogui, for instance, traces the origins of international law and identifies distinctions made by leading jurists such as Vitoria between Europeans and non-Europeans. Their analysis clearly signal continued wariness concerning the legacy of contemporary international law doctrines and institutions. Indeed, overall TWAIL now provides an insistent counterweight to the overwhelming dominance of American and European legal scholarship, offering alternatives to traditional paradigms of understanding and producing knowledge about legitimacy in international law. Speaking from a variety of views on the nature and implications of the hegemonic Euro-American framing of international law represented by liberal internationalism, institutionalism, constitutionalism, and of course by neo-conservative realism in international law scholarship, TWAIL scholars have been asking very difficult questions, not only about the legitimacy of law but also about the

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<sup>201</sup> See Mark Toufayan, "When British Justice (in African Colonies) Points Two Ways: On Dualism, Hybridity, and the Genealogy of Juridical Negritude in Taslim Olawale Elias" in *African legal theory and contemporary problems* (Springer Netherlands, 2014): 31-70.

<sup>202</sup> See Anna Krueger, "Conference Report: The Battle for International Law in the Decolonization Era" (2016) 49 *VRÜ Verfassung und Recht in Übersee* 80.

origins of the existing state system.<sup>203</sup> The critical issue here is not so much producing accounts of countervailing or “more authentic” notions of legitimacy, but opening up a space for scholarly and political projects that are capable of formulating change while acknowledging genealogies of injustice. In the following pages, working from within the TWAIL perspective, I will refute some of the key arguments commonly used in defense of the neutrality of international law, though to a somewhat unusual end: to foreground *jus cogens* norms in a more palatable context for the societies in the Global South. These norms form the foundations of universal jurisdiction and, as such, they are essential in understanding the unfolding trends in the adjudication of crimes against humanity at a global scale.

In the case of *jus cogens* norms, my opinion is that even inclusive legal positivism and new forms of legal pluralism do not succeed in estranging themselves adequately from the traditional, apoliticized conception of international law.<sup>204</sup> It is true that legal positivism, unlike

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<sup>203</sup> Though by no means an exhaustive list, the selections below all raise the same question of how to formulate change once we identify where things went wrong: See D. Kennedy, “The disciplines of international law and policy” (1999) *Leiden Journal of International Law*, 12(01), 9-133; Okafor, O. C., “Critical Third World approaches to international law (TWAIL): theory, methodology, or both?” (2008) *International Community Law Review*, 10(4), 371-378; Fidler, D. P., “Revolt against or from within the West-TWAIL, the Developing World, and the Future Direction of International Law” (2003) *Chinese J. Int’l L.*, 2, 29; Mutua, M., & Anghie, A., “What is TWAIL?” (2000) In *Proceedings of the Annual Meeting (American Society of International Law)* at 31-40; Ngugi, J., “Making new wine for old wineskins: can the reform of international law emancipate the Third World in the age of globalization” (2002) *UC Davis J. Int’l L. & Pol’y*, 8, 73; Fidler, David, “Revolt against or from within the West-TWAIL, the Developing World, and the Future Direction of International Law” *Chinese J. Int’l L.*, 2, 29; Okafor, O.C., “Newness, imperialism, and international legal reform in our time: a TWAIL perspective” (2005) *Osgoode Hall LJ*, 43, 171; Okafor, O. C., “After Martyrdom: International Law, Sub-State Groups, and the Construction of Legitimate Statehood in Africa” (2000) 41 *Harvard International Law Journal* 503.

<sup>204</sup> On the issue of how to salvage legal positivism, and how the effort fails, see Koskenniemi, Martti, *The gentle civilizer of nations: the rise and fall of international law 1870–1960*. Vol. 14 (Cambridge University Press, 2001); Balakrishnan Rajagopal, *International law from below: Development, social movements and third world resistance* (Cambridge University Press, 2003); Gerry Simpson, *Great powers and outlaw states: unequal sovereigns in the international legal order*. Vol. 32 (Cambridge University Press, 2004); Martti Koskenniemi, *From apology to utopia: the structure of international legal argument* (Cambridge University Press, 2006); Anthony Anghie, *Imperialism, sovereignty and the making of international law*. Vol. 37 (Cambridge University Press, 2007). Very pointedly, back in 2004, B. S. Chimni argued that a growing network of international institutions now constitutes a nascent global state in order to realize the interests of an emerging transnational capitalist class, to the disadvantage of subaltern classes in the third and first worlds. Underpinning this emerging imperial global state, Chimni saw a web of sub-national authorities that represent, along with non-governmental organizations, its decentralized face and thus produce a false impression of an incomplete project. Chimni contended that these developments seriously undermine substantive democracy at both inter-state and intra-state levels. Though his work also ventured into whether and how international institutions, including courts, can be reformed, the process he proposed hinges upon statist reforms initiated and supported by powerful global social movements. In this regard, there was no merit attributed to legal positivism whatsoever. Accordingly, it is not the form, but the content, that really matters. See Bhupinder S. Chimni, “International institutions today: an imperial global state in the making” (2004) 15 *European Journal of International Law* 1.

other views on the nature of law and its command upon societies, could give us a sensible explanation of law useful for a theory of historical change; but it does so only if we turn it upside down. I contend that if canonized debates about the legitimacy of international law were to shed their state-centric approach along with their Eurocentricity, and if the field could be re-contextualized in terms of histories of capitalism and the legacy of North–South relations, a much richer discourse on international law would emerge. Prior to the emergence of TWAIL as a formidable school of thought, the conventional view tended to characterize “Third World legal discourses on international law” as *ad hoc* and reactive rather than as a distinctive mode of analysis.<sup>205</sup> Given that we have now reached a juncture where, for a growing number of scholars, thinkers, and legal activists, TWAIL offers both theories of and methodologies for analysing international law and its institutions, we must reframe the questions of both legitimacy and universality in international law. In the following pages, I will make a concerted attempt in that direction.

## II. THE QUESTION OF THE STATE IN INTERNATIONAL LAW AS SEEN FROM THE GLOBAL SOUTH: A CHANCE TO START ANEW?

Post-Cold War rejuvenation of enthusiasm about international law has been attributed in part to the way that “critical legal scholarship,” in particular the TWAIL work, has reshaped the discipline and provided it with new sensibilities and perspectives, increasing its appeal to larger audiences.<sup>206</sup> Still, the increasingly textured, adversarial, and divisive debate among international relations scholars about how to embrace the study of international law is a clear indication of how

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<sup>205</sup> Mickelson, K. (1998), “Rhetoric and rage: Third World voices in International Legal discourse” *Wisconsin International Law Journal*, 16(2), 353–419.

<sup>206</sup> Debates have indeed intensified in recent years about the utility of international law scholarship. This is despite the fact that traditionally, the courts and other state authorities have identified scholars of international law as holding a special place of privilege and stature in the interpretation of international law. Changing trends in jurisprudential categories of scholarship between “the law of nations,” “international law,” and “human rights” does not tell the whole story in this regard. For a detailed discussion on historical trajectories in international law scholarship, see Hugh Kindred et al, *International law, chiefly as interpreted and applied in Canada* (Emond Montgomery Publications, 2014); Gregory Shaffer, “The New Empirical Turn in International Law Scholarship” (2014) 108 *Am. Soc’y Int’l L. Proc.* 369; Yannick Radi, “In Defence of ‘Generalism’ in International Legal Scholarship and Practice” (2014) 27 *Leiden Journal of International Law* 303; Sergey Vasiliev, “On Trajectories and Destinations of International Criminal Law Scholarship” (2015) 28 *Leiden Journal of International Law* 701.



Herculean such an attempt is.<sup>207</sup> In the previous chapter, I suggested that one way that international law and international relations scholarship could converge, in more than tangential ways, is to re-conceptualize the State. Indeed, I believe that when the state is problematized in each of these domains, rather than being treated as a political given or a historical *fait accompli*, a real chance for dialogue may emerge.

In this section, I will first identify the historical importance of the state in the emergence of international law from the perspective of the Global South. I will then examine select examples of the classical mode of thinking in legal scholarship on international law in terms of the perception of its building blocs and key conceptual tools for understanding how law works in this specific instance. I will conclude the section with a brief discussion of the treatment of the state in particular, and power in general, in international law scholarship, and underline the possibility of a different take on this particular issue for the future studies of international law.

There are a series of fundamental conflicts over both the meaning and workings of international law as it relates to the history of the nation-state since the Treaty of Westphalia (1648). Well into the mid-1800s, the classic form of the state was a multi-ethnic empire.<sup>208</sup> The populations of such states belonged to many ethno-religious groups and spoke different languages. These empires were often dominated by particular ethno-religious groups, and, the language of these groups were declared to be the language of public administration. The identity and the composition of such ruling groups changed over time, however. Internal state structures

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<sup>207</sup> As already discussed in the previous chapter, the relationship between the discipline of international relations and international law scholarship swings between comfort and discomfort. The question is whether international relations theories are becoming the preferred discursive framework for contemporary practitioners and academics of international law. The older desire for certainty over contention, action over discourse and simplicity over complexity seems to have been replaced by asking large, systemic questions about how international law creates legacies and effects changes in international politics. On the dominant currents of contemporary IR scholarship on international law, see Karin Fierke and Knud Erik Jorgensen, *Constructing International Relations: the next generation* (Routledge, 2015); and Ken Booth and Toni Erskine, eds., *International relations theory today* (John Wiley & Sons, 2016).

<sup>208</sup> On the resilience of the Westphalian state, see the exchange between David Koller, "The End of Geography: The Changing Nature of the International System and the Challenge to International Law: A Reply to Daniel Bethlehem" (2014) 25 *European Journal of International Law* 25; and Carl Landauer, "The Ever-Ending Geography of International Law: The Changing Nature of the International System and the Challenge to International Law: A Reply to Daniel Bethlehem" (2014) 25 *European Journal of International Law* 31-34. For a counter argument, see Andrea Bianchi, ed., *Non-state actors and international law* (Routledge, 2017). Also see Claus Kreß, "Major Post-Westphalian Shifts and Some Important Neo-Westphalian Hesitations in the State Practice on the International Law on the Use of Force" *Journal of the Use of Force and International Law* 1.1 (2014): 11-54.

also exhibited a considerable degree of variation despite the overarching imperial format.<sup>209</sup> Finally, some of the smaller European states were not ethnically or religiously diverse, and yet possessed considerable territorial sovereignty due to their “successful” imperial and colonial expansion strategies. In examining these “smaller” states prior to the advent of the nation-state, one must keep in mind either their religio-political significance, as in the case of the Vatican, or their overseas connections, as in the case the Netherlands, when judging the political power they possessed and the bargaining power they could levy in their dealings with other states.<sup>210</sup>

It was against the background of this general imperial mold that, from the late eighteenth century onwards, and for reasons far too complex to be adequately covered here, the ideal of the nation-state took root. The origins of the nation-state are highly contested.<sup>211</sup> Canonical figures in the field such as Benedict Anderson have even suggested that nationalism was actually a product of what happened in the overseas colonies. It was “over there” that the spark was set off, giving the idea peoples ruled by imperial powers that “another world was possible.”<sup>212</sup> For many other scholars, however, it is from within Europe that we should read the histories of both the nation-state and nationalism, initiated by the transformations of the absolutist state on the Continent.<sup>213</sup> Across Europe, some regions grew into nation-statehood through unification by trade and political integration, while others were brought in by military force and invasions—for which the

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<sup>209</sup> See Antony Anghie, “International Law and the Pre-History of Globalisation” (2015) 33 *Sing. L. Rev.* 3. In his work, Anghie examines the issue of how imperialism has impinged on theorization of international law in great detail, with particular attention paid to different historical periods. In this context, imperialism emerges as a distinctive experience that has generated new questions and concepts concerning our understanding of the operations of international law, and its effects on the world in general and not just the empires themselves. Specifically, Anghie posits that although imperialism has been crucial to the development of international law, for much of the last century the emphasis of the debate on international law shifted elsewhere. As a result, “colonial questions” have been reduced to political issues that could not implicate the great theoretical concerns of the time. See Antony Anghie, “Imperialism and International Legal Theory” *The Oxford Handbook of the Theory of International Law*. 2015.

<sup>210</sup> The work of world-systems theorists on the history of the modern state system is of special import here. In particular, see Immanuel Wallerstein, *Modern World-System in the Longue Duree* (Routledge, 2015).

<sup>211</sup> See the work of Anthony Smith, *Nations and nationalism in a global era* (John Wiley & Sons, 2013); and Anthony Smith, *Nationalism and modernism* (Routledge, 2013).

<sup>212</sup> See Benedict Anderson, *Imagined Communities: Reflections on the origin and spread of nationalism* (Verso Books, 2006); as well as Pheng Cheah and Jonathan Culler, *Grounds of comparison: around the work of Benedict Anderson* (Routledge, 2013).

<sup>213</sup> See Eric Hobsbawm, *The age of extremes: a history of the world, 1914-1991*, Pantheon Books, 1995; Eric Hobsbawm, *Age of Capital: 1848-1875*. (Hachette UK, 2010), and Eric Hobsbawm, *Nations and nationalism since 1780: Programme, myth, reality* (Cambridge University Press, 2012). Also see John Breuilly, *Nationalism and the State* (Manchester University Press, 1993); Liah Greenfeld, *Nationalism: Five roads to modernity* (Harvard University Press, 1993); Michael Billig, *Banal nationalism* (Sage, 1995); Dominique Schnapper, *La communauté des citoyens* (Gallimard, 2003); Ernest Gellner and John Breuilly, *Nations and nationalism* (Cornell University Press, 2008).

French are singularly blamed. Meanwhile, despite their differences, scholars of nationalism representing separate schools do agree on one issue: the so-called nation-state emerged at the end of a particularly brutal trajectory of homogenization and organized violence during the eighteenth and nineteenth centuries. Secondly, it was the political entity that sought to define a firm national identity in order to justify its existence, internally and externally, and, not *vice versa*. This is not to suggest that nationalism was purely myth and invention, or that it did not have historical roots. This observation does indicate, however, that there was as much politics involved in the emergence of modern nations as there was culture. Furthermore, it is also generally agreed that with the growth of not only the concept but also the reality of a nation-state came the idea of societies-cum-nations to be controlled by a centralized system of government with a *complete* say over the livelihood of its citizens. As such, any dealings with entities outside of the “national jurisdiction” had to be regulated otherwise. Here are the beginnings of international law as known today.<sup>214</sup>

The question remains, however: what kind of international law? Until the beginning of the 20th century, relations between nation-states were almost exclusively dictated by treaties, which are in essence legally unenforceable agreements obliging the concerned states to behave in a certain way towards each other or another state, based on the threat of use of force.<sup>215</sup> At the other end of the spectrum were customary practices, mainly applicable in the field of warfare, such as *jus in bello* and *jus ad bellum*. As the 20th century progressed, a number of extremely destructive armed conflicts and unprecedented forms of organized violence, particularly WWI, WWII and the Holocaust, starkly exposed the underbelly of this semi-voluntary/semi-militaristic system of international law, at least as far as relations between states were concerned. After WWI, the model of international law as it pertained to interstate relations was that the League of Nations, which lasted only until the outbreak of WWII. In the aftermath of the two World Wars, in an attempt to create a more entrenched and encompassing system of rules and laws to prevent

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<sup>214</sup> See the seminal article of William Coplin, "International law and assumptions about the state system" (1965) 17 *World Politics* 615. On the origins of international law in minority rights issues, see Jennifer Jackson Preece, "Minority rights in Europe: from Westphalia to Helsinki" (1997) 23 *Review of international studies* 75; Jennifer Jackson Preece, *National minorities and the European nation-states system* (Oxford University Press, 1998); Jennifer Jackson Preece, "Ethnic cleansing as an instrument of nation-state creation: changing state practices and evolving legal norms" (1998) 20 *Human Rights Quarterly* 817.

<sup>215</sup> See Martti Koskenniemi, "What is international law for?" (2003) 89 *International law* 110, and, Martti Koskenniemi, "The fate of public international law: between technique and politics" (2007) 70 *The Modern Law Review* 1.

similar future conflicts, a new vehicle for the application of international law was found in the form of the United Nations (UN), which came to encompass several international law-making bodies. So far, this narrative follows a standardized and also, at least in the eyes of critical international studies scholars, apoliticized history of public international law.<sup>216</sup> Skeptical readings of this account are also quick to point out that international law is a somewhat young, and in effect essentially Eurocentric, creation, and to define it does not require going back to some assumed seventeenth-century fathers. While legal scholarship in this area dictates that the idea of international law was extant before the nation-state system came to dominate the political universe of statehood, other angles on the issue make every conceivable effort to separate the worlds of Grotius, Vattel, and Kant from that of the International Court of Justice and other legal bodies with an international mandate. For the purposes of the present study, the question that persists among these categorically different takes on the origins and meaning of international law is whether or not system-oriented developments in international law have managed, at least in select areas, to take power away from states and governments, and to cede it to international bodies with a clear mandate. In other words, regardless of one's position on its roots (intellectual as well as historical), has international law evolved to such a point that it now exists separately from the mere consent of states or other relevant actors?<sup>217</sup> Or, as vehemently maintained by the current government of the United States of America, for instance, is state sovereignty to be regarded as the only true principle of international law?<sup>218</sup> At a different but related plane of

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<sup>216</sup> See Antonio Cassese, *Self-determination of peoples: a legal reappraisal*. No. 12. (Cambridge University Press, 1995); Karen Knop, *Diversity and self-determination in international law*. Vol. 20. Cambridge University Press, 2002; Hurst Hannum, *Autonomy, sovereignty, and self-determination: the accommodation of conflicting rights* (University of Pennsylvania Press, 2011).

<sup>217</sup> One of the most articulate accounts of this particular question is provided by O. A. Elias and C. L. Lim's work on consensualism in international law. Their work is complimented by Robert Keohane's take on reciprocity (2002). These two themes are further developed in Benedict Kingsbury's questioning of the meaning of public in international law. See Robert Keohane, "Reciprocity in international relations" (1986) 40 *International organization* 1; Olufemi Adegunle Elias, and Chin L. Lim, *The paradox of consensualism in international law* (Kluwer law international, 1998); Benedict Kingsbury, "Sovereignty and inequality" (1998) 9 *European Journal of International Law* 599; Robert Keohane, Power and Governance in a Partially Globalized World (Routledge, 2002); Benedict Kingsbury, Nico Krisch, and Richard B. Stewart, "The emergence of global administrative law" (2005) 68 *Law and contemporary problems* 15; Joel Rosenthal, *Ethics and International Relations* (Routledge, 2017).

<sup>218</sup> Stephen Krasner's markedly hostile take on sovereignty, as well as a growing field of scholarship in international relations questioning both the history and current validity of the notion of state sovereignty, does of course merit attention here. See Stephen Krasner, "The hole in the whole: Sovereignty, shared sovereignty, and international law" (2003) 25 *Mich. J. Int'l L.* 1075. On this issue, also see his earlier work, Stephen Krasner, "Compromising westphalia" (1995) 20 *International security* 115, and Jack Goldsmith and Stephen D. Krasner, "The limits of idealism" (2003) 132 *Daedalus* 47.

analysis, is it possible to discern a legislative and judicial process endemic to international law that actually parallels such processes within domestic law? For any of these questions to be attended to satisfactorily, the sources of international law need to be re-examined. This is exactly what has been happening in both of the fields of expertise being studied here: legal scholarship on the one hand, and international relations scholarship on the other.

Legal scholarship clearly posits that there are three recognized sources of international law: international treaties, customary law, and general principles of law.<sup>219</sup> Specifically, international treaty law is comprised of obligations that states expressly and voluntarily accept between themselves through treaties. Customary international law, on the other hand, is assumed to have derived from the consistent practice of states accompanied by *opinio juris*, i.e. the conviction of states that a legal obligations requires a consistent practice. Finally, the judgments of international tribunals and courts, as well as legal scholarship, have traditionally been regarded as a source for international law.<sup>220</sup> Accordingly, the common narrative account of the emergence of the current regime of international law suggests that attempts to codify customary international law assumed decisive momentum after WWII with the formation of the International Law Commission (ILC).<sup>221</sup> The ILC was established by the General Assembly of the United Nations in 1947, with the specific purpose of codifying and promoting international law, although it is acknowledged that this project begun with the activities of the League of Nations from 1924 onwards.<sup>222</sup>

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<sup>219</sup> These are also cited in this order in Article 38 of the Statute of the International Court of Justice. For the full text, see the online version at [http://www.kentlaw.edu/faculty/bbrown/classes/HumanRightsSP10/CourseDocs/ICJ%20Art\\_38.pdf](http://www.kentlaw.edu/faculty/bbrown/classes/HumanRightsSP10/CourseDocs/ICJ%20Art_38.pdf) [15.04.2017].

<sup>220</sup> On the publicists debate, see D. F. Vagts, “Hegemonic International Law” (2001) 95 Am. J. Int’l L. 843, and, S. Sivakumaran, “The influence of teaching of publicists on the development of international law” (2017) 66 Int. & Comp. Law Quarterly 1. Although the category of “teachings of publicists” is not a homogeneous one, it broadly comprises of two groups: entities empowered by States to conclude teachings, such as the International Law Commission and expert groups, such as the Institut de Droit International, and “ordinary” publicists. The teachings of ordinary publicists include digests, treatises, textbooks, monographs, journal articles, etc. The standard assessments of influence focus on the extent to which these teachings are cited by courts and tribunals, in particular by the International Court of Justice. However, that approach privileges the role of courts and tribunals in the development of international law at the expense of other actors. Therefore, in full agreement with Sivakumaran, I concur that we cannot limit the debate on “other sources” solely to citations in court judgments.

<sup>221</sup> For a counter argument that goes further back, see Umut Ozsu, *Formalizing displacement: International law and population transfers* (Oxford University Press, 2015). I was a member of the doctoral supervision team of Ozsu and his work is indeed reflective of a growing trend among the new generation of international law scholars of looking back to the age of Empires for discerning the roots of the current regime.

<sup>222</sup> See Alina Kaczorowska-Ireland, *Public international law* (Routledge, 2015).

In general, codification in international law is achieved either through the production of a binding interpretation of an underlying custom by agreement, or through a treaty. What was unique about the ILC was that in the case of acts of codification undertaken by this body, states not party to such treaties were nonetheless expected to accept the work of the ILC in the name of customary law.<sup>223</sup> This was declared possible because the general principles of international law were seen as concurrent with those commonly recognized by the major legal systems of the world. Meanwhile, non-legal scholarship on this issue points out that only a very small section of international law achieves the binding force of peremptory norms (*jus cogens*) and thus could include all states with no permissible derogations. Despite this uneven state of affairs in terms of legal certainty as to what international law stands for in its post-WWII format, both *jus cogens* and *opinio juris* are persistently cited as among the fundamental principles of international law. This is despite the fact that, unlike ordinary customary law that traditionally requires consent and allows the alteration of obligations between states through treaties, neither *jus cogens* nor *opinio juris* could be violated or questioned by any state.<sup>224</sup> An added complication is that the actual list of peremptory norms is not exclusively catalogued. In legal terms, they are not listed or defined by any singular authoritative body. Rather, they often arise out of case law, customary law, and, in cases such as crimes against humanity, as a direct result of changing social and political attitudes within the institutional bodies now given power to produce new laws, such as the International Criminal Court (ICC). Generally included in this list are prohibitions on waging

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<sup>223</sup> On ILC's working principles, see Eyal Benvenisti and George W. Downs, "The premises, assumptions, and implications of Van Gend en Loos: Viewed from the perspectives of democracy and legitimacy of international institutions" (2014) 25 *European Journal of International Law* 85; and Lusa Fernando Bordin, "Reflections of Customary International Law: The Authority of Codification Conventions and ILC Draft Articles in International Law" (2014) 63 *International and Comparative Law Quarterly* 535.

<sup>224</sup> Under the Vienna Convention on the Law of Treaties, which was adopted on May 22, 1969 and entered into force in January 1980, any treaty in violation of a peremptory norm is declared as null and void. The Vienna Convention allows for the emergence of new peremptory norms, although it does not itself specify any peremptory norms. Still, the Convention is regarded as the primary source for the codification of pre-existing international customary law. The work on the Vienna Convention was also conducted under the auspices of the International Law Commission. Although only 105 states ratified the Convention, it is again regarded as binding upon those who are not signatories as it is considered as a founding pillar of customary international law. However, it must be noted that the scope of the Convention is quite limited. It only applies to treaties concluded between states (Article 1 of the Convention), and excludes treaties between states and international organizations as well as treaties among international organizations themselves. At least in its original version, it was explicitly and unapologetically state-centric. Other aspects of international law came to be governed under the subsequent 1986 Vienna Convention on the Law of Treaties Between States and International Organizations or Between International Organizations. See Ineta Ziemele, *Reservations to human rights treaties and the Vienna Convention regime: conflict, harmony or reconciliation* (Springer, 2013).

aggressive war, war crimes, piracy, genocide, slavery, racial discrimination, and torture, in addition to crimes against humanity. Despite the seemingly clear weight of condemnation related to such practices, the division of international legal norms into a hierarchy causes serious problems regarding both consensual ratification and enforcement. Furthermore, there are disagreements over whether a particular case violates a peremptory norm, and how and by whom such an occurrence is to be determined. As in other areas of international law, states generally insist on reserving the right to interpret these norms. Where there are disputes about the exact meaning and application of international law, ultimately their resolution is deemed the responsibility of national courts, unless otherwise specified as in the case of the ICC. In other words, to decide what a particular international law means or how it could be interpreted rests with the superior domestic courts, unless extenuating circumstance dictate otherwise. Legal entities such as the ICC or the ICJ are allowed to enter into the debate only if the national courts fail to give “true meaning” to the *jus cogens* interpretation of a specific violation.<sup>225</sup> Meanwhile, domestic practices of providing a rendition for *jus cogens* often lead to a compromise between three different forms of legal interpretation.<sup>226</sup> The textual approach dictates a restrictive interpretation based on the “ordinary meaning” of the norm or ruling in question;<sup>227</sup> the subjective approach considers the idea behind the letter of the law, as well as the context within which it came into existence or was put into force; and finally, interpretation can also be conducted in the light of both the object and the purpose of a given norm or ruling. These variations in interpretation imply differences in the understanding and entrenchment of

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<sup>225</sup> In the case of the ICJ, states can, upon mutual consent, submit disputes for arbitration by the Court. The judgments given by the Court in these cases are binding, although the court possesses no means to enforce its rulings. The Court may also give an advisory opinion on any legal question at the request of whatever body may be authorized by or in accordance with the Charter of the United Nations to make such a request. There have been at least 150 primary cases receiving judgment since the ICJ evolved from the Permanent Court of International Justice in 1945. Decisions made through other means of international arbitration may be binding or non-binding depending on the nature of the arbitration agreement, whereas decisions resulting from contentious cases argued before the ICJ are always binding on the involved states. See Taslim Elias, *The international court of justice and some contemporary problems: essays on international law* (Springer Science & Business Media, 2013); as well as Paula Wojcikiewicz Almeida and Jean-Marc Sorel, eds. *Latin America and the International Court of Justice: Contributions to International Law* (Routledge, 2016).

<sup>226</sup> See Antonio Cassese et al, *Cassese's international criminal law* (Oxford University Press, 2013); Gerhard Werle and Florian Jessberger, *Principles of international criminal law* (OUP Oxford, 2014); Karel Wellens, *Negotiations in the case law of the international court of justice: a functional analysis* (Routledge, 2016).

<sup>227</sup> On the issue of interpretation of international legal norms, see Anthony Clark Arend and Robert J. Beck, *International law and the use of force: beyond the UN Charter paradigm* (Routledge, 2014).

international law within the domestic sphere, as is to be expected.<sup>228</sup> In other words, as much as legal scholarship would like to capitalize the importance of *opinio juris* and *jus cogens*, international relations scholars in all camps are equally determined to reveal the highly political nature of these principles celebrated in the field of international law.

### III. *JUS GENTIUM* AND THE OUTER LIMITS OF INTERNATIONAL LAW

Historically, international relations scholars have regarded international law with a marked degree of distance, on the presumption that what exists in the domain of law could only be a reflection of what goes on in the domain of politics. In other words, although the world of all things legal distinctly assumed its autonomy, international relations scholars saw this self-perception and self-presentation as nothing more than a comforting illusion for those who subscribe to it.<sup>229</sup> In particular, the lack of a systemic inclusion of the issue of the exercise of power by states into the study of legal processes and structures has long been taken as a demonstration that legal scholarship suffers from a lack of depth and width in its understanding of how power is organized, operationalized, and, of course, maintained.<sup>230</sup> I would disagree with this conclusion and attribute it in part to the lack of dialogue between these two spheres of scholarship. However, it is important to make a note of this disjunct here as it clouds our perception of what to do with power and hegemony, and in general history, in the context of internal debates on international law. This is particularly relevant for the exercise of determining

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<sup>228</sup> The only obvious area where interpretation is less open to differences of national opinion is cited as the UN Charter. Violations of the UN Charter by members of the United Nations are to be raised by the aggrieved state in the General Assembly for debate. The General Assembly cannot make binding resolutions, but under the resolution GA/RES/0377 it could authorize the use of force if there had been what is considered as “Breaches of the Peace” or “Acts of Aggression,” provided of course that the Security Council failed to act due to a negative vote of a permanent member in the first place. The United Nations General Assembly could also call for other collective measures such as economic sanctions if the situation is considered as constitutive of a milder threat to international peace. If these issues are raised at the level of the Security Council, this particular body is equipped to pass resolutions under Chapter VI of the UN Charter to recommend “Pacific Resolution of Disputes.” Still, none of these resolutions are binding under international law, being *ad hoc* solutions to emergent problems. On the workings of the UN in the area of international law, see Thomas Weiss et al, *The United Nations and changing world politics* (Westview Press, 2016), and Simon Chesterman, Ian Johnstone and David M. Malone, *Law and practice of the United Nations: documents and commentary* (Oxford University Press, 2016).

<sup>229</sup> See David Kennedy, *A world of struggle: How power, law, and expertise shape global political economy* (Princeton University Press, 2016).

<sup>230</sup> See Simon Archer, Daniel Drache, and Peer Zumbansen, eds. *The Daunting Enterprise of the Law: Essays in Honour of Harry Arthurs* (McGill-Queen's Press-MQUP, 2017).



the limitations of universalized applications of international law, which is an important part of the focus of this dissertation.

Needless to say, a judicious assessment of both the limits and possibilities inherent in the conduct of international law requires that a bridge be established between these two domains of scholarship.<sup>231</sup> Whether this would happen through the translation of the terms and workings of international legality into the language of political science, or through making the conceptual basis of international relations debates more transparent to scholars and practitioners of international law surely depends on the initial motivation for attempts at such a bridging act. Two main issues must be addressed in this context. First and foremost, debates on both the sources and the meaning of customary international law assume something without ever feeling the need to explicitly mentioning it; this is the “legal personhood of the state.” It then becomes extremely difficult for the unsuspecting eye of the non-legal scholar to identify the distinction between “*opinio juris*” and “consensual state practice” in international law scholarship. Secondly, what states might be legally obligated to do under the rubric of international law, and what they actually do and for which specific reasons (apart from legal ones), is as important as *opinio juris* in particular, and *jus gentium* in general.<sup>232</sup> In this context, the first critical question concerning the connection between legal and political science inquiries, and the study of international law is to determine whether *opinio juris* gives the acts of a state their legal significance, and thus stands for more than a widespread consensus symbolizing a shared, though contextually bound, understanding among states. Only on the condition that *opinio juris* is larger and deeper than occasional moments of forced or voluntary consensus on specific issues could states receive their norms and guidance about what is legally relevant or consistent through *jus gentium*. The next question that troubles non-legal takes on international law is related to how the codification of *jus*

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<sup>231</sup> See the classical debate initiated by Anne-Marie Slaughter and Kenneth Abbott on this issue, in particular Anne-Marie Slaughter, Andrew S. Tulumello, and Stepan Wood, “International law and international relations theory: A new generation of interdisciplinary scholarship” (1998) *American Journal of International Law* 367-397; Kenneth Abbott, “International relations theory, international law, and the regime governing atrocities in internal conflicts” (1999) 93 *The American Journal of International Law* 361; Slaughter, Annie-Marie, and Steven R. Ratner, “Appraising the methods of international law: A prospectus for readers” (1999) 93 *Am. J. Int’l L.* 291.

<sup>232</sup> The idealistic take on *opinio juris* suggests that international law has developed through a pluralistic process, its history revealing a pattern of proportionality. Accordingly, states as legal agencies are equipped, organized, and empowered to participate actively in the interpretation and development of *opinio juris* on an equal basis. For a strong critique of this approach, see Andrew Guzman and Jerome Hsiang, “Some Ways that Theories on Customary International Law Fail: A Reply to László Blumman” (2014) 25 *European Journal of International Law* 553.

*gentium* takes place. In this regard, the “customary processes” depicted by legal theory are often deemed inadequate to diffuse widespread consensus regarding what *jus gentium* stands for and requires of states. Consequently, the articulation between customary international law, its codification practices, and exercises of power in international politics came to constitute a real divide between legal and political studies of international law.<sup>233</sup> That is what is being attacked and systemically eroded via the interventions of TWAIL scholarship in particular, and critical debates emanating from the Global South in general.

Power, needless to say, comes in many forms and disguises. Both consent and coercion are essential means through which power is exercised. In other words, effective control and dispensation of force, as well as claims of legitimate authority, are equally needed for the use of power. As such, the critical international relations scholar dares to question why legal scholarship on international law privileges or isolates the power of rules as the ultimate tool for constraining, persuading, and guiding behavior, at the expense of things that are overtly political in their nature.<sup>234</sup> Why, when we study international law, are we to separate power as it is conceived within the framework of a legal system from power in its other embodiments? Could developments in international law solely be explained by the unfolding jurisprudence of international law alone? Could law generate its own source of legitimacy in an all-encompassing way? How could we understand the background to the foundational principles of international law, such as reciprocity, jurisdiction, legal personality and legitimate expectations, as well as their effects in constraining and influencing how states behave, without paying attention to the very mechanisms that define and sustain these states? Why is it that the idea of obligation constitutes the distinguishing mark of an international law scholar’s worldview, as opposed to the idea of conflict? In international relations literature, the same world of interstate relations is defined by anything but the principle of obligation and the rule of law, regardless of the school of thought a particular scholar ascribes to. Furthermore, current critical scholarship in IR goes as far as suggesting that obligations and rules sanctified by international law are often used to qualify

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<sup>233</sup> On the development of *jus gentium*, see Arturo Escobar, “Thinking-feeling with the Earth: Territorial Struggles and the Ontological Dimension of the Epistemologies of the South” (2016) 11 *AIBR. Revista de Antropología Iberoamericana* 11; and Edward Cavanagh, “Prescription and Empire from Justinian to Grotius” (2017) 60 *The Historical Journal* 273.

<sup>234</sup> See Charles De Visscher, *Theory and reality in public international law* (Princeton University Press, 2015).

the abuse of power within the international system by bigger and richer states against others.<sup>235</sup>

Legal scholars could of course posit that the obligations of international law are designed, first and foremost, to constrain violence and excessive use or abuse of power, in addition to framing rights that are at least in principle applicable to all members of the “international community,” as they are bound by international law.<sup>236</sup> Yet, what about obligations, such as those related to “humanitarian law,” that can generate a correlative right to apply power against select states despite the right to territorial integrity or immunity from interference, as exemplified by the invasions of Afghanistan and Iraq?<sup>237</sup> If the foundational principles of international law are indeed there to condition states in their attempts to modify customary international legal rules within the bounds of judicial merit and legitimate expectation, then explicit respect is paid to the legal personhood of the state at the expense of other international entities. If international law is open to change emanating from within the system—as long as it is consistent with its founding premises—this amounts to a protection of the existing status quo of unequal relations and historical injustices. Among the principles of international law cited above, reciprocity emerges as primary in international legal relations. It is assumed to ensure—at least in principle—that the activities and claims of powerful states could be moderated by the knowledge that other states or conglomerations of states have the right to engage in similar activities or to make similar claims.<sup>238</sup> International relations scholarship on international law, on the other hand, openly depreciates the principle of reciprocity as a mere front, and not an effective device in regulating

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<sup>235</sup> See Stephen Gill and A. Claire Cutler, eds., *New constitutionalism and world order* (Cambridge University Press, 2014). Gill and Cutler argue that the relationships between law, power, and contestation in the global political economy are of paramount importance. Drawing upon critical theories of political economy, their analysis aims to advance a radical critique of dominant understandings of the distinction between international and transnational law. Specifically, they argue that transnational law operates dialectically as the common sense of contemporary global capitalism to subordinate national politico-legal orders and societies. As such, it works to discipline the masses through hard, enforceable corporate trade and investor rights, whilst limiting corporate social responsibilities to soft, voluntary and unenforceable standards. Still, the authors also welcome contestation and re-imagining capitalist legality.

<sup>236</sup> See Marie-Claire Cordonier Segger and Judge CG Weeramantry, eds., *Sustainable Development Principles in the Decisions of International Courts and Tribunals: 1992-2012* (Routledge, 2017).

<sup>237</sup> See the work of Michael Mandel on this issue, particularly Michael Mandel, *How America Gets Away with Murder: Illegal wars, collateral damage and crimes against humanity* (Pluto Press, 2004).

<sup>238</sup> See Michael Byers, *International law and the Arctic* (Cambridge University Press, 2013). For an example of a strong counter argument, see Wafula Okumu, “Humanitarian international NGOs and African conflicts” (2003) 10 *International Peacekeeping* 120.

interstate relations—or indeed any other form of inter- or transnational politics.<sup>239</sup> This is despite the fact that the legal principle of legitimate expectation encompasses powerful norms such as *pacta sunt servanda*.<sup>240</sup> In contrast, from the classical legal scholarship point of view, the principle of legitimate expectation combined with the principle of reciprocity could build into the system of international law the desired degree of stability, both in the operation of its rules and in the structure of its institutions. Here the assumption is that there is indeed a stable set of constraints operating on powerful states in international law, and thus fears that it will only serve the interests of the mighty is unjustified. Legal scholarship has traditionally insisted that once norms are created in international law, based on shared understandings of the customary processes, the relationship between law and politics is no longer a one-way street.

In summary, whichever route one takes to a full-fledged understanding of international law, the intersection of politics and law appears a key preoccupation. Legal scholarship on international law cannot avoid debates on the power/law nexus, and the contributions of critical legal studies scholarship, the New Haven School, debates on transnational law, and TWAIL scholarship readily attest to this inevitability.<sup>241</sup> On the international relations side of things, the

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<sup>239</sup> See Cedric Ryngaert, *Jurisdiction in international law* (OUP Oxford, 2015); Franz von Benda-Beckmann and Keebet von Benda-Beckmann, *Mobile people, mobile law: Expanding legal relations in a contracting world* (Routledge, 2017).

<sup>240</sup> In its most common use, *pacta sunt servanda* refers to private contracts and implies that contained pacts and clauses are to be considered with the weight of law between the engaged parties. It thus implies that non-fulfilment of respective obligations stated in these pacts constitutes a breach of a pact made in good faith. In international law, *pacta sunt servanda* is regarded as a basic requirement for the efficacy of the whole system, given the predominance of soft as opposed to hard law endemic to its workings. See Hans Wehberg, "Pacta sunt servanda" (1959) 53 *The American Journal of International Law* 775; Jonathan Charney, "Universal international law" (1983) 87 *The American Journal of International Law* 529; Dinah Shelton, "International law and 'relative normativity'" (2014) 2 *International law* 159.

<sup>241</sup> The theory of international law developed by the New Haven School (NHS) has been subject to criticism from within legal scholarship for over half a century. Members of the school are best known for their scepticism regarding the role of norms as this issue has been traditionally conceived in legal theories of international law. Accordingly, norms are not to be viewed as operating autonomously, in as much as they cannot be understood separate from general legal principles. The NHS puts particular emphasis on how decision-makers make their choices in the context of conflicting drives and principles, such as the clash between *pacta sunt servanda* and *clausula rebus sic stantibus*, the latter structuring the evolving regime of sovereign titles over natural resources such as the seas. For the NHS, the question of which principle is, or ought to be, given endorsement in a concrete situation cannot be answered by resort to rules alone. Rather, there are extra-legal factors at play, including the policy-relevant social and political interests of the actors in a position to make such choices. Particularly the Continental followers of Neo-Kantianism—which was developed by the Marburg School a hundred years ago and still provides the intellectual subtext for much formal positivist legal scholarship today—exhibit an openly hostile attitude towards the NHS and its legacy. See Michael Reisman, "Theory about law: Jurisprudence for a free society" (1999): 935-939; Janet Koven Levit, "Bottom-up international lawmaking: reflections on the new haven school of international law" (2007) 32 *Yale J. Int'l L.* 393; Paul Schiff Berman, "A pluralist approach to international law" (2007) 32 *Yale J. Int'l L.* 301; Oona

long-lived doctrinal triumph of realism has not helped to create conditions for an interdisciplinary examination of international law. In particular, “realist” international relations scholarship of the 1940s and 1950s showed a very strong dislike for the “idealist” international law of the inter-war, and later on post-war, period. Scholars as high profile as Hans Morgenthau branded international law scholarship—refererring explicitly not only to legal positivism but also to liberal idealism--as naïve, dangerous and morally dubious.<sup>242</sup> The peculiar relationship between legal positivism and political realism thus assumes a long history, with each constituting the “classical paradigm” for their respective disciplines. One may in fact go as far as arguing that they are in effect fully complementary with each other’s projects, particularly regarding the issue of the state. Both are state-centric, though legal positivism is so inherently and intrinsically, when compared to realism’s formulaic focus. Both take the state for granted, the former by not talking about it other than in a subsidiary manner or as background, and the latter by always starting the debate from state interests. Equally significant for the purposes of the present analysis is the fact that although neither school now enjoys the intellectual dominance once characteristic of them, both realism and positivism have left strong legacies. Any critical activity in international relations literature on international law, for instance, begins with a well-versed attack on either or both; this includes but is not limited to work by liberal internationalists and cosmopolitanists, neo-Marxists, constructivists, institutionalists, and of course critical theorists of a post-modernist persuasion. Legal positivism, on the other hand, is a common target for both critical legal scholars of myriad schools and transnationalism debates in international law. The remaining question is whether, by attempting to surpass both legal positivism and realism in a sweeping motion, these new developments in either of the fields have managed to tackle the issue that both have in common while being acutely unaware of its shared status: the state. Furthermore, whether it is the same state we are talking about in each case is a question mostly avoided outside of particular cases such as TWAIL scholarship.<sup>243</sup>

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Hathaway, "The Continuing Influence of the New Haven School" (2007) 32 *Yale J. Int'l L.* 553; Siegfried Weissner, "Law as a Means to a Public Order of Human Dignity: The Jurisprudence of Michael Reisman" (2009) 34 *Yale J. Int'l L.* 525.

<sup>242</sup> See Hans Morgenthau, *Politics Among Nations* (Alfred Kopf, 1948). Also see Gerry Simpson, "The situation on the international legal theory front: the power of rules and the rule of power" (2000) 11 *European Journal of International Law* 439.

<sup>243</sup> For an idealist take on the issue of the state in international law, see Malcolm Langford, *Global justice, state duties: the extraterritorial scope of economic, social, and cultural rights in international law* (Cambridge University

#### IV. *JUS COGENS* OR NOT—DILEMMAS?

The standard account of customary international law is that it arises from the widespread and consistent practice of states acting out of a sense of legal obligation, though this is in turn owed to many hegemonic practices and global hierarchies. This account, although commonly recited, is plagued by evidentiary, normative, and conceptual difficulties, and has been subjected to increasing criticism.<sup>244</sup> A fundamental problem with much theorizing about international law is that it fails to identify the decision-maker(s) under study. Instead, the discussion proceeds as if international law exists in the abstract, without any particular political entity to interpret and apply it.<sup>245</sup> In contradistinction, the application of a fundamental norm like *jus cogens* cannot be understood without paying attention to the preferences of the relevant legal actors. In the absence of a controlling treaty, these preferences provide the actual content of *jus cogens* above and beyond the letter of the law, perhaps somewhat akin to the judicial development of Anglo-American common law.<sup>246</sup> Immunities in international law expose multifaceted tensions between the conflicting goals of international stability of the state-system and legal accountability of the states. The laws arranging immunities do not provide conceptual and doctrinal coherence in terms of the relationship between state immunity and jurisdictional universalism. Foreign sovereign immunity and official status-based immunity are jurisdictionally sound, and protective of the existing state system in that they block the exercise of adjudicative jurisdiction by foreign states' courts. However, these immunities do not necessarily preempt the prescriptive jurisdiction of foreign states' laws to regulate conduct—even conduct inside other states—if a basis of prescriptive jurisdiction exists in international law such as the kind dictated by *jus cogens* norms. This is particularly important in the case of universal jurisdiction for state criminality. The question is to understand what determines a particular violation's status as subject to peremptory

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Press, 2013). For a comparative analysis of the treatment of the state in international law scholarship, see David Bederman and Chimene Keitner, *International law frameworks* (West Academic, 2016). For a heavily critical take, see Simpson, Gerry, "The sentimental life of international law" (2015) 3 *London Review of International Law* 3.

<sup>244</sup> See Leonard Hammer, *A Foucauldian approach to international law: descriptive thoughts for normative issues* (Routledge 2007) as well as Bederman and Keitner, *International law frameworks*, supra note 236, particularly the section on legal obligation.

<sup>245</sup> See Dinah Shelton, "International law and 'relative normativity'" (2004) 2 *International law* 159.

<sup>246</sup> For an authoritative and all encompassing treatment of *jus cogens*, see Marteen den Heijer and Harmen van der Wilt, eds. *Netherlands Yearbook of International Law 2015: Jus Cogens: Quo Vadis?*. Vol. 46. (Springer, 2016).

norms and prescriptive jurisdiction in international law. Considering the notion of a hierarchical international legal order whereby (certain) norms are elevated to a superior level, classical scholarship posits that international law has largely developed as a horizontal system of norms. The most prominent exception to this is the concept of *jus cogens*, which denotes a substantive hierarchical superiority in international criminal law. Since most of the accepted items clustered under *jus cogens* norms belong to the domain of human rights violations and state criminality, there is a tendency to presume that human rights concerns sit at the top of the pyramid of international legal norms. Yet it remains highly questionable whether the *jus cogens*-based substantive norm hierarchy is anything more than theoretical or aspirational. Due to the rather narrow interpretation of the scope of *jus cogens* norms in both domestic and international judicial practice, in reality they remain within the horizontal scope of international law, unless used by powerful legal actors.<sup>247</sup>

I would argue that this dynamic endemic to the relationship between state sovereignty and universal jurisdiction holds two important consequences for the current state of international law. The connection between immunities and applications of *jus cogens* is a very important one in the sense that the latter introduces practices that are against the mandate of the former in international law, in particular in the domain of criminal law. A few caveats are necessary here. First, the relevant law preempting immunities normally accorded to the state is the law in existence when a court determines whether to entertain suit, and not the law in existence at the time of the domestic conduct leading to the international adjudication of the issue. As a result, the viability of claims from the same underlying facts could and does change along with shifts in international law. This in turn causes complaints concerning legal certainty of adjudication under the aegis of international criminal law. Second, peremptory norms doctrines by and large lack rule-of-law coherence, since they are often embroiled with problems of their accepted legality and possible retroactive applications. This has been particularly troubling in the interpretation of ICC judgments discussed in previous chapters, and it is an issue receiving further elaboration in the next chapter of this work on hybrid courts and tribunals. If we were to assess violations of *jus cogens*, or peremptory norms of international law, compared with the relatively settled laws of

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<sup>247</sup> See William Conklin, "The peremptory norms of the international community" (2012) 23 *European Journal of International Law* 837, and Robert Kolb, *Peremptory International Law-Jus Cogens: A General Inventory* (Bloomsbury Publishing, 2015).

foreign sovereign and status-based immunities, it would become apparent that international law of conduct-based accountability and removal of immunities is in a state of flux. Since customary international law arises from state practices and *opinio juris*, arguments used to avoid direct collisions between state sovereignty and *jus cogens* do not necessarily lend themselves to a distinct doctrine of international law in this area. Most prominently, arguments suggesting that *jus cogens* addresses substantive prohibitions under international law may not even apply when the acts at issue are to be brought to trial under conduct-based jurisprudence and in *ad hoc* settings. Bending towards accountability norms whereby the law about state criminality is unsettled is not a high priority in international law. The only exception to this seems to emerge where international legal bodies are engaged in determining culpability and accountability concerning the acts of the states and high ranking officials representing the state in the Global South. Only then, it appears, do *jus cogens* norms become well and alive. If so, *jus cogens* norms do not hold such a unique position in the hierarchy of international law. The presumption that, unlike treaty law, peremptory norms abide no derogation and are binding on all states regardless of their willingness to be bound by them translates, in actual practice, into something else. As a result, I would argue that the authority of peremptory norms cannot be adequately explained by positivist, institutionalist, and voluntarist explanations of their authority. Perhaps the only other option available is an explanation from natural law or its derivatives, if the authority of peremptory norms is to avoid the conceptual difficulties engulfing their traditional renditions.<sup>248</sup> I will further explicate this issue in the last chapter of this dissertation, on collective responsibility and applied political philosophical debates on the notion of justice as it relates to virtue ethics on the one hand, and natural law theories on the other.

Meanwhile, in the next two chapters of this dissertation, I will first attend to the applicability of the principle of legal certainty to the category of crimes against humanity and highlight some of the missing connections between *jus cogens* norms, *erga omnes* crimes and actual international law adjudication of egregious criminal conduct. I will further exemplify my misgivings on the issue of the application of universal jurisdiction concerning crimes against humanity legislation through a discussion on limits of ICC jurisprudence and potential avenues

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<sup>248</sup> See Dan Dubois, "The authority of peremptory norms in international law: state consent or natural law?" (2009) 78 *Nordic Journal of International Law* 133.



for alternative practices in the form of hybrid courts and tribunals. However, before advancing the debate on universal jurisdiction in that particular direction, first I will summarize my findings concerning the doctrinal limits of universal jurisdiction in terms of its applications in the Global South.

## CONCLUSION

The thrust of this chapter was the critical examination of the matter of the state in contemporary international law, in relation to the work done by international relations scholars on the same subject; and to determine how these findings relate to some pertinent issues concerning statehood and sovereignty in the Global South under the aegis of the global application of *jus cogens* norms. This examination was essential for understanding the limits of universal jurisdiction, which is the main tenet of adjudication of crimes against humanity.

The central motif of this chapter was understanding how conceptualizations of the state—as emblematic of power relations in general—shape the context as well as content of processes and practices of international criminal law in the Global South. The original idea for this inquiry emerged from the observation that a noteworthy conglomeration of recent trends in international relations seemed to insist that they have solutions to offer for deficits in the study of international law. However, upon closer examination, it has become apparent that the leading cadres of international relations scholarship today no longer takes much interest in the state, and rather treat it either as a relic or as a nuisance. The claim that it is possible to bring these two enterprises, namely international relations and international law scholarship on the subject of law, together in the form of a dialogue without sorting out what separated them in the first place has thus proved absurd. There is no foundation upon which one can appeal for a common understanding of international law other than the one that engages with power, hegemony and histories of discontent. As such, one comes across a series of semi-independent conversations amongst individuals familiar with each other's intellectual traditions and methodological preoccupations. In this sense, the most distinctive feature of the current study of international law could be determined as the decisive conflation of its subject and its object, the state. The possibility of an external normative order grounding the equality and morality of the state on an autonomous system of legal sources and processes is currently all the rage. Oddly enough, now that the

classical bastion of state-centric analyses of politics—i.e. international relations—no longer cares much for the state, one is faced with the illusion that legal and non-legal scholarship are indeed engaged in a new kind of dialogue, despite all their previously missed opportunities. The characteristics of contemporary legal arguments on international law as a result remain elusive. The evasive rhetoric of the discipline regarding the state in particular, and power relations in general, provides the ultimate guarantee for its intellectual and professional autonomy. The traditional circles within which this kind of noble self-isolation would have been methodically scrutinized, international relations scholarship, is too busy with other questions.

In this context, the suggestion made in this chapter is two-fold. First and foremost, the debate about the state should at least remain a point of discomfort for international law scholarship. Second, the grammar of legal theory attending to international law should include the state as a problem-laden point of reference, rather than a foundational pillar, and contextualize it both geographically and historically. Perhaps then we could finally start a genuine conversation about why the state no longer seems to matter as much as international law once assumed it to. Through interdisciplinary dialogue, we may indeed develop a deeper understanding of law's secretive over-dependency on the state. Unlike the immediate post-war years, the international law scholar's ultimate wish to dispense with the need for the consent and compliance of the sovereign state now very much coincides with the reality that his/her counterparts work with across the disciplinary fence, in the field of international relations. However, the challenge now comes from elsewhere, the Global South, whereby the state re-emerged as a bastion of hope against the invasive forces of neoliberalism and global constitutionalism. Coming back full circle, on the issue of how to relate to the state in the context of Global South's engagements with international law, a major consequence of the new global restructuring of states, societies and economies has been the double process of further and deeper integration to the global market on the one hand, and, social exclusion, dispossession, and emergence of novel forms of widespread insecurity and precarity, on the other. These processes have led to an exponential growth of marginalized and deinstitutionalized subaltern classes, especially in the Global South, rendering them all the more vulnerable to becoming subjects of

state criminality.<sup>249</sup> Critically navigating through prevailing perspectives on international criminal law pertaining to violent acts and crimes committed by states against their own people--otherwise known as crimes against humanity, the next three chapters of the dissertation will thus strive to propose an alternative outlook. In the spirit of a “quiet encroachment of the ordinary,” I will address crimes against humanity first normatively, then as seen through the mechanisms of international law as they are sought to apply in the Global South, and finally from within the states and societies wherein they are committed.<sup>250</sup>

International law, and in particular international criminal law, reproduces many of the oligarchic tendencies in global governance, while also creating ambiguities and a new multilateral ethos of indifference. Within these parameters of a dialectics of stability and change, practices and processes not only inhibit global transformations and reproduce some of the most oppressive conditions of the existing order, they also lead to new openings. As the following discussion on crimes against humanity will illuminate, international criminal law is not immune to these coexisting forces and, as such, it can harbour promises as much as it casts long dark shadows.

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<sup>249</sup> On this issue, see Boaventura de Sousa Santos and César A. Rodríguez-Garavito, eds., *Law and globalization from below: towards a cosmopolitan legality* (Cambridge University Press, 2005), and Stephen Gill, ed., *Globalization, democratization and multilateralism* (Springer, 2016).

<sup>250</sup> For a similar use of the phrase of ‘quiet encroachment of the ordinary’ but in a different context, see Asef Bayat, “From Dangerous Classes’ to Quiet Rebels’ Politics of the Urban Subaltern in the Global South” (2000) 15 *International sociology* 533.

## ***Chapter IV. Crimes Against Humanity Legislation in International Law and The Conundrum of Jurisdictional Certainty***

### **INTRODUCTION**

This chapter pursues the question of what distinguishes crimes against humanity from other crimes, as well as why and how they fall under the purview of universal jurisdiction. To this end, it examines the jurisprudential architecture of crimes against humanity legislation in order to determine whether jurisdictional certainty alone would suffice for establishing the basis for adjudication to ensue. In this work, crimes against humanity is the key category of criminal conduct codified by international law that I chose to use as the basis of my analysis concerning limits of universal jurisdiction. This is so not because the crimes that fall under its aegis constitute in any way less than a frontal assault on human dignity and humanity at large. Rather, the conundrum concerns the impossibility of removing the vestiges of a historically skewed regime of accountability in international law regardless of the severe and egregious nature of such crimes. In other words, the problem rests with the way international [criminal] law operates and not with the applicability of the norm of universal jurisdiction to crimes against humanity. In this context, let me start this somewhat unsettling discussion with the citation of a very recent incidence befitting the definition of such crimes, and use this vignette as a starting point to analyze the current impossibility of legislating an applicable punishment scheme against many such crimes.

In August 2016, the Syrian Network for Human Rights (SNHR) published a report in which it documents in detail the crimes against humanity and war crimes that led to the complete depopulation of Darayya city.<sup>251</sup> The SNHR is an independent, non-governmental human rights organization founded in June 2011, and is a certified source for the United Nation of statistics about human rights violations in Syria. The report notes that all truces and reconciliations regarding circumstances in Darayya were implemented while negating basic international

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<sup>251</sup> See the Report, '*Crimes against Humanity and War Crimes are the reason behind the Forced Migration in Darayya: Siege, Chemical Weapons, Barrel Bombs, and International Silence*' at

[http://sn4hr.org/wpcontent/pdf/english/Crimes\\_against\\_humanity\\_forced\\_displacement\\_for\\_Daraya\\_en.pdf](http://sn4hr.org/wpcontent/pdf/english/Crimes_against_humanity_forced_displacement_for_Daraya_en.pdf)  
[03.03.2017]

humanitarian and human rights law.<sup>252</sup> Negotiations were carried out under oppression and dictated by siege, indiscriminate bombing, starvation, and the prohibition of civilian residents and aid from getting into or out of the city. According to the report, the crime of *en masse* forced displacement was carried out in a blatant manner in Homs, Darayya, and Banyas.<sup>253</sup> This particular report is one example amongst many documenting mass political violence committed by states against their own citizens since 1945. In this sense, it does more than shed an at least partial light on the drastic changes in the demography of Syria over the past six years as a result of the killing, indiscriminate and deliberate bombing, and destruction of livelihood of civilian communities. It also provides an inlet into a more nuanced understanding of the limits of the applications of crimes against humanity legislation *in situ*. In Syria, close to seven million people have been displaced and became refugees, while 6.3 million people have become IDPs.<sup>254</sup> Such demographic changes undoubtedly pose threats to the wellbeing of the peoples of the entire region, but equally importantly they raise the additional challenge of establishing an accountability regime in the aftermath of the still-ongoing war. In the specific case of Daraya city, for instance, the report records the killing of no less than 817 civilians, including 67 children and 98 women, during the time period covered by the report. These numbers and associated circumstances of the killing of civilian populations constitute an additional concern for the determination of the extent of crimes against humanity committed during the Syrian War, even as

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<sup>252</sup> On the basis of ICTY and ICTR case law, one of the main issues raised in the context of mass transfer of populations during armed conflict is the question of assessing whether people have chosen to leave conflict zones of their own free will—or at least as much free will as can be expected under circumstances of war. Thus, what really counts as “genuine choice” in each particular case cannot be established once and for all *a priori*. A careful consideration of the specific circumstances must be carried out before reaching any definitive conclusion. Secondly, international criminal law would benefit from further clarification of the meaning of the clause “displacement of persons from the area in which they are lawfully present” as one of the constitutive elements of the crimes of deportation and forcible transfer. While the reading of the term “lawfully” suggested by the ICTY is reasonable, especially in the context of a conflict where different national groups and political parties confront each other in what effectively amounts to a civil war, this is not helpful in other circumstances. Internally displaced persons often lack proper residency permits or registration, and often they move multiple times. Consequently, there might be “penumbral” situations that are not at all straightforward for adjudication purposes. This is an area where greater cross-fertilization between international refugee law and international criminal law would lead to a better understanding of how to address mass human suffering in these specific situations. Even the difference established by the ICTY between deportation and forcible transfer does not change the basic point that all of these acts are criminal, and that forcibly transferring people within a country is as serious a threat to their livelihood as deporting them across a State border.

<sup>253</sup> On the Lebanese case of the relationship between forced displacement and crimes against humanity, see <http://www.refworld.org/pdfid/4e09a5622.pdf> [03/03/2017].

<sup>254</sup> Nergis Canefe, “Management of Irregular Migration: Syrians in Turkey as Paradigm Shifters for Forced Migration Studies” (2016) 54 *New Perspectives on Turkey* 9; and Nergis Canefe, ‘Post-Colonial State and Violence: Rethinking the Middle East and North Africa outside the Blindfold of Area Studies’ (2015) 45 *Refugee Watch* 7.

they are naturalized as wartime casualties. Again according to the report, government forces-owned helicopters dropped no less than 7,846 bombs on the city, including barrel bombs loaded with a flammable substance that is evidently napalm. The report then documents that the siege imposed on the city and its fallouts, such as shortages in food and medicine, resulted in civilian deaths as well. Finally, there are 4,311 forcibly-disappeared persons from Darayya who were arrested by government forces, while later on the authorities denied their existence.<sup>255</sup>

The commonly accepted understanding of the modern concept and related jurisprudence of crimes against humanity is that this section of international law is a product of the horror of the crimes committed during the two World Wars. It was then revitalized due to the growing consensus amongst both European and post-colonial states that certain crimes committed within national borders and by the states against their own citizens should be legitimate subjects of international law and adjudication.<sup>256</sup> However, unlike war crimes and genocide, the law of crimes against humanity has primarily developed through piecemeal additions to customary international law.<sup>257</sup> Today, the statutes of most international and internationalized tribunals such as the International Criminal Court's Rome Statute contain definitions of these crimes, though there are significant differences in terms of the jurisprudence employed by different international, regional and hybrid courts.<sup>258</sup> To say the least, the evolution of the definition of crimes against

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<sup>255</sup> The summary description provided above clearly shows the complexities of subsuming the atrocious crimes related to forced displacement under clear-cut legal categories for the purpose of international criminal prosecution. These difficulties arise from the complexity of identifying the most appropriate approach to legally characterizing widespread violations of fundamental human rights amounting to forcible transfer and deportation. Especially when committed with a discriminatory intent and as a part of a widespread or systematic attack against civilians, this type of conduct does fall under the purview of crimes against humanity. The case law in this area already established the criminal nature of certain types of forced displacement and the need to prosecute those responsible for forced displacement situations. However, the problem lies in finding the venue and the court, and, more generally, finding political consent for the trial of these atrocities.

<sup>256</sup> On the politics of the establishment of the ICC and the drafting and ratification of the Rome Statute, see D. F. Orentlicher, 'Politics by Other Means: The Law of the International Criminal Court,' (1999) 32 *Cornell Int'l LJ* 489.

<sup>257</sup> On the history of crimes against humanity in international law, see G. Robertson, *Crimes against humanity: the struggle for global justice* (The New Press, 2013); A. F. Lang Jr, *Punishment, justice and international relations: ethics and order after the cold war* (Routledge, 2009); M. Cherif Bassiouni, ed. *International Criminal Law, Volume 2 Multilateral and Bilateral Enforcement Mechanisms* (Brill, 2008); L. May, *Crimes against humanity: a normative account* (Cambridge University Press, 2005); D. Luban, 'A theory of crimes against humanity' (2004) 29 *Yale J. Int'l L.* 85; D. Robinson, 'Defining 'Crimes Against Humanity' at the Rome Conference' (1999) 93 *The American Journal of International Law* 43.

<sup>258</sup> For an historical overview of the contents of the definition, see in chronological order:

1945 London Charter of the International Military Tribunal (Nuremberg Charter), Article 6(c): "murder, extermination, enslavement, deportation, and other inhumane acts committed against civilian populations, before or during the war; or persecutions on political, racial or religious grounds in execution of or in connection with any

humanity as an international instrument has not been linear.<sup>259</sup> As far as the practices of international courts are concerned, later definitions are often more expansive, while at the regional level domesticated definitions tend to be narrower than their international counterparts. Furthermore, the contents of the legal norms *jus cogens* and *erga omnes* obliging state parties to punish crimes against humanity remain subject to greater controversy than has been the case in the prescribing of punishment for genocide and war crimes.<sup>260</sup>

Overall, one might say that these are internal disputes, jurisprudential matters to be settled in the courts themselves. In this work, however, I will argue otherwise, and posit that many of these seemingly jurisprudential disputes actually relate to the criteria used for the determination of what constitutes crimes against humanity on the ground. Therefore, there is actually an intrinsic politico-normative challenge on the issue of their universal applicability. In

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crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated.” [This definition was also used in the Charter of the International Military Tribunal for the Far East.]

The Statute of the International Criminal Tribunal for the former Yugoslavia (ICTY), Article 5:

“...the following crimes when committed in armed conflict, whether international or internal in character, and directed against any civilian population: (a) murder; (b) extermination; (c) enslavement; (d) deportation; (e) imprisonment; (f) torture; (g) rape; (h) persecutions on political, racial and religious grounds; (i) other inhumane acts.”

The Statute of the International Criminal Tribunal for Rwanda (ICTR), Article 3:

“...the following crimes when committed as part of a widespread or systematic attack against any civilian population on national, political, ethnic, racial or religious grounds: (a) Murder; (b) Extermination; (c) Enslavement; (d) Deportation; (e) Imprisonment; (f) Torture; (g) Rape; (h) Persecutions on political, racial and religious grounds; (i) Other inhumane acts.”

The Statute of the Special Court for Sierra Leone (SCSL), Article 2:

“...the following crimes as part of a widespread or systematic attack against any civilian population: a. Murder; b. Extermination; c. Enslavement; d. Deportation; e. Imprisonment; f. Torture; g. Rape, sexual slavery, enforced prostitution, forced pregnancy and any other form of sexual violence; h. Persecution on political, racial, ethnic or religious grounds; i. Other inhumane acts.”

The Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia (ECCC), Article 5:

“...any acts committed as part of a widespread or systematic attack directed against any civilian population, on national, political, ethnical, racial or religious grounds, such as: murder; extermination; enslavement; deportation; imprisonment; torture; rape; persecutions on political, racial, and religious grounds; other inhumane acts.”

<sup>259</sup> For instance, in 2002, the USA asked all countries who were part of the ratification scheme for the ICC to sign agreements exempting US citizens from prosecution by the Court, and threatened economic sanctions if they refused. Some countries yielded to this pressure even after ratifying the ICC Statute, while others chose to honor their original commitments. Why some countries were more responsive to US influence than others is not a question that will be dealt with in here. However, no doubt state vulnerability to attempts of influence through the lens of economic sanctions played a significant role. What is important for the present context is the introduction of bilateral immunity agreements (BIAs) into the architecture of the Rome Statute. For further debate, see I. Nooruddin and Autumn Lockwood Payton, “Dynamics of influence in international politics: The ICC, BIAs, and economic sanctions” (2010) 47 *Journal of Peace Research* 711.

<sup>260</sup> On the disputed nature of the norm, see P. Wald, “Genocide and crimes against humanity” (2007) 6 *Wash. U. Global Stud. L. Rev.* 621; R. K. Paterson, ‘Resolving Material Culture Disputes: Human Rights, Property Rights and Crimes against Humanity’ (2006) 14 *Willamette Journal of International Law and Dispute Resolution* 161.

jurisprudential terms, the primary challenge in defining crimes against humanity is to identify the precise elements that distinguish these offenses from crimes exclusively subject to national laws. The definition itself not only determines the scope of international jurisdiction, it also gives rise to a number of important consequences concerning trial structure, conditional and selective removal of immunities and the commuting of sentences. Unlike the majority of domestic crimes, these offenses are generally considered outside the purview of statutes of limitations. Equally importantly, the immunities that often shield state representatives and high-ranking public and military officers from criminal responsibility are categorically removed in the context of crimes against humanity, at least when trials are held before international tribunals or domestic courts employing universal jurisdiction. Although the concept of universal jurisdiction—the principle that certain crimes are subject to jurisdiction by all states—remains controversial vis-à-vis the capacities of domestic courts, proponents of universal jurisdiction invariably include crimes against humanity within its scope. If put into practice, the principle would deliver the following result: while the crime of murder could only be tried in a court with a jurisdictional link to the act, a murder committed as a crime against humanity could be tried in any criminal court in the world. Finally, the prohibition of crimes against humanity is a *jus cogens* norm of international law, thus certifying that its derogation is not pardonable or to be permitted under any circumstance. As a result of its special status, at least in theory, states have an obligation under international law either to prosecute perpetrators of crimes against humanity or to extradite them to states intending to pursue prosecutions, hence the *erga omnes* part of the equation pertaining to this particular set of crimes. In light of the serious legal consequences of designating an offense a crime against humanity, as well as the severe moral condemnation the label entails, the importance of understanding the exact judicial nature of these offenses needs no further emphasis. However, this chapter is not an exercise in that vein. Although it does provide a brief historical sketch of the evolution of the norms and jurisprudence prohibiting crimes against humanity, as well as an assessment of the current state of the definition with respect to each key element of its constitutive crimes, the core of the argument developed in the following pages pertains to another and, I would purport, an equally important issue: the politico-normative framework within which these offenses find meaning and are deemed worthy of trial in the domestic setting. In this sense, the focus is to be shifted away from institutions such as the ICC to hybrid courts and the overall possibility of the domestication of this particular category of



international crimes.

In essence, crimes against humanity are mass crimes committed against the fundamental human rights of a civilian population. In this context, I make the point that their common inclusion under humanitarian, rather than human rights, law is misleading and has grave consequences. They are rightfully distinguished from egregious state crimes such as genocide in that they need not target a specific group, but may aim at the civilian population in general. Thus, they include crimes against political and or other groups, and creating conditions of generalized trauma and loss. In contrast to genocide, it is not necessary for the perpetrator to intend to destroy a group as such, in whole or in part. Similarly, crimes against humanity should be regarded different from war crimes insofar as the criminal conduct may be directed not towards the legally defined enemy's population but against the perpetrator's own; hence the difficulty of their legislation. In the following pages, an appeal is thus made to understand the politico-normative precepts of crimes against humanity jurisdiction, in an attempt to render them meaningful and useful within the domestic realm, where these crimes are perpetrated, rather than being seen as an imposition by an international court or a consortium of states (the latter format commonly known as “victor’s justice”).

## **I. JURISPRUDENTIAL ARCHITECTURE OF CRIMES AGAINST HUMANITY**

In international law, crimes against humanity found their first explicit formulation as a category of crime in Article 6 (c) of the Nürnberg/Nuremberg Charter which emerged from the Tribunal.<sup>261</sup> The offenses categorized as crimes against humanity were also included in Article 5 (c) of the Tokyo Charter and Article II (1) of Control Council Law No. 10.<sup>262</sup> While the Nuremberg and Tokyo Charters required that crimes against humanity evidence a connection to aggressive war or war crimes, this supplementary requirement was left out of Control Council Law No. 10. The Statutes of the Yugoslavia and Rwanda Tribunals and the International

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<sup>261</sup> See *The Charter and Judgment of the Nürnberg Tribunal – History and Analysis: Memorandum* submitted by the Secretary-General, Document A/CN.4/5 at [http://www.cininas.lt/wpcontent/uploads/2015/06/1949\\_UN\\_ILC\\_N\\_statuto\\_koment.pdf](http://www.cininas.lt/wpcontent/uploads/2015/06/1949_UN_ILC_N_statuto_koment.pdf) [03.03.2017]

<sup>262</sup> For the full text, see <http://avalon.law.yale.edu/imt/imt10.asp> [03.03.2017]. The list includes the following: atrocities and offenses, including but not limited to murder, extermination, enslavement, deportation, imprisonment, torture, rape, or other inhumane acts committed against any civilian population, or persecutions on political, racial or religious grounds whether or not in violation of the domestic laws of the country where perpetrated.

Criminal Court have then reaffirmed the customary law character of crimes against humanity, and the prohibition of crimes against humanity was recognized as having the status of *jus cogens* and belonging to the domain of *erga omnes*.

The legal phrase “crimes against humanity” was first employed earlier, in a 1915 Declaration by the governments of Great Britain, France and Russia which condemned the Turkish government for the alleged massacres of Armenians as “crimes against humanity and civilization for which all the members of the Turkish Government will be held responsible together with its agents implicated in the massacres.”<sup>263</sup> Despite this early use of the term, however, the first full prosecutions of crimes against humanity did not take place until after the Second World War in 1945, in the form of the International Military Tribunal (IMT) at Nuremberg, Germany. The charter establishing the Nuremberg IMT defined crimes against humanity as murder, extermination, enslavement, deportation, and other inhuman acts committed against any civilian population, before or during the war, or prosecutions on political, racial or religious grounds in the 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 they were perpetrated. Subsequent to the Nuremberg Charter, the Tokyo Charter of 1946 established the International Military Tribunal for the Far East, incorporating the same definition of crimes against humanity. Following the Nuremberg and Tokyo trials of 1945-1946, no other international tribunal with jurisdiction over crimes against humanity was established until the Yugoslav and Rwanda Tribunals. However, in 1947, the International Law Commission was charged by the United Nations General Assembly with the formulation of the principles of international law recognized and reinforced in the Nuremberg Charter and judgment, and drafted a “code of offenses against the peace and security of mankind,” which included crimes against humanity.<sup>264</sup> In 1996, this Draft Code from 1947 was brought to the attention of jurists who reinstated crimes against humanity as inhumane acts including murder, extermination, torture, enslavement, persecution on political, racial, religious or ethnic grounds, institutionalized discrimination, arbitrary deportation or forcible transfer of population, arbitrary imprisonment,

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<sup>263</sup> See G. Robertson, *Crimes against humanity: the struggle for global justice* (The New Press, 2013); and D. Matas, ‘Prosecuting crimes against humanity: the lessons of World War I’ (1989) 13 *Fordam Int'l LJ* 86.

<sup>264</sup> See the Commentaries document on the 1996 Draft Code of Crimes against Peace and Security of Mankind regarding the reference to International Law Commission at [http://legal.un.org/ilc/texts/instruments/english/commentaries/7\\_4\\_1996.pdf](http://legal.un.org/ilc/texts/instruments/english/commentaries/7_4_1996.pdf) [03.03.2017]

rape, enforced prostitution, and other inhuman acts committed in a systematic manner or on a large scale and instigated or directed by a Government or by any organization or group within the boundaries of a state.<sup>265</sup> This latter definition differs from the one used in Nuremberg in the sense that, as stated above, the former only targeted criminal acts that were committed “before or during the war,” thus establishing a prescriptive nexus between crimes against humanity and armed conflict. Prior to the 1996 definition, in 1993 the International Criminal Tribunal for the Former Yugoslavia (ICTY), established by the UN Security Council in order to investigate and prosecute genocide, war crimes, and crimes against humanity which had taken place in the former Yugoslavia, have already opened up the 1947 draft definition. However, it did so only for the specific case of the former Yugoslavia. Although the ICTY’s connecting of crimes against humanity to both international and non-international armed conflict led to the expansion of the list of criminal acts used in Nuremberg to include imprisonment, torture and rape, as per Article 5 of the ICTY Statute, this was done so with reference to a specific case. In 1994, the UN Security Council established the International Criminal Tribunal for Rwanda (ICTR) pursuant to the genocide that had taken place between April and July 1994. This second *ad hoc* international criminal tribunal yet again changed the scope of the definition of crimes against humanity. In the ICTR Statute, the linkage between crimes against humanity and an armed conflict of any kind was dropped. Rather, a new requirement was added that the inhumane acts must be part of a “systematic or widespread attack against any civilian population on national, political, ethnic, racial or religious grounds,” as per Article 3 of the ICTR Statute.<sup>266</sup> This change was stipulated due to the concern that, given the internal nature of the conflict in Rwanda, crimes against humanity would likely not have been applicable if the nexus to armed conflict had been maintained.

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<sup>265</sup> The International Law Commission’s Draft Code of Crimes against the Peace and Security of Mankind (1996), Article 18:

“...any of the following acts, when committed in a systematic manner or on a large scale and instigated or directed by a Government or by any organization or group: (a) Murder; (b) Extermination; (c) Torture; (d) Enslavement; (e) Persecution on political, racial, religious or ethnic grounds; (f) Institutionalized discrimination on racial, ethnic or religious grounds involving the violation of fundamental human rights and freedoms and resulting in seriously disadvantaging a part of the population; (g) Arbitrary deportation or forcible transfer of population; (h) Arbitrary imprisonment; (i) Forced disappearance of persons; (j) Rape, enforced prostitution and other forms of sexual abuse; (k) Other inhumane acts which severely damage physical or mental integrity, health or human dignity, such as mutilation and severe bodily harm.” [http://legal.un.org/ilc/texts/instruments/english/draft\\_articles/7\\_4\\_1996.pdf](http://legal.un.org/ilc/texts/instruments/english/draft_articles/7_4_1996.pdf) [03.03.2017]

<sup>266</sup> See the full body of the Statute at [http://legal.un.org/avl/pdf/ha/icttr\\_EF.pdf](http://legal.un.org/avl/pdf/ha/icttr_EF.pdf) [03.03.2017]

The most up-to-date definition of crimes against humanity came with the establishment of the permanent International Criminal Court in 2002. In its founding treaty, the Rome Statute, crimes against humanity are stated somewhat differently than in any of the preceding legal definitions. For the purpose of this Statute, “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: murder; extermination; enslavement; deportation or forcible transfer of population; imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law; torture; rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity; persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court; enforced disappearance of persons; the crime of apartheid; and other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.<sup>267</sup> Essentially, the Rome Statute employs the same definition of crimes against humanity that the ICTR does. However, it removes the requirement that the attack have been carried out “on national, political, ethnic, racial or religious grounds.” In addition, the Rome Statute definition

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<sup>267</sup> Here, in actual treaty language, an “attack directed against any civilian population” means a course of conduct involving the multiple commission of acts against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack; “Extermination” includes the intentional infliction of conditions of life, *inter alia* the deprivation of access to food and medicine, calculated to bring about the destruction of part of a population; “Enslavement” means the exercise of any or all of the powers attaching to the right of ownership over a person and includes the exercise of such power in the course of trafficking in persons, in particular women and children; “Deportation or forcible transfer of population” means forced displacement of the persons concerned by expulsion or other coercive acts from the area in which they are lawfully present, without grounds permitted under international law; “Torture” means the intentional infliction of severe pain or suffering, whether physical or mental, upon a person in the custody or under the control of the accused; except that torture shall not include pain or suffering arising only from, inherent in or incidental to, lawful sanctions; “Forced pregnancy” means the unlawful confinement of a woman forcibly made pregnant, with the intent of affecting the ethnic composition of any population or carrying out other grave violations of international law. This definition shall not in any way be interpreted as affecting national laws relating to pregnancy; “Persecution” means the intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity; “The crime of apartheid” means inhumane acts ... committed in the context of an institutionalized regime of systematic oppression and domination by one racial group over any other racial group or groups and committed with the intention of maintaining that regime; and, “Enforced disappearance of persons” means the arrest, detention or abduction of persons by, or with the authorization, support or acquiescence of, a State or a political organization, followed by a refusal to acknowledge that deprivation of freedom or to give information on the fate or whereabouts of those persons, with the intention of removing them from the protection of the law for a prolonged period of time.

offers the most expansive list of specific criminal acts to be covered by international criminal law. Despite the extensive degree of legislation, however, international law scholars have repeatedly pointed out the need for a specialized convention on crimes against humanity.<sup>268</sup> This is in part due to the fact that its current framing could be problematic in light of the limited application of select principles of legality to such crimes. For instance, the maxim *nullum crimen sine lege*, a fundamental principle of international criminal law, dictates that an individual can only be convicted for specific acts which, at the time of commission, were known to be of criminal nature. The aforementioned *ad hoc* tribunals could not limit their jurisdiction with that maxim. However, there is at least a partial solution offered to this conundrum in international jurisprudence. Fundamentally, crimes against humanity are inhumane acts committed as part of a widespread or systematic attack against civilians by their own state or an organized political authority with jurisdiction over that territory. The connection to a broader or systematic attack is then what justifies the exercise of international criminal jurisdiction and thus removes the burden of such crimes not being already codified within the confines of domestic jurisprudence. Similarly, the *erga omnes* category dictates the necessity for any legal party to pursue punishment, even in the event of the impossibility of domestic adjudication of crimes against humanity. No doubt the *erga omnes* clause is weaker than the *nullum crimen sine lege* dictum, though together they do form a defense of the applicability of crimes against humanity legislation for both past and present cases. It is also true that some scholars make a distinction between substantive and procedural law in the context of *nullum crimen sine lege*.<sup>269</sup> According to this view, a change in substantive law leading to liability must occur before a criminal act is committed, but a change in procedural law leading to liability may occur after the act is committed. For example, extending the statute of limitations to allow the prosecution of crimes that occurred in the past would constitute a change in procedural law.<sup>270</sup> This would directly apply to acts punished by international criminal tribunals that were of ambiguous legality in the immediate context of the conflict or atrocity situations in which these acts were committed. In this regard, *nullum crimen sine lege* as the legality principle as it pertains to international law

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<sup>268</sup> M. C. Bassiouni, ed., *International Criminal Law, Volume 2 Multilateral and Bilateral Enforcement Mechanisms* (Brill, 2008).

<sup>269</sup> M. Boot, *Genocide, crimes against humanity, war crimes: nullum crimen sine lege and the subject matter jurisdiction of the International Criminal Court*, Vol. 12 (Intersentia, 2002).

<sup>270</sup> G. Fletcher, *Basic Concepts of Criminal Law* (Oxford University Press, 1998).

jurisprudence requires a procedural reading in the case of crimes against humanity. Finally, though the exact wording of the definitions of crimes against humanity differ in the cornerstone documents that provide it a juridical standing, each definition is made up of similar underlying criminal elements (e.g., murder, extermination, rape, and so forth) as well as common contextual elements under which the criminal act must have been committed.

As far as the structure of these crimes is concerned, the material element of crimes against humanity requires the commission of a specific individual act in the course of a widespread or systematic attack on a civilian population.<sup>271</sup> The attack on the civilian population represents the contextual element of the crime. The mental element requires intent and knowledge regarding the material elements of the crime, including the contextual element. These crimes affect not only the individual victim, but as already mentioned, constitute a systematic or widespread attack on the fundamental human rights of a civilian population as a whole. This particular context of organized violence calls into question the responsibilities of humanity as a whole against the atrocities committed by a state against its own people. At least in principle, the norm also protects individual human rights, including the individual victim's life, health, freedom and dignity.<sup>272</sup>

The object of these crimes is, without exception, harming the civilian population, though this explicit focus does not apply to the category of war crimes, the latter category including both military personnel and civilian populations in the category of victims. Furthermore, crimes against humanity are directed against a civilian population at large and not merely against select individuals. A civilian population is any plurality of persons that are connected with each other by common characteristics, including but not limited to ethnicity, religion, race, nationality, and political belief, and any one of these characteristics could render them the target of an attack. The most contentious section of this definition is the criterion that the presence of a limited number of combatants among an attacked civilian population does not negate its civilian character. At times of ethnic civil war, for instance, the state cannot justify its actions in attacking civilian populations through the reasoning that they have a military/guerilla arm. Neither is it necessary

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<sup>271</sup> See Article 7 of the ICC Statute as document A/CONF.183/9 of 17 July 1998 at [https://www.icc-cpi.int/nr/rdonlyres/ea9aeff7-5752-4f84-be94-0a655eb30e16/0/rome\\_statute\\_english.pdf](https://www.icc-cpi.int/nr/rdonlyres/ea9aeff7-5752-4f84-be94-0a655eb30e16/0/rome_statute_english.pdf) [03.03.2017]

<sup>272</sup> Again according to the definition in Article 7 (2) (a) of the ICC Statute, an "attack on a civilian population" denotes "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."

for the entire population of a state or territory to be affected by the attack. The civilian character of the attacked population and persons applies both in civil war and during peacetime. Therefore, for the purpose of determining the criminal element, a distinction between civilians and non-civilians is not possible solely by applying the terms of customary international humanitarian law. In the context of crimes against humanity, application of the notion of harming the civilian population for criminal adjudication aims to protect the fundamental rights of every human being against any form of systematic violation. The essential determining factor is the victims' need for protection, and the presumption of their defenselessness vis-à-vis the state, the military or other types of politically organized force. By derivation, anyone who is *not* part of this organized political power using force is considered a civilian. Furthermore, it is not the formal status—such as membership in the military forces—but a person's actual role at the time of commission of these crimes that determines their culpability under the purview of crimes against humanity. In other words, members of military forces or other armed groups who have laid down their arms or have otherwise been rendered *hors de combat* are not to be subjected to culpability criteria.

Another very important feature concerning the jurisprudential architecture of these crimes is the idea of “attack.” This element describes a specific course of conduct involving the commission of acts of violence. Such a course of conduct must include the “multiple commission” of acts listed in Article 7 (1) of the ICC Statute. However, this does not mean that the perpetrator needs to act repeatedly by him- or herself.<sup>273</sup> Rather, what is in question is the widespread or systematic character of these acts of violence. Specifically, the criterion “widespread” describes a quantitative element related to the crimes committed. The widespread nature of the attack can arise either from the number of victims or from the extension of its effects over a broad geographic area. The criterion of a systematic attack, on the other hand, is a qualitative qualifier. It refers to the organized nature of the committed acts of violence, and thus serves to exclude isolated acts from the notion of crimes against humanity. Earlier case law of the *ad hoc* tribunals required that an individual act that is adjudicated based on the definition of crimes against humanity must follow a predetermined plan or policy. However, the Appeals Chamber of the Yugoslavia Tribunal then distanced itself from such a requirement and set a

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<sup>273</sup> Also see D. Luban, ‘A theory of crimes against humanity’ (2004) 29 *Yale J. Int'l L.* 85.

precedent for limited coverage.<sup>274</sup> Accordingly, although attacks on a civilian population typically do follow a predetermined plan, this does not make the existence of a plan or policy an element of crime. This argument relies on the principle that, under customary international law, crimes against humanity do not call for the proven presence of a policy element. However, Article 7 (2) (a) of the ICC Statute extended the definition again and stipulated that crimes against humanity jurisdiction requires that the attack on a civilian population must have been carried out "pursuant to or in furtherance of a State or organizational policy to commit such attack."<sup>275</sup>

Finally, there is the issue of perpetrators. Perpetrators need not be members of the State or an organization involved in the crime, but can include all persons who act to implement or support the policy of the State or the organization in question. These individual acts include killing (Art. 7 [1] [a] of the ICC Statute); extermination (Art. 7 [1] [b]); enslavement (Art. 7 [1] [c]); deportation or forcible transfer of population (Art. 7 [1] [d]); imprisonment (Art. 7 [1] [e]); torture (Art. 7 [1] [f]); sexual violence (Art. 7 [1] [g] of); persecution (Art. 7 [1] [h]); enforced disappearance (Art. 7 [1] [i]); apartheid (Art. 7 [1] [j]), and 'other inhumane acts' (Art. 7 [1] [k]). For all these acts, it must be proven beyond doubt that the perpetrator acted with intent. He/she must have acted with knowledge of the attack on the civilian population and must be fully cognizant that the action constituted a part of the attack.<sup>276</sup>

In the ICC's jurisprudence, then, emphasis has been placed on the criteria to be fulfilled for the possibility of persecution of crimes against humanity as defined by post-Second World War jurisprudence. This led to a narrower interpretation of the term "civilian." Prior to the Rome

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<sup>274</sup> See the United Nations International Criminal Tribunal for the Former Yugoslavia jurisprudence in the section on judgment and sentencing at <http://www.icty.org/en/about/chambers> [03.03.2017].

<sup>275</sup> The judicial commentary on the article reads as the following: "2. *For the purpose of paragraph 1: (a) "Attack directed against any civilian population" means 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; Article 7(2)(a) clarifies that it needs to be a State or organizational policy. One Pre-Trial Chamber declared that the term 'State' was self-explanatory but added that the policy did not have to be conceived 'at the highest level of the State machinery' [Situation in the Republic of Kenya, ICC PT. Ch. II, Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya, ICC-01-09, 31 March 2010, para. 89, citing Prosecutor v Blaškić, ICTY T. Ch., Judgment, 3 March 2000, para. 205]. Therefore, also a policy adopted by regional or local organs of the State could satisfy this requirement [Ibid.].*" See <https://www.casematrixnetwork.org/cmn-knowledge-hub/icc-commentary-elicc/commentary-rome-statute/commentary-rome-statute-part-2-articles-5-10/> [03.03.2017]

<sup>276</sup> On the issue of intent, see G. Werle, *Principles of International Criminal Law* (Oxford University Press, 2005), and G. Mettraux, *International Crimes and the ad hoc Tribunals* (Oxford University Press, 2005).



Statute, in some cases courts have interpreted the term “civilian” by incorporating *hors de combat*. However, both the ICTY and the ICC have moved towards a more restrictive interpretation of the term, potentially excluding members of the armed forces. This move may be regarded as regressive, going against the spirit in which the category of crimes against humanity was created and leading to a protection gap which crimes against humanity legislation was initially intended to close. In hindsight, the exclusion of members of the armed forces from the definition of “civilian” may have been a concession extended to increase the number of signatory states to the Rome Statute.<sup>277</sup>

In summary, crimes against humanity pertain to both past and present atrocities, and two new concepts have been introduced into the international landscape as a result: the first one describes the violence, oppression, or persecution undertaken or allowed under law by the state itself (international crime component), and the second one encompasses the variety of responses to these acts of violence, oppression or persecution (transitional justice component). With the establishment of the ICC, the hope arose that common citizens, whose lives were marked by the violence of genocide, crimes of war, and crimes against humanity, have finally found a platform to ask for justice and the punishment of persons responsible for these atrocities. However, the truth is much more complicated, and justice for crimes against humanity is far more evasive than what a flat reading of the Rome Statute might suggest.

A reexamination of the Tokyo Trial in comparison with the ICC reveals interesting characteristics concerning the evolution of international criminal law. The background of the

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<sup>277</sup> As Payam Akhavan argues, if conduct is consistent with the laws of war, it may be hard to prove that it nonetheless falls under a category of crimes against humanity during an armed conflict. Initial legislation pertaining to crimes against humanity extended the protection of the laws of war to a perpetrator's co-nationals. Although this new category initially required a nexus with an international armed conflict, it is now an autonomous concept based on human rights law that criminalizes large-scale atrocities in *both war and peacetime*. However, crimes against humanity committed during an armed conflict continue to be shaped by the laws of war. There is substantial convergence between the normative core of “non-derogable” human rights and the minimum humane treatment standards in the Geneva Law. Meanwhile, there is considerable divergence with respect to combat operations where the Hague Law applies as *lex specialis* concerning human rights norms. Akhavan states that the ICTY jurisprudence clearly demonstrates some of the instinctive tensions inherent in reconciling human rights law with armed conflict. A notable instance is the Gotovina case, in which the Trial Chamber held that the laws of war do not apply to ‘deportation’ qua crimes against humanity such that there is no distinction between forcible displacement of civilians in occupied territories as opposed to combat operations. If so, the temptation to dilute the laws of war through reclassification of the conduct as crimes against humanity should be resisted, because it may in effect lead to a decrease of protection for civilians in times of armed conflict. See P. Akhavan, ‘Reconciling Crimes Against Humanity with the Laws of War Human Rights, Armed Conflict, and the Limits of Progressive Jurisprudence,’ (2008) 6 *Journal of International Criminal Justice* 21.

Tokyo Trial was somewhat different from that of the Nuremberg Trial, and it had a unique jurisprudential context due to the declarations made specifically on Japan by the principal Allied Powers. Among the crimes provided for in Article 5 of the Tokyo Charter, crimes against peace, for which there was to be individual responsibility, were the most disputed legislation during the trials. Furthermore, war crimes and crimes against humanity were not clearly distinguished in either the Indictment or the Judgment of the Trial.<sup>278</sup> Later discussions on international criminal law led to the necessity of posing some new questions on the position of peremptory norms in international law, which were not addressed during the Tokyo Trials. As a safeguard, the 1969 Vienna Convention on the Law of Treaties introduced the concept of *jus cogens* into international law.<sup>279</sup> Still, the related category of *erga omnes* obligations remains one of the most problem-laden areas in international law. The rule that every state has the right to define its international legal position remains in force. In this regard, the judgment of the English House of Lords in the Pinochet case is of special interest<sup>280</sup>, as the problem of criminal responsibility of individuals for grave violations of international law was trumped by the concerns about the personal immunity of heads of state, combined with another problem of (quasi-) universal jurisdiction within British administrative law.<sup>281</sup>

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<sup>278</sup> See M. Futamura, *War crimes tribunals and transitional justice: the Tokyo trial and the Nuremberg legacy* (Routledge, 2007), as well as Y. Tanaka, Tim McCormack, and Gerry Simpson, eds., *Beyond Victor's Justice? The Tokyo War Crimes Trial Revisited* (Martinus Nijhoff, 2010) accessible at [https://www.researchgate.net/profile/Yoriko\\_Otomo/publication/282818305\\_The\\_Decision\\_Not\\_to\\_Prosecute\\_the\\_Emperor/links/561d6c5508aec7945a2532e9.pdf](https://www.researchgate.net/profile/Yoriko_Otomo/publication/282818305_The_Decision_Not_to_Prosecute_the_Emperor/links/561d6c5508aec7945a2532e9.pdf) [03.03.2017].

<sup>279</sup> See M. E. Villiger, *Commentary on the 1969 Vienna Convention on the Law of Treaties* (Brill, 2009); and C. Bassiouni, 'International crimes: jus cogens and obligatio erga omnes,' (1996) 59 *Law & Contemp. Probs.* 63.

<sup>280</sup> This judgment was given on 25 November 1998. The appeal was allowed by a majority of three to two and the House restored the second warrant of 23 October 1998. Of the majority, Lord Nicholls and Lord Steyn each delivered speeches holding that Senator Pinochet was not entitled to immunity: Lord Hoffmann agreed with their speeches but did not give separate reasons for allowing the appeal. Lord Slynn and Lord Lloyd each gave separate speeches setting out the reasons for their dissent. As a result of this decision, Senator Pinochet was required to remain in the UK to await the decision of the Home Secretary whether to authorise the continuation of the proceedings for his extradition under section 7(1) of the Extradition Act 1989.

See the actual text of the judgment at <https://publications.parliament.uk/pa/ld199899/ldjudgmt/jd990115/pino01.htm> [14.10.2017].

<sup>281</sup> Since this case, the impact (if any) of Spanish and British Court rulings on the Pinochet case on human rights progress in Chilean courts has been widely debated. Chilean judges chafe at the notion that foreign courts exerted any influence on them, arguing that, based solely on Chilean law and the evidence already before them, they were empowered to strip Pinochet of his immunity. Human rights critics, on the other hand, allege that the courts had been thoroughly immobilized for decades by the authoritarian legacy to which they were enjoined. No progress at all would have occurred were it not for the dramatic verdicts handed down in British courts for the rest of the world to see. The botched trial certainly achieved this much: it shamed the Chilean Government into pressuring its own high

In a larger view, the emergence of legal rules governing criminal liability for genocide represents the response of society in the face of criminal phenomena that cannot be categorized otherwise. Punishing those responsible for committing such abominations led to a strong consecration of the criminality of mass killings at the hands of the state in international humanitarian law. Regulations concerning the methods and means of war, limiting or prohibiting the use of certain types of weapons and ammunition, and requiring protection of victims of armed conflict, a body of legislation known as war crimes, are another example. These may be treated as prerequisites for the criminalization of actions and deeds circumscribed by crimes against humanity. Unlike these two other prototypical international crimes—war crimes and genocide—the proscription against crimes against humanity remains to be enshrined in a domestic constitutional context. While the former two are primarily used for international law purposes outside the domain of domestic jurisdiction, and historically in international courts, crimes against humanity relates to internal affairs of the state and, as such, requires additional steps to be taken at the national level to enable its local adjudication. As already discussed, the legislation pertaining to crimes against humanity has developed piecemeal, largely through the legal instruments and jurisprudence of various courts and tribunals established for adjudicating crimes that fall under this description. This process has yielded enduring normative difficulties as well as doctrinal ambiguities. Still, the law against crimes against humanity promises to fulfill a function that no other body of jurisprudence is or has been capable of in the context of human rights law or humanitarian law.

## II. COMPETING POLITICO-NORMATIVE VISIONS

Despite the long struggle to reach a certain level of jurisdictional certainty, there are foundational normative questions that crimes against humanity legislation is not fully poised to answer, such as what makes an inhumane act a crime against humanity, or what is the distinct purpose of establishing such a category of crimes. This is the case despite the fact that, in the drafting of the Rome Statute, the differentiation of these crimes from war crimes and genocide

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courts to deliver a modicum of justice to the victims of Pinochet. See A. Bianchi, “Immunity versus human rights: the Pinochet case” (1999) 10 *European Journal of International Law* 237.

needed to be fortified with substantive legal reasoning.<sup>282</sup> Furthermore, during the Rome Conference and in its aftermath normative discussions were always circumscribed by the conflicting political goals of individual states.<sup>283</sup> At least in some cases, delegations were willing to compromise their vision of crimes against humanity if the alternative was to write off the entire prospect of a permanent international criminal court. As such, the Rome Conference produced a definition of crimes against humanity without an underlying or overtly expressed normative consensus. Instead, several normative visions of crimes against humanity competed, and continue to do so, for recognition in the law, jurisprudence, and scholarship related to these crimes. In order for the ICC or other national or international judicial bodies to be able to exercise jurisdiction over crimes against humanity, it is essential that they be able to identify accurately and consistently situations in which these crimes have been committed. This is not exclusively a jurisdictional matter. As well, for judicial bodies to attribute individual criminal responsibility for such crimes without violating the principle of legality, they must have clear guidance of principles with reference to indictment, defense, and sentencing. This again is not simply a jurisdictional matter. Finally, in order for states to justify universal jurisdiction in addressing the commission of crimes against humanity, the scope of these crimes must be clearly defined. This is perhaps the only aspect of crimes against humanity with an exclusively legislative focus. Even there, however, politico-normative concerns determine the threshold for resorting to the exercise of universal jurisdiction, i.e., trying nationals of another country above

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<sup>282</sup> Offering an ethical critique of the “right to punish,” Bill Wringe argues that the principles that govern extraterritorial punishment under international law advocate an interest-based theory of punishment rather than a normative one. Accordingly, competing justifications for legal punishment based on grounds of universality have to shed their exterior of consequentialist and deontological reasoning in order to substantiate the establishment of core legislation for practices of international criminal law. See B. Wringe, ‘Why punish war crimes? Victor’s justice and expressive justifications of punishment’ (2006) 25 *Law and Philosophy* 159.

<sup>283</sup> As another case in point, the institutional design of the new United Nations (UN) human rights organ, the Human Rights Council (HRC), was heavily contested between the North and the South: while the former opted for an exclusive body with a high membership threshold, the latter pressed for an inclusive structure and cooperative mechanisms. Consequently, the eventual institutional design of the HRC features a moderate membership threshold. This was the outcome of a discursive struggle between the North, which promoted the paradigm of civilization, and the South, which endorsed the paradigm of expansion and inclusion of differences. The same dynamic was in place during the drafting of the Rome Statute. On this issue, see Larry May’s work, including L. May, *Genocide: a normative account* (Cambridge University Press, 2010), L. May, *Crimes against humanity: a normative account* (Cambridge University Press, 2005), L. May, and Stacey Hoffman, eds., *Collective responsibility: Five decades of debate in theoretical and applied ethics* (Rowman & Littlefield Publishers, 1992), as well as J. T. Kelly, “The moral foundations of international criminal law” (2010) 9 *Journal of Human Rights* 502, and Scheipers, Sibylle, “Civilization vs toleration: the new UN Human Rights Council and the normative foundations of the international order” (2007) 10 *Journal of International Relations and Development* 219.

and beyond the requirements of nationality-territoriality nexus.

Despite the heavily normative nature of the establishment, adoption, and application of definitions pertaining to crimes against humanity, declaring them as worthy of international law jurisdiction simply on the basis that they threaten the peace and security of the world was the central justification for the Nuremberg Charter and Judgment as reflected in the war nexus.<sup>284</sup> In other words, it was the context of war that justified the adjudication of such crimes. Atrocities committed within a state with no connection to war were regarded as concerning that state alone. Indeed, some participants in the Rome Conference endorsed this perspective as late as 1998. With the Rome Statute's coming into effect, however, a broader view of the peace and security rationale was adopted, which encompasses threats posed by internal armed conflict as well. This latter perspective also provided the legal basis for the establishment of the *ad hoc* international criminal tribunals for former Yugoslavia and Rwanda under Chapter VII of the United Nations Charter.<sup>285</sup> Ultimately, the elimination of the requirement of any context of armed conflict from the definition trumped the peace and security rationale for these crimes. However, what is to replace the war nexus is yet to be determined. Crimes committed in peacetime by a sovereign state pose unique challenges for international law. The trials about the horrendous crimes of the Khmer Rouge provide an apt example. In justifying the continued detention of one of the defendants charged with crimes against humanity, the Extraordinary Chambers in the Courts of Cambodia ('ECCC') echoed the old peace and security rationale.<sup>286</sup> The Rome Statute's rationale, on the other hand, rests more on the gravity of the crimes than on any concrete threat to international peace and security. One of the most frequently invoked justifications for crimes against humanity is then that they "shock the conscience of humanity."<sup>287</sup>

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<sup>284</sup> M. Badar, "From the Nuremberg Charter to the Rome Statute: defining the elements of crimes against humanity" (2004) 5 *San Diego Int'l LJ* 73; and G. Robertson, *Crimes against humanity: the struggle for global justice* (The New Press, 2013).

<sup>285</sup> For Chapter VII of the UN Charter's full text, see <http://www.un.org/en/sections/un-charter/chapter-vii/> [03.03.2017] Chapter VII pertains to threats to peace, breaches of peace and acts of aggression.

<sup>286</sup> Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea, NS/RKM/1004/006 (2004), Art. 5, and, Nuon Chea (ECCC-002/14-08-2006), Provisional Detention Order, 19 September 2007, para. 5.

<sup>287</sup> This language evokes the Martens' Clause's "laws of humanity" and "dictates of the public conscience" as stated in the Preamble to the Hague Conventions on the Laws and Customs of War on Land (1899). The clause states that "[u]ntil a more complete code of the laws of war is issued, the High Contracting Parties think it right to declare that in cases not included in the Regulations adopted by them, populations and belligerents remain under the protection

This view of crimes against humanity is duplicated in the human rights law framework, as a result of which crimes against humanity are depicted as particularly severe violations of fundamental human rights. According to this perspective, the purpose of the overarching category of crimes against humanity is to capture this seriousness through the requirements of a targeted “population” and a “widespread or systematic attack.” Proponents of the gravity rationale reject the notion that crimes against humanity should require a government or organizational policy or a discriminatory intent. Unfortunately, the difficulty with this latter normative vision is that it necessitates a scale for judging the gravity of the crime in question. This task is not a legitimate component of international law, much less of the legislation pertaining to crime against humanity. Nevertheless, the gravity of the crimes probably remains as the most pervasive normative justification for crimes against humanity legislation thus far.<sup>288</sup>

In addition to the peace and security argument and the justification from the gravity of the

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and empire of the principles of international law, as they result from the usages established between civilized nations, from the laws of humanity and the requirements of the public conscience.” See T. Meron, “The Martens Clause, principles of humanity, and dictates of public conscience” (2000) 94 *The American Journal of International Law* 78.

<sup>288</sup> The contours of the prohibition of crimes against humanity with reference to proceedings before the ICTY and deliberations at the Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court (ICC) prove that, because of the relatively contemporary status of these offenses under international law, a particular reference to the genesis and re-interpretation of the war nexus requirement is essential. The task at hand is identifying the elements of these offenses to distinguish them from “ordinary” municipal crimes (e.g., murder, assault or false imprisonment) and to justify the exercise of international jurisdiction that would otherwise be the subject of domestic adjudication. For the drafters of the Nuremberg Judgment, the war nexus originally served this purpose. The ICTY indeed devised an ingenious solution to the problem of delimiting international jurisdiction and distinguishing crimes against humanity from “ordinary” crimes: the Trial Chamber did not require proof of a substantial link between the defendant's inhumane act and a state of war. Rather, the Chamber defined crimes against humanity in terms of the *mens rea* of the defendant and the existence of a widespread or systematic attack against a civilian population. However, at the same time, a Trial Chamber of the Tribunal added additional elements to the definition of crimes against humanity, further complicating the definition and the Prosecution's burden of proof. The Appeals Chamber did overturn the Trial Chamber's decision in this regard in the Tadic case (INTERNATIONAL DECISION: Prosecutor V. Tadic (Judgement). Case No. IT-94-1-A. 38 ILM 1518 (1999). International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, July 15, 1999). During the drafting of the Statute for the permanent ICC, both the ICTY Statute and the work of the Tribunal were used in drafting a consensus definition of crimes against humanity that will govern prosecutions before the new permanent international court. In this latter case, the drafters of the Rome Statute defined crimes against humanity with reference only to the existence of a widespread or systematic attack against a civilian population and the mental state of the individual defendant. In so doing, they recognized that once abuse of civilians surpasses a particular threshold, the prescriptions of international law are activated and individual perpetrators can be held internationally liable for their acts of murder, assault, rape, or unlawful detention. As such, the principles guiding the contemporary codification of international criminal law has shifted considerably since the Nuremberg Judgment. Condemning injurious conduct and guaranteeing the accountability of individuals who subject others, including their compatriots, to inhumane acts, have found adequate codification. However, this does not eliminate the politico-normative concerns debated in the present work. See M. McAuliffe deGuzman, “The road from Rome: the developing law of crimes against humanity” (2000) 22 *Human Rights Quarterly* 335.

offenses, there is a third normative perspective that envisions crimes against humanity as offenses committed exclusively by state actors and, as such, the ethos of crimes against humanity emerges as punishment for the misuse of state power to attack rather than to protect.<sup>289</sup> If so, it is the misuse and abuse of state power that renders these crimes non-justiciable in the domestic sphere, and the likelihood they will go unpunished mandates the availability of international jurisdiction. Proponents of this view promote the inclusion of a state policy element in the definition of crimes against humanity. In other words, only inhumane acts dictated by a state policy to commit such violence would merit designation as a crime against humanity. This vision relies heavily on a historically descriptive point of view. At the same time, it also reflects an overreliance on a rigid understanding of state sovereignty, especially concerning crimes perpetrated by regional alliances and non-state actors intervening in a civil war situation or during a military occupation. While it is true that domestic legal systems are generally unwilling or unable to prosecute either their own state or non-state actors, it is far from clear that international courts could easily step in to remedy the lacunae in adjudication of such crimes. In this regard, though the critique of state sovereignty is the strongest normative standpoint for the justification for crimes against humanity legislation, it falls short of identifying the political and institutional route required to try these cases in non-domestic courts. This weakness is at least partially remedied by emphasis on the group harm elements of the crimes against humanity legislation.<sup>290</sup> This requires that the targeted group share particular characteristics beyond the geographic proximity of its members, such as nationality, race, religion, or ethnicity.<sup>291</sup> This brings the normative basis of crimes against humanity legislation close to the prohibition against genocide, although without the requirement of intent to destroy the group in whole or in part. The focus on group-based harm undoubtedly captures one of the primary features of crimes against humanity. Still, it lacks the large-scale and systemic attack component, and thus is weakened in its coverage.

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<sup>289</sup> Both Cherif Bassiouni and William Schabas believe that the concept of crimes against humanity embraces only serious and egregious violations of human rights perpetrated by members of the state or state-like actors against their own citizens. See W. Schabas, "State Policy as an Element of International Crimes" (2008) 98 *Journal of Criminal Law and Criminology* 959; M. Bassiouni, *The Legislative History of the International Criminal Court* (Transnational Publishers, 2005), particularly pp. 151-5; and R. Vernon, "What is a Crime Against Humanity?" (2002) 10 *Journal of Political Philosophy* 242.

<sup>290</sup> For David Luban, for example, the rationale for crimes against humanity lies in the interest all humans share 'in ensuring people are not killed solely because of their group affiliation'. See D. Luban, "A Theory of Crimes Against Humanity" (2004) 29 *Yale Journal of International Law* 139.

<sup>291</sup> Legal philosopher Larry May also suggests that group-based harm can justify attaching the label crimes against humanity. *Supra* note 32.

In summary, only a composite analysis of existing approaches would provide a complete rationale and normative foundation for crimes against humanity legislation. Thus far, none of them is capable of redefining the applicable nexus, due to their emphasis on select elements or aspects of these crimes. No single vision of crimes against humanity has predominated in scholarship, law, or jurisprudence. Instead, from the Nuremberg judgment onwards, various approaches continue to compete for the provision of a solid basis for the adjudication of these crimes. The ILC has also experimented with different rationales. The 1954 Draft Code adopted a combination of state action and discrimination, while the 1991 Draft Code relied on seriousness, introducing the criteria of “systematic” or “mass scale.” Finally, the 1996 Draft Code combined the seriousness and state action requirements. All of the post-Nuremberg statutes pertaining to crimes against humanity have carried forward inconsistencies in their justifications. The ICTY resurrected the nexus with armed conflict; the ICTR required both seriousness and discrimination; the ICC injected a requirement of state—or at least group—action; the Special Court for Sierra Leone (SCSL) relied almost exclusively on seriousness; and the ECCC re-injected the element of discrimination.<sup>292</sup> The resultant lack of normative uniformity in the legislation has led to important doctrinal questions remaining perpetually unresolved. The current state of affairs also clearly indicates the importance of the politico-normative context of the adoption and usage of crimes against humanity legislation.

### **III. ADJUDICATION, RESPONSIBILITY AND THE LAW: LIMITS OF UNIVERSAL JURISDICTION**

Since 1945, there have been myriad kinds of prosecutions for crimes against humanity. In addition, charges for particular crimes against humanity are often brought in conjunction with charges for particular war crimes in a given prosecution.<sup>293</sup> The changing nexus within which these prosecutions took place has already been discussed. In this section, this debate will be extended to address another issue, that of collective responsibility. As already stated, under Article 7(2)(a) of the ICC Statute, crimes against humanity require that a widespread or systematic attack on a civilian population be committed “pursuant to or in furtherance of a State

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<sup>292</sup> Supra note 239.

<sup>293</sup> A lengthy list of crimes against humanity cases can be found in the International Criminal Database (ICD) at <http://www.internationalcrimesdatabase.org/Cases/ByName> [03.03.2017].



or organizational policy to commit such attack.” Here, both the term state policy and the interpretation of the term “organization” remain controversial. Normative and jurisprudential debates on the exact meanings of these terms lead to varying conclusions. Now, if these terms were understood as reflecting the ordinary meaning of the concept and including any association of persons with an established structure of political authority, perhaps the dubiousness of their coverage would erode. What is it, then, that makes such a wide and yet simple interpretation, associating responsibility with the state or state-like organizations and people acting on their behalf, so cumbersome a task?

The missing link between the adjudication of crimes against humanity and a principled acknowledgement of their defining relationship with the acts of the state or state-like political authority harks back to the painful debate that emerged in the aftermath of the 1961 Eichmann trial in Jerusalem.<sup>294</sup> The Eichmann trial is part of a series of Holocaust-related trials widely known and studied among Holocaust scholars, but which rarely enter into other debates on international criminal law. Specifically, Holocaust scholars have come to employ the tripartite concept of information, knowledge, and awareness for the determination of accountability based on the study of these of trials. Their work maintains that an awareness gap exist between information flow, its processing and interpretation into general knowledge, and the crystallization of the recognition of the consequences of criminal actions.<sup>295</sup> In many ways, these trials directly contributed to building a consciousness about individual responsibility for state crimes. In this regard, in addition to the Nuremberg Trial, the trials of Jewish functionaries during the Holocaust (otherwise known as the Kapo trials), the Malkiel Gruenwald trial (otherwise known as the Kastner trial), and the Eichmann trial are cornerstones of legally inclined Holocaust research.<sup>296</sup> Insofar as the Holocaust was so aberrant and unprecedented an event, these trials also set a formidable precedent for tracing the complex paths that acts constituting crimes against humanity follow before they amount to mass destruction.

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<sup>294</sup> With regard to the trials, the primary text referred to through out this section is H. Arendt, *Eichmann in Jerusalem* (Penguin, 1963).

<sup>295</sup> H. Yablonka, “The development of Holocaust consciousness in Israel: The Nuremberg, kapos, Kastner, and Eichmann trials” (2003) 8 *Israel Studies* 1.

<sup>296</sup> See the judgment of the Nuremberg trials at [https://www.loc.gov/rr/frd/Military\\_Law/pdf/NT\\_Vol-I.pdf](https://www.loc.gov/rr/frd/Military_Law/pdf/NT_Vol-I.pdf) [03.03.2017]. For the case summaries of the remaining Holocaust trials, see M. J. Bazyler and Frank M. Tuerkheimer, *Forgotten Trials of the Holocaust* (NYU Press, 2015).

Unlike the way that ICTY or ICTR are examined, however, these trials are generally accepted as offering significant clues concerning the politico-normative underpinnings of crimes against humanity adjudication. The Nuremberg trials (1945-1947), which took place during the period immediately prior to the establishment of the state of Israel, were marked by the intensive diplomatic and military struggle against the British for Jewish independence in Mandate Palestine and the sanctification of national freedom. The "Kapo trials" and the Kastner trial (1948-1959) occurred during the transition from a pre-state community (*Yishuv*) to sovereign statehood, and took place under the circumstances of Israel's War of Independence, mass immigration, and the building of the new state's legal, economic, and security infrastructure. At this time, Israeli jurors also crafted the Law no. 64, "Nazi and Nazi Collaborators Punishment Law" (1950), designed to bring Nazis and their proxies to justice through the quasi-legal practice of universal jurisdiction.<sup>297</sup> The Eichmann Trial (1960-1967) came after these two initial sets of trials; it received public attention at a time of economic and political growth of the Israeli state and was used to make that state's voice heard in international law. Holocaust scholars are not at all reticent in stating that each of these trials proceeded according to the national spirit and political environment of the times. Each trial was also associated with a specific agenda: the Nuremberg trials reflected the Allies' victory over Nazi Germany, while the Kapo trials were an expression of the postwar mass immigration that put its stamp on Israeli society. The political dimension of awareness of the Holocaust as an international crime stood at the core of the Kastner trial. The Eichmann trial, on the other hand, focused on the operative meaning of state sovereignty, the privatization of the Holocaust, and the place of crimes against humanity in the wider context of World War II. In the post-Nuremberg era, we rarely associate political agendas with courts, tribunals and trials working towards the adjudication of crimes against humanity, but in the 1960s Holocaust scholars readily did so.

The remainder of this section will focus on the interpretation of crimes against humanity during and in the aftermath of the Eichmann trial, and compare the context within which this debate took place with the current obsession on the universality of the Rome Statute. According to Hannah Arendt, men are not capable of forgiving what they cannot punish, nor are they

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<sup>297</sup> For the full text of the law, see the International Red Cross Archives at <https://ihl-databases.icrc.org/applic/ihl/ihl-nat.nsf/0/9D6164171FA43DE7C12575AE0034A437> [03.03.2017].

capable of adequately punishing what is unforgivable. Indeed, the most distinguishing feature of crimes against humanity, in the form that they were articulated during the Eichmann trials, is their imprescriptibility.<sup>298</sup> The Arendtian claim concerning the impossibility of punishment in certain cases such as crimes against humanity is a clear indicator of the limits of positive law. This is what Arendt calls the “radical evil,” the inadequacy of existing sentences and punishment schemes in addressing the damage caused, both because of the unprecedented nature of the crimes committed and due to their extreme cruelty constituting an obstacle to the very idea of adequate punishment. According to Arendt, during the Eichmann trial, the monstrous scale of the Nazi crimes made any punishment provided for them inadequate and absurd.<sup>299</sup> More specifically, in *Personal Responsibility under Dictatorship*, Arendt stated that the horror of the Nazi crimes themselves, in their naked monstrosity, transcended all moral categories and exploded existing standards of jurisdiction.<sup>300</sup> Hence she reached the conclusion that such crimes were neither adequately punishable nor suitable for forgiveness. In the same text, she further claimed that, contrary to the statements made by the Israeli courts, reasons such as the need for society to be protected against these kinds of crimes, the rehabilitation of criminals, the dissuasive force of the example, or measures of retributive justice would not bring a complete closure. Thus, our ordinary sense of justice does not suffice in the case of crimes against humanity. In her later work, however, in particular in *The Human Condition*, Arendt admitted a possible combination of forgiveness and punishment concerning crimes against humanity.<sup>301</sup> Still, she clearly stated that punishment is an alternative to forced forgiveness by the dictates of history and not its opposite.<sup>302</sup> Punishment and forgiveness have one crucial aim in common: an attempt to put an end to something that without interference could lack closure and repeat itself endlessly. Forgiveness is not alien to politico-normative judgment. In other words, forgiveness

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<sup>298</sup> For the full text of the proceedings of the Eichmann Trial, see <http://remember.org/eichmann/charges> [03.03.2017].

<sup>299</sup> See H. Arendt, *The Origins of Totalitarianism* (Meridian Books, 1962). Similar to Arendt, philosopher Vladimir Jankélévitch advocated the idea that if no proportional punishment can be found, the crime remains unforgivable. According to him, forgiveness died in the death camps. See V. Jankélévitch, *L'imprescriptible. Pardonner? Dans l'honneur et la dignité* (Le Seuil, 2015).

<sup>300</sup> H. Arendt, “Personal responsibility under dictatorship” in *Responsibility and judgment* (Schocken Books, 2003): 17-48.

<sup>301</sup> H. Arendt, *The human condition* (University of Chicago Press, 2013). On the issue of forgiveness, also see J. Derrida, *On cosmopolitanism and forgiveness* (Psychology Press, 2001).

<sup>302</sup> This is despite the fact that confusion blurring the boundaries between forgiveness, apology, remorse, amnesty, and prescription remains problem laden.

could not be routinized, and it remains an exceptional act. Meanwhile, we make the opposite claim for crimes against humanity legislation: it is meant to be the supreme example of the regularization of international law and its universal codification.

To think more deeply about this seeming antinomy, it is necessary to consider the context in which both the “globalization of forgiveness” and universal jurisdiction pertaining to crimes against humanity emerged.<sup>303</sup> Especially in the Global South, but also in the heart of what were once the colonial empires, scenarios of repentance, confession and forgiveness have multiplied since the end of the Second World War. The Catholic Church’s request for forgiveness for the Second World War crimes, that of the Prime Minister of Japan to the Korean and Chinese, that of the Belgian government for not having acted on the genocide in Rwanda, the Chilean armed forces’ confession of their crimes, and the Canadian prime minister’s apology to the Native Peoples of Canada are just a few examples that were widely advertised in this avalanche of a desire for forgiveness for crimes that cannot be punished. This proliferation of scenes of regret and requests for forgiveness coincides with the renewed urgency of memorials, of self-accusation, and of repentance. It appears to be a symptom of a larger yearning for redemption. As such, forgiveness and its solicitation are directly conditioned by the weight of guilt felt on the shoulders of the public. What is worrisome about this trend is not so much that we choose to remember and to give account for, but the *simulacrum* of healing that comes with repentance. This calculative aspect of public apology is indeed troubling, considering the egregious nature of the crimes committed that constitute the subject matter of historical apologies. Consequently, the general character of requests for forgiveness could be paramount to collective guilt rather than collective responsibility. Perhaps this is the point at which one re-embraces the strong reasoning for celebrating the legislation of crimes against humanity in international law. This particular branch of criminal jurisprudence emerges as the only chance for freeing societies from the repentance-redemption equation or its opposite, the total denial of heinous and most egregious crimes. A publicly appointed body could not forgive on behalf of either the direct victims of

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<sup>303</sup> D. Levy and Natan Sznaider, “Forgive and not forget: Reconciliation between forgiveness and resentment” *Taking wrongs seriously: Apologies and reconciliation* (2006): 83-100, and R. Bernstein, ‘Derrida: The aporia of forgiveness?’ (2006) 13 *Constellations* 394.

egregious crimes or the public at large who suffered in relation to or as a result of such crimes. The State, its institutions and courts cannot force wronged peoples to forgive simply because an apology has been extended to them. Through the adjudication of crimes against humanity, on the other hand, the culpable person(s) is punished for unforgivable acts, and yet without being redeemed. That is a much stronger form of claiming responsibility for mass violence, rooted in politics, history and normative grounds, than what forgiveness alone could provide.<sup>304</sup>

## CONCLUSION

Despite the universal jurisdiction clause attached to them, much like forgiveness crimes against humanity have politico-normative foundations that determine the shape and content of their adjudication. And much like forgiveness for mass societal and political crimes, crimes against humanity legislation should not be normalized and become routine in international law. By the very nature of the crimes it attends, this body of legislation must remain exceptional and extraordinary, putting impossibility to the test, as if it interrupted the ordinary course of human temporality. Only then it would assume the power to intercept the flow of events that sanctify egregious crimes. This chapter opened with the question of what distinguishes crimes against humanity from other crimes. The answer to this question cannot be determined solely on the basis of the jurisprudential architecture of crimes against humanity legislation. Their distinct status has a deep connection with Hannah Arendt's narration of the "banality of evil" with reference to the Eichmann trials. More than half a century ago, as Arendt witnessed the proceedings of the trial of Adolf Eichmann as one of the major figures in the organization and conduct of the Holocaust, she coined two separate terms: "radical evil" and the "banality of evil." The latter term has since become something of a legal and normative conundrum. Arendt certainly did not mean evil had become ordinary, or that Eichmann and his Nazi cohorts had committed ordinary crimes. Rather, she was convinced that the crimes committed were so exceptional, they demanded a new

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<sup>304</sup> Again for Arendt, forgiveness is a purely human experience, rather than having anything to do with divinity or sacred realms. Yet if forgiveness is a grand societal and historical gesture, the essence of which could not be captured by any existing, past or future law, it cannot sustain the presumption of symmetry between itself and adequate punishment. This is a very important debate in the transitional justice literature pertaining to mass societal and political crimes, which, however, falls beyond the scope of this dissertation. See P. Hazan, "Measuring the impact of punishment and forgiveness: a framework for evaluating transitional justice" (2006) 88 *International Review of the Red Cross* 19.

approach to legal judgment itself.<sup>305</sup> Concomitantly, she offered several challenges to traditional conceptions of legal judgment. The first one was related to *legal intention*. The key question here is whether the courts had to prove that Eichmann intended to commit genocide in order for him to be convicted of the crime. Eichmann may well have lacked the required legal intention, insofar as he failed to even think about his acts as constitutive of a crime. Though Eichmann acted in full conscious capacity and without being affected by insanity, he lacked a mode of rationality that would yield intentionality. This observation led Arendt to claim that although national socialism was capable of making individuals implement policies that led to egregious crimes, it also equipped them with a cathartic state of assuming no responsibility for their actions and attributing no intentionality to their involvement in the making and sustenance of a criminal regime. In order to claim intentionality, one has to convey the capacity or knowledge needed to think reflectively about the consequences of one's willful actions. The banality Arendt names thus corresponds to the inability to think and understand the weight of one's own actions as a legal/political being.

Arendt was not trying here to establish an exceptional case for Israel or the Jewish people. Rather, she was trying to establish the backbone of a theory of crimes against humanity, one that would acknowledge the destruction of not just Jews, but also Catholics, Gypsies, gay people, communists, the disabled and the ill under the Nazi regime.<sup>306</sup> In her thinking, the destruction and displacement of these populations on a categorical basis was an attack not only on those specific groups, but on humanity itself. As a result, Arendt objected to a specific nation-state such as Israel conducting the trial of Eichmann exclusively in the name of its own population. She was cursed and almost crucified for her interpretation of the crimes of the Nazis. And yet her interventions also made it possible to talk about crimes against humanity above and beyond the Jewish case and the Holocaust. As the history of crimes against humanity legislation proves, after the particular historical juncture of the Eichmann trial it indeed became necessary to

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<sup>305</sup> Since 1945, the gulf between the visibility of evil and the paucity of international legal resources for coming to grips with it has narrowed. However, in the works of the three post-Holocaust thinkers—Emmanuel Levinas, Hans Jonas, and Hannah Arendt—radical evil, a term originally coined by the German philosopher Immanuel Kant, found a disturbing new meaning that casts a shadow over the gains of the jurisprudential successes of crimes against humanity legislation. On the meaning and implications of both “radical evil” and the “banality of evil”, see S. Neiman, *Evil in modern thought: An alternative history of philosophy* (Princeton University Press, 2015); and C. Card, *The atrocity paradigm: A theory of evil* (Oxford University Press, 2002).

<sup>306</sup> See J. Kristeva, *Hannah Arendt*. Vol. 1 (Columbia University Press, 2001); and R. Fine, “Crimes Against Humanity Hannah Arendt and the Nuremberg Debates” (2000) 3 *European Journal of Social Theory* 293.

devise new structures of international law that identify and propose punishment for crimes against humanity in a generic sense. There is a critical aspect of Arendt's observations of the Eichmann trial, however, that fell aside in international jurisprudence. This aspect concerns the "banality" of such crimes, indicating that they were committed in the midst of daily life and routines, without opposition to their conduct, and without being named as a crime at the time that they were committed. In a sense, Arendt's calling a crime against humanity banal allows us to conceptualize the socially accepted, routinized nature of these crimes which are committed mostly through policy enactments and, as such, without moral revulsion, political indignation or resistance. Thus, her interpretation of crimes against humanity calls for a new mode of political and legal reflection. Combined with the notion of radical evil, this opposition between the radical nature of the crimes committed and the ordinariness that their committal assumes invites us to rethink the almost mechanical reiteration of crimes against humanity legislation in the post-Rome Statute era of international law.

Arendt was long blamed for trivializing the Holocaust and the Nazi crimes, as she was seen as attributing them to the Nazis' and their collaborators' simple failure to think before they act. For her, however, the degradation of thinking worked hand in hand with the systematic destruction of populations. What drew the ire of Jews at the time against Arendt's interpretation of the Eichmann trials was also the fact that she showed the audacity to quarrel with the reasoning put forward at the trial, and confronted the Israeli courts in terms of their legal reasoning and conduct, though not their final verdict. She thought the trial needed to focus more on the acts that Eichmann committed, acts that left an imprint on the whole of humanity, not only the millions of European Jews who perished as a result. This is partly due to the fact that, similar to the legal philosopher Yosel Rogat before her, Arendt did not think that anti-semitism in Germany could be tried in a courthouse.<sup>307</sup> She thus objected to the ways that Israel used the Eichmann trial to establish and legitimate its own legal authority and national aspirations as a Jewish state. She was severely displeased by the fact that Eichmann was made to stand for all of anti-semitism and for every Nazi. In her view, this was far too simplistic an interpretation of who Eichmann was and what he stood for. For Arendt, the Eichmann trial also necessitated a deep

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<sup>307</sup> See Y. Rogat, "The Judge as Spectator" (1964) 31 *University of Chicago Law Review* 213.

critique of the idea of collective guilt, as well as a broader reflection on the historically specific challenges to collective and moral responsibility under dictatorships and authoritarian rule. Eichmann was guilty because he failed to take distance from the requirements that Nazi law and policy imposed upon him in a legal order that was impeccably legitimate on paper. Thinking about Eichmann in terms of his obedience, his lack of critical judgment despite his high status and rank, and his failure to think about the results of his actions, is the lasting of Arendt's struggles with the Israeli courts at the time; and it is a very precious legacy indeed.

There remains, then, a question that, from the legal point of view, has provoked several discussions and still lacks a definitive answer. It pertains to the politico-normative foundations of the adjudication of egregious crimes such as crimes against humanity. The first time we heard of acts that could be defined as crimes against humanity was 100 years ago, in 1915, when France, Great Britain and Russia used this concept in a diplomatic note. They were considering issuing a warning concerning the massacre of the Armenians at the hands of the Ottomans. The first legally sanctioned instance of the adjudication of this category of crimes appeared at the Nuremberg trials, set up to judge major Nazi criminals. At Nuremberg, it became a practical necessity to create a special category of crimes that did not fit into the conduct commonly classified as war crimes. This need to create a new framework was partly due to the fact that Germany's persecution of its own citizens could not be classified as a war crime. It is true that a country's expulsion, deportation, and mass murder of its own citizens was not unheard of in the history of war. However, the degree to which these acts were orchestrated and publicly condoned by the German state constituted a unique case. What was once considered unique, however, became a normalized category on its own, expected to deliver a sense of closure for societal morass and collective responsibility. Thus, the current normative framework that characterizes crimes against humanity as a frontal attack on plurality and human diversity in effect became a pro forma acknowledgement of the conducts that constitute crimes against humanity as part of the maintenance of the Westphalian system of sovereign statehood. Addressing this issue requires a closer study of the way that international law has played out in court and litigation-based accountability measures systems, with a particular emphasis on the Global South, which is the task undertaken in the next chapter.



## *Chapter V. Through the Looking Glass: Hybrid Courts and International Criminal Law in the Global South*

### INTRODUCTION

This chapter offers a critical analysis of a particular set of courts in international criminal law, which have emerged since 1990s. This constitutes a continuation of the debate over the limits of universal jurisdiction in the Global South that was covered in the first three chapters of the present work. These are the third generation of international criminal bodies and they are commonly known as hybrid courts.<sup>308</sup> The term has been used to address at least three jurisdictions, all of which were created between 1999 and 2001. They include the Crimes Panels of the District Court of Dili, The “Regulation 64” Panels in the Courts of Kosovo and the Court for Sierra Leone.<sup>309</sup> To this list, one should also add the Extraordinary Chambers in the Courts of Cambodia,<sup>310</sup> and the Extraordinary African Union Chamber in the Court of Senegal.<sup>311</sup> Most of the earlier hybrid courts have closed their operations and thus it is possible to ascertain the outcomes of these trials. Indeed, there is significant merit in examining the promise or potential

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<sup>308</sup> The first-generation courts are the Nuremberg and Tokyo Tribunals, while the second-generation courts are the ICTY, ICTR and ICC. See the Project on International Courts and Tribunals at <http://www.picti.org/courts/hybrid.html> [25.04.2017].

<sup>309</sup> Cesare Romano, André Nollkaemper & Jann K. Kleffner, eds., *Internationalized Criminal Courts and Tribunals: Sierra Leone, East Timor, Kosovo, and Cambodia* (Oxford University Press, 2004).

<sup>310</sup> The Extraordinary Chambers in the Courts of Cambodia (ECCC) were established in 2004 through an agreement between the United Nations (UN) and the Cambodian government, as a means to address the crimes committed during the Khmer Rouge regime in Cambodia between 1975 and 1979. The ECCC encompasses both national and international elements in its structure, composition and jurisdiction. As with the other hybrid courts, it was expected to allow for a higher degree of participation by national actors, and to be better placed to produce long-lasting effects. The value added by the participation by various national actors in the judicial proceedings is indeed the key feature of the ECCC, despite concerns raised about the judicial independence of the court. See Elizabeth Bruch, “Hybrid Courts: Examining Hybridity Through a Post-Colonial Lens” (2010) 28 *BU Int'l LJ* 1.

<sup>311</sup> The Extraordinary African Chambers (EAC) was created by the African Union (AU) and Senegal in 2012, specifically to try former Chadian president Hissène Habré and his officials for atrocities allegedly committed during his time in office between 1982 and 1990. Habré was accused of war crimes, crimes against humanity and torture. Some 40 000 surviving victims were directly represented in court and 92 witnesses and experts have recounted his fierce repression. The *Habré* trial represents the first trial by an African state of a former head of state of another African state. As the first internationalized tribunal to have been established with the involvement of the African Union, the EAC will also provide valuable insight into what a regional approach to internationalized justice may look like. It is also important to note the consistency of the EAC Statute with the *nullum crimen sine lege* principle. See Sarah Williams, “The Extraordinary African Chambers in the Senegalise Courts: An African Solution to an African Problem?” (2013) 15 *J of Int. Crim. J.* 1139;

benefits of hybrid tribunals and courts for the future of international criminal law in the Global South as an alternative to the centrifugal model, which then leads to severe limitations in terms of the application of the universal jurisdiction model concerning crimes against humanity legislation. This chapter thus attempts to identify the distinct features of hybrid courts while acknowledging the variation amongst those that have thus far been created. It is true that literature in the field has moved away from analyzing or attempting to examine the promise of hybrid courts. Current commentaries on existing hybrid tribunals or courts are more inclined to examine specific issues or areas in the jurisprudence or statutes of hybrid courts. The approach presented in this chapter differs in that it focuses on the general promise of the mechanisms offered by hybrid courts as an important tool to be used for criminal adjudication in the Global South. To this end, the discussion presented in the following pages is divided according to three separate themes. These are: TWAIL [Third World Approaches to International Law] scholarship and discussions surrounding the Global/ North/South dichotomy and its effect on accountability; exploration of hybrid courts as viable mechanisms of criminal justice in cases of state criminality; and the ICC and the principles of universal jurisdiction and complementarity.

Like preexisting international judicial bodies, such as the International Court of Justice or the European Court of Human Rights, hybrid courts are composed of independent judges, working on the basis of predetermined rules of procedure, and rendering binding decisions. They are subject to the same principles governing the work of other international judiciaries, including but not limited to due process, impartiality and independence. Within this wider class of international courts, however, hybrid courts belong to a specific order. They are specialized criminal organs with a limited mandate, and prescribed to fulfill their function with reference to a predetermined time period. Meanwhile, although their goal is to sanction serious violations of international law, and in particular international humanitarian law and human rights law, they are part of transitional justice regimes rather than being an ongoing feature of the legal system in any of the given constituencies. Similarly, although they impose criminal penalties, their primary obligation is to the state and society within which they are situated, rather than addressing the international community. Akin to the ICTY and the ICTR, but unlike the ICC, they are *ad hoc* institutions, created as the result of singular political and historical circumstances. Still, similar to other international criminal institutions, in order to carry out their mission hybrid courts need to

rely on international jurisprudence and judicial assistance from states and international organizations, although their peculiar legal status gives an utmost priority to the bridging act of creating hybrid jurisprudence which resonates with the national legal system. In some cases, they are part of the judiciary of a given country, while in others they have been grafted onto the local judicial system through the intermediary action of international bodies. One constant feature they exhibit, however, is that their jurisdictional portfolio is mixed, incorporating international and national features.<sup>312</sup> This chapter argues that on the critical issues of criminal accountability and responsibility, hybrid courts exhibit a unique promise for states and societies in the Global South.

The literature on international criminal law has already welcomed hybrid courts as a new type of international crimes courts, asserting that they have the benefits, while avoiding the drawbacks, of both purely international and purely domestic trials. A closer examination of current examples of hybrid courts, however, in Kosovo, East Timor, Sierra Leone, Cambodia and Bosnia and Herzegovina, reveals something else as well. Attributing a promise to hybrid courts as a fixed category has raised false expectations, as each court has fundamental differences and distinct features. I will argue that this variation is endemic to any genuine transitional justice project, and should be welcomed rather than shunned. Hybrid domestic-international tribunals and courts offer an important new angle to institutional approaches to international law and to transitional justice, whose formulation is often given by donor institutions in the Global North. The processes by which societies provide accountability and reconciliation for mass atrocity in their own terms is often overlooked. Hybrid courts are courts in which both the institution and the applicable law consist of a blend of international and the domestic jurisprudence. In many cases, foreign judges sit alongside their domestic counterparts to try cases prosecuted and defended by teams of local lawyers working with those from other countries. At the same time, the judges apply domestic law that has been reformed to include international standards. Furthermore, these courts have developed in an ad hoc way, the result of on-the-ground innovation rather than grand institutional design, which carries the seed of a genuine political involvement from within. Typically, they have emerged in post-conflict situations to address cases involving mass atrocity, usually where no politically viable full-fledged international tribunal exists, as in East Timor or

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<sup>312</sup> Etelle R. Higonnet, "Restructuring hybrid courts: local empowerment and national criminal justice reform" (2005) 23 *Ariz. J. Int'l & Comp. L.* 347.

Sierra Leone, or where an international tribunal exists but cannot cope with the sheer number of cases, as in Kosovo or Cambodia. Yet despite these features, they have often been marginalized as yet another failed project of the Global South. The truth is more complicated, and worthy of real attention.

## I. MAPPING RESPONSIBILITY FOR MASS ATROCITIES

Theories of transgovernmental and transnational networks, when applied to cross-border regulation regimes in areas such as international finance, antitrust regulation, environmental protection, or securities law, have steady purchase amongst international law scholars. One area to which this type of theorization has not yet been fully applied, however, is international criminal law.<sup>313</sup> Until recently, international criminal law had not been conceptualized within the framework of the transnational networks that have caught our attention in other legal fields.<sup>314</sup> With few exceptions, the predominant conception has been that international criminal law is enforced primarily through a universalized idiom and with a top-down approach. However, as critical debates in the area of human rights scholarship amply demonstrate, this picture is far from accurate. Human rights lawyers, activists, and advocates as well as investigators, prosecutors, and judges dealing with specific categories of crimes have long been acting in degrees of collaboration or consultation, with their peers across borders and with their counterparts at other national or international courts and regulatory bodies.<sup>315</sup> In the following pages, some of these developments are evaluated in reference to hybrid courts dealing with cases of mass atrocities. Providing a conceptual framework within which transnational networks are not seen as an

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<sup>313</sup> As an exception, see Jenia I. Turner, "Transnational networks and international criminal justice" (2007) 105 *Michigan Law Review* 985. The theory of transgovernmental networks Turner uses describes how government officials make law and policy on issues of global concern by coordinating across borders, but without legal or official sanction. Banking, antitrust, environmental protection, and securities law are sample areas in this regard.

<sup>314</sup> *Ibid* at 1020-1025.

<sup>315</sup> For select recent debates on how international human rights law "works," see Kurt Mills & David Jason Karp, eds. *Human Rights Protection in Global Politics: Responsibilities of States and Non-State Actors* (Palgrave Macmillan, 2015); Alexandra Huneus, "Human Rights between Jurisprudence and Social Science" (2015) 28 *Leiden Journal of International Law* 255; William Armaline, Davita S. Glasberg & Bandana Purkayastha, eds., *The Human Rights Enterprise: Political Sociology, State Power, and Social Movements* (John Wiley & Sons, 2015); Courtney Hillebrecht, *Domestic Politics and International Human Rights Tribunals: The Problem of Compliance* (Cambridge University Press, 2014); Ryan Goodman and Derek Jinks, *Socializing States: Promoting Human Rights Through International Law* (Oxford University Press USA, 2013); Thomas Risse, Stephen C. Ropp & Kathryn Sikkink, eds. *The Persistent Power of Human Rights: From Commitment to Compliance* (Cambridge University Press, 2013).

anomaly, in the context of a nexus between international human rights law and international criminal law, is essential in this regard. International human rights law, which in essence embodies a constant mediation between claims about the core values of justice and dignity, on the one hand, and hard-fought contingent politico-historical battles, on the other, is in particular need of a richer exchange between the North and South. As amply illustrated by TWAIL [Third World Approaches to International Law] scholarship, political geography has much to contribute to the critical study of international law, above and beyond connecting rights discourse with particular contemporary justice agendas.<sup>316</sup> As TWAIL scholars declare, for instance, human rights struggles, even when they are regarded as part of independence struggles, reveal a global gap of consistent practices of violence, which necessitated current human rights practices in the first place.<sup>317</sup> The ways that responsibility for systemic and structural violence has been claimed, denied, ascribed, enacted, or avoided have cartographical anchorage. The North takes the credit for creating discourse and jurisprudence, while the South carries the burden of the heaviest violations and at the same time is singled out as the worst violator. We need a new and more evocative lens for understanding the place of human rights law and its variants, within a global framework of emancipatory politics.<sup>318</sup> As Vijay Prashad puts it ever so succinctly, “The Third

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<sup>316</sup> Here, I rely heavily on the following sub-section of TWAIL scholarship: Luis Eslava, Michael Fakhri and Vasuki Nesiah (Eds), *Bandung, Global History and International Law: Critical Pasts and Pending Futures* (Cambridge University Press, 2015); K. Mickelson, “Taking stock of TWAIL histories” (2008) 10 *International Community Law Review* 355; Obiora Chinedu Okafor, “Critical Third World approaches to international law (TWAIL): theory, methodology, or both?” (2008) 10 *International Community Law Review* 371; M. Khosla, “The TWAIL Discourse: The emergence of a new phase” (2007) 9 *International Community Law Review* 291; Obiora Chinedu Okafor, “Newness, imperialism, and international legal reform in our time: a TWAIL perspective” (2005) 43 *Osgoode Hall LJ* 171; Makau Mutua & Antony Anghie, “What is TWAIL?” (2000) *Proceedings of the Annual Meeting*, The American Society of International Law.

<sup>317</sup> See Anthony Anghie, “Colonialism and the Birth of International Institutions: Sovereignty, Economy, and the Mandate System of the League of Nations,” (2002) 34 *New York University Journal of International Law and Politics* 513, at 517; Jose Manuel Barreto, ed. *Human rights from a Third World perspective: critique, history and international law* (Cambridge Scholars Press, 2013), in particular his introductory essay, as well as Amy Maguire, “Contemporary Anti-colonial Self-Determination Claims and the Decolonisation of International Law,” (2013) 22 *Griffith Law Review* 238, and Amy Maguire & Jeffrey Mcgee, “A Universal Human Right to Shape Responses to a Global Problem? The Role of Self-Determination in Guiding the International Legal Response to Climate Change,” (2017) 26 *RECIEL* 54. Maguire and Mcgee contribute to the existing debate on the relevance of human rights struggle in the Global South in the specific context of climate change and greenhouse gas emissions. They focus on the foundational principle of the self-determination of peoples as a collective human right, which has emerged in the context of movements of decolonization and emancipation of oppressed peoples. In their belief, self-determination might offer an alternative logic of duty on high-emitting States to the plight of populations who find their territories under threat from anthropogenic climate change.

<sup>318</sup> Nicole Laliberté, “Geographies of Human Rights: Mapping Responsibility” (2015) 9 *Geography Compass* 57.

World was not a place. It was a project.”<sup>319</sup> TWAIL scholarship both specifies and expands upon the sense in which Third World or Global South was never a place *per se*. In the same spirit, in the following pages the Global South, as well as the North-South divide, are treated as part of a grand political project of some elusive universal legal order, which is subject to constant reinvention. Here, the emphasis will be put on alternative lineages of the Global South, outside the realm of state-based narrations of post-colonial politics, as explicated in the methodology section of the Introduction to this work. Indeed, it is essential to foreground aspects of the North-South divide that hinge upon the premise of intertwined regimes of accumulation, regulation, culpability, and responsibility. Only then can we truly challenge the top-down approach—the siren call of international human rights law and international criminal law in the Global South—and offer something more palatable in its place, based on a transnational politics of rights struggles, accountability for mass crimes, and substantive human emancipation.

#### ***A. More Than Each unto His Own -- Hybrid Courts in the Global South***

This chapter singularly focuses on the distinctive characteristics of regional, sub-regional and hybrid courts operating outside of Europe. Their operations clearly suggest that in terms of universal jurisdiction and the application of international law, the Global South is *not* an unwilling participant at best and an insignificant addendum at worst. Tailgating TWAIL scholarship, I strongly argue otherwise, and the examples chosen here amply illuminate the reasons for insisting upon alternative vantage point.

To begin with, there is a growing number of new international courts, tribunals, and quasi-judicial review bodies that exercise compulsory jurisdiction over states parties which are located not only located in the North but also in the Global South. Secondly, established hybrid and international tribunals, despite all their failings, trials and tribulations, have been steadily expanding their authority over a wide range of legal actors, including but not limited to states. Many of these courts owe their strength to their limited-subject-matter mandates and conscribed geographic and chronological reaches. Thus, the argument that the North subjects the Global South to neo-colonialism via international criminal law is nullified to a large degree. The majority of these courts and tribunals, in fact, attend to regional affairs and internal conflicts that

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<sup>319</sup> Vijay Prashad, *The Poorer Nations: A Possible History of the Global South* (London: Verso, 2012).

entail massive human rights violations. In other words, they constitute a new terrain for the establishment of fragmented and yet reasonably operational accountability regimes in the Global South. There is, it's true, grounds for fear of a growing trend towards the judicialization of politics at a global scale in this regard. We certainly cannot take it on faith that creating new international courts or hybrid tribunals will necessarily provide solutions to deep-seated societal and political problems. Rather, the role of law in various struggles for social and political justice in the Global South, some of which take are waged against post-colonial states themselves by their own citizens, should be the focus here. The case of hybrid courts signal the emergence of alternative forms of international law, ones which call for new legal theories capable of capturing the potential of, and the tensions endemic to, counter-hegemonic forms of globalization.

Although the legitimacy of domestic courts is no doubt more established than that of their international or hybrid counterparts, the risks of depending solely on domestic adjudication at historical junctions in relation to transition from civil war, ethnic cleansing, genocide, occupation, etc. are far greater than resorting to divergent interpretations of international criminal law in these settings. Furthermore, third-generation courts are often regional in scope and thus cover both states and subterranean or non-state actors within their jurisdiction. This is yet another advantage they have over domestic courts. They have the ability to contextualize a given conflict, a most urgent need in the cases of mass political violence in Africa, the Balkans, or South East Asia. Equally importantly, while traditional international courts have had shallow—i.e. optional—jurisdictional powers, hybrid courts tend to have a much deeper jurisdictional basis that leads to compulsory jurisdiction, since they act over a limited number of issues in conjunction with a set number of parties.

Thus far, perhaps, international courts and hybrid tribunals have made only limited contributions to the resolution of high-politics disputes. At the same time, concerning broader trends in international adjudication, it is safe to suggest that based on the increasing number of rulings produced by regional tribunals and hybrid courts in Africa, Latin America, and Eurasia, there is an emerging litigation pattern that may be significantly different from those of international or European courts.<sup>320</sup> These rulings span a broad range of subjects, including

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<sup>320</sup> The Andean Court of Justice, the Court of Justice of the Economic Community of West African States, the Caribbean Court of Justice, the Court of Justice and Arbitration of the Organization for the Harmonization of

customs, taxes, and tariffs and non-tariff barriers to trade, as well as criminal proceedings. In these alternative settings of international jurisdiction, national as well as international judges, administrative officials, and private parties participate in litigation. The symbiotic relationship between international and national law exemplified by these courts and tribunals also has a broader significance. Even when (national) law proves moot, a distinctive group of sub-state actors including human rights movements, NGOs, political movements, and judges, can serve as conduits to bypass the indifference or even the resistance of governmental institutions to delivering justice where (though rarely when) it is due. Alas, such is the nature of criminal law.

## **II. THE CLARION CALL OF DOMESTICATED UNIVERSAL JURISDICTION IN INTERNATIONAL CRIMINAL LAW**

One of the more recent and noteworthy episodes in international criminal law pertaining to a rising demand for hybrid, as opposed to centralized, courts is the Darfur crisis. In July 2008, the chief prosecutor of the International Criminal Court (ICC) in the Hague sought the indictment of the Sudanese president, Omar al-Bashir, on charges of genocide and war crimes.<sup>321</sup> Subsequently, foreign diplomats, regional leaders, and many Sudanese activists, including members of the political opposition in the country, expressed divided opinions in their evaluation of this indictment. It is true that some supported the idea of prosecuting President Bashir and his leading cadres for the human catastrophe they are alleged to have inflicted on Sudan's western province of Darfur.<sup>322</sup> At the same time, a growing number of NGOs, political groups, and legal scholars in the Global South were not comfortable with the indictment of a serving president by an international court situated in Europe due to two factors: its neo-colonialist optics, and the indictment's possible negative effects on the Sudanese society. For instance, human rights circles

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Business Laws in Africa, and the East African Community Court of Justice are some of the leading examples of non-European regional courts with a strong human rights-related track record of rulings.

<sup>321</sup> For the text of the ICC indictment as well as the text of the April 2009 arrest warrant, please see the relevant documents at <http://www.icc-cpi.int/NR/exeres/0EF62173-05ED-403A-80C8-F15EE1D25BB3.htm> [15.03.2017]. Specifically, the indictment indicates that the Sudanese President is suspected of being criminally responsible, as an indirect co-perpetrator, for intentionally directing attacks against a selected part of the civilian population of Darfur, Sudan, and, murdering, exterminating, raping, torturing and forcibly transferring large numbers of civilians, and pillaging their property. This is the first warrant of arrest issued for a sitting Head of State by the ICC.

<sup>322</sup> For a general global survey regarding the perception of the indictment, see the IPS poll results published in July 2009 at <http://ipsnews.net/news.asp?idnews=47678> [15.03.2017]. The survey results indicate that the publics in four majority Muslim and African nations, contrary to the positions of their governments, largely approved of the indictment of President Bashir by the International Criminal Court. This is despite the fact that many fellow African and Muslim leaders have supported Bashir and argued that the indictment was politically motivated.



repeatedly stated that a vindictive Bashir could resort to a number of violent strategies in response to the ICC's indictment, which could indeed make the situation in Sudan worse than before.<sup>323</sup> They argued that President Bashir's repertoire of actions could include ending the already fragile peace process in Darfur, expelling UN troops from the region, and retarding the implementation of a peace agreement between his government and the former rebels in south Sudan.<sup>324</sup> Differences in interpretation persisted when in April 2010 President al-Bashir won Sudan's first multi-party elections in 24 years, despite the fact that observers criticised the election as falling short of international standards. Many opposition parties withdrew from the race, alleging widespread vote rigging and intimidation.

In the light of the developments and concerns exemplified by the case of Sudan, it is timely to ask whether a better mechanism of international criminal law could be envisaged to hold individuals responsible for the type of atrocities perpetrated in Darfur, and elsewhere in the Global South, without jeopardizing the safety of local populations or creating an aura of neocolonial moral and legal superiority. This inquiry is linked with the larger question that runs through this entire dissertation: how meaningful and beneficial is it for crimes against humanity to be subject to universal jurisdiction if the local constituency, including the victims' groups, rejects or disagrees with the charges, methods of trial, or both? More specifically, what are the implications of trials held in an international court, removed from the original locale where the crimes were committed, rather than being deemed as an internal affair of the societies in question? In Sudan, for instance, in response to significant worries about escalation of violence in the aftermath of the ICC indictment against President al-Bashir, Sadiq al-Mahdi, the country's

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<sup>323</sup> On this issue, see the manifesto of Doctors without Borders at <http://doctorswithoutborders.org/publications/article.cfm?id=3516&cat=op-eds-articles> [15.03.2017]. Their worry was directly related to the fact that with attacks on remaining aid workers increasing, the Sudanese president had declared that all international humanitarian aid organizations must leave the country in the foreseeable future, thus further endangering the delivery of food, water and medical care to millions of people in the war-scarred region. These expulsions are seen as a reprisal against groups suspected of being involved with the ICC investigations as well as against governments that support the indictment of President al-Bashir.

<sup>324</sup> Elections were swiftly delayed in the aftermath of the ICC indictment. Under the 2005 peace deal to end years of war in the south, these elections were supposed to be held in 2009. The SPLM, former rebels from the south, were expected to field a candidate against President Omar al-Bashir. In 2010, there were six elections: national, presidential, and parliamentary, the south Sudanese presidency, state governors, the southern parliament and state assemblies. The polls were Sudan's first democratic elections in more than two decades. See BBC news at <http://news.bbc.co.uk/2/hi/7980032.stm> [15.03.2017].

most prominent opposition politician, urged for a “third way” solution.<sup>325</sup> Like many in human rights circles, he believed that an ICC indictment of President Bashir would lead to further chaos in Sudan.<sup>326</sup> He did not agree that hauling the Sudanese president to the Hague would achieve much in terms of the crimes in Darfur. Instead, he suggested setting up an independent “hybrid” court for Darfur, which would have both Sudanese and international judges, and would sit in Sudan as opposed to Europe, the land of ex-colonial powers. The idea of mixing national and international jurisprudence and legal procedures, and of holding difficult trials for societal and international crimes on home turf, has already been accepted in Sierra Leone and Cambodia, among others.<sup>327</sup> It is true that these two examples have thus far yielded only mixed success. Still, the overall prospect of hybrid courts possesses both legal and political attractiveness. In the case of Sudan, for instance, a hybrid or “internationalized” court could dispense justice close to the scene of the crime, and at the heart of the society directly affected by the atrocities committed. Additionally, if such a special court were deemed to be a genuine, impartial attempt to obtain justice, the ICC could defer its indictment of President Bashir under Article 16 of the Rome Statute.<sup>328</sup> Finally, a hybrid court with a strong domestic element would have the strength to counter the furious denunciations of the ICC charges and indictments as a Western imperialist plot against the Bashir government and its supporters.

Based on the understanding of these potential gains for transitional justice as a societal project with a strong historical dimension, rather than a package of mechanized solutions, the remainder of this chapter will examine past examples of hybrid courts, as relevant cases for emerging models of transnational justice and for the dissemination of international criminal law

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<sup>325</sup> Al-Mahdi had been the head of the Umma party as well as the last democratically elected prime minister in 1986 before being toppled by a coup. He is also the spiritual leader of the powerful Ansar sect in the region. For his political profile, see his biography published by the Club of Madrid, an independent pro-democracy consortium at <http://www.clubmadrid.org/cmadrid/index.php?id=397> [15.03.2017].

<sup>326</sup> For a sample of these arguments, see <http://africanarguments.org/2009/03/the-icc-sudan-and-the-crisis-of-human-rights/> [15.03.2017]. African Arguments Online is a counterpart to the African Arguments book series, edited jointly by Alex de Waal and Richard Dowden, published by Zed Books in the U.K. and Palgrave Macmillan in the U.S.

<sup>327</sup> For a detailed account of the jurisprudence of these hybrid courts, see the UN documents at <http://www.ohchr.org/Documents/Publications/HybridCourts.pdf> [15.03.2017].

<sup>328</sup> The Rome Statute establishing the ICC contains a provision, Article 16, which allows the UN Security Council to pass a resolution (under its Chapter VII authority) to defer an ICC investigation or prosecution for a renewable period of 12 months. Article 16 states in full that “No investigation or prosecution may be commenced or proceeded with under this Statute for a period of 12 months after the Security Council, in a resolution adopted under Chapter VII of the Charter of the United Nations, has requested the Court to that effect; that request may be renewed by the Council under the same conditions.” For a debate on the use of Article 16 of the Rome Statute in the Darfur context, see <http://www.hrw.org/en/news/2008/08/15/q-article-16> [15.03.2017].

jurisdiction in a genuine fashion. The fragmented nature of the international legal regime of accountability—despite the post-ICC solidification of the doctrine of universal jurisdiction for international crimes—is not something to be shunned but a development to be embraced. The benefits of the limited application of universal jurisdiction, as endorsed by the hybrid courts that have emerged under the guidance of or in consultation with the ICC during the last decade, are yet to be explored. Legal literature has already welcomed hybrid courts as a new type of international crimes courts, asserting that they could avoid the drawbacks of purely international and purely domestic trials.<sup>329</sup> Upon closer examination of the recent examples of hybrid courts in Kosovo, East Timor, Sierra Leone, Cambodia, and Bosnia and Herzegovina, it becomes clear, however, that the current set of hybrid courts differ from one another in critical respects. To attribute promise to the category of hybrid courts as a whole may be to raise false expectations. A more realistic approach to major new developments in international criminal law, such as the idea of universal jurisdiction with reference to select categories of crimes, may be to evaluate hybrid courts as part of a large continuum of fragmented practices, which include truth and reconciliation commissions, local adaptations of the Rome Statute, and expansive application of human rights mechanisms to improve general standards of societal responsibility in the event of mass crimes. There is no doubt that hybrid mechanisms blending international and domestic elements have the capacity to deliver improved justice measures—especially when they are undertaken via local judicial reforms, thus initiating a process of serious commitment to legal accountability for war crimes and crimes against humanity in post-atrocity states.

Furthermore, at the institutional level, the claim of universal jurisdiction put forward by the ICC has severe limitations. To begin with, many crimes currently ailing post-conflict societies cannot be tried by the ICC, since conflicts which occurred before the Rome Statute went into effect, or ongoing conflicts in non-signatory nations, lie beyond the jurisdiction of the Court. Secondly, even when the ICC has jurisdiction over a set of crimes, its mandate is primarily

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<sup>329</sup> See, for instance, Laura Dickinson, “The Relationship Between Hybrid Courts and International Courts: The Case of Kosovo” (2003) 37 New Eng. L. Rev. 1059; as well as her “Using Legal Process to Fight Terrorism: Detentions, Military Commissions, International Tribunals, and the Rule of Law” (2002) 75 S. Cal. L. Rev. 1407 and “The Promise of Hybrid Courts” (2003) 97 Am. J. Int’l L. 295. Also see Abdul Tejan-Cole, “The Complementary and Conflicting Relationship Between the Special Court for Sierra Leone and the Truth and Reconciliation Commission” (2003) 6 Yale Hum. Rts. & Dev. L. J. 139; Suzanne Katzenstein, “Hybrid Tribunals: Searching for Justice in East Timor” (2003) 16 Harv. Hum. Rts. J. 245; and Secretary-General, *The Rule of Law and Transitional Justice in Conflict and Post-conflict Societies*, U.N. Doc. S/2004/616 (Aug. 23, 2004).

limited to calling for the involvement of a handful of senior figures. In other words, societal responsibility is not within the reach or the mandate of the Court with reference to the overall process of transitional justice. Last but not the least, the ICC has thus far entertained a binary approach to societal crimes, either providing wholly international justice or leaving the conflict to local post-atrocity courts, an approach that often goes against ensuring genuine accountability. In the light of these concerns, a closer look into the promise of a fragmented embrace of universal jurisdiction in the form of hybrid courts, and what they entail for both the current project of international criminal law, must be synchronized with a tally of local endeavours for transitional justice and societal accountability for mass atrocities. Going back to the case of Sudan, on 13 October 2016 the African Union Commission (AUC) launched a campaign to “restore the dignity of women and to ensure accountability in South Sudan.”<sup>330</sup> This campaign was intended to lobby for accountability and an end to the atrocities that have disproportionately affected women in South Sudan. It was organized in solidarity with the women of South Sudan, and spearheaded by the AU Special Envoy on Women, Peace, and Security in Addis Ababa.<sup>331</sup> The outcomes of the campaign were to be presented to high-ranking South Sudanese officials. While accountability has been touted as a key element for peace and reconciliation in South Sudan, it remains to be seen whether the envisaged hybrid court for South Sudan would be able to try sitting leaders and senior government officials who had involvements with the atrocities in the country.<sup>332</sup> Human rights reports on the South Sudanese conflict consistently point out that the country’s leaders bear responsibility for the war crimes and crimes against humanity perpetrated in the country, and have in fact benefited from these offenses.<sup>333</sup> Thus any real effort to ensure accountability in

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<sup>330</sup> See the African Union report on the launch at <https://www.au.int/en/newsevents/31469/press-conference-launch-african-union-campaign-restore-dignity-women-and> [15.03.2017].

<sup>331</sup> For the full manuscript of Bineta Diop, see <http://www.peaceau.org/en/page/40-5676-static-bineta-diop> [15.03.2017].

<sup>332</sup> Concerning the latest efforts for establishing a South Sudanese hybrid court, see <https://justiceinconflict.org/2017/02/28/the-hybrid-court-for-south-sudan-looking-for-a-way-forward-part-2/> [15.03.2017]. Also see Nicki Kindersley & Oystein Rolandsen, “Briefing: Prospects for Peace and the UN Regional Protection Force in South Sudan,” (2016) *African Affairs*, available at <https://doi.org/10.1093/afraf/adw067> [14.10.2017] South Sudan is a country in transition that is still struggling with the consequences of the 50-year civil war as well as resurging internal ethnic conflict. The most recent ethnic clashes in South Sudan are evidence that one of the main challenges for the newly independent country in its continued effort in state building is the implementation of an accountability regime for organized political violence in the midst of more than 60 different ethnic groups.

<sup>333</sup> These include key reports by the AU Commission of Inquiry Report at <http://www.peaceau.org/en/article/final-report-of-the-african-union-commission-of-inquiry-on-south-sudan> [15.03.2017], the Human Rights Watch Report on Sudan at <https://www.hrw.org/world-report/2017/country-chapters/sudan> [15.03.2017], the United Nations

South Sudan needs to engage the role of the South Sudanese leaders. Efforts continue at the legal affairs department of the AUC to mobilize funds and finalize the memorandum of understanding (MoU) for the establishment of the hybrid court. This is in line with the Agreement on the Resolution of the Conflict in the Republic of South Sudan, signed by former vice-president Riek Machar and President Salva Kiir.<sup>334</sup> According to the peace agreement and the MoU, the mandate and the jurisdiction of the proposed hybrid court should have been finalized within six months of the formation of the government of national unity, which took place in April 2016. The hybrid court was to be operational within 12 months of that date, April 2017. However, the ongoing violence, and the replacement of Machar with Taban Deng Gai as vice president of the government of national unity, are stalling this process, and attention is instead focused on ending the most recent crisis. As it is, the authorities refuse to execute arrest warrants issued by the International Criminal Court (ICC). The security and humanitarian situation in Darfur, Blue Nile, and South Kordofan states remains dire, with widespread violations of international humanitarian and human rights law. Furthermore, evidence points to the use of chemical weapons by government forces in Darfur. The rights to freedom of expression, association and peaceful assembly are repeatedly and arbitrarily restricted and critics and suspected opponents of the government have been regularly subjected to arbitrary arrest, detention and other violations. These “internal hindrances” aside, a crucial question remains: will the AU Assembly of heads of state and government—its highest decision-making body—draw up legislation for a hybrid court that enables it to try leaders and senior government officials? For instance, Chapter 5 of the peace agreement stipulates that the hybrid court “shall not be impeded or constrained by any statutes of limitations or the granting of pardons, immunities or amnesties. No one shall be exempt from criminal responsibility on account of their official capacity as a government official, an elected official or claiming the defense of superior orders.”<sup>335</sup> Meanwhile, the AU remains in favor of immunity for sitting heads of state and senior government officials. This development came after

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Human Rights Council Report on Sudan at <http://www.ohchr.org/EN/HRBodies/HRC/CoHSouthSudan/Pages/Index.aspx> [15.03.2017] and Amnesty International Report on Sudan at <https://www.amnesty.org/en/countries/africa/sudan/report-sudan/> [15.03.2017].

<sup>334</sup> For the full text of the Agreement signed on 17 August 2015, see [https://unmiss.unmissions.org/sites/default/files/final\\_proposed\\_compromise\\_agreement\\_for\\_south\\_sudan\\_conflict.pdf](https://unmiss.unmissions.org/sites/default/files/final_proposed_compromise_agreement_for_south_sudan_conflict.pdf) [15.03.2017].

<sup>335</sup> Also see the legal opinion expressed in the Office for Democratic Institutions and Human Rights document on the issue at <http://www.osce.org/odihr/elections/tunisia/247346?download=true> [15.03.2017]

the ICC's issuance of an arrest warrant for President Omar Al Bashir of Sudan in 2009. The AU's new immunity stance led to the inclusion of an immunity clause in Article 46A of the 2014 Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights.<sup>336</sup>

In effect, prior to the Sudan issue, the AU has fought desperately, in the case of Kenya and Sudan, for the lifting of ICC charges against leaders in office. The AU also recently called for an inquiry into a collective withdrawal from the ICC based on the differences over immunity concerns in Africa.<sup>337</sup> To date, Burundi, South Africa and The Gambia have already announced their withdrawal from the ICC.<sup>338</sup> The dilemma is that, according to the peace deal, the same leaders who would have to be tried by the hybrid court are meant to occupy leadership positions in the transitional government of national unity. The South Sudanese deal keeps South Sudanese leaders in the positions they occupied before the war started. The dynamics among the member states of the Intergovernmental Authority on Development (IGAD), who are mediating in the South Sudan conflict, indicates that the question of leadership accountability is a contested issue. Hence, there is not enough regional support for the issue to deter South Sudanese leaders from orchestrating further violent atrocities. The hybrid court for South Sudan could thus end up

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<sup>336</sup> This new article is to replace the 2008 Protocol on the Statute of the African Court of Justice and Human Rights, which had no immunity clause. For the immunity clause, see the relevant AU document and the full text of the article at <http://www.ijrcenter.org/2014/07/02/african-union-approves-immunity-for-heads-of-state-in-amendment-to-african-court-of-justice-and-human-rights-statute/> [15.03.2017] Accordingly, "no charges shall be commenced or continued before the court against any serving AU head of state or government or anybody acting or any entitled to act in such capacity, or other senior state officials based on their functions, during their tenure of office."

<sup>337</sup> See the ICTJ document on the AU's request for collective withdrawal at <https://www.ictj.org/news/au-withdrawal-icc-non-starter> [15.03.2017].

<sup>338</sup> The treaty leading to the Rome Statute (2002) had 124 member states including 34 African states, which represents the largest regional bloc of member states. Since then, many African countries have expressed dissatisfaction with the Court and have accused it of bias. Gambia announced on October 25, 2016 that it would withdraw from the ICC, calling the Court an "International Caucasian Court" for the persecution and humiliation of people of color, especially Africans. Similarly, Burundi labeled the ICC as a "Western tool to target African governments." Uganda's president Yoweri Museveni called the ICC "useless," and praised South Africa's decision to leave. Namibia is also reconsidering its membership. Additionally, the African Union earlier this year said it would consider a mass withdrawal from the Court—a proposal initiated by Kenyan president Uhuru Kenyatta, who had previously appeared at The Hague on allegations of crimes against humanity. Despite this, the Court also has supporters in the region. At the African Union summit meeting in July 2016, the Democratic Republic of Congo, Ivory Coast, Nigeria, Senegal and Tunisia were among the countries that opposed a Kenyan-led drive for a group walkout. Currently, nine out of 10 cases the Court is currently investigating are in African countries (Mali, Cote D'Ivoire, Central African Republic, Libya, Kenya, Sudan, Uganda, Democratic Republic of Congo). Georgia is the only country not in Africa facing an investigation. One example given of bias is the fact that the Gambia has pressured the ICC to try and punish the European Union for the deaths of thousands of African migrants trying to reach its shores, yet has been unsuccessful. See Jean-Baptiste Jeangebe Vilmer, "The African Union and the International Criminal Court: counteracting the crisis" (2016) 92 *International Affairs* 1319.

prosecuting lesser officials and soldiers of both Kiir and Machar factions. Due to these concerns, some observers attending the issue of accountability in South Sudan have recommended that an alternative international body should provide the necessary checks and balances.<sup>339</sup> Others have recommended that the South Sudanese leaders should be bound through the peace agreement to ratify the Rome Statute, thereby enabling the ICC to intervene if they attempt to undermine the efforts of the hybrid court—though no doubt given the present climate this is one of the most unrealistic solutions proposed. Although the peace agreement is vague about the role of the transitional government in the workings of the hybrid court, Chapter 5(1.1) of the agreement states that the transitional government “shall initiate legislation for the establishment of the transitional justice institutions,” and Chapter 5(1.5) expects the hybrid court to cooperate with the AU and the international community in its operationalization.<sup>340</sup> This gives the transitional government some leverage to influence the establishment and mandate of the hybrid court from the outset. In the end, the liability of South Sudanese leaders for the heinous atrocities and human rights abuses in the country rests on the balance of societal pressure and political negotiations, and not just on the form or legislative intent of the proposed hybrid court *per se*. Neither could these dynamics be reversed or undone by the sheer presence of ICC indictments. In the case of mass political violence, (criminal) law and politics go hand in hand to introduce change, rather than the former leading the latter in providing solutions and rectificatory and restitutive justice.

### ***A. The ICC and Domestic Applications of the Rome Statute***

Overall, this chapter purports that the establishment of the ICC by no means lessened the need for regional, lesser, or hybrid courts. Instead, it argues for an increased appreciation of the fragmented nature of international criminal law as an accountability regime. Even in treaty terms, pursuant to Article 11 of the Rome Statute, the ICC has jurisdiction only with respect to crimes committed after the Treaty came into force in 2002. Consequently, there is a marked judicial vacuum concerning crimes identified by the Rome Statute as subject to universal jurisdiction in

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<sup>339</sup> See the American Bar Association’s Report on South Sudan at [http://www.americanbar.org/content/dam/aba/directories/roli/sudan/aba\\_rolisudan\\_assessment\\_final\\_report\\_0614.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/directories/roli/sudan/aba_rolisudan_assessment_final_report_0614.authcheckdam.pdf) [15.03.2017]

<sup>340</sup> *Supra* note 321. Also see Rosanna Lipscomb, “Restructuring the ICC Framework to Advance Transitional Justice: A Search for a Permanent Solution in Sudan” (2006) *Columbia Law Review* 182.



the period prior to ICC's establishment, as well as regarding countries that are not signatories.<sup>341</sup> With reference to these limitations, hybrid forms of endorsing international legal accountability have become the focal point of a growing number of discussions on the ICC.<sup>342</sup> Those who support hybrid courts' functioning in tandem with the Rome Statute argue that national/municipal courts and the ICC constitute "two layers of judicial institutions" that can cooperate in bringing perpetrators of international crimes to justice.<sup>343</sup> This state of heightened expectation from multi-level judicial dialogue is partly due to the fact that the question of the limited potential of the ICC to affect the international criminal justice system, and more specifically to sustain an international legal regime of accountability as the leading institution, remains unanswered. In reality, the ICC is a carefully constrained legal institution in its structure and reach, despite the fact that it relies on universal jurisdiction for the crimes falling under its purview.<sup>344</sup> Not only is the jurisdiction of the court limited, as exemplified by discussions of the above-cited Article 11. The Rome Statute also requires that either the state where the crimes have occurred, or the state of which the accused is a national, must be a party to the Statute. Crimes committed on the territory of a non-consenting or non-party State by the nationals of a non-consenting or non-party State may not be prosecuted before the ICC, unless the case is referred to the Court by the Security Council of the United Nations. This is a current problem clouding the prospects of, for instance, those who wish to bring the case of Israeli war crimes in Gaza to the Court's

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<sup>341</sup> Article 11 defines *jurisdiction ratione temporis* in the following terms: "The Court has jurisdiction only with respect to crimes committed after the entry into force of this Statute, and, if a State becomes a Party to this Statute after its entry into force, the Court may exercise its jurisdiction only with respect to crimes committed after the entry into force of this Statute for that State, unless that State has made a declaration under article 12, paragraph 3." For the full text of the treaty item, see <http://www.preventgenocide.org/law/icc/statute/part-a.htm> [15.03.2017].

<sup>342</sup> On this issue, see Payam Akhavan, "The International Criminal Court in Context: Mediating the Global and Local in the Age of Accountability" (2003) 97 *Am. J. of Int'l L.* 712.

<sup>343</sup> See William W. Burke-White, "Regionalization of International Criminal Law: A Preliminary Exploration" (2003) 38 *Tex. Int'l LJ* 729 at 755–61; Thomas Buergenthal, "Proliferation of International Courts and Tribunals: Is It Good or Bad?" (2001) 14 *Leiden J. Int'l L.* 267 at 272; Jonathan I. Charney, "Is International Law Threatened by Multiple International Tribunals?" (1998) 271 *Recueil des Cours* 125.

<sup>344</sup> Complementarity has been extolled as the pioneering way for the ICC to navigate the difficulties of state sovereignty when investigating and prosecuting international crimes. Victims have often been held up to justify and legitimize the work of the ICC and states complementing the Court through domestic processes. In Uganda, for instance, new laws, legal procedure, and accountability for international crimes has been introduced over the past decade, all based on the complementarity principle, culminating in the trial of Thomas Kwoyelo. After several years of proceedings, however, it has yet to move to the trial phase, due to the issue of amnesties. While there has been a profusion of provisions to allow victims to participate, with protection measures and planned reparations, in practice very little has changed for them. There are indeed dangers of complementarity being proposed as the sole solution to protracted conflicts, in particular in the area of the realization of victims' rights. See Harmen van der Wilt, "Complementary Jurisdiction (Article 46H)" *The African Criminal Court* (TMC Asser Press, 2017) at 187-202.



attention.<sup>345</sup> The limitations that come with a territorial or nationality-based nexus to the crime in question could be overcome only to a certain extent through the exercise of universal jurisdiction by states that are a party to the Rome Statute. For universal jurisdiction to take effect, these state-parties must be willing to try the case in their own courts in accordance with international criminal law as embedded in their national legal systems. Again in the Israeli case, so far only Belgian courts have expressed a willingness to consider a trial at a future date. Added to these constraints are the complexities of the complementarity principle, as well as limitations regarding subject-matter jurisdiction and the parliamentary overview of critical judicial matters, as exemplified by the final decision concerning the Pinochet extradition case in the United Kingdom.

Given all this, what does universal jurisdiction [re]defined by the Rome Statute of the ICC add to the already existing regime of accountability in international criminal law?<sup>346</sup> The core idea of universal jurisdiction is that some crimes are so heinous that they lead to a duty, in every society and in every system of substantive law, to prosecute the perpetrators when the opportunity arises. The very category of “crimes against humanity” captures this notion at its best: it refers to criminal acts that constitute an offense to every human being, and a corresponding obligation to take action against the perpetrator(s) regardless of the specific circumstances of the crime or limitations to jurisdiction.<sup>347</sup> Although the concept of crimes against humanity had specific roots as one of the key justifications for the Nuremberg trials of Second World War criminals from 1945 to 1949, it came into much more common use after the collapse of dictatorships in Latin America during the 1980s.<sup>348</sup>

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<sup>345</sup> For a full coverage of the crimes under consideration, see Richard Falk’s report published in Le Monde diplomatique (March 2009) titled *Israel’s war crimes: Calls for investigation into Gaza attacks*. For the full text, see [http://www.tni.org/detail\\_page.phtml?act\\_id=19322&username=guest@tni.org&password=9999&publish=Y&print\\_format=Y](http://www.tni.org/detail_page.phtml?act_id=19322&username=guest@tni.org&password=9999&publish=Y&print_format=Y) [15.03.2017].

<sup>346</sup> Here, I define accountability regimes in international law on par with Steven Ratner and Jason Abram’s definition in their work *Accountability For Human Rights Atrocities In International Law: Beyond The Nuremberg Legacy* (Oxford University Press, 2001). Accordingly, accountability regimes in current international law are those that respond to the necessity of holding individuals and legal subjects accountable for gross human rights violations.

<sup>347</sup> For an authoritative account of crimes against humanity not just from a legal but also from a historical perspective, see Larry May, *Crimes Against Humanity: A Normative Account* (Cambridge University Press, 2005).

<sup>348</sup> On the issue of the use of the legal category of crimes against humanity in the context of transitional justice, see “What is Transitional Justice?” *A Voice for Victims*, New York: International Center for Transitional Justice Annual Report 2004/2005 1; and Naomi Roht-Arriaza & Javier Mariezcurrena, eds., *Transitional Justice in the Twenty-First Century: Beyond Truth versus Justice* (Cambridge University Press, 2006).

Here attention should be turned to transitional justice measures and their relationship to accountability regimes in international criminal law. The overall aim of transitional justice projects is to end impunity deriving from official or personal exceptions accorded to state representatives and high-ranking officers, and to guarantee personal accountability for gross human rights abuses and societal crimes. In this vein, for instance, the impetus behind the reactivation of the legal category of crimes against humanity against Latin American dictatorships was the hope that universal jurisdiction in relation to these crimes would help to bring torturers and murderers to justice when national jurisdictions were failing to try them. Another pertinent reason for the call for universal jurisdiction in the case of crimes against humanity is that many deposed oppressors have sought amnesty outside of their own country and claimed asylum on neutral grounds. By removing the territorial nexus of the crime, it was hoped that universal jurisdiction litigation would allow for the capture of fugitive statesmen, army officers, and former dictators. In summary, universal jurisdiction for international crimes would, at least in principle, obligate governments to prosecute the perpetrators of a certain set of crimes wherever they were found. While the government of the country where the atrocities occurred might be severely compromised to prosecute these persons, the idea is that another government without a history of complicity in these crimes could reach out and punish the concerned criminals based on the principle of universal jurisdiction. As early as 1999, the very date that marks the formulation of the ICC jurisprudence on crimes against humanity, Amnesty International reported that twenty-four national jurisdictions had adopted universal jurisdiction for serious international crimes such as genocide, among them Spain and Belgium.<sup>349</sup> Since then, however, there have been very few prosecutions. Perhaps as to be expected, the most notable case was in Britain and Spain against the Chilean ex-dictator Augusto Pinochet, prior to the establishment of the International Criminal Court (ICC) in 2002. The success of this particular rendition of universal jurisdiction, however, remains far from obvious.<sup>350</sup>

The Pinochet case is of interest for understanding both the internal and institutional

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<sup>349</sup> See Cherif Bassiouni, "Chronology of efforts to establish an International Criminal Court" (2015) 86 *Revue internationale de droit pénal* 1163.

<sup>350</sup> See for instance, David Pion-Berlin, "The Pinochet Case and Human Rights Progress in Chile: Was Europe a Catalyst, Cause or Inconsequential?" (2004) 36 *Journal of Latin American Studies* 479; David Sugarman, "From Unimaginable to Possible: Spain, Pinochet and the Judicialization of Power" (2002) 3 *J. of Spanish Cult. Stud.* 107; Henry A. Kissinger, *The Pitfalls of Universal Jurisdiction* (2001) 80 *Foreign Affairs* 86; and A. Bianchi, "Immunity versus human rights: the Pinochet case" (1999) 10 *Eur. J. of Int'l L.* 237.

limitations of universal jurisdiction as endorsed by the ICC. As far as the ICC is concerned, the claim in its statute that the Court's jurisdiction is “complementary” to that of the nations that endorse it emphasizes its underlying purpose: to drive societies to prosecute criminals in the places where the crimes were committed, or in countries which are signatories to the Rome Statute, but not at the Hague itself. In this sense, the Court supplements rather than dictates universal jurisdiction. It is constituted as a transnational tribunal to try only a select set of international crimes when all else fails. If it is to provide outreach services or to act as a centrifugal force, this should take place at the level of jurisprudential framing provided by the Rome Statute, rather than in the actual proceedings of the court. A legitimate question that needs to be answered in the context of the Pinochet case, for instance, is the following: if Chile, currently a democratic state peopled by many of the victims of Pinochet's regime, did not want to prosecute the ex-dictator in 1998, on what basis could a magistrate in Spain interfere in Chile's internal affairs or past crimes committed by its state officers? Furthermore, when a Spanish court claims to exercise universal jurisdiction over Pinochet's crimes, how could Britain refuse to honour Spain's request for extradition, despite the fact that Britain herself is a signatory to the Rome Statute and a dedicated state-party to the ICC? In this regard, the internal and historical facts of the Pinochet case allow us to examine a different and mostly overseas dimension of the universal jurisdiction debate. Chile granted amnesty to Pinochet as a way to break his grip on local politics and to return to democratic governance.<sup>351</sup> Still, this should not have shielded the retired General from justice for his gross human rights violations, and specifically the crimes against humanity associated with his regime. The only reasonable explanation for this local lapse of justice is that Chilean prosecutors and investigating magistrates, while enjoying institutional independence, were bound to operate within the strictures of Chilean law and politics. These legal authorities had to answer to appeals courts and to other officials, and they had to honour statutory obligations, one of which is stated as the immunity of General Pinochet in perpetuity. A legal authority outside Chile may not claim to have a direct interest in the affairs of the nation where the crime occurred. And yet, under the principle of universal jurisdiction, they would have the freedom to indict and to prosecute. This paradox repeats itself in African and other cases as well.

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<sup>351</sup> See John Dugard, “Dealing With Crimes of a Past Regime. Is Amnesty Still an Option?” (1999) 12 *Leiden J. of Int'l L.* 1001.

A more recent example that further illustrates the pros and cons of universal jurisdiction exercised by foreign courts taking on cases pertaining to international crimes, rather than the issue being referred to the ICC, is the case of Belgium and the investigation it launched against Israel's military offensives in Gaza and Lebanon during the last few decades.<sup>352</sup> Human rights groups hailed the Belgian Supreme Court's decision as another stepping stone for international justice, following the path heralded by the arrest of the former Chilean dictator Augusto Pinochet in Great Britain on a Spanish warrant. The high-profile Sharon case complemented the 1993 Belgian universal jurisdiction law, which permits lawsuits to be filed in Belgian courts for war crimes, crimes against humanity, torture, and genocide regardless of the time and place of the crimes committed and regardless of any national or geographical link to Belgium by the plaintiffs or the accused.<sup>353</sup> This is despite the fact that the Belgian law had to go through a series of

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<sup>352</sup> See the *Haaretz* article, dated October 31<sup>st</sup>, 2009 on the developments regarding the relations between Israel and Belgium on this issue. On October 30<sup>th</sup>, 2009, the Belgian Supreme Court ruled that Defense Ministry director-general Amos Yaron could be prosecuted for his involvement in the Sabra and Shatila massacres in 1982 in Beirut, when he was commander of the IDF forces in the Lebanese capital at the time. The court also ruled that Prime Minister Ariel Sharon can be put on trial for his alleged involvement in the affair, but only after he ceases to be prime minister, when he no longer has diplomatic immunity. Back in 2001, two separate claims against Mr Sharon were brought under a 1993 Belgian law which allows war crimes and genocide to be tried in Belgium, even if the events took place elsewhere, and even if none of the victims was Belgian. The first case, charging Mr Sharon with responsibility for the deaths, was lodged by a group of Palestinians, Lebanese, Moroccans and Belgians. The second suit for alleged crimes of crimes against humanity, genocide and war crimes was filed by 23 survivors of the massacres and five eyewitnesses. Initially, in 2002, the Belgian appeals court ruled on June 26 that the law was not applicable in Sharon's case because the accused was not on Belgian territory. However, the later verdict reversed that decision. Palestinian Authority Chairman Yasser Arafat was also in line for prosecution in Belgium, in the wake of complaints filed against him by Israeli terror victims. On December 10, 2008, a formal complaint was filed against Ehud Barak to the ICC, on suspicion of war crimes and crimes against humanity because of the siege of Gaza." For full details of both complaints, see <http://www.haaretz.com/hasen/pages/ShArt.jhtml?itemNo=262391&contrassID=2&subContrassID=1&sbSubContrassID=0&listSrc=Y> [15.03.2017].

<sup>353</sup> For full citation of this law, see Cherif Bassouni (2001-2002), *supra* note 304. Proponents of universal jurisdiction commonly argue that the principle is well established in international law and that a wide range of human rights offenses are subject to universal jurisdiction. One such prominent group drafted the "Princeton Principles on Universal Jurisdiction," which held that the following offenses can be tried by any court in the world without regard to where the crime occurred or who committed it: piracy, slavery, war crimes, crimes against peace, crimes against humanity, genocide, and torture. Typically, legal specialists recognize five bases for jurisdiction under international criminal law. The two best-established jurisdictional bases concern the territoriality and nationality principles, in which states have jurisdiction over crimes committed in their territory or by their nationals. Two other jurisdictional bases have received less consistent acceptance: passive personality, based on the nationality of the victim, and protective clause, based on the existence of serious threats to a state. The fifth jurisdictional base, the universality principle, refers to claims based only on the nature of the crime, for which none of the other forms of jurisdiction are present in any substantial way. For an all-encompassing debate on the fate of universal jurisdiction, see Antonia Cassese, "Is the Bell Tolling for Universality? A Plea for a Sensible Notion of Universal Jurisdiction" (2003) 1 J. of Int'l Crim. Justice 589. For the Princeton Principles document, see [http://lapa.princeton.edu/hosteddocs/unive\\_jur.pdf](http://lapa.princeton.edu/hosteddocs/unive_jur.pdf) [15.03.2017].

amendments.<sup>354</sup> The specific case against Sharon was brought by a group of Lebanese citizens, who charged him with war crimes in connection to his indirect role in the 1982 massacre of at least 800 Palestinians by Phalangist troops in the Sabra and Shatila refugee camps outside Beirut, while the camps were under Israeli control. Sharon was found “indirectly responsible” for the massacre by an Israeli judicial commission in 1983, and was barred for a time from holding high office in Israel. In 2002, a Belgian appeals court ruled that Sharon could not be tried in Belgium because he was not physically present in the country; the Belgian Supreme Court reversed that ruling in 2003. This latter decision acknowledged diplomatic immunity only for serving heads of state or ministers. Based on this nuanced reading of immunity, Belgian prosecutors could open proceedings against other Israelis allegedly involved in the massacre, including former Israeli army chief of staff Rafael Eitan and current Defense Ministry Director General Amos Yaron, who was the Israeli army commander in Beirut at the time. Consequently, in addition to the possibility of arrest on Belgian soil, Israeli officials became worried about possible extradition demands from other European states. Israel has extradition treaties with most European countries, and all members of the European Union have conventions requiring that an extradition request by a member state is be considered by others.

The plot thickened in January 2017, A Belgian court ordered the arrest of former Israeli Minister of Foreign Affairs, Tzipi Livni, when she disembarked the plane on her upcoming scheduled trip to Belgium. Livni is accused of committing war crimes and crimes against humanity during her time as Minister of Foreign Affairs from 2006-2009. She oversaw the Israeli military operation "Cast Lead" in the Gaza Strip, from which the crimes allegedly stem. In effect, Livni was one of several Israeli officials named in the lawsuit filed by a group of victims in 2010 in response to the military activities in Gaza. Livni, who is a member of the Israeli parliament, was set to meet with Jewish leaders in Brussels, but canceled the trip before the report of the

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<sup>354</sup> The 1993 law, amended in 1999 and again in 2003, gives Belgian courts the authority to prosecute persons accused of genocide, crimes against humanity, or war crimes regardless of where the crimes took place or whether the suspect or the victims are Belgian. The new version of the 1993 law, however, grants immunity to serving heads of state or government, as well as ministers. It also acknowledges the preeminence of the ICC, which will have priority in prosecution of crimes committed after its establishment on July 1, 2002. Finally, the law creates a “filter” against abusive lawsuits by granting the prosecutors’ office the option of rejecting complaints if they are deemed unfounded or politically motivated. It is noteworthy that the Belgian law has also served as a basis for complaints against a series of other foreign leaders, including Yasser Arafat. For a detailed analysis of the Belgian ‘anti-atrocity’ law, see the Human Rights Watch report at [http://thewe.cc/contents/more/archive2003/july/belgium\\_law\\_on\\_atrocities.pdf](http://thewe.cc/contents/more/archive2003/july/belgium_law_on_atrocities.pdf) [15.03.2017].

arrest order came out. Back in 2010, Livni had been set to speak at the Jewish National Fund Vision 2010 conference in London, but again cancelled her travel plans after a British court issued an arrest warrant for her. In 2011, however, the UK announced that Livni would enjoy diplomatic immunity. The practice of giving immunity to foreign officials who are accused of serious crimes under international law, in order for the host country to avoid having to arrest them, readily receives criticism. Proponents of the warrants argue that countries giving immunity to these officials are not living up to their responsibility under international law, and are thus complicit in creating impunity for international crimes.<sup>355</sup> Belgium and the UK are not the only countries to have enshrined elements of universal jurisdiction in their laws during the process of ratifying the Rome Statute. With Spain and Canada coming on board, the endorsement of the Rome Statute moved to the far end of the spectrum in terms of domestic law's engagement with international criminal law according to the principle of universal jurisdiction.<sup>356</sup> Other notable countries opting for institutionalizing universal jurisdiction as defined by the Rome Statute include Australia, Germany, New Zealand, and South Africa, all of which have amended their laws to provide for the opening of investigations without any of the traditional *nexus* requirements.<sup>357</sup>

Situated at the other end of this spectrum, where rejection of “international jurisprudential intervention” constitutes the distinguishing feature of the domestic judicial order, are the United States and Israel. Still, even these states have legal mechanisms that allow foreign acts to be prosecuted in their courts. For instance, the Alien Torts Act allows foreigners to sue in United States Federal Court if acts were committed against them in violation of the law of nations or an

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<sup>355</sup> See the *Jurist* article on the issue at <http://www.jurist.org/paperchase/2017/01/belgium-court-orders-arrest-of-former-israel-top-official-for-war-crimes.php> [15.03.2017]

<sup>356</sup> Canada became the first country in the world to incorporate the obligations of the Rome Statute into its national laws when it adopted the Crimes Against Humanity and War Crimes Act (CAHWCA) on June 24, 2000. To ensure that Canada can fully cooperate with ICC proceedings, the CAHWCA also amended existing Canadian laws like the Criminal Code, Extradition Act and Mutual Legal Assistance in Criminal Matters Act. For the full text of the act, see <http://www.iccnw.org/documents/Canada.CrAgH.WcrEng.pdf> [15.03.2017]. The first case under Canada's Crimes Against Humanity and War Crimes Act (2000) opened at the main courthouse in Montreal on March 26, 2007. The defendant, Désiré Munyaneza, a Rwandan charged with genocide, faced seven charges in the indictment cover the period from April 1, 1994 through the end of July 1994, roughly corresponding to the 100 days of the genocide in Rwanda. Munyaneza, a Hutu, faced two counts of genocide, two counts of crimes against humanity and three counts of war crimes. For a case summary, see the International Criminal Database report at <http://www.internationalcrimesdatabase.org/Case/1176> [15.03.2017]

<sup>357</sup> It is notable, however, that South Africa first withdrew from the ICC in 2016, and then reversed its withdrawal in March 2017. See the New York Times article (March 8, 2017) on the issue at [https://www.nytimes.com/2017/03/08/world/africa/south-africa-icc-withdrawal.html?\\_r=0](https://www.nytimes.com/2017/03/08/world/africa/south-africa-icc-withdrawal.html?_r=0) [15.03.2017]

American treaty. This act was used by a group of Bosnians against Serb leader Radovan Karadzic for crimes committed in the Balkans. Similarly, in Israel, the Knesset passed an amendment to the Penal Code in 1995 that is almost identical to Belgium's 1993 law.<sup>358</sup> Israel also passed legislation making it responsible for the protection of every Jew around the world, whether or not such protection is requested. According to this law, anyone committing a crime against a Jew anywhere in the world breaks Israeli law and is liable to punishment by the Jewish state. In this sense, it would be apt to suggest that Israel herself has long been a pioneer among nations in forcefully applying universal jurisdiction, though only in select areas.<sup>359</sup>

Based on the two examples of the Pinochet case and the Belgian law for universal jurisdiction, it is apt to suggest that the key question concerning the limits of universal jurisdiction is whether the problems that are appearing in its current applications in national *and* international courts are likely to weaken its usefulness or legitimacy. In this context, some argue that hybrid courts established closer to the scene of the crime and in direct contact with the societies involved could be more effective in delivering universal justice for international crimes.<sup>360</sup> Where the scope of a state's application of universal jurisdiction is wide, as seen in Belgium for instance, the problems may indeed increase in some areas. As a case in point, in 2000 Belgium sought to extradite the Congolese Minister of Foreign Affairs for speeches that

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<sup>358</sup> See Luc Reydam, *Universal Jurisdiction: International and Municipal Legal Perspectives* (Oxford University Press, 2003).

<sup>359</sup> To mention the most famous trial in this regard, in 1960, Israeli agents kidnapped the Nazi official Adolf Eichmann in Argentina. They brought him to Jerusalem to be tried for crimes against humanity committed in Europe during the 1940s, before Israel achieved statehood. He was found guilty of crimes against humanity, war crimes, and genocide and was hanged in 1962. Eichmann was charged under a 1950 Israeli law enacted to punish Nazis and their collaborators. He was charged on 15 counts. Charge 1: He was ultimately responsible for the murder of millions of Jews; Charge 2: He placed these Jews, before they were murdered, in living conditions designed to kill them; Charge 3: He caused them grave physical and mental harm; Charge 4: He took actions which resulted in the sterilization of Jews and otherwise prevented childbirth; Charge 5: He caused the enslavement, starvation, and deportation of millions of Jews; Charge 6: He caused general persecution of Jews based on national, racial, religious and political grounds; Charge 7: He spoiled Jewish property by inhuman measures involving compulsion, robbery, terrorism and violence; Charge 8: That all of the above were punishable war crimes; Charge 9: He deported a half-million Poles; Charge 10: He deported 14,000 Slovenes; Charge 11: He deported tens of thousands of gypsies; Charge 12: He deported and murdered 100 Czech children from the village of Lidice. The final three charges involved membership in organizations which were judged to be criminal by the Nuremberg Trials: the S.D., Gestapo, and S.S. The first 12 counts of the indictment each carried the death penalty as the maximum punishment. For a critical case history of the Eichmann trial, see Shoshana Felman, "Theaters of Justice: Arendt in Jerusalem, the Eichmann Trial, and the Redefinition of Legal Meaning in the Wake of the Holocaust" (2000) 1 *Theoretical Inquiries in Law* 8.

<sup>360</sup> See Laura Dickinson, "The Relationship between Hybrid Courts and International Courts: The Case of Kosovo" (2003) 37 *New Eng. L. Rev.* 1059 and also her "The Promise of Hybrid Courts" (2003) 97 *Am. J. of Int'l L.* 295.

allegedly incited to race-hatred in the Congo.<sup>361</sup> Given Belgium's troubled history of colonial engagement in the Congo, such a complaint opened the country to a charge of neo-colonialism. In response, the International Court of Justice (ICJ) stepped in and declared that an incumbent minister of foreign affairs was immune from Belgian criminal proceedings. The principal problem in this case was less with the process of filing and administering complaints than with its political character. In contemporary international criminal law, the majority of the states that ratified and embedded the Rome Statute into their constitution and/or criminal law are ex-colonial powers. Complicating matters further, the majority of the cases that fall under universal jurisdiction take place in the Global South, and therefore in ex-colonies. This brings forth the critical issue of trust, and opens domestic courts such as the Belgian courts to charges of neo-colonial domination of the Global South through the means of international criminal law, and via the premise of universal jurisdiction.

There is another concern, too, when domestic courts take on international criminal cases above and beyond the traditional nexus requirements. They tend to act as a magnet for complaints, regardless of their merit, leading to arguments that both the claims and the resultant complaints against the claims are rooted in regional or global political vendettas. On the other hand, international power politics tend to narrow jurisdiction and to cut off complaints, as in the case of claims made against Israel. This latter situation then leads to the argument that when domestic courts exercise universal jurisdiction concerning cases that affect other societies, meritorious complaints could be stifled due to extraneous issues not germane to the case itself. Domestic criminal jurisdiction, where it embraces universal jurisdiction, aspires to be free of politics and discrimination. However, it is also true that, since the Second World War, interest in universal jurisdiction has grown partly because of the biases in and failures of domestic jurisdiction. International criminal jurisdiction, for all its shortcomings, has been compensating for the failures of the domestic courts. If this is so, how could we rely on domestic courts to deliver justice based on the principles of universal jurisdiction? Is the solution simply a matter of someone else's domestic courts doing the difficult work? If high-ranking Israeli soldiers and leaders could not be tried in Israel, is their trial in Belgium the ultimate solution to the suspicion

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<sup>361</sup> For the arrest warrant, see Chanaka Wickremasinghe and Malcolm D. Evans, "Case concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)" (2001) 50 *Int'l and Com. L. Quarterly* 670.



and accusation of war crimes, for instance?

The answer to the question of the pros and cons of universal jurisdiction exercised by organs other than international or transnational courts is two-fold. By virtue of being complementary to the domestic system, the workings of international criminal justice organs such as the ICC could create a dialogue, however limited, that in turn would increase the possibility of establishing of a legal regime of accountability for international crimes. In the Pinochet case, the British authorities managed to avoid his extradition based on the defendant's alleged illness. However, the British courts also recognized that his crimes were heinous enough to support extradition to Spain where he would have had to stand trial. That development alone could be considered a key element that has driven Chilean courts to undertake their own case against Pinochet, despite the many internal obstacles leading them to avoid this for decades. This has been pinpointed by legal scholars such as Stephen Ratner as the “democratizing effect” of international law, despite the fact that international law itself may not qualify as a democratic edifice in its origins.<sup>362</sup> The second point to be made is that unless and until we accept international accountability regimes such as international human rights law or international criminal law as fragmented regimes composed of variant elements, rather than centre-heavy and fixed structures, we will continue to have far too many (and often unrealistic) expectations from organs such as the ICC. This could in turn create effects to the detriment of the very regime we purport to uphold, as these courts and their proceedings often reflect power dynamics in global politics that in turn render their reach uneven, and sometimes problem-laden. This is in addition to the fact that, unlike the ICJ for instance, ICC is defined as a court of last and not first resort.

In the remainder of this section, the critical role of the complementarity principle as a defining feature of the post-ICC regime of accountability for international crimes will be examined. Select cases of hybrid courts will also be brought into the picture, to determine the degree of their contribution to international criminal law in terms of the expansion of universal jurisdiction, especially in the context of transitional justice. The goal of this exercise is to determine the relationship between international, domestic, and hybrid courts, and to revisit the

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<sup>362</sup> On this issue, see Stephen Ratner's work on transnational corporations, “Corporations and Human Rights: A Theory of Legal Responsibility” (2001) 111 Yale L.J. 443; as well as his work on international crimes, Steven R. Ratner, Jason S. Abrams & James Bischoff, *Accountability for Human Rights Atrocities in International Law Beyond the Nuremberg Legacy* (Oxford University Press, 2009).

idea of the fragmented nature of international criminal law as an accountability regime in terms of its future promise.

### ***B. The ICC and the Importance of the Complementarity Principle for the International Legal Regime of Accountability***

The basic stated objective of the establishment of a permanent international criminal court was to replace a culture of impunity for the commission of very serious crimes with an international legal regime of accountability.<sup>363</sup> To this end, the provisions of the Rome Statute expressly address a specific set of crimes—i.e. genocide, war crimes, crimes against humanity, and the crime of aggression—as indictable crimes. Prior to the founding of the ICC, there were numerous other tribunals with an international mandate. However, bodies such as the *ad hoc* Tribunals for Former Yugoslavia and Rwanda were necessarily limited in scope, due to their context-specific and time-sensitive characteristics. To a certain degree, the idea of a permanent court was also a response to the UN Security Council's monopoly on international tribunals, which many states in the Global South deemed as being far too selective in “distributing” international justice.<sup>364</sup> Still, there is an ongoing argument about the deterrent effect of international tribunals or courts in general, whether permanent or *ad hoc* in their constitution. There is also the much larger question of what universal justice means for different societies, and

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<sup>363</sup> In this regard, the relevant parts of the Preamble to the Rome Statute read as the following: “[A]ffirming 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 by taking measures at the national level and by enhancing international cooperation, determined to put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes, recalling that it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes ... determined to these ends and for the sake of present and future generations, to establish an independent permanent International Criminal Court in relationship with the United Nations system, with jurisdiction over the most serious crimes of concern to the international community as a whole, emphasizing that the International Criminal Court established under this Statute shall be complementary to national criminal jurisdictions, resolved to guarantee lasting respect for and the enforcement of international justice...” Christopher Mullins, David Kauzlarich & Dawn Rothe, “The International Criminal Court and the Control of State Crime: Prospects and Problems” (2004) 12 *Crt. Crim.* 1205.

<sup>364</sup> The question of the relationship between the international criminal court and the Security Council was only partially settled at the Rome Conference. Aspects of the power differences between Security Council members and lay members of the UN system in the application of international law remain subjects of a heated debate. Among them, to say the least, is the role of the Security Council with respect to the trial of the crime of aggression, a body that includes United States of America as a permanent member. For a critical account of this issue, see Louise Arbour, “The Relationship between the ICC and the UN Security Council” (2014) 20 *Global Governance: A Review of Multilateralism and International Organizations* 195.

whether some are treated “more equal” than others within its reach, especially under the purview of Europe-based international courts such as the ICC.<sup>365</sup> The common response to the establishment of the ICC emanating from scholars and practitioners of international law is that the effectiveness of such international tribunals and courts must be judged within a long-term perspective.<sup>366</sup> Accordingly, the impact of these relatively new bodies cannot fairly be compared to that of longstanding institutions such as the Security Council or the ICJ. Specifically, the ICC is seen as part of a framework of measures brought into effect in order to establish and sustain a new international regime of accountability, including increased domestic prosecution of such crimes, the greater and wider use of common jurisdiction, and greater international and transnational cooperation and coordination in the addressing of international crimes.

The cornerstone of this anticipated legal regime is the principle of complementarity, as reflected in Articles 18 and 19 (containing procedures) and Articles 17 and 20 (containing the substantive criteria) of the Rome Statute.<sup>367</sup> This principle was agreed upon as a result of long negotiations. It was put in place to ensure that “State Parties” will always have primacy if they choose to investigate and prosecute crimes within domestic jurisdiction or in accordance with the jurisdiction of the Court. Accordingly, it is only where States are unwilling or unable to act within the meaning of the Statute, or where they are simply inactive, that the ICC will take on a

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<sup>365</sup> In brief, the ICC is structured in the following format. The Office of the Prosecutor is an independent organ of the court, and it decides whether there is a reasonable basis to investigate possible crimes. As already stated, cases are referred to the court either by a State Party or by the UN Security Council. The Pre-Trial Chamber has authority to issue an arrest warrant after considering submissions by the prosecutor. When a wanted person appears before the court, the Pre-Trial Chamber holds a hearing to confirm the charges that will be the basis of the trial. The Trial Chamber is where the actual hearings take place. If the charges are confirmed, the court assigns the case to the three-judge Trial Chamber responsible for conducting fair and expeditious proceedings. After the conclusion of testimony, the Trial Chamber issues its decision, acquitting or convicting the accused. If the person is convicted, the Trial Chamber issues a sentence of imprisonment and may also order reparations to victims. Finally, throughout the proceedings the parties can appeal decisions to an Appeal Chamber of five judges. The Trial Chamber’s verdict or sentence may also be appealed by the prosecutor or by the accused.

<sup>366</sup> On this issue, see the work of one of ICC’s founders, Phillippe Kirsch, in his and John T. Holmes’s “The Rome Conference on an International Criminal Court: The Negotiating Process” (1999) 93 *Am. J. Int’l L.* 2; his “The International Criminal Court: Current Issues and Perspectives” (2001) 64 *L. and Contemp. Prob.* 3; and his “The Role of the International Criminal Court in Enforcing International Criminal Law” (2007) 22 *Am. U. Int’l L. Rev.* 53.

<sup>367</sup> According to Article 17, Section I, the Court shall determine that a case is inadmissible whereby: (a) The case is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable to genuinely carry out the investigation or prosecution; (b) The case has been investigated by a State which has jurisdiction over it and the State has decided not to prosecute the person concerned, unless the decision resulted from the unwillingness or inability of the State genuinely to prosecute; (c) The person concerned has already been tried for conduct which is the subject of the complaint, and a trial by the Court is not permitted under article 20, paragraph 3; (d) The case is not of sufficient gravity to justify further action by the Court.

The full text of the Statute can be accessed at <http://www.icc-cpi.int/legaltools/> [15.03.2017].

case. Moreover, if a State has started proceedings, the ICC will only be able to take on the case if it is shown that domestic authorities acted with an intention to shield the person(s) concerned from justice, or in a manner that was inconsistent with the intent to bring the person(s) concerned to justice. Without such a finding, lack of observance of international standards of due process or differences in sentencing practices does not constitute a valid reason for ICC to step in. At the same time, there are complementarity provisions to guide national authorities towards incorporating the Rome Statute definitions of genocide, crimes against humanity, and war crimes into their domestic law. As such, the primacy of State Parties for investigation and trial purposes does not go against the principle of universal jurisdiction and the demand for the faithful adoption of its current legal articulations by the Rome Statute. On the contrary, the complementarity principle reflects the belief that universal jurisdiction is best achieved through a multi-level and complex model of jurisprudential expansion that links international and domestic spheres. Meanwhile, it is important to note that this still remains a centrifugal model; the ICC acts as the epicenter, and produces the blueprint to be appropriated wherever a certain set of international crimes are concerned. Both State and non-State Parties are expected to adopt the principles and format of codification developed by the Court, in order to make a legitimate claim that their legal regime is on par with the international-cum-transnational one in this specific area of criminal law.

In this context, the “proper implementation” of the Rome Statute within the national law of States Parties is of key importance for the establishment and sustenance of a legal regime of accountability. This is in addition to the required cooperation between the ICC and affected States Parties in the investigation and preparation of cases, as outlined by the elaborate machinery set out in Part 9 of the Statute.<sup>368</sup> Indeed, there is a set of specific stipulations put in place to ensure the desired coordination for investigation and adjudication purposes. First, States Parties are under an unequivocal obligation to cooperate fully with the Court (Article 86) and to modify national law as necessary to allow the forms of cooperation required by the Statute (Article 88).<sup>369</sup> States Parties are also obliged to arrest and surrender suspects to the Court (Article 89),

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<sup>368</sup> Part IX outlines principles of International Cooperation and Judicial Assistance. For full text of the Rome Statute Part IX, see [http://untreaty.un.org/cod/icc/statute/rome\\_fra.htm](http://untreaty.un.org/cod/icc/statute/rome_fra.htm) [15.03.2017].

<sup>369</sup> Meanwhile, whether a separate law should be adopted to provide for the required cooperation, or whether existing legislation can be modified, depends entirely on the legal context of a particular State Party.

and to provide other forms of cooperation as requested, such as the questioning of witnesses, the conduct of searches and seizure of evidence, the protection of witnesses, and the tracing, freezing, and seizure of assets related to the crimes under investigation (Article 93). The grounds allowed for refusing cooperation are extremely limited. States Parties cannot refuse to extradite their own nationals, and immunities available under national law cannot be used to refuse to hand over one's own nationals to the Court. Notwithstanding these precautionary mechanisms, suffice it to say that national security concerns can always provide a limited basis for refusal to cooperate, provided all the consultation measures set out in Article 72 of the Statute are undertaken. It is in this larger context of complementarity that ICC and the Rome Statute function as guideposts for the exercise of universal jurisdiction. No doubt the domestic jurisprudence of a State Party to the ICC provides the critical mass of laws and principles specifically designed to govern and protect its people and its borders. However, the majority of recent cases brought to the attention of the ICC proved that while these domestic laws can prosecute individuals for crimes such as murder, rape, armed robbery, and larceny, they often do not equip the national judicial system with the competence to try perpetrators of serious violations of International Human Rights Law or International Humanitarian Law.<sup>370</sup> Hence the need to enact laws that can address egregious crimes committed both in conflict and during peace-time. The standard route for this is the domestication of the Rome Statute by the States Parties.<sup>371</sup> The assumption behind this prescription is that the domestication process would provide the legal framework for the implementation of ICC jurisprudence, inching towards a wider network of universal jurisdiction in the case of select international crimes, and hence a sustainable legal regime of accountability.

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<sup>370</sup> Here, International Human Rights Law (IHRL) is defined as a system of laws, domestic, regional and international, designed to promote human rights. States that ratify human rights treaties at least in principle commit themselves to enact domestic human rights legislations. Human rights law is related to, but not the same as International Humanitarian Law or Refugee Law. In contrast, International Humanitarian Law (IHL) is defined as a set of rules that seek, for humanitarian reasons, to limit the effects of armed conflict. IHL's aim is to protect persons who are not or are no longer participating in the hostilities and to restrict or regulate the means and methods of warfare. IHRL and IHL are two distinct but complementary bodies of law. Both seek to protect the individual from arbitrary action and abuse. However, while IHRL is worded to protect the individual at all times, IHL only applies in situations of armed conflict. The ICC's mandate covers both areas due to the specific set of crimes it is set to codify and when applicable, adjudicate. However, its mandate does not exhaustively cover either body of law since it deals with a very specific set of crimes concerning crimes against humanity, genocide and crimes of aggression in addition to war crimes.

<sup>371</sup> For a detailed discussion of the domestication procedures of the Rome Statute and for a sample of implementation packages, see <http://www.iccnw.org/?mod=romeimplementation> [15.03.2017]. The list of packages available for public review include those used by Uruguay, France, the Arab League, Commonwealth, Columbia, Bolivia, Kenya and Argentina as well as the ICC's own recommendations for implementation.

As a final note, the Rome Statute makes provisions for victims' participations at all stages of proceedings. As a result, at least in principle, the ICC assures the victims' access to and participation in the adjudication process. In international law, this is regarded as a unique development in the structure and operations of international tribunals. The ICC also takes into account issues of reparations for victims beyond the traditional punishment and deterrence objectives of domestic courts. Specifically, Article 79 of the Rome Statute provides for the establishment of a trust fund for victims and their families.<sup>372</sup> This does not only address the issue of reparation, it also guarantees legal representation to allow victims to participate at all stages of the proceedings. The court can determine the extent of damages, and can order perpetrators to compensate victims as such. Furthermore, adhering to international standards, the ICC does not use the death penalty as punishment. Article 77 of the ICC's Statute provides that the court can only institute penalties such as life imprisonment, imprisonment for a designated number of years, and fines, but cannot institute the death penalty.<sup>373</sup> Domesticating the Rome Statute could therefore constitute a significant step to expunge capital punishment from domestic jurisdictions.

These points may appear as tangential to the issue of universal jurisdiction. However, in effect, they could also be seen as part and parcel of the transfusion of a legal culture of accountability and the globalized endorsement of a new approach to international crimes, especially those committed by state authorities and people in position of power, a process that has included victims as legal actors since Nuremberg trials. In summary, the ICC's complementarity principle is essential to the workings of a new legal regime of accountability for select international crimes. This principle operates at three levels. First, it dictates the set of crimes that fall under the purview of universal jurisdiction. If local, domestic legal authorities and courts do not act on these crimes, and if these crimes are brought to the attention of the Court, it then becomes a court of last resort and, in select cases at least, proceeds to try those accountable for the identified crimes. Alternatively, if there is not a case brought directly to ICC's attention, or, if there are local attempts to achieve accountability that are hindered by domestic circumstances,

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<sup>372</sup> Article 79 is on the issue of Trust Fund, according to which a Trust Fund shall be established by decision of the Assembly of States Parties for the benefit of victims of crimes within the jurisdiction of the Court, and of the families of such victims. Section 2 then states that the Court may order money and other property collected through fines or forfeiture to be transferred, by order of the Court, to the Trust Fund.

<sup>373</sup> In addition, again in Article 77, it is stated that a fine could be issued under the criteria provided for in the Rules of Procedure and Evidence, or a forfeiture of proceeds, property and assets derived directly or indirectly from that crime could be confiscated, without prejudice to the rights of *bona fide* third parties.

the ICC then provides a reservoir of legal expertise, as well as guidelines for juridification for these trials and transitional justice projects-in-the-making. Hybrid courts fall under this last category. This induction is based on a nuanced rendition of the complementary principle both by the Court itself and also by domestic legal and political actors. In this chapter, examples of hybrid courts and their workings have been presented in order to illustrate their potential, but also to underline the fact that they are not the ultimate solution to the problems with a centrifugal model of universal jurisdiction. Indeed, their operations are much more complex than have thus far been foreseen by proponents of universal jurisdiction in the area of international criminal law.

### III. HYBRID COURTS: FRACTURED OR OVERLAPPING LEGAL REGIMES OF ACCOUNTABILITY?

To reiterate, due to disappointments and difficulties with both local trials and international tribunals in the area of international criminal law, hybrid courts and tribunals are increasingly seen as a compromise that could benefit from the strengths of international jurisprudence while minimizing the weaknesses and “side effects” of central institutions such as the ICC, particularly concerning the charge of neo-colonialism.<sup>374</sup> A hybrid tribunal is indeed a distinct instrument of international criminal law. It is a court in which international judges and local judges sit side-by-side, drawing their decisions from a blend of both local and international jurisprudence. From the point of view of an international/transnational regime of accountability, hybrid courts are expected to benefit from the outreach of universal jurisdiction and the codification of international criminal law achieved by various conventions and the Rome Statute, while honoring domestic legal traditions. During the post-ICC era, the first hybrid court was established in Kosovo in 2000. As discussed, this was followed by hybrid courts in East Timor, Sierra Leone, and Bosnia. Cambodia is in the final stages of a hybrid court to address crimes committed by the Khmer Rouge,<sup>375</sup> and Lebanon is yet another country to have expressed desire

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<sup>374</sup> Mary Kimani, “ICC and Africa: Pursuit of justice or Western plot? International indictments stir angry debate in Africa” (2009) 23 *Africa Renewal* 3; and Max du Plessis, *The International Criminal Court and its work in Africa: Confronting Myths* (ISS Paper 173, November 2008).

<sup>375</sup> The Khmer Rouge seized power in Cambodia in 1975 and killed more than a million people during its four-year rule. It was only in March 2003 that the United Nations reached a draft agreement with the Cambodian government for the establishment of the Extraordinary Chambers in the Courts of Cambodia (ECCC) to try former Khmer Rouge leaders. The agreement took five years of negotiations and only came into effect 24 years after Khmer Rouge were driven from power. The ECCC consists of both Cambodian and international judges and has exclusive jurisdiction

to create a hybrid tribunal.<sup>376</sup> As mentioned in the earlier sections of this work, there were also internal and external political demands for the Sudan's President Bashir to be tried by a hybrid court rather than by the ICC. Then there is the successful resolution of the trial of the former dictator of Chad, Hissène Habré, in the Senegalese hybrid court. Concerning this last example, the Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights, known as the Malabo Protocol,<sup>377</sup> truly reconceptualized the idea of transitional justice mechanisms and purported that transitional justice mechanisms can encompass regional and transnational efforts to respond to mass political violence. In this sense, the Protocol actively seeks to correct for perceived biases in international criminal justice. As such, it offers the Continent, and Global South at large, a substantive alternative vision of local and regional criminal justice and criminal accountability for state criminality targeting a state's own civilian population.<sup>378</sup> In keeping with these developments, in the final section of this Chapter, the workings and institutional characteristics of some hybrid courts established since the establishment of the ICC and the coming into effect of the Rome Statute will be further scrutinized.

My starting premise on hybrid courts has been that domestic criminal justice systems have options for flexible responses not currently available to the ICC, and that these options extend beyond criminal proceedings to encompass civil proceedings. The right to sue governments and out-of-court settlements supervised by judges that allow for the participation of those harmed also promise a wider range of potentially satisfying compensatory activities for government-induced harms. These and other strategies of litigation inch towards restorative justice measures, and do not limit accountability for societal harm to criminal proceedings. That is perhaps where hybrid courts have so far been underutilized, due to their dependency on the list of crimes and trial procedures defined by the Rome Statute. Restorative justice, in contrast to

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over selected crimes committed by the Khmer Rouge regime between 1975 and 1979. However, only one person has been indicted due to interference from the government and resource issues, as well as responsible persons passing the age of 70. For further details on the ECCC, see <https://www.un.org/ruleoflaw/thematic-areas/international-law-courts-tribunals/international-hybrid-criminal-courts-tribunals/> [15.03.2017].

<sup>376</sup> See Mettraux, G., *International crimes and the ad hoc tribunals* (Oxford University Press, 2005).

<sup>377</sup> For the actual text of the Malabo Protocol, see Amnesty International document <https://www.amnesty.org/download/Documents/AFR0130632016ENGLISH.PDF> [14.10.2017].

<sup>378</sup> On the promise of a new model of international criminal justice emerging from the African context, see Leigh Stewart, "International Justice in Africa: Defining Authority and Localizing the Global." (2017) *iCourts Working Paper Series No. 86*, accessible at <http://dx.doi.org/10.2139/ssrn.2917110> [14.10.2017].



retributive justice as embodied in international criminal law, does not focus solely on the punishment of the offender, but rather seeks to address the needs of both victim and the offender, with the goal of restoring the broader wellbeing of the individuals and communities involved.<sup>379</sup> An equally important point is that contemporary prosecutions at international criminal courts and tribunals have demonstrated that, where individuals are convicted of core international crimes, the resources available for reparations are grossly insufficient to meet even the basic restitutionary needs of both the victims and the society at large. Most of the wealth that might exist as a result of crimes such as crimes against humanity or war crimes is likely to be in the hands of individuals via corporations or other artificial persons who have gained property and income through these mass human rights violations. None of the international criminal courts and tribunals (together known as the ICCTs) has adjudicative jurisdiction over artificial persons of any sort. This means that any progress on restitution and restorative justice must come through national tribunals. This applies to both core international crimes and the broader category of human rights treaty crimes, which remain outside the authority of ICCTs.<sup>380</sup> Translating the experiences of restorative justice into international criminal law dealing with mass atrocities is not simple. While restorative justice is traditionally used in response to lower-impact crimes such as property damage or fraud, it has also been successfully used in response to higher-order offenses such as sexual assault or murder, for example, where the victim or their family and the offender agree to participate, and where traditional retributive forms of punishment, such as imprisonment, could not resolve the issue of long-standing damages. As a case in point, the potential utility of restorative justice measures in the context of hybrid court trials and for past mass atrocities was a lively public debate and in and around the Juba Peace Talks in Uganda.<sup>381</sup>

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<sup>379</sup> An important part of the debates on restorative justice is a critical analysis of how the main “crime stakeholders” (victim, offender and the community at large) are represented within policy framework and legal statutes. The most recurrent normative representations of the victim, offender, and community exhibit a range of typified features. In real cases, however, there is no ‘ideal’ victim or offender and communities are often implicit in mass crimes, pinpointing many overlaps. Finally, the political and cultural contexts within which these representations have emerged historically influence both policy and laws pertaining to their litigation. Here, restorative justice is taken as to offer more than a critical reflection on the normative dimension of western penal policies. On the restorative justice debate, see Daniel W. Van Ness & Karen Heetderks Strong, *Restoring justice: An introduction to restorative justice* (Routledge, 2014); and Gerry Johnstone, *Restorative justice: Ideas, values, debates* (Routledge, 2013).

<sup>380</sup> See Kerry Clamp, “Clearing the conceptual haze: restorative justice concepts in transitional settings” (2016) *Restorative Justice in Transitional Settings* 1; and Philio McCready, *Can restorative practices work in a Loyalist area?: a case study on restorative responses to community conflict of a Loyalist area in South Belfast*. Diss. (Ulster University, 2016).

<sup>381</sup> The war in Northern Uganda between the Lord’s Resistance Army (LRA) and Government of Uganda (GoU)

The July 2007 agreement between the Ugandan Government and the LRA on Accountability and Reconciliation stated that traditional justice mechanisms as practiced in the communities affected by the conflict shall be promoted, with necessary modifications, and that restorative justice measures would be treated as a central part of the framework for accountability and reconciliation.<sup>382</sup> Although the Final Peace Agreement was not signed, various forms of traditional restorative justice in northern Uganda have been used extensively with lower-level LRA members who have returned to their communities.<sup>383</sup>

No doubt there are inherent problems with traditional forms of justice, and overreliance on them could also lead to an evasion of the retributive justice embodied in indictments by the ICCTs. Still, some of the practical questions faced by both the state and the society during the Uganda peace talks reveal the essential element of limitations posed by criminal trials alone. For instance, how should abducted children who committed atrocities be treated, when they are both victims and perpetrators? Can traditional justice work both for formerly abducted children who became LRA fighters under duress, and for LRA commanders and those who enlisted voluntarily as adults? Traditional forms of restorative justice that are locally rooted and adapted for the purpose of reconciliation, truth-telling, and advancing peace for a just social and political future

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forces dates back to 1986. In 2006, the Juba Peace Talks were held between the GoU and the LRA, mediated by Riek Machar, the Vice President of South Sudan. However, LRA leader Joseph Kony refused to sign the final peace agreement, and the LRA has been at large since. Military campaigns by all parties to the 20-year-conflict led to fierce attacks on civilian populations across Northern Uganda, which included raping, mutilating and abducting civilians, raiding villages, and looting and burning houses. The conflict has had disastrous economic, physical, social and psychological effects on the entire civilian population. It is essential to note that both during and after the conflict, women played important roles as combatants, in support roles in the military as well as the domestic sphere and in initiating community-led approaches to ending the violence. Nonetheless, transitional justice discussions in Uganda almost exclusively focus on male parties to the conflict only. For a policy brief describing gender-based violence, its occurrence and effects on local communities during and after the conflict in Northern Uganda, see Sylvia Pinia and Frederike Bubenzer, *Gender Justice and Reconciliation in Uganda* (Institute for Justice and Reconciliation 2011).

<sup>382</sup> For the full text of the government's declaration, see the Report by the Institute for War and Peace Reporting at <https://iwpr.net/global-voices/can-traditional-rituals-bring-justice-northern-uganda> [15.03.2017].

<sup>383</sup> A small sample of the critical literature on Ugandan Peace Talks includes the following: Ronald R. Atkinson, "From Uganda to the Congo and Beyond: Pursuing the Lord's Resistance Army" New York: International Peace Institute, December 2009 at [www.ipacademy.org/media/pdf/publications/e\\_pub\\_uganda\\_to\\_congo.pdf](http://www.ipacademy.org/media/pdf/publications/e_pub_uganda_to_congo.pdf) [15.03.2017]; Adam Branch, "Uganda's civil war and the politics of ICC intervention" (2007) 21 *Ethics and International Affairs* 179; Mareike Schomerus, "Small Arms Survey. The Lord's Resistance Army in Sudan: A History and Overview" (Geneva: Graduate Institute of International Studies, 2007); Moses Chrispus Okello, "The false polarisation of peace and justice in Uganda" Expert paper "Workshop 2—Justice in Situations of Ongoing Conflict" Conference organized by International Center for Transitional Justice. Nuremberg, Germany, June 2007. [www.peace-justice-conference.info/download/WS-2-Expert%20Paper-Okello.pdf](http://www.peace-justice-conference.info/download/WS-2-Expert%20Paper-Okello.pdf) [15.03.2017]. The author of the present manuscript had the privilege of working with Moses Okello and Chris Dolan in Uganda on issues pertaining to transitional justice measures and forced migration in the summer of 2012.

order do not have to take place in opposition to or in isolation from ICCT involvement.<sup>384</sup> However, the question remains as to whether simply prosecuting and convicting Kony and a few of his senior commanders would indeed satisfy the needs of justice in the Ugandan context.<sup>385</sup> Rather, a multi-layered, locally nuanced set of approaches to finding justice and peace is more likely to deliver the needed results, a possibility that could be made into reality through the mechanisms of a hybrid court. Overall, the verdict from the Global South is that the ICC in particular pursued a narrow criminal justice mandate under the Rome Statute to investigate and prosecute those primarily responsible for committing mass atrocities.<sup>386</sup>

As stated, according to the ICC's defining principle of complementarity, the Court will take on an atrocities case only if the domestic courts are "unable or unwilling" to do so. The Court may also agree to hand over the prosecution of a case in midstream, if its judges are convinced that the proposed special domestic (or hybrid) court would be as strict and fair in its application of justice—including its sanctions—as the ICC itself. This is an option that could be put into practice for cases pertaining to countries such as Sudan and Uganda. It may indeed become a necessary route to take, as in recent years the ICC has faced a growing degree of suspicion since its first trial was suspended and the defendant, the Congolese warlord Thomas Lubanga, was subsequently ordered to be released.<sup>387</sup> In the meantime, a decade of war began in the Democratic Republic of Congo (DRC) with Laurent-Désiré Kabila's 1996–1997 campaign to overthrow the repressive rule of Mobutu Sese Seko in the country then known as Zaire.

Here is how this peculiar story seems to have unfolded: in resource-rich Ituri province in the country's northeast, Thomas Lubanga led the Union des Patriotes Congolais (UPC) and its militia, the Forces Patriotiques pour la Libération du Congo. In 2004, the DRC herself invited the

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<sup>384</sup> Lucy Hovil and Joanna Quinn, "Peace First, Justice Later: Traditional Justice in Northern Uganda" Refugee Law Project Working Paper No. 17. (Kampala: Refugee Law Project, 2005) at [www.refugeelawproject.org/working\\_papers.php](http://www.refugeelawproject.org/working_papers.php) [15.03.2017].

<sup>385</sup> International Crisis Group, *Northern Uganda: The road to peace, with or without Kony*. Africa Report No. 146, 10 December 2008.

<sup>386</sup> See Franziska Boehme, "'We Chose Africa': South Africa and the Regional Politics of Cooperation with the International Criminal Court" (2016) 24 *International Journal of Transitional Justice*.

<sup>387</sup> Congolese warlord Thomas Lubanga was found guilty of war crimes in recruiting and using child soldiers. The prosecutor, Luis Moreno-Ocampo, has vowed to seek the maximum sentence for Lubanga and called the conviction a victory for humanity. However, it is worthy of note that the case was twice delayed due to stays imposed by the judges in response to the office of the prosecutor's failure to disclose information to the defense. Consequently, the trial chamber ordered the release of Lubanga and the trial almost came to a premature end. See the BBC News article (March 28, 2012) on the issue at <http://www.bbc.com/news/world-africa-18779726> [15.03.2017].

ICC to investigate and prosecute war crimes that had occurred in the DRC since July 1, 2002.<sup>388</sup> Meanwhile, DRC authorities arrested Lubanga in March 2005 and charged him with genocide and crimes against humanity, based on provisions of the DRC's military criminal code. These charges concerned the UPC's alleged participation in the killing of civilians in the villages they attacked. In March 2005, DRC authorities issued a second warrant charging Lubanga with illegal detention and murder. After these two warrants, the ICC issued a complementary arrest warrant accusing Thomas Lubanga Dyilo of war crimes for conscripting children as soldiers in 2006. However, the Court had to cancel the beginning of his trial in June 2008 because of what is stated as "complex procedural issues." The two other Congolese warlords, Mathieu Ngudjolo Chui and Germain Katanga, are awaiting trial in The Hague, while a fourth, Bosco Ntaganda, has been indicted but is still at large.<sup>389</sup> None of these long-drawn-out proceedings has helped matters concerning how to deal with the ICC in particular, and ICCTs in general, as they become involved with mass crimes in the post-colonial world. The growing tendency and desire is to see locally rooted and regionally legitimate institutions come on board instead.<sup>390</sup>

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<sup>388</sup> In 2004, the Congolese government invited the ICC to investigate and prosecute war crimes that have occurred in the DRC since July 1, 2002. The ICC has issued four arrest warrants concerning the conflict in the Ituri district of the DRC, for Thomas Lubanga Dyilo and the following suspects: Germain Katanga, alleged commander of the Force de Résistance Patriotique en Ituri (FRPI). The ICC charged Katanga with multiple counts of war crimes and crimes against humanity. Katanga has been in ICC custody since 2007. Mathieu Ngudjolo Chui, alleged former leader of the Front National Intégrationniste (FNI) and a colonel in the National Army of the DRC (FARDC). The ICC charged Ngudjolo with multiple counts of war crimes and crimes against humanity in Ituri. Ngudjolo was transferred to ICC custody in February 2008. The ICC has joined Ngudjolo's case with that of Germain Katanga. In September 2008, a Pre-Trial Chamber confirmed the charges against Ngudjolo and Katanga. Bosco Ntaganda, alleged former deputy chief of the general staff of the FPLC and alleged current chief of staff of the Congrès National pour la Défense du Peuple (CNDP). The ICC unsealed an arrest warrant for Ntaganda on charges focusing on recruitment of child soldiers. Ntaganda remains at large. In addition to the four ICC cases concerning the Ituri conflict in the DRC, the ICC has arrested another Congolese suspected war criminal: Jean-Pierre Bemba Gombo, leading Congolese opposition figure, president of the Mouvement de Libération du Congo (MLC), senator and former vice-president. Bemba was arrested in Belgium in May 2008 on an ICC arrest warrant charging him with war crimes committed in the Central African Republic in 2002-2003. He was then transferred to ICC custody in The Hague in July 2008. See the special report by the International Justice Monitor at <https://www.ijmonitor.org/category/germain-katanga-and-mathieu-ngudjolo-chui/> [15.03.2017].

<sup>389</sup> For the full text of the ICC Pre-Trial Chamber decision concerning the Case: *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*

Situation: Situation in the Democratic Republic of the Congo made in 2008, see <https://www.icc-cpi.int/Pages/record.aspx?docNo=ICC-01/04-01/07-717> [15.03.2017].

<sup>390</sup> See Ben Okolo, "African Renaissance, African Conflicts and the Regional Security Complex" (2010) 16 *The state of Africa 2010/11: Parameters and legacies of governance and issue areas* 103.

## CONCLUSION: HYBRID COURTS AS NEW ACTORS OF INTERNATIONAL CRIMINAL LAW IN THE GLOBAL SOUTH?

Major cases that have taken place before hybrid tribunals all merit close examination in terms of their legal and political context, as well as their procedural details and jurisdictional outcomes. To this end, in the remaining pages a select number of these cases will be examined. In the Extraordinary Chambers of the Courts of Cambodia (ECCC), for instance, there are two particularly critical cases: Case 001 (Kaing Guek Eav a.k.a. “Duch”), and Case 002 (with defendants Nuon Chea, Khieu Samphan, Ieng Sary, and Ieng Thirith). The individuals mentioned were each charged with war crimes, genocide, crimes against humanity, and crimes under Cambodian Law.<sup>391</sup> Meanwhile, Case 003 and Case 004 have been opposed by the Cambodian government, as a result of which several members of the court’s international staff resigned from the tribunal. At the Special Court for Sierra Leone (SCSL), the trials for the Civil Defense Forces (CDF; including Sam Hinga Norman, Moinina Fofana, and Allieu Kondewa), the Revolutionary United Front (RUF; including the surviving leaders Issay Sesay, Morris Kallon, and Augustine Gbao), and the Armed Forces Revolutionary Council (AFRC; Alex Tamba Brima, Brima Bazzy Kamara and Santigie Borbor Kanu), along with the indictment, arrest, and prosecution of Charles Taylor, are of particular concern for the future of international criminal law from the perspective of its future in the Global South.<sup>392</sup> There are also the cases of Julio Fernandez and Joao Fernandez, The Los Palos Case, and the indictment of General Wiranto before the Special Panel for Serious Crimes, Dili. At the Bosnia War Crimes Chamber, the Foča Rape Camp Trials as well as the Kravica Case, focusing on violence related to the Srebrenica massacres in 1995, are of significant concern. Similarly, in Kosovo, the trial of Milos Jokic as well as the Racak massacre and the 2001 bombing of the Nis Express (Florim Ejupi) are to be followed closely, in terms of both their results and their reception in the larger context of bringing closure to the war and atrocities that marred former Yugoslav Republics in South-Eastern Europe.

All of these hybrid courts of the Global South operate based on the same principles that guide international criminal law and human rights law nexus in other, larger, regional and

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<sup>391</sup> For details of these cases, see the documents published by ECCC at <https://www.eccc.gov.kh/en/case/topic/1?page=6> and <https://www.eccc.gov.kh/en/case/topic/1299> [15.03.2017].

<sup>392</sup> For detailed information and case summaries, see Aaron Fichtelberg, “Leading Cases of the Hybrid Courts” in *Hybrid Tribunals* (Springer New York, 2015) at 113-175.

international courts. First and foremost, whether they appear as witnesses, victim participants, or civil parties in mass crimes proceedings, victims contribute vital evidence and insight bearing on the guilt or innocence of the accused. Their testimony is accepted as a categorically valid contribution to the truth-telling function of the process, and under some circumstances used as a base for coming to terms with societal trauma. However, as has been widely discussed, victim testimonies can also lead to re-traumatization.<sup>393</sup> Furthermore, from a jurisdictional point of view, they could compromise the fairness or efficiency of the judicial process if emotional distress is regarded as a factor that undermines the testimony's relevance, credibility, or focus. Inherent tensions are inevitable due to the nature of courtroom experience for victims, who are subjected to pointed questioning and cross-examination on the details of very traumatic events as part of standard procedures that are essential for a fair criminal trial. What is unique about the hybrid courts is the way they deal with such tensions, and the flexibility and innovativeness they exhibit compared to the much more rigid structures embraced by the larger courts. A key example in this regard is the UN-backed hybrid court established to address crimes of the Pol Pot era. The ECCC has tried to facilitate victim testimony both through formal procedures and through informal trial management strategies, including two important innovations in international criminal justice. Specifically, the ECCC spearheaded the special "victim impact hearings" and "statements of suffering," both of which allow civil parties to describe harms they endured under Khmer Rouge rule before a judgment is reached. These types of interventions help ease the tension between survivors' interests and the rights of the accused, which is for the benefit of the society at large.<sup>394</sup>

When it comes to mass atrocities and egregious crimes, the techno-legal transitional justice paradigm and the heyday of transitional justice institutions funded by the global North but operating across the Global South is beginning to pass. Therapeutic legalism did not deliver.<sup>395</sup> This creates a wonderful window of opportunity for the societies in the Global South. Similar to standard international judicial bodies, such as the International Criminal Court or the European

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<sup>393</sup> See Cathy Caruth, *Unclaimed experience: Trauma, narrative, and history* (JHU Press, 2016); Ross McGarry & Sandra Walklate, *Victims: Trauma, testimony and justice* (Routledge, 2015); and Dominick LaCapra, *Writing history, writing trauma* (JHU Press, 2014).

<sup>394</sup> Brianne McGonigle Leyh, "Victim-Oriented Measures at International Criminal Institutions: Participation and its Pitfalls" (2012) 12 *International Criminal Law Review* 375.

<sup>395</sup> The term "therapeutic legalism" was coined by Duncan McCargo. See Duncan McCargo, "Transitional Justice and Its Discontents" (2015) 26 *Journal of Democracy* 5.

Court of Human Rights, the hybrid and “internationalized” criminal organs are composed of independent judges, working on the basis of predetermined rules of procedure, and rendering binding decisions. They are subject to the same principles governing the work of all international judiciaries, including due process, impartiality, and independence.<sup>396</sup> Within this wider class of international judicial bodies, however, hybrid courts belong to a specific order. Similar to the ICC, ICTY, and ICTR, their goal has been to sanction serious violations of international law in the area of international humanitarian law and human rights law, to secure individual accountability, and to act as a deterrence mechanism against future violations. To serve these functions, these internationalized criminal courts impose criminal penalties. This is perhaps the most critical feature setting this group of judicial bodies apart from other international judicial bodies. Moreover, like the ICTY and ICTR, but unlike the ICC, they are by their nature *ad hoc* institutions. They have been created to address particular situations, for a limited period of time, and they respond to singular political and historical circumstances. Finally, like all other international criminal organs, in order to carry out their mission the hybrid courts rely on cooperation from international legal organs such as the ICC and judicial assistance by individual states, as well as the endorsement of international organizations such as the UN. In summary, hybrid courts, as a specific form of internationalized criminal institutions, constitute a group of their own, and yet they operate within the larger field of other international judicial and political institutions and entities. They possess common characteristics that set them apart from other cognate entities. In some cases they are part of the judiciary of a given country, while in others, they may have been grafted onto the local judicial system by outside actors and possess a semi-independent status. In all the cases covered in this chapter, however, their make-up is markedly mixed, incorporating international and national features, and their mandate is circumscribed and issue-specific. They all are composed of international and local staff (judges, prosecutors, support staff), and apply a compound of international and national substantial and procedural law. The remaining question is whether these hybrid courts constitute the future of international criminal law in terms of the dissemination of jurisprudence produced and endorsed by central institutions such as the ICC. More specifically, one must carefully examine their significance in terms of an

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<sup>396</sup> For a detailed critique of the workings of the ICC and both its strengths and its failings in terms of upholding foundational principles of criminal justice, see Larry May & Shannon Fyfe, *International Criminal Tribunals: A Normative Defense* (Cambridge University Press, 2017).

international regime of accountability regarding the crimes that now fall under the purview of the Rome Statute.

Throughout this chapter, I posited that international criminal law on war crimes, crimes against humanity, and genocide—perhaps better clustered together as societal crimes—constitutes a fragmented accountability regime. The common mistake regarding this regime is to limit the roster of actors that constitute it to state parties and international institutions such as international courts. The ICC is an independent, permanent court that tries persons accused of the most serious crimes of international concern under its aegis. The ICC was established based on a treaty, which was originally joined by 108 countries.<sup>397</sup> However, the ICC is a court of last resort. It will not act if a case is investigated or prosecuted by a national judicial system unless the national proceedings are not genuine, for example if formal proceedings were undertaken solely to shield a person from criminal responsibility. In addition, the ICC can only try those accused of the gravest crimes. One of the great innovations of the Statute of the International Criminal Court and its Rules of Procedure and Evidence is the series of rights granted to victims. For the first time in the history of international criminal justice, barring the Eichmann trials that took place in a domestic court, victims have the possibility under the Statute to present their views and observations before the Court. Participation before the Court may occur at various stages of proceedings, and it may take different forms. Although it is up to the judges to give directions as to the timing and manner of participation, the victim-based provisions within the Rome Statute provide victims with the opportunity to have their voices heard and to obtain, where appropriate, different forms of reparation. At least in theory, it is this balance between retributive and restorative justice that enables the ICC to carry out a mandate of not only bringing criminals to justice, but also helping the victims to obtain justice and have a sense of closure. However, as we have seen from the existing trials, in reality hybrid courts are much better equipped than the ICC to ensure such results.

In setting up the ICC, its founders stated two main aims: to end impunity for the worst

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<sup>397</sup> See the lengthy tally of state behavior provided in Nasser Zammit, *Human Rights and Responsibility* (Connaissances et savoirs, 2012).



mass crimes, and to deter would-be perpetrators.<sup>398</sup> Since its inception, three States Parties to the Rome Statute—Uganda, the Democratic Republic of the Congo (DRC), and the Central African Republic—have referred situations occurring on their territories to the Court. In addition, the Security Council has referred the situation in Darfur, Sudan—a non-State Party. The Court’s Prosecutor has opened and conducted investigations in all of the above-mentioned situations.<sup>399</sup> Given that the Court’s first four cases are all in Africa, no doubt the accusation of neo-colonial bias is raising its head. This is despite the fact that, in Congo, Uganda and the Central African Republic, it was the governments themselves that requested the court to investigate. There are also charges that accuse the Court of being used by corrupt leaders and dictators in the Global South, who use the Court as a stage to wage battles against the opposition in their countries. In this context, hybrid courts do seem to offer a much-needed new platform for accountability in international criminal law. Another recent case that caused immense controversy is that of Charles Taylor. In May 2010, the trial of Charles Taylor at the Special Court for Sierra Leone (SCSL) took a dramatic twist as prosecutors requested the judges to issue a subpoena to supermodel Naomi Campbell, requiring her appearance before the Chambers.<sup>400</sup> The SCSL Prosecutors made an application that they be allowed to reopen their case, which was closed in February 2009, or to bring evidence in rebuttal against Taylor by calling three additional witnesses, Campbell, Carole White, and Mia Farrow. Campbell was required to testify as a witness about a diamond gift she allegedly received from Taylor in South Africa in 1997. Campbell’s evidence eventually supported the Prosecution’s allegations that the Accused used rough diamonds for personal enrichment and arms purchases for Sierra Leone, particularly during the AFRC/RUF period. As the actual recipient of the accused’ gift of diamonds, Campbell was in a position to provide material evidence about this event. This case indicated that the cooperation of states whose citizens are subpoenaed is essential to the functioning of these hybrid judicial bodies. The witness’ voice is of key importance to justify the exercise of extraordinary judicial power in international criminal law. That being said, concerns remain about the efficacy of hybrid

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<sup>398</sup> See, for instance, the transcript of the group discussion titled “Millennium 2000: Would an International Criminal Court Help or Hinder Pursuit of Global Justice,” available online at <http://transcripts.cnn.com/TRANSCRIPTS/0001/02/bp.00.html> [15.03.2017].

<sup>399</sup> The information on the ongoing trials and cases in the Court is taken from ICC’s official site, <http://www.icc-cpi.int/Menus/ICC/Situations+and+Cases/> (last accessed on November 22<sup>nd</sup>, 2009).

<sup>400</sup> See Charles Call, “Is transitional justice really just?” (2004) 11 *The Brown journal of world affairs* 101.

courts in carrying forward the mandate of the Rome Statute. Yet, what is the alternative? Perhaps the problem lies with our expectations from transitional justice, or the rigidity of institutional forms that the existing framework for international criminal law imposes rather, than the hybrid courts themselves.

On a final note, although the inherent pluralism of international criminal law has gained increasing acceptance in recent years, scholarship on sentencing, for instance, remains surprisingly universalist. Leading scholars advance sentencing principles that are intended to apply to international crimes, no matter where they are prosecuted.<sup>401</sup> Here, I wish to challenge this viewpoint and the resultant flat reading of ICC jurisprudence in that regard, both empirically and normatively. Scholarly expectations of sentencing consistency across international courts are premised on the misguided and factually unsupported notion that international courts constitute central components of a unified international criminal justice system. Sentencing disparities across hybrid courts not only can be justified, but are normatively desirable because they respond to a host of crucial differences in domestic criminal prosecutions pertaining to international crimes, including differences in the kinds of atrocities that occurred, the rank and status of the perpetrators who can be prosecuted, and the hybrid courts' own mandates. These differences create the need for differentiated sentencing schemes across different tribunals and courts. It is high time that we accept domestic sentencing norms as a particularly crucial factor that should

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<sup>401</sup> Sentencing in international criminal law is an under-attended field. Based on the statutes and decisions of the current International Tribunals for the former Yugoslavia (ICTY) and Rwanda (ICTR), one critical aspect of sentencing emerges as how judges assess the harm caused by the perpetration of international crimes. The aforementioned Tribunals' judges had great discretion in imposing sentences. All crimes within their jurisdiction were punished with terms ranging from one day to life imprisonment. This resulted in a lack of uniformity in sentencing decisions, both in sentence length and in methodology. There is indeed a need for in-depth conversations concerning the framework for evaluating the harm associated with the different kinds of crimes within the jurisdiction of the ICCTs as well as hybrid courts. The crimes within the jurisdiction of the ICC have two sets of elements: the chapeau, which confers international jurisdiction over the offense, and the enumerated acts, which resemble domestic crimes. Most hybrid courts consider only the harm associated with the enumerated act when imposing an appropriate sentence. However, it is critical that the courts also consider the chapeau elements in their harm determinations. These international criminal elements encode important information about the secondary harms caused by the offenses. Equally importantly, they reflect the norms underlying the internationalization of the crime and thus reinforce the distinction between international and domestic criminal offenses. In this regard, the consistency and ultimately the legitimacy of international criminal law as it is applied in hybrid courts are of paramount importance for existing and future enforcement regimes. See Andrea Carcano, "Sentencing and the gravity of the offence in international criminal law" (2002) 51 *International and Comparative Law Quarterly* 583; Allison Marston Danner, "Constructing a hierarchy of crimes in international criminal law sentencing" (2001) 87 *Virginia Law Review* 415, and William Schabas, "Sentencing by international tribunals: a human rights approach" (1996) 7 *Duke J. Comp. & Int'l L.* 461.

influence every hybrid court's specific sentencing scheme. As I discussed in the opening chapter of this dissertation, traditional accounts of international law entertain a distinction between monist and dualist legal systems.<sup>402</sup> In monist systems, courts apply international law directly. In dualist systems, direct application is not an option, so courts apply international law indirectly, or not at all. Although this distinction may be formally correct, it tells us very little about the functional role of domestic courts in the international legal system.

In this chapter, both a functional and a normative account of hybrid courts was presented, with a particular focus on the distinctions among the horizontal, vertical, and transnational legal obligations and merits of such courts. Modern international law regulates horizontal relationships between states, vertical relationships between states and private parties, and transnational relationships between private parties whose interactions cross state lines. In conjunction, the role of domestic courts in interpreting and applying international law varies greatly, depending on whether the international rule at issue is horizontal, vertical, or transnational. As the examples examined here demonstrate, the willingness or the ability of state-based courts to apply international law is not solely a legal matter. It depends heavily on the political nature of the subject matter of the trials. In effect, domestic courts rarely interpret horizontal rules. Rather, they refer to treaties that regulate the horizontal relationship between states as *ultra vires* in nature. As a result, implementation of horizontal obligations as dictated by international law jurisdiction typically involves executive and not judicial action. Furthermore, this is true for both monist and dualist regimes. However, the role of domestic courts in interpreting and applying vertical rules, such as human rights treaties, tends to be different. Particular political relationships may affect the willingness of domestic or hybrid courts to implement international law, and to effect legal change based on their own initiative. This chapter drew on materials from several jurisdictions, all of them situated in the Global South, to present a holistic account of the role played by hybrid courts in interpreting and applying horizontal, transnational, and vertical international legal rules. As these cases demonstrate, the history of the application of universal

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<sup>402</sup> See the original formulation of this opposition in Gabriel Joseph Starke, "Monism and dualism in the theory of international law" (1936) 17 *Brit. YB Int'l L.* 66. In more recent times, Leslie Green's work particularly reintroduced this debate. See Robert A. Friedlander, "The Foundations of International Criminal Law: A Present-Day Inquiry" (1983) 15 *Case W. Res. J. Int'l L.* 13; and Leslie C. Green, "An International Criminal Code-Now" (1976) 3 *Dalhousie LJ* 560.

jurisdiction over core international crimes has been uneven. Non-governmental organization (NGO) activism has been regarded as a significant factor in this regard, but much less attention has been paid to the political composition of the public in terms of their willingness to bring certain matters to the courtroom. After the Pinochet case in the UK, the “amputation” of the universal jurisdiction laws in Belgium in 2003 and Spain in 2009 and 2014 made it clear that expecting one’s unfinished business to be settled in another country’s courts was not all that realistic.

Subsequently, an alternative view of this history emerged. Universal jurisdiction is not necessarily on the decline. The number of universal jurisdiction-related statutes and trials has increased significantly in recent years, indicating the fact that the trajectory of universal jurisdiction is shifting towards hybrid and at-home courts. Perhaps it is time to revise received wisdom concerning the operation of international criminal law in the Global South. Rather than seeing the matter as an ongoing competition between two conceptions of the role states play in the universal jurisdiction regime (i.e. national versus international accountability and enforcement regimes), the emphasis could be put on the mandate of the jurisdiction itself. States are not necessarily the “global enforcers” of the Rome Statute *verbatim*. Although signatory states have a role in preventing and punishing core international crimes committed anywhere in the world, which is the “no safe haven” conception, states should not be seen as the guardian of the victims of crimes perpetrated by other states, either.<sup>403</sup> More to the point, the anti-impunity rationale of international criminal law should not be reduced to legalistic position and a zealously Northern rhetoric about universal jurisdiction. The “post-colonial legalism” approach to international law has already established a critical jurisprudential tradition that asks how actors use and apply law, in order to understand how law obtains meaning, is practised, and changes over time.<sup>404</sup> Combined with TWAIL scholarship, it is possible to ask different questions about the possibility of life after Rome Statute, so to speak. The rise of transnational activity that led to an enlarged scope of both national and transnational problem-solving strategies through

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<sup>403</sup> Máximo Langer, "Universal Jurisdiction is Not Disappearing The Shift from ‘Global Enforcer’ to ‘No Safe Haven’ Universal Jurisdiction" (2015) 13 *Journal of International Criminal Justice* 245.

<sup>404</sup> See Partha Chatterjee, "Introduction Postcolonial Legalism" (2014) 34 *Comparative Studies of South Asia, Africa and the Middle East* 224. This is a special issue that explores the specific field of postcolonial practices of the law in four countries: India, Sri Lanka, Lebanon, and South Africa. The key concern in all discussions of the legal-constitutional framework of postcolonial politics is the question of social transformation induced by law rather than law’s superior position as an abstract construct.

international law further enhances this viewpoint. Debates on universal jurisdiction concerning gross and systemic humanitarian law violations have long suffered from a single focus on institutional certainties or a neutered state-centric worldview.<sup>405</sup> It is time to look closely at the realities of universal jurisdiction on the ground, and to give up the obsession with what goes on in the chambers of international courts or national courts in the North, to come up with strategies and answers about human suffering in the Global South from within.

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<sup>405</sup> Nancy Combs, "Seeking Inconsistency: Advancing Pluralism in International Criminal Sentencing" (2015) 41 *Yale Journal of International Law* 387.

## *Chapter VI. Mea culpa, Sua culpa, Tua Maxima Culpa: Collective Responsibility and Legal Judgment*<sup>406</sup>

### INTRODUCTION

*ad auctores reddit sceleris coacti culpa* –the guilt of imposed crimes lies on those who impose them.

Seneca.<sup>407</sup>

*cavendum est ne major poena, quam culpa, sit*—care should be taken in all cases, that the punishment not exceed the guilt.

Cicero.<sup>408</sup>

If only we would abide by the ethical guidelines offered by the Romans, problematic aspects of collective responsibility in law and legal morality could perhaps be successfully avoided. However, a harmonious relationship between social life and political peace is not so easy to attain or sustain during deep crises and mass violence in our current era. Issues concerning justice and personal desert at times of turmoil and uproar such as genocidal violence, ethnic cleansing, or crimes against humanity cannot be reduced to proven links between punishable individual actions, international criminal law and related regimes of responsibility-cum-accountability. The intricacies of mass political violence and societal crimes render such direct and methodical solutions lacking. This final chapter of the dissertation thus invites the

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<sup>406</sup> I am in debt to Les Jacobs for guiding me through the debate on Aristotelian ethics, re-reading Arendt and in general in terms of how to approach the law and society relationship in a critical and yet methodical manner. The latin term *Mea culpa, Sua culpa, Tua Maxima Culpa* could be translates as “through my fault, through your fault, we are where the fault lies most” and is an acknowledgement of having done wrong collectively.

<sup>407</sup> See the Latin-English dictionary Eudict online at <http://www.eudict.com/?lang=lateng&word=ad%20auctores%20redit%20sceleris%20coacti%20culpa> [21.03.2017] For the full text of Seneca’s work on Melancholy from which this quote comes, see <http://www.gutenberg.org/files/10800/10800-h/ampart1.html> [21.03.2017].

<sup>408</sup> For the translations, see Eudict at <http://www.eudict.com/?lang=lateng&word=cavendum%20est%20ne%20major%20poena,%20quam%20culpa,%20sit;%20et%20ne%20iisdem%20de%20causis%20alii%20plectantur,%20alii%20ne%20appellentur%20quidem> [21.03.2017].

reader to consider the limitations of seeking societal peace and political transformation mainly on the grounds of achieving criminal accountability concerning the individual perpetrators of mass atrocities. All of the examples covered in the previous pages pertain to post-WWII applications of universal jurisdiction concerning egregious crimes. They also belong to a particularly difficult field of inquiry: transitional justice. The field of transitional justice is increasingly characterized by the dominance of legalism to the detriment of advocacy, politics, scholarship and practice.<sup>409</sup> My fear is that correctives to such leanings are by and large missing in legal scholarship. Furthermore, the tendency towards aggrandizement of litigation-related measures is further supported by the success of hybrid courts and other localized applications of universal jurisdiction in international criminal law. In this closing chapter, I will thus venture a politico-philosophical inquiry underlining the importance of legal humility and contextualizing the criminology of transitional justice. As law's place at the heart of transition from societal and political conflicts becomes increasingly secure, the time is right for a more honest appraisal of the limitations of legalism and a correspondingly greater willingness to countenance the role of forms of knowledge pertaining to accountability for mass atrocities. Specifically, an endowed debate on the difficult subject of collective responsibility will both thicken the subject of criminal accountability for mass violence, and deliver a methodological insight to more effective changes on the ground.

How far are our lives implicated by what other people do to each other *indirectly*? How much responsibility falls on our shoulders from the harms that flow from the social, economic, and political institutions in which we are embedded, even if we do not inflict harm while occupying positions of authority? Do our relations as individuals to spheres of collective existence lead to complicity and collective responsibility in the event that they lead to harm for select sectors of the society?<sup>410</sup> In the following pages, I will argue that the relationship between collective responsibility, individual guilt and criminal accountability is a very critical albeit difficult one, often avoided entirely in international criminal law. And yet, it provides a precious

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<sup>409</sup> See Nergis Canefe, ed., *Transitional Justice and Forced Migration: Critical Perspectives from the Global South* (Cambridge University Press, forthcoming).

<sup>410</sup> As Christopher Kutz' work shows, the two prevailing theories of moral philosophy, Kantianism and consequentialism, both have difficulties resolving problems concerning complicity in collective violence. See Christopher Kutz, *Complicity: Ethics and Law for a Collective Age* (Cambridge University Press, 2007). Also see the classical work of Andrew Arato, "The Bush Tribunals and the Specter of Dictatorship" (2002) 9 *Constellations* 457.

point of entry to the nature of our relations with society and the state, of which we are a part and for which we are the harbingers of legitimacy. Here, I posit that international criminal law scholarship needs a richer theory of accountability, in which our understanding of individual responsibility in relation to societal acts of violence not only allows for but demands an analysis of collective action and thus contextualizes litigation in this select area. Specifically, I will argue that what should be sought after is not more complicated punishment schemes but rather a substantive way of addressing harm we give to each other both by commission and by omission.<sup>411</sup> In this context, intentional and purposeful collective action, collective moral responsibility and collective guilt, individual responsibility for (and in) collective wrongs, collective legal obligations to victims of societal and political crimes, and individual moral responsibility with regard to wrongful social and political acts constitute key entries to a meaningful politico-legal debate on collective responsibility and legal judgment. I will pursue these questions in a context originally set by Hannah Arendt's work on legal judgment.

In *Eichmann in Jerusalem*, her account of the trial of Adolf Eichmann, Arendt used the phrase "the banality of evil," describing how a man who was neither a monster nor a demon could nevertheless be an agent of the most extreme and evil acts of violence and destruction.<sup>412</sup> This subsequently prompted her to readdress fundamental questions and concerns about the nature of [collective] violence and our making of moral choices. Her *Responsibility and Judgment*, a sequel to her work on Eichmann in this regard, gathers together unpublished writings from the last decade of Arendt's life.<sup>413</sup> In these later works, she strived to further explicate the meaning of the Eichmann trial in Jerusalem. At the heart of this series of essays lies a profound ethical investigation concerning the use of traditional moral truths as politico-legal standards to

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<sup>411</sup> On this issue, see Larry May, *Crimes Against Humanity: A Normative Account*. (Cambridge University Press, 2007). May's work is the first book-length treatment of the philosophical foundations of international criminal law. His focus is on the moral, legal, and political questions that arise when individuals who commit collective crimes, such as crimes against humanity, are held accountable by international criminal tribunals. These tribunals challenge one of the most sacred prerogatives of states—sovereignty. Breaches in this sovereignty can be justified only in limited circumstances, which constitutes the minimalist threshold of the justification for international prosecution. May's work began an important discussion inside the field of international criminal law. What I purport here is to carry this discussion forward in conjunction with moral theories of judgment in applied legal philosophy and legal ethics.

<sup>412</sup> See Hannah Arendt, *Eichmann in Jerusalem* (Penguin, 1963). Also see Jacob Robinson, *And the Crooked Shall Be Made Straight: the Eichmann Trial, the Jewish Catastrophe, and Hannah Arendt's Narrative* (MacMillan, 1965); and Seyla Benhabib, "Arendt's Eichmann in Jerusalem" in Dana Richard Villa, ed. *The Cambridge Companion to Hannah Arendt* (Cambridge University Press, 2000) at 65-85.

<sup>413</sup> See Hannah Arendt, *Responsibility and Judgment* (Schocken Books, 2003).



judge criminality as it relates to mass violence. Arendt's analysis of judgment tests to its limits our ability to distinguish good from evil and right from wrong. The radical evil she had addressed in her earlier work on totalitarianism evolves into a much more pernicious account of evil, almost independent of political ideology, whose execution is limitless when the perpetrator feels no remorse and can erase the memory of his/her acts as soon as they are committed. For such acts, individual criminal responsibility, even if it comes tied to mass crimes such as crimes against humanity, does not suffice for us to understand the true nature of the harm and wrong implicated by such violent acts. Arendt's conclusion has serious repercussions for contemporary conceptions of accountability at the level of international criminal law, and the debate presented here is a token of dedication to think further in that vein.

We are currently witnessing a bewildering variety of developments in regimes of control articulated in domestic legislation of criminal justice. These range from demands for execution or preventive detention for sexual predators, paedophiles, and persistent violent offenders to the development of dispersed, designed in-control regimes for the continual, silent and largely invisible work of the assessment, management, communication and control of risk-laden groups deemed prone to commit crimes. Political programmes of crime control cycle through the alternatives from "prison works" and "boot camps," through "community corrections," "reintegrative shaming," "therapeutic rehabilitation" to "lifetime imprisonment without parole" and ultimately the death penalty. Concerns about illegality and crime at the individual level are clearly articulated both by judicial institutions and security practices. Nonetheless, at a more general level, little attention is paid to the inner workings of mass political violence and systemic societal crimes. In an attempt to address this lacuna, I will pinpoint the ways in which accountability regimes in international criminal law have been severely individualized with regard to practices of government illegality and state criminality. In the post-Rome Statute era of international criminal law, the pervasive image of the perpetrator of crime as the juridical subject of the rule of law is no doubt a great leap forward towards the erosion of unjustified defense of state sovereignty and related individual immunities. However, the forms of legal knowledge and modes of jurisprudential expertise that are implicated in these new techniques and rationalities of criminalization of state conduct also carry the danger of blinding us towards larger socio-political realities of mass crimes.

In criminal justice, individual autonomy is used as a bench-mark and an ideal that refers to the capacity to be one's own person, and to live one's life according to reasons and motives that are taken as one's own and not the product of manipulative, coercive or distorting external forces. Individual autonomy is also the central value in the Enlightenment tradition of moral philosophy. Starting with Kant, it is given fundamental status in John Stuart Mill's and his successors' versions of utilitarian liberalism. Examination of the concept of autonomy similarly figures centrally in debates over legal freedoms and rights (such as freedom of speech and the right to privacy), as well as moral and political theory pertaining to justice.<sup>414</sup> In the realm of moral theory, seeing autonomy as a foundational value stands in contrast with alternative frameworks, such as ethics of care and ethics of virtue. Consequently, these concepts are rarely brought into debates on criminal justice. Autonomy has traditionally been thought to connote independence, and hence to prioritize individual agency in moral thinking and political decision-making.

In the specific context of individual autonomy and its relation to the banality of evil connoting societal crimes, the existing arsenal of concepts we have does not suffice to deal with the massive problem in hand: namely, how to understand the weight of individual choices in producing unforgivable forms of societal and mass harm. In the following pages, I argue that we therefore have to turn to another concept, albeit one that Arendt did not contend with at all. In order to make sense of the conundrum of common-place and rule-bound choices made by individuals leading to collective forms of violence and societal wrongdoing, I will examine the idea of *collective responsibility*.<sup>415</sup> In legal philosophy, starting with Joel Feinberg's work, the debate on collective responsibility has been kept alive like a slowly burning flame, looming at the background of questions concerning accountability but rarely entering the registers of litigation-oriented takes on applications of international law in the context of transitional justice measures

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<sup>414</sup> See Immanuel Kant, *Grounding for the Metaphysics of Morals*, in I. Kant, *Ethical Philosophy*, James W. Ellington, trans. (Indianapolis, IA: Hackett Publishing [1785/1983]); and his *Metaphysical Elements of Justice*, John Ladd, ed. (Indianapolis, IN: Hackett, [1797/1999]); John Stuart Mill, *On Liberty*, David Spitz, ed. (Norton, [1859/1975]). Also see Joseph Raz, *The Morality of Freedom* (Clarendon 1986); Jennifer Nedelsky, "Reconciling Autonomy: Sources, Thoughts, and Possibilities" (1989) 1 *Yale Journal of Law and Feminism* 7; and Ben Coburn, *Autonomy and Liberalism* (Routledge, 2010).

<sup>415</sup> In legal scholarship, the concept was taken up mainly in the context of blameworthiness for litigation purposes. The first important intervention in this regard came in the form of the suggestion that actions could serve as legitimate bases for blame without objective wrongdoing *per se*. Here, intent is identified as the key. See Jan Narveson, "Collective responsibility" (2002) 6 *The Journal of Ethics* 179.

and in post-conflict societies.<sup>416</sup> It has received ire from many corners, as it goes against the basic principle that no one can be responsible, in the properly ethical or criminal sense, for the conduct of another, and that criminal responsibility squarely belongs to the individual. Concerning mass political violence and state criminality, the implications of exclusive reliance on the principle of individual criminal liability are more damaging than is evident at first.<sup>417</sup> In international criminal law, reverting to the barbarous notion of collective or group responsibility for litigation purposes is considered an absolute derogation of rights, and rightfully. What I am pursuing here is rather different: it is the notion of accountability for atrocities as societal responsibility in a distinctively moral and socio-political sense, and thus as an element that foregrounds the socio-political acceptance and legitimacy of criminal trials targeting egregious acts such as crimes against humanity.<sup>418</sup>

My purpose is not to attribute a diminishing importance to causation in criminal law, whether domestic or international in its application. In ideal circumstances where harm is not involved, the outcome of an act does not and should not effect our assessment of the moral quality of the act. In cases of acts blameworthy due to their resulting in harm or near harm, however, should our moral assessment be neutral? Furthermore, concerning acts that are committed under the aegis of state criminality, should we not look elsewhere than the individual *mens rea* component? Do such criminal acts not require societal endorsement, support and condoning? Should larger outcomes never matter in our assessment of a person's individual criminal conduct? Back in 1968, when D. E. Cooper proposed the thesis that collectives can be held responsible in a sense not reducible to the individual responsibility of members of the collective, he also stated clearly that it is not *moral* responsibility which is involved in such

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<sup>416</sup> See Joel Feinberg, "Collective responsibility" (1968) 65 *The Journal of Philosophy* 674. Also see Virginia Held, "Can a random collection of individuals be morally responsible?" (1970) 67 *The Journal of Philosophy* 471. Held's article was taken up and reevaluated extensively in Stanley Bates, "The Responsibility of Random Collections" (1971) 81 *Ethics* 343.

<sup>417</sup> See Amy Harbin and Jennifer Lewelyn, "Restorative Justice in Transitions: The Problem of 'The Community' and Collective Responsibility," in Kerry Clamp (ed.), *Restorative Justice in Transitional Settings* (Routledge, 2016) 133-151.

<sup>418</sup> Starting with Hywel D. Lewis, "Collective responsibility" (1948) 23 *Philosophy* 3, the spectrum of works to be consulted in this regard include Larry May, *Sharing responsibility* (University of Chicago Press, 1992); Larry May & Stacey Hoffman, eds. *Collective responsibility: Five decades of debate in theoretical and applied ethics* (Rowman & Littlefield Publishers, 1992); Angelo Corlett, *Collective responsibility* (John Wiley & Sons, Ltd, 2001); and Christopher Kutz, *Complicity: Ethics and law for a collective age* (Cambridge University Press, 2007).

accountability.<sup>419</sup> I strongly concur with Cooper, and invite us to revisit the somewhat dated collective responsibility debate<sup>420</sup> at the current historical junction of criminal acts pertaining to state criminality, civil war, military occupation, and neo-colonialism, almost all of which are now within the reach of the current regime of accountability in international criminal law and the universal jurisdiction jurisprudence. We have nothing to lose in this regard, and perhaps much to gain, by at least temporarily suspending our overdependence on legal institutions for finding cures to our societal ills via litigation of state criminality and political violence solely based on individual accountability.

## I. BEYOND EICHMANN: ON THE NECESSITY OF JUDGMENT

Half a century ago, while writing *Eichmann in Jerusalem*, Hannah Arendt struggled to defend the possibility of judgment against the manifold problems we encounter in our attempts to offer legally valid and morally meaningful verdicts concerning those who have committed crimes in morally bankrupt and legally defunct communities.<sup>421</sup> No doubt some of Arendt's conclusions concerning Eichmann are equivocal. Her theory of judgment in the *Eichmann* manuscript itself could even suggest that Arendt may have remained trapped within a set of Kantian assumptions

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<sup>419</sup> See the Cooper/Downie debate at David E. Cooper, "Collective responsibility" (1968) 43 *Philosophy* 258, and Robert Silcock Downie, "Collective responsibility" (1969) 44 *Philosophy* 66. Also see Howard McGary, "Morality and collective liability" (1986) 20 *The Journal of Value Inquiry* 157.

<sup>420</sup> Of the most recent vintage, see Mark Osiel, *Mass atrocity, ordinary evil and Hannah Arendt: criminal consciousness in Argentina's dirty war* (Yale University Press, 2001) and Mark Osiel, *Obedying orders: Atrocity, military discipline and the law of war* (Routledge, 2017); Robbie McVeigh, "Hate and the State: Northern Ireland, Sectarian Violence and 'Perpetrator-less Crime'" in A. Haynes et al. (eds) *Critical Perspectives on Hate Crime* (Palgrave Macmillan, 2017).

<sup>421</sup> See Hannah Arendt, *Eichmann in Jerusalem*, supra note 397 and Hannah Arendt, "Eichmann in Jerusalem: An exchange of letters between Gershom Scholem and Hannah Arendt" (1964) 22 *Encounter* 51. Commentaries on Arendt's *Eichmann in Jerusalem* are generally one of two kinds. The first group confronts the historical relevance of Arendt's observations and attempts to ascertain whether her presentation of Eichmann's trial complements or corresponds to the reality of the incommensurable suffering of the Jewish people during the Second World War. The second variety focuses on the meaning of her term "the banality of evil" by placing Arendt in a long tradition of moral and political philosophy concerned with the problem of judging evil and harm. See, for instance, Peg Birmingham, "Holes of Oblivion: The Banality of Radical Evil," (2003) 18 *Hypatia* 80. If one reads Arendt's treatise on Eichmann in light of Walter Benjamin's conceptions of history and storytelling, a third route emerges, and it becomes clear that *Eichmann in Jerusalem* was not intended to reflect reality objectively. On the contrary, Arendt aimed at avoiding the cold and detached neutrality of historicism, or as she calls it the "tradition of *sine ira et studio*," the Latin term meaning "without anger and fondness" or "without hate and zealotry." For Arendt, such an approach to Eichmann and the crimes he committed would represent a renunciation of his and others' responsibility for them. See Annabel Herzog, "Reporting and Storytelling: Eichmann in Jerusalem as Political Testimony" (2002) 68 *Thesis Eleven* 83.

in her philosophy of history, and thus ended up defining the question of freedom to act in a binary way. In contradistinction, proposing that judgment has an antinomical character and emphasizing the importance of elements of reason and sense as well as circumstance and context may allow for a better understanding of the collective nature of responsibility for societal crimes.<sup>422</sup> In Theodor Adorno's terms, judgment becomes the very test for the limits of agency and autonomy suffered by the potentially free but essentially "unfree subjects" of modernity.<sup>423</sup>

Contemporary readers of *Eichmann in Jerusalem* sometimes cast it as a juridical text, due to the fact that it is presumably more concerned with justice than with politics or ethics. Such juridical readings of Arendt's treatise on Eichmann in particular, and crimes against humanity in general, focus attention on what Arendt calls the primary challenge of the case—namely, the trial of Eichmann's unprecedented crimes against humanity in a domestic court.<sup>424</sup> However, putting so much emphasis on the nature of crimes against humanity legislation leads to our failing to attend to Arendt's principled resistance to a merely juridical response in such cases. This is clearly evidenced in her criticism of both procedural and substantive aspects of the Jerusalem Court's ruling. Taking my cue from Arendt's resistance to the Israeli Court's approach, here I argue that *Eichmann in Jerusalem* does not authorize a solely juridical approach to the

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<sup>422</sup> For a timely discussion on the presence of "ethical" narratives and images of the Holocaust in debates and demonstrations around the recent conflicts in Gaza and the need for a new form of foundation for legal reflection, legal judgment and legal justice in the Arendtian tradition of rethinking law, see David Seymour, "From Auschwitz to Jerusalem to Gaza: Ethics for the Want of Law" (2011) 6 *Journal of Global Ethics* 205.

<sup>423</sup> During the 1960s, Theodor Adorno became the most prominent challenger of both Karl Popper's philosophy of science and Martin Heidegger's philosophy of existence. The scope of Adorno's influence stems from the interdisciplinary character of his research and the critical influence of Frankfurt School to which he belonged. The thoroughness with which he examined the Western philosophical traditions from Kant onward, and the radicalness of his critique of contemporary Western society remain pivotal for any critique of moral claims concerning individual autonomy. It should also be noted that for both Adorno and Arendt, a critical reading of Kant's *Third Critique* is the indispensable means by which it is possible to locate a path pointing beyond the chiasmic structure suggested by the modernist tradition of history. See Theodore Adorno, *Can One Live after Auschwitz?: A Philosophical Reader*, ed. R. Tiedemann, trans. R. Livingstone et al. (Stanford University Press, 2003). Also see Susan Buck-Morss, *The Origin of Negative Dialectics; Theodor W. Adorno, Walter Benjamin and the Frankfurt Institute* (Free Press, 1977).

<sup>424</sup> In the course of her 1964 interview with Günter Gaus, Arendt stated her distaste for "intellectual business" that arose from witnessing the widespread and "relatively voluntary" Gleichshaltung (co-ordination) of German "intellectuals" with the Nazis in 1933. This raises the following question: what does lack of conscientious engagement with one's own acts—as exemplified by Eichmann—tell us about the relation between reason, judgment and harm? For a select list of critical readings on the subject, see Shoshana Felman, "Theatres of Justice: Arendt in Jerusalem, The Eichmann Trial and the Redefinition of Legal Meaning in the Wake of Holocaust" (2001) 27 *Critical Inquiry* 201; Paul Formosa, "Thinking, Conscience and Acting in the Face of Mass Evil" in Andrew Schaap, Danielle Celermajer and Vrasidas Karalis, eds., *Power, Judgement and Political Evil: In Conversation with Arendt* (Ashgate, 2010); Roger Berkowitz, Jeffrey Katz & Thomas Keenan, eds. *Thinking in Dark Times: Hannah Arendt on Ethics and Politics* (Fordham University Press, 2010).

unprecedented and egregious crimes under discussion, namely crimes against humanity. Instead, it could lead us to think about the importance of an “agonistic understanding of law.”<sup>425</sup> Such a take would foreground law's dependence on the political acceptance or contestation of legal strictures, maxims, and constraints. Especially with the advent of mass crimes such as crimes against humanity, Arendt asks us to attend to law's dependence on the human capacity to resist ‘illegal’ compulsions, and urges us to redefine the meaning and merit of legal institutions in light of the responsibility of all concerned for their maintenance, sustenance, and functioning.<sup>426</sup>

Foregrounding this debate, in her *Lectures on Kant's Political Philosophy*, Arendt detranscendentalizes Kant by linking Kant's judgment of taste to empirical sociability and lived experience.<sup>427</sup> However, she does not confuse Kant's idea of enlarged thinking with an actual dialogue with others. Instead, she introduces the notion of interdependence between judgment and speech (or communication). In this sense, Arendt interprets Kant's *Critique of Judgment* not as a theory of aesthetic judgment, but as an answer to the more general question of “how do I judge?” She also draws a distinction between common sense and community sense, a notion further explored in the work of Jennifer Nedelsky and others writing in the area of human rights. Working with the notion of community sense, Arendt uncovers a foundation not only for humans as political beings but also for the idea of humanity at large, a finding that is often overlooked in the literature on her theory of judgment.<sup>428</sup> Here, I would like to bring back this sense of the

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<sup>425</sup> See Lida Maxwell, “Towards an Agonistic Understanding of Law: Law and Politics in Hannah Arendt's Eichmann in Jerusalem” (2010) 11 *Contemporary Political Theory* 88. On the issue of morality and politics of law concerning Nazi crimes, see Diana Taylor, “Hannah Arendt on Judgment: Thinking for Politics” (2002) 10 *International Journal of Philosophical Studies* 151; Craig Reeves, “Exploding the Limits of Law: Judgment and Freedom in Arendt and Adorno” (2009) 15 *Res Publica* 137; Seyla Benhabib, ed. *Politics in Dark Times: Encounters with Hannah Arendt* (Cambridge University Press, 2010).

<sup>426</sup> The literature on this debate is immense. For a select set of critical readings that concentrates precisely on this subject, see Samir (2004) “Writing and Judging: Adorno, Arendt and the Chiasmus of Natural History” *Philosophy and Social Criticism* 30 (4): 445-475; Parekh, Serena (2008) *Hannah Arendt and the Challenge of Modernity: A Phenomenology of Human Rights* Routledge; Gandesha, Goldman, and Avery (2010) “An Antinomy of Political Judgment: Kant, Arendt and the Role of Purposiveness in Reflective Judgment” *Continental Philosophy Review* 43 (3): 331-352; Degryse, Anthony (2011) “Sensus Communis as a Foundation for Men as Political Beings: Arendt's Reading of Kant's Critique of Judgment” *Philosophy and Social Criticism* 37 (3): 345-358; Villa, Dana (2012) “From the Critique of Identity to Plurality of Politics: Reconsidering Adorno and Arendt” in Lars Rensmann and Samir Gandesha, eds., *Arendt and Adorno: Political and Philosophical Investigations*. Stanford University Press.

<sup>427</sup> See Hannah Arendt & Ronald Beiner, *Lectures on Kant's political philosophy* (University of Chicago Press, 1989).

<sup>428</sup> On this issue, see Ronald Beiner, “Rereading Hannah Arendt's Kant Lectures” (1997) 23 *Philosophy and Social Criticism* 21; Paul Formosa, “Thinking, Willing, Judging” (2009) 4 *Crossroads* 53; Avery Goldman, “An Antinomy of Political Judgment: Kant, Arendt and the Role of Purposiveness in Reflective Judgment” (2010) 43 *Continental Philosophy Review* 331; Roger Berkowitz & Majid Yar, “From Actor to Spectator: Hannah Arendt's Two Theories

political groundedness of collective action vis-à-vis our notion of collective responsibility and extend this debate to criminal judgments pertaining to individual acts leading to state criminality, political violence, or both. This is the very category of criminal acts that fall under the purview of crimes against humanity legislation, the key focus of this dissertation.

Of Arendt's completed works, the "Postscriptum" to *Thinking*, the first volume of *The Life of the Mind*, and her Lectures on *Kant's Political Philosophy* are widely considered to be her definitive remarks on judgment. These texts are privileged for two reasons. First, they were written after Arendt's controversial text, *Eichmann in Jerusalem*. It was Arendt's recognition of the role that Eichmann's inability to think played in his war crimes which motivated her to analyze more fully not only the "human activity" of thinking, but those of willing and judging as well. In addition, in both *The Life of the Mind* and the *Kant Lectures*, Arendt treats judgment as a distinct human activity with a unique potential. In these later works, though Arendt does indeed reformulate her notion of judgment, she does not depoliticize it. On the contrary, the effects of what Arendt refers to as "dark times" are long-term and pervasive and, moreover, the function of making judgments within such an expanded context remains as politically germane as it was in the immediate aftermath of WWII.

The basic project of Arendt's *Lectures on Kant's Political Philosophy* could be identified as an attempt to ground the idea of human dignity within the context of the publicly displayed "words and deeds" that constitute the realm of human affairs and, of course, politics. Her attempt to redefine human dignity also involves a strong philosophical response to Plato's impugning of dignity from the *polis*. The Kant Lectures bring this distinct philosophical take on the political nature of genuine human conduct to its completion: the enactment of public deeds presupposes a company of engaged spectators who draw meaning by judging what is enacted in the public sphere. In other words, Arendt appropriates and reconceptualizes Kant's work in such a way that judgment, while a distinct faculty, nonetheless retains an utmost political character. To put Arendt's conclusion in a specific international criminal law and crimes against humanity context, it is not possible to kill, plunder, violate, rape and decimate entire populations using state power or official condonement unless there was wide-spread complicity for such egregious acts on the

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of Judgment" (2010) 26 *Philosophy and Social Criticism* 1; and Roger Berkowitz, ed. *Thinking in Dark Times: Hannah Arendt on Ethics and Politics* (Fordham University Press, 2010).

ground.

## II. TOWARDS AN ENGAGED THEORY OF JUDGMENT AND COLLECTIVE RESPONSIBILITY

The notion of collective responsibility indeed proves legally and morally unsustainable if it is taken to be an unqualified application of the Kantian model of individual moral responsibility to society at large.<sup>429</sup> However, it emerges as a more coherent phenomenon if we choose to formulate it in terms of moral choices leading to willing acts that are above and beyond the singular capacity of autonomous individual agents.<sup>430</sup> Our desire for accountability in the case of actions of groups and institutions that cause harm and injustice in the society at large could be satiated, at least partially, if we allow the lens of collective responsibility to refocus our attention from intentionality of harm to processes concerning its production or possible curtailment.<sup>431</sup>

In the field of legal theory pertaining to criminal justice, the biggest controversy

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<sup>429</sup> For a strong philosophical critique of the direct application of the Kantian model with reference to legal obligations, see David Copp, "What Collectives are: Agency, Individualism and Legal Theory" (1984) 23 *Dialogue* 249; and Kendy M. Hess, "Because They Can: The Basis for the Moral Obligations of Collectives" (2014) 38 *Midwest Studies in Philosophy* 203. Philosophers who reject rank individualism and a self-interested legal culture tend to reject schisms between legal norms and community values, institutionalized separation of law from morals, supremacy of intricate regimes of legislation, and adjudication over social truths. They also tend to stand against the culture of rampant litigation for seeking justice. The alienation of individuals from each other and from their communities is easily bred within highly complex political and legal systems. This issue is squarely taken up by communitarian critiques of law in legal theory. See for instance, Chantal Mouffe, "Democratic citizenship and the political community" in her *Dimensions of radical democracy: Pluralism, citizenship, community* (Verso, 1992) at 225-239.

<sup>430</sup> On the legal significance of the concept, see Joel Feinberg's work, especially his *Doing and deserving: essays in the theory of responsibility*, supra note 6. Also see Linda Raznik, "Collective Responsibility and Duties to Respond" (2001) 27 *Social Theory and Practice* 455; Iris Marion Young, "Responsibility and Global Justice: A Social Connection Model" (2006) 23 *Social Philosophy and Policy* 102; Ronald Tinnevelt, "Collective Responsibility, National Peoples and the International Order" (2009) 2 *Netherlands Journal of Legal Philosophy* 147; and Margaret Gilbert, "Shared Intention and Personal Intentions" (2009) 144 *Philosophical Studies* 167.

<sup>431</sup> On the issue of "communities of judgment," Jennifer Nedelsky makes a strong argument in support of the social foundations of judgment. Nedelsky posits that the debates over "universal" human rights versus abuses in the name of culture and tradition are best understood as conflicts between different communities of judgment. Using Hannah Arendt's work on judgment as a starting point, she addresses the problems and possibilities that arise out of Arendt's view that judgment relies on a "common sense" shared by members of a community of judging subjects. Nedelsky points out that "common sense," "community," and "other judging subjects" are concepts not fully developed in Arendt's theory. This leads to her account of the concept of "enlarged mentality" as the basis for human rights. There remains, however, the thorny question of how one could decide to change or oppose "common sense" when it seems to be presupposed for judgment to be possible. As we attend to concrete manifestation of the problem of judgment across communities, our linked capacities for autonomy and judgment emerge as complementary rather than contradictory faculties and capacities. Nedelsky's insights on Arendt's theory of judgment prove most useful in the context of collective responsibility. See Jennifer Nedelsky, "Communities of Judgment and Human Rights" (2000) 1 *Theoretical Inquiries in Law* 245.



concerning collective responsibility involves the method of its attribution. Without grounds for ascertaining collective responsibility, received wisdom has it that there is no possibility for judgment. Legally speaking, collective responsibility is defined mainly in terms of duties to respond to the victims of collective crimes. Therefore, it invokes a reverse reading that is heavily situation-bound. Accordingly, reasonable fear on the part of victimized groups and communities creates duties to respond that concern both members of the perpetrating group and the society at large. This circumscribed account of collective responsibility may offer us a justification for making judgments about collective responsibility that are compatible with the separateness and autonomy of persons. However, it still leaves a number of critical questions unattended. For instance, could we defend the claim that collective responsibility can be assigned based on group membership?. For the purpose of examining the nature of legal judgment under the strenuous circumstances of egregious crimes, collective responsibility is indeed best understood in terms of *societal duties* to respond to the victims of collective crimes rather than attribution of collective guilt and culpability.<sup>432</sup> If applied to individual accountability-based adjudication of state criminality, this presupposition would translate into the need to determine whether a person in a position of high office and responsibility used all available means to subvert and constrain damages that were implicated by egregious acts committed using public resources, in addition to the determination of whether the individual in question partook in these acts.

The responsibilities moral agents have in relation to global structural social processes with unjust consequences constitute another good case in point for further debate on the inadequacies endemic to existing criminal liability schemes when applied to mass crimes. How ought moral agents, whether individual or institutional, conceptualize their responsibilities in

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<sup>432</sup> Plausibly, only moral agents can bear action-demanding duties and thus only moral agents could be subjected to criminal attribution. This standard places serious constraints on the determination of which collectives can bear action-demanding duties or be rendered accountable for societal harm. It is erroneous to assume that individual agents can bear duties and full scale of legal obligations regarding actions that only a collective could perform. This leaves us at a loss when assigning duties in circumstances where only a collective could perform some morally desirable action and no collective exists. It also causes problems concerning attribution of guilt and adjudication of crimes involving collectivities. Collectivization of duties and introduction of notions such as “public responsibility” may alleviate some of the problem. Specifically, we could define individual duties to take steps towards forming a collective sense of responsibility, which then incurs a duty over collective and cumulative action. However, this problem cannot be so easily overcome with the adjudication of mass crimes and attribution of guilt. See Marion Smiley, “From Moral Agency to Collective Wrongs: Rethinking Collective Moral Responsibility” (2010) 1 *Journal of Law and Policy* 171; Tracy Isaacs, *Moral Responsibility in Collective Context* (Oxford University Press, 2011); and Anne Schwenkenbecher, “Joint Duties and Global Moral Obligations” (2013) 26 *Ratio* 310.

relation to global injustice, for instance, if they do so at all? In this case, a model of collective responsibility deriving from global social connections and interdependencies may serve as the foundation for defining obligations of justice that arise from structural social processes. As detailed in the work of Iris Marion Young, for instance, such a social connection model of responsibility dictates that all agents who contribute by their actions to the structural processes that produce injustice have responsibilities to work to remedy these injustices.<sup>433</sup> This is quite different from the standard model of criminal responsibility that puts emphasis on liability. This alternative model does not isolate perpetrators. Instead, it judges background conditions of action as well as consequences. It is forward-looking and relies upon shared responsibility. Furthermore, it can be discharged only through collective action and as such, would not fit into the criminal justice model per se but would necessitate the inclusion of alternative modes of justice. As such, Marion Young's social connection model and Arendt's notion of community sense have more in common than at first meets the eye, and this is a hopeful overlap for any future discussion on collective responsibility in international criminal law under circumstances dictated by mass atrocities and state criminality.

### ***A. The Threshold Question***

In terms of commission of mass crimes such as those defined by crimes against humanity, which is the subject matter of this work, could we possibly redefine the legal threshold to determine whether a collective shares the intention to harm a select group, which is the distinctive feature of collective as opposed to individual responsibility? There are at least three criteria of adequacy for an account of shared criminal intention, namely disjunction, concurrence, and obligation.<sup>434</sup> Accordingly, people share an intention when and only when they are jointly committed to intend as a body to commit an act in the future. In other words, there is the element

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<sup>433</sup> See Iris Marion Young, *Responsibility for Justice* (Oxford University Press, 2011). On the application of restitutive justice at a global scale, see Jacob Schiff, "Confronting Political Responsibility: The Problem of Acknowledgement" (2008) 23 *Hypatia* 99; Henning Hahn, "The Global Consequences of Participatory Responsibility" (2008) 5 *Journal of Global Ethics* 43; and Todd Calder, "Shared Responsibility, Global Structural Injustice and Restitution" (2009) 36 *Social Theory and Practice* 263.

<sup>434</sup> See Thomas Scanlon, *What We Owe to Each Other* (Belknap Press of Harvard University Press, 1998); Michael Bratman, *Faces of Intention: Selected Essays on Intention and Agency* (Cambridge University Press, 1999); Elisabeth Pacherie, "Framing Joint Action" (2011) 2 *Review of Philosophy and Psychology* 173; and Darrell Cole, "War and Intention" (2011) 10 *Journal of Military Ethics* 174.

of premeditation as well as active participation in the commission of a violent act or acts. The problem is that, in the case of societal and political crimes, many instances of wrongdoing and violence appear to be of a distinctly spontaneous kind, without clear signs of premeditation. It is true that when one group commits genocide against another, the genocide is collective in the sense that the wrongfulness of genocide is morally distinct from the aggregation of individual murders that make up the genocidal killings in their entirety. Even then, however, it may not be possible to prove, or indeed to find a clear framework for, determining shared intentions for genocide for each of the perpetrators of these criminal acts. The problem, which I would rephrase as the problem of *collective wrongdoing*, is how to assign blame to individual contributors for distinctly collective acts of violence, when none of those individual contributors is singularly guilty of the Wrongdoing (with a capital W) in question.

In such instances, suffice it to say that intention is not merely a private mental act known only by those who express their intentions in public. Rather, intention is a communal act. Meanwhile, it is only observable circumstances and consequences that determine the justiciability of intention in criminal law. Here, Christopher Kutz's *Complicity Principle* provides a good starting point for tackling the problem of intentionality in societal and political mass crimes.<sup>435</sup>

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<sup>435</sup>See Christopher Kutz, *Complicity: Ethics and Law for a Collective Age* (Cambridge University Press, 2000). On the issue of collective complicity, also see Larry May, "Complicity: Ethics and Law for a Collective Age" (2002) 111 *Philosophical Review* 483; Garrath Williams, "No Participation without Implication: Understanding the Wrongs we do Together" (2002) 8 *Res Publica* 201; Torbjorn Tannsjo, "The Myth of Innocence: On Collective Responsibility and Collective Punishment" (2007) 36 *Philosophical Papers* 295; Tracy Isaacs, *Moral Responsibility in Collective Contexts* (Oxford University Press, 2011); Uwe Steinhoff, "Rights, Liability and the Moral Equality of Combatants" (2012) 16 *Journal of Ethics* 339; and Brian Lawson, "Individual Complicity in Collective Wrongdoing" (2013) 16 *Ethical Theory and Moral Practice* 227. Over the past decade or so political leaders around the world have begun to apologize for, and seek reconciliation between the perpetrators and victims of, large-scale moral wrongs such as slavery, past campaigns of ethnic cleansing, and official regimes of racial segregation. This movement towards a politics of "moral healing" and the emergence of an official regime of requesting forgiveness is in effect at odds with full-fledged reconciliation concerning societal wrongs, unless it leads to concrete policies of amelioration, structural change, and implementation of restorative justice measures. For wrongs caused by state-sanctioned moral atrocities, and requiring mass participation and endorsement, interpersonal reconciliation is not likely to be a promising model for providing closure. In this context, Isaacs' work is particularly relevant. She relates intentional collective action to collective moral responsibility, as distinct from collective guilt. She also traces the pedigree of individual responsibility for (and in) collective wrongs and links collective obligations with individual obligations. The remaining question, at least in the context of criminal law, pertains to individual moral responsibility and possibilities of accountability in wrongful and harmful social and political practices. An interesting case in this regard is the matter of combatants discussed by Steinhoff. According to the dominant position in the just war tradition from Augustine to Anscombe and beyond, there is no "moral equality of combatants" for criminal justice purposes. In other words, combatants participating in a justified war may kill enemy combatants participating in an unjustified war. In the meantime, where combatants violate the rights of innocent people—known as collateral damage in humanitarian law—they are in fact liable to attack by the combatants even on the unjustified side for self-defense.

Kutz's work examines the relationship between collective responsibility and individual guilt. He presents a rigorous philosophical account of the nature of our relations to social groups in which we participate, and then links this debate to contemporary moral theory. For him, there are two prevailing theories of moral philosophy, Kantianism and consequentialism, both of which have difficulties dealing with the issue of complicity in a legal context. For Kutz, similar to Arendt, a richer and more grounded theory of accountability demands that our understanding of collective action not only allow but call for redefining individual responsibility in collective settings via complicity.

No doubt Kutz' principle ought to be expanded to link it with the legal phenomenon of attribution of collective responsibility. In this context, the view I purport is that individuals are blameworthy for collective harms insofar as they knowingly participate in those harms, and that said individuals remain blameworthy regardless of whether they succeed in making a causal contribution to those harms.<sup>436</sup> In this sense, my argument for collective responsibility is based on contra-factual reasoning. For instance, if a collective takes no active responsibility for the conservation of life and livelihood of all of its members but especially ignores those with vulnerabilities, then it is right to presume that there emerges collective responsibility for the harm that ensues from lack of provision for any necessary protections.<sup>437</sup> This is one way to avoid the

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That fact on its own gives us a hint about the fluidity of the concepts of liability, culpability, and accountability, even under the most rigid circumstances such as active warfare.

<sup>436</sup> In support of my proposition, see Margaret Gilbert, *Sociality and Responsibility: New Essays in Plural Subject Theory* (Rowman & Littlefield Publishers, 2000). One of the most distinguished social philosophers of our times, Margaret Gilbert develops her arguments around a plural subject theory of human sociality, first introduced in her *On Social Facts* and *Living Together*. See Margaret Gilbert, *Living together: Rationality, sociality, and obligation* (Rowman & Littlefield Publishers, 1996), and her earlier work, *On social facts* (Princeton University Press, 1992). In *Sociality and Responsibility*, Gilbert presents an extended discussion of her proposal that joint commitments inherently involve obligations and rights, and thus proposes a new theory of obligations and rights that deviates from individualistic agency arguments. Presenting political obligation, collective remorse, collective guilt, shared intention, and important classes of rights and obligations from a plural subject theory perspective, Gilbert's work is very relevant to legal scholars who engage the subject of collective responsibility. Also see Margaret Gilbert, "Collective guilt and collective guilt feelings" (2002) 6 *The Journal of Ethics* 115; and her *Joint commitment: How we make the social world* (Oxford University Press, 2015).

<sup>437</sup> For a strong take on environmental justice and collective responsibility, see Mary Oksanen, "Species Extinction and Collective Responsibility" (2007) in *The Proceedings of the Twenty-First World Congress of Philosophy* (Vol. 3 at 179-183). On the issue of what we owe to the world at large, David Zoller argues that while it is well-recognized that many everyday consumer behaviors, such the purchasing of sweatshop goods, come at a very heavy cost to the global poor, it has proven difficult to argue that contributors are somehow morally complicit in those outcomes. The problem concerning marginal contributions to distant harms stems from lack of explicit knowledge of the aforementioned consequences which consumers could have born in mind. Critics taking this approach reasonably argue that distant and inadvertent acts that cause harm provide insufficient grounds for moral or legal blame.

problem of intentionality that clouded Arendt's path, in terms of identifying wrongdoing that is not seen or known as wrongdoing by either the person who commits it or by those who condone it.

At this point, the writings of David Miller on national responsibility, read alongside Karl Jasper's work on societal responsibility, are of great relevance. In his work on national responsibility and global justice, Miller conceptualizes and justifies a particular model of national responsibility—a model that may be helpful in devising a wholesome approach to collective responsibility in terms of justice.<sup>438</sup> His conceptualization proceeds in two steps. He starts by developing two models of collective responsibility, the like-minded group model and the cooperative practice model. He then proceeds to discuss national responsibility as a species of collective responsibility, and argues that nations have features such that both models of collective responsibility apply to them. I would argue that Miller's like-minded model does not provide a plausible conceptualization of collective responsibility in the politico-legal realm at all, as it tends to rely upon a bucolic, romanticized notion of a nation as an ethically cohesive unit.<sup>439</sup> The collective practice model, on the other hand, could provide a strong argument for formulating state criminality-related collective responsibility, as is widely present in the context of crimes against humanity. The standard example used in this context is, of course, the conceptualization of crimes pertaining to societal and political violence under the Third Reich.<sup>440</sup>

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However, the damage that agents bring about through their contributions to distant collective wrongs ultimately depends upon our morally sparse and individualistic take on everyday purchases and decisions. In this instance, contributors who knowingly disregard distant harms, rather than being reckless or negligent about consequences they could have foreseen, directly perpetuate the moral invisibility and the lack of recognition from which the global poor generally suffer. For Zoller, this provides agents with clearer moral reasons to refrain from knowing participation in unstructured collective harms. See David Zoller, "Moral Responsibility for Distant Collective Harms" (2015) 18 *Ethical Theory and Moral Practice* 995. Also see Bjorn Pettersson, "Co-responsibility and Causal Involvement" (2013) 41 *Philosophia* 847.

<sup>438</sup> See David Miller, "National responsibility and global justice" (2008) 11 *Critical Review of International Social and Political Philosophy* 383.

<sup>439</sup> For a critique of Miller's work, see Roland Pierik, "Collective responsibility and national responsibility" (2008) 11 *Critical Review of International Social and Political Philosophy* 465; and K. Lippert-Rasmussen, "Responsible nations: Miller on national responsibility" (2009) 2 *Ethics & Global Politics* 21.

<sup>440</sup> To reiterate an otherwise well-known historical vignette, Hitler was appointed Chancellor of Germany by the President of the Weimar Republic Paul von Hindenburg on January 1933. The Nazi Party then began to eliminate all political opposition and consolidate its power. By 1934 Hitler became dictator of Germany, by merging the powers and offices of the Chancellery and Presidency. This was further entrenched by a national referendum held on 19 August 1934, confirming Hitler as the sole Führer (leader) of Germany. Consequently, all power was centralized in Hitler's office, and his word became above all laws. As to be expected, opposition to Hitler's rule was ruthlessly suppressed and members of the liberal, socialist, and communist opposition were killed, imprisoned, or exiled. The

In this regard, Miller attempts to attribute to nations the kind of responsibility that is generally vested in states as legal actors. Unfortunately, models of statist legal responsibility disregard society's inner dynamics. In addition, they sanction the differences between intrastate and interstate forms of law as irremovable. Miller aims to build up the moral and historical prestige of the nation-state to make it a viable agent embracing a claim of universal morality. Miller's nations thus become political organizations capable of instantiating great moral truths. This results in an account that is compassionately cosmopolitan, and yet with very little interest in or engagement with local forms of delivery of justice that relate to mass violence either within state perimeters or globally.<sup>441</sup>

Overall, however, Miller's work raises a number of interesting questions concerning both weak and strong variants of collective responsibility and state-centric law.<sup>442</sup> For instance, he defends a theory of connections to address remedial responsibilities amongst states. His interventions on the subject of cosmopolitanism in particular endorse a position where states that are causally and morally responsible for deprivation and suffering in other states may be held remedially responsible for their actions. This is despite the fact that there is no international mechanism to ensure that remedially responsible states would offer assistance to or accountability for the suffering of affected states and societies, other than instances of victor's justice and imposed war reparations. As such, this job squarely falls into the hands of international public law for purposes of enforcement. In this regard, Miller's claims of universal morality as applied to international or transnational law are severely idealistic. In contradiction, I would argue that we must initiate a kind of deflation of both the nation and the state as foundational moral agents in international law. Just as the diminution of responsibility for mass

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implementation of the regime's racial policies culminated in the mass murder of Jews and other minorities in the Holocaust. For a detailed account of law during the Third Reich, see the historical pieces written and published during the Second World War: K. Loewenstein, "Law in the Third Reich" (1936) 45 *The Yale Law Journal* 716; V. L. Gott, "The National Socialist theory of international law" (1938) 32 *The American Journal of International Law* 704; as well as the more recent debates such as D. F. Vagts, "International law in the Third Reich" (1990) 84 *The American Journal of International Law* 661; Martin Lippman, "They Shoot Lawyers Don't They: Law in the Third Reich and the Global Threat to the Independence of the Judiciary" (1992) 23 *Cal. W. Int'l LJ* 257; and David Dyzenhaus, "Legal theory in the collapse of Weimar: contemporary lessons?" (1997) 91 *American Political Science Review* 121.

<sup>441</sup> See T. J. Levy, "National and statist responsibility" (2008) 11 *Critical Review of International Social and Political Philosophy* 485; and Margaret Moore, "Global justice, climate change and Miller's theory of responsibility" (2008) 11 *Critical Review of International Social and Political Philosophy* 501.

<sup>442</sup> See in particular David Miller, "Collective responsibility and international inequality in the law of peoples" In *Rawls's Law of Peoples: A Realistic Utopia?* (2006) at 191-205.

crimes from the collective entirely to the individual is faulty, the aggrandizement of individual moral agency and accountability to the grandiose entity of the state or the construct of the nation as the ultimate truth bearer is equally hyperbolic.

### ***B. The Outcomes Perspective***

At this point, as an alternative to cosmopolitan and liberal accounts such as Miller's work, I will examine collective responsibility from an outcomes perspective. A central feature of my analysis is to give precision to the idea that moral responsibility for criminal acts implies a reasonable demand and possibility that an agent should have acted otherwise. Allocation of moral responsibility to individuals concerning complex collective actions that result in mass harm is an issue that goes well beyond "the problem of many hands" as exemplified by the classic Frankfurt counter-examples.<sup>443</sup> Philosophers usually discuss responsibility in terms of responsibility for past actions or as a question about the nature of moral agency. Yet the word responsibility also ushers in deep concerns about human agency, more than the answers it possibly elicits in legal terms. This particular take on responsibility also relates it to civic virtues that can be demonstrated both by individuals and organizations or institutions. Such a virtue-based account of responsibility occupies a distinctive place in the context of discussions of the moral and political needs of societies, especially those that have survived mass political violence and trauma.

This is an opportune moment to bring in Karl Jaspers' work. When Hitler came to power in 1933, Jaspers was taken by some degree of surprise, as he had thought that this movement would destroy itself from within, leading to the reorganization and liberation of other political

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<sup>443</sup> Matthew Braham & Martin Van Hees "An anatomy of moral responsibility" (2012) 121 *Mind* 601. As discussed in detail by Braham and Van Hees, Frankfurt cases (also known as Frankfurt counterexamples) were presented by philosopher Harry Frankfurt in 1969 as counterexamples to the "principle of alternate possibilities", which holds that an agent is morally responsible for an action only if that person could have done otherwise. Frankfurt infers that a person could still be morally responsible for what he has done even if he could not have done otherwise. Frankfurt's examples involve agents who are intuitively responsible for their behaviour even though they lack the freedom to act otherwise. Frankfurt thus suggests that we question the fallacy of the notion that coercion precludes an agent from moral responsibility. See Harry G. Frankfurt, "Alternate possibilities and moral responsibility" (1969) 23 *The Journal of Philosophy* 829. This line of reasoning and debate on responsibility under coercion resurfaced in more recent work such as Jay R. Wallace, *Responsibility and the Moral Sentiments* (Harvard University Press, 1984); John Martin Fischer & Mark Ravizza, *Responsibility and Control: A Theory of Moral Responsibility* (Cambridge University Press, 2000); and Derk Pereboom, *Living without Free Will* (Cambridge University Press, 2006).

forces active at the time.<sup>444</sup> His expectations did not materialize, and because his wife was Jewish, Jaspers qualified as an enemy of the German state. Consequently, from 1933 onwards, he was excluded from the higher councils of the university. In 1935 the first part of his work on logic, entitled *Vernunft und Existenz* (*Reason and Existence*, 1955), appeared. This was followed by a book on Nietzsche in 1936, an essay on Descartes in 1937, and in 1938 his *Existenzphilosophie*.<sup>445</sup> Meanwhile, a series of decrees were promulgated against him, including removal from his professorship and a total ban on any further publication. These measures effectively barred him from living and working in Germany. Permission was finally granted to him in 1942 to go to Switzerland, but a condition was imposed by the Nazis that required his wife to remain behind in Germany. Jaspers chose to stay with his wife and remain in Germany. Both of them had decided, in case of an arrest, to commit suicide. In 1945 he was told that his deportation was scheduled to take place on April 14. On March 30, Heidelberg was occupied by the American forces and Jaspers and his wife avoided deportation.

Marked by the events of the pre-war years, Jasper's detailed philosophical examination of the contemporary state and nature of humankind, titled *Man in the Modern Age*. This is a seminal work that touches upon precisely the issue of our responsibility for our own and others' future.<sup>446</sup> Elucidating his theories on a variety of topics pertaining to contemporary and future human existence, the volume meditates upon the tension between mass-order and individual human life, our present conception of human life, and the potential for a better future. Jaspers wrote this work before the advent of the Second World War, but at a time when Nazi ideology and institutional practices were beginning to run rampant in Germany. This particular volume constitutes the departure point for the next section of the present debate on collective responsibility.

Jaspers' contribution to the literature on collective responsibility took an even more pointed form with the publication of *Die Schuldfrage* [The Guilt Question], which addressed the

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<sup>444</sup> See the Karl Jaspers entry of Encyclopedia Britanica by Hans Saner at <https://www.britannica.com/biography/Karl-Jaspers> [21.03.2017].

<sup>445</sup> See Karl Jaspers, *Vernunft und Existenz*, Groningen: Wolters. Translated as, *Reason and Existenz*, trans. W. Earle (New York: Noonday Press, 1955); *Nietzsche: Einführung in das Verständnis seines Philosophierens*, Berlin: de Gruyter. Translated as *Nietzsche: An Introduction to his Philosophical Activity*, trans. C. F. Wallraff and F. J. Schmitz (University of Arizona Press, 1965); and *Existenzphilosophie*, Berlin: de Gruyter. Translated as *Philosophy of Existence*, trans. R. F. Grabau (University of Pennsylvania Press, 1971).

<sup>446</sup> See Karl Jaspers, *Die Geistige Situation der Zeit*, Berlin: de Gruyter. Translated as *Man in the Modern Age*, trans. E. Paul and C. Paul (London: Routledge, 1933). The original volume in German came out in 1931.



question of the collective responsibility of the German people for the criminal actions of their government.<sup>447</sup> In that short treatise, Jaspers listed four types of guilt. The first category, criminal guilt, derives from violating unequivocal laws and is capable of being determined based on objective proof. Its jurisdiction rests with the courts. The second category, political guilt, involves the deeds of statesmen and implicates the citizens of a state as having to bear the consequences of the deeds of the state whose power governs them and under whose order they live. Jurisdiction of this type of guilt rests with the power and will of the victor if the state was defeated militarily, or, again with the courts if this was a civil war situation. The charge would be failure to exercise political prudence to mitigate arbitrary use of power. Then there is the category of the moral guilt. It pertains to the actions of those who cannot act otherwise than as an individual. They are nonetheless deemed morally responsible for all their deeds, including the execution of political and military orders. Its jurisdiction, however, purely rests with one's conscience, and is retained within the community. This text was written prior to the Nuremberg and Eichmann Trials. In this regard, Jaspers' last category, that of metaphysical guilt, is the most troubling one, and it also became a point of contention in his lengthy exchanges with Arendt during the post-War years. Accordingly, Jaspers assumes that there exists a solidarity among men as humans that makes each co-responsible for crimes committed in his presence or with his knowledge.

No doubt, the underlying assumptions of Jasper's work on guilt can easily lead to the sanctimonious political moralism that has often been used to justify acts of vengeance and collective punishment. It may also lead to a conception of war as a crusade that requires unconditional surrender by the enemy.<sup>448</sup> Still, there is still room for further deliberation. For instance, for Jaspers metaphysical guilt results from confining our solidarity to the closest human ties—family, friends, neighbors, ethno-religious brethren, etc.—rather than extending it to all of humanity. It makes us suffer from lack of proportion in terms of judging our world and human

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<sup>447</sup> See the English translation as Karl Jaspers, *The question of German guilt* (Fordham University Press, 2009). This work was translated by E. B. Ashton and it was published in a series edited by John Caputo. The original version came out in German back in 1946 and the first English edition was published in 1947. See Karl Jaspers, *Die Schuldfrage*, Heidelberg: Schneider ([translated as, *The Question of German Guilt*, trans. E. B. Ashton] The Dial Press, 1947).

<sup>448</sup> See Hannah Arendt et al, *Hannah Arendt/Karl Jaspers Correspondence, 1926-1969*. (Harcourt Brace Jonakovich, 1992).

value. And most importantly, Jaspers acknowledges that jurisdiction over metaphysical guilt for mass political violence lies with no court. As such, this easily abused concept reminds us of the myriad ways in which our lives are entangled with, and may profit from, the suffering of others.

### **III. COLLECTIVE RESPONSIBILITY AND LEGAL JUDGMENT IN INTERNATIONAL LAW: THE JASPERS ALTERNATIVE?**

Ascertaining litigation for crimes reaching the dimensions of what Jaspers had in mind remains an ongoing quest, starting with the precedents set by post-WWII trials. Indeed, the trial of major Nazi war criminals in Nuremberg (1949) is considered a landmark event in the development of international criminal law, and continues to be highly influential in our understanding of international criminal law in post-conflict settings.<sup>449</sup> The plethora of essays and manuscripts written on the Trial, discussing key legal, political, and philosophical questions raised both at the time and in historical perspective, are indicative of the crowned position it occupies in legal history. Those involved in the tribunal, the establishment of the tribunal, the trial process itself, and the debate that followed its judgment have all been subject to rigorous debate. Ranging from the contribution of Nuremberg, to the substantive developments in international criminal law, to the philosophical evaluation of legalism in post-conflict systems of justice, the persistent significance of Nuremberg is indeed worthy of attention.<sup>450</sup> Examinations of the Nuremberg legacy in contemporary international criminal justice are already widely available.

However, the reason why I include a discussion of the Nuremberg Trials in this debate on collective responsibility for mass crimes is somewhat different than what is covered in the canonized literature on international criminal law. The Nuremberg Judgment is often counted as

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<sup>449</sup> See Diane F. Orentlicher, "Settling accounts: the duty to prosecute human rights violations of a prior regime" (1991) 100 *Yale Law Journal* 2537; Steven Ratner, Steven, Jason S. Abrams & James L. Bischoff, *Accountability for Human Rights Atrocities in International Law: Beyond the Nuremberg Legacy* (Oxford University Press, 2009).

<sup>450</sup> See Henry T. King Jr, "The Legacy of Nuremberg" (2002) 34 *Case W. Res. J. Int'l L.* 335; Christian Tomuschat, "The legacy of Nuremberg" (2006) 4 *Journal of International Criminal Justice* 830; and Steven R. Ratner, Jason S. Abrams & James L. Bischoff, *Accountability for human rights atrocities in international law: beyond the Nuremberg legacy* (Oxford University Press, 2009).

the benchmark in international law for the definition and adjudication of individual accountability for human rights abuses at a mass scale. In this sense, it did constitute a tipping point in the context of legal doctrines concerning the nature of legal responsibility. Still, as I will argue in the following paragraphs, this achievement did not alleviate Jaspers' concern that, for such crimes, judgment cannot emanate from the courtroom alone.

During the Trial, the concept of *Nullum Crimen Sine Lege* was put to the test of war crimes and, despite a degree of inexactitude, both crimes against humanity and genocide have been retroactively codified as a result.<sup>451</sup> These developments in adjudication of international crimes were then followed by the codification of slavery, forced labor, torture, forced disappearances, racial discrimination, and apartheid as indictable crimes. In this sense, the Trial also redefined the notion of culpability in international law. It introduced significant changes to our understanding of individual criminal responsibility, and despite statutes of limitations and the reasonable time period clauses, it opened the path for reinstituting the threshold of legal requirements for individual accountability for mass crimes. Aside from its importance for the codification of societal and mass crimes in international law, however, the Nuremberg Trial also forced us to address the problem of whether and on what basis a successor government must prosecute the human rights abuses of a prior regime. Contending that the rule of law and natural justice principles require that the very worst crimes be prosecuted no matter what the rank and status of the accused person(s), Nuremberg judges proposed that principles of international law, both in its customary and conventional forms, impose a duty to investigate and prosecute in such extreme cases.<sup>452</sup> This take on legality and judgment has been accepted as a foundational premise for contemporary international criminal courts.<sup>453</sup> However, in terms of the defenses available for the accused in international criminal law pertaining to war crimes and crimes against humanity, for instance, the generic standardization of prosecutions in national courts as well as in

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<sup>451</sup> See Makoto Usami, "Retroactive justice: trials for human rights violations under a prior regime." In Burton Leiser & Tom Campbell, eds. *Human rights in philosophy and practice* (Routledge, 2001), and Kirsten Sellars, ed. *Trials for international crimes in Asia* (Cambridge University Press, 2016)

<sup>452</sup> See Aryeh Neier, *War crimes: Brutality, genocide, terror, and the struggle for justice* (Crown Publishing Group, 1998).

<sup>453</sup> See Cherif M. Bassiouni, ed., *International Criminal Law, Volume 2 Multilateral and Bilateral Enforcement Mechanisms* (Brill, 2008); William Schabas, *An Introduction to the International Criminal Court* (Cambridge University Press, 2011); and the standard text book by Antonio Cassese et al, *Cassese's international criminal law* (Oxford University Press, 2013).

international tribunals is causing an increasing number of problems, with significant socio-political repercussions. The most important substantive defenses at the international level include superior orders, command responsibility, *tu quoque* as a subcategory of *argumentum ad hominem*,<sup>454</sup> military necessity, proportionality, and reprisals. Jurisdictional defenses applicable in national tribunals, on the other hand, include personal jurisdiction, subject-matter jurisdiction, and double jeopardy. Then there are defenses concerning the issue of the location of the tribunal or the trial, the status of the presiding judge or judges, and the legitimacy of the court producing the judgment.<sup>455</sup>

In this context, if we look at the victor's justice argument posed about Nuremberg and Tokyo trials from the point of view of the victims, it is possible to posit that although forgiveness is often taken to bear a close connection to societal reconciliation, there is a good deal of scepticism about its role in situations where there is no consensus on the moral complexion of the past and no clear admission of guilt on the part of the perpetrator. In other words, the conviction-oriented framework of these post-WWII Military Tribunals are indeed troubling for societal and political crimes. Forgiveness without perpetrator acknowledgement aggravates the risk of recidivism, yields a substandard and morally compromised form of political accommodation, and leads to the silencing and patronizing of the victims, therefore potentially causing further social and political alienation and victimization. Guilt becomes inscribed in the collective memory of nations as a dividing line, but neither forgiveness nor true understanding emanates from the litigation of such crimes alone. Hence the need to underline the importance of legal humility concerning mass violence as the impetus for the penning of this last chapter.

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<sup>454</sup> In terms of legal defense, arguing *ad hominem* in its original sense is a legitimate strategy of using an interlocutor's concessions to show that the interlocutor is committed to a certain conclusion. The *tu quoque*, which emerged from this sense as an appeal to commitments implicit in the behaviour of one's critic, legitimately challenges the critic to explain away an apparent inconsistency. The defensive *ad hominem* is an attack on an opponent's ethos. The circumstantial *ad hominem*, which attributes the position of one's opponent to self-interest or a dogmatic bias, raises legitimate suspicion about the credibility of the opponent's statements and arguments. See David Hitchcock, "Is there an argumentum ad hominem fallacy?" In Hans V. Hansen and Robert C. Pinto, eds. *Reason reclaimed: Essays in honor of J. Anthony Blair and Ralph H. Johnson* (Vale Press, 2007), 187–199.

<sup>455</sup> James Meernik, "Victor's Justice or the Law? Judging And Punishing At The International Criminal Tribunal For The Former Yugoslavia" (2003) 47 *Journal of Conflict Resolution* 140; Victor Peskin, "Beyond Victor's Justice? The Challenge of Prosecuting the Winners at the International Criminal Tribunals for the Former Yugoslavia and Rwanda" (2005) 4 *Journal of Human Rights* 213; Bill Wringe, "Why punish war crimes? Victor's justice and expressive justifications of punishment" (2006) 25 *Law and Philosophy* 159; William A. Schabas, "Victor's Justice: Selecting Situations at the International Criminal Court" (2009) 43 *J. Marshall L. Rev.* 535.

#### IV. MORAL RESPONSIBILITY AS AN EPICURIAN CURE FOR THE CONUNDRUMS OF INTERNATIONAL CRIMINAL LAW?

From Epicurus onwards, the notion of moral responsibility based on a moral agent's causal ownership of his/her actions, as opposed to the agent's ability to act or choose otherwise, has troubled legal thinking. This is indeed the crux on which aforementioned Frankfurt examples were built.<sup>456</sup> It also relates to the puzzles surrounding Arendt's view on the banality of evil and the possibility/impossibility of the punishment of the unforgiveable. Epicurus considered it a necessary condition for praising or blaming an agent for an action, that it has been the agent and not anything else that brought the action about.<sup>457</sup> Thus, the central question of moral responsibility was whether the agent was a cause of the action, or whether the agent was forced to act by some other force. Accordingly, actions are to be attributed to agents if it is in their actions that agents, *qua* moral beings, manifest themselves. Here, the question of moral engagement becomes the most important component of [criminal] acts, which significantly differs from the outcomes perspective discussed above.<sup>458</sup> In his narration of how humans become moral beings, Epicurus envisaged a complex theory of moral responsibility and moral development, which could indeed find application in the area of collective responsibility and mass crimes. Epicurean ethics does not have the function of developing or justifying a moral system that allows for the

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<sup>456</sup> See Frankfurt counterexamples, *supra* note 459.

<sup>457</sup> See Epicurus, *The Essential Epicurus: Letters, Principal Doctrines, Vatican Sayings, and Fragments* (Prometheus Books, 1993). This popular arrangement of fragments follows the outline set forth by C. Bailey's 1926 collection on the thinker. One of the major philosophers in the Hellenistic period (the three centuries following the death of Aristotle in 323 B.C.E.), Epicurus developed an unsparingly materialistic and empiricist epistemology, and is known for his hedonistic ethics. He rejected the existence of Platonic forms and an immaterial soul, and famously declared that gods have no influence on our lives. His gospel of freedom from fear proved to be quite popular, and communities of Epicureans flourished for centuries after his death. In Anglo-American philosophical traditions, Epicurean thought re-emerged primarily in the context of moral responsibility and intentionality. See Phillip Mitsis, *Epicurus' Ethical Theory: The Pleasures of Invulnerability* (Cornell University Press, 1988).

<sup>458</sup> Developing a core conception of moral responsibility, Epicurus' writings pose the question of what human life without moral responsibility would be like. That exploration alone establishes that many robust forms of human relationship and situational normativity could continue, absent moral responsibility. However, accountability would become impossible. For a full debate on the Epicurean legacy concerning contemporary debates on moral responsibility, see Martin John Fischer, *My Way: Essays on Moral Responsibility* (Oxford University Press, 2006). Fischer's work is particularly relevant in its emphasis on the connections between deliberation and action, and between free will, freedom of action, and moral responsibility/accountability. This frame of reference ties together responsibility for actions, omissions, and consequences.

effective allocation of praise and blame.<sup>459</sup> Instead, it looks at the choices people make regardless of the system they are surrounded by. On the issue of free will and moral responsibility, Harry Frankfurt's argument that moral responsibility does not require the freedom to do otherwise, linked with the debate over whether moral responsibility is an essentially historical concept, indeed echoes the Epicurean call for deciphering individual agency in collective acts. Thus, the central question of moral responsibility in the context of mass crimes and societal violence becomes whether the agent was the cause of the action, or whether the agent was forced to act.

Some instances of wrongdoing are of a distinctly collective kind. When, for example, one group commits genocide against another, this is a collective act of crime in the sense that the wrongness of genocide is morally distinct from the aggregation of individual murders that make up the genocide. The problem, which I will refer to as the problem of collective wrongs, is that in traditional criminal law, how to assign blame for distinctly collective wrongdoing to individual contributors, when at least some of those individual contributors are not directly guilty of the wrongdoing in question, is a question habitually left unclear. I have already offered Christopher Kutz's *Complicity Principle* as a starting point for solving this particular problem, although the principle ought to be expanded to include a broader and more appropriate range of cases than Kutz initially intended. The view I ultimately defend is that individuals are blameworthy for collective harms insofar as they knowingly participate in or collaborate in the committal of those harms, and that said individuals remain blameworthy regardless of whether they succeed in making a causal contribution to those harms.<sup>460</sup> This is a distinctly Epicurean take on societal crimes and opposes the traditional outcomes oriented litigation methods. Suffice to say, however, I am not making this suggestion for it to be incorporated into the relevant bodies of international criminal law. Rather, the issue here is how to address mass crimes in a contextualized manner and with reference to forms of justice other than restitution.

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<sup>459</sup> On the issue of the allocation of moral responsibility to individuals in complex collective wrongdoings, see Kenton Machina, "Moral Responsibility—What is All the Fuss About?" (2007) 22 *Acta Analytica* 29; Neil Levy & Michael McKenna "Recent Work on Free Will and Moral Responsibility" (2009) 4 *Philosophy Compass* 96; and M. Braham & M. van Hees "An Anatomy of Moral Responsibility" (2012) 121 *Mind* 601. Braham and van Hees' work is particularly significant for its examination of the structure of moral responsibility in relation to outcomes. A central feature of their analysis is a condition that they term "avoidance potential," which indicates that moral responsibility implies a reasonable demand that an agent should have acted otherwise.

<sup>460</sup> On this issue, also see Brian Lawson, "Individual Complicity in Collective Wrongdoing" (2013) 16 *Ethical Theory and Moral Practice* 227.

Regarding this issue of [criminal] intent, another prominent political philosopher of the post-WWII era, Michael Bratman, made critical contributions to our understanding of the notion of intention and how it relates to criminal action in particular. In Bratman's view, when we settle on a plan for action we are committing ourselves to future conduct. The commitment involved in intending, and its implications for our understanding of shared intention and shared cooperative activity, lead to a richer discussion on moral responsibility.<sup>461</sup> In the context of philosophy of action and moral philosophy, issues about the nature of agency, intention and practical reason, free will and moral responsibility, and shared agency are indeed much more easily brought to the fore compared to the difficulties we may face with regard to discussing these in the context of philosophy of law. In this sense, Bratman's work *Intention, Plans, and Practical Reason* (1987) permanently altered the landscape of both the philosophy of action and the theory of practical rationality by drawing our attention to the complex, constitutive roles that intention plays in human agency.<sup>462</sup> In particular, his essays on shared agency are of utmost significance for the debate on collective responsibility.<sup>463</sup>

If we accept Bratman's description, the notion of collective responsibility would refer to both the responsibility of moral agents for causing harm in the world and the blameworthiness we ascribe to them for having caused such harm. Hence, it would assume both a *moral* and a *causal* component. Criminal law does associate causal responsibility and blameworthiness with groups in rare cases such as genocide and crimes against humanity, but for litigation purposes the line in the sand is always drawn at individual culpability. Specifically, criminal jurisprudence locates the source of moral responsibility in collective actions only if collectives were directly involved in

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<sup>461</sup> See Michael Bratman, *Faces of intention: Selected essays on intention and agency* (Cambridge University Press, 1999)

<sup>462</sup> What happens to our conception of the mind and of rational agency when we take future-directed intentions seriously? What is the role of intention as input for practical reasoning? Michael Bratman responded to these questions in a series of papers that he wrote during the early 1980s. In his manuscript *Intention, Plans, and Practical Reason*, Bratman fully developed the main themes of the previous essays and proposed a full-fledged theory of intention. In this later work, intentions are treated as essential elements of plans of action. These plans play a basic role in practical reasoning, supporting the organization of our activities within a future oriented trajectory. Bratman's work also explores the relationship between intention and intentional action, as well as the distinction between intended and expected effects of what one intends. All these issues are very critical for reaching a deeper understanding of collective responsibility. See Michael Bratman, *Intention, Plans, and Practical Reason* (University of Chicago Press, 1987).

<sup>463</sup> Michael Bratman, *Shared agency: A planning theory of acting together* (Oxford University Press, 2013).

these acts of harm.<sup>464</sup> Here, I beg to differ from this commonplace reference to the notion of collective responsibility as derivative of an assumed group morality. I am also standing against the assumption that collective responsibility violates principles of individual responsibility and fairness concerning criminal attribution. On the contrary, collective responsibility—as well as group intentions, collective action, and group blameworthiness—is a coherent construct, and can be ascribed to moral agents fairly in cases of societal and political crimes. This attribution, however, does not have to be punitive in nature.

My reservations about associating collective responsibility with group morality could perhaps be explicated further in the context of the structure of the argument that was augmented by traditions of religious thought, such as those found in the Old Testament (*Tanakh*) referring to the accounts of the Flood, the Tower of Babel, or Sodom and Gomorrah, as well as the New Testament blaming of Jews as an entire race for the killing of Jesus Christ. In these narratives, entire communities were punished for their supposed deeds, and to set an example for the rest of humanity. In Biblical narratives pertaining to the death of Jesus, for instance, the blame was cast not only on the Jews of the time but upon all future generations to come. The core of these religious arguments relates to a desire for communal forms of punishment for collective harms. No doubt, secular forms of this logic are equally widespread and troubling. Post-9/11 trends of anti-Islamism and resultant public policy measures are an all too familiar case in point. Collective responsibility translated into a rationale for collective punishment is also regularly used as a disciplinary measure in military units, prisons, and psychiatric facilities used for political crimes, such as those operated in Russia or in the post-Guantanamo Bay United States.<sup>465</sup> Without fail, these measures breed distrust and desire for vengeance among the members of the punished group and their communities at large. These punishment schemes are also commonly practiced in situations of war, based on the presupposition of collective guilt. Collective guilt, or guilt by association, is a dangerous claim that assumes groups of humans can bear guilt and should be subject to punishment above and beyond the guilt of individual members. Luckily, contemporary criminal law operates on the principle that guilt shall only be attributed to a legal person and not

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<sup>464</sup> For a debate on intergenerational collective responsibility, see Janna Thompson, (2006) "Collective Responsibility for Historic Injustices" (2006) 30 *Midwest Studies in Philosophy* 154.

<sup>465</sup> See Melvyn Freeman & Soumitra Pathare, *WHO resource book on mental health, human rights and legislation* (World Health Organization, 2005); and Steven Fish, *Democracy derailed in Russia: The failure of open politics* (Cambridge University Press, 2005).



to a group or community. Keeping these intricacies and problem-laden historical examples of attribution of collective guilt in mind, one must not equate collective responsibility either with collective punishment or the collective assignment of presumed moral failure to groups, communities or societies. However, this precaution should not restrain us from seeking a substantive definition of collective responsibility for mass crimes either.

While the majority of debates on collective responsibility continue to deliberate on the very possibility of it, a select group of scholars have ushered in two further concerns. The first has to do with whether groups can meet stringent conditions of moral responsibility that individuals do. Intentionality, as I touched upon briefly in the above paragraphs, becomes key in this context. The second concern has to do with the advantages and disadvantages of holding particular kinds of groups, such as communities or particular ethno-religious groups, or even states, morally responsible in response to harm caused by their direct or indirect actions.<sup>466</sup> One key example to consider in this area is that of lustration. Often, after a regime-changing war, a state engages in lustration in order to secure the condemnation and punishment of dangerous, corrupt, or culpable members of the previous political system. Changes in the political structure of post-Apartheid South Africa, post-WWII de-Nazification of Germany, or the recent de-Ba'athification in Iraq are commonly referred cases of lustration. This common practice poses an important dilemma from the perspective of how to define and put into practice collective responsibility, because even well planned, legally sound, and nuanced lustration involves condemning groups of people.<sup>467</sup> It also raises important questions about collective agency and the rectification of historical injustices. While group treatment might be justified on grounds of convenience and political peace in times of transitional justice, there are also valid arguments

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<sup>466</sup> For instance, the proxy wars in Iraq and Afghanistan have put front and centre the problem of dealing with non-uniformed combatants. They also led to questions concerning the legitimacy of resorting to martial violence under such circumstances of quasi-occupation. The location of legal agency for attributing responsibility to right the wrongs committed after the fact, and who to turn to for that end, remain major issues, especially for the American military establishment. The specific problem of non-uniformed combatants and the general problem of justifying war are profoundly linked. War is but only one form of generalized collective violence. Collective violence poses a particular set of challenges to the application of moral and legal principles within the context of the traditional model of criminal responsibility. See Anna Stilz, "Collective responsibility and the state" (2011) 19 *Journal of Political Philosophy* 190; and Christopher Kutz, "The difference uniforms make: collective violence in criminal law and war" (2015) 33 *Philosophy & Public Affairs* 148.

<sup>467</sup> This problem is discussed in detail in Avia Pasternak, "The collective responsibility of democratic publics" (2011) 41 *Canadian Journal of Philosophy* 99. The main reference used in this context is Hanna Pitkin's work. See Hanna Fenichel Pitkin, *The Concept of Representation* (University of California Press, 1967).

consistent with due process requirements for wholesale group punishment.<sup>468</sup>

Concomitantly, I would like posit a theory of combined criminal and political accountability based on an understanding of collective action and collective responsibility that not only allows for but demands individual responsibility.<sup>469</sup> In other words, instead of generalizing the sum total of individuals as a collective, the causation I propose implicates a movement from the collective back to the individual. No doubt, there isn't a single, simple, and all-encompassing solution to the problem of the relationship between individual and collective responsibility for wrongdoing and harm. The one component that most obscures the fundamental requirement for ascribing responsibility is that of moral agency. Closer attention to matters of individual and collective agency may provide a defensible criterion for establishing when an individual is and isn't responsible for the untoward consequences of a collective act.<sup>470</sup> For instance, not only individuals but organizations and institutions can act and exercise power, and thus could be deemed as accountable for harm. This is possible because they possess decision-making structures that are formal. As such, they could be deemed as "legal persons." The actions of such legal actors are not reducible to the actions of their individual members. Since these legal actors/agents could have acted differently or could have been re-organized to change the course of their harmful acts, they could also be deemed as morally responsible for the untoward effects of the power they exercise upon the larger population. Thus, at least in principle, they are blameworthy and could be subject to legal judgments. The ability to exercise power purposely,

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<sup>468</sup> See Yvonne Chiu, "Liberal Lustration" (2011) 19 *Journal of Political Philosophy* 440. For a larger debate on war and justice, see Robert E. Williams & Dan Caldwell, "Jus post bellum: Just war theory and the principles of just peace" (2006) 7 *International Studies Perspectives* 309; Jens Meierhenrich, "The ethics of lustration" (2006) 20 *Ethics & International Affairs* 99; Darrel Mollendorf, "Jus ex bello" (2008) 16 *Journal of Political Philosophy* 123; Mark Evans, "Moral responsibilities and the conflicting demands of jus post bellum" (2009) 23 *Ethics & International Affairs* 147; Anatoly Levshin, "Jus Contra Bellum in the Modern States System: Observations on the Anomalous Origins of the Crime of Aggressive War" (2015) 10 *St Antony's International Review* 141.

<sup>469</sup> See Christopher Kutz, *Complicity: Ethics and Law for a Collective Age* (Cambridge University Press, 2007)

<sup>470</sup> Albert Flores & Deborah G. Johnson, "Collective responsibility and professional roles" (1983) 93 *Ethics* 537. This is a very interesting debate on the responsibilities of "the peg in the cog," i.e. individuals working as part of large institutions and organization and towards a cumulative end result. The authors reach the conclusion that collective responsibility cannot be appropriated to individuals in such situations. Rather, it should be the specific individuals and offices that provide the overall design and goals of the organization and determine the distribution of duties that should be held responsible for erroneous acts of such organized bodies. For a counter argument on this issue, see W. H. Walsh, "Pride, shame and responsibility" (1970) 20 *The Philosophical Quarterly* 1. Also see Virginia Held, "Can a random collection of individuals be morally responsible?" (1970) 67 *Journal of Philosophy* 471. For Held, the crux of the matter lies in the defining characteristics of a "collectivity," and how decisions that lead to harm are reached. She takes a strong position against "methodological individualism," which I share full-heartedly.

knowingly as opposed to recklessly or negligently, reveals a particular disposition to abusing power, since it is concentrated and institutionalized. Furthermore, I would argue that such legal actors' disposition is not reducible to the dispositions or degrees of blame of the individual members who participated in the internal decision-making processes, or even those who led these organizations and institutions, which is the dictum used for litigation against crimes against humanity, for instance. Instead, there is a need for a larger discussion on the interdependent relationship between the individual and the collective in upholding a system of abuse, harm, and danger. Here, the Epicurean cure for the conundrums of the debate on moral responsibility comes to our rescue as the foreground allowing us to think about intentionality and causal involvement in collective acts, and as a call to assume responsibility for our own decisions to act or not to act.

## V. COLLECTIVE RESPONSIBILITY AND THE DISTRIBUTION OF BLAMEWORTHINESS

Whether collective responsibility makes sense as a non-distributive phenomenon, that is to say whether it transcends the contributions of particular group members, is a debate that remains pivotal for legal theory. In this context, two claims are crucial. The first is that groups, unlike individuals, cannot be accountable for intentions, and hence cannot act or cause harm *qua* groups. The second is that groups, as distinct from their individual members, cannot be understood as morally blameworthy according to the criteria required by moral responsibility argument. Accordingly, we cannot isolate genuinely collective actions, as distinct from the identical actions of many persons; and groups, unlike the individuals who belong to them, cannot formulate intentions of the kind thought to be necessary to actions. Here, the main worry is about the fairness of ascribing collective responsibility to individuals who do not themselves directly cause harm, or who do not bring about harm purposefully.<sup>471</sup>

If group intention is a necessary condition of attributing collective responsibility, the

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<sup>471</sup> See Steven Sverdlik, "Collective Responsibility" (1987) 51 *Philosophical Studies* 61. For him, moral blameworthiness requires the existence of bad intentions—or at least moral faultiness—on the part of those being held responsible. Otherwise, one cannot seek criminality. On this issue, also see Seumas Miller, "Collective responsibility" (2001) 15 *Public Affairs Quarterly* 65; and Jan Narveson, "Collective responsibility" (2002) 6 *The Journal of Ethics* 179. Miller's emphasis is typical of the traditional criminal law approach to collective responsibility. He underlines joint actions, rather than omissions and complicity that cause grave harm. He also makes a clear distinction between retrospective and prospective responsibility, an issue best attended to in the context of debates on restorative justice.

question then becomes how it can be ascertained.<sup>472</sup> In this context, collective behaviours are separated from *collective actions*, the latter arguably caused by the beliefs, desires and wants of the collective itself. As such, moral blameworthiness is grounded in the bad intentions of moral agents who cause harm, in defining both individual and collective responsibility. If so, how can groups, as distinct from their individual members, have bad intentions and demonstrate the ability to act on them? Could entire communities be deemed as appropriate bearers of moral blameworthiness, guilt, or shame? Critics of the collective responsibility argument concentrate on showing either that actions are associated exclusively with individuals, not groups or communities, or that groups cannot make choices or hold beliefs in the sense required by the formulation of intentions as defined by criminal law.<sup>473</sup> Meanwhile, these same critics pay much less attention to the nature of collective actions. It may be true that collectivities may not have moral faults, since they don't make moral choices in the way that is commonly understood. And yet, does that mean by default that they cannot properly be ascribed moral responsibility for harmful actions that are only possible if and when individuals act collectively?

At the other end of the spectrum, defenders of the collective responsibility argument feel compelled to justify both the moral possibility of collective responsibility and the coherence of collective responsibility as a moral, and hence possibly legal, construct. To start with, precepts of methodological individualism are brought under attack.<sup>474</sup> Accordingly, the collective blame that we ascribe in mass crimes cannot be realized in terms of individual blameworthiness. Furthermore, as exemplified by Larry May's work, there is a class of predicates that can only be true of collectives. May uses the relational theory of Jean-Paul Sartre to argue that groups can legitimately be ascribed actions in cases where individuals act together in a manner that would

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<sup>472</sup> See Angelo J. Corlett, *Responsibility and Punishment*. Vol. 9. (Springer, 2009). For Corlett, collective intentionality is a required condition to ascertain collective liability. In this vein, he also argues that collective responsibility can only be ascertained if there was collective voluntariness and if a corporate moral agency for wrongdoing and harm can be identified.

<sup>473</sup> See, for instance, the classic work of Hywel D. Lewis, "Collective responsibility" (1948) 23 *Philosophy* 3, as well as David E. Cooper, "Collective responsibility" (1968) 43 *Philosophy* 258; and Robert Silcock Downie, "Collective responsibility" (1969) 44 *Philosophy* 66.

<sup>474</sup> See David E. Cooper, "Collective Responsibility" (1968) 43 *Philosophy* 258; and Howard McGary, "Morality and Collective Liability" (1986) 20 *The Journal of Value Inquiry* 157. Peter French's work on corporations is particularly useful in this context. See Peter A. French, "The Corporation as a Moral Person" (1979) 16 *American Philosophical Quarterly* 207. Interestingly, this debate dates back to late 1970s, well before the post-Marxist legal critiques of international public law.

not be possible if they acted alone.<sup>475</sup> On the issue of group intentions, however, the legal problem of ascertaining intentionality is not easy to tackle, and it remains a threshold issue for criminal law-related determinations. If intentions play a fundamental role in an agent's practical deliberation and volition, the prospect of a shared intention introduces the specter of shared mental states. This is *not* included in the standards of proof for criminal law litigation and for very valid reasons, as it would lead to collective punishment.

If so, if the possibility of collective responsibility supposedly requires a collective mind, we might as well give up on the notion of collective responsibility altogether. Groups can legitimately be said to have shared beliefs and convictions, yet this is quite distinct from the proposition of a collective mind-set. These convictions are otherwise known as institutional culture, ideology, political movements, and so on. Hence, looking for a collective mind-set to ascertain collective responsibility for societal harm and wrongdoings is not the business of criminal justice litigation.<sup>476</sup> And yet, it is a very important component of how to rebuild a sense of trust and societal peace in the aftermath of mass crimes. In the area of political philosophy, in Raimo Tuomela and Kaarlo Miller's work these factors are named as "we intentions," and they provide the springboard for joint commitments and actions.<sup>477</sup> According to Tuomela, actions by collectives build upon the actions of the operative members of the collective in such a way that the properties of collectives, such as their intentions, beliefs, and desires, are both embodied and determined by the perspectives of individual members or representatives of the collective in question. This is an unusual intervention, with very important implications for the production of legal judgments concerning collective wrongs. Larry May similarly offers one of the most

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<sup>475</sup> See Larry May, *The Morality of Groups* (University of Notre Dame Press, 1989); and Larry May & Stacey Hoffman, eds. *Collective Responsibility: Five Decades of Debate in Theoretical and Applied Ethics* (Rowman & Littlefield Publishers, 1992)

<sup>476</sup> According to both Margaret Gilbert and Michael Bratman, the key is joint commitment. In other words, group intentions exist when two or more persons constitute the plural subject of an intention to carry out a particular action. See Margaret Gilbert, "Modelling collective belief" (1987) 73 *Synthese* 185; Margaret Gilbert, *Living together: Rationality, sociality, and obligation* (Rowman & Littlefield Publishers, 1996); Margaret Gilbert, *Sociality and responsibility: New essays in plural subject theory* (Rowman & Littlefield Publishers, 2000); Margaret Gilbert, "Shared intention and personal intentions" (2009) 144 *Philosophical studies* 167. Bratman's most relevant work in the context of shared intention and mutual obligations is his *Faces of intention: Selected essays on intention and agency* (Cambridge University Press, 1999). Also see David J. Velleman, "What happens when someone acts?" (1992) 101 *Mind* 461.

<sup>477</sup> See Raimo Tuomela & Kaarlo Miller "We-intentions" (1988) 53 *Philosophical Studies* 367. Also see Raimo Tuomela, "We-intentions revisited" (2005) 125 *Philosophical Studies* 327 and Raimo Tuomela, *The Philosophy of Sociality: The Shared Point of View* (Oxford University Press, 2007).

interesting arguments of this sort in his defense of collective moral agency. Although he rejects accounts of group intentions that are tied to Kantian notions of moral agency, he reformulates group intentions with reference to a theory of interdependence and sociality.

Historically, for those who work on collective responsibility as a necessary notion for applied philosophy, ethics, and legal theory, the focus has been on nations, corporations, and other groups that have an institutional backbone and well-ordered decision-making procedures in place. Organizational and institutional mechanisms through which courses of concerted action have been decided upon and justified as rule-bound are deemed particularly important. Similarly, enforced standards of conduct for individuals that are stringent and disciplinarian constitute an important aspect of such forms of action. In turn, purposeful, planned and institutionally controlled actions could render groups and communities collectively responsible for harm caused by their joint acts, though most likely not in a criminal sense. In the case of social and political movements, as discussed in detail by Joel Feinberg in his body of work on collective responsibility, there is the added element of ideological directives and the resultant group solidarity leading individuals to pursue projects together as a collective agent.<sup>478</sup> All of these are aspects of a very germane debate on collective responsibility that has been thus far overlooked by theories of international criminal law pertaining to mass crimes, war crimes, and crimes against humanity. This is a deep chasm that must be addressed without further ado, and this chapter has endeavored to provide a critical review of some of the key connections already built in this regard.

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<sup>478</sup> See Joel Feinberg, *Doing and Deserving; Essays in the Theory of Responsibility* (Princeton University Press, 1970). In his later treatise *Moral Limits of Criminal Law*, Feinberg focuses on the relationship between interests and wants, and makes a distinction between want-regarding and ideal-regarding analyses of interests. In particular, he focuses on hard cases for the application of the concept of harm. Examples of the "hard cases" Feinberg uses are harm to character, vicarious harm, and prenatal and posthumous harm. Feinberg also discusses the relationship between harm and rights, the concept of a victim, and the distinctions of various quantitative dimensions of harm, consent, and offense, including magnitude, probability, and risk, as well as the importance of harm for both the individual and the society at large. See Joel Feinberg, *The Moral Limits of Criminal Law* (Oxford University Press, 1984).

## CONCLUSION: THE DILEMMA OF THE SUM TOTAL VERSUS ITS CONSTITUTIVE PARTS

Since collective responsibility refers to the addressing of widespread harm and wrongdoing associated with the actions of collectivities, groups, societies and institutional bodies, the key components of its adjudication are directly related to constitutive aspects of social, cultural and political life. While there is a broad, often tacit, agreement regarding the basic model of moral and criminal responsibility when it is applied to individuals, there is considerable doubt, as we have seen, about how this notion might be applied to collectivities and their members at large. First and foremost, even the thought of adjudicating collective responsibility leads to disagreement about the very conception of collective responsibility.<sup>479</sup> One version maintains that only individual human agents can be held morally and criminally responsible for harmful acts, while another conception insists that groups, collectivities, and institutions can be held morally and criminally responsible as collectivities, independently of their members' individual actions. The former conception has, as its departure point, the conviction that collectivities and institutions are capable of actions that cannot be reduced to the actions and interests of their individual members.<sup>480</sup> Yet this belief or conviction alone does not render adjudication of collective responsibility a straightforward process. It does, however, indicate that the courtroom alone is not the solution for mass crimes. Furthermore, adjudicating egregious acts such as crimes against humanity does indeed require societal action and willful participation, particularly if these litigation-oriented strategies of transitional justice are to be pursued at the local and domestic level.

In this context, Joel Feinberg's now largely forgotten taxonomy of collective responsibility arrangements constitutes a critical contribution to the exploration of issues regarding the culpability of collectives and their members. In his classic treatise written back in

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<sup>479</sup> The main texts I refer to in this regard are again those pertaining to the Arendt-Jaspers correspondence. Also see Hannah Arendt, *German guilt* (Jewish Frontier Association, 1945); Karl Jaspers, *The question of German guilt* (Fordham University Press, 2009); and his *The Origin and Goal of History* (Routledge Revivals Series, Routledge, 2014).

<sup>480</sup> See Carl Wellman, *A Theory of Rights: Persons under Laws, Institutions and Morals* (Rowman & Allanheld, 1985); Meir Dan-Cohen, *Rights, Persons, and Organizations a Legal Theory for Bureaucratic Society* (University of California Press, 1986); and Allen Buchanan, "Toward a Theory of the Ethics of Bureaucratic Organizations" (1996) *6 Business Ethics Quarterly* 419. These essays articulate a crucial and neglected element pertaining to the general theory of ethics of bureaucratic organizations, in both private and public realms. The key to the approach developed here is the thesis that distinctive ethical principles must be applicable to bureaucratic organizations due to their aggregate power-holding status. This arises from the nature of bureaucratic organizations as complex webs of principal/agent relations that cannot be reduced to individual actions.

1970, *Doing and Deserving*, Feinberg presents four distinct responsibility arrangements: (a) “Whole groups can be held liable even though not all of their members are at fault”; (b) “A group can be held collectively responsible through the fault, contributory or noncontributory, of each member”; (c) “Group liability [could be attributed] through the contributory faults of each and every member”; and (d) “Through the collective ... fault of the group itself [the collective] bears liability independently of its members.”<sup>481</sup> If we are to consider each of Feinberg’s constructs in order to reach a conclusion pertaining to the justiciability of collective acts leading to harm, the complications involved need to be adequately addressed.<sup>482</sup>

In Feinberg’s first case, if a whole group is liable for the faulty and harmful actions of one or several members of the group, there must be the accompanying assumption that this sort of collectivity possesses a significant degree of solidarity. No doubt, this presumption stands against the ideal of individual responsibility and autonomy. Punishment of all for the wrongdoing of a few is not defensible on moral or legal grounds. For both goods and harms to be defined as collective and shared, would promotion of a mutual sense of collective destiny suffice? Looked at through the lens of justiciability, the answer is negative. Courts often invoke one of the justiciability doctrines—standing, ripeness, and mootness—to bring potentially important public litigation to a definite conclusion. According to orthodox understandings of justiciability, these

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<sup>481</sup> In his treatise *Doing and Deserving*, Feinberg covers the following notions that are most pertinent to the current debate on collective responsibility: Supererogation and rules, problematic responsibility in law and morals, justice and personal desert, *sua culpa* and collective responsibility. See Joel Feinberg, *Doing and Deserving: Essays in the Theory of Responsibility* (Princeton University Press, 1970). Also see his *The Moral Limits of the Criminal Law* (Oxford University Press, 1984). This latter work is the first volume in a four-volume series entitled *The Moral Limits of the Criminal Law*, which addresses the question of what acts the state may rightly render as criminal. Here, Feinberg identifies four liberty-limiting or coercion-legitimizing principles, each of which is the subject of a separate volume. In the first volume, he looks at the principle of harm to others, which John Stuart Mill identified as the only liberty-limiting principle. The other principles that Feinberg considers in subsequent volumes are (1) the offense principle—it is necessary to prevent hurt or offense (as opposed to harm) to others; (2) legal paternalism—it is necessary to prevent harm to the actor herself; and (3) legal moralism—it is necessary to prevent immoral conduct whether or not it harms anyone. Feinberg himself rejects legal paternalism and legal moralism, maintaining that the harm principle and the offense principle exhaust the class of morally relevant reasons for criminal prohibitions. Feinberg’s examination of the harm principle begins with an account of the concept of harm and its relation to other concepts like interests, wants, hurts, offenses, rights, and consent. He considers both the moral status of a failure to prevent harm and the problems related to assessing, comparing, and imputing harms. These discussions are essential for developing a robust, legally applicable understanding of collective responsibility.

<sup>482</sup> Justiciability is a key concept especially for constitutional and international law, due to the fact that it pertains to the determination of the limits posed upon legal issues over which a given court can exercise its judicial authority. It includes the legal concept of standing, which is commonly used to determine if the party bringing a legal suit is a party appropriate to establish whether an actual adversarial act or issue exists. Essentially, justiciability seeks to address whether a court possesses the ability to provide adequate resolution of a disputed matter. Where a court feels it cannot offer such a final determination, the matter is rendered “not justiciable.”



doctrines disempower courts from deciding certain kinds of cases. Of the three, mootness is the most relevant for our purposes, as it has the strongest moral moorings in terms of law's compass in society. Collectives are not punishable where individual autonomy is held as a supreme value in the constitutional order. Furthermore, constitutional schemes often create a presumption in favour of preserving a degree of legislative control over jurisdiction. In the case of collective responsibility, courts would need to transform mootness from a constitutional doctrine into a prudential doctrine that would enable them to decide otherwise "moot cases" whenever a decision would help give true and concrete meaning to important public values. That is, however, an idealistic future projection rather than the present-day reality of litigation for societal and political crimes.

Furthermore, in a standard criminal law setting, arrangements in which the whole group is punished for the faults or wrongdoing of a few constitute *vicarious liability*, and a person punished on account of another's wrongdoing is said to have been punished vicariously. Vicarious liability squarely conflicts with individual moral responsibility and, of course, the principle of individual accountability for criminal acts.<sup>483</sup> For litigation purposes, vicarious attribution of group or collective liability is an arrangement unsuitable for most forms of harm or wrongdoing.<sup>484</sup> However, the issue is not so clear when we are dealing with the actions of state institutions, for instance. In this changed setting, Feinberg's second arrangement of collective responsibility comes into the picture, which is based on the examination of implications for a group of individuals sharing a common agenda, or who could possibly have engaged in a similar harmful act. As such, the ascription of criminal or moral responsibility requires that an act causing harm has actually occurred rather than simply been intended.<sup>485</sup>

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<sup>483</sup> This is despite the fact that Christian teachings interpret Jesus' crucifixion as his vicarious punishment for the sins of all humankind.

<sup>484</sup> See Victor Tadros, *The Ends of Harm: The Moral Foundations of Criminal Law* (Oxford University Press, 2011).

<sup>485</sup> An interesting case on the issue of vicarious liability is that of *Lister v Hesley Hall* [2002] 1 AC 215. In this case, the House of Lords reformed the law on vicarious liability, in the context of a claim arising over the intentional infliction of harm, by introducing the "close connection" test. The immediate catalyst was the desire to facilitate recovery of damages on the part of victims of child abuse. The precise form the revision assumed was derived from two Canadian Supreme Court cases: *Bazley v Curry* [1999] 174 DLR (4th) 45 and *Jacobi v Griffiths* [1999] 174 DLR (4th) 7. Compared with other common law practices, Canadian jurisprudence contains a detailed review of the policy factors underpinning the law of vicarious liability and expresses the view that the most significant of these is "enterprise liability." See Douglas Brodie, "Enterprise Liability: Justifying Vicarious Liability" (2007) 27 *Oxford Journal of Legal Studies* 493. On the larger issue of permissibility to harm others and related legal liabilities, see Charlie Webb, "What is Unjust Enrichment?" (2009) 29 *Oxford Journal of Legal Studies* 215; Victor Tadros, "Duty

To conclude, as I have discussed thus far, legal-philosophical debates in the field of collective responsibility clearly prove that an exaggerated conception of fault and responsibility could easily lead to the ascription of blameworthiness to groups and communities without having a solid ground for justiciability. This is clearly observable in Feinberg's categorizations, which constitute one of the finest examples of the legal-philosophical analysis of collective responsibility. If so, formal organizations, such as business corporations, nation-states, armies, or public bureaucracies appear to be the only legal actors to which we could accrue justiciable forms of collective responsibility. That locks us back into the problem of responsibility being allocated only to formal units and their representatives thereof, and leaves us astray when it comes to societal accountability for mass political crimes.

Whether a true and systemic rectification of injury and harm aiming for corrective justice is at all possible concerning mass political crimes thus remains as a very troubling question. By whom justice must be performed is where almost all attention seems to have focused on up until now. If the injuries in question are divided into components of harm and wrong, each component's rectification would have to be considered separately. Although pecuniary compensation for such harms is practically plausible, money cannot act as a mediator between severely damaged lives and abusers of political power. Not all harms could be compensated, nor can it be said that when compensation is paid, the *status quo ante* should be restored. There is no normative or conceptual reason for compensation to remedy societal harms. On the issue of the wrong, on the other hand, standard methods of rectification may or may not work, depending on the specific context of the injustice in question. For instance, to correct wrongdoing by rectifying harm may not be at all possible in the event of mass civilian deaths and disappearances. Deploying only punitive damages may not be of much benefit for thousands or millions of displaced populations, either. The third, most common option embraced by international criminal law, individual incarceration and punishment, remains by and large symbolic. There may well be a need for an admission of causal and moral responsibility, public and institutional repudiation of

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and Liability" (2012) 24 *Utilitas* 259; and Joanna Mary Firth & Jonathan Quong, "Necessity, Moral Liability and Defensive Harm" (2012) 31 *Law and Philosophy* 673. The last two articles build upon Jeff McMahan's work on justified killing at times of war, which sets out a number of conditions for a person to be liable to attack, provided the attack is used to avert an objectively unjust threat defined in the following terms: (1) The threat, if realized, will wrongfully harm another; (2) the person is responsible for creating the threat; (3) killing the person is necessary to avert the threat; and (4) killing the person is a proportionate response to the threat. See Jeff McMahan, *The Ethics of Killing: Problems at the Margins of Life* (Oxford University Press, 2002).

the criminal act, substantive reforms at the state level, and, in some cases, disgorgement and reparations to be performed as a sign of a good faith effort to share the burden of the victims' suffering by the society at large. Although these cannot be forced onto members of the society, the state and its institutions are obligated to take an institutional lead in this regard. However, how much of a restoration these measures would lead to is truly dependent on how the society at large deals with the issue of collective responsibility for mass crimes in a non-criminal sense, as well.

In this vein, this chapter has offered a refutation of the litigation-heavy focus of international criminal law as it has been applied to mass societal and political crimes. Instead, it embraced the view that if so used, criminal law essentially becomes a stunted system of corrective and restitutional rather than restorative justice. The concept of corrective justice is neither capable of offering solutions to society-wide problems nor is it poised to deliver restorative justice for historical wrongdoings. Rather, what is required in instances such as crimes against humanity is an essentially protective function and a future-oriented vision. The aim is the protection of legal subjects and valuable social interests from such harms in future. Here, I have also tried to address the question of whether a statute of limitations on a historical injustice is morally justified. In essence, rectificatory justice calls for the ascription of a right to ask for rectification once an injustice has been perpetrated, without reference to a set time frame. To claim a statute of limitations on historical injustices amounts to inserting a temporal limit on the legitimacy of rights to rectification—a set amount of time following injustice after which claims of rectification could no longer be considered valid. However, since ascribing a right to rectification for an injustice is a requirement of fundamental justice, and since the temporal limit called for by a statute of limitations on injustice is a constraint on that requirement, the idea of a statute of limitations on historical injustices is morally justified only if one has substantive reasons for accepting this constraint, such as the establishment and maintenance of societal peace.

As a footnote to this entire debate, in legal philosophy there is a peculiar argument that has been widely applied to substantiate the validity of claims for historic justice. It is known as the “non-identity argument.”<sup>486</sup> Accordingly, the harm to descendants of historically wronged

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<sup>486</sup> The non-identity problem emerged as a lively ethical debate concerning our obligations to future generations during the 1970s. It figured strongly in the works of Derek Parfit, Thomas Schwartz and Robert M. Adams. See

peoples could be explained away not as deriving from the historic wrongs, but from the failure to provide rectification to the previous generation for the harm they suffered. In this chain of injustices, each failure to provide rectification becomes the source of wrongful harm to the next. Non-identity philosophers argue that such chains form a bridge between the historic wrong and the harm suffered by living individuals today. In other words, past wrongs, for which original wrongdoers are responsible, harm descendants of original victims. Still, how do we distinguish claims of descendants of historic victims and claims made by others with unrelated interests in the rectification of the previous generation? A supplementary solution may be offered in the form of focusing on group harm and group membership. This approach ties individual harm to group harm rather than limiting justice claims to individual restitution or compensation. For instance, did slavery not harm the descendants of slaves? This is the classical example proving the shortcomings of the individual responsibility argument applied to reject the validity of claims for historic justice based on harms to descendants of victims of historic wrongs. According to the individual responsibility argument, if descendants are never harmed directly and personally by historic wrongs, they have no right to ask for rectification. This conclusion may be legally sound but it is morally unintuitive and must be debunked.

To conclude, due to the extensive nature of harm involved in historic injustices, one must try in earnest to overcome the hurdle posed by the individual responsibility argument wielded against justice claims. Many of the crimes adjudicated under the aegis of crimes against humanity do constitute or lead to historical injustices. These forms of injustice and the harms they generate are best understood as group or collective harms. The response to group harms has to have a collective component as well, because the remedies offered are again only meaningful in a social and political context. Claims for justice under such circumstances have to be grounded in harms currently suffered by living individuals as a function of the harms their group or community were subject to as part of historic wrongs. One common form of such harm, constitutive harm, significantly differs from the aggregative accounts of harm generally used by standard individual

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Derek Parfit, *Reasons and persons*. (Oxford University Press, 1984); James Woodward, "The non-identity problem" (1986) 96 *Ethics* 804; Doran Smolkin, "The Non-Identity Problem and the Appeal to Future People's Rights" (1994) 32 *The Southern journal of philosophy* 315; Derek Parfit & Samuel Scheffler, *On what matters: volume one* (Oxford University Press, 2011).

criminal litigation processes. Constitutive harm could not be addressed in that limited context at all. It is the type of harm people suffer as members of historically wronged groups and communities. Therefore, historic injustice cases require a different account of responsibility, one that cannot be harnessed solely based on individual responsibility argumentation within the context of criminal justice jurisprudence. With all the reservations carefully examined in this chapter, we must make room for considerations pertaining to collective responsibility as a moral obligation, providing a context within which legal judgment should be firmly situated, though itself not catapulted to the status of a criminal charge.

This chapter might at first seem as an aberration in terms of both its methodology and its subject matter vis-à-vis the core subject matter of this dissertation: universal jurisdiction and adjudication of crimes against humanity. However, the frame within which these two issues are debated throughout includes the parameters of “limitations” and the “Global South,” which changes the tenor of the arguments made and encourages a layered and historically informed understanding of how international law works in settings wherein it assumes a very problem-laden identity. In this regard, I believe it is apt to look for societal and political sources that establish or increase the legitimacy of criminal litigation against mass crimes and societal violence from within as well as through the use of international jurisprudence concerning egregious acts such as crimes against humanity. This latter, I believe, could significantly benefit from an integrated discussion of collective responsibility in a non-criminal sense, as a foundational tenet of establishing the normative grounds for the desirability of trials and courts that attend to state criminality locally and regionally.

***In Lieu of Conclusion: Deliverance of Justice in International Criminal Law and the Role of Political Judgment as Purposive Action***

...time shall in fine out breake  
When Ocean wave shall open every Realme  
The wandering World at will shall open lye,  
And Thyphis shall some newe founded Land Survey Some travellers shall the Countries  
farre escrye, Beyond small Thule, known farthest to this day.

Seneca, *Medea* (from the John Studley translation of 1581)

Taken from Seneca's tragedy *Medea*, these lines have become symbolic of a prediction that a "new found land" will indeed appear, discovered across the ocean by travellers, located far beyond the edges of the known world. This utopian impulse, or the commitment to and desire for imagining a different, better, or even perfect society is nothing new. In fact, there is always a dramatic increase in expressions of such a utopian impulse when times get harder. This "New World" of Seneca's could take many forms, as it offers the potential actualization of novel ways of doing things, seeing things, and understanding anew. From Platonic dialogues to architectural treatises and plans, from literary and theatrical works to historical documents and legal texts, expressions of a yearning for what we are told we cannot have find their way by myriad means into our existing order of things as an outcry.

Law and its *ethos* and *pathos* constitute a triplet that looks perhaps rather unlikely at first sight as a harbinger for a utopian impulse and a desire to transcend existing delimitations of legal regimes. They have a fundamental connection: all three have the common function of imposing structure and discipline while striving for the creation of an ideal order. As so clearly heralded by Plato's late dialogues many centuries ago—namely *Timaeus*, *Critias*, and the *Laws*—in which he outlined the characteristics of the ideal society and of a divine creator as the architect of the universe, the yearning for a transformative ideal in the form of law has become a foundational belief. Indeed, while *Timaeus*, *Critias*, and Socrates are talking about the ideal society, Socrates wishes to see this ideal in action and find out if it works. *Critias* tells him that Athens once was

this ideal society. He heard that from Solon, who heard from an old man, who heard from an Egyptian that Athens was that ideal at the time they defeated Atlantis. Having no writing, the Athenians forgot this and are learning it all afresh. Timaeus then suggests that the world is a receptacle into which images of the eternal forms are stamped. Thus, physical things are copies of the eternal forms, and these copies are continually decaying though their essence remains. Then comes the place for Law. These late dialogues suggest that Athenians who defeated Atlantis have degenerated to the extent that their laws and thoughts moved away from the original divine form. The Platonic hope is that the essence of things could be restored and preserved by creating pure laws and institutions to fight off any diversion from the spirit of the divine presence.<sup>487</sup>

These dialogues, as distinct from anything law-related as they may appear, speak in a language that one often hears about *erga omnes* crimes and *jus cogens* norms in particular, and customary international law in general. So does something even more remote from international law, the *Ten Books of Architecture* by Vitruvius, which display his belief in perfect geometric shapes forming the basis for universal order. The Renaissance embellished this idea of “perfect reflection” further to include the human form: Leonardo da Vinci and Cesare Cesariano illustrated it in what is now known as “Vitruvian Man,” based on Vitruvius’ discussion of the proportions of the human body inscribed in a circle and a square. From Plato onwards, the ideal city, the ideal state, the ideal order have always hinged upon a very strong sense of the existence of a self-contained order expressed in pure laws.

In the opening chapters of this dissertation, I argued that recent scholarship on theories of international law with an interdisciplinary bent attributes the post-Cold War rejuvenation of interest in international law to at least two kinds of developments. On the one hand, I argued that “critical legal scholarship” has reshaped the discipline so profoundly that it has indeed provided it with new sensibilities and perspectives, thus rendering it desirable for a variety of other disciplines and discourses. On the other hand, I asserted that younger generations of international law scholars have succeeded in reaching out to international relations scholars and linked their work with theirs, forming a relationship which led to a recasting of the way in which legality, jurisdictional capabilities, and the state as a legal actor are approached. In the end, however, the

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<sup>487</sup> See Gijsbert Jonkers, *The Textual Tradition of Plato's Timaeus and Critias* (Brill, 2016). The actual text could be accessed at <https://plato.stanford.edu/entries/plato-timaeus/> [25.04.2017].

realization of a full-fledged reconciliation and dialogue among these disciplines is far from an easy task. The increasingly textured, adversarial and divisive debate about how to approach the study of international law should be regarded as an indication of how Herculean such an attempt is. In this work, I have hoped to contribute to this (ongoing) debate by focusing on common conceptions pertaining to the ideal of the state and what they leave behind, the residue, so to speak.

Deliverance of justice is a central, and yet another highly contested, element in theories and debates on international law, particularly as far as international courts are concerned. As the justice claims of non-state actors increasingly clash with the largely statist basis of existing legal practices and institutions pertaining to the transnational level, it is again becoming increasingly critical that we question the role of international organizations, including the Courts, in creating and sustaining the illusion of a perfect global legal order.<sup>488</sup>

As this detailed and multifaceted debate on the jurisprudential merits of international criminal law in the area of crimes against humanity proves, international organizations including courts such as the ICC will have to reconstitute some of their authoritative practices and render them open to the motives of both new and previously marginalized legal actors.<sup>489</sup> Furthermore, international organizations have to be open to potential norm change and evolution based on claims unaddressed in the past, as well as claims related to current and newly emerging forms of injustice.<sup>490</sup> This is notwithstanding the limited capacity of existing international organizations for realizing such claims. If and when they cannot do the job, alternative models of adjudication should be welcome as a true feature of the fragmented regime of accountability, with both fragmentation and poli-centricity characterizing the essential nature of international criminal law.

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<sup>488</sup>See Gerry Simpson, *Great powers and outlaw states: unequal sovereigns in the international legal order* (Cambridge University Press, 2004).

<sup>489</sup>For a similar argument albeit with reference to the specific national context of India, see Shalini Randeria, "The state of globalization: Legal plurality, overlapping sovereignties and ambiguous alliances between civil society and the cunning state in India" (2007) 24 *Theory, Culture & Society* 1.

<sup>490</sup>A strict closure privileges existing authoritative legal practices, and thus mainly assumes a protective stance vis-à-vis the *status quo* in international governance. See, for instance, Andrew Moravcsik, "Taking Preferences Seriously: A Liberal Theory of International Politics" (1997) 51 *International Organization* 513; Richard Devetak & Richard Higgot "Justice Unbound? Globalization, States, and the Transformation of the Social Bond" (1999) 75 *International Affairs* 21; Taslim Elias, *The international court of justice and some contemporary problems: essays on international law*. Vol. 2. (Springer Science & Business Media, 2013); William A. Schabas, Gerry Simpson & Suzannah Linton, *For the sake of present and future generations: essays on international law, crime and justice in honour of Roger Clark* (Brill Nijhoff, 2016).



I have also argued that the institutional masking of the hegemony of certain key actors within the international legal domain—needless to say not only core states—creates a blind spot. International organizations have in the past, and might again in the present, become the bulwark of hegemonic privilege.<sup>491</sup> Last but not the least, the tempering of conflicting interests by judicial idealism does not guarantee that an international organization can or does provide a sufficient, widely recognized, and inclusive mechanism for dealing with the justice-related claims of different actors. Ongoing conflicts in global politics are carried onto the institutional and organizational realm as well, and bodies such as international courts constitute no exception to this phenomenon.

As posited throughout this dissertation, normative theories of international law at least promise to adequately address these critical questions regarding the deliverance of justice.<sup>492</sup> However, a distinction is to be made between the deliverance of justice as a motive and as an authoritative legal practice. Accordingly, some international organizations aim at raising the

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<sup>491</sup> On this issue, Steven Ratner's *The Thin Justice of International Law* offers a comprehensive interdisciplinary theory of international law's relationship with global justice. Ratner argues that the justice of legal norms that constitute our international legal order should be determined according to two criteria: the degree to which they causally bring about international and intrastate peace; and the degree to which they causally bring about a state of affairs in which basic human rights are respected. However, I disagree with Ratner's commitment to rule consequentialism, his treatment of the state system as a fixed attribute of our international legal order, and his particular embrace of a political conception of human rights. In particular, Ratner's commitment to rule consequentialism leads to the possibility that pillars of global justice might give way to more fundamental moral concerns relating to the attainment of human welfare and human flourishing. Similarly, his commitment to the state system as a fixed attribute of international legal order results in a conception of international law as a rigid system. Consequently, questions relating to international law's distribution of sovereignty — its origins, the episodic recalibrations to which it is subject, especially during and after times of war, and its distributional consequences remain outside the normative sphere of global justice. Finally, Ratner's endorsement of a political conception of human rights does not protect international law from a zealous aspiration to organize global politics into an international legal order. Human rights that speak to the mitigation of some of these consequences —such as full-fledged transitional justice schemes—merit recognition for the instantiation of global justice. See Steven Ratner, *The thin justice of international law: a moral reckoning of the law of nations* (OUP Oxford, 2015).

<sup>492</sup> Here, the work of Nardin, Cox, Held, Murphy, Welch and Rosenau are representative of the origins of this unfolding debate. See Terry Nardin, *Law, Morality and the Relations of States* (Princeton University Press, 1983); James Rosenau & Ernst-Otto Czempiel, eds. *Governance Without Government: Order and Change in World Politics* (Cambridge University Press, 1992); David Welch, *Justice and the Genesis of War* (Cambridge University Press, 1993); James Rosenau, "Governance in the Twenty-First Century" (1995) 1 *Global Governance* 13; David Held, *Democracy and the Global Order: From the Modern State to Cosmopolitan Democracy* (Stanford University Press, 1995); Daniele Archibugi & David Held, eds. *Cosmopolitan Democracy: An Agenda for a New World Order* (Polity Press, 1995); Robert Cox, "An Alternative Approach to Multilateralism in the Twenty-First Century" (1997) 3 *Global Governance* 1; James Rosenau, *Along the Domestic-Foreign Frontier: Exploring Governance in a Turbulent World* (Cambridge University Press, 1997); Craig Murphy, "Global Governance: Poorly Done and Poorly Understood" (2000) 76 *International Affairs* 780. Also see Donatella Della Porta, et al. *Global justice movement: Cross-national and transnational perspectives* (Routledge, 2015); and Satvinder Juss, *International migration and global justice* (Routledge, 2016).

specter of lack of just practices in given areas of international law, while others such as the ICC are built upon the premise of deliverance of justice according to established legal norms and practices. Why states and other international actors would seek the construction of institutions that can authoritatively settle disputes about rights and entitlements is not the issue here. On the surface, the international legal obligations of a state are overwhelmingly based on its consent. This formal commitment to consent supposedly preserves the power of states, though with a bias towards the *status quo*. Historically, the regime of international law has not been equitable to all states that are a party to it.<sup>493</sup> International law, given its background, has developed a variety of ways to live with the problem of consent. The expectation from international criminal law has been for it to overcome this hurdle via normative prerogatives such as those exemplified by universal jurisdiction for crimes against humanity.<sup>494</sup> Meanwhile, when states establish international organizations such as the ICC, they create an institution with a life of its own. There is always the risk that the institution would develop its own interests.<sup>495</sup> How much of the existing landscape of international criminal law has been formed by state responses to acts such as crimes against humanity is somewhat dubious. Rather, what is at stake here is life after the ICC for international criminal law. As Kantian scholarship in this area has long insisted, seeking a legalized and institutionally guarded regime of accountability to constrain others has direct benefits in terms of avoiding random warfare in an age where such wars tend to bring more damage than profit.<sup>496</sup> In this context, justice delivered via international criminal law is considered a virtue. This peculiar understanding of political order relies on standardized

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<sup>493</sup> See Anthony Clark Arend & Robert J. Beck, *International law and the use of force: beyond the UN Charter paradigm* (Routledge, 2014), and Upendra Baxi, "Some Newly Emergent Geographies of Injustice: Boundaries and Borders in International Law" (2016) 23 *Indiana Journal of Global Legal Studies* 15. Baxi famously argues that the relationship between the boundaries and borders of international law and the production of geographies of injustice becomes devastatingly obvious when examined through the lens of colonial epistemologies, especially in private international law. His work addresses the languages and logics of "coloniality" and "postcoloniality" under the complex and contradictory unity of neoliberalism. Thus, it is present- and future-oriented, rather than providing a chronology of injustices in international law. Still, his interventions are important in terms of deciphering the strong voices of discontent emanating from the Global South.

<sup>494</sup> See the work of Andrew Guzman, in particular his "International organizations and the Frankenstein problem" (2013) 24 *European Journal of International Law* 999.

<sup>495</sup> In forced migration studies literature, this kind of accusation has been made widely against the UNHCR for instance. See James Hollifield, Philip Martin, and Pia Orrenius. *Controlling immigration: A global perspective* (Stanford University Press, 2014).

<sup>496</sup> The main reference to this debate is Immanuel Kant, "Perpetual Peace: A Philosophical Sketch" in Hans Reiss, ed., *Kant's Political Writings* (Cambridge University Press, 1992).

expectations, procedures and entitlements.<sup>497</sup> There is no power in it, or no outright conflict. This brings us back to the longings we hear in Seneca's play *Medea*: "The wandering World at will shall open lye..."

It has also been commonly argued for decades that the essence of any meaningful and reasonable idea of international governance is the expectation that international law will be primarily about the rules and procedures that allow states to coexist.<sup>498</sup> This take on international law and its engagement in the deliverance of justice is quite similar in its logic to the way constitutions are defined as frames within which societies and polities can accommodate change and conflict without breaking existing political systems apart. Why, then, is international law often deemed to be "practical" rather than purposive—and thus its organs portrayed as standing in contradistinction with the institutions through which the laws of national political communities are created? Is it not so much a maker as it is a protector of the *status quo*? Even the *jus cogens* norms and *erga omnes* crimes do not constitute major exceptions in this sense. Consequently, in international criminal law justice is defined mainly in formal procedural terms. Bodies such as international courts become limited to clarifying the procedures to be observed by states and other international actors in the event that their actions fall under the purview of international law. There is very little room left for political judgment or norm creation to enter the debate, even concerning critical instances that challenge the founding pillars of the entire state system such as crimes against humanity.<sup>499</sup> In this work, I have inquired about whether it is possible to strike a balance between normative and deliberative purposefulness and authoritative jurisdictional practices in international criminal law, in such a way that its legislative prowess is not just "effective" but also legitimate. My examination of the limits of the application of universal jurisdiction in the context of crimes against humanity and particularly in the Global South was a

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<sup>497</sup> The two extremes of this argument are found in the work of Hedley Bull, "The State's Positive Role in World Affairs" (1979) 108 *Daedalus* 111, and his *The Anarchical Society: A Study of Order in World Politics* (Macmillan, 1977); and John Rawls, *The Law of Peoples* (Harvard University Press, 1999).

<sup>498</sup> For further debate, see the early work of Lawrence Finkelstein, "What Is Global Governance?" (1995) 1 *Global Governance* 367; Martin Hewson & Timothy J. Sinclair, eds., *Approaches to Global Governance Theory* (SUNY Press, 1995); as well as John Ruggie, "Global governance and 'new governance theory': Lessons from business and human rights" (2014) 20 *Global Governance* 5-17; and Nico Krisch, "The decay of consent: international law in an age of global public goods" (2014) 108 *American Journal of International Law* 1.

<sup>499</sup> On the issue of substantive challenges to existing global governance structures via law, see Lawrence Gostin & Devi Sridhar, "Global health and the law" (2014) 370 *New England Journal of Medicine* 1732; and Kenneth Gould, David N. Pellow & Allan Schnaiberg, *Treadmill of Production: Injustice and Unsustainability in the Global Economy* (Routledge, 2015).

testimony to the intrinsically challenging nature of such yearnings. This problem of disjunct between what legal theorists such as Hart named as primary and secondary rules is endemic to the dominant statist model of international law, and bars our vision from seeing it for what it is—a transnational and fragmented enterprise. Especially in the last two chapters, I posited that the whole array of non-state, transnational, individual, regional and communal actors have to be brought into the discussion concerning the legitimacy of jurisprudence produced by international criminal law and international courts. Acknowledgement of the wider plurality of political actors, as well as forms of legal and political action, is essential for achieving large enough scope of applicability for models of deliverance of justice beyond the confines of international courts. Needless to say, addressing this plurality alone cannot override the normative centrality of the state in international criminal law. However, as I indicated throughout my debate on hybrid courts, formal international criminal law is stagnating in its universalistic claims. Particularly disconcerting is the status of the treatment of injurious acts such as crimes against humanity, which have implications for the past, present and future of whole societies.

In this vein, I argued that rather than crowning the achievements of international bodies such as the ICC as the ultimate point that international criminal law could reach, we must pay closer attention to “informal lawmaking” that involves new actors, new processes, and new outputs concerning the most heinous forms of state criminality. On many occasions, existing institutional structures of formal lawmaking have become shackles rather than instigators of judicial processes, hence the emergence of bodies such as hybrid courts or regional mediation mechanisms. The validation requirements of traditional international criminal law as it is spread through centrifugal adaptation of the Rome Statute have to be rethought. Crimes against humanity legislation adapted to local realities by hybrid courts and regional organizations vividly prove this point. It is erroneous to use the example of the Belgian courts as the test case for universal jurisdiction, as Belgium is a European country with its own heavy history of colonial crimes and involvements. To recommend that this example should be followed in India, Russia, China, Brazil, Uganda, Turkey, etc. only points to the continuing blindness of dominant international law scholarship to both the history and politics of how our post-WWII universe of state system was built, and at what costs it is maintained. If the ultimate criterion by which to evaluate the deliverance of justice at the international platform is to see how many legal borders

have been crossed, rather than what substantive benefits it can provide for societies, perhaps international organizations such as the ICC could be construed as effective in their mandate. However, the closure of justice claims as well as methods of deliverance within this model remains problematic for several reasons. In this work, I have presented these issues in detail, highlighting the necessary involvement of political judgment in the alignment of international and domestic law. This is essential for widespread endorsement and application of the current legal codification of crimes against humanity to become possible. In my view, it is a base requirement for international criminal law in this area to become purposive rather than remaining formalistic. Finally, the shift of focus I suggested in the above pages is also meaningful from the point of view of posing challenges to conventional configurations of power, authority, legality, and legitimacy at both national and international levels.

The development of a justice-based dialogue above and beyond the confines of the sovereign state is possible only via political deliberation, legal arguments keen on persuasion rather than dictation, and the endorsement of multilateral legal premises rather than a monist or dualist legal framework in international criminal law. Both statist and purely intergovernmentalist models of international law require that demands for justice be either channeled through domestic policy processes, or appropriated within a top-down process of international jurisdiction. In the specific case of crimes against humanity, there are widely observed and profound structural tensions between the human rights and humanitarian norms introduced into the framework of international law since World War II, and the Westphalian order according to which such norms are expected to be pursued. According to the existing model, international criminal law jurisprudence is attempting to adjudicate the crimes committed by the very actors that it protects, i.e. the state, by asking them to come to international courts or local courts of other states empowered by universal jurisdiction in the event these states fail to try their own leaders. In this sense, I believe the word ‘transnational’ continues to escape universal jurisdiction debates.<sup>500</sup> Yet when it comes to issues such as crimes against humanity, how could such an argument be maintained: that human rights and human dignity must be met within the parameters determined by the limits of either the “national” understanding and domestic jurisdiction of such crimes, or

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<sup>500</sup> As an exception, see Yves Dezalay & Bryant Garth, eds., *Lawyers and the Rule of Law in an Era of Globalization* (Routledge, 2011); and Yves Dezalay & Bryant Garth, eds., *Lawyers and the construction of transnational justice* (Routledge, 2013).

via litigation sought in the chambers of a distant international court or a European domestic court such as the Belgian ones, armed with universal jurisdiction? This is precisely the conundrum that triggered the methodological investigations and conceptual worries presented in this work.

As signaled throughout this dissertation, a post-statist and transnational conception of international law and international organizations no doubt helps the matters a great deal.<sup>501</sup> However, this approach is heavily indebted to sociological theory and tends to keep its distance from legal enterprises such as international courts. At least as far as international criminal law is concerned, I strongly believe that we need to include both realms and think deeply about their present and possible future interactions. Ideally, in this new setting, the justice motives of a variety of actors beyond the state would become favourable to international law scholarship. However, the static and authoritative perception of law in this field often acts as an impediment for such a hybrid and well-endowed understanding of [global] justice. It is as if legal debates about the deliverance of justice are utterly uninterested in dealing with moral dilemmas, ethical concerns, normative reflections, and political deliberations.

By introducing the notions of political judgment and collective responsibility for state criminality as necessary components of the debate on the deliverance of justice in international criminal law, this work exemplifies a concerted effort to bypass the dichotomy between the domestic and international spheres that is essentialized by the statist model of international law.<sup>502</sup> Just as values and norms are affected by a wide plurality of actors and political forces both within and beyond states, so are the actual workings of international law, including international criminal law. There is very little reason to assume that international criminal law is purely formal and structurally sealed from the purposive claims of various political agents and legal actors. The crucial matter concerning the category of legal norms such as those pertaining to

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<sup>501</sup> Exemplary of this point of view, see Chris Brown, "Review Article: Theories of International Justice" (2001) 27 *British Journal of Political Science* 371; and Antonio Franceschet, "Theorizing state civil disobedience in international politics" (2015) 11 *Journal of International Political Theory* 239. Franceschet argues that illegal state actions and political crimes are sometimes interpreted simply as a matter of civil disobedience. These interpretations result in an elitist conception of state criminality, because most states in the Global South cannot refashion the key rules of sovereign existence in the international legal order. By introducing a broader conception of resistance and proposing two interdependent types of power, namely *constituent* power and *destituent* power, Franceschet claims that we would have a more accurate understanding of state criminality overall.

<sup>502</sup> See, for instance, the articulation of a similar ideal though in a different context in Robert O'Brien, Anne Marie Goetz, Jan Aart Scholte & Marc Williams, eds., *Contesting Global Governance: Multilateral Economic Institutions and Global Social Movements* (Cambridge University Press, 2000).

crimes against humanity is not so much the presence of value plurality that they have to address, but whether there are limits and thresholds beyond which their very existence loses its validity. Whether these limits can be established based on deliberations among different parties, or whether such an agreement needs to be nurtured and fostered via normatively purposive international organizations such as the ICC, is a real matter of concern for the future of international criminal law. Given the weight of its subject matter, international criminal law cannot turn its back on voices of dissent, particularly those emanating from communities who currently suffer the most from state brutality and politically organized forms of criminality, which are no doubt not limited to those nations in the Global South. In this regard, *ad hoc* and hybrid tribunals' jurisprudential contributions, their extra-legal impact and legacies, and the intrinsic relationship between transitional justice projects and international criminal law have to be brought into the canonized debates. The concept of state legacy is itself contested and the appropriateness of international courts' (such as the ICC) efforts to consolidate it must be questioned. As attested in the pages of this work, a conceptual critique of the history of international criminal law pertaining to the legislation of crimes against humanity also provides an opportune moment to reflect upon the work of both international courts and hybrid courts, *ad hoc* tribunals and other transitional justice mechanisms, with a view to enriching the debate by the inclusion of more voices and with an ear on the ground for historic grievances.<sup>503</sup>

On a final note, I would like to conclude this treatise on a hopeful note for the future of international law scholarship pertaining to expanding circles of application of universal jurisdiction in the context of crimes against humanity. In a series of speeches and occasional essays delivered in 1999 and 2000, Pierre Bourdieu, one of France's leading sociologists of culture, called for a new European social movement to unite existing and future unions, new social movements, and intellectuals to struggle against globalization.<sup>504</sup> In his outcry, Bourdieu denounced numerous evils of globalization, especially its guiding philosophy of neoliberalism, and he sketched specific roles that writers, scholars, artists, and research workers—otherwise

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<sup>503</sup> See Karen Alter, *The new terrain of international law: Courts, politics, rights* (Princeton University Press, 2014); Charles De Visscher, *Theory and reality in public international law* (Princeton University Press, 2015); and Eyal Benvenisti & Sarah MH Nouwen, "Leaving Legacies Open-Ended: An Invitation for an Inclusive Debate on International Criminal Justice" (2016) 110 *AJIL* 205.

<sup>504</sup> See Michael James Grenfell, *Pierre Bourdieu: key concepts* (Routledge, 2014); Pierre Bourdieu, *Outline of a Theory of Practice*. Vol. 16. (Cambridge university press, 1977); and Pierre Bourdieu, *Les structures sociales de l'économie* (Le Seuil, 2016).

known as Bourdieu's "intellectuals"—could play in this new composite movement. While this call to arms is not without contradictions, it offered encouragement to intellectuals to join the working classes (unionized and not), farmers, the unemployed, immigrants, activists, students, and militants to struggle against the depredations of the new world order. For Bourdieu, as for many other critics of globalization, what is particularly vexing is the recent retreat of national governments from funding welfare, medical care, housing, public transportation, education, and, of course, culture. The neoliberal focus of the past few decades on privatization, deregulation, and self-help, characteristic of the economies in the Global North but also becoming widespread policy initiatives in the Global South, argued Bourdieu, were unabashedly supported by international organizations such as the World Bank, International Monetary Fund, and World Trade Organization (WTO). The quest for maximum short-term profits and reduced expenditures is seeping into the everyday life of citizens in an exponentially increasing number of states and creating a perpetual condition of insecurity. Ironically, noted Bourdieu, the transnational spread of this neoliberal social insecurity provides a solid and tangible foundation for a new form of politics.<sup>505</sup>

If one was to echo this quintessential call to unite all possible forces against unjust practices endorsed by institutions of global governance and against entrenched state criminality, whom could we call upon? Surely, the work of Pierre Bourdieu offers a potentially productive way to practice research in international relations. Does it also offer clues concerning how to practice international legal scholarship and advocacy perhaps with less jurisdictional certitude but more moral conviction and normative involvement with global injustices perpetuated by the very states that international criminal law deals with in such a circumscribed manner? Bourdieu's work explores the alternatives in such a way that academia is invited to refuse an opposition between general theory and everyday life. His preference for this relational approach acts as a protective shield against two of the biggest handicaps affecting academic work in the area of international criminal law, as well: namely, essentialization and ahistoricism. In order to untie state centrism and to discuss the possible adaptations and transformations of international

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<sup>505</sup> For a rather discontented critical analysis of academia in general, also see Pierre Bourdieu, *Homo academicus* (Stanford University Press, 1988), and Pierre Bourdieu, Franck Poupeau & Thierry Discepolo, *Political interventions: Social science and political action* (Verso Books, 2008).



criminal law, we must show the courage to reveal the power relations hidden beneath the perfect spectre of universal jurisdiction at national, subnational, and transnational levels. This dissertation attempted to do so within the specific context of the applications of the normative framework of universal jurisdiction to crimes that fall under the aegis of crimes against humanity, both within and beyond the confines of the ICC. Its findings encourage us to renew the debate on the growing network of international law institutions and the underpinnings of the transnational legal regime of accountability from the lens of an important web of regional, national, and sub-national authorities and spaces along with non-governmental organizations, political movements and civic initiatives. These developments seriously undermine the substantive claims of a centrifugal theory of international [criminal] law. The complex nature of the transnational dimensions of universal jurisdiction as it pertains to some of the most egregious crimes committed by states against their own people or in lands where they reside as occupying forces renders such a change of optics necessary in both the short and medium terms. Amidst the rising tide of seeking justice for political and mass crimes, using the rubric of international criminal law for the questioning of individual responsibility for societal crimes at the local and domestic levels has indeed been a very important first step in that direction.<sup>506</sup> This issue has been explicated in depth in my discussion on hybrid courts and other mechanisms that do not rely on the direct involvement of an international court such as the ICC in matters concerning states and societies in the Global South. However, I also urge the reader to take one more step forward and extend the normative frame of reference used to adjudicate crimes against humanity in the direction of a rejuvenated debate on the notion of collective societal responsibility for mass crimes. The resultant opening up of the horizon of jurisprudential scholarship in such a way as to allow for concerns about transitional justice and overall socio-political transformation of the societies in question would not erode the basis of universal jurisdiction in international law. On the contrary, it would engender new debates about its usefulness in domestic and local settings and thus introduce the elements of choice and volitional consent in the Global South for future uses of international law jurisprudence.

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<sup>506</sup> Antony Anghie and B. S. Chimni, "Third World Approaches to International Law and Individual Responsibility in Internal Conflicts" (2003) 2 *Chinese J. Int'l L.* 77.

Only then, would the prediction of Seneca I cited in the opening of this conclusion find true meaning in international law scholarship: "...time shall in fine out breake / When Ocean wave shall open every Realme..."

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