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**Philosophical Foundations of International Criminal Law:  
Correlating Thinkers**

Morten Bergsmo and Emiliano J. Buis (editors)



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**Front cover:** *The cut stem of a fir tree in the forest around Vallombrosa Abbey in Reggello, in the Apennines east of Florence. The monastery was founded in 1038, and is surrounded by deep forests tended over several centuries. The concentric rings show the accumulating age of the tree, here symbolising how thought expands and accumulates over time, and how lines or schools of thought are interconnected and cut through periods. Photograph: © CILRAP, 2017.*

**Back cover:** *The forest floor covered by a deep blanket of leaves from past seasons, in the protected forests around Camaldoli Monastery in the Apennines east of Florence. Old leaves nourish new sprouts and growth: the new grows out of the old. We may see this as a metaphor for how thinkers of the past offer an attractive terrain to explore and may nourish contemporary foundational analysis. Photograph: © CILRAP, 2017.*

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*Dedicated to Philip Allott*



## EDITORS' PREFACE

This first edition of *Philosophical Foundations of International Criminal Law: Correlating Thinkers* contains 20 chapters about renowned thinkers from Plato to Foucault. As the first volume in the series “Philosophical Foundations of International Criminal Law”, the book identifies leading philosophers and thinkers in the history of philosophy or ideas whose writings bear on the foundations of the discipline of international criminal law, and then correlates their writings with international criminal law. There is basic commonality in the structure of the correlational analyses, although the authors were encouraged to draw on their particular expertise and interest in the elaboration of each chapter. Chapters were selected from a broad public call for papers as well as through direct invitations to leading experts on specific thinkers, notably Sergio Dellavalle (Chapter 13 on Georg W.F. Hegel) and Jochen von Bernstorff (Chapter 16 on Hans Kelsen). It goes without saying that additional chapters are required to close lacunae in this volume. To this end, we are committed to releasing new, expanded editions in the coming years, through the kind cooperation of the Torkel Opsahl Academic EPublisher. We will make further efforts to add chapters on more non-Western thinkers and schools of philosophy.

We have been cognizant of the importance of a global approach from the very start of the project. Most of the chapters in this first edition were prepared for a conference on the topic organised by the Centre for International Law Research and Policy (CILRAP) and the Indian Law Institute in New Delhi on 25–26 August 2017. The forewords to this book come from the opening and closing conference-statements by Judge Madan B. Lokur and Gregory S. Gordon respectively, bridging the conference and the book. Several of the other co-organisers of the conference are based in India, including the Asian-African Legal Consultative Organization, Indian Society of International Law, National Law University (Delhi), O.P. Jindal Global University, and University of Delhi Campus Law Centre. We also included co-organisers from China and Japan (Peking University International Law Institute and Waseda University Law School), in addition to three European co-organisers (Grotius Centre for International Legal Studies of Leiden University, Institute for International Peace and Security Law of the University of Cologne, and The Univer-

sity of Nottingham). There was, in other words, a broad intellectual mobilisation around the concept of the project, with active participation from around the world. This included a recognition of the need to include a correlational dimension to the project and series.

The other two dimensions of the project find expression in the sister-volumes *Philosophical Foundations of International Criminal Law: Foundational Concepts* and *Philosophical Foundations of International Criminal Law: Legally Protected Interests*. In Chapter 1 to the present volume we discuss the relationship between these three dimensions, and what the project seeks to achieve. It does not aspire to formulate a particular philosophy or theory of international criminal law, but to nourish a discourse space that includes a) correlational or historical, b) conceptual or analytical, and c) interest- or value-based approaches. We are not suggesting that the discourse space should be limited to these three approaches, even if they constitute the deliberate taxonomy of the first edition of the three volumes. We believe that such a triangular understanding of the discourse space enables an emerging sub-discipline of philosophy of international criminal law to accommodate existing strands of inquiry, while ensuring that the space is open to new discourse actors.

This volume is dedicated to Philip Allott of Cambridge University. In his policy brief “How to Make a Better World: Human Power and Human Weakness”, he argues that the “high social function of philosophy must be restored”, and urges lawyers to try to make international law “as good as it can be”, given that the international legal system “was rationalised in the eighteenth century as a system for the piece-meal reconciling of the self-interest of States, as represented by their governments”.<sup>1</sup> The point is not to preserve a particular discourse role or power for the discipline of philosophy – or for international law, for that matter. Rather, Allott signals that the present international legal order requires development – from the eighteenth to the twenty-first century – and that its required contemporary rationalisation should not exclude insights that philosophy may offer.

Such exclusionary tendencies need not be the result of prejudice against philosophy as a discipline, schools of legal realism (such as Scandinavian Realism), language barriers (which are not limited to the Anglo-

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<sup>1</sup> Philip Allott, “How to Make a Better World: Human Power and Human Weakness”, FICHL Policy Brief Series No. 75 (2016), Torkel Opsahl Academic EPublisher, Brussels, 2016 ([www.legal-tools.org/doc/a35654/](http://www.legal-tools.org/doc/a35654/)).

sphere), or the numbness which may come with self-contentment. They may simply reflect the reactive way in which international law has traditionally been made. International lawyers have time and again found themselves in the back seat, seeking opportunities to influence the direction of governments to allow incremental standard-setting and institution-building. In the struggle for relevancy, mastery of the art of the possible has been a much-valued skill in international law-making. We do not yet have a legal policy and law-making capacity in the international community comparable to more mature national orders. A future-oriented rationalisation of international criminal law should not be reduced to scrambling to use short windows of opportunity. It is possible to start a broader, proactive process of analysis, consultation and research, including on which additional values should be recognised by the international criminal law of tomorrow. A suitable discourse space for such a process should include considerations of ethics and conceptual clarity. It is our hope that this common endeavour can start paving the way towards that end.

We would like to thank the authors for their work on the chapters and their patience and co-operation during the editing process. They are the chief stakeholders in the book. We also thank CHAN Ho Shing Icarus and Manek Minhas – Editors at the Torkel Opsahl Academic EPublisher – for their invaluable assistance with the editing of this volume. Thanks also go to LIAO Wan-Ting for the design of the dust jacket of the book. Finally, we are grateful to the Norwegian Ministry of Foreign Affairs and the International Nuremberg Principles Academy for financial contributions to this project.

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## FOREWORD BY JUDGE MADAN B. LOKUR

At the outset, I congratulate the editors of this project on international criminal law for focusing on a subject of immense importance in today's violence-ridden world. For maintaining a just world order, the basic tenets of international law and adherence to its rules cannot be ignored or brushed aside. We can tackle the global problems of climate change, terrorism and armed conflict only by working together to find common approaches. In such times, it is important to strengthen existing norms and, wherever necessary, create new norms. International law is more relevant today than ever before and theoretical inquiries into its sub-disciplines such as international criminal law are necessary for its growth. Hence the congratulatory note.

International criminal law is a relatively young field and remains to some extent undeveloped. It did not grow out of existing practice and consensus, like most of international law, nor was it theorized and set in motion to address a growing need, like other niche areas such as space law. Instead, it was created, almost out of thin air, to deal with the aftermath of calamity – in that sense, most of what we see today as 'international criminal law', is law created for, and practiced by, the *ad hoc* tribunals stretching from Nuremberg to ex-Yugoslavia and Rwanda. This *ad hoc* approach was then generalized to form the backbone of the International Criminal Court ('ICC'), an ambitious project for such a young intellectual discipline.

Nevertheless, as far as India is concerned, this ambitious project was not actually a rabbit out of thin air – we have been familiar with its core principles for millennia. The laws of armed conflict were discussed, as early as in 2000 BC in the Hindu epics, the *Mahabharata* and the *Ramayana*. Here the use of weapons of mass destruction, which kill even unarmed civilians, were prohibited as being against the prevailing moral values of the time. Judge Nagendra Singh of the International Court of Justice discussed how these morals developed into norms in the later *Manusmṛiti*, from the fourth century BC, where a wide variety of weapons that could cause unnecessary suffering such as arrows with heated, poisoned or hooked ends were prohibited in battle. These norms required that

those who surrender, flee or are otherwise *hors de combat* were not to be attacked, foreshadowing protections for prisoners of war. Precursors of modern laws of warfare are found in the *Dharmashastras*, such as a differentiation between just and unjust war, and military and non-military targets. Drawing from these rules, Kautilya, an adviser to the Maurya ruler Chandragupta, advocated similar rules in his political treatise, the *Arthashastra*, written between the fourth and third centuries BC.

What is even more interesting is that it was not merely rules of warfare that were laid out – much like in the current international legal system – but also the fact that the violation of these rules entailed something similar to criminal, or at the very least, moral responsibility. The twelfth book of the *Mahabharata*, the *Santi Parva*, describes how “violators of the law of war were classed as outcasts and stripped of privileges”. Even later, in 256 BC, the Emperor Ashoka, after witnessing the unnecessary suffering caused by his military conquest of Kalinga, took the moral blame upon himself and renounced war, turning to Buddhism instead. He laid down his ‘dhammas’ or edicts, the thirteenth of which advocated that military conquests, if carried out at all, should be done with forbearance and light punishment.

There was thus a deep sense of moral recognition and familiarity in ancient India and across the world for these principles of international humanitarian and criminal law, as a precursor to the Geneva Conventions.

In its current form, ‘international criminal law’ draws from the philosophical underpinnings of both criminal and international law. In one sense, it can be seen as their logical extension: criminal law has, at its core, the idea that individuals should agree to certain minimum rules of conduct within a society, the violation of which could be classified as morally wrong. International law rests on an analogous basis – that nation States should agree on certain minimum rules of conduct to promote a peaceful world order. Increasingly, these minimum standards in international law tend towards upholding humanitarian values. Accordingly, it would seem natural for acts contravening both these standards – acts that are both criminal within a society, and acts in contravention of international humanitarian standards – to be prosecuted internationally, in addition to domestically.

However, alongside this fundamental consonance of values is also a dissonance – namely, that international law upholds State sovereignty, which would oppose any outside interference, including through criminal prosecutions. It was the Second World War which drove home the point

that certain atrocities were so grave, that it was not just *that* society, but the entire world that was invested in punishing and preventing such acts. Since acts of this magnitude were usually committed by those with access to the State machinery, it became doubly important that international accountability be established, since the likelihood of domestic prosecution was low. An international mechanism became a necessity.

It was in this attempt to reconcile the irreconcilable that modern international criminal law was born – it carved out treaty-bound exceptions to sovereignty, allowing international prosecutions in these limited circumstances. This was on the jurisprudential back of ‘universal criminal jurisdiction’ over such ‘serious crimes’, a concept earlier extended only to crimes such as piracy on the high seas, which were outside any nation’s purview, but which was expanded to fit these new needs. When this was first achieved at Nuremberg and Tokyo, it was seen – hopefully, perhaps at that time – as a legal exception for the extraordinary circumstances of the Second World War. It did not seem likely that the world, or the West at any rate, would see genocide and its likes, again.

The war in ex-Yugoslavia and the simultaneous genocide in Rwanda put an end to this view. New tribunals were created by Security Council resolutions but their *ad hoc* nature retreated to the idea of international criminal law as an exceptional measure. Hence naturally, it has been difficult to tie these individual, limited experiments in international criminal law, into a grand academic and philosophical theory. However, the recognition in the 1990s of the inevitability of conflict, alongside a lowering of the humanitarian standards for overruling State sovereignty, culminated in several attempts to do so.

To give a few examples: certain States took the idea to its farthest logical endpoint, by opening themselves up to unfettered ‘universal jurisdiction’, over any ‘serious crime’, committed by any person, in any part of the world. This led to a multiplicity of litigations and allegations of infringement of sovereignty by affected third-party States, as a consequence of which Belgium and Spain – two of the most notable examples – retreated from this stance.

On the other hand, general international law advanced more cautiously, by way of the Rome Statute of 1998 (in force since 2002), to extend a limited universal jurisdiction to a neutral, international court – the ICC. Limited, because jurisdiction did not extend retroactively, did not extend to cases already tried elsewhere, or which could potentially be tried domestically, and most importantly, did not extend to the territory or

nationals of States not party to the Rome Statute. Nevertheless, this has been the boldest experiment in international criminal law to date, pushing the practical boundaries of the field closer to its jurisprudential ends. Now, as the ICC reaches the end of its second decade, it is more important than ever that international criminal law turn its gaze inwards to strengthen its core theoretical foundations, in order to ensure that it remains efficacious.

This is especially true in light of the jolt the field received at the start of 2017, when, following on the heels of the withdrawal by Russia and three African States from the Rome Statute, the African Union itself threatened a mass withdrawal. This did not come to pass, with South Africa and The Gambia both retracting their statements, but it highlighted the need for introspection. Is international justice, through the ICC, a better solution than regionalized, or *ad hoc* justice? The spate of withdrawals was based on claims that deeper neo-imperialist biases were at play in the choice of cases prosecuted at the ICC.

It seems that regional international criminal law solutions, rather than a universal one, might be one answer. To give a few examples: Senegal's successful prosecution of the former Chadian dictator, Hissène Habré, offers a strong case for regional justice mechanisms. Extraordinary African Chambers constituted within the Senegalese court structure, staffed by Senegalese and African Union judges and prosecutors, provided a uniquely African solution to African crimes.

Hybrid courts such as the one in Cambodia, with a certain degree of international scrutiny and control, but with sufficient local representation as well, may also be a more acceptable negotiation of issues of sovereignty and local accountability. However, Sri Lanka's resistance to setting up of such a tribunal to prosecute alleged war crimes during the Liberation Tigers of Tamil Eelam conflict, shows that some States may be unwilling to admit even so much of an incursion into their sovereignty.

The last remaining solution is an entirely domestic one. Bangladesh, for instance, has constituted a domestic war crimes tribunal to deal with crimes committed by its own nationals, during an international armed conflict. This attempt has met with some criticism as regards its independence and impartiality. Further, its structural inability to prosecute foreign nationals for related crimes is another obstacle to this being a comprehensive solution.

In Sri Lanka's case as well, insistence on an entirely domestic tribunal, if at all, has been at the expense of the Tamil minority's concerns regarding the reliability of such prosecution. This is of course the inevita-

ble side-effect of hyper-localization of international criminal justice – by their very nature, crimes of such scale are often tied to the political apparatus of nations and their domestic prosecution will always be riddled with the victors’ biases. Thus, localization may not be the automatic answer to the problems of international criminal law and the ICC.

Nevertheless, regional solutions do have their advantages. The International Criminal Tribunal for the former Yugoslavia (‘ICTY’), for example, was distanced to some extent, from its own victims, witnesses and the society it seeks to serve, by language – a tribunal functioning in English and French was prosecuting crimes conceived in ‘BCS’ – shorthand for the dialectic variations of the Yugoslav language. Even today, outreach includes translations and publicity of proceedings in the region, in order to aid the rehabilitative process – something localized proceedings could achieve more organically.

In fact, one of the successes of the Habré prosecution was that victims of sexual crimes felt far more comfortable travelling to Senegal – being within their cultural and geographic comfort zone – than they would have been travelling to the cold, northern shores of The Hague, to the ICC. This easy access to witness and victim testimony made the prosecution that much easier.

Even after prosecutions are concluded and convictions are entered, international justice poses further quandaries – the same concerns that drive international, rather than domestic prosecutions would also militate against holding these criminals in their home countries. Questions of safety and impartiality would always remain. This then poses the problem of where to detain them. High security detention centres are expensive and cumbersome and third-party States may often be unwilling to take on this additional burden. For instance, in Charles Taylor’s case, the Netherlands took on pre-conviction detention with the specific caveat that his final sentence would be enforced elsewhere. Even when willing countries are identified, the convicts themselves may raise concerns. One of the post-conviction issues in the ICTY is of detainees seeking transfers to different enforcement states from those chosen for them, claiming linguistic and cultural alienation and consequent exacerbation of their punishment.

These are all issues that might be resolved more easily through regional justice mechanisms.

Lastly, there is the question of the future: military technologies have progressed considerably and the ambit of modern warfare covers autonomous weapons systems, drones and cyber-warfare. While we must first

determine the permissibility of such technology under international humanitarian law, it will also soon be necessary to determine the legal framework within which, if permissible, they will operate. This will include the question of how we will assign moral culpability, under international criminal law, for the actions of such non-sentient systems. This is a jurisprudential challenge that must be tackled head-on before such situations play out, in order to ensure that the existing system of prevention and punishment remains relevant in the future as well.

There is thus no better time to review the foundations, consider the limits, and envisage the potential of international criminal law, a crucial field of law. It has contributed immensely in healing the wounds of the past, but for its future, one hopes that it can grow into an effective enough deterrent to forestall any tragedy.

Madan B. Lokur  
*Judge, Supreme Court of India*

## FOREWORD BY GREGORY S. GORDON

The three volumes of *Philosophical Foundations of International Criminal Law – Correlating Thinkers, Foundational Concepts and Legally Protected Interests* – flow from the conference organised by the Centre for International Law Research and Policy (‘CILRAP’) with Indian and other partners in New Delhi on 25–26 August 2018. I had the pleasure of speaking at that conference, and my paper appears as Chapter 20 in the first edition of the present volume. I thoroughly enjoyed the intellectual structure and organization of the conference, which flowed seamlessly and is reflected in the sequence of these three volumes: first we considered philosophers, then foundational concepts, and finally legally protected interests or values.

In the previous Foreword, Justice Lokur of the Indian Supreme Court observes that the foundations of international criminal law are found in the *Ramayana* and the *Mahabharata* (of which the *Bhagavad Gita* is a part). We shall not forget either that the philosophy of Gandhi – whose life and teachings seemed to play such a large role during our conference deliberations, and who is discussed in Chapter 15 below – was informed by the *Gita*. We were reminded that Gandhi in many ways echoed the conduct and philosophy of the great Indian emperor Ashoka, who created one of the largest empires in ancient India and then gave it all up to become a Buddhist monk. Along the way, he renounced violence and introduced a policy that established welfare as a right for all citizens; he promoted religious tolerance and core universal values including respect for all life and the importance of spiritual awareness. We ended the conference with Surabhi Sharma’s reflections on Indian thought on the collective goods protected by international criminal law, in particular ‘unity’ (see her chapter in *Legally Protected Interests*). This is a deep, rich, ancient but still vital vein of thought. These discussions took place in a particularly appropriate place, New Delhi.

What did those discussions centre on? During his introductory lecture at the conference, Morten Bergsmo talked about the emergency-response creation and growth of international criminal law, and that we should take a more systematic approach as we look towards its further

development. We need a holistic approach to reformulating international criminal law in general. At the conference, we had a very special opportunity to think deeply and reflectively about potential theoretical grounds for expanding international criminal law's subject-matter jurisdiction to include crimes against the environment, aggression and perhaps terrorism, among other possible offenses. We could step back and explore the foundations of international criminal law – indeed, its *philosophical* foundations – in the kind of depth that is necessary for the international community to consider its essential qualities, potential problems, and most pressing needs. The global community can now benefit from the fruits of those New Delhi colloquies thanks to these three volumes published by the Torkel Opsahl Academic EPublisher ('TOAEP').

The volumes engage in a number of important philosophical inquiries. For example: What is the foundational legitimacy of international criminal law? This first volume contains insights into this based on the works of philosophers throughout history, from Hobbes to Kant to de Vattel to Arendt to Foucault. Some have found legitimacy and some have questioned it. We can perhaps see international criminal law through the lens of Machiavelli – a Prince nakedly arrogating power to himself – or perhaps through the lens of a new interpretation of Foucault, where power is about security for vulnerable populations and is beneficent on a macro-level. Or we can even see it through an updated view of Hobbes, where a new social contract might be negotiated in the community of nations.

To those who have expressed a dim view of international criminal law – who see that it is not applied evenly or efficaciously – let me pose a question. Why does it have to be a zero-sum game? Why not acknowledge *Realpolitik* and say: “Yes, we did what was politically feasible. That was all we could do. We admit that. And even if we did that consciously, we did what we could for salutary purposes. And we know we are building for a better future when *Realpolitik* may be less of an obstacle. We have a foundation here. So it is better to do what we are doing than do nothing at all”? That is a reasonable narrative. For many of us who work in this area, it allows us to see an importance in what we are doing, despite the many obstacles.

As for international criminal law being ‘a new form of colonialism’, another critique we heard during the conference, let us consider the Latin logical fallacy ‘*post hoc, ergo propter hoc*’ (‘after this, therefore because of this’). Because it so happens that Africa had been the main focus of the International Criminal Court by the time of the 2017 conference in New

Delhi, it does not mean that we are confronting a new kind of colonialism. International criminal law's space for operation is limited. Again, we are confronted with *Realpolitik* and the phenomenon of self-referrals, as has been discussed. Perhaps there are unfortunate power plays behind the scenes. That is the subject of another anthology – *Power in International Criminal Justice* – forthcoming by TOAEP at the time of writing. That should indeed be another discussion. What is being done in international criminal law today may be crucial for future generations. The reflections of this conference and anthology have made that much clear. At the same time, we need to improve international criminal law. That much has also been clear.

These volumes ask other questions as well: What are the aims of international criminal law? Here we will begin with Plato and a Platonic theory of punishment advising that we minimize emotional bias in punishment (Chapter 2 below). More modernly, we explore utilitarianism, through Bentham (Chapter 12). We look at retributivism and expressivism as well. Are international criminal law's aims legitimate? Is its remit too broad? We have been asked to think of post-conflict justice more granularly. Perhaps, in reference to certain norm-violators, we need to be more aware of other institutions, including non-punitive ones, that can contribute more effectively to the legal goods of unity and reconciliation that were highlighted in the last conference panels, as elaborated in *Legally Protected Interests*.

We also consider issues of epistemology with reflections on Wittgenstein (Chapter 17) in relation to proving, among other things, *dolus specialis*; and truth and testimony in relation to epistemic injustice in international criminal law. We even consider the notion of normative pluralism and fragmentation in international criminal law (the last two topics, in *Foundational Concepts*). Here, and elsewhere in these volumes, we study Habermas and his theory of communicative rationality and the public sphere. We have seen different theories treated in different contexts in different parts of these three volumes. That is another reminder of how rich the discourse was during the conference, as now presented in these volumes.

Finally, we should think of this project on philosophical foundations in the context of others that have been led by CILRAP and TOAEP. The multi-volume *Historical Origins of International Criminal Law*, the second conference for which was also held in New Delhi in 2014, stands out. We have seen the connections between that great project and this one.

There have been many explicit and implicit references. In the course of 2017, CILRAP also organised a conference at the Peace Palace in The Hague on preliminary examinations, which led to the publication in September 2018 of *Quality Control in Preliminary Examination: Volumes 1 and 2*. They deal with how the machinery of international criminal law works. Here, we consider, if you will, the ‘ghost in the machine’. In the forthcoming volume *Power in International Criminal Justice*, CILRAP seeks to shed light on who operates the machine. This is such an amazing opportunity to understand and develop this discipline of international criminal law through what CILRAP refers to as ‘communitarian scholarship’. It is a great honour to have my work featured in these pages and to share these thoughts with readers about to embark on a great philosophical journey.

Gregory S. Gordon  
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# Setting a Discourse Space: Correlational Analysis, Foundational Concepts, and Legally Protected Interests in International Criminal Law

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## 1.1. The Philosophical Foundations of International Criminal Law Project and its Purpose

The title of this volume is *Philosophical Foundations of International Criminal Law: Correlating Thinkers*. It is neither as pretentious nor unclear as it may first sound. It is the first of three books in the series *Philosophical Foundations of International Criminal Law*, based on a research project undertaken in 2017 and 2018 by the Centre for International Law Research and Policy (CILRAP) in co-operation with international partners,<sup>1</sup> including a conference in New Delhi on 25 and 26 August 2017.<sup>2</sup> The sub-title *Correlating Thinkers* signifies that this volume correlates the writings and ideas of leading philosophers and thinkers with the contemporary discipline of international criminal law. Such writings or ideas may at the time of origin have addressed domestic criminal law, public international law more broadly, or philosophy or religion. Although not straight-

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<sup>1</sup> The project partners included the Indian Law Institute, University of Delhi Campus Law Centre, the Indian Society of International Law, National Law University, Delhi, O.P. Jindal Global University, Asian-African Legal Consultative Organization, Peking University International Law Institute, Waseda University Law School, the Grotius Centre for International Legal Studies, the University of Nottingham, and the Institute for International Peace and Security Law.

<sup>2</sup> This project has been undertaken with financial support from the Norwegian Ministry of Foreign Affairs and the International Nuremberg Principles Academy.

forward, correlational analysis may nevertheless have value. The rules and tests that make up legal doctrines, and are subjected to doctrinal writing, are usually built over long periods of time, with contributions from law-makers, judges, prosecutors, counsel, and publicists. The concepts on which rules, tests and principles are based are older yet, and have been given meaning also by philosophical, religious and other inputs, from across the globe. This volume seeks to look more closely at such philosophers and thinkers, and to view the discipline of international criminal law from their intellectual perspective.

Such correlational analysis maps existing philosophical thought relevant to international criminal law. This is, we submit, a prerequisite to any serious attempt to construct a sub-discipline or discourse space of philosophy of international criminal law. The alternative – relying only on the more theoretical texts by international criminal law scholars, combined with philosophy of criminal law generally, and works on theory of international law – would narrow the basis from which we construct, with several risks such as losing important perspectives as well as extent of representation, re-invention of past thought, and attachment to trend-sensitive theoretical approaches that may not enjoy long lives. Like the concentric rings formed in the trunk of a tree by the annual growth of wood – the front-cover image of this book – thought expands layer by layer through the writings and other recorded ideas of thinkers. By mapping the concentric layers or paradigms more widely, we can see the evolution of thought, the extent of commonality and interdependence, and the intellectual lines that cut through multiple layers or periods.

This is no small undertaking. As you see, the first edition of this volume contains 20 chapters, on thinkers such as Hugo Grotius, Thomas Hobbes, Emmerich de Vattel, Immanuel Kant, Georg W.F. Hegel, Jeremy Bentham, Raphael Lemkin, and Hannah Arendt. Obviously, more chapters are required to meet the broader ambition of *Correlating Thinkers*. We are committed to increasing this number, to cover more thinkers and traditions, and the Torkel Opsahl Academic EPublisher has fortunately agreed to releasing several new and expanded editions of the three initial books in the series in the coming years, to make the work as complete and representative as possible. The series is in other words an ongoing commitment of the co-editors and publisher.

The other two volumes in the *Philosophical Foundations of International Criminal Law* series are subtitled *Foundational Concepts* and

*Legally Protected Interests*. Neither volume is correlational as such. Rather, *Foundational Concepts* focuses on the main conceptual building blocks of the discipline of international criminal law. There is no generally recognised list of such concepts, and we are not proposing one. Nor is there a clear demarcation line between doctrinal (or dogmatic) and philosophical approaches to international criminal law. The latter needs to include an atomist or analytical focus on foundational concepts or categories. In its first edition, *Foundational Concepts* contains chapters on the notions of ‘sovereignty’, ‘global criminal justice’, ‘international criminal responsibility’, ‘punishment’, ‘impunity’ and ‘truth’. Future editions will also include chapters on notions such as ‘accountability’, ‘retribution’, ‘intent’, ‘territoriality’ and perhaps ‘*ius puniendi*’, and possibly on discretionary markers such as ‘reasonable’, ‘proportional’ and ‘necessity’ in the context of international criminal law. We have no intention of creating a rigid theoretical framework as a superstructure on top of the individual chapters. Rather, in *Foundational Concepts* our role is more akin to surveyors assessing the conceptual geography of the discipline of international criminal law, in the borderland between doctrinal and theoretical approaches. We would, however, welcome future supplementary chapters that analyse the relations between the foundational concepts, attempt classifications and hierarchies, and draw lines to *Correlating Thinkers*. The more comprehensive these two volumes become through future editions, the more intellectual exploration they may support, serving as an open knowledge-base in the public commons which anyone can draw on or interact with.

The third volume – *Legally Protected Interests* – maps the fundamental legal interests or values currently protected by international criminal law (such as ‘humanity’ and ‘international peace and security’), and discusses ‘reconciliation’, ‘solidarity’ and ‘unity’ as interests that should perhaps be more firmly recognised by international criminal law or international law more widely. The volume seeks to increase our awareness of the values and interests which international criminal law currently protects. What is the relationship between them? Is there a hierarchy or are other classifications than ranking more intuitive? Was there systematic thought behind the original protection of these values by international criminal law, or were they articulated and promoted more randomly or reactively in a politically-led process to establish a jurisdiction quickly, before a window of opportunity would close?

Developing higher awareness of the values protected by international criminal law will not necessarily affect its interpretation and application in different criminal jurisdictions. The point is not the outcome of cases. But it helps us to explore the limits and further potential of international criminal law. It invites a future-oriented rationalisation of the discipline, assessing whether international criminal law in its present, rudimentary form fails to protect interests that reflect common contemporary or emerging values that people care about. Should the discipline extend beyond wrongdoing in armed conflict and similar exceptional situations, to mainstream problems such as serious harm to the environment, public health or financial markets? *Legally Protected Interests* seeks to inform proactive consideration of how international criminal law should evolve in the coming decades. We are of the view that such considerations should commence in earnest, and that contemporary thinkers should engage in proactive analysis, with a particular emphasis on contributions from experts familiar with Chinese, Indian and other non-Anglosphere or -Western perspectives.

The wider context may help us understand why these questions are important. There has been an apparent flourishing of international criminal law since the early 1990s. States have led the way by establishing and sustaining special war crimes jurisdictions – international, internationalised and national – and by negotiating the legal infrastructure of the permanent International Criminal Court (‘ICC’), setting it up, funding it, and being patient with it. Non-governmental organisations have cheered States along, advocating certain benchmarks when States designed the jurisdictions, and subsequently offering assistance to the courts and tribunals, in particular their prosecution services. Practicing judges and lawyers within the war crimes jurisdictions commenced detailed analysis, interpretation and writing about the applicable international criminal law. It took several years for academics to catch up with what had become a rapidly expanding, State- and practice-led field. But they have since made their contributions in considerable numbers, generating a dense literature of articles, monographs, commentaries and blogs.

This body of doctrinal or dogmatic literature – texts on doctrines, rules, offences, elements or other norms and provisions of international criminal law – has not only accumulated and matured, but started to saturate in some areas of the discipline. We see early signs of a will to dogmatise that could soon go beyond the actual needs of the practice of criminal

justice for core international crimes – this would reflect a well-known lawyerly inclination towards ‘*Über-dogmatisierung*’. Similarly, the literature on the relational or socio-political role of the practice of international criminal law (that is, criminal justice for core international crimes) has become abundant, in particular in the context of so-called transitional justice. We may well be approaching a point where the international community in general has adequate access to expertise on international criminal law and its possible application during transitions towards peace and stability, away from armed conflict. Needless to say, such adequacy of expertise does not equate to a stronger will by governments to actually use criminal justice to deal with core international crimes. But it does indicate that inquiry needs to move forward and open itself to new challenges, and not become stale.

Whereas the discipline of international criminal law could soon be partially over-dogmatised, it concurrently lacks a crystallised sub-discipline or discourse space of philosophy of international criminal law. As such, the *Philosophical Foundations of International Criminal Law* project seeks to clarify and deepen the intellectual roots of the discipline of international criminal law. Such anchoring in older and more diverse schools and traditions of thought should contribute towards maturing international criminal law as a discipline, and cement the consensus around its basic building blocks. That is important. The project also aims to offer reflections on how the discipline of international criminal law should evolve further, what its perceivable outer limits may be, and which gentle civilisers other than international criminal law should begin where its reach necessarily ends.

On this last point, a November 2017-publication by four independent directors reminded us that the “aspirations of individuals and communities *made* the [International Criminal] Court and continue to provide its foundation. If the leaders of the Court cannot retain their trust, their aspirations will move on to other instruments for the betterment of humankind”.<sup>3</sup> The authors were concerned with challenges of integrity in international criminal justice. It is readily apparent that philosophy can contribute to the clarification of ‘integrity’ or other ethics standards, and as-

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<sup>3</sup> Morten Bergsmo, Wolfgang Kaleck, Sam Muller and William H. Wiley, “A Prosecutor Falls, Time for the Court to Rise”, FICHL Policy Brief Series No. 86 (2017), Torkel Opsahl Academic EPublisher, Brussels, 2017, p. 4 (italics added) ([www.legal-tools.org/doc/41b41a/](http://www.legal-tools.org/doc/41b41a/)).

sociated analysis of awareness, motivation and cultures of ‘integrity’. As regards other “instruments for the betterment of humankind” *within* international law, practicing international lawyers and diplomats may not always be best-placed to proactively analyse the needs in a systematic and open manner, as opposed to identifying and reacting to opportunities in practice. But the reference of the four directors to “instruments for the betterment of humankind” – or gentle civilizers – is not restricted to international law, and thus recognizes the openness of the impending discourse, also to philosophical reasoning.

In his 2016-policy brief “How to Make a Better World: Human Power and Human Weakness”, the Cambridge law professor Philip Allott argues that the “high social function of philosophy must be restored”,<sup>4</sup> a sentiment that also permeates former Yale Law Dean Anthony T. Kronman’s monograph *Confessions*.<sup>5</sup> Allott writes: “Law cannot be better than the society that it serves. But lawyers have a duty to try to make the law as good as it can be. Nowhere is this more necessary than in international society. We have inherited an international legal system that was rationalised in the eighteenth century as a system for the piece-meal reconciling of the self-interest of States, as represented by their governments”.<sup>6</sup> This largely reflects the state of the discipline of international criminal law as well.

We hope the *Philosophical Foundations of International Criminal Law* series may help us approach the future of international criminal law in a more systematic and representative manner. That is our objective – not to develop a particular theory or philosophy of international criminal law which, we fear, would tend to be the fool’s errand. A sub-discipline of philosophy of international criminal law can hardly be the equivalent of a specific theory or philosophy of a discipline of domestic law, as we know it from, for example, German criminal law. That would not take properly

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<sup>4</sup> Philip Allott, “How to Make a Better World: Human Power and Human Weakness”, FICHL Policy Brief Series No. 75 (2016), Torkel Opsahl Academic EPublisher, Brussels, 2016, para. 33 ([www.legal-tools.org/doc/a35654/](http://www.legal-tools.org/doc/a35654/)). The policy brief – which is published in English, Chinese and Arabic – builds on his 2016 study *Eutopia: New Philosophy and New Law for a Troubled World*, Edward Elgar Publishing, Cheltenham, 2016, p. 368.

<sup>5</sup> Anthony T. Kronman, *Confessions of a Born-Again Pagan*, Yale University Press, New Haven, 2016, pp. 161 ff.

<sup>6</sup> Allott, 2016, see *supra* note 4, para. 31.

into account the contemporary global reality nor the rapidly changing nature of international legal research.

In 1922 Wittgenstein wrote that “[p]hilosophy is not a body of doctrine but an activity”.<sup>7</sup> At the time of writing in 2018, the Internet has developed to such an extent that a new sub-discipline of philosophy of international criminal law should not be a mere “activity”, but a ‘communitarian activity’. It should be a *discourse space*, open to all, unconstrained by proprietary or national interests, and continuously evolving. The texts of recognised philosophers and thinkers of the past obviously belong in this space. But so do those who write about and analyse the writings of past leaders of thought (such as the chapter-authors in this volume), those who write on specific foundational concepts and legally protected values, as well as others who contribute to the space.

To function well, such a discourse space requires commitment to rigorous quality control on the part of its editors or conveners, and a common-sense structure or taxonomy. Our initial taxonomy is the division into correlation, foundational concepts, and legally protected interests – corresponding to the three volumes in the *Philosophical Foundations of International Criminal Law* series, of which this book is the first. These volumes are books in their own right and in the traditional library sense, but when you combine the three e-book versions, the notion of knowledge-base should also become tangible.

## 1.2. International Law and Philosophy: Why and How?

Our conceptualisation of a sub-discipline of philosophy of international criminal law as primarily a discourse space cannot be completely detached from the wider engagement of philosophy with international law. This is an engagement that has a long and varied history. Many international lawyers see little value in bringing philosophy to bear on international law. The relative maturity of international law methodology and the degree of definitional precision, make us sympathize with their scepticism. Be that as it may. The approach of this volume – and the wider *Philosophical Foundations of International Criminal Law* series – does not depend on any particular view on the wider consideration of philosophy and in-

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<sup>7</sup> Ludwig Wittgenstein, *Tractatus Logico-Philosophicus*, 1922, para. 4.112 (“Die Philosophie ist keine Lehre, sondern eine Tätigkeit.”).

ternational law. We should nevertheless briefly revisit key phases in this engagement.

The Vienna Convention on the Law of Treaties ('VCLT'), adopted on 23 May 1969, entered into force on 27 January 1980.<sup>8</sup> It codifies a number of customary provisions dealing with the legal regime of treaties between States. Articles 31 and 32 of the VCLT contain basic norms related to interpretation. As far as Article 31 is concerned, it is said that treaties shall be interpreted in good faith "in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose". A literal reading of the provisions should be therefore enhanced by the contextual dimension, including previous or subsequent agreements or other connected instruments. In Article 32, supplementary means of interpretation are included, since understanding a treaty may require examining the causes and origins of the text (as in the preparatory works) or its purpose and end, especially when a literal reading might leave the meaning ambiguous or obscure or lead to a result which is manifestly absurd or unreasonable.

These conventional provisions have inspired philosophers of international law, insofar as the rationale behind the articles in the VCLT is useful to describe the importance of a philosophical dimension in international legal thought. If the wording, the context and the purpose should come together for a more suitable interpretation of a specific rule, it could be stated similarly that the entire discipline of international law can only be fully grasped if those three aspects are jointly considered. The text of the legal instruments that configure the legal body of international rules should be examined in order to get a better perception of its scope, but at the same time it is relevant to think of the causes that motivate the agreements on those rules and of the intention behind those agreements. That is the general purpose of a philosophical approach, which can provide us with broad views on the scope of rights and obligations foreseen in their legal norms, both by permitting a linguistic examination of its provisions (literal interpretation) and a more abstract contextual analysis of the intent and aims. It looks at the international legal rules in their content and narrative, but it also encompasses a wider assessment in light of the surrounding social, political and cultural environment.

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<sup>8</sup> See [www.legal-tools.org/doc/6bfcd4/](http://www.legal-tools.org/doc/6bfcd4/).

For many decades, legal philosophy and international law seem to have walked different paths. This is not surprising; most authors who decided to think about the theory of law were absorbed by the centrality of the State as the centrepiece of a legal system. The authority of State organs over their subjects, related to the hierarchical nature of a centralized regime, needed to be explained. Legal philosophy became a useful tool to discuss the supremacy of the role of the State and its monopoly concerning the use of force against its people on its own territory. International law, on the other side, was far away from these discussions, since it was perceived as a quasi-legal order which lacked the main characteristics of its more ‘developed’ domestic counterpart. The absence of a centralized legislative power and the voluntary jurisdiction of international tribunals were the landmarks of an international legal network created by the common will of sovereign States, where no hierarchy could be established. This ‘Westphalian’ myth of origin, based upon the emergence of the sovereign equality of States, created a horizontal *corpus iuris* in which no superior force could be identified.<sup>9</sup>

At the same time, the birth of modern international law was traditionally seen as a practical necessity rather than an intellectual enterprise. Since there is no formal mechanism that could eventually ensure States’ compliance with its provisions, it was argued that international law was missing the rational enforcement strategies which are common in domestic normative systems. This pragmatic view – which identified international law as a moral, political or social set of rules considered to be an efficient instrument in the hands of the most powerful nations – did not exactly nourish a consistent philosophical approach to its substance. More related to international politics than to law, international law required higher degrees of normativity in order to ‘improve’ its reach, increase its utility, and endorse its long-standing purpose of regulating the international community. A higher ‘normative’ character would be accompanied by an *in crescendo* philosophical inquiry into its existence, validity and legality.

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<sup>9</sup> On the creation of a modern fiction of international law based on a Westphalian model and the political hiding of the realist paradigm, see Emiliano J. Buis, “El Derecho Internacional Público: Conceptos, características y evolución histórica”, in Silvina S. González Napolitano (co-ordinator), *Lecciones de Derecho Internacional Público*, 2015, Errepar, Buenos Aires, pp. 1–21.

These and other reasons may explain why international law was overlooked by legal philosophers for so long. Only recently may this tendency have been overturned, by a number of contributions that have started to provide a conceptual basis to conduct philosophical inquiries into international law.<sup>10</sup> It is true that international law has become more like municipal legal systems, and that domestic law and international law have become more integrated.<sup>11</sup>

In the beginning, the philosophical interest focused for the most part on issues concerning the existence and validity of international law. It is undeniable now that international law has its own rules determining its authority, and that consequently it is an autonomous legal order. Nevertheless, the problem of law-making has still promoted intense debate from a theoretical standpoint, and both the category of ‘subjects’ and ‘sources’ – typical to domestic regimes – do not seem to fall easily within the logic of international law and have therefore fostered strong discussions. The role of States as main subjects has been heavily criticized by positions claiming for a more democratic foundation of the system. The limits of the consent theory have been acknowledged in order to identify the need for a moral background in the birth of international custom and treaties.<sup>12</sup>

In any case, for many years the question had been whether international law was *law*, and therefore considered the basis of its ‘legal’ nature. More recently, theoretical approaches have sought to shift the question to whether international law is truly *international*.<sup>13</sup> This seems to have been an unasked question in some countries, perhaps primarily in some powerful English-speaking countries, whereas it can hardly be perceived as novel in places such as China, India, Latin America or the Nordic countries. The question could potentially re-open the ground to analyse the universal background of its principles, especially in the light of relativist approaches that condemn its historical Eurocentrism and focus on other

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<sup>10</sup> A significant exception is Edward Dumbauld, “The Place of Philosophy in International Law”, in *University of Pennsylvania Law Review*, 1935, vol. 83, no. 5, pp. 590–606, who already identified some of the key issues now under discussion.

<sup>11</sup> Samantha Besson and John Tasioulas, “Introduction”, in Samantha Besson and John Tasioulas (eds.), *The Philosophy of International Law*, Oxford University Press, Oxford, p. 13.

<sup>12</sup> Ronald Dworkin, “A New Philosophy for International Law”, in *Philosophy and Public Affairs*, 2013, vol. 41, no. 1, pp. 2–30.

<sup>13</sup> Anthea Roberts, *Is International Law International?*, 2017, Oxford University Press, Oxford.

(traditionally neglected) normative traditions. This could give the philosophical approach a new dimension, which is associated with its relative nature. It can be argued that engaged theoretical thinking of international law should be cognizant of historical biases in its origins, to give space for other traditions that were largely ignored and which might lead to questions about some of its long-standing principles.<sup>14</sup>

As we will discuss in the next section, the self-contained normative regime of international criminal law shares these aspects, but at the same time includes some other theoretical challenges because of the specific philosophical debate surrounding its penal nature.

### **1.3. From Plato to Foucault: A Sample of Philosophical Dialogues**

A comprehensive survey of the philosophical foundations of international criminal law is both necessary and timely. The modern evolution of the discipline, since the creation of the post-World War II military tribunals in Nuremberg and Tokyo, has reached a level of relative maturation where many of its discourse participants may benefit from a more theoretical exploration of its roots, main landmarks, and values protected. Two decades ago, in 1998, the Rome Statute was signed and the ICC, a permanent international criminal tribunal with universal scope, was created for the very first time. This has raised the discourse circumstances to another level. With the time that has passed since the Nuremberg and Tokyo trials, and the establishment of the ICC, there is a healthy distance to the use of international criminal justice in the aftermath of World War II and the innovations that facilitated that. We now have the opportunity to look forward in time and consider how international criminal law should develop in the coming decades, in light of the path walked so far and the new threats to fundamental interests of humankind. As expressed in the research programme that fostered this publication, a philosophical approach can contribute towards critical questioning of fundamental concepts and reasoning about values protected. It can provide a higher level of abstraction that helps us see more clearly where international criminal law falls short of the future.

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<sup>14</sup> This cultural bias was noted by the well-known monography of Wolfgang Preiser, *Frühe völkerrechtliche Ordnungen der ausseneuropäischen Welt*, 1976, Franz Steiner Verlag, Wiesbaden. An updated version in French was published as Robert Kolb, *Esquisse d'un droit international public des anciennes cultures extra européennes*, 2010, Pedone, Paris.

The task of offering an ample vision of international criminal law through the lens of a philosophical approach is, however, not an easy one. The convergence of philosophy and international criminal law has not been a mainstream approach, and it has only recently produced some texts which in fact only account so far for partial reflections.<sup>15</sup> This lack of confluence in the literature reflects that criminal law is still the subject of philosophical interest mainly at the domestic level. National penal systems, in spite of transnational traditions, have been perceived as an arm of sovereignty, and criminalisation has traditionally been viewed as a local phenomenon that could only be explained on a national scale. This explains why criminal law has been analysed in the last centuries by tools from a State-centred system of normative values. The recent projection to the international level – and the appearance of new trends and characteristics – has come with new challenges and questions.

This volume – complemented, as already explained, by two following volumes that take other angles – engages several of the current particularities of international criminal law by resorting to the works of relevant thinkers across time. Either explicitly or implicitly, in different moments of history and from various places, doctrinal contributions have established the basis of the principles and have given rise to the foundational notions that are constitutive today of what we understand as international criminal law.

Due to chronological reasons, the relevance of some authors is self-explanatory. At the origins of the discipline, the first experiences of international criminal tribunals were critically examined through (and sometimes against) the framework of contemporary legal positivism, such as the workings of Hans Kelsen.<sup>16</sup> In some ways, philosophical schools (and

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<sup>15</sup> The more interesting studies have come in the last decade. They include two chapters by David Luban and Antony Duff in the volume by Samantha Besson and John Tasioulas (eds.), *The Philosophy of International Law*, Oxford University Press, Oxford, 2010; the volume by Larry May and Zachary Hoskins (eds.), *International Criminal Law and Philosophy*, Cambridge University Press, Cambridge, 2010; the book by Alejandro Chehtman, *The Philosophical Foundations of Extraterritorial Punishment*, Oxford University Press, Oxford, 2011; and a thematic focus in the *International Criminal Law Review*, Anna Matwijkiw (ed.), 2014, vol. 14, nos. 4–5.

<sup>16</sup> For the different views on the positivist basis of the Nuremberg trials, see the papers of Quincy Wright, “Legal Positivism and the Nuremberg Judgment”, in *American Journal of International Law*, 1948, vol. 42, no. 2, pp. 405–14; Stanley L. Paulson, “Classical Legal Positivism at Nuremberg”, in *Philosophy & Public Affairs*, 1975, vol. 4, no. 2, pp. 132–58.

their associated authors, as singular embodiments of ideas common to a group of thinkers) can be useful to address conceptual pillars that support the structure of international criminal law.

Other individual thinkers are included in the book because they have been instrumental in discovering concepts, even though they offered their views in contributions published or circulated long before the emergence of the discipline of international criminal law. The interaction between contemporary thought and ideas that predate the birth of the first international tribunals is, in our minds, one of the assets of this volume. It opens for a diachronic analysis of issues such as the value of justice or liberty, the nature and imposition of punishment, the respect for the rights of victims, the interplay between legality and legitimacy, or the importance of the moral scenery that shapes international criminal law.<sup>17</sup> If philosophy is a history of ideas over time, the influence and distance between different authors is not only extremely pertinent, but also the more correct approach. Philosophical thinking is built on dialogue. By putting together a truly international group of experts coming from law, philosophy, history, literature and political science, this project seeks to foster a dialogical methodology, hence our emphasis on discourse space in Section 1.1. above and CILRAP's general promotion of communitarian scholarship. From Plato to Foucault, from Cicero to Arendt, this book is an invitation to explore concepts and inter-textual influence.

In spite of their chronological presentation, an equally rewarding way of reading these contributions is to mingle the chapters and place them together, to see the interactions, explore similarities, and conclude that concepts are best understood when different ways of reasoning intertwine. Authors fuel uneven levels of magmatic accumulations, and international criminal law has evolved into a *sui generis* outcome drawing on a variety of sources. In other words, many of the complexities of international criminal law today are, in large part, a result of echoes and tensions that have emanated from a plurality of theoretical backgrounds. Recovering many of these inputs helps us understand intricacies present in international justice. Readers of this volume are invited to follow that track.

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<sup>17</sup> For a chronological overview of the most important studies on the subject, see Robert Cryer, "The Philosophy of International Criminal Law", in Alexander Orakhelashvili (ed.), *Research Handbook of the History and Theory of International Law*, Edward Elgar, Cheltenham, 2011, pp. 232–67.

A second advantage of the communitarian endeavour behind this volume is that, apart from covering a large spectrum of epochs – from ancient Greece to the twentieth century – it offers a landscape that has attempted to go beyond Eurocentrism (or, more accurately in today's terms, Anglosphere-centrism). The modern attacks against international criminal law as a product which has been elaborated upon and fashioned exclusively from a Western logic, show that there is a wide range of influences that come from other cultural traditions. Non-Western insights are included in the presentation of the topics covered in this volume. A comprehensive discussion needs to consider traditionally excluded perceptions – a global discourse requires that all relevant voices are heard. Traditional philosophical approaches to law have generally failed to do that. Although future editions of this work will include additional thinkers, we hope to demonstrate in the following pages that the past focus on an Anglosphere-centric (and previously Eurocentric) bias has limited our understanding of the potential of international criminal law. By including the teachings of Buddha and Gandhi, we are opening the debate to streams of thinking which have not been present in the traditional discussion. Similarly, including early Christian Church Fathers expands the scope of the study. Much remains to be done to include more Asian and Middle Eastern perspectives, as well as Latin American and African philosophical contributions.

Needless to say, what we include here is far from an exhaustive list of relevant thinkers. In this first edition of the book, we could only offer an initial collection of relevant thinkers. It is, nevertheless, a rich assembly. Figures such as Plato, Cicero, Ulpian, Buddha, Ambrose, Augustine, Aquinas, Vitoria, Suárez, Grotius, Hobbes, Locke, De Vattel, Kant, Bentham, Hegel, Durkheim, Gandhi, Kelsen, Wittgenstein, Lemkin, Arendt and Foucault present a rich canvas of ideas that have moulded, from complementary viewpoints, our modern positions on international criminal law. Each chapter shows us that these thinkers had ideas relevant to concepts such as punishment, justice, international law or universal jurisdiction. Taken as a whole, they offer a sense of the nature of the dialogue that has helped construct what we believe today to be the ideological architecture of international criminal law.

What are some of the leading correlational themes and concepts that different thinkers and philosophical traditions have explored? Some of the authors have provided useful readings on the notion of sovereignty in

relation to criminal law. In Rome, while Cicero introduced his ideas on the domestic establishment of a penal law addressed to the punishment of foreign enemies, Ulpian settled the theoretical basis for the consolidation of national criminal jurisdictions from a legal criterion. The founding fathers of the discipline can say much on this: the notion of punishment in times of war can also be traced in the famous works of Grotius, whereas the idea of a common ‘enemy’ that could justify a legal system among sovereign States is present in those of Vattel, one of the creators of the modern concept of sovereignty.

Other chapters pay attention to the efficiency of sanctions and their function as such. From a sociological perspective, Durkheim thinks of crime and punishment as part of a collective moral process based on shared sentiments engraved in common conscience. Retribution is required to enforce group beliefs and social cohesion. From a different perspective, Bentham’s principle of utility considers the overall well-being of societies affected by crimes: the aim of a criminal law should be to promote the largest happiness of the greatest number by educating people and deterring offences. A psychological viewpoint, such as the one promoted by Wittgenstein, focuses on the need to examine the *mens rea* of the perpetrator to take proper account of his or her state of mind by identifying both intent and knowledge.

Alternative responses to grave crimes have been suggested in other philosophical traditions more interested in the protection of victims and the peaceful settlement of traumatic experiences. Buddhism, for instance, has heavily relied on the value of reconciliation by resorting to religious principles. In contemporary Indian thought, moral considerations were also part of Gandhi’s approach to the legal order and his spiritual standards to understand the logic of law. This draws on a large tradition of the importance of ethical and religious considerations, as documented over many centuries in the works of Christian thinkers with a strong background in natural law, such as Ambrose, Augustine, Aquinas, Vitoria and Suárez.

The convergence of national interests and universalism is also discussed in some chapters. Cosmopolitanism, already suggested by Ulpian in its archaic roots, re-flourished in the twentieth century together with the origins of a global and overarching human rights movement. When discussing the negative effects of totalitarian regimes, Arendt encouraged robust civic intervention in fighting against criminal wrongdoings. This is

also a key element in international criminal law. Societies, in her opinion, have to respect plural and inclusive conditions of the political community: citizens are in charge of establishment a system of prevention to the benefit of all.

This inclusiveness also relates to other ways of embracing a criminal legal endeavour in the international sphere. The complex nature of cosmopolitanism, seeded as we said by Ulpian, was developed by Kant as a global system of law in favour of humanity, founded on the aspiration of a perpetual peace. Similarly, to overcome the anarchy of a plurality of States, another ‘internationalist’ perspective would endorse the need to consolidate the fiction of universal institutions as a global social contract (as hinted by Hobbes).

The relationship between the local and the global cannot be absent in a philosophical dialogue on the foundations of international criminal law. Hegel, for example, provided novel ideas to examine the inherent plurality of legal and social orders, which is very useful to understand the parochial and, simultaneously, universalistic features of international justice.

The birth and development of international criminal tribunals can also be examined through philosophical lenses. Different positions can give us reasons to identify the role of the ICC as a common judge against impunity (as one could interpret from Locke), but also as a security-enforcing regime that has managed to generate close control through its social power (as a Foucauldian assessment could insinuate). The origins of specific offences, which are now part of the hard core of recognised international crimes, are also present in the debates, as suggested by Lemkin’s definition of genocide and the original difficulties of including it in relevant legal instruments.

Clearly, previous to the existence of international criminal law as a discipline, thinkers contributed to its future development with theoretical ideas arising either from criminal law or international law. These interdisciplinary readings need to be revisited for a more general view of international criminal law to be grasped. Like the tree rings depicted on the cover of this book, our effort shows that analysing the philosophical foundations of international criminal law implies looking at overlapping layers from different moments, places, and fields of expertise. It shows the growth of a discipline that lived through cycles of experiences in a continuous historical sequence. Beyond the individualisation of relevant thinkers and

how they perceived this legal phenomenon, this is a claim about the need to study those interdependent layers and the voices that have come together to plant the trees and produce the wood in the fascinating landscape of international criminal law.

We expect that the *Philosophical Foundations of International Criminal Law* series will open a discussion on the future development of international criminal law. On the one hand, an examination of its normative framework will need serious efforts to strengthen the regime and protect it against political, economic and cultural critiques. At the same time, this criticism (which is frequently referred to in the different chapters of this book) deserves special attention to understand its function and the seriousness of the risks to the development of criminal justice at an international level. Rather than taking the debate to a detached, abstract level, endorsing a philosophical analysis paves the way to a better understanding of the most concrete efforts of international criminal tribunals, and of which fundamental values international criminal law should next protect. If born out of a plurality of readings and a multiplicity of voices as intended in these volumes, such an analysis can contribute to a global perspective.

#### **1.4. The Contents of This Volume**

The first chapters of this volume deal with antiquity. Focusing on classical Greece, Emiliano J. Buis revisits in Chapter 2 (“Restraint over Revenge: Emotional Bias, Reformative Punishment and Plato’s Contribution to Modern International Criminal Law”) several Platonic dialogues in order to examine the affective importance in the administration of Athenian justice. His approach to legal emotions becomes an efficient method to address the value of sentimental considerations in judging, which is of the utmost importance for the understanding of the development of international criminal tribunals (from the biased experience of Nuremberg to the discreet foundations of an ‘aseptic’ ICC). According to Buis, Plato’s statements on *timoria* (‘vengeance’) and the citizen’s instruction in prudent reasonableness, help to show that there has always been a need to rationally overcome the theoretical foundations of revenge in order to consolidate curative benevolence as an educational basis for punishing in criminal proceedings.

Chapter 3 (“Cicero: *Bellum Iustum* and the Enemy Criminal Law”) by Pedro López Barja de Quiroga starts by reminding us that “Rome pun-

ished her enemies but did not take them to trial”. How does the author then correlate Roman legal thought with the discipline of international criminal law? He begins with the relationship between ‘just war’ (*bellum iustum*) on the one hand, and ‘enemy criminal law’ (*Feindstrafrecht*), on the other. The author uses Cicero to explain the relationship between these concepts, discussing in detail his understanding of ‘*bellum iustum*’ in the context of theory and practice in Rome at his time. The concept of ‘states of exception’ is also studied, taking Schmitt’s thinking as a starting point. Barja de Quiroga concludes that Cicero’s importance for contemporary international law relies both on his emphasis on ‘*ius post bellum*’ and on his thoughts related to criminal law and sovereignty. The chapter also includes Günther Jakobs’s notion of ‘enemy criminal law’ – closely related to Schmitt’s thinking on ‘states of exception’ – in order to examine in some detail the Ciceronian influence; the Roman contribution to the notion of ‘enemy criminal law’ can then be expanded to the modern idea of ‘enemy-combatant’ used by the United States in its so-called “war on terror”.

In Chapter 4 (“Roman Jurists and the Idea of International Criminal Responsibility: Ulpian and the Cosmopolis”), Kaius Tuori investigates the writings of Roman jurist Ulpian (170–223 AD), examining the Roman origins of ‘international criminal responsibility’. The author looks at concepts such as sovereignty, responsibility, universal jurisdiction and authority. Commenting on the ideas of exclusive jurisdiction and national sovereignty, the author states that “approaching the pre-modern ideas and practices of jurisdiction and its limits enables us to see not only the origins of the modern conventions but also the limitations inherent in them”. Furthermore, the Stoic doctrine of ‘*cosmopolis*’ (the universal community of men), as presented in the thought of Ulpian, is analysed through the lens of the evolution of Roman legal thought.

In Chapter 5 (“*Inter Homines Esse*: The Foundations of International Criminal Law and the Writings of Ambrose, Augustine, Aquinas, Vitoria and Suárez”), Judge Hanne Sophie Greve elucidates the purpose of international criminal law in terms of questions regarding the value of individual human life and the purpose of the organisation of collective life. She explores the contribution of the thinkers Ambrose, Augustine, Aquinas, Vitoria and Suárez in relation to “first principles” shaping legal thought and practice. Natural law theory is discussed in addition to morality and civil law. The author states that there is a link between the trans-

cent human dignity and the law of nature or the law of reason. Although this law neither settles all questions nor solves every problem, it shows that humankind endorses a common ground concerning the basics of human life – that of the *singular human being* and that of the *plurality*.

In Chapter 6 (“Buddhist Philosophy and International Criminal Law: Towards a Buddhist Approach to Reckoning with Mass Atrocity”), Tallyn Gray analyses core international crimes through a Buddhist framework. Employing texts such as the Dhammapada, Theragata and Majjhima Nikaya, Buddhist concepts like ‘*Dharma*’, ‘*Karma*’, ‘*Dukkha*’ (‘suffering’) and ‘*Metta*’ (‘loving kindness’) are considered in the context of mass violence. He initiates a discussion on Buddhist conceptions of the role of the victim, pre-emptive justice, retribution and reconciliation, and then uses the genocide by the Khmer Rouge in Cambodia as an example of Buddhist thought having an impact on the response to atrocities.

In Chapter 7 (“Hugo Grotius on War, Punishment, and the Difference Sovereignty Makes”), Pablo Kalmanovitz argues that the concept of ‘solemn war’ introduced by Grotius in his *De Jure Belli ac Pacis* better reflects Grotius’s position on the requirements of wartime legislation (although one of ambivalence) than the concept of ‘just war’. The concept of ‘solemn war’ cannot be fully reconciled with that of ‘just war’ due to, among others, the differences in punitive measures supported by them. Crimes committed in a ‘solemn war’ would not necessarily be punished, if they had been decreed by the sovereign and followed an official declaration of war. Customarily, exemptions would be made for such acts. Therefore, sovereignty is central to how the law and punishment are applied in ‘solemn war’. The reasons why Grotius introduced the concept and the impunity supported by it are discussed in the chapter, in addition to how those reasons and the concept of ‘solemn war’ could be relevant today.

In Chapter 8 (“Hobbes and the International Criminal Court: the fantasy of a global social contract”), written in French, Juan Branco provides us with a Hobbesian insight on international criminal law, in general, and more particularly on the creation and functioning of the ICC. Far from being related to the universality promoted in times of the Enlightenment, the ICC is instead built on the political pressure exerted by the sovereign interests of States. Branco explains that, rather than being strictly Kantian in its constitution, the ICC remains very closed to the reality of the political balance at the moment of its origins. Hobbes’ notions relating to the social contract and the Leviathan are therefore efficient tools to

discuss the nature of the tribunal, its inherent limitations and, eventually, its possibilities for the future.

Chapter 9 (“An Analysis of Lockean Philosophy in the Historical and Modern Context of the Development of, and the Jurisdictional Restraints Imposed by, the ICC Statute”) by Daniel N. Clay deals with John Locke’s contribution. According to the author, contrary to Hobbes, Locke’s philosophy of justice does not require that the State have complete sovereignty, attributing greater authority to a ‘common judge’ than to the State. Locke’s concept of a ‘state of nature’ grounded in natural law preceding the establishment of a society wherein positive law and a ‘common judge’ presides, is offered by Clay as a characterisation of the current order, in light of the state of the ICC. This Lockean basis of international criminal justice is contrasted with Hobbesian philosophical foundations, and the process leading to the establishment of the ICC is analysed in this light. Gustave Moynier’s early contribution towards the establishment of an international court is discussed, as well as the limitations imposed on the ICC by the Rome Statute. The future of the court is presented as either going further in a Hobbesian direction due to the declining credibility of the Court, pushing States to reduce co-operation, or in a Lockean direction through the strengthening of the opinion that a ‘common judge’ in fact promotes justice.

Elisabetta Fiocchi Malaspina outlines in Chapter 10 (““The friend of all nations”: Punishment and Universal Jurisdiction in Emer de Vattel’s *Law of Nations*”) the influence that Vattel’s classical treatise has had on the development of international criminal law. She discusses the historical and intellectual contexts in which the treatise came about and was received, by whom it was influenced, as well as for whom it was primarily intended. She considers that Vattel’s theories on punishment and universal jurisdiction – as well as his contribution to the formation of concepts – remain relevant to international criminal and humanitarian law; among those concepts, the author deals with “enemy of mankind”, *jus cogens* and “crime against the law of Nations”. Fiocchi Malaspina suggests that Vattel’s ideas on the State, international relations and military intervention for humanitarian purposes are useful for a better understanding of contemporary international criminal law.

In Chapter 11 (“The Statute of the International Criminal Court as a Kantian Constitution”), Alexander Heinze provides a defence of the ICC based on Kantian moral and political philosophy. Throughout the chapter

the author interprets Kant's *The Metaphysics of Morals*, *Critique of Judgement*, and *Perpetual Peace: A Philosophical Sketch*, as well as other political writings. He deals with issues such as human rights violations at the national as well as the international level, punishment in relation to questions of freedom, the complementarity principle, and the organisation and role of the ICC within international criminal justice. He examines the Rome Statute in light of the notion of a constitution of the international community. The role and purpose of international law and politics are also discussed, not only through the lenses of the rights of nations, but also those of the individual human being.

Chapter 12 (“Jeremy Bentham’s Legacy: A Vision of an International Law for the Greatest Happiness of All Nations”) by Gunnar M. Ekeløve-Slydal focuses on Jeremy Bentham’s contribution to the establishment of international law. The ‘utility principle’ being the guiding norm in his thought, Bentham manages to de-emphasise natural law and rights as a basis for the development of international law. In his primary legal works, *Introduction to the Principles of Morals and Legislation* and *Of Laws in General*, Bentham undertook the task of codifying international law, which made him take the view that a court was needed to arbitrate in international disputes. His well-known contributions include having coined the term ‘international’ to describe what we know today as ‘international law’, and having resorted to the idea of an international law as a means to avoid war and promote lasting peace.

Sergio Dellavalle’s Chapter 13 (“Reconciliation v. Retribution, and Co-operation v. Substitution: Hegel’s Suggestions for a Philosophy of International Criminal Law”) suggests that, although Hegel’s writings do not explicitly deal with international law, they are on a conceptual level relevant to the discipline and deal with several of its core issues. Hegel’s political outlook differs from Enlightenment philosophers such as Kant in that the community – not the individual – takes precedence. A legal framework must serve community interests, the intrinsic value of which differ from those of individuals. This conception has shaped his view on crime and punishment: the effect crime has on the community as a whole is given added value, and reconciliation rather than retribution is seen as the crucial way forward in conflict. Interpreting Hegel’s stance, Dellavalle suggests that the State cannot be underestimated among collectives, in its role of enacting and consolidating justice. However, due to his conception of ‘reason’, Hegel cannot be accused of favouring particularism over uni-

versalism; instead he supports a form of pluralism. The author concludes that international bodies such as the ICC are seen as complementary actors in strengthening peace and security in the international community.

Chapter 14 (“Understanding the International *Ius Puniendi* under Durkheim’s Collective Conscience: An Anachronism or a Viable Path?”) is co-authored by Carlos Augusto Canedo Gonçalves da Silva and Aléxia Alvim Machado Faria. They pay particular attention to questions regarding the purpose, function and justification of punishment by looking at Émile Durkheim’s social theory. The chapter focuses in particular on the term ‘collective conscience’, which can be defined as the set of shared beliefs, ideas and moral attitudes which unify a society. The primary purpose of punishment – according to Durkheim – is thus symbolic, namely to uphold certain values or norms, or to confirm certain moral feelings in society, thereby strengthening social cohesion and solidarity. The problem, as shown by the authors, arises as to which values are dominant in the ‘collective conscience’ of the international community. It is concluded that ‘collective conscience’, although too abstract and problematic as a concept, can be claimed to stretch beyond borders and shape the understanding of the norms underlying the justification of punishment.

In Chapter 15 (“Gandhism and International Criminal Law”), Abraham Joseph studies a number of relevant Gandhian concepts and their relationship to international criminal law. The author suggests that in Gandhian terms international criminal justice can be seen as “peace trusteeship”. Non-violence or ‘*Ahimsa*’ is seen as a route to peace and the realisation of moral truth; therefore, criminal law – which deals with criminals responsible for acts of great violence – is perceived as serving the ends of non-violence and peace. However, law and judicial procedures must also conform to the teaching of non-violence, hence the death penalty and life imprisonment should not be used. According to Joseph’s reading of Gandhi, the purpose of punishment should be to morally reform the perpetrator. Having said that, it is also stated that non-violence does not prohibit the use of violence in all situations, since Gandhi himself did permit the use of violence under particular circumstances (that is, for self-defence).

In Chapter 16 (“Hans Kelsen and the Move to Compulsory Criminal Jurisdiction in International Law”), Jochen von Bernstorff examines Kelsen’s contribution to the idea of compulsory international criminal jurisdiction. The author discusses Kelsen’s proposals *de lege ferenda*, as

well as his theory of the evolution of legal systems, which identifies international legal jurisdiction as an organic subsequent step after that of national law. Kelsen supported the formation of a strong world court and a peace organisation consisting of an assembly, a tribunal, a council and secretariat. Von Bernstorff's contribution discusses Kelsen's ideas on the structure of an international court and, more general, of international law. In spite of his advocacy for international criminal jurisdiction, Kelsen did not support the Nuremberg trials, primarily due to what he saw as a flawed legal basis for the institution of international criminal responsibility.

Chapter 17 (“*Mens Rea*, Intentionality, and Wittgenstein’s Philosophy of Psychology”) by Jaroslav Větrovský applies Wittgenstein’s philosophy – in particular his concept of language play – to the notion of intention or *mens rea*. Intention, as perceived in international criminal law, is suggested to be compatible with Descartes’ dualism of body and mind. The understanding that intentions are private (that is, that they cannot be known by others) is investigated, as well as how intentions are said to be known by ourselves. More specifically, Větrovský discusses the “grammar” or linguistic elements of the concept of intention. He suggests that there might be a lack of precision in the language describing criminal intent when the concept is analysed from Wittgenstein’s point of view.

Chapter 18 (“Genocide: The Choppy Journey to Codification”) by Mark A. Drumbl argues that the concept of genocide has been altered through the making of the 1948 Genocide Convention and has become narrower than its original meaning, as put forward by Raphael Lemkin. By looking at counterfactuals, Drumbl compares the processes of the codification of ‘crimes against humanity’ and ‘genocide’, and constructs a different path for the consolidation of Lemkin’s definition of genocide before its resulting in codification. According to the text, a slower approach could have contributed to the retention of some of the concept’s pre-treaty breadth. Notwithstanding the weaknesses of the treaty definition of genocide, the author argues that it fundamentally protects the rights and values intended by Lemkin, and considers that future case law may improve the definition in order to echo Lemkin’s original notion.

In Chapter 19 (“Arendt on Prevention and Guarantees of Non-Recurrence”), Djordje Djordjević outlines the features of Hannah Arendt’s writings dealing with the prevention of core international crimes and their recurrence. He introduces a set of conditions which, in his view, Arendt

deemed essential to prevent the commission of core international crimes. Arendt approaches the topic of prevention by identifying the social conditions leading to such crimes, critically examining political and legal responses to such atrocities, and underlining the importance of a normative approach in the form of civic action and responsibility. Djordjević relates Arendt's critique of legalism and her model of citizenship – analysing the importance of mental predispositions and political action – to current debates on how to develop civic resilience and strengthen prevention.

Finally, in Chapter 20 (“Transnational Governmentality Networking: A Neo-Foucaultian Account of International Criminal Law”), Gregory S. Gordon relates Foucault's theory of power to international criminal law and to the notion of ‘transnational governmentality networking’. Previous scholarship on Foucault and international criminal law has largely been based on Foucault's book *Discipline and Punish: The Birth of the Prison*. According to Gordon, scholarship has often characterised the notion of ‘power’ as embracing institutional control of individuals on a larger scale. International criminal justice has not only been a way to end impunity for individuals, but also a means to maintain order in line with the interests of global actors and nation States. The interpretation of Foucault's notion of ‘power’ in this chapter draws more heavily on his later writings and does not characterise power as coercion and control, but rather as ‘governmentality’, which is a non-disciplinary form of power. The author argues that international criminal justice cannot be understood as a forum for the maintenance of supranational control, but rather as a set of ‘lower-level transnational networks’ having reached critical mass through the process of governmentality. International criminal justice, therefore, not only represents punishment and coercion, but also local-global capacity building. Power can thus be viewed as a normative and institutional bond.

As a whole, these chapters offer a rich canvas for those interested in tracing how the idea of an international criminal justice started to emerge and consolidated, and thus how it might evolve into the future. Read one after the other, these contributions by specialists from around the globe show that different lines of thought from a number of historical periods, representing a wide range of interests, had to come together to nurture the field of international criminal law. The philosophers or thinkers who are discussed in the following pages have had a fundamental role to play in this story, a story that attempts to explain the foundations of international criminal law as a practice and as a discipline, identify the nature of its

institutions, and understand with better tools the present and future scope of its rules. They set a discourse space which we hope readers of this volume might be interested in learning from, comparing, discussing and perhaps contributing to as it continues to evolve and become more global.



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# Restraint over Revenge: Emotional Bias, Reformative Punishment, and Plato's Contribution to Modern International Criminal Law

Emiliano J. Buis\*

## 2.1. Introduction

The historical and conceptual evolution of international criminal law can be read as an open thread of tension between emotional punishment and more rationalising endeavours – in short, between retribution and individual reform. In order to justify its creation, at the end of World War II, the Nuremberg and Tokyo international military tribunals were presented as an improvement of previous revenge-based reactions, as a more sophisticated tool in the path towards the achievement of justice. Nevertheless, some authors have criticised this experience by stating that, in spite of its alleged explanations, these courts were heavily influenced by strong feelings on behalf of the victors against those who had just lost the war. Revenge and justice have always been at the core of the debates and sometimes coexisted in the creation of international tribunals.

According to a contemporary account that was declassified by the British government in October 2012, Winston Churchill opposed the es-

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establishment of the Nuremberg tribunals after World War II because he wanted Nazi leaders to be summarily executed and others to be imprisoned without judicial proceedings. This proposal, presented at the Yalta conference in February 1945, was rejected by Joseph Stalin, who claimed that public judgments would promote positive propaganda value, and Franklin D. Roosevelt, who contended that the American people were rather expecting institutionalised trials.<sup>1</sup>

From different perspectives, both Marxist and Realist scholars have made it clear that these international legal developments can be shown as emotional constructions that are often very far away from the rationality their architects seemed to endorse in order to justify their necessity. “To realists”, Gary Bass writes in a book on the politics of international criminal courts, “a war crimes tribunal is simply something that the countries that decisively win a war inflict on the helpless country that loses it. It is punishment, revenge, spectacle – anything but justice”.<sup>2</sup>

The *ad hoc* international criminal tribunals, created by the Security Council as a result of the conflicts in the former Yugoslavia and Rwanda,<sup>3</sup> have generated interesting debates on the tension between the alleged legality of the procedures and the identification of a vindictive approach of the international community to specific situations that needed to be solved locally.<sup>4</sup>

A similar line of thought, of course, seems to have accompanied the International Criminal Court (‘ICC’) from its very beginning at the Rome Conference. Unlike its predecessors, the ICC has been described as a contemporary institution built as a result of diplomatic agreements on the bases of legal legitimacy, due process, and institutionalised complementarity. However, its alleged selectivity has drawn sustained criticism from

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<sup>1</sup> Ian Cobain, “Britain favoured execution over Nuremberg trials for Nazi leaders”, in *The Guardian*, 26 October 2012.

<sup>2</sup> Gary J. Bass, *Stay the Hand of Vengeance: The Politics of War Crimes Tribunals*, Princeton University Press, Princeton, 2000, p. 11.

<sup>3</sup> The International Criminal Tribunal for the Former Yugoslavia (‘ICTY’) was established by the United Nations Security Council (‘UNSC’) Resolution 827/93, whereas the International Criminal Tribunal for Rwanda (‘ICTR’) was established the following year by UNSC Resolution 955/94.

<sup>4</sup> Payam Akhavan, “Beyond Impunity: Can International Criminal Justice Prevent Future Atrocities?”, in *American Journal of International Law*, 2001, vol. 95, p. 12, considers that both tribunals helped to marginalise nationalist political leaders and other forces allied to ethnic war and genocide, and were able to discourage vengeance by victim groups.

different theoretical perspectives, which have highlighted a problematic political context. For example, in a lecture delivered back in 2009, Hans Köchler addressed the politicisation of international criminal justice, considering that the ICC was more interested in exerting global revenge than in promoting universal justice.<sup>5</sup> That may or may not be true, but there has been a discussion between retributive and restorative justice in place in the last years as a result of the need to strike a balance between the role of victims and defendants in international tribunals.

Revenge has been considered a key element in international *politics*, a form of negative reciprocity that consists in seeking emotional satisfaction at the suffering of another.<sup>6</sup> It has been frequently stated that international justice is a struggle against retaliation, since revenge, associated with anger, is an over-reaction that tends to inflict exaggerated and unreasonable suffering.<sup>7</sup> Courts such as the *ad hoc* tribunals or the ICC operate in a “turbulent world where power matters”, where a small number of stronger countries intervene and operate far away from the imperatives of international justice.<sup>8</sup> This explains why punishment – exacted by the most powerful – has not always responded to a proportional infliction of penalties but rather depended on the perception of harm or the subjective experience of maltreatment. The moral rejection of vindictive impulses has triggered a less politicised – and more rationalised – image of international justice.<sup>9</sup> Based on the reading of the case law from the *ad hoc* tribunals, it could be said that the aim of punishment in international crimi-

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<sup>5</sup> Hans Köchler, “Global Justice or Global Revenge? The ICC and the Politicization of International Criminal Justice”, lecture delivered at the World Conference for International Justice, *United against the Politicization of Justice*, Khartoum, Sudan, 6 April 2009 (on file with the author).

<sup>6</sup> On the importance of revenge in the context of interstate relations, see Oded Löwenheim and Gadi Heimann, “Revenge in International Politics”, in *Security Studies*, 2008, vol. 17, pp. 685–724. Although the paper focuses on the reaction of states that inflict suffering and explains the reasons behind revengeful retaliation, most of the arguments are relevant to discussions on the negative affective aspects of judicial revenge by judges in international courts.

<sup>7</sup> Wesley Cragg, *The Practice of Punishment*, Routledge, London, 1992, pp. 16–19.

<sup>8</sup> Citing an author who has dwelt on US power and international criminal justice, see David Bosco, *Rough Justice: The International Criminal Court in a World of Power Politics*, Oxford University Press, Oxford, 2014, p. 1.

<sup>9</sup> Robert Nozick, *Philosophical Explanations*, Harvard University Press, Cambridge, 1981, pp. 366–67, has stressed the idea that revenge is opposed to the disinterestedness and ‘dispassion’ that are typical to just punishment.

nal tribunals has been somewhat unclear: keeping away from any possible connection to emotional payback, it has been attributed to general prevention, special deterrence, retribution, and – to a much lesser extent – rehabilitation.<sup>10</sup>

The long-term consequences of international prosecutions in the discouragement of future offences have been acknowledged,<sup>11</sup> even if the deterrent effects have appear to have been modest in practice so far.<sup>12</sup> There has been protracted confusion around the justifications put forward to endorse punishment at an international level. It has been suggested that the traditional purposes in criminal law should be supplemented.<sup>13</sup> A lack of consensus around the justifications could arguably weaken the legitimacy of international sanctions, especially in situations where those affected oppose and attack the justice process, as was the case in the former Yugoslavia. It would be helpful if the perceived dichotomy or antithesis between retributivism and deterrence<sup>14</sup> could be overcome. A more coherent and embracing theory of punishment could foster a better convergence of the interests of truth and justice.<sup>15</sup> Ralph Henham has stated that, in any case, there is a need to re-conceptualise sentencing if restorative justice is intended to become a core purpose of international criminal justice: then judges should balance the interests of victims and stakeholders.<sup>16</sup> Such an

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<sup>10</sup> Damien Scalia, *Du principe de légalité des peines en droit international pénal*, Bruylant, Brussels, 2011, pp. 280–85.

<sup>11</sup> Philipp Kastner, *International Criminal Justice in Bello?: The ICC Between Law and Politics in Darfur and Northern Uganda*, International Humanitarian Law Series, vol. 34, Martinus Nijhoff Publishers, Leiden, 2012, p. 10. On deterrence in international criminal law, see Payam Akhavan, “Justice in The Hague, Peace in the former Yugoslavia? A Commentary on the UN War Crimes Tribunal”, in *Human Rights Quarterly*, 1998, vol. 20, no. 4, pp. 737–816.

<sup>12</sup> David Wippman, “Atrocities, Deterrence, and the Limits of International Justice”, in *Fordham International Law Journal*, 1999, vol. 23, pp. 473–88.

<sup>13</sup> On these objectives (with bibliography), see Mihaela Mihai, “Socializing Negative Emotions: Transitional Criminal Trials in the Service of Democracy”, in *Oxford Journal of Legal Studies*, 2011, vol. 31, no. 1, p. 112.

<sup>14</sup> On a dubious claim concerning the uselessness of these categories for practical purposes in international criminal law, see Alexander K.A. Greenawalt, “International Criminal Law for Retributivists”, in *University of Pennsylvania Journal of International Law*, 2014, vol. 35, no. 4, pp. 969–1044.

<sup>15</sup> Ralph Henham, “The Philosophical Foundations of International Sentencing”, in *Journal of International Criminal Justice*, 2003, vol. 1, no. 1, pp. 64–85.

<sup>16</sup> Ralph Henham, “Towards Restorative Sentencing in International Criminal Trials”, in *International Criminal Law Review*, 2009, vol. 9, p. 832.

approach, in which ending impunity implies balancing rights (of victims) and accountability (of perpetrators), emerges against the background of the perceived humanitarianism that international tribunals have pursued in furtherance of a restorative function.<sup>17</sup>

The implicit language in these approaches points to the rationale underlying international criminal law. Since the work of judges and tribunals involves delicate exercise of discretion (including respect for authority, sovereignty and its limits, and punishment of perpetrators), it may be unavoidable that there is an emotional dimension that can help explain the fortune of international criminal justice. Facing a desire for revenge, a humanitarian sentiment of compassion or benevolence resonates with many judges and other lawyers involved in questions of guilt and sentencing.

Is there an historical *Hinterland* to all these considerations? Can history illustrate this state of affairs and even clarify some of what most scholars consider to be recent tensions in international criminal justice? Despite possible, isolated examples that could be related to *post bellum* regulations, international criminal law (as we know it today) was unknown in the times of Classical Greece and Rome. This does not imply that no connection can be suggested between ancient Greek thought and the foundations of international justice. In this chapter, I will address this possible connection by drawing attention to the specific discussion of emotion, revenge, humanitarian benevolence and punishment, since I believe that some classical Greek philosophical discussions can shed light on some of the current debates surrounding the work of international tribunals. In particular, I will first deal with the concept of 'emotion' and its importance in reflections in international legal discourse (Section 2.2.). Against this interpretative framework, I will then focus on Plato's doctrines, which can provide interesting insights into key problems related to both the consolidation of modern international criminal law and hindrances thereto (Section 2.3.).

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<sup>17</sup> This is the main argument of Sara Kendall, "Beyond the Restorative Turn: The Limits of Legal Humanitarianism", in Christian De Vos, Sara Kendall and Carsten Stahn (eds.), *Contested Justice: The Politics and Practice of International Criminal Court Interventions*, Cambridge University Press, Cambridge, 2015, pp. 352–76.

## 2.2. Emotions, Crimes and International Law

At the beginning, the study of emotions was confined to philosophers,<sup>18</sup> before turning to the field of psychology, from which it derives current theoretical input.<sup>19</sup> Emotions gradually started to invade the reflections of all human and social sciences.<sup>20</sup> A group of authors, inspired by the first steps taken by Charles Darwin, promoted an organic vision that places the origins of emotions in nature. They would try to find categories based on neurobiology, independent of linguistic and cultural differences.<sup>21</sup> This ‘biologist’ perspective – which postulates that emotions are repeated unchanged in different historical and social spheres – was later challenged by the so-called cultural (or relativist) theories.

Authors embedded in cultural relativism identify the existence of an ideological construction of emotions that changes according to time, place and a series of variables conditioning its appearance and features.<sup>22</sup> In line with this way of revisiting emotions, gestures that show affective experiences are far from being mere manifestations that repeat from one place to another; rather, emotions are meaningful only in the context in which they are experienced. In other words, instead of serving only to reveal feelings,

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<sup>18</sup> Cf. Michel Meyer, *Le Philosophe et les passions*, Presses Universitaires de France, Paris, 2007; Peter Goldie, *The Oxford Handbook of Philosophy of Emotion*, Oxford University Press, Oxford, 2010.

<sup>19</sup> For instance, Keith Oatley, *Best Laid Schemes: The Psychology of Emotions*, Cambridge University Press, Cambridge, 1992.

<sup>20</sup> For the purposes of this chapter, and following the model which has been suggested by previous work, I will refer to the concepts of ‘emotion’, ‘affection’ and ‘feelings’ as synonyms. For a more detailed and accurate perspective, see António R. Damásio, *Descartes’ Error: Emotion, Reason and the Human Brain*, Harper Collins, New York, 1994.

<sup>21</sup> See, for instance, Paul Ekman, *Emotions in the Human Face*, Cambridge University Press, Cambridge, 1982, who discusses universal emotions and their facial expressions, which – according to him – remain unchanged. David Buss, *The Evolution of Desire: Strategies of Human Mating*, Basic Books, New York, 1994, focuses on common transcultural experiences that can be identified in affective terms.

<sup>22</sup> For example, James Clifford and George E. Marcus (eds.), *Writing Culture: The Poetics and Politics of Ethnography*, University of California Press, Berkeley, 1986. On the variation of emotions in history, see Peter N. Stearns, “History of Emotions: Issues of Change and Impact”, in Michael Lewis and Jeannette Haviland-Jones (eds.), *Handbook of Emotions*, 2nd edition, Guilford Press, New York, 2000, pp. 16–29.

emotional experiences are conditioned by circumstances and, therefore, are symbolic.<sup>23</sup>

Cognitivist theories, meanwhile, deal with the claim that emotions provide value judgments, imply the appreciation or evaluation of an external 'object' perceived and interpreted. Emotions become thus a social phenomenon.<sup>24</sup> It is interesting to dwell on this cognitive imprint, which allows us to identify in every emotion a cultural and interpersonal process that is not spontaneous.

Some eclectic positions have finally tried to overturn the traditional dichotomy between neo-Darwinians and cognitivists: in conceiving that emotions represent a complex reality, it seems that natural, cultural, biological and social elements coexist in the affective dimension.<sup>25</sup>

From my perspective, emotions should be defined as a broad set of differentiated, biologically-based complexes that are constituted by interactions between physical and socio-cultural systems.<sup>26</sup> Martha Nussbaum has stated that emotions are not natural elements, but rather constructs learned and reinforced through social interactions.<sup>27</sup> In this double dimension, then, feelings convey information about people and unconscious

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<sup>23</sup> Janet Beavin Bavelas and Nicole Chovil, "Faces in Dialogue", in James A. Russell and José Miguel Fernández Doll (eds.), *The Psychology of Facial Expression*, Cambridge University Press, Cambridge, 1997, pp. 337–39. In an important contribution that will be dealt with later in this chapter, David Konstan, *The Emotions of the Ancient Greeks: Studies in Aristotle and Classical Literature*, University of Toronto Press, Toronto, 2006, p. 5, considers an analogy. He compares the identification of emotions to the cultural perception of colours, which can be classified differently according to the cultural circumstances affecting the evaluation. This conclusion makes it impossible to consider emotions as universal products.

<sup>24</sup> Cf. Albert Bandura, *Aggression: A Social Learning Analysis*, Prentice Hall, Englewood Cliffs, 1973.

<sup>25</sup> Some scholars, like Paul E. Griffiths (in *What Emotions Really Are: The Problem of Psychological Categories*, University of Chicago Press, Chicago, 1994), draw a distinction between two different kinds of emotions on the basis of the degree of 'naturalness' of feelings involved: the 'highest' emotions are considered to be the cognitive ones (among which are envy, guilt, jealousy or love). In my opinion, attempts to classify emotions are problematic, since they often lose sight of the general features of emotions and stigmatise affective experiences by labelling their content and characteristics.

<sup>26</sup> Rose McDermott, "The Feeling of Rationality: The Meaning of Neuroscientific Advances for Political Science", in *Perspectives on Politics*, 2004, vol. 2, p. 692.

<sup>27</sup> Cf. Martha Nussbaum, *Upheavals of Thought: The Intelligence of Emotions*, Cambridge University Press, Cambridge, 2001; Martha Nussbaum, *Hiding from Humanity: Disgust, Shame and the Law*, Princeton University Press, Princeton, 2004.

processes that then become conscious and affect their perceptions.<sup>28</sup> According to recent neuropsychological studies,<sup>29</sup> emotions are essential prerequisites for understanding the behaviour of subjects and, therefore, for explaining the emergence of the rules that frame their actions.<sup>30</sup>

Law, as expressed by Susan Bandes, is pervaded with emotions.<sup>31</sup> In criminal law, for example, there has been a big debate on the presence of affections in the courtroom, especially taking into account that litigants frequently make reference to a subjective dimension when trying to convince the jury members. What role should emotions play in addressing facts and, then, in condemning or releasing an alleged criminal? It has been a widespread position to argue that, as opposed to the natural impulses of affections which are typical to criminal cases, judges should refrain from displaying any sort of emotional bias. Terry Maroney – one of the scholars who dedicated more efforts to the topic – suggested that there is a conventional image of a judge acting as a dispassionate person, creating in modern times a stereotype based on a “persistent cultural script of judicial dispassion”.<sup>32</sup> Even if recent work has been done on the positive role of judicial emotions as an instrument that might help the judge arrive at correct decisions,<sup>33</sup> at the end of the day there is always a strong practical argument for judges to refrain from acting on an emotional basis. However, the idea that emotion and reason are contradictory phenomena, which stands at the core of Western judicial culture, needs to be revisited, and few attempts have been made to reveal what lies behind the much appreciated ‘objectivity’ of jurors.<sup>34</sup> One of these attempts consists in ac-

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<sup>28</sup> Gerald L. Clore, “Cognitive Phenomenology: Feelings and the Construction of Judgment”, in Leonard L. Martin and Abraham Tesser (eds.), *The Construction of Social Judgments*, Erlbaum, Hilldale, 1992, pp. 133–63.

<sup>29</sup> Damásio, 1994, pp. 127–63, see *supra* note 20.

<sup>30</sup> This is the central idea in Nico H. Frijda, *The Emotions*, Cambridge University Press, Cambridge, 1986.

<sup>31</sup> Susan Bandes, “Introduction”, in Susan Bandes (ed.), *The Passions of Law*, New York University Press, New York, 1999, p. 1.

<sup>32</sup> Terry Maroney, “The Persistent Cultural Script of Judicial Dispassion”, in *California Law Review*, 2011, vol. 99, pp. 629–81.

<sup>33</sup> Pavel Vasilyev, “Beyond Dispassion: Emotions and Judicial Decision-Making in Modern Europe”, in *Rechtsgeschichte*, 2017, vol. 25, pp. 277–85.

<sup>34</sup> One example of this approach, that insists on revealing the “emotional” background behind the ambition for objectivity, can be found in Stina Bergman Blix and Åsa Wettergren, “A Sociological Perspective on Emotions in the Judiciary”, in *Emotion Review*, 2016, vol. 8, no. 1, pp. 32–37.

knowledging that, far from consolidating an unwary reaction, there exists a conscious adjustment of feelings and expressions in the judiciary, an operation that Arlie R. Hochschild has called “emotion management”.<sup>35</sup>

The widespread reflection on the emotional experience of judges sitting in national courts, as we have just mentioned, has had its difficulties in spreading to the international debate, in spite of the number of recent contributions that have been suggesting the importance of the emotional shift in international law.<sup>36</sup> Very few voices have so far discussed the emotional bias of judges sitting in international tribunals. One notorious exception is Vesselin Popovski, who has claimed for a demotionalisation of the international criminal process in order for courts to be granted legitimacy.<sup>37</sup>

Examining the pros and cons of emotional bias in the judiciary (and even its feasibility) can be better achieved if its theoretical background is revealed. In my opinion, this understanding – or at least the identification of the interests at stake – requires a philosophical exploration, since the relationship between the affections and the judicial resolution of controversies has a long-standing tradition in legal thinking.

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<sup>35</sup> Arlie Russell Hochschild, *The Managed Heart: Commercialization of Human Feeling*, University of California Press, Los Angeles, 1983; Arlie Russell Hochschild, “Ideology and Emotion Management: A Perspective and Path for Future Research”, in Theodore D. Kemper (ed.), *Research Agendas in the Sociology of Emotions*, State University of New York Press, New York, 1990, pp. 117–42.

<sup>36</sup> On emotions and international relations, see, for instance, Neta C. Crawford, “The Passion of World Politics: Propositions on Emotion and Emotional Relationships”, in *International Security*, 2000, vol. 24, no. 4, pp. 116–56; Roland Bleiker and Emma Hutchison, “Fear No More: Emotions and World Politics”, in *Review of International Studies*, 2008, vol. 34, no. 1, pp. 115–35; Brent E. Sasley, “Theorizing States’ Emotions”, in *International Studies Review*, 2011, vol. 13, pp. 452–76; George E. Marcus, *The Sentimental Citizen: Emotion in Democratic Politics*, Pennsylvania State University Press, University Park, 2002; Andrew A.G. Ross, *Mixed Emotions: Between Fear and Hatred in International Conflict*, University of Chicago Press, Chicago, 2014. On the emotional turn in international law, see Gerry Simpson, “The Sentimental Life of International Law”, in *London Review of International Law*, 2015, vol. 3, no. 1, pp. 3–29.

<sup>37</sup> According to him, “judges need to remain un-biased, non-emotional, looking only at the facts and laws when delivering sentences”; cf. Vesselin Popovski, “Emotions and International Law”, in Yohan Arriffin, Jean-Marc Coicaud and Vesselin Popovski (eds.), *Emotions in International Politics: Beyond Mainstream International Relations*, Cambridge University Press, Cambridge, 2016, p. 185.

The so-called ‘affective turn’, which seems to have made its way into the legal sphere only recently,<sup>38</sup> can be traced in its origins to the experience of Greek philosophers, who were in fact the first to understand that emotions (*páthe*) could provide a basis to understand judicial performance. In the case of ancient Athens, emotions were already deemed to be socially relevant,<sup>39</sup> since according to David Konstan, their identification involved an awareness of other subjectivities.<sup>40</sup> *Páthe* were seen as responses to actions that generate consequences for our own (or someone else’s) relative social status<sup>41</sup> and should be interpreted thus as symbolic constructions which have great value in political terms.<sup>42</sup> As I intend to show, the inputs provided by the classical Greek experience can be extremely useful in re-thinking the problems related to the benefits and risks involving the display of certain emotions in legal procedures.

The public representation of emotions in the ancient Greek world responded to social patterns which turned them into cultural constructions under social control. Joining the conclusions of a very interesting debate on the construction of common emotional experiences in religious rituals,<sup>43</sup> I contend that it might be possible to identify in classical Greece what Barbara Rosenwein called a legal ‘emotional community’.<sup>44</sup> When dealing with justice and revenge, ancient Greeks can be seen as a group

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<sup>38</sup> Bandes, 1999; see *supra* note 31; Terry A. Maroney, “Law and Emotion: A Proposed Taxonomy of an Emerging Field”, in *Law and Human Behavior*, 2006, vol. 30, no. 2, pp. 119–42; Susan Bandes and Jeremy A. Blumenthal, “Emotion and the Law”, in *Annual Review of Law and Social Science*, 2012, vol. 8, pp. 161–81.

<sup>39</sup> Angelos Chaniotis, “Unveiling Emotions in the Greek World: Introduction”, in Angelos Chaniotis (ed.), *Unveiling Emotions: Sources and Methods for the Study of Emotions in the Greek World*, Steiner Verlag, Stuttgart, 2012, p. 15.

<sup>40</sup> This is the thesis endorsed by David Konstan, *The Emotions of the Ancient Greeks: Studies in Aristotle and Classical Literature*, University of Toronto Press, Toronto, 2006.

<sup>41</sup> *Ibid.*, p. 40.

<sup>42</sup> *Ibid.*, p. xiii: “The emotions, as opposed to drives or appetites, depend on the capacity for symbolization. For the Greeks, persuasion was central to the idea of an emotion, whether in the law courts, in political assemblies, or in the various therapies that relied on verbal interactions to change the judgments that are constitutive of the passions”.

<sup>43</sup> Angelos Chaniotis, “Emotional Community through Ritual. Initiates, Citizens, and Pilgrims as Emotional Communities in the Greek World”, in Angelos Chaniotis (ed.), *Ritual Dynamics in the Ancient Mediterranean: Agency, Emotion, Gender, Representation*, Steiner Verlag, Stuttgart, 2011, pp. 264–90.

<sup>44</sup> Barbara H. Rosenwein, *Emotional Communities in the Early Middle Ages*, Cornell University Press, Ithaca, 2006, p. 2.

that adhered to the same norms of emotional expression, valuing the same (or related) emotions on law and its possibilities.

The example of the earliest case of transitional justice on record is useful here.<sup>45</sup> In 404 BC, by the end of the Peloponnesian War, an oligarchy was established at Athens. It lasted four months during which massacres were committed and half of the population was forcibly displaced.<sup>46</sup> When democracy was re-established, there was a delicate balance between retribution and forgiveness: those who had held the highest offices under the regime of the Thirty Tyrants were prosecuted and found guilty of atrocities committed against the people (they could be condemned to death unless they were in exile), but it was decided to grant amnesty to all the rest.<sup>47</sup> Aristotle records these events, emphasising that the cancellation of responsibility for past actions was a commendable decision (*Ath. Pol.* 40.2–3):

δοκοῦσιν κάλλιστα δὴ καὶ πολιτικώτατα ἀπάντων καὶ ἰδία  
καὶ κοινῇ χρῆσασθαι ταῖς προγεγενημέναις συμφοραῖς· οὐ  
γὰρ μόνον τὰς περὶ τῶν προτέρων αἰτίας ἐξήλειψαν, ἀλλὰ

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<sup>45</sup> Jon Elster, *Closing the Books: Transitional Justice in Historical Perspective*, Cambridge University Press, Cambridge, 2004. I have already discussed the historical aspects of this episode in Emiliano J. Buis, “Between *Isonomia* and *Hegemonia*: Political Complexities of Transitional Justice in Ancient Greece”, in Morten Bergsmo, CHEAH Wui Ling, SONG Tianying and YI Ping (eds.), *Historical Origins of International Criminal Law: Volume 3*, , Torkel Opsahl Academic EPublisher, Brussels, 2015, pp. 57–60.

<sup>46</sup> The orator Isocrates relates in his *Areopagiticus* that the Thirty Tyrants killed fifteen hundred people without trial and forced more than five thousand to leave the city and take refuge in the Piraeus (οἱ μὲν γὰρ ψηφίσματι παραλαβόντες τὴν πόλιν πεντακοσίους μὲν καὶ χιλίους τῶν πολιτῶν ἀκρίτους ἀπέκτειναν, εἰς δὲ τὸν Πειραιᾶ φυγεῖν πλείους ἢ πεντακισχιλίους ἠνάγκασαν, 7.67). The Greek text corresponds to Isocrates, *Isocrates*, vol. 2, George Norlin ed. and trans., Harvard University Press, Cambridge, 1980. The *Constitution of the Athenians* (35.4) also notes that no fewer than fifteen hundred individuals were killed. This is undoubtedly the best documented instance of *stasis* in the period just after the Peloponnesian War, as presented by Josiah Ober, “Conflicts, controversias y pensamiento político”, in Robin Osborne (ed.), *La Grecia Clásica: 500-323 a. C.*, Critica, Barcelona, p. 128.

<sup>47</sup> On this episode and its repercussions in modern cases of transitional justice, cf. Elster, 2004, see *supra* note 45, pp. 7–8; Adriaan Lanni, “Transitional Justice in Ancient Athens: A Case Study”, in *University of Pennsylvania Journal of International Law*, 2010, vol. 32, no. 2, pp. 551–94. On other possible examples of amnesty laws in classical Greece, cf. Gertrude Smith, “The Prytaneum in the Athenian Amnesty Law”, in *Classical Philology*, 1921, vol. 16, pp. 345–46.

καὶ τὰ χρήματα Λακεδαιμονίοις, ἃ οἱ τριάκοντα πρὸς τὸν πόλεμον ἔλαβον, ἀπέδοσαν κοινῇ [...]<sup>48</sup>

But [the Athenians] appear both in private and public to have behaved towards the past disasters in the most completely honorable and statesmanlike manner of any people in history; for they not only blotted out recriminations with regard to the past, but also publicly restored to the Spartans the funds that the Thirty had taken for the war [...]<sup>49</sup>

The only contemporary evidence that has survived concerning these events comes from indirect references in Andocides' speech *On the Mysteries*. After having been arrested and tried for entering a sacred precinct when forbidden by a decree – because he had participated in the sacrileges of 415 BC – the orator argues that the decree denying him entry to the precinct is null and void as a result of the amnesty following the restoration of democracy in the autumn of 403. It is in this context that Andocides describes the advantages of the new regime in general and of the amnesty in particular, in the following terms (1.81):

ἐπειδὴ δ' ἐπανήλθετε ἐκ Πειραιῶς, γενόμενον ἐφ' ὑμῖν τιμωρεῖσθαι ἔγνωτε ἔαν τὰ γεγενημένα, καὶ περὶ πλείονος ἐποίησασθε σφῶν τὴν πόλιν ἢ τὰς ἰδίας τιμωρίας, καὶ ἔδοξε μὴ μνησικακεῖν ἀλλήλοισ τῶν γεγενημένων.<sup>50</sup>

After your return from Piraeus you resolved to let bygones be bygones, in spite of the opportunity for revenge (τιμωρεῖσθαι). You considered the safety of Athens of more importance than the settlement of private scores; so both sides, you decided, were to forget the past (μὴ μνησικακεῖν).<sup>51</sup>

The prohibition on bringing up the bad things that had happened (μὴ μνησικακεῖν)<sup>52</sup> is interpreted as a decision in favour of the salvation

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<sup>48</sup> The Greek text is that of Aristotle, *Constitution d'Athènes*, George Mathieu and Bernard Haussoullet eds. and trans., Les Belles Lettres, Paris, 2002.

<sup>49</sup> Aristotle, *Athenian Constitution. Eudemian Ethics. Virtues and Vices*, Harris Rackham ed. and trans., Harvard University Press, Cambridge, 1952.

<sup>50</sup> The Greek text in this and the following quotation corresponds to Antiphon and Andocides, *Minor Attic Orators*, vol. 1, Kenneth John Maidment ed. and trans., Harvard University Press, Cambridge, 1968.

<sup>51</sup> *Ibid.*

<sup>52</sup> On the expression and its complex connotations, cf. Edwin Carawan, "The meaning of *mê mnêsikakein*", in *Classical Quarterly*, 2012, vol. 62, no. 2, pp. 567–81, who translates it as 'recall-wrong'. As noted by David Cohen, "The rhetoric of justice: strategies of reconcilia-

of the city and against the survival of a spirit of revenge unsuitable in the public sphere.<sup>53</sup> Later in the speech, Andocides insists upon a strict opposition between an act of public justice (forgetfulness that begets concord) and private retribution (which prolongs suffering); he stresses the wisdom and prudence of the former (1.140):

νυνὶ πᾶσι τοῖς Ἕλλησιν ἄνδρες ἄριστοι καὶ εὐβουλότατοι δοκεῖτε γεγενῆσθαι, οὐκ ἐπὶ τιμωρίαν τραπόμενοι τῶν γεγενημένων, ἀλλ' ἐπὶ σωτηρίαν τῆς πόλεως καὶ ὁμόνοιαν τῶν πολιτῶν. συμφοραὶ μὲν γὰρ ἤδη καὶ ἄλλοις πολλοῖς ἐγένοντο οὐκ ἐλάττους ἢ καὶ ἡμῖν· τὸ δὲ τὰς γενομένας διαφορὰς πρὸς ἀλλήλους θέσθαι καλῶς, τοῦτ' εἰκότως ἤδη δοκεῖ ἀνδρῶν ἀγαθῶν καὶ σωφρόνων ἔργον εἶναι.

The whole of Greece thinks that you have shown the greatest generosity and wisdom in devoting yourselves, not to revenge (τιμωρίαν), but to the preservation of your city and the reuniting of its citizens. Many before now have suffered no less than we; but it is very rightly recognized that the peaceable settlement of differences requires generosity and self-control (σωφρόνων).<sup>54</sup>

This original means of dealing with *stásis* or internal strife – es-chewing punishment and mandating forgetfulness – had a clear aim: to

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tion and revenge in the restoration of Athenian democracy in 403 BC”, in *European Journal of Sociology (Archives Européennes de Sociologie)*, 2001, vol. 42, no. 2, p. 339: “the relevant phrase which grounds the amnesty is typically translated as ‘to forget’ or ‘not to remember’ what the oligarchs had done. In this context, however, the crucial phrase ‘not to *mmesikakein*’ actually means not to hold a grudge in the sense in which this is understood in a revenge society: that is, not to seek vengeance”. A passage from the *Constitution of the Athenians* repeats the language of Andocides when affirming that “no one was permitted to hold the past against anyone (τῶν δὲ παρεληλυθότων μηδενὶ πρὸς μηδένα μνησικακεῖν ἐξεῖναι) except the Thirty, the Ten, the Eleven, and those who were in charge in the Piraeus; and not even against them if they should render their accounts” (39.6). This evidence is not original, however, since the agreement of 403 did not include exceptions to the obligation of μὴ μνησικακεῖν (according to Edwin Carawan, “Amnesty and Accountings for the Thirty”, in *Classical Quarterly*, 2006, vol. 56, no. 1, pp. 57–76, this passage combines the content of the original agreement with exceptions that were added later).

<sup>53</sup> Similarly, the particular role of local amnesties in the transitional experiences of Mozambique and South Africa as a better institutional alternative to the traditional Western approaches to justice has been studied by Helena Cobban, *Amnesty After Atrocity? Healing Nations After Genocide and War Crimes*, Routledge, New York, 2007.

<sup>54</sup> Antiphon and Andocides, 1968, see *supra* note 50.

end the civil war<sup>55</sup> and restore democratic values.<sup>56</sup> In a time of political transition, the sentence and the amnesty provided emotional relief as they permitted the re-establishment of Athenian unity and social peace without the need to revisit negative emotions related to revenge, which meant returning to the past.<sup>57</sup>

This example prepares the setting to a brief exploration of the Platonic theoretical contributions on justice, punishment and the role of judicial emotions.

### 2.3. Learning from Punishment in Plato: Suppressing Anger?

According to Aristotle (*Rhetorics* 2.2, 1378a-30-32), anger (*orgé*) is a longing (ὄρεξις), accompanied by pain (μετὰ λύπης), for a revenge (τιμωρίας) due to a real or apparent insult (διὰ φαινομένην ὀλιγωρίαν) affecting a man or one of his friends, when such an insult is undeserved (τοῦ ὀλιγορεῖν μὴ προσήκοντος). According to this vision, *orgé* entails certain pleasure, he says, since it is gratifying to inflict a penalty over a person who deserves it. This relationship between anger and revenge has drawn several authors to consider that *orgé* in Athens was an emotion closely related to the democratic body, a collective emotion that could be unleashed when citizens were called to defend the *pólis* and its institutions. This is done by retaliating against a specific individual who acted unjustly.<sup>58</sup>

This feature explains the frequent reference to the verb ὀργίζω in the ancient sources related to the functioning of Athenian law courts.<sup>59</sup> In

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<sup>55</sup> Christopher J. Joyce, “The Athenian Amnesty and Scrutiny of 403”, in *Classical Quarterly*, 2008, vol. 58, no. 2, pp. 507–18.

<sup>56</sup> The Thirty Tyrants were seen as enemies of the democratic regime. Cohen, 2001, p. 347, see *supra* note 52, clearly states: “In the political discourse of fourth century Athens, the Thirty Tyrants came to stand for the antithesis of the rule of law”.

<sup>57</sup> Lanni, 2010, see *supra* note 47, pp. 593–94.

<sup>58</sup> On ancient Greek anger, cf. Danielle Allen, “Angry Bees, Wasps and Jurors: the Symbolic Politics of *orgê* in Athens”, in Susanna M. Braund and Glenn W. Most (eds.), *Ancient Anger: Perspectives from Homer to Galen*, Yale Classical Studies, no. 32, Cambridge University Press, Cambridge, 2003, pp. 76–98; William V. Harris, *Restraining Rage: The Ideology of Anger Control in Classical Antiquity*, Harvard University Press, Cambridge, 2001; Konstan, 2006, see *supra* note 40, pp. 41–76 (especially in its relationship to democracy, pp. 75–76).

<sup>59</sup> Cf. Lene Rubinstein, “Stirring Up Dicastic Anger”, in Douglas Cairns and Ronald Knox (eds.), *Law, Rhetoric, and Comedy in Classical Athens: Essays in Honour of Douglas M. MacDowell*, The Classical Press of Wales, Swansea, 2004, pp. 187–204; Évelyne Scheid-

his *Against Leochites*, for instance, Isocrates (20.6) states that, after an act of *adikia*, free men need to become angry and exert revenge. Similarly, if an injustice is committed on purpose, Demosthenes explains that anger and punishment (*timoria*) should go hand in hand (*On the Crown*, 18.274).

In the context of what we can call the first attempt at the consolidation of an affective psychology,<sup>60</sup> Plato's perspective on the limits of anger can be useful when assessing the reality underlying the administration of justice, as it shows the difficult coexistence between revenge and justice.<sup>61</sup> His dialogues provide us with the earliest example of reformatory punishment in Western thought, since they display a revision of the Athenian conception of punishment, which is challenged by a new conception. In this 'paradigm shift',<sup>62</sup> the angry punisher willing to rectify an unbalanced social order is replaced by a rational judge whose intention is to educate or reform a diseased wrongdoer who committed an injustice because he was sick and needed to be cured. Plato offers a subversion of the traditional paradigms of justice on which Athens was based. In his opinion, criminal justice is a cure, a way of responding to social disruption, and not an opportunity to exercise anger and exert power against the enemy.

Our study of the texts should definitely start with *Protagoras* 323d–324b. In this moment of the dialogue, Socrates agrees with Protagoras when he considers that people who punish for the sake of irrational passions and look to the past are bestial, as part of an argument for reforma-

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Tissinier, "Les revendications de la vengeance dans les plaidoyers attiques", in Michel Molin (ed.), *Les régulations sociales dans l'antiquité*, Presses Universitaires de Rennes, Rennes, 2006, pp. 97–113; Évelyne Scheid-Tissinier, "Le rôle de la colère dans les tribunaux athéniens", in Pauline Schmitt Pantel and François de Polignac (eds.), *Athènes et le politique: Dans le sillage de Claude Mossé*, Albin Michel, Paris, 2007, pp. 179–98; Victor Bers, "Appeals to Pity and Displays of Anger", in *Genos Dikanikon: Amateur and Professional Speech in the Courtroom of Classical Athens*, Center for Hellenic Studies, Trustees for Harvard University, London, 2008, pp. 77–98.

<sup>60</sup> H.N. Gardiner, "The Psychology of Affections in Plato and Aristotle", in *The Philosophical Review*, 1918, vol. 27, no. 5, p. 469.

<sup>61</sup> On emotions in Plato, see the short but interesting introduction by Lidia Palumbo, *Eros, Phobos, Epithymia: Sulla natura dell'emozione in alcuni dialoghi di Platone*, Loffredo, Naples, 2001. Her selection of sources, however, does not provide the reader with a comprehensive picture.

<sup>62</sup> Danielle S. Allen, *The World of Prometheus: The Politics of Punishing in Democratic Athens*, Princeton University Press, Princeton, 2000, pp. 245–81.

tive punishment based on the values of social virtue. In 324a–b, Protagoras had presented the essential grounds for his argument:

εἰ γὰρ ἐθέλεις ἐνοῆσαι τὸ κολάζειν, ὃ Σώκρατες, τοὺς ἀδικοῦντας τί ποτε δύναται, αὐτὸ σε διδάξει ὅτι οἱ γε ἄνθρωποι ἡγοῦνται παρασκευαστὸν εἶναι ἀρετὴν. οὐδεὶς γὰρ κολάζει τοὺς ἀδικοῦντας πρὸς τούτῳ τὸν νοῦν ἔχων καὶ τούτου ἕνεκα, ὅτι ἠδίκησεν, ὅστις μὴ ὥσπερ θηρίον ἀλογίστως τιμωρεῖται· ὁ δὲ μετὰ λόγου ἐπιχειρῶν κολάζειν οὐ τοῦ παρεληλυθότος ἕνεκα ἀδικήματος τιμωρεῖται—οὐ γὰρ ἂν τό γε πραχθὲν ἀγένητον θείη—ἀλλὰ τοῦ μέλλοντος χάριν, ἵνα μὴ αὐθις ἀδικήσῃ μήτε αὐτὸς οὗτος μήτε ἄλλος ὁ τοῦτον ἰδὼν κολασθέντα.

For if you will consider punishment, Socrates, and what control it has over wrong-doers, the facts will inform you that men agree in regarding virtue as procured. No one punishes (κολάζει) a wrong-doer from the mere contemplation or on account of his wrong-doing, unless one takes unreasoning vengeance (τιμωρεῖται) like a wild beast. But he who undertakes to punish (κολάζειν) with reason (μετὰ λόγου) does not avenge (τιμωρεῖται) himself for the past offence, since he cannot make what was done as though it had not come to pass; he looks rather to the future, and aims at preventing that particular person and others who see him punished (κολασθέντα) from doing wrong again.<sup>63</sup>

Protagoras makes a distinction here between two kinds of punishment, namely punishment that aims to reform and punishment that seeks to remedy the past.<sup>64</sup> He uses the word ‘*kolázein*’ to refer to reformative punishment and ‘*timoreîsthai*’ to denote a retributive punishment related to revenge.<sup>65</sup> Reasonable self-control here seems to be opposed to emotional backlash. In this set of concepts, *timoría* – personal vengeance – is clearly marginalised. Socrates argues with Protagoras’ analysis of why virtue is teachable, but never dismisses the dichotomy: whereas most peo-

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<sup>63</sup> The Greek text and the translation are taken from Plato, *Lysis. Symposium. Gorgias*, Walter Rangeley Maitland Lamb ed. and trans., Harvard University Press, Cambridge, 1967.

<sup>64</sup> According to Leo Zaibert, “Punishment and Revenge”, in *Law and Philosophy*, 2006, vol. 25, p. 81, this passage “continues to be the predominant view amongst philosophers of law regarding the relationship between punishment and revenge”. The paper discusses modern approaches to the interplay between the two concepts.

<sup>65</sup> On the Greek vocabulary for punishment – especially the antithesis between *timoría* and *kólasis* – see Allen, 2000, see *supra* note 62, pp. 68–72.

ple consider that to be punished means to suffer something bad, Socrates contends that suffering justice is getting something beautiful. Hence the act of 'suffering justice' cannot be considered as an unpleasant experience or as an evil but rather implies having one's life enhanced by justice.<sup>66</sup> Rage (*thymós*) is opposed to virtue; by condemning the spontaneity of retribution, Protagoras rationalises a collective sanction which has an instructive and moralising purpose towards the community.<sup>67</sup> It is the basis of a new morality founded on a rational will to reform.<sup>68</sup> As Mackenzie explains, this position will echo Plato's own theory – which will be presented in other dialogues – in which “rational punishment [...] looks to the future by preventing the offender himself from repeating the offence and by deterring others to emulate him”.<sup>69</sup>

In the dialogue *Gorgias*, Plato holds the opinion that moral wrongs harm those who commit them. Socrates's interlocutor, Polus, argues that wrongdoers are wretched and those who escape punishment are worse than those who face them (473b–c). Punishment in fact should grant a benefit for the offenders, as stated in the many questions asked by Socrates in 477a: he who pays the penalty suffers what is good (*ἀγαθὰ ἄρα πάσχει ὁ δίκην δίδούς*), because he becomes better if he is justly punished

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<sup>66</sup> This paragraph comes from Anastasios Ladikos, “Plato's View on Capital Punishment”, in *Phronimon*, 2005, vol. 6, no. 2, p. 52.

<sup>67</sup> Olivier Renaut, *Platon: La médiation des émotions: L'éducation du thymos dans les dialogues*, J. Vrin, Paris, 2014, pp. 62–63. According to Létitia Mouze, “Les émotions dans la théorie esthétique et politique platonicienne”, in Sylvain Roux (dir.), *Les émotions*, J. Vrin, Paris, 2009; p. 23: “tout le problème du législateur est donc de rationaliser la sensibilité, et de ce point de vue, de la rendre spécifiquement humaine”. According to her, art, education, and legislation have the same objective: to humanise emotions (p. 24).

<sup>68</sup> This seemingly unemotional restraint, as it will be explained later, does not exclude compassion under certain circumstances. John R. Wallach, *The Platonic Political Art: A Study of Critical Reason and Democracy*, The Pennsylvania State University Press, University Park, 2001, p. 161, states that “with respect to the institution of punishment, Protagoras notes how Athenians regard with pity those individuals who either lack a valuable trait that normally comes by nature or possess a regrettable trait that they have acquired by chance, but pitilessly chastise those who lack qualities that come by exercise and training”.

<sup>69</sup> Mary Margaret Mackenzie, *Plato on Punishment*, Cambridge University Press, Cambridge, 1981, p. 189. Caution however should be applied when comparing Protagoras' position in the dialogue with the Platonic views. That said, it seems clear to me that the references in Protagoras are extremely useful in order to understand Plato's penology. On a thorough examination of the passages mentioned *supra* as an embodiment of Protagoras' authentic views, see R.F. Stalley, “Punishment in Plato's *Protagoras*”, in *Phronesis*, 1995, vol. 40, no. 1, pp. 1–19, who concludes that both Protagoras and Socrates represent some of the arguments which will be included in Plato's later dialogues.

(βελτίων τὴν ψυχὴν γίγνεται, εἴπερ δικαίως κολάζεται), and thus relieved from the badness of soul (κακίας ἄρα ψυχῆς ἀπαλλάττεται ὁ δίκην διδούς).<sup>70</sup> Punishment is therefore owed to the wrongdoer because he has made a mistake on the best way to live, which is of course to comply with the demands of justice. In educating the offender, it is possible to return him to a better (just) life. In other words, punishment has the purpose of purging the diseased wrongdoers from their moral sickness; it promotes self-control or *sophrosýne*, the moral virtue related to restraint.<sup>71</sup> This amounts to an attack on the irrationality of retribution.

In *Timaeus* 86d–e, Socrates will hold that no one is voluntarily evil,<sup>72</sup> since evil turns out to be the consequence of disease, physical weakness or a bad upbringing:

καὶ σχεδὸν δὴ πάντα ὅποσα ἡδονῶν ἀκράτεια καὶ ὄνειδος ὡς ἐκόντων λέγεται τῶν κακῶν, οὐκ ὀρθῶς ὄνειδίζεται· κακὸς μὲν γὰρ ἐκὼν οὐδεὶς, διὰ δὲ πονηρὰν ἕξιν τινὰ τοῦ σώματος καὶ ἀπαίδευτον τροφήν ὁ κακὸς γίγνεται κακός, παντὶ δὲ ταῦτα ἐχθρὰ καὶ ἄκοντι προσγίγνεται.<sup>73</sup>

And indeed almost all those affections which are called by way of reproach “incontinence in pleasure,” as though the wicked acted voluntarily, are wrongly so reproached; for no one is voluntarily wicked but the wicked man becomes wicked by reason of some evil condition of body and unskilled nurture, and these are experiences which are hateful to everyone and involuntary.<sup>74</sup>

No one does wrong willingly, Socrates says. Hence a person who acts unjustly cannot be blamed because he acts as a result of circumstances which are out of his control. Since his actions are not voluntary, and should be attributed to his parents (or to nobody in particular), it would be

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<sup>70</sup> As expected, the verb *kolázein* is used here. On the limits of Socrates’ case in this passage, see Andrew Stauffer, *The Unity of Plato’s Gorgias: Rhetoric, Justice, and the Philosophical Life*, Cambridge University Press, Cambridge, 2006, p. 77.

<sup>71</sup> Mackenzie, 1981, p. 184, see *supra* note 69.

<sup>72</sup> Cf. *Protagoras* 345d ff. and *Laws* 731c ff.

<sup>73</sup> The Greek text for the quotations of the play is that of Plato, *Platonis Opera*, John Burnet ed. and trans., Oxford University Press, Oxford, 1903.

<sup>74</sup> The translation used for the text of *Timaeus* is by Plato, *Timaeus. Critias. Cleitophon. Menexenus. Epistles*, R.G. Bury ed. and trans., Harvard University Press, Cambridge, 1925.

most unfair to consider he is willingly evil.<sup>75</sup> Since he is infected, his cure is the responsibility not of himself but of others, who will do their best to restore his path towards what is good. Wickedness is against our own interest, and therefore no one really desires to be wicked.<sup>76</sup> As people do not seek to act in a wicked way deliberately, wicked men cannot be put to blame, for pursuing evil means having one's true desires perverted by factors which exceed our control (87b):

ἔτι δὲ μαθήματα μηδαμῆ τούτων ἰατικά ἐκ νέων μανθάνηται, ταύτη κακοὶ πάντες οἱ κακοὶ διὰ δύο ἀκουσιώτατα γιγνόμεθα· ὧν αἰτιατέον μὲν τοὺς φυτεύοντας ἀεὶ τῶν φυτευομένων μᾶλλον καὶ τοὺς τρέφοντας τῶν τρεφομένων, προθυμητέον μὴν, ὅπη τις δύναται, καὶ διὰ τροφῆς καὶ δι' ἐπιτηδευμάτων μαθημάτων τε φυγεῖν μὲν κακίαν, τοῦναντίον δὲ ἐλεῖν.

And when, moreover, no lessons that would cure these evils are anywhere learnt from childhood – thus it comes to pass that all of us who are wicked become wicked owing to two quite involuntary causes. And for these we must always blame the begetters more than the begotten, and the nurses more than the nurslings; yet each man must endeavor, as best he can, by means of nurture and by his pursuits and studies to flee the evil and to pursue the good.

Committing an offence, thus, is the result of an unwilling mistake that has to be corrected. In this re-establishment of the right track, the metaphor of disease is relevant.<sup>77</sup> The criminal possesses a vicious disposition and, according to *Timaeus*, human vice occurs through the disorder of the body (86b1) and all psychological disorders can be justified by physical explanations. As a result, and just as it happens with bodily sufferings, vice needs to be treated by medical means. It can be cured, and

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<sup>75</sup> But parents who educate wrong should be in fact also unwillingly acting as such towards their children. On this paradox, Gregory Vlastos, "Reasons and Causes in the *Phaedo*", in *Platonic Studies*, Princeton University Press, Princeton, 1973.

<sup>76</sup> Mackenzie, 1981, see *supra* note 69, p. 143.

<sup>77</sup> See *ibid.*, p. 177. Medical images and metaphors related to health are frequent in Plato, as shown by Elizabeth E. Pender, *Images of Persons Unseen. Plato's Metaphors for the Gods and the Soul*, Academia Verlag, Sankt Augustin, 2000, pp. 199–206. See also Mario Vegetti, *La medicina in Platone*, Il Cardo, Venice, 1995, and Álvaro Vallejo Campos, "Socrates as a Physician of the Soul", in Gabriele Cornelli (ed.), *Plato's Styles and Characters*, Walter de Gruyter, Berlin, 2016, pp. 227–39.

punishment therefore should be interpreted as an efficient medicine that the *pólis* should provide.<sup>78</sup>

With the exception of *Republic* – which has been considered a totalitarian exercise of mind, in which virtue cannot be taught<sup>79</sup> – in Plato's works, punishing always implies an education (*máthesis*) born out of a concern for the soul of the wrongdoer. This is what Socrates claims when defending himself from the charges brought by Meletus against him for corrupting the youth (*Apology* 26a):

εἰ δὲ ἄκων διαφθείρω, τῶν τοιούτων καὶ ἀκουσίων ἀμαρτημάτων οὐ δεῦρο νόμος εἰσάγειν ἐστίν, ἀλλὰ ἰδίᾳ λαβόντα διδάσκειν καὶ νουθετεῖν· δῆλον γὰρ ὅτι ἐὰν μάθω, παύσομαι ὃ γε ἄκων ποιῶ. σὺ δὲ συγγενέσθαι μὲν μοι καὶ διδάξαι ἔφυγες καὶ οὐκ ἠθέλησας, δεῦρο δὲ εἰσάγεις, οἷ νόμος ἐστίν εἰσάγειν τοὺς κολάσεως δεομένους ἀλλ' οὐ μαθήσεως.

But if I corrupt them involuntarily, for such involuntary errors the law is not to hale people into court, but to take them and instruct (*διδάσκειν*) and admonish them in private. For it is clear that if I am told about it, I shall stop doing that which I do involuntarily. But you avoided associating with me and instructing (*διδάξαι*) me, and were unwilling to do so, but

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<sup>78</sup> On Plato's 'medical penology' both in its theoretical underpinnings and practical implementation, see the excellent discussion of relevant sources in Trevor J. Saunders, *Plato's Penal Code: Tradition, Controversy, and Reform in Greek Penology*, Clarendon Press, Oxford, 1991, pp. 139–95.

<sup>79</sup> After Glaucon describes the story of the Ring of Giges (a ring that grants its owner the power of becoming invisible) and asking if men would still be just, knowing that they cannot be seen, Socrates will argue that justice does not derive from the social construct related to the fear of being caught. The man who decides to abuse the power of the ring has become a slave of his own appetites, whereas the man who chooses not to use it is a rational man, since he stays in control of himself: his restraint amounts to happiness (*Republic* 10:612b). Such an extreme position (in which emotions and self-control are given facts that cannot be modified) seems to have been rejected by Plato in his later works, to the extent that his last work – *Laws* – has been perceived as a 'corrective' approach, more moderate, to the totalitarian theory presented in the *Republic*, where virtue cannot be taught and therefore education seems to have a very little effect in changing people. *Republic* has been traditionally neglected as a source for Plato's penology; nevertheless, Allen, 2000, see *supra* note 58, pp. 254–55, has shown that the work is essential for a complete understanding of the relationship between anger, justice, and punishment (for example, 440c–d).

you hale me in here, where it is the law to hale in those who need punishment (κολάσεως), not instruction (μαθήσεως).<sup>80</sup>

Wrongdoers should be punished (*kolázein*) with the sole purpose of becoming virtuous. This moral regime, which excludes retributive sanctions resulting from anger (indicated by expressions such as *timoreîn* or *lambánein díken*), requires persuasion and obedience, both elements typical to the process of instruction.<sup>81</sup> Shortly after the previous statement by Socrates in *Apology*, the philosopher will criticise his opponents for being “very violent and unrestrained” (πάνυ εἶναι ὕβριστῆς καὶ ἀκόλαστος) when they “brought this indictment in a spirit of violence and unrestraint and rashness” (ἀτεχνῶς τὴν γραφὴν ταύτην ὕβρει τινὶ καὶ ἀκολασία καὶ νεότητι γράψασθαι) (*Apology*, 26e).

In a similar vein, a short passage in *Laws* 862d shows that the Athenian considers that (instead of inflicting a penalty out of wrath) the task of the best laws should be to instruct:

ὅπως ὅτι τις ἂν ἀδικήσῃ μέγα ἢ σμικρόν, ὁ νόμος αὐτὸν διδάξει καὶ ἀναγκάσει τὸ παράπαν εἰς αὐτῆς τὸ τοιοῦτον ἢ μηδέποτε ἐκόντα τολμήσῃ ποιεῖν ἢ διαφερόντως ἤττον πολὺ, πρὸς τῇ τῆς βλάβης ἐκτίσει. ταῦτα εἴτε ἔργοις ἢ λόγοις, ἢ μεθ' ἡδονῶν ἢ λυπῶν, ἢ τιμῶν ἢ ἀτιμιῶν, καὶ χρημάτων ζημίας ἢ καὶ δώρων, ἢ καὶ τὸ παράπαν ὅτινι τρόπῳ ποιήσῃ τις μισῆσαι μὲν τὴν ἀδικίαν, στέρξαι δὲ ἢ μὴ μισεῖν τὴν τοῦ δικαίου φύσιν, αὐτὸ ἐστὶν τοῦτο ἔργον τῶν καλλίστων νόμων.

In this – that whenever any man commits any unjust act, great or small, the law shall instruct (διδάξει) him and absolutely compel him for the future either never willingly to dare to do such a deed, or else to do it ever so much less often, in addition to paying for the injury. To effect this, whether by action or speech, by means of pleasures and pains, honors and dishonors, money-fines and money-gifts, and in general by whatsoever means one can employ to make

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<sup>80</sup> The text and translation of *Apology* are taken from Plato, *Euthyphro. Apology. Crito. Phaedo*, William Preddy ed. and trans., Harvard University Press, Cambridge, 1966.

<sup>81</sup> Allen, 2000, see *supra* note 58, pp. 247–48: “In the Athenian context, the victim’s and the community’s anger generated the need for punishment, but Socrates argues that any claims that will be made about the need for punishment must be based on an assessment of what the wrongdoer’s soul needs”.

men hate injustice and love (or at any rate not hate) justice – this is precisely the task of laws most noble.<sup>82</sup>

The emphasis here is placed on a utilitarian perspective, insofar as the criminal should be taken back to the realm of justice by means of instruction and constraint.<sup>83</sup> But the situation becomes more complicated in *Magnesia*, since a distinction is made there between voluntariness and involuntariness, which has implications in the difference between culpability and responsibility. Therefore, *Laws* tries to reconcile the Socratic principle that no one does wrong willingly with a distinction between deliberate and unintentional harms.<sup>84</sup> Criminal actions may be different from accidents that ‘happen’ to someone (*Laws* 860d) – and therefore crimes cannot be ignored – but in any case, punishment should come as a way of reforming a criminal (disordered) disposition so that the wrongdoer will not make mistakes in his objectives in the future.<sup>85</sup>

It has been suggested that Plato’s moral theory on justice and punishment seems to exclude irrational revenge and endorse some kind of pity or benevolence, insofar as criminals are unfortunate wrongdoers who should be saved from themselves; judges should improve their disposition.<sup>86</sup> Education implies a humanitarian approach to the wrongdoers, who become the object of pity or compassion.<sup>87</sup> The judge is thus perceived as a doctor-benefactor who, through punishment, has the good intention of offering a positive means to achieve virtue instead of sanctioning vice. As this implies an education in the right path towards positive values, then the didactic function of criminal justice is clear.<sup>88</sup>

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<sup>82</sup> The text and the translation of *Laws* are taken from Plato, *Laws*, vols. 1–2, Robert Gregg Bury ed. and trans., Harvard University Press, Cambridge, 1967–68. According to Mouze, 2009, see *supra* note 67, pp. 31–32, in the more humane city described in *Laws*, a political use of emotions is endorsed; the dialogue therefore overcomes the traditional opposition between affections and reason.

<sup>83</sup> Saunders, 1991, see *supra* note 78, pp. 144–45, considers this passage as “the most radical penological manifesto ever written”.

<sup>84</sup> Christopher Bobonich, “Introduction”, in Christopher Bobonich (ed.), *Plato’s Laws: A Critical Guide*, Cambridge University Press, Cambridge, 2010, p. 3.

<sup>85</sup> Mackenzie, 1981, see *supra* note 69, p. 145.

<sup>86</sup> *Ibid.*, pp. 156–57.

<sup>87</sup> On the value of pity and law in ancient times, see David Konstan, *Pity Transformed*, Duckworth, London, 2001, pp. 27, 48.

<sup>88</sup> Several authors have discussed the need for a ‘didactic’ function of international courts. See, for instance, Lawrence Douglas, *The Memory of Judgment: Making Law and History*

Plato's theory, however, is complex and leaves room for discussion. In *Laws* 908a, several prisons are distinguished, one of them designed to keep those who cannot learn and have to be detained in a distant facility. It is a reference to those criminals who, unlike the great majority, cannot be cured because they committed severe crimes. It seems that the text allows for a difference in punishment.<sup>89</sup> Excessive emotion could be sometimes acceptable, whereas in most cases it is necessary to show pity towards the offender and refrain from acting in revenge (*Laws* 731c-d):

ἀλλὰ ἐλεεινὸς μὲν πάντως ὁ γε ἄδικος καὶ ὁ τὰ κακὰ ἔχων,  
ἐλεεῖν δὲ τὸν μὲν ἰάσιμα ἔχοντα ἐγγωρεῖ καὶ ἀνείργοντα τὸν  
θυμὸν πραῦνειν καὶ μὴ ἀκραχολοῦντα γυναικείως  
πικραινόμενον διατελεῖν, τῷ δ' ἀκράτως καὶ ἀπαραμυθήτως  
πλημμελεῖ καὶ κακῷ ἐφιέναι δεῖ τὴν ὀργήν· διὸ δὴ θυμοειδῆ  
πρέπειν καὶ πρᾶόν φαμεν ἐκάστοτε εἶναι δεῖν τὸν ἀγαθόν.

Now while in general the wrongdoer and he that has these evils are to be pitied, it is permissible to show pity to the man that has evils that are remediable, and to abate one's passion and treat him gently, and not to keep on raging like a scolding wife; but in dealing with the man who is totally and obstinately perverse and wicked one must give free course to wrath (ὀργήν). Wherefore we affirm that it behoves the good man to be always at once passionate and gentle.<sup>90</sup>

Nevertheless, this exception to the rule does not require additional explanations and turns out to be coherent within Plato's penology. Even in the case of the incurable wrongdoers, punishment finds a rational justifi-

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*in the Trial of the Holocaust*, Yale University Press, New Haven, 2001, who embraces the idea that the Nuremberg tribunals and the Eichmann trial can be used as a tool of collective pedagogy.

<sup>89</sup> On the exceptional punishment of death penalty in Plato, see Ladikos, 2005, see *supra* note 66.

<sup>90</sup> On this passage, Lorraine Smith Pangle, "Moral and Criminal Responsibility in Plato's *Laws*", in *The American Political Science Review*, 2009, vol. 103, no. 3, p. 469, interprets:

As citizens we should be as gentle as possible toward first offenders and youthful offenders who give reason to hope that they may be cured; we should willingly expend time and resources to help them and should not let irrational indignation get in our way. The Athenian indeed goes quite far in associating gentleness with the greatest strength and the ultimate manliness: this is part of his systematic attempt to reform thumos. Although anger looks manly, he suggests that it is really an expression of the bitterness of one who was impotent to stop a harm and who now is unable to feel whole again until one has lashed out in return.

cation. Inflicting a penalty is not aimed at their own reform but the benefit of others. So it happens in *Gorgias* 525c–d:

οἱ δ' ἂν τὰ ἔσχατα ἀδικήσωσι καὶ διὰ τὰ τοιαῦτα ἀδικήματα ἀνίατοι γένωνται, ἐκ τούτων τὰ παραδείγματα γίνονται, καὶ οὗτοι αὐτοὶ μὲν οὐκέτι ὀνίανται οὐδέν, ἅτε ἀνίατοι ὄντες, ἄλλοι δὲ ὀνίανται οἱ τούτους ὀρῶντες διὰ τὰς ἀμαρτίας τὰ μέγιστα καὶ ὀδυνηρότατα καὶ φοβερώτατα πάθη πάσχοντας τὸν αἰεὶ χρόνον, ἀτεχνῶς παραδείγματα ἀνηρημένους ἐκεῖ ἐν Ἄιδου ἐν τῷ δεσμοτηρίῳ, τοῖς αἰεὶ τῶν ἀδίκων ἀφικνουμένοις θεάματα καὶ νοουθετήματα.

But of those who have done extreme wrong and, as a result of such crimes, have become incurable, of those are the examples (*παραδείγματα*) made; no longer are they profited at all themselves, since they are incurable, but others are profited who behold them undergoing for their transgressions the greatest, sharpest, and most fearful sufferings evermore, actually hung up as examples there in the infernal dungeon, a spectacle (*θεάματα*) and a lesson (*νοουθετήματα*) to such of the wrongdoers as arrive from time to time.

If curable wrongdoers are dealt with through *kólasis* or reform, the incurable would exceptionally be subjected to *timoría* and, therefore, to *orgé*.<sup>91</sup> But even in those cases there is an educational purpose in the very end. This instructive purpose is achieved by means of visual (*θεάματα*) and mental (*νοουθετήματα*) strategies. The didactic is therefore met in any case: someone is improved through the act of punishment.<sup>92</sup> Public good is rationally taken into consideration when *kólasis* occurs.

#### 2.4. Suffering Universal Punishment in War? *Páthos* in Interstate *Nómos*

As explained so far, the opposition between irrational retribution and rational reform is a key element in the Platonic examination of punishment. But the different dialogues show that criminal justice and penal procedures only seem to be considered relevant within the domestic legislation of Athens, the Just City or Magnesia. The question that can be asked at this stage is: in what way could these philosophical contributions by Plato

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<sup>91</sup> See Allen, 2000, see *supra* note 62, pp. 278–80, who considers that this represents the ultimate limits of reform: “Anger arrives in the just city only when the limits of curability, the limits of Socratic punishment have been reached”.

<sup>92</sup> Mackenzie, 1981, see *supra* note 69, p. 186.

on the rationalisation of emotions become relevant also at the international level? Even if the theory of punishment in Plato seems to be related to the domestic system of a *pólis*, the truth is that the Greeks were well aware of the existence of interstate regulations and their sources provide concrete information on the presence of rules (*nómoi*) which were applicable universally.

A series of current studies, which have attempted to reassess the complex nature of interstate relations in the Greek world,<sup>93</sup> have succeeded in demonstrating that the practice of external affairs and the creation of a close network of legal connections constituted one of the elements that most clearly reflected sovereign power in classical *póleis*,<sup>94</sup> and that it complied with specific legal regulations. Indeed, the existence of genuine customary 'inter-*pólis*' or 'intra-Hellenic' law practices – capable of regu-

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<sup>93</sup> Among others, it is possible to emphasise the preliminary works by Coleman Phillipson, *The International Law and Custom of Ancient Greece and Rome*, vols. 1–2, Macmillan, London, 1911; Victor Martin, *La vie internationale dans la Grèce des cités (Ve-IVe s. av. J.-C.)*, Recueil Sirey, Geneva, 1940; George C. Ténèkides, "Droit international et communautés fédérales dans la Grèce des cités (Ve-IIIe s. av. J.C.)", in *Recueil des cours: de l'Académie de droit international de La Haye*, vol. 90, no. 2, Martinus Nijhoff, Leiden, 1956, pp. 475–652; Georges C. Ténèkides, *Les relations internationales dans la Grèce antique*, Fondation A.G. Leventis, Athens, 1993; Elias J. Bickerman, "Remarques sur le droit des gens dans la Grèce classique", in *Revue Internationale des Droits de l'Antiquité*, 1950, vol. 4, pp. 99–127; Derek J. Mosley, "Diplomacy in Classical Greece", in *Ancient Society*, 1972, vol. 3, pp. 1–16; Derek J. Mosley, *Envoys and Diplomacy in Ancient Greece*, Franz Steiner, Wiesbaden, 1973; Frank E. Adcock and Derek J. Mosley, *Diplomacy in Ancient Greece*, Thames and Hudson, London, 1975, which serve as basis for most current studies. A global picture of international law in antiquity can be seen in more recently in David. J. Bederman, *International Law in Antiquity*, Cambridge University Press, Cambridge, 2001, and in Dominique Gaurier, *Histoire du droit international: De l'Antiquité à la création de l'ONU*, Presses Universitaires de Rennes, Rennes, 2014, pp. 33–87. Supporter of a broader perspective of the phenomenon, Polly Low, *Interstate Relations in Classical Greece: Morality and Power*, Cambridge Classical Studies, Cambridge University Press, Cambridge, 2007, points out the presence of a conceptual framework of legal rules, beliefs and expectations underlying the development of interstate relations among Greek cities.

<sup>94</sup> "Each independent polis had its own territory, its own citizenry and government, and its own defense capacity; each, in theory at least, pursued its own foreign policy, and claimed to enjoy an ostensibly equal standing to other States in the Hellenic community. That community, in turn, was constituted not only by a common culture, but by an intricate web of legal relationships" (George A. Sheets, "Conceptualizing International Law in Thucydides", in *American Journal of Philology*, 1994, vol. 115, no. 1, p. 53). As regards the 'international' feature of such system from a legal perspective, see Roberto Ago, "The First International Communities in the Mediterranean World", in *British Yearbook of International Law*, 1982, vol. 53, no. 1, pp. 213–32.

lating permitted conduct among organised Greek communities and prescribing improper behaviour – disclose a regulatory order. Such order was believed to complement that of domestic systems (each *pólis*' law) so, *mutatis mutandis*, it is not so distant from modern international law. Hence, when the sources mention expressions such as the 'law of the Greeks' (νόμος τῶν Ἑλλήνων, *nómos tōn Hellénon*), 'common law' (νόμος κοινός, *nómos koinós*) or the 'right of all men' (νόμος πάντων τῶν ἀνθρώπων, *nómos pánton tōn anthrópon*),<sup>95</sup> they are describing a legal system similar in many aspects to what the Romans will later identify as *ius gentium*.<sup>96</sup> In a famous passage of his *Republic*, Plato himself proposed to extend the existing rules already applicable to cases of *stásis* (that is, to armed conflicts among Greek *póleis*)<sup>97</sup> and cover those cases of war in which Greeks and barbarians confronted each other (469b5–471b8):

τί δέ; πρὸς τοὺς πολεμίους πῶς ποιήσουσιν ἡμῖν οἱ στρατιῶται; [...] ἐγὼ μὲν, ἔφη, ὁμολογῶ οὕτω δεῖν πρὸς τοὺς ἐναντίους τοὺς ἡμετέρους πολίτας προσφέρεσθαι πρὸς δὲ τοὺς βαρβάρους, ὡς νῦν οἱ Ἕλληνες πρὸς ἀλλήλους.<sup>98</sup>

But again, how will our soldiers conduct themselves toward enemies? [...] "I," he said, "agree that our citizens ought to

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<sup>95</sup> Cf. Alessandro Bonucci, *La legge comune nel pensiero greco*, Bartelli, Perugia, 1903. In his Ph.D. dissertation at Freiburg University, Demetrius Wogasli (*Die Normen des altgriechischen Völkerrechtes* [Nomoi Koinoi tōn Hellénon], 1895) has particularly dealt with the general issue raised by the expression, though to a large extent his conclusions were overcome by historiographical criticism and new philological studies.

<sup>96</sup> For a detailed study on this (especially regarding the international legal scope of the laws of war), see Emiliano J. Buis, *La súplica de Eris: Derecho internacional, discurso normativo y restricciones de la guerra en la antigua Grecia*, Eudeba, Buenos Aires, 2015, and, more recently, *Taming Ares. War, Interstate Law and Humanitarian Discourse in Classical Greece* (Series on Studies in the History of International Law, vol. 26), Brill/Nijhoff, Leiden, 2018.

<sup>97</sup> Internal armed conflicts are frequently characterised in ancient Greece by analogy to international conflict or war, as shown by Julien du Bouchet, "Remarques sur le vocabulaire du conflit en Grèce ancienne", in Hélène Ménard, Pierre Sauzeau and Jean-François Thomas (eds.), *La pomme d'Éris: Le conflit et sa représentation dans l'Antiquité*, Presses universitaires de la Méditerranée, Montpellier, 2012, p. 75. On *stasis*, see particularly Hans Joachim Gehrke, *Stasis: Untersuchungen zu den inneren Kriegen in den griechischen Staaten des 5. und 4. Jahrhunderts v. Chr.*, Beck, Munich, 1985; Nicole Loraux, *La cité divisée: l'oubli dans la mémoire d'Athènes*, Payot, Paris, 1997.

<sup>98</sup> The Greek text is that of Plato, *Platonis Opera*, vols. 1–5, John Burnet ed. and trans., Clarendon Press, Oxford, 1967–68.

deal with their Greek opponents on this wise, while treating barbarians as Greeks now treat Greeks.”<sup>99</sup>

The desired universality of rules applicable to the enemy is based upon an idea of justice that tends to eliminate the difference between traditionally friendly Greeks and foreign enemies, thus breaking the centrality of the domestic order to endorse common laws promoting rational and measured behaviours. This may not be surprising if we consider that, by this time, the idea of cosmopolitanism was being consolidated by some emerging contemporary philosophical schools such as the Cynics.<sup>100</sup>

A last episode from the end of the Peloponnesian War offers an interesting and quite exceptional example of the emotional bias involved in the creation of an international *ad hoc* tribunal.<sup>101</sup> In his *Hellenica*, Xenophon explains that the Spartan general Lysander sailed from Rhodes to deal with revolting cities on the coast of Asia Minor in 405 BC. Having won a major naval victory in the Dardanelles, and having liberated those captured by the enemy, Lysander transferred his loot and his prisoners – among whom were Philocles, Adeimantus, and other Athenian generals – to Lampsacus. There he summoned his allies to a tribunal in order to judge the atrocities committed by his enemies, especially the Athenians, who had voted that, in the event of victory, they would cut off the hands of the vanquished (2.1.31–32):<sup>102</sup>

Φιλοκλῆς δ' ἦν στρατηγὸς τῶν Ἀθηναίων, ὃς τούτους διέφθειρεν. ἐλέγετο δὲ καὶ ἄλλα πολλά, καὶ ἔδοξεν ἀποκτεῖναι τῶν αἰχμαλώτων ὅσοι ἦσαν Ἀθηναῖοι πλὴν Ἀδεϊμάντου, ὅτι μόνος ἐπελάβετο ἐν τῇ ἐκκλησίᾳ τοῦ περὶ τῆς ἀποτομῆς τῶν χειρῶν ψηφίσματος· ἠτιάθη μὲντοι ὑπὸ τινῶν προδοῦναι τὰς ναῦς. Λύσανδρος δὲ Φιλοκλέα πρῶτον ἐρωτήσας, ὃς τοὺς Ἀνδρίους καὶ Κορινθίους κατεκρήμισε,

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<sup>99</sup> Plato, *Republic*, vols. 1–2, Paul Shorey ed. and trans., Harvard University Press, Cambridge, 1969.

<sup>100</sup> Diogenes of Sinope (c. 390–23 BC), who was a younger contemporary of Plato, was a Cynic philosopher who suggested that being a ‘citizen of the world’ was a way of rejecting local norms; cf. Anthony A. Long, “The concept of the cosmopolitan in Greek & Roman thought”, in *Daedalus*, 2008, vol. 137, no. 3, p. 50.

<sup>101</sup> Further information on this episode from a legal perspective can be found in Buis, 2015, see *supra* note 45, pp. 50–54.

<sup>102</sup> On the dangers facing prisoners of war, with special reference to this particular example, see Lawrence A. Tritle, “Men at Work”, in Brian Campbell and Lawrence A. Tritle (eds.), *The Oxford Handbook of Warfare in the Classical World*, Oxford University Press, Oxford, 2013, p. 289.

τί εἴη ἄξιός παθεῖν ἀρξάμενος εἰς Ἑλληνας παρανομεῖν, ἀπέσφαξεν.<sup>103</sup>

And it was Philocles, one of the Athenian generals, who had thus made away with these men. Many other stories were told, and it was finally resolved to put to death all of the prisoners who were Athenians, with the exception of Adeimantus, because he was the one man who in the Athenian Assembly had opposed the decree in regard to cutting off the hands of captives; he was charged, however, by some people with having betrayed the fleet. As to Philocles, who threw overboard the Andrians and Corinthians, Lysander first asked him what he deserved to suffer (παθεῖν) for having begun outrageous practices towards Greeks, and then had his throat cut.<sup>104</sup>

As I explained elsewhere, the language in the narrative of the episode is quite similar to the discourse used by the Allied tribunals of last century's post-world war periods.<sup>105</sup> In fact, the reference to the Greeks collectively (εἰς Ἑλληνας) represents a significant appeal to the existence of legal norms that, insofar as they are overarching rules elevated above 'national' systems, seem to create rights and obligations at an interstate level: this is a new reference to the 'common' law of the Greeks, envisaged as a universal order. In any case, what I want to emphasise here, in light of those similarities, is the emotional implication of the court that was created.<sup>106</sup>

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<sup>103</sup> The Greek text is that of Xenophon, *Xenophontis Opera Omnia*, vols. 1–4, Edgar Cardew Marchant ed. and trans., Clarendon Press, Oxford, 1968–71.

<sup>104</sup> Xenophon, *Hellenica*, vol. 1, Carleton L. Brownson ed. and trans., Harvard University Press, Cambridge, 1918.

<sup>105</sup> Georges S. Maridakis, "Un précédent du Procès de Nuremberg tiré de l'histoire de la Grèce ancienne", in *Revue hellénique de droit international*, 1952, vol. 5, pp. 1–16, has studied the passage and concluded that Lysander's court represented a clear forerunner of the judicial process carried out in the International Military Tribunal at Nuremberg: notable similarities include the trial's international character (the involvement of the 'allies'), the victors' *ex post facto* decision to create the court, and the death sentence imposed on the accused without the possibility of appeal. A much more recent translation of his paper can be found in Georges S. Maridakis, "An Ancient Precedent to Nuremberg", in *Journal of International Criminal Justice*, 2006, vol. 4, no. 4, pp. 847–52). For opposite views on the episode, see Erich Kraske, "Klassische Hellas und Nürnberger Prozess", in *Archiv des Völkerrechts*, 1953–54, vol. 4, pp. 183–89.

<sup>106</sup> Bosworth, 2012, p. 19, refers to it as a "kangaroo court".

The punishment imposed on the Athenian generals presupposes the application of a law that transcends the geographic boundaries of the city-state; nevertheless, the language of punishment still relates to the field of sentiments. When Xenophon underlines that “Lysander first asked him what he deserved to *suffer*”, the verb *patheîn* clearly indicates that even in *ad hoc* tribunals an affective dimension is introduced.<sup>107</sup> According to the text, the capital punishment imposed on Philocles and others is related to the will to cause suffering and thus to exert violence. Since death penalty was rejected in the Greek world as an unfair sanction,<sup>108</sup> the passage can cast some light on Plato's reasonings: *timoría* should be rejected since it draws people to react emotionally instead of finding ways to impose justice by educating the wrongdoer. This is compatible with Plato's closeness to Thucydides when agreeing that the underlying cause of Athenian imperialism can be attributed to a combination of greed (*pleonexía*) and the internalisation of specific sophistic teachings that supported negative affections and uncontrolled appetites as the best way of life.<sup>109</sup>

This episode criticised by Xenophon – who was also a pupil of Socrates and contemporary to Plato – can provide an interesting example to justify the possible applicability at an interstate level of the ancient Greek notion of rational justice and the restriction of irrational and uncontrolled vengeance.<sup>110</sup>

## 2.5. Concluding Remarks

According to Saunders, the frequent use of myths in Plato's texts show a universal moral principle stating that injustice will always be punished in the end (*Gorgias* 523a–527c; *Phaedo* 81a, 107d–108c, 113d–114c; *Phae-*

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<sup>107</sup> The verb is clearly related to the noun *páthos*, translated as ‘emotion’.

<sup>108</sup> On this, see Eva Cantarella, *I supplizi capitali in Grecia e a Roma (Origini e funzioni delle pene di morte nell' antichità classica)*, Rizzoli, Milan, 1996.

<sup>109</sup> This is the thesis defended by Scott Matthew Truelove, *Plato and Thucydides on Athenian Imperialism*, Ph.D. Dissertation, University of Texas, Austin, 2012. It should be remembered that according to Plato, *pleonexía* – a desire which is a disease typical to wild beasts – is the target of the legislator's therapeutic punishment (*Republic* 906b).

<sup>110</sup> Martha Nussbaum has recently identified the constructive functions of ‘anger’, considering that it can be a rational emotion that relates to the ethical need of a dissuasive punishment. She seems to identify the origins of this tradition in Aristotle and the Stoics. As I hope to have shown, Plato offers an even earlier attempt to address this ‘transition-anger’. See Martha Nussbaum, *Anger and Forgiveness: Resentment, Generosity, and Justice*, Oxford University Press, Oxford, 2016.

*drus* 248c–249b; *Republic* 614a–619b; *Laws* 903b–905c, among others).<sup>111</sup> The recurrence of myths, in this sense, helps to explain the universality of Plato’s proposal and contributes to promote the analogy between the Platonic view of suppressing the negative emotional bias related to *timoría*, as described, and the evolution of a global contemporary international criminal law endorsed in a common and rational ethical foundation.<sup>112</sup>

The discussion on those passions related to the Athenian experience of justice, as provided in the Platonic corpus, could provide us with a useful philosophical framework to explore the problems related to the affective turn in international justice. As a final remark, I believe that Plato’s contribution can help us revisit the long-standing arguments on the value of emotions in judging.<sup>113</sup> At the same time, they disclose the need to rationally overcome the theoretical foundations of revenge in order to consolidate curative benevolence, rational reform, and civic self-control as an educational basis for punishing in criminal proceedings.<sup>114</sup>

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<sup>111</sup> Saunders, 1991, see *supra* note 78, pp. 196–211. On myths concerning punishment in Plato, see David Sedley, “Myths, Punishment, and Politics in the *Gorgias*”, in Catalin Partenie (eds.), *Plato’s Myths*, Cambridge University Press, Cambridge, 2009, pp. 51–76.

<sup>112</sup> It should be added here that Plato’s penology is intended to cover not only the citizens of the *pólis*, but also slaves and foreigners; cf. Saunders, 1991, see *supra* note 78, pp. 344–45. This last aspect has to be taken into account if we seek to expand the Platonic theory to an interstate dimension.

<sup>113</sup> According to Plato, emotions in themselves are not negative. They depend heavily on the context, as concluded by Christina Tarnopolsky, “Plato on Shame and Frank Speech in Democratic Athens”, in Rebecca Kingston and Leonard Ferry (eds.), *Bringing the Passions Back In: The Emotions in Political Philosophy*, UBC Press, Vancouver, 2008, p. 59. And to the Greek mind, I may add, the context in which emotions are deployed is, to a certain extent, always political.

<sup>114</sup> Stalley, 1995, see *supra* note 69, p. 19, states that all dialogues, in spite of their differences, “share the view that the city as a whole has a responsibility for training the characters of its citizens and that punishment plays an essential role in that process”.

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## Cicero: *Bellum Iustum* and the Enemy Criminal Law

Pedro López Barja de Quiroga\*

The Indians will, I hope, soon stand in the same position towards us in which we once stood towards the Romans.<sup>1</sup>

### 3.1. Introduction

There never was anything that could be included in the modern category of international criminal law in Roman history. Rome punished its enemies but did not take them to trial. It was the privilege of the general, when entering the city in triumph after victory, leading an impressive parade of captives and spoils, to either kill or spare the lives of the defeated and brutally humiliated enemies.<sup>2</sup> No justification was needed, even if

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<sup>1</sup> Charles Trevelyan, 1838, cited by Neville Morley, *The Roman Empire: Roots of Imperialism*, University of Chicago Press, London, 2010, p. 39.

<sup>2</sup> Although some sources appear to claim that prisoners were regularly executed when the ceremony of the triumph ended, this has been questioned: see Mary Beard, *El triunfo romano: Una historia de Roma a través de la celebración de sus victorias*, Crítica, Barcelona, 2009, pp. 176–79.

some was offered in particular cases, as when Vercingetorix was executed as a treacherous rebel.<sup>3</sup>

Other times, however, Rome acknowledged the violation of proper conduct in war. In five cases, at least, Roman offenders were handed over at Roman initiative to a foreign nation: 321 (both consuls to the Samnites, Caudine Forks), 236 (M. Claudius Clineas, Corsica), and 137 (consul Mancinus, Numantia).<sup>4</sup> These three high magistrates had signed peace treaties and returned home only to discover that the Roman senate did not uphold them. Religious scruples were bypassed through the simple method of handing over the magistrates to the enemies. The remaining two cases concerned injuries suffered by foreign ambassadors: in 266 two senators were sent to Apollonia, whose legates they had struck, and in 188 two men were sent to Carthage for the same offence. In both cases the offenders were returned unharmed. There is one more instance, probably the most famous: in 55, Cato the Younger suggested that Julius Caesar should be handed over to the Gauls, for massacring the Usipetes and Tencteri, two German tribes, when their leaders had come to him as an embassy seeking a truce.<sup>5</sup> Needless to say, the proposal was laid to rest.

This chapter begins with the intriguing relationship between the two poles that underpin this reflection, namely ‘just war’ (*bellum iustum* in Latin) on the one hand, and ‘enemy criminal law’ (*Feindstrafrecht* in German) on the other. This relationship can be characterised as a *specular* one, for one mirrors the other. ‘Just war’ renders the enemy a citizen who can be submitted to trial, implying that there is a common law binding on States. On the other side, *Feindstrafrecht* renders the citizen an enemy who is not to be protected by the same law as the rest of the citizens. We may have a precedent for this ‘specular relation’ between war and justice in the way crimes were punished in modern Europe. As Michel Foucault pointed out, kings were the ones who decided upon war but also upon their subjects’ lives. Kings waged war against those who had committed a

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<sup>3</sup> Matthias Gelzer, *Caesar: Politician and Statesman*, Harvard University Press, Cambridge (MA), 1968, p. 284.

<sup>4</sup> Unless otherwise stated, all dates are BC (that is, Before Christ).

<sup>5</sup> Appian, *Celtica*, 18; Plutarch, *Life of Caesar*, 22.4; Plutarch, *Life of the Younger Cato*, 51.1–2; Plutarch, *Life of Crassus*, 37.2–3; Suetonius, *Life of Caesar*, 24.3; John Rich, “The *fetiales* and Roman International Relations”, in James H. Richardson and Federico Santangelo, *Priests and State in the Roman World*, F. Steiner, Stuttgart, 2011, p. 199.

crime, for they had implicitly put their power into question. They were ritually killed to restore the natural order of things.<sup>6</sup>

As it is well known, *bellum iustum* goes hand in hand with empires, for it provides a justification for expansion and conquest. Rome is no exception, even if it did not invent the concept.<sup>7</sup> As an advocate of both ‘just war’ and the (*avant la lettre*) ‘enemy criminal law’, Cicero – the Roman philosopher and politician (106 – 43) – is in a unique position to illustrate their relationship. He was a successful advocate and ascended to the top of the Roman political hierarchy (the consulate) in a very difficult period. He suffered the calamities and atrocities of several civil wars and was killed as a consequence of the proscription by Mark Antony and Octavian (who would be Emperor Augustus). His head and left hand were exposed to the public on the *rostra*, the tribunal in the Forum where orators used to stand up when speaking to the people. He was not very much interested in the military, for clearly he had a talent for words, not for war, but he had time to think about the Roman constitution, including its past history as conqueror of the peoples and territories surrounding the Mediterranean Sea. Traditionally, historians have portrayed him as a writer without ideas of his own, only capable of translating Greek concepts and reflections into good Latin.<sup>8</sup> Since much of this Greek ‘original’ is now lost, attempts to reconstruct a Greek model for every Ciceronian idea were essentially futile. Fortunately, the perception of Cicero has changed in these past few

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<sup>6</sup> Michel Foucault, *Surveiller et punir: Naissance de la prison*, Gallimard, Paris, 1975, chap. 1.

<sup>7</sup> Anthony Pagden, “Natural Rights and Europe’s Imperial Legacy”, in *Political Theory*, 2003, vol. 31, no. 2, pp. 171–99; Benjamin Straumann, “Ancient Caesarian Lawyers in a State of Nature: Roman Tradition and Natural Rights in Hugo Grotius’s *De iure praedae*”, in *Political Theory*, 2006, vol. 34, no. 3, pp. 328–50. On the Greek precedents, see Silvia Clavadetscher-Thürlemann, *Πόλεμος δίκαιος und Bellum iustum: Versuch einer Ideengeschichte*, Juris, Zurich, 1985. Rome has recently been claimed as the inventor of the ‘civil war’ or *bellum civile* by David Armitage, *Civil Wars: A History in Ideas*, Alfred A. Knopf, New York, 2017.

<sup>8</sup> After Theodor Mommsen’s blunt condemnation of Cicero, the criticism of the orator from Arpinum became widespread. Frederick Pollock, in his *Introduction to the History of the Science of Politics*, MacMillan, London, 1895, wrote: “He succeeded admirably in transcribing the current ideas of the Greek schools [...] More than this he did not attempt and in any case did not achieve. Nobody that I know has as yet succeeded in discovering a new idea in the whole of Cicero’s philosophical and semi-philosophical writings” (p. 31). See William H. Altman (ed.), *Brill’s Companion to the Reception of Cicero*, Brill, Leiden, 2015, p. 215.

years. Now, scholars begin to acknowledge his contributions as a thinker and philosopher.<sup>9</sup>

### 3.2. The Just and Righteous War

We may start with the ideology of the ‘just and righteous war’ (*bellum iustum piunque*). I will first comment shortly on what this *bellum iustum* was not, and then I will focus on how we can get an idea of what it was by analysing Cicero’s version of it. To take up the former, *bellum iustum* was not reduced to a question of using the right procedure when declaring war (that is, the so-called *ius fetiale*).<sup>10</sup> This is a serious misunderstanding of the role of the *fetiales*, an archaic college of priests (number unknown, perhaps 20) who were involved in the rituals associated with declaring a war, but had no power to decide it.<sup>11</sup>

Ideally, the procedure as described by Livy (1.32) and Dionysius of Halicarnassus (2.72) consists of three steps: (a) an embassy of *fetiales*, who states Roman claims in front of the foreign political representatives; (b) a debate in the Senate concerning this war; (c) if the Senate agrees on war, then a second embassy of *fetiales* is sent to inform the enemy. This embassy was not meant to conduct any negotiation, but to carry on as instructed by the Senate.<sup>12</sup> As Ferrary notes, any Roman war vote, in the Senate and/or the assembly, must have preceded the despatch of the fetial to make such a proclamation, rather than followed it, as some old version (Ancus Marcius) claims.<sup>13</sup> In short, as other Roman priests, these *fetiales*

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<sup>9</sup> On Ciceronian thought, see my book *Imperio legítimo: El pensamiento político en tiempos de Cicerón*, Madrid, 2007, with bibliography.

<sup>10</sup> Some authors have recently argued that, for Cicero, a *bellum iustum* was simply the one that has been ritually declared, with no ethical reflection upon its causes. In this sense, see Luigi Loreto, *Il bellum iustum e i suoi equivoci*, Jovene, Naples, 2001; Antonello Calore, *Forme giuridiche del ‘bellum iustum’*, Giuffrè, Milan, 2003; Antonello Calore, “*Bellum iustum* e ordinamento fetiale”, in *Diritto@storia*, 2005, no. 4. See also the considerations by Jörg Rüpke, *Domus Militiae: Die religiöse Konstruktion des Krieges in Rom*, F. Steiner, Stuttgart, 1990, pp. 237–42.

<sup>11</sup> Federico Santangelo, “The Fetials and their *ius*”, in *Bulletin of the Institute of Classical Studies*, 2008, vol. 51, pp. 63–93.

<sup>12</sup> Adalberto Giovannini, “Le Droit fécial et la déclaration de guerre de Rome à Carthage en 218 avant J.-C.”, in *Athenaeum*, 2000, vol. 88, pp. 69–116 (see in particular his criticism of Walbank’s views that there was a change in the procedure around 238 BC by which the senatorial decision preceded the embassy and the latter was entitled to negotiate with the enemy and to declare war as they saw fit).

<sup>13</sup> Jean-Louis Ferrary, “*Ius fetiale* et diplomatie”, in Edmond Frézouls and Anne Jacquemin (eds.), *Les relations internationales : Actes du colloque de Strasbourg 15-17 Juin 1993*, De

were experts who knew the rituals, the prescribed words, and were consulted by the Senate on these issues, but the decision was in the hands of the Senate or the People: they decided whether the war was just or unjust, not basing their decision on whether the rituals had been rightly performed, but on moral issues (more on this later). In 200, the fetial college was consulted by the Senate on the appropriate procedure for announcing the declaration of war against King Philip, and a similar consultation was made in 191 before the war against Antiochus and the Aetolians (Livy, 31.8.3; 36.3.7–12).<sup>14</sup> The decision to go to war was not taken by the *fetiales*, they simply knew how to declare it. In fact, they could be declaring an unjust war, as the ‘official’ formula – no doubt, an antiquarian reconstruction – explicitly stated: “If I unjustly and unrighteously (*iniuste impieque*) demand that those men and those goods (*illos homines illasque res*) be handed over to me, then may I never be allowed to enjoy my fatherland” (Livy, 1.32.7). Not all the wars were declared by Rome using the *fetiales* – they probably ceased being used in pre-war missions around 340, although they continued to be consulted on the proper procedure to declare war – which is enough evidence that a war could be deemed just and righteous without the intervention of the *fetiales*. In short, “the wider role in ensuring the just conduct of the Roman State which the fetials are portrayed as discharging in early times by Dionysius and to some extent by Cicero and Varro is an idealising construct”.<sup>15</sup>

There is a well-known episode that may help us understand the concept. In 167, Rome utterly defeated the last king of Macedon, Perseus, in the battle of Pydna. The Senate then discussed what should be done with some other minor powers in the area, such as the relatively small Greek island of Rhodes, which had maintained an ambiguous attitude during the war. Cato the Elder made a famous pronouncement in the Senate, which we can partially read today, where he argued that Rome should not declare war on Rhodes (Aulus Gellius, *Attic Nights*, 6.3). He strove to demon-

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Boccard, Paris, 1995, pp. 411–32. See also Ernesto Bianchi, “Fest. s. v. nuntius p. 178, 3 L e i documenti del collegio dei feziali”, in *Studia et Documenta Historiae et Iuris*, 2000, vol. 66, pp. 335–41; François Blaive, “*Indictio belli*. Recherches sur l’origine du droit fécial romain”, in *Revue Internationale des Droits de l’Antiquité*, 1993, vol. 40, pp. 185–207.

<sup>14</sup> Rich, 2011, p. 189, see *supra* note 5.

<sup>15</sup> *Ibid.*, p. 233. Cf. the criticism of Calore and Loreto (cited at *supra* note 10) in Maria Floriana Cursi, “*Bellum iustum* tra rito e *iustae causae belli*”, in *Index*, 2014, vol. 42, pp. 570–85.

strate that the Rhodians were not guilty, using three arguments: firstly, the many favours received and the long-standing friendship between both cities; secondly, that the Rhodians never publicly aided Perseus, for one should not be punished solely for wishing to do harm; lastly, that Rome should not be the first to do what the Rhodians merely wished to do (that is, he declares himself against the so-called ‘pre-emptive wars’). The important thing is that Cato framed the question in moral terms: if Rhodians were guilty, then war would be just. *Fetiales* were simply technicians who faithfully obeyed the decision taken by the Senate or the people because they knew the words to say and the rituals to perform, such as the famous ‘bloody spear’ which should be thrown against the territory of the enemy.<sup>16</sup>

So the question comes up: if a just war cannot be defined as one that has been ritually and solemnly declared by the *fetiales*, how can we define it? To answer it, we should now take a look at Cicero’s writings that reflected on this topic: *On the Commonwealth* (published in 51) and *On Duties* (written in 44). It is widely agreed that Cicero’s role in this subject was of paramount importance. According to J.L. Conde, he was instrumental to the transition from a ‘shame culture’ – when Romans only cared about propitiating the gods, but were unapologetically brutal when narrating their victories to other men – to a ‘guilt culture’, when the need was felt to invoke moral principles in order to justify the empire to an auditory of men.<sup>17</sup>

Unfortunately, *On the Commonwealth* is badly mutilated and the part of book III where the characters in this dialogue debated on just war is lost. We have to rely on a handful of sentences quoted by other authors, which give us just a highly unsatisfactory (and potentially misleading) approximation. Still, by reading these few sentences that have been preserved together with *On Duties*, four important ideas can be highlighted in the Ciceronian argument. Firstly, a war can be deemed just when started not only for defensive reasons but also for glory. Cicero is quite explicit on this: when the survival of the city is at stake, it is a cruel and fierce war; when the war is a fight for command and glory, then it is of a less brutal

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<sup>16</sup> *Hasta sanguinea* (Livy, 1.32.12), which has been interpreted as a reference to the *Cornus sanguinea*, the common dogwood, in Jean Bayet, “Le rite du fécial et le cornuiller magique”, in *Mélanges de l’École Française de Rome*, 1935, vol. 52, pp. 29–76.

<sup>17</sup> Juan Luis Conde, *La lengua del imperio: La retórica del imperialismo en Roma y la globalización*, Alcalá Grupo Editorial, Alcalá la Real, 2008, pp. 103–04.

kind. Nevertheless, both types must have been entered upon with the same intention, namely that of living peacefully, without suffering any harms (*iniuria*) (Cicero, *On Duties*, 1.34 and 1.38). This does not amount to a blank admission of all wars as just, because it is the intention that matters: if the war was prompted by avarice, then it cannot be deemed just. He took an opposing view to that which has become predominant since 1945 with the entry into force of the Charter of the United Nations:<sup>18</sup> Cicero did not rule out all types of aggression from the category of ‘just war’ for he thought that not only defensive wars were ‘just wars’. In a world like his, where conflicts were permanent, the distinction between defensive and aggressive wars probably was not so clear cut.<sup>19</sup>

Secondly, Cicero does not focus exclusively on the road to war. Using modern parlance, he also takes into account *ius in bello* and *ius post bellum* (Cicero, *Laws*, 2.14.34). What he has to say of the *ius in bello* is neither extensive nor original, but he has clearly expressed the rule that only proper soldiers can fight. Those who have been dismissed by their general are not allowed to engage in combat (Cicero, *On Duties*, 1.37). This idea, that civilians are not allowed to fight in a just war, may have some relevance for modern thought if connected to the theory of the Partisan, as elaborated by Carl Schmitt, or even to the definition of ‘war crimes’ in the Rome Statute creating the International Criminal Court,<sup>20</sup> which includes “killing or wounding treacherously individuals belonging to the hostile nation or army”,<sup>21</sup> but we may leave this aside for the moment.

As to *ius post bellum*, it is noteworthy that it does not appear in the list of requirements for a just war according to St. Thomas of Aquinas.<sup>22</sup>

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<sup>18</sup> Nicholas Rengger, “On the Just War Tradition in the Twenty-First Century”, in *International Affairs*, 2002, vol. 78, no. 2, pp. 358–59.

<sup>19</sup> This is a very important point. To my view, Harris is mistaken to consider that all “defensive wars” could be deemed ‘just wars’: this is an anachronistic concept. See William V. Harris, *Guerra e imperialismo en la Roma republicana*, Siglo XXI, Madrid, 1989, pp. 163–72.

<sup>20</sup> Rome Statute of the International Criminal Court, 17 July 1998, in force 1 July 2002 (‘ICC Statute’) ([www.legal-tools.org/en/doc/7b9af9/](http://www.legal-tools.org/en/doc/7b9af9/)).

<sup>21</sup> *Ibid.*, Article 8(2)(b)(xi). See Mark Klamberg (ed.), CLICC in Lexis (www.cilrap-lexis.org/clicc/8-2-b-xi/8-2-b-xi).

<sup>22</sup> Authors such as Francisco de Vitoria or Hugo Grotius (see *infra* chaps. 5 and 7) did not put very much emphasis on this *ius post bellum*. See Gary J. Bass, “Jus post bellum”, in *Philosophy and Public Affairs*, 2004, vol. 32, no. 4, pp. 384–412. Only a few pages were dedi-

Cicero had thought otherwise – for him it was of paramount importance: unless the enemy’s behaviour during the combats had been extremely brutal and savage, the obligation of the conqueror was to preserve the vanquished. This does not mean that Rome abstained from taking advantage of its victories. We know of many cases of brutality, where enemies were killed by thousands without remorse. The important thing was not the people but their city, since the city itself should be preserved and not annihilated. To take a minor example: Sallust says that Marius’s complete destruction of the small town of Capsa in Numidia was “against the law of war” (*contra ius belli*, *The Jugurthine War*, 91.3).

Cicero made a very good argument, based on Roman generosity, in granting citizenship. Yesterday’s enemies could be the senators of tomorrow and the Emperor in a couple of days’ time. Rome’s record concerning the *ius post bellum* (which may have some connections to the modern concept of ‘nation-building’) is clearly outstanding when compared to other empires in world history, who blocked the accession to power by local oligarchies. Speaking about the Spanish Empire, Doyle underlined the contrast between Spanish ‘nationality’ and Roman citizenship: “While an Indian could become a Christian he could not become a Spaniard”.<sup>23</sup> In a similar way, in the British empire, local elites were educated and trained to serve as loyal servants in the colonies, without any chance to occupy a position among the rulers of the empire.<sup>24</sup> For this reason, Rome’s treatment of its subjects has been taken as a template for imperialism in modern times by many politicians and scholars, including Charles Trevelyan, whose observation about the relations between Great Britain and the Indians is quoted at the beginning of this chapter.

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cated to this subject in Walzer’s seminal book, under the general principle that no outcome whatsoever may compensate for the losses in human lives during the war. See Michael Walzer, *Guerras Justas e injustas: Un razonamiento moral con ejemplos históricos*, Tomás Fernández Aúz and Beatriz Eguibar eds. and trans., Paidós, Barcelona, 2001, pp. 161–69; translated from Michael Walzer, *Just and Unjust Wars: A Moral Argument With Historical Illustrations*, 3rd edition, Basic Books, New York, 1997.

<sup>23</sup> Michael W. Doyle, *Empires*, Cornell University Press, Ithaca, 1986, p. 122. Roman citizens could also be found lower down the social hierarchy, particularly among freedmen and veterans of the auxiliary troops. On this point, see Myles Lavan, “The foundation of empire? The spread of Roman citizenship from the fourth century CBE to the third century CE”, in Katell Berthelot and Jonathan Price (eds.), *Citizenship and Political-Religious Self-Definitions in the Roman Empire*, Peeters, Leuven, 2018 (forthcoming).

<sup>24</sup> See Benedict Anderson, *Imagined Communities: Reflections on the Origins and Spread of Nationalism*, 2nd edition, Verso, London, 1991, pp. 83–94.

Thirdly, a just war ought to be solemnly declared, and this could only happen with enemies Rome had recognised as such. Therefore, a war against pirates does not fall into this category, “for a pirate is not included in the number of lawful enemies, but is the common enemy of all the world; and with him there ought not to be any pledged word nor any oath mutually binding” (Cicero, *On Duties*, translation by W. Miller, 3.107). According to Cicero, pirates had no common authority and they acted mainly for profit. As we have seen, when avarice was the cause of the war it could not be deemed ‘just’.<sup>25</sup>

Fourthly, it can be seen that the subject of ‘just war’ was very important to him. Cicero built his most important dialogue (*On the Commonwealth*) upon the idea that the Commonwealth (the *res publica*) was defined by justice: unjust Commonwealths were not true republics. Therefore, for it to be the ideal regime he had in mind, Cicero had to prove that Rome had conquered its empire with no injustice on its side.

### 3.3. States of Exception

#### 3.3.1. Carl Schmitt and Walter Benjamin

The very famous first sentence of Schmitt’s *Political Theology* (written in 1922) reads: “Sovereign is he who decides on the Exception” (*Souverän ist, wer über den Ausnahmestand entscheidet*).<sup>26</sup> The eighth thesis of the “Theses on the Philosophy of History” written in 1940 by Walter Benjamin contains an explicit reference to this Schmittian idea:

The tradition of the oppressed teaches us that the “emergency situation” [*Ausnahmestand*] in which we live is the rule. We must arrive at a concept of history which corresponds to this. Then it will become clear that the task before us is the introduction of a real state of emergency; and our position in the struggle against Fascism will thereby improve. Not the least reason that the latter has a chance is that its opponents, in the name of progress, greet it as a historical norm. – The astonishment that the things we are experienc-

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<sup>25</sup> Walter Rech, *Enemies of Mankind: Vattel’s Theory of Collective Security*, Martinus Nijhoff Publishers, Leiden, 2013, pp. 29–35. Rech rightly casts some doubts on the translation of *communis hostis omnium* as ‘enemies of all the world’ (for *omnes* is ambiguous). I want to thank my colleague and contributor to this volume Elisabetta Fiocchi Malaspina, for helping me with Vattel (see *infra* chap. 10).

<sup>26</sup> Carl Schmitt, *Political Theology. Four Chapters on the Concept of Sovereignty*, George Schwab ed. and trans., University of Chicago Press, Chicago, 2005, p. 5.

ing in the 20<sup>th</sup> century are “still” possible is by no means philosophical. It is not the beginning of knowledge, unless it would be the knowledge that the conception of history on which it rests is untenable.<sup>27</sup>

In 2003, Giorgio Agamben devoted a small book to this ‘state of exception’.<sup>28</sup> According to Schmitt, the state of exception implies a “suspension of the entire existing juridical order”. Agamben underscores the uncertain and paradoxical character of the resulting condition. The state of exception presents itself as an inherently elusive phenomenon, a juridical no-man’s land where the law is suspended in order to be preserved. The state of exception “is neither external nor internal to the juridical order, and the problem of defining it concerns a threshold, or a zone of indifference, where inside and outside do not exclude each other but rather blur with each other”. In this sense, the state of exception is both a structured or rule-governed and an anomic phenomenon: “The state of exception separates the norm from its application in order to make its application possible. It introduces a zone of anomie into the law in order to make the effective regulation of the real possible”.<sup>29</sup>

The state of exception, as conceptualised first by Schmitt in 1922 and then by Benjamin in 1940, has again come to the forefront as a direct consequence of the 9/11 terrorist attacks on United States soil. As Agamben pointed out:

The state of exception has today reached its maximum worldwide deployment. The normative aspect of law can

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<sup>27</sup> “Die Tradition der Unterdrückten belehrt uns darüber, daß der Ausnahmezustand in dem wir leben, die Regel ist. Wir müssen zu einem Begriff der Geschichte kommen, der dem entspricht. Dann wird uns als unsere Aufgabe die Herbeiführung des wirklichen Ausnahmezustands vor Augen stehen; und dadurch wird unsere Position im Kampf gegen den Faschismus sich verbessern. Dessen Chance besteht nicht zuletzt darin, daß die Gegner ihm im Namen des Fortschritts als einer historischen Norm begegnen. — Das Staunen darüber, daß die Dinge, die wir erleben, im zwanzigsten Jahrhundert ›noch‹ möglich sind, ist *kein* philosophisches. Es steht nicht am Anfang einer Erkenntnis, es sei denn der, daß die Vorstellung von Geschichte, aus der es stammt, nicht zu halten ist”; Walter Benjamin, “Über den Begriff der Geschichte”, in *Gesammelte Schriften*, vol. I, no. 2, Suhrkamp Verlag, Frankfurt, 1974, p. 697. The translation into English is taken from Walter Benjamin, *On the Concept of History*, Dennis Redmond trans., Global Rights, 2016.

<sup>28</sup> Giorgio Agamben, *Lo stato di eccezione*, Bollati Boringhieri, Torino, 2003.

<sup>29</sup> This paragraph is a quotation from Elena Bellina and Paola Bonifazio (eds.), *State of Exception: Cultural Responses to the Rhetoric of Fear*, Cambridge Scholars Press, Newcastle, 2006, p. viii.

thus be obliterated and contradicted with impunity by a governmental violence that—while ignoring international law externally and producing a permanent state of exception internally—nevertheless still claims to be applying the law.

It is my contention that this ‘state of exception’ idea lies under a new doctrine on criminal law which has been named as ‘enemy criminal law’ or (since the name and first development were attributed to a German professor, Günther Jakobs) in German, *Feindstrafrecht*. The idea is essentially Schmittian: those who reject the tenets of the common constitution are ‘outsiders’ who are not entitled to the same protection by the State as ordinary citizens. They have lost their status as citizens and have become ‘enemies’. A specific and tougher criminal law, less respectful with civic liberties, is created – a criminal law specifically designed for terrorist attacks and totally different from the criminal law applied to ordinary citizens who are considered to be ‘within’ the system.

### 3.3.2. States of Exception in Rome

When one takes even a cursory look at the several ‘states of exception’ measures of the Roman ‘constitution’, what surely strikes most is their sheer number, their abundance.<sup>30</sup> Firstly, we have the dictatorship, which fell out of use after the Second Punic War (at the end of the third century). Although it was later re-introduced by Sulla and Caesar, its nature was changed, for the six-month limit was overruled (Caesar was designated dictator first for ten years and then for life). Mark Antony then passed a law abolishing the dictatorship altogether; as is well known, Augustus did not need the dictatorship to claim sole-power. Schmitt considered that Roman dictatorship does not fit into the state of exception category, but this is too formalistic: “dictatorship was a regularised irregularity”.<sup>31</sup>

The next three (*Senatus Consultum ultimum*, *hostis-Erklärung* and *tumultus*) are best seen together for they constituted the panoply that was at the Senate’s disposal to fight against any attempt at regime change. *Tumultus* was a mass levy, declared by the consul in front of an immediate and serious threat, where, as opposed to the ordinary levy (*dilectus*), the

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<sup>30</sup> See Figure 2 at the end of this chapter: my emphasis has been on the public instance that had the power to decide on the exception in every different case, the Schmittian approach.

<sup>31</sup> Michele Lowrie, “Sovereignty before the Law: Agamben and the Roman Republic”, in *Law and Humanities*, 2007, vol. 1, no. 1, p. 44.

ordinary excuses of people avoiding enlistment were invalid.<sup>32</sup> The *hostis-  
Erklärung* is the modern name given to a declaration of the Senate that  
someone was a public enemy (*hostis*), and thereby had lost his citizenship  
and could be killed with impunity.<sup>33</sup> The last one is the most important  
and most difficult to grasp. Scholars have discussed at length the *Senatus  
Consultum ultimum* or ‘ultimate decree’ (hereafter ‘SCU’); they have de-  
bated its legality and they have come to very different, even contradictory  
conclusions: for some, it had no legal meaning, and carried only a politi-  
cal message, without conferring new capacities or legal powers to the  
magistrates involved. The truth is that the actual words of the senatorial  
decree were laconic. Even if there are variants in the sources, we may be  
confident that this so-called SCU was very short, just one sentence. To  
take just one example, when Caesar in 49 did not comply with the Sen-  
ate’s demands, the response was (using his own words) as follows:

Recourse is had to that extreme and ultimate decree of the  
senate which had never previously been resorted to except  
when the city was at the point of destruction and all des-  
paired of safety through the audacity of malefactors. Now, he  
quotes the *senatus consultum*: ‘The consuls, the praetors, the  
tribunes, and all the proconsuls who are near the city shall  
take measures that the state incur no harm.’<sup>34</sup>

It is true that this ‘ultimate decree’ “identified neither the additional  
powers at the magistrate’s disposal nor the citizen rights which might be  
overridden for reasons of state”.<sup>35</sup> The decree did not set any time-frame,  
nor do we ever hear of a senatorial decision declaring that this ‘state of  
emergency’ was over and things had gone back to normal. No specific  
measure seems here to be contemplated; in particular, there is no mention  
of the right to kill Roman citizens without trial. According to several Ro-

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<sup>32</sup> On the *dilectus-tumultus* see Claude Nicolet, *The World of the Citizen in Republican Rome*, Batsford, London, 1980, pp. 96–102.

<sup>33</sup> See Annie Allély, *La déclaration d’hostis sous la République romaine*, Ausonius, Bordeaux, 2012.

<sup>34</sup> “Decurritur ad illud extremum atque ultimum senatus consultum, quo nisi paene in ipso urbis incendio atque in desperatione omnium salutis sceleratorum audacia numquam ante descensum est: dent operam consules, praetores, tribuni plebis, quique pro consulibus sint ad urbem, ne quid res publica detrimenti capiat”; see Caesar, *Civil Wars*, A.G. Pekkett trans., Loeb Classical Library, Cambridge, 1979, 1.5.3.

<sup>35</sup> Wilfried Nippel, *Public Order in Ancient Rome*, Cambridge University Press, Cambridge, 1995, p. 63.

man laws, magistrates were subjected to *prouocatio*, which meant that they could not sentence a citizen to a death penalty if a tribune of the plebs interfered. The judgement had then to be deferred to the assembly of the citizens or a jury court. Citizens were thereby protected from arbitrary punishment, but only if and when a tribune of the plebs gave his protection (*auxilium*) to the accused, which surely only happened in ‘political’ cases.<sup>36</sup> Some scholars think that the SCU was devised to destroy this legal protection; for this reason, it was deemed contrary to the Roman ‘constitution’, for the Senate could not pass a decree which was against a law of the people, as the one that embodied this *prouocatio*.

On this subject, modern interpretations have perhaps put too much emphasis on the legal aspects. Roman authors were fully aware of the implications of the measure, which were many and severe. For example, Caesar (*Civil Wars*, 1.7.5) explicitly said that this decree implied an order to the Roman people to repair to arms (*qua uoce et quo senatus consulto populus Romanus ad arma sit uocatus*), against seditious measures pursued by tribunes of the plebs and the consequences have been the killing of the tribunes (the Gracchan brothers and Saturninus). Sallust is more specific:

The power which according to Roman usage is thus conferred upon a magistrate by the senate is supreme, allowing him to raise an army, wage war, exert any kind of compulsion upon allies and citizens and exercise unlimited command and jurisdiction at home and in the field; otherwise the consul has none of these privileges except by the order of the people.<sup>37</sup>

Modern scholars tend to think that Sallust was wrong, that the consuls could legally take all those measures without needing any special authorisation by the Senate.<sup>38</sup> This is hard to believe. We have evidence

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<sup>36</sup> See Wolfgang Kunkel, *Untersuchungen zur Entwicklung des römischen Kriminalverfahrens in vorsullanischer Zeit*, Beck, Munich, 1962.

<sup>37</sup> “Ea potestas per senatum more Romano magistratui maxuma permittitur: exercitum parare, bellum gerere, coercere omnibus modis socios atque civis, domi militiaeque imperium atque iudicium summum habere; aliter sine populi iussu nullius earum rerum consuli ius est”; see Sallust, *The War with Catiline*, J.C. Rolfe trans., William Heinemann, London, 1921, 29.3.

<sup>38</sup> Hugh Last, in S.A. Cook, Frank Ezra Adcock and M.P. Charlesworth (eds.), *Cambridge Ancient History: Vol. IX, The Roman Republic, 133 to 44 B.C.*, Cambridge University Press, Cambridge, 1962, pp. 84–85. Antonio Guarino, “Nemico della patria a Roma”, in

that the SCU, at least by implication, gave the right to command troops inside the city. This is clearly what happened in the year 100: after the SCU has been obtained, C. Marius as consul distributed among the people weapons that had been guarded in the temple of Saucus and in public arsenals (*armamentarii publici*; Cicero, *For Rabirius, on a Charge of Treason*, 20). According to Cicero, Opimius admitted to having organised the killing of Gracchus but it was done in the public interest when there was a call to arms by a senatorial decree (*rei publicae causa cum ex senatus consulto ad arma uocasset*; Cicero, *On the Orator*, 2.132). All this, together with Caesar's text, gives some credit to Sallust's claim that the SCU authorised "to raise troops". Mommsen was probably right in saying that this 'ultimate decree' established in Rome the law of war, even if it was not automatically followed by a *tumultus*.<sup>39</sup> When this 'ultimate decree' was followed by a levy, it was an ordinary one (*dilectus*), not a *tumultus*, but this implies a state of war nevertheless. The decree by itself only authorised the magistrates to do as they see fit. It was a direct response to conflicts or rebellions in the city of Rome, the *urbs*, not Italy or the provinces (when there were problems there, the Senate used the *hostis-Erklärung* doctrine).<sup>40</sup> It revolves around the idea of preserving the public order in the *city of Rome*, a sacred precinct where the military power (*imperium militiae*) was not valid. If, as we know, no army could legally enter the city and there were no police stations to seek help, how was a rebellion in the city to be crushed? This 'ultimate decree' protected the magistrates if they use their military power (*imperium*) inside the sacred boundary of the city, known as *pomerium*.<sup>41</sup> One exception apparently occurred in the year 49, when the Senate decided that Caesar was to be

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Labeo, 1972, vol. 18, pp. 95–100. There is an extensive bibliography on the topic of SCU. Among the main titles, see Jürgen Ungern-Sternberg, *Untersuchungen zum späten republikanischen Notstandsrecht: Senatusconsultum ultimum und hostis-Erklärung*, C.H. Beck, Munich, 1970 (whose idea that the *hostis-Erklärung* was included in SCU has not been generally accepted); Antonio Duplá, *Videant consules: Las medidas de excepción en la crisis de la República romana*, Universidad de Zaragoza, Saragossa, 1990; Roberto Fiori, *Homo sacer: Dinamico politico-costituzionale di una sanzione giuridico-religiosa*, Jovene, Naples, 1996, pp. 415–47.

<sup>39</sup> See on "Kriegsrecht": Theodor Mommsen, *Römisches Staatsrecht*, S. Hirzel, Leipzig, 1888, vol. III-2, pp. 1244 ff.

<sup>40</sup> See Andrew Lintot, *Violence in Republican Rome*, 2nd edition, Oxford University Press, Oxford, 1999, p. 156.

<sup>41</sup> See on "Domus": Fred K. Drogula, *Commanders & Command in the Roman Republic and Early Empire*, University of North Carolina Press, 2015, p. 125.

replaced as governor of Gaul, but things are more complicated than that: the SCU was not directed against Caesar (he was straightforwardly declared ‘public enemy’ or *hostis*) but against some of the tribunes in Rome, whose tactics had hindered the Senate’s efforts for too long.<sup>42</sup> The tribunes knew perfectly well what the implications of the decree were, for they left Rome in a hurry (according to some sources, disguised as slaves) and ran to Caesar.

The actual words of the text are not the only thing that matters: we know also what happened after the Senate passed the decree. What our sources tell us amounts to a proper state of emergency. It was not only the killing of hundreds or even thousands of Roman citizens on the spot, without trial. Their goods were confiscated, their houses razed to the ground and their bodies thrown into the Tiber. Even Caius Gracchus’s widow was not allowed to recover her dowry. Special trials were conducted against the friends of the agitators. The prosecution tried to eradicate even the memory of their deeds. The tribune of the plebs in 99 (Sextus Titius) was sentenced to exile a year later for the only reason of having at home a statue of Saturninus, the violent tribune who had been killed two years before (Cicero, *For Rabirius, on a Charge of Treason*, 24; Valerius Maximus, *Memorable Deeds and Sayings*, 8.1 damn.3). The same fate was reserved to a man called C. Apuleius Decianus: he had showed his sorrow for the tragic death of Saturninus (Valerius Maximus, *Memorable Deeds and Sayings*, 8.1 damn.2).

At the end of the day, it is difficult not to accept that the SCU was very successful: in the eight instances when the Senate resorted to this measure, several thousand Roman citizens – including two tribunes of the plebs – were killed without trial and no one was ever condemned for these crimes, with the only debatable exception of Cicero himself; and debatable it is, for he went to exile in order to avoid standing trial. No one can say if he would have been found guilty. In other cases, such as Opimius in 120, the magistrates who took the lead in the attack under the umbrella of the SCU were formally accused, but the jury pronounced them not guilty. The case of Rabirius in 63 is more complex: he was about to be con-

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<sup>42</sup> Marianne Bonnefond-Coudry, *Le Sénat de la République romaine*, BEFAR, Roma, 1989, p. 769. Recently, Allély, after reviewing all the evidence, concludes that in 49 BC, SCU and the *hostis-Erklärung* took place, affecting both Caesar and his soldiers, see Allély, 2012, pp. 82–84, see *supra* note 33.

demned when the vote of the assembly was interrupted by a trick (the red flag on the Janiculus Hill was lowered) and never resumed.

In its blurry figure, the SCU fits perfectly well into the ‘state of emergency’ as conceived of by Agamben. This has been interpreted by Andreas Kalyvas as proof that, contrary to the conventional wisdom, a ‘mixed constitution’ such as the Roman regime was less – and not more – stable than a democracy, since Athens had no use of the emergency measures:

Whereas democratic Athens banned the tyrannical form of power in the name of freedom, the Roman republic legalised it in the name of liberty. What was excluded from the constitutional arrangement of Athens was fully included in the mixed regime of Rome.<sup>43</sup>

This is not completely accurate: ostracism was clearly an emergency measure incorporated in the Athenian constitution, for it meant that someone was exiled for ten years without any juridical procedure, as a direct consequence of a popular vote: no evidence against him was presented nor was he given any opportunity to defend himself. The reason underpinning ostracism was the necessity to summarily expel from the city of Athens those people who supposedly were seeking to become tyrants.<sup>44</sup> Yet, Kalyvas has correctly emphasised the paradox of a constitution which repeatedly needed to invoke emergency measures to avoid being overthrown. The reason is clear: “sovereignty had no stable location in the Roman Republic”.<sup>45</sup> We will come back to this at the end of this chapter.

### 3.3.3. Cicero on the State of Exception

It is not easy to give an overview of Cicero’s ideas on this subject, for these were deeply influenced by the moment and the context. Hence, I shall review briefly, one by one in chronological order, the main texts, which are as follows: *For Rabirius, on a Charge of Treason* (63), *Against*

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<sup>43</sup> Andreas Kalyvas, “The Tyranny of Dictatorship: When the Greek Tyrant Met the Roman Dictator”, in *Political Theory*, 2007, vol. 35, no. 4, p. 431.

<sup>44</sup> See Aristotle, *Constitution of Athens*, 22 and 43, 5 with Peter J. Rhodes, *A Commentary on the Aristotelian Athenaion Politeia*, Clarendon Press, Oxford, 1981 *ad loc.*

<sup>45</sup> Lowrie, 2007, p. 32, see *supra* note 31.

*Catiline IV* (63), *In defence of Sestius* (56), *On Laws* (52-51), *In defence of Milo* (52), and *Philippics* (44-43).<sup>46</sup>

*For Rabirius, on a Charge of Treason*: This was a very strange case. Saturninus, tribune of the plebs, had been violently killed after being compelled to surrender by the consul, who had the backing of the ‘ultimate decree’. This happened in 100. Almost 40 years later, in 63, Rabirius was accused of having taken part in the violent repression of Saturninus rebellion. Cicero was his lawyer and his discourse revolved entirely around the problem of the ‘ultimate decree’. He was adamant: if sovereignty belongs to the person or the public instance who can declare the state of exception (as Carl Schmitt was to proclaim, many years later), he insisted this one should be the Senate. Accusers did not want only to punish Rabirius, they wanted to destroy the Senate’s power (Cicero, *For Rabirius, on a Charge of Treason*, 2). Cicero called Saturninus ‘enemy of the Roman people’ (*hostis populi Romani*; *For Rabirius, on a Charge of Treason*, 20): he surely was not officially declared as such, but these legal niceties were of little significance to his theory.

*Against Catiline*: Cicero delivered the first of his famous Catilinarian orations when Catiline was sitting in the Senate (8 November 63). An ‘ultimate decree’ had been passed, but Cicero, as consul, wanted to have complete and unequivocal evidence before taking harsh measures against him. Still, he stated very clearly his position: the laws protecting citizens did not benefit those who had “deserted the republic”, and this had always been so in the history of the Republic (Cicero, *Against Catiline*, 1.10.28). The day after, Catiline had flown away and Cicero was speaking not in front of the Senate, but the people: “we are conducting a just war against an enemy” (*Against Catiline*, 2.1.1). Cicero threatened with severe punishments those friends and allies of Catiline who remained in the city: he considered them to be *hostes* (public enemies), even if they were born Roman citizens (*Against Catiline*, 2.12.27). In his Third Speech against Catiline (with the conspiracy already dismantled and its leaders in prison), Cicero said they wanted to destroy the city and all its inhabitants and announced to the people that by a decision of the Senate, Lentulus, one of

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<sup>46</sup> See, in general, Thomas N. Mitchell, “Cicero and the *Senatus Consultum Ultimum*”, in *Historia: Zeitschrift für alte Geschichte*, 1971, vol. 20, pp. 47–61; Antonio Duplá, “Política y violencia en la reflexión ciceroniana: legalidad, legitimidad, oportunismo”, in Marcelo Campagno, Julián Gallego and Carlos García MacGaw (eds.), *El Estado en el Mediterráneo antiguo: Egipto, Grecia, Roma*, Miño y Dávila, Buenos Aires, 2011, pp. 351–70.

the leaders, who was also a praetor that year, had forfeited his condition as citizen (*Against Catiline*, 3.6.15). But it is in the Fourth Speech (5 December, in front of the Senate) where we find the clearest expression of Cicero's thought in this issue. He very specifically referred to the Sempronian law, according to which only the People (not the Senate or any magistrate) could pass a capital sentence against a Roman citizen; again, Cicero said, those who are public enemies of the Republic are not citizens (*Against Catiline*, 4.5.10). They were not just 'criminal citizens', *improbissimi ciues*, but the most cruel enemies (*Against Catiline*, 4.7.15): they were worse than *hostes alienigenae* (foreign enemies). Those mad men (*dementes*) who had decided to become enemies of their country, could not be compelled by force nor gained with benefits – this is the reason why war against them is eternal (*Against Catiline*, 4.10.22).

We cannot be sure, but it is probably at this point in time, in this particular context, that Cicero invented his new theory, "namely that a citizen who was guilty of *perduellio* forfeited his rights of citizenship retrospectively to the time when his crime was committed, and could therefore be summarily dealt without trial".<sup>47</sup> This idea was accepted by later jurists. In the Severan period (early third century), Paulus pointed out that those who had been declared 'public enemies' (*hostes*) by the Senate or a law forfeited their Roman citizenship.<sup>48</sup>

*On Laws*: Cicero's dialogue *On Laws* provides insight on the general argument underpinning Cicero's view on *hostes*. Cicero's philosophical approach rested on the idea of natural law, that is, natural reason (Cicero, *On Laws*, 1.18), which only the Wise Man has (*On Laws*, 2.8). Laws are not those texts which have gone through all the established procedures, but "the highest reason, implanted in nature, which orders those things that are to be done and prohibits the opposite" (*On Laws*, 1.18). Only just laws are truly laws and should be called that; if unjust then they are not laws (*On Laws*, 1.42–44). When a band of thieves lays down some rules for its own use, these are not laws. In a similar way, those that are proposed by 'radical' tribunes do not deserve to be called laws (*On Laws*, 2.14). Cicero applied the same reasoning to republics (they only exist

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<sup>47</sup> K.A. Bauman, "The Hostis Declarations of 88 and 87 BC", in *Athenaeum*, 1960, vol. 51, p. 281.

<sup>48</sup> *Dig.* 4.5.5.1. Cf. Carla Masi Doria, "*Salus populi suprema lex esto*: Modelli costituzionali e prassi del Notstansrecht nella res publica romana", in Carla Masi Doria, *Poteri magistrature processi nell'esperienza costituzionale romana*, Jovene, Naples, 2015, pp. 1–21.

when founded upon just laws: *On Laws*, 1.42) or to criminals: they are not so because a legally established court has pronounced them guilty, but rather because natural law says so. This argument led Cicero to a forgone conclusion: taking natural law as a guide, there is no need to declare a ‘state of emergency’ of any kind, for the good citizen can identify by himself where the danger to the Republic lays. Against the dangerous citizen everybody may lawfully stand up and oppose his evil intentions.

In this dialogue, Cicero sought to reinforce the power of the Senate: a dictator is to be appointed (for no longer than six months) with full powers against an external war or internal conflicts (*On Laws*, 3.9.2) so there is no need of an ‘ultimate decree’ which he does not mention (but we should take into account the fact that the text as preserved is not complete). It is in the Senate’s power to decide if and when a dictator should be appointed. Book 3 is badly damaged so we do not know if Cicero perceived the dictator’s powers to be limited by *prouocatio*. We may suspect that he did not, for Cicero does not appear to have a negative view of the dictatorship, not even when used against internal enemies, as an instrument to re-construct the Republic (Cicero, *On the Commonwealth*, 6.12). The government of Rome should be in the hands of the Senate (Cicero, *On Laws*, 3.28).

*In defence of Sestius*: Cicero had just returned from exile and now stood in defence of Sestius, accused of violence because of the riots and the fights between Ciceronian partisans and their enemies. The description our orator made of the street fight is highly evocative:

Having occupied the Forum, the Comitium, and the Senate House late at night with armed men, for the most part slaves, they attacked Fabricius, lay hands upon him, kill some of his party, wound many. As that excellent and most steadfast man, Marcus Cispus, a tribune of the commons, was coming into the Forum, they drive him away by force, wreak great slaughter in the Forum, and then all together, their swords drawn and dripping with blood, it was my brother, my excellent, my most brave and devoted brother, that they began to search for, to clamour for, in every quarter of the Forum... You remember, gentlemen, how the Tiber was filled that day

with the bodies of citizens, how the sewers were choked, how blood was mopped up from the Forum with sponges.<sup>49</sup>

All the blame is laid on the ‘enemies’ who are held responsible of the riot. Cicero’s main idea is the defence of a ‘consensus of all the excellent people’ against the rest. Who is this rest? According to him, they belong to three different categories: firstly, madmen, people with a pathological mind (further explored below); secondly, those who are troubled by their heavy debts; and lastly, those who need to avoid punishment for their very serious crimes. In short, Cicero refuses to see his opponents as politicians, with different views from their own: they are criminals wanting to destroy the Republic (Cicero, *In defence of Sestius*, 99–100). This, in modern parlance, translates as terrorists, for they use violence in order to unsettle the democratic order.<sup>50</sup>

The ideas Cicero expressed in his speech *In defence of Milo* are not very different. This was Cicero’s last speech in his long career as an advocate. Milo had killed his rival Clodius in a fortuitous clash on a road 20 kilometres away from Rome. The killing of the charismatic tribune unleashed riots and troubles in Rome at a hitherto unprecedented scale. Even the Senate house (*curia*) was burnt to the ground by the angry mob. An ‘ultimate decree’ was passed, soldiers entered the city and order was restored. Cicero did what he could for Milo, but it was not enough for he was exiled. The discourse revolved around the idea that Clodius’s death was a blessing for the Republic, for he was an enemy of the good people. Milo deserved honour and glory for having killed a tyrant.<sup>51</sup> Cicero des-

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<sup>49</sup> “Cum forum, comitium, curiam multa de nocte armatis hominibus ac seruis plerisque occupauissent, impetum faciunt in Fabricium, manus adferunt, occidunt non nullos, uulnerant multos. uenientem in forum uirum optimum et constantissimum M. Cispium, tribunum plebis, ui depellunt, caedem in foro maximam faciunt, uniuersique dstrictis gladiis et cruentis in omnibus fori partibus fratrem meum, uirum optimum, fortissimum meique amantissimum, oculis quaerebant, uoce poscebant [...] Meministis tum, iudices, corporibus ciuium Tiberim compleri, cloacas refarciri, e foro spongiis effingi sanguinem”, see Cicero, *In defence of Publius Sestius*, R. Gardner trans., Loeb Classical Library, Cambridge, 1966, 75–77.

<sup>50</sup> The use of the word ‘terrorist’ to denigrate certain violent acts from the Roman past is not wholly uncommon in modern authors. Syme, for instance, called Augustus ‘the terrorist of Perusia’ (Ronald Syme, *The Roman Revolution*, Oxford University Press, 1939, p. 257), but this is entirely different from the Ciceronian view. For him, the question was not how cruel or violent one man (Augustus in this case) could be, but his political objectives.

<sup>51</sup> “Graeci homines deorum honores tribuunt eis uiris qui tyrannos necauerunt. Quae ego uidi Athenis! quae aliis in urbibus Graeciae! quas res diuinas talibus institutas uiris! quos cantus, quae carmina! prope ad immortalitatis et religionem et memoriam consecrantur. Vos

perately tried to convince the jurors that Milo had killed Clodius not only in self-defence but also in defence of the Republic. Clodius, the seditious tribune of the plebs, was a pest and a real menace – and this is the point that needs to be emphasised – because of the laws he was ready to pass through the people’s assembly. In this case, there were no riots or violence to justify the killing, but good Roman laws. Nor was there an ‘ultimate decree’ (previous to the incident which resulted in Clodius’s death) or any other public measure to give the appearance of legality to Milo’s crime. Cicero, in retrospect, wanted to condone political violence without any formal procedure or decision.

*Philippics*: This was Cicero’s last stand for Republicanism, with mixed results. They gave the orator fame and glory, but also provided justification for his murder during the subsequent proscriptions. In his long tirade against the consul Mark Antony, Cicero knew no bounds. The acts of open rebellion by the young Octavian (who would become Emperor Augustus) were justified by the orator in the name of the Republic. Even if Brutus, the tyrant-slayer, warned him against giving too much power and honours to the young and ambitious heir of Caesar, Cicero paid no heed to his advice. He was true to his ideas: against the tyrant (he had no doubts Mark Antony was aiming at tyranny) every response, every form of resistance, is permitted.

### 3.4. *Feindstrafrecht*

The ‘enemy criminal law’ was devised as an ‘ideal-type’ by Günther Jakobs for the first time in 1985. This ideal-type became a highly topical issue after the war on Iraq and the debates on ‘enemy combatants’ incarcerated without accusation or trial in Guantánamo. Jakobs’s proposal amounts to the creation of a new type of criminal law, which is governed by three principles:

[F]irst, punishment comes well before an actual harm occurs; second, it contains disproportionate, i.e., extremely high, im-

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tanti conseruatorem populi, tanti sceleris ultorem non modo honoribus nullis adficietis, sed etiam ad supplicium rapi patiemini? Confiteretur, confiteretur, inquam, si fecisset, et magno animo et libenter fecisse se libertatis omnium causa, quod et ei non confitendum modo, verum etiam praedicandum”; see Cicero, *In defence of Milo*, 80.

prisonment sanctions; third, it suppresses procedural rights [...]<sup>52</sup>

There has been some inquiry into the origins of this ‘enemy criminal law’. While Jakobs himself has claimed there is no connection with the notorious concept of ‘enemy’ by the Nazi jurist Carl Schmitt, other more palatable names such as Hobbes and Kant are usually mentioned by him or his followers. Jakobs only acknowledges a connection with those philosophers or thinkers who agree with his defence of the *status quo* and the established order; when the dialectic of ‘friend versus enemy’ is used with revolutionary purposes (by Saint-Just, to cite just one name), he is simply not interested.<sup>53</sup> In my opinion, the link between Jakobs and Schmitt’s theories is direct and strong, though there is insufficient space to explore that here.<sup>54</sup> Our interest lies in the connection with Cicero. As far as I know, the ancient roots of this ideal-type have never been explored.<sup>55</sup> Yet they are very visible to the observer. In ancient Roman law, citizens were protected by the right to *prouocatio*, which meant, as we have already seen, that they could not be put to death unless by the assembly or a jury of citizens. Cicero argued that he who has conspired against the Republic has voluntarily forfeited his citizenship, and could be dealt with accordingly, that is, as an enemy of Rome. His justification was almost the same as the one Jakobs provided: the state (the Republic for Cicero) has the right to protect itself in order to avoid being destroyed – what Jak-

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<sup>52</sup> Carlos Góómez-Jara Díez, “Enemy Combatants versus Enemy Criminal Law”, in *New Criminal Law Review*, 2008, vol. 11, no. 4, pp. 529–62.

<sup>53</sup> Xavier Bastida, “Los bárbaros en el umbral. Fundamentos filosóficos del derecho penal del enemigo”, in Manuel Cancio Meliá and Carlos Gómez-Jara (eds.), *Derecho penal del enemigo: El discurso penal de la exclusión*, Edisofer, Madrid, 2006, pp. 277–304.

<sup>54</sup> In Miguel Polaino-Orts, *Derecho penal del enemigo*, Bosch, Barcelona, 2009, pp. 133–39, Polaino-Orts rejects any connection between Jakobs and Schmitt, but for the wrong reason: according to him, in Schmitt the enmity is ‘private’ (p. 134), but this is not correct; for Schmitt, only a public enemy is an enemy: “Feind ist nur der öffentliche Feind [...] Feind ist *hostis*, nicht *inimicus*”. See Carl Schmitt, *Der Begriff des Politischen*, Duncker and Humbolt, Munich, 1932, p. 16; Gabriella Slomp, *Carl Schmitt and the Politics of Hostility, Violence and Terror*, Palgrave Macmillan, Houndmills, 2009.

<sup>55</sup> The only hint I have been able to find so far is faint, does not concern Cicero and is incorrect. Bastida, 2006, p. 286 (see *supra* note 53) very briefly refers to a distinction which he claims functioned in Rome between *hostis iudicatus* and *hostis alienigena*, but with no reference to sources. In Cicero, *Against Catiline*, 4.22, *hostes alienigenae* are indeed mentioned in the context of a contrast between *uictoriae domesticae/externae*, but there is nothing here about *hostis iudicatus*. In fact, I have not seen the couple used together anywhere in the corpus of Latin literature.

obs encapsulates as the so-called ‘right to security’ (*Grundrecht auf Sicherheit*).

The application of this enemy criminal law to the ‘war on terror’ was a collective work in which we may mention the role played by John Yoo, a member of the neo-conservative think-tank American Enterprise Institute, a law professor at Berkeley and above all, Deputy Assistant Attorney General in the office of the Legal Counsel of the U.S. Department of Justice between 2001 and 2003.<sup>56</sup> He is credited, in particular, with a memorandum dated 14 March 2003, which simply dismissed all national and international laws governing the treatment of prisoners: the President of the United States could do with them what he thought fit for national security reasons. It is true that the majority of these prisoners are not U.S. citizens, but when the ‘enemy criminal law’ is set in motion, the issue of citizenship and the protection it provides simply fades away, as is proven by the case, among others, of Yaser Hamdi, a U.S. citizen imprisoned in Guantánamo. The district court declared the following:<sup>57</sup>

This case appears to be the first in American jurisprudence where an American citizen has been held incommunicado and subjected to an indefinite detention in the continental United States without charges, without any findings by a military tribunal and without access to a lawyer. Despite the fact that Yaser Esam Hamdi (‘Hamdi’) has not been charged with an offence nor provided access to counsel, the Respondents contend that his present detention is lawful because he has been classified as an enemy combatant.

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<sup>56</sup> Scott Horton, “The Return of Carl Schmitt”, in *Balkanization*, 7 November 2005.

<sup>57</sup> Aglaia McClintock, “Nemico non più cittadino. Il caso di Yaser Hamdi, prigionero a Guantánamo”, in *Fides Humanitas Ius: Studi in onore di Luigi Labruna*, vol. V, Editoriale Scientifica, Naples, 2007, pp. 3479–94.

<i>FEINDSTRAFRECHT</i> (Jakobs)	<i>HOSTIS IN ROMAN LAW</i>
<b>Punishment comes well before an actual harm occurs</b>	“Other crimes you may punish after they have been committed; but as to this, unless you prevent its commission, you will, when it has once taken effect, in vain appeal to justice. When the city is taken, no power is left to the vanquished” (Sallust, <i>Conspiracy of Catiline</i> , 52.4)
<b>It contains disproportionate, that is, extremely high, imprisonment sanctions</b>	Citizens are not sentenced to death but to exile (Polybius, 6.14.7–8; Sallust, <i>Conspiracy of Catiline</i> , 51.22). Yet the opponents of Sulla were killed with impunity (Appian, <i>The Civil Wars</i> , 1.60).
<b>It suppresses procedural rights</b>	<i>Lex Sempronia (provocatio)</i> refers to citizens, those who are public enemies of the Republic are not citizens (Cicero, <i>Against Catiline</i> , 4.5.9)

**Figure 1. Ciceronian Foundations of *Feindstrafrecht*.**

One last point should be addressed. Who is then a public enemy, an *hostis*? The answer must be: the tyrant, for tyrants do not belong to human society (Cicero, *On Duties*, 3.32). Anybody can kill them without suffering any penalty. Cicero had a very specific word for them, which purports to reveal their true nature: *furiosi*. Contrary to other mental illness such as dementia (*insania*) or stupidity (*stultitia*), *furor* can also affect the Wise Man (Cicero, *Tusculans*, 3.5.11). This is not an inborn illness. Very able men, excellent orators and statesmen, for different reasons became *furiosi* – that is, frenzied, mad, and wild men. It was one of Cicero’s favourite insults, he used it very many times; he applied the insult to each and every popular leader in the recent history of his time, from Tiberius Gracchus and Rabirius, through Catiline and Clodius to Mark Antony.<sup>58</sup> But there is more to it. *Furiosus* (as Cicero himself said) translates

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<sup>58</sup> See Catiline, *Catilinarian Speeches*, 1.1 and 1.15; Clodius, *Domo*, 113; Saturninus, *In defence of Rabirius*, 22 and 24; Tiberius Gracchus, *On Friendship*, 37; Mark Antony, *Philippics*, 13 and 16. On *furiosus*, from a juridical point of view, see Xavier D’Ors, “Sobre XII tablas V, 7a: *si furiosus escit*”, in *Homenaje al profesor Álvaro Otero*, University of

the Greek *melancholia*, or ‘black humour’, which is the psychological feature of the tyrant (Plato, *Republic*, 573c). When Cicero called his political rivals *furiosi*, he was insulting them for aspiring to tyranny, as tyrants-to-be. He considered them criminals not for what they had done, but because their psychological conditions or personal liabilities (enormous amount of debt, horrifying crimes such as incest or murder) impelled them to destroy the political community.

We may find some connection with the (purportedly vague) notion of ‘enemy’ in Jakobs’s theory: ‘Enemy’ is understood here as someone who:

to a not merely incidental extent in his attitude [...] or his occupational life [...] or [...] by his inclusion in an organization [...], has at any rate presumably permanently [*dauerhaft*] turned away from the law and in this respect does not guarantee the minimum cognitive security of personal behaviour and demonstrates this deficit by his behaviour.<sup>59</sup>

In both cases (Cicero and Jakobs) it is the moral or personal behaviour of the ‘enemy’ that counts, which places him permanently outside the law. Punishment has to change its objective accordingly: it is no more the cure of the convicted; crimes are no longer seen as remedial diseases. Even if some of Catiline’s followers could be transformed into good citizens, it would be in the interest of the Republic that the vast majority perish, be annihilated (Cicero, *Against Catiline*, 2.22). At most, punishment may serve as a warning to other criminals who may then change their behaviour (*Against Catiline*, 3.17). Soon, Cicero convinced himself that this was pointless: their minds could not be cured or changed; his enmity with the Catilinarians was a perpetual war (*aeternum bellum*; Cicero, *In defence of Sulla*, 28).

### 3.5. Conclusions

It makes little sense to insist on the illegality of measures such as the ‘ultimate decree’: they are emergency measures; therefore they are located

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Santiago, Santiago, 1981, pp. 221–49; Carlo Lanza, *Ricerche su furiosus in diritto romano*, La Sapienza, Rome, 1990. The connection between *furor* and the ambition of becoming king is clearly stated in Cicero, *Against Catiline*, 2.19.

<sup>59</sup> Günther Jakobs, “On the Theory of Enemy Criminal Law”, in Markus D. Dubber (ed.), *Foundational Texts in Modern Criminal Law*, Oxford University Press, Oxford, 2014, pp. 415–24.

outside the law. We have a somewhat unexpected testimony of this in the writings of Julius Caesar, who was an outstanding advocate of the tribunes' rights against the supremacy of the Senate. At the beginning of the Civil War, Caesar criticised the 'ultimate decree' but he did not claim it was illegal; he simply said that the situation was not so extreme. In his view, the Senate had overreacted to the tribunes of the plebs using their veto. The historical precedents he mentions, when the decree was, by implication, justified, include open rebellion and violence but also 'dangerous laws'.<sup>60</sup> This is revealing, for we have here the 'ultimate decree' *in opposition to laws*: not just violence or riots, but also good and sound Roman laws forced the passing of emergency measures.

The conflict that eventually destroyed the Roman Republic revolved around who could decide on the exception, that is, the question of who was sovereign. Cicero's answer was in the first place the Senate, but at the bottom, it was the Wise Man, for everyone is entitled to stand up against the tyrant. "Publius Scipio, the highest priest, killed Tiberius Gracchus as a private citizen, even though he was moderately disturbing the state of public affairs" (Cicero, *Against Catiline*, 1.3). This leads to a paradox, by which the sovereign is any private man, defending the Republic against the tyrant.<sup>61</sup> Cicero's extreme vision of the emergency measures is incompatible with any rational theory of sovereignty.

Cicero's influence has been indirect but strong both in the 'just war' theory (through thinkers such as Vitoria, Grotius or Vattel) and in modern reflection on 'enemy criminal law' (through Schmitt). From our vantage point in the twenty-first century, Cicero's main contribution to the international criminal law discipline likely lies in two areas: on the one hand, his emphasis on the *ius post bellum*, for too often a poor peace treaty has planted the seed for a new war; on the other hand, his reflections on criminal law are particularly relevant to our present times, when State sovereignty is put into question by very different worldwide forces (that is, globalisation).

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<sup>60</sup> Caesar, *Civil Wars*, 1.7.5–6.

<sup>61</sup> Cf. Wilfried Nippel, *Aufbruch und 'Polizei' in der römischen Republik*, Klett, Stuttgart, 1988, p. 83: the killing of the tyrant is an exception in which 'self-help' is permitted.

	<b>CREATED</b>	<b>APPOINTED/ DECLARED BY</b>	<b>REMARKS</b>
DICTATORSHIP	501-202: 85 instances. Sulla: 82-81 Caesar: I (49); II (Nov. 48-Nov. 47); III (April 46: Ten Years) IV (Feb. 45) Perpetuus: Feb. 44 Abolished (M. Antonius, 44).	Following the Senate's instructions, the consul appointed the dictator. Interrex, <i>lex</i> (Sulla) <i>lex</i> : Caesar	Six months maximum From 300 BC ( <i>lex Valeria de prouocatione</i> ), under <i>prouocatio</i> A third of all recorded instances were appointed simply to hold elections
SCU = Senatus Consultum Ultimatum (the 'ultimate decree')	121 (C. Gracchus); 100 (Saturninus); 87 (Cinna); 77 (Lepidus); 63 (Catiline); 62 (Nepote); 52 (after Clodius's burial); 49 (Caesar); 47 (Dolabella); 43 (Mark Antony)	Senate	
<i>Hostis-Erklärung</i>	Invented by Sulla in 88 (Marius + 10 others) 87 (twice: Cinna, Sulla) 83 (senators who supported Sulla) 77 (Lepidus) 63 (Catiline and Manlius) 49 (Caesar) 43 (Mark Antony, Lepidus: both annulled in August by S.C.) 40 (Salvidienus)	Senate	Loss of citizenship, property, life.

<i>Tumultus</i>	296 (?) 225 200 193 (Ligurians) 192 (Sicily) 181 (Ligurians) 77 (?) (Lepidus) 73 (?) (Spartacus) 43 (M. Antonius)	Senate	Emergency draft (not dilectus) <i>ad unum bellum</i> . A <i>iustitium</i> was needed.
<i>Iustitium</i>	296; 111; 88 (?) Suggested by Clodius in 56 (Cic. <i>Har.</i> 26).	Consul, praetor or dictator	“complete cessation of public business, preventing all government activities not related to war”. <sup>62</sup>
<i>Homo sacer/euocatio</i>	439 Sp. Maelius? 133 Tib. Gracchus?	<i>priuatus</i>	Whoever wants the Republic to be safe, follow me!

**Figure 2. States of Emergency in Rome (all dates are BC).**

<sup>62</sup> Gregory K. Golden, *Crisis Management during the Roman Republic: The Role of Political Institutions in Emergencies*, Cambridge University Press, Cambridge, 2013, p. 87.

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# Roman Jurists and the Idea of International Criminal Responsibility: Ulpian and the Cosmopolis

Kaius Tuori\*

## 4.1. Introduction

Discussing the ancient roots of a modern concept is an enterprise fraught with difficulty. International criminal responsibility, the idea that a number of acts result in criminal liability irrespective of national or jurisdictional limitations, is a concept that transcends several of the boundaries of conventional modern law, such as national sovereignty and the powers that are normally associated with it, including the capacity to exercise exclusive jurisdiction and to determine the crimes that this jurisdiction covers. However, because these very ideas of exclusive jurisdiction and national sovereignty are deeply rooted in the modern concept of the nation-State, approaching pre-modern ideas and practices of jurisdiction and its limits enables us to see not only the origins of modern conventions but also the limitations inherent in them.

The purpose of this chapter is to explore the roots of international criminal responsibility, a task complicated by the fact that the notions of ‘crime’, the ‘State’ and the ‘international’ plane were unknown in their modern forms. Using the writings of ancient Roman jurists and especially those of Domitius Ulpianus (circa 170–223), commonly known as Ulpian, the chapter analyses the transformation of concepts such as ‘sovereignty’,

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‘responsibility’, ‘universal jurisdiction’ and ‘authority’. Of particular interest is the influence of the Stoic doctrine of cosmopolis, of the universal community of men, as a framework that informed the transformation of Roman legal thought.<sup>1</sup>

For Ulpian, the key to transcending the systemic limits of law was the near-universal authority of the Emperor and its manifestation in law. Rather than understanding the law as a function of power, Ulpian links it with the ethical demands of justice and humanity, presenting a solution to the problem of power as theorised by Seneca. As pre-modern jurisdictional order was commonly based on the personality principle, issues such as citizenship, legal privilege and property were fundamental in the formation of an understanding of sovereignty, jurisdiction and their limits. As modern international law was founded on analogies to Roman private law, this chapter will delve into the ways that Roman legal doctrine was adapted and utilised in the making of the international legal order.<sup>2</sup>

The role of Roman jurists – and Ulpian in particular – in the development of international criminal responsibility has thus far not been covered in the scholarship. The main recent study on Ulpian, Tony Honoré’s *Ulpian: Pioneer of Human Rights*, does not cover this topic and the studies on Ulpian comprise only some articles, none of which have taken up the same.<sup>3</sup> There have been some studies on particular issues such as sov-

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<sup>1</sup> On the emergence of the ancient concept of cosmopolis, see Daniel S. Richter, *Cosmopolis: Imagining Community in Late Classical Athens and the Early Roman Empire*, Oxford University Press, Oxford, 2011.

<sup>2</sup> Hersch Lauterpacht, *Private Law Sources and Analogies of International Law*, Green and Co., London, 1927; Arthur Nussbaum, “The Significance of Roman Law in the History of International Law”, in *University of Pennsylvania Law Review*, 1952, vol. 100, no. 5, pp. 678–87. On the use and reuse of ancient tradition in the making of international law, see David J. Bederman, “Reception of the Classical Tradition in International Law: Grotius’ *De Jure Belli ac Pacis*”, in *Emory International Law Review*, 1996, vol. 10, no. 1, pp. 1–50; Kaius Tuori, “The Reception of Ancient International Law in the Early Modern Period”, in Bardo Fassbender, Anne Peters, and Simone Peter (eds.), *The Oxford Handbook for the History of International Law*, Oxford University Press, Oxford, 2012, pp. 1012–33. On international law in antiquity, see David J. Bederman, *International Law in Antiquity*, Cambridge University Press, Cambridge, 2001; Nadine Grotkamp, *Völkerrecht im Prinzipat*, Nomos, 2009.

<sup>3</sup> Valerio Marotta, *Ulpiano e l’impero*, Loffredo Editore, Naples, 2000–2004; Tony Honoré, *Ulpian*, Oxford University Press, Oxford, 2002; Giuliano Crifò, “Ulpiano. Esperienze e responsabilità del giurista”, in *Aufstieg und Niedergang der römischen Welt*, 1976, part II, vol. 15, pp. 734–36; Wolfgang Kunkel, *Die Römischen Juristen. Herkunft und soziale Stellung*, Böhlau, 2001, pp. 245–54.

ereignty and authority, but there are no discussions therein on the theme of international criminal law. Even the concept of jurisdiction in ancient international law is under-developed to say the least, with the last article on the matter dated 1935.<sup>4</sup>

This chapter will first trace the life and career of Ulpian, looking at his transformative influence not only in the Roman legal tradition but equally in the development of jurisprudence in general. Ulpian represents a crossroads in the Roman legal tradition, being a central figure in the Severan revolution of law, whereby the legal system began to fully realise the implications of the unfettered power of the Roman Emperor in the legal field. The following sections will then take on the fundamental concepts and texts wherein Ulpian and his colleagues discuss the implication of that power in the understanding of concepts like ‘sovereignty’, ‘responsibility’, ‘universal jurisdiction’ and ‘authority’. Through these sections, it will become clear the degree of influence that the idea of cosmopolis had on Ulpian’s thought. While the influence of Stoicism in the field of law has been long debated,<sup>5</sup> in the case of Ulpian, the impact is potentially significant because such ideas may be seen as the beginnings of a fundamental transformation in legal doctrine.

Ulpian was not an international lawyer (an anachronism at the time), but he laid the groundwork for the doctrinal division between different types of law that would later be adapted into international legal discourse. According to Ulpian, while Roman citizens were subject to *ius civile*, the civil law or literally the law of the citizens, all people regardless of status or origin were subject to *ius gentium*, the law of all nations. However, *ius*

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<sup>4</sup> Shalom Kassan, “Extraterritorial Jurisdiction in the Ancient World”, in *American Journal of International Law*, 1935, vol. 29, no. 2, pp. 237–38. Recent books like Cedric Ryngaert, *Jurisdiction in International Law*, Oxford University Press, Oxford, 2008, pp. 44–47, touch upon the matter from a different perspective. The author has a forthcoming chapter in the *Oxford Handbook of Jurisdiction in International Law*, Oxford University Press, Oxford, 2018.

<sup>5</sup> Honoré, 2002, , p. ix, see *supra* note 3, sees a wider, proto-human rights thought in Ulpian’s thinking: “The values of equality, freedom and dignity, to which human rights give effect, formed the basis of Ulpian’s exposition of Roman law as the law of the cosmopolis”. On Stoicism and law, see also Paul A. Vander Waerdt, “Philosophical Influence on Roman Jurisprudence? The Case of Stoicism and Natural Law”, in *Aufstieg und Niedergang der römischen Welt*, 1994, part II, vol. 36, no. 7, p. 4892; Ulrich Manthe, “Beiträge zur Entwicklung des antiken Gerechtigkeitsbegriffes II: Stoische Würdigkeit und die iuris praecepta Ulpian’s”, in *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte: Romanistische Abteilung*, 1997, vol. 114, no. 1, pp. 14–22.

*gentium* was not international law but Roman law, specifically the rules of Roman law that would apply to all.<sup>6</sup>

The main sources of this chapter are the writings of Ulpian as they are available to us today. Hence, this discussion of the ideas of Ulpian must take into account the convoluted history of textual transmission and preservation. While, in the modern intellectual history of law, one may be relatively certain that the text being read reflects the ideas that the author intended, it is not so straightforward in the case of ancient legal sources. For example, the writings of Ulpian are mainly preserved to us in the work known as the *Digest of Justinian* (hereinafter, the ‘*Digest*’), a post-classical compilation from the 530s of which some 40 percent of the total text is attributed to Ulpian. A part of the collection later called the *Corpus Iuris Civilis*, the *Digest* is a compilation of the writings of Roman jurists mainly from the classical period, roughly the first three centuries of the first millennium AD. The work is a collection of excerpts from the writings of jurists, arranged in books according to the topic of the text. Because the *Digest* sought to present the law as it was understood in the 530s, only the excerpts that reflected contemporaneous valid law were included. Some of the excerpts were even edited to conform to the state of the law at the time. Thus, even though the writings of Ulpian, Paul, Papinian and others were seemingly reproductions of the original texts, they were selected, edited and amended to correspond to the legal situation, sometimes half a millennium later. For the main part, it is impossible to determine with any certainty how many of the texts have been altered by the Justinianic law commission led by Tribonian that compiled the final text of the *Digest*. Besides the *Digest*, there are also other relevant post-classical collections of texts, such as the *Epitome of Ulpian*. These texts sometimes include segments in their purportedly unaltered state.

What is certain is that the re-discovery of the text of the *Digest* in 1135 led to an unprecedented revival in the study of law and the understanding of jurisprudence. Thus, the work of Ulpian is significant not only

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<sup>6</sup> Ulpian divides law into three parts, *ius naturale*, *ius gentium* and *ius civile*. *Digest*, 1.1.1.4: “*Ius gentium est, quo gentes humanae utuntur. Quod a naturali recedere facile intellegere licet, quia illud omnibus animalibus, hoc solis hominibus inter se commune sit*” (The law of nations is that which all human peoples observe). All translations from the *Digest* are from *The Digest of Justinian*, Alan Watson ed. and trans., University of Pennsylvania Press, Philadelphia, 1998. On the Roman concept of *ius gentium*, see Max Kaser, *Ius gentium*, Böhlau, Vienna, 1993.

due to its crucial importance in the transformation of ancient Roman law, but equally in the way that it transformed the European understanding of law during the Middle Ages.

Due in large part to considerations of space and priority, this chapter will focus primarily on Ulpian's ideas on sovereignty and authority, rather than criminal law itself. For further research, the opinions of Ulpian, for instance in his work *On the Duties of the Proconsul*, were enormously important for the development of the thinking on human dignity and ultimately on human rights. For example, in *Digest* 1.6.2, Ulpian notes that it is the duty of the proconsul to punish a master who had savagely maltreated his slave. This and other notions are indicative of the mentality that, despite the wide leeway that a master was given, rules of definite responsibility were enforced to curtail egregious offences.<sup>7</sup>

#### **4.2. Ulpian, a Roman Jurist from the Severan Period**

Ulpian or Domitius Ulpianus, the main character of this inquiry, was a Roman imperial official during the Severan period. Like most of the fundamental characters of a ground-breaking historical development, Ulpian was not truly unique, but rather, a product of the culmination of a number of tendencies and one of many similar characters of that period. What makes Ulpian so important is: first, his extraordinary productivity and the fecundity of his ideas; and second, the way that his work not only resolved many crucial legal problems that had been dividing the legal profession but equally presented jurisprudence with a new philosophical foundation based on the application of the Stoic doctrine.

Ulpian was a provincial, hailing from the Eastern part of the Roman Empire, from the city of Tyre in current Lebanon. During the time of the Roman Republic, his origins would have prevented him from making a career in the highest echelons of the Roman State because the senatorial families were still in control of magistracies. For them, pedigree was paramount and even someone like Cicero would be considered a *homo novus*, a new man, because he lacked the line of ancestors who served the State with distinction. In contrast, during the High Empire, from the second century onwards, Roman citizenship was extended to the provincial elites, who were increasingly entering into imperial service. This development was accelerated when a provincial became the Emperor: after a civil war,

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<sup>7</sup> On Ulpian's ideas on criminal law, see A. Nogrady, *Römisches Strafrecht nach Ulpian*, Duncker and Humblot, Berlin, 2006.

the throne was taken by Septimius Severus, a career soldier from a small town called Leptis Magna in current Libya. This ended a civil war between claimants to the throne that had begun when Commodus died in 192. After a long battle, Severus finally defeated his erstwhile ally Albinus in 197. Severus, having risen to the throne by virtue of his own military prowess and the allegiance of his legions, had little to be thankful for *vis-à-vis* the old Roman elites and proceeded to reform the governance of the Empire according to his own wishes.<sup>8</sup>

A great part of the administrative reforms centred on the strengthening of the imperial council and chancellery and the *curae* in direct imperial control. The Roman administration was based on a dual system. In the transition from Republic to Empire, the old Republican system of city-State governance, where assemblies that voted a series of magistrates the highest of which were the consuls, was retained. The Emperor had no official position but, rather, wielded a collection of powers; sometimes the Emperor could be a consul but that was not really necessary. With the reforms of Augustus, the first Emperor, a new system emerged where salaried officials appointed by the Emperor and answerable only to him were given significant tasks without any consideration to the Republican structures.

Ulpian was one of these new magistrates, who were most often not from the senatorial elite but either former imperial slaves or equestrians, a rank below the senatorial class. Little is known of Ulpian's life, beyond his official career, and of his family. We are fortunate in that there is an honorary inscription dedicated to Ulpian, documenting the *cursus honorum* (that is, the official career and civil and military magistracies that Ulpian, as a Roman in public service, held). This inscription was found in Tyre, his home town. It confirms the highlights of his career as indicated in other sources – the posts of *praefectus annonae*, the prefect of the grain supply, and *praefectus praetorio*, the praetorian prefect. They were both positions of vital importance and enormous power. The *praefectus anno-*

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<sup>8</sup> On Septimius Severus and his reforms, see Achim Lichtenberger, *Severus Pius Augustus: Studien zur sakralen Repräsentation und Rezeption der Herrschaft des Septimius Severus und seiner Familie (193–211 n. chr.)*, Brill, Leiden, 2011; Alison E. Cooley, "Septimius Severus: The Augustan Emperor", in Simon Harrison Swain and Jas Stephen Elsner (eds.), *Severan Culture*, Cambridge University Press, Cambridge, 2007, pp. 385–400; Anthony R. Birley, *Septimius Severus: The African Emperor*, Routledge, New York, 1999; and Anna Marguerite McCann, *The Portraits of Septimius Severus (AD 193–211)*, American Academy in Rome, Rome, 1968.

*nae* was mainly responsible for the grain supply of the city of Rome, the procurement and transport of grain from all parts of the empire, mainly Egypt, to feed the roughly one million inhabitants of the city. It was a vast logistical enterprise and any disruptions would mean famine and social unrest. His following position was, if possible, even more important. The *praefectus praetorio* was the head of the imperial administration and acted as the Emperor's stand-in. In time, the praetorian prefect became the chief judge and head of the legal service. They are both equestrian positions, and confirm that he was never raised to the rank of a senator. Hence Ulpian's career, like those of many important imperial functionaries, was dependent on the Emperor and his favour. His career spanned almost the whole of the Severan period. He started out in the service of Septimius Severus as an assessor, a junior official in the council of the famous jurist Papinian. During the reign of Caracalla, Ulpian continued in the imperial service as a legal secretary (*a libellis*) responsible for answering legal petitions.<sup>9</sup>

Being reliant on the will and whim of the Emperor exacted a steep price on those willing to advance in the imperial service. Even for serious and conscientious men like Septimius Severus, life at the top was risky. After the death of Severus, the throne was held by a series of more unstable men who were often mere puppets of the strong women of the family of Julia Domna, Severus's wife. The two sons of Severus, Caracalla and Geta, ruled as co-rulers for some time, but infighting led to conflict where Caracalla finally had Geta murdered. In the purges that followed, some twenty thousand allies of Geta were killed, among them innumerable imperial officials. A short-lived interlude followed the death of Caracalla where Macrinus, his murderer, attempted and failed to consolidate his power and Elagabalus was raised to the throne at the instigation of Julia Mamaia, Caracalla's aunt. When he was in turn murdered by soldiers, Severus Alexander, his cousin, was chosen as Emperor. Julia Mamaia, who was Elagabalus and Severus Alexander's grandmother, was once again behind this. The problem of the dynasty was that the quality of the rulers supplied by the family got progressively worse. Caracalla, who is known as a tyrant of the first degree, was still a military man who had the support of the troops. Elagabalus and Severus Alexander were teenagers

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<sup>9</sup> *L'Année Épigraphique* 1988, 1051; Honoré, 2002, pp. 7–12, see *supra* note 3; Crifò, 1976, pp. 708–87, see *supra* note 3; Kunkel, 2001, pp. 245–54, see *supra* note 3.

who had no support themselves and provoked both the populace and the troops. Cassius Dio, an eyewitness, writes that Elagabalus liked to cross-dress and otherwise play with gender roles and would not abide by the duties of the office. Ulpian was among a number of officials banished during the reign of Elagabalus.<sup>10</sup>

After the murder of Elagabalus and his mother, Julia Soaemias, Severus Alexander was raised to the throne at the age of thirteen. In the spree of murders that took place, the prefects and most of the high administration officials were also killed. After the excesses of Elagabalus and the popular outcry that this had caused, there was an effort to improve administration. To do this, trusted people from the reign of Septimius Severus were brought in. Among them were both Cassius Dio and Ulpian. Alexander, at the instigation of his grandmother Julia Mamaia, had employed Ulpian to aid the praetorian prefects, which led to his gradual rise to the top of the administrative ladder. Ulpian became a member of his council and *magister scrinium*. He was an excellent lawyer and legislator, but irritated the soldiers, especially the praetorian guard, because he sought to curtail their privileges. After Ulpian was made sole praetorian prefect, he was killed by the praetorians in front of the Emperor and his mother.<sup>11</sup>

The career of Ulpian was thus one forged in times of instability, mass murder and emperors of murderous tendencies. For the main part of his official duties, he was employed by the Emperor in the imperial legal service, answering petitions and legal queries sent by the populace to the Emperor. Of his writings, none has survived intact. We know the titles of many of his books because they are mentioned in the quotations preserved in the *Digest of Justinian*. His commentary of the praetor's edict, the principal source for legal procedure, contained at least 83 books (one book was equivalent to one scroll, corresponding roughly to a chapter in modern terms). Another major work was a commentary titled *Ad Sabinum*, which was a jurisprudential work, whose title was a reference to the jurist Sabinus, the founder of the Sabinian school of law. He would write numerous works on administration and on the duties of different magistrates, of which *De officio proconsulis* is the best known. A number of his works

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<sup>10</sup> Cassius Dio, 80.14.3–4; *Scriptores Historiae Augustae, Heliogabalus*, 16.4.

<sup>11</sup> Zosimus, 1.11.2; Cassius Dio, 80.1–2.3; Eutropius, 8.23.

have been found in manuscripts. In total, there are roughly 300,000 lines of text ascribed to him.

Because of the exalted status of Ulpian and the role his writings have had, he is oft-regarded as an intellectual figure. This stems partly from the fact that much of his career corresponded with that of Cassius Dio, one of the most prolific historical and political writers of the era. Dio mentions Ulpian frequently, as do other writers, giving him a level of exposure and visibility that other lawyers of the era did not have. Ulpian's thought and his writings have been seen as a profound influence on the way Rome's legal policy was shaped. The role of Ulpian has been promoted by scholars like Tony Honoré, who claims that Ulpian promoted the idea of the equality of men and the rule of law.<sup>12</sup>

In addition, owing to the fundamental issues of law and humanity in the writings of Ulpian, he has been linked with philosophers of the era. One of the most interesting possibilities that has been raised is the role of Julia Domna, Caracalla's mother and the wife of Septimius Severus. The Greek philosopher Philostratus mentions in his works the circle of intellectuals around Julia Domna when she was in Rome. This circle included many of the most famous scholars of the era, including philosophers and writers. Within the circle were numerous esteemed jurists, of which Philostratus names Papinian, Ulpian and Paul. Critical scholars such as Crifò have raised doubts over the reliability of the information presented by Philostratus and the true nature of the circle.<sup>13</sup> To many scholars of Ulpian, these indications have been very enticing. Would Ulpian, Papinian and Paul, the most prominent jurists of the era, have been in contact with the brightest intellectuals of their day, discussing the nature of justice and humanity? Is it possible that the new conceptions of law and justice, and Ulpian's idea of law as a true philosophy, were influenced by the circle?<sup>14</sup>

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<sup>12</sup> Honoré, 2002, p. 81, see *supra* note 3.

<sup>13</sup> Philostratus, *Vita Apollonii*, 1.3. See also Philostratus (the Elder), *Epistolae*, 73; Glen W. Bowersock, *Greek Sophists in the Roman Empire*, Oxford University Press, Oxford, 1969. On Domna's circle, see Barbara Levick, *Julia Domna: Syrian Empress*, Routledge, New York, 2007, pp. 107–23; Crifò, 1976, pp. 734–36, see *supra* note 3.

<sup>14</sup> *Digest*, 1.1.1.pr. Regarding Ulpian's role in the circle, Laurens Winkel, "Die stoische oikeiōσις-Lehre und Ulpian's Definition der Gerechtigkeit", in *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte: Romanistische Abteilung*, 1988, vol. 105, no. 1, pp. 669–79, pp. 677–78 is positive about its influence in his thought, but both Tony Honoré, *Emperors and Lawyers: With a Palingenesia of Third-century Imperial Rescripts 193–305 AD*, Clar-

We cannot really know, of course, since the information given by Philostratus is rather vague, though it does indicate that there was a shared literary and intellectual culture in which ideas circulated.

### 4.3. Sovereignty

Ulpian was the main formulator of the conception of the sovereign legal power of the Emperor. According to Ulpian, the Emperor was law animate (*lex animata*) and imperial power was to be truly unfettered. The real contribution of Ulpian in this regard was to define the undefined imperial power and its relationship with the law. Ulpian translated the narrative of imperial sovereignty and absolutism, as they emerged in the Roman legal, historical and political tradition, into the language of law.

The first signs regarding the sovereignty of the Emperor with regard to law emerged quite soon after the reign of Augustus. During the first two centuries of the Roman Empire, the idea of the unrestricted power of the Emperor was formulated mainly in the writings of panegyrists like Pliny or imperial functionaries like the philosopher Seneca. They would soon thereafter start to make their way into law, in the various manners in which the position of the Emperor could be defined. During the accession of Emperor Vespasian, after the fall of the Julio-Claudia dynasty with the murder of Nero in the year 69, a law now called the *Lex de imperio Vespasiani* had numerous paragraphs outlining the different powers of the Emperor based mostly on precedents. Such niceties were largely dispensed with during the Severan period, when there was no real Republican opposition against the sovereign power of the Emperor.

What Ulpian thus did was to first acknowledge the true nature of imperial power, that of sovereignty, but secondly and importantly, to present an ethical ultimatum to the use of that power. Ulpian's great achievement was thus to combine the positivism of imperial law with the ethical demands that he placed on the law. For the international criminal law, these innovations are fundamental. The idea that the sovereign has unfettered power meant that there was a claim of universal authority that is bound by ethical and moral consideration that transcend that power. Thus, even though Ulpian wrote explicitly on imperial power, discussing

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endon Press, Oxford, 1994, pp. 81–82, and Crifò, 1976, pp. 734–36, see *supra* note 3, are sceptical.

the Roman Emperor, his ideas transcended the historical boundaries of the Roman State and became universalised in the later jurisprudence.

Ulpian's work established the relationship between the Emperor and the law in a way that had profound implications on how the decisions of the executive power changed law. However, Ulpian would demand that the adjudication be done in the name of imperial power and the Emperor be of the highest intellectual, legal and ethical standard. Thus, law had to be authoritative both in form and in content.<sup>15</sup>

Ulpian's most famous line is a passage in the *Digest* where he maintains that the Emperor is free from the power of the law:

The emperor is not bound by law.

*Princeps legibus solutus est.*<sup>16</sup>

The line contains a momentous defining task. The Emperor was both free from the compulsion of the laws in his own actions and therefore, legal recourse against the Emperor was not possible. Furthermore, the Emperor was not bound by the laws when he was exercising jurisdiction. In consequence, the Emperor could deviate from the established law. Would that mean that a decision made by the Emperor could be against the law? Was he free to not observe the laws as he saw fit? Or would he be changing it in the process? What is often omitted is that this quotation was initially on a piece of statutory law (*lex Julia et Papia*) which explained that the Emperor was exempt from it.<sup>17</sup>

Fortunately, Ulpian clarified the issue. Affirming that the Emperor had a power to make decisions which disregarded the law would have led to considerable logical difficulties if it had not been supplemented by a second statement confirming that the word of the Emperor was law. Ulpian

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<sup>15</sup> On Ulpian's conception of justice, see Winkel, 1988, *supra* note 14; Wolfgang von Waldstein, "Zu Ulpian's Definition der Gerechtigkeit (D. 1,1,10pr)", in *FS Flume*, 1978, vol. 1, pp. 213–323.

<sup>16</sup> *Digest*, 1.3.31, Watson ed. and trans., 1998, see *supra* note 6.

<sup>17</sup> The reference to a *lex imperii* comes up also with Severus Alexander in 232 (*Codex Iustinianus*, 6.23.3). Ulpian's statement formed the legal basis of political absolutism in European history and thus the literature on it is vast. The process through which the compilers transformed this into an absolutist statement is a well-known example of 'interpolation by decontextualization'. See Crifò, 1976, p. 778, *supra* note 3, and Filippo Gallo, "Per il riesame di una tesi fortunata sulla solutio legibus", in *Sodalitas: scritti in onore di Antonio Guarino*, Jovene, Naples, 1984, pp. 651–82, for references to older literature. For its vast influence, see Kenneth Pennington, *The Prince and the Law 1200–1600: Sovereignty and Rights in the Western Legal Tradition*, University of California Press, Los Angeles, 1993.

an expressed this through the idea of popular sovereignty and the theory that the Roman people had transferred their legislative power to the prince:

What pleases the prince has the force of law. The *populus* has with the *lex regia* that his *imperium* is founded transferred to him their *imperium* and power.

*Quod principi placuit, legis habet vigorem: utpote cum lege regia, quae de imperio eius lata est, populus ei et in eum omne suum imperium et potestatem conferat.*<sup>18</sup>

Consequently, the Emperor was living law or law animate, his will having a legislative capacity. The theoretical implications of this statement are vast, but they coincide well with what Ulpian's contemporary historian Dio thought of the roots of imperial power. The practical side was more challenging to fathom. Would every word or thought of the Emperor be binding and create law? Ulpian, ever the practical administrator, explained thereafter that the key is the intention of the Emperor – matters that are personal or relate to an individual issue do not necessarily have a general effect (*Digest*, 1.4.1.1–2). If the Emperor means it, his words and intent are precedential and they have a legislative effect.

The imperial legislative power was, in theory, universal. The imperial control over the legal system extended throughout the courts. Thus, Ulpian wrote that if a judge appointed by the Emperor hears a case, restitution cannot be granted by anyone other than the Emperor. According to him, the possibility of appeal is necessary to correct the partiality or inexperience of the judges. It is even possible to successfully appeal against a rescript of the Emperor because it may be that the person writing to the Emperor asked for something else or that matters were misrepresented in the letter.<sup>19</sup>

The universal power and sovereignty of the Roman Emperor was something that had been created over a long period of time. By the time of Ulpian, emperors and imperial officials had long understood the dangers of such a power and sought to present limitations. Emperor Antoninus Pius wrote in a rescript in the mid-second century AD that the law of the sea would be the law of the Rhodians, posing this as a self-limitation:

Voluvius Maecianus, From the Rhodian Law: Petition of Euraemon of Nicomedia to the Emperor Antoninus: “Anto-

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<sup>18</sup> *Digest*, 1.4.1pr, Watson ed. and trans., 1998, see *supra* note 6.

<sup>19</sup> *Ibid.*, 4.4.18.4, 49.1.1.pr–2.

ninus, King and Lord, we were shipwrecked in Icaria and robbed by the people of the Cyclades.” Antoninus replied to Eudaemon: “I am master of the world, but the law of the sea must be judged by the sea law of the Rhodians where our own law does not conflict with it.” Augustus, now deified, decided likewise.

Maecianus ex lege Rhodia. Ἀξίωσις Εὐδαίμονος Νικομηδέως πρὸς Ἀντωνῖνον βασιλέα. Κύριε βασιλεῦ Ἀντωνῖνε, ναυφράγιον ποιήσαντες ἐν τῇ Ἰταλία διηρηπάγημεν ὑπὸ τῶν δημοσίων τῶν τὰς Κυκλάδας νήσους οἰκούντων. Ἀντωνῖνος εἶπεν Εὐδαίμονι. ἐγὼ μὲν τοῦ κόσμου κύριος, ὁ δὲ νόμος τῆς θαλάσσης. τῷ νόμῳ τῶν Ῥοδίων κρινέσθω τῷ ναυτικῷ, ἐν οἷς μήτις τῶν ἡμετέρων αὐτῷ νόμος ἐναντιοῦται. τοῦτο δὲ αὐτὸ καὶ ὁ θειότατος Αὐγούστος ἔκρινεν.<sup>20</sup>

What Antoninus Pius outlines here is the jurisprudence of a universal empire that rests on legal pluralism. He first asserts his sovereignty and universal authority (referring to himself as “master of the world”), but then inserts the self-limitation. The customary law of the sea, that is the sea law of Rhodians, may be applied, but only as long as it is not contrary to the rules of Roman law.

The Roman jurists would thus envision the status of the Emperor as a universal authority that was wielded with sovereign power. However, this sovereign power was one established through a set of limitations imposed by the emperors themselves. The seemingly illogical and contradictory conceptions of universality and particularity were combined through the careful use of grandiose statements and their meticulous definitions seeking to ensure that the imperial theory would not write checks that the imperial power could not cash.

#### 4.4. Responsibility

Ulpian outlined the imperial power over law through two main attributes: positivism and the ethical demand for justice. Positivism was formulated via the concept of legal positivism: the Emperor’s will is law and therefore all issues of law may be resolved through imperial power. The ethical demand for justice meant that law and jurisprudence have an ethical or philosophical dimension, namely to bring justice.

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<sup>20</sup> *Ibid.*, 14.2.9.

What the two attributes, when combined, led to is a conundrum. The Emperor is given unfettered power and his decisions are assumed to be ethically sound. However, a brief glimpse into Roman history, as with the history of any autocratic government, reveals that human agents tend to be fallible and do not unfailingly fulfil the great demands of ethics. Rather than referring to the actual Roman Emperors, the ethical sovereign has a counterpart in the narratives of kingship. The narrative line of the divine good king who not only represents the living law, but is also virtuous and just, has a rich history in the ancient world. Versions of the stories emerge in the Hellenistic literature and come to the Roman literary tradition mainly through Seneca. In his writings on the young Nero, Seneca would stress these two attributes, the astounding power of the Emperor and his unflinching virtue. As is obvious from the contrast between the ideal and the actual history of the reign of Nero, these two aspects were not easily combined in real life.<sup>21</sup> Thus, the concept should be seen as an ideal, where the moral and ethical virtue of the ruler is more aspirational rather than something that should be assumed. In his *De Clementia*, Seneca presents a description of the virtues of a good emperor in a fictitious speech by Nero, beginning by describing his terrifying power:

Have I of all mortals proved good enough and been chosen to act as the gods' representative on earth? I make decisions of life and death for the world. The prosperity and condition of each individual rests in my hands.

*Egone ex omnibus mortalibus placui electusque sum, qui in terris deorum vice fungerer? Ego vitae necisque gentibus arbiter; qualem quisque sortem statumque habeat, in mea manu positum est; quid cuique mortalium [...].*<sup>22</sup>

While Seneca and Pliny wrote at length about the imperial power and the virtue of the Emperor as the true foundations of justice, the concept took some time before it was incorporated into Roman jurisprudence. When it was, Roman jurists sought to resolve the conundrum by separating the actual person from the legal figure of the Emperor. It is quite clear from even a cursory reading of the history of the Severan period that the Emperors themselves were hardly the perfect ethical and moral persons that the good king narrative described. However, even lazy and murderous

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<sup>21</sup> On the context, see James Romm, *Dying Every Day: Seneca at the Court of Nero*, Knopf, New York, 2014.

<sup>22</sup> Seneca, *De Clementia*, 1.1.2.

emperors of the Severan period, like Caracalla or even Elagabalus, seem to leave behind imperial constitutions that are legally sound and within the doctrine of the law. This has led many to think that the emperors (the physical persons) may not have always had that much to do with the drafting of legal resolutions.<sup>23</sup>

By separating the private and the public person of the Emperor, the jurists managed to have their cake and eat it. Even if the Emperor as a person may have been a raving lunatic, the imperial bureaucracy, the legally trained secretaries, would write in the manner that the Emperor would need to write and uphold the façade of the law. Michael Peachin has described this in terms of a Weberian separation of the person and the position. For the working of the law, it was deemed important that there be the *institution* of the Emperor and the imperial bureaucracy, not necessarily an emperor knowledgeable in law.<sup>24</sup>

Related to the development of international criminal law is another change which led to the spread of the idea of the Emperor as a universal judge and legislator: the spread of Roman citizenship. Previously, almost throughout the ancient world, the personality principle had been applied in the administration of justice. This meant that the Greeks would be subjected to the laws of their hometown, the Persians tried according to their own law, and so on. However, Rome became the great exception, bestowing citizenship to allies and even former slaves, leading to the growing influence of Roman law. This development came to a head with the impact of the so-called *Constitutio Antoniniana* by Caracalla that granted Roman citizenship to the inhabitants of the Empire in the year 212.<sup>25</sup> The true impact of the *Constitutio* was unclear even to the ancient Romans. Cassius Dio wrote that Caracalla's aim with the grant of citizenship was

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<sup>23</sup> Honoré, 1994, p. 95, see *supra* note 14. Examples of Elagabalus's rulings: Visigothic epitome of *Codex Gregorianus*, 13.14.1; *Corpus Inscriptionum Latinarum*, VI 21046.33.

<sup>24</sup> Michael Peachin, *Iudex vice Caesaris: Deputy Emperors and the Administration of Justice during the Principate*, Franz Steiner Verlag, Stuttgart, 1996, p. 203.

<sup>25</sup> *P.Giss.* 40.1; Cassius Dio, 77(78).9.4; *Digest*, 1.5.17; Christoph Sasse, *Die Constitutio Antoniniana*, Otto Harrassowitz, Wiesbaden, 1958; Hartmut Wolff, *Die Constitutio Antoniniana und Papyrus Gissensis 40 I*, Universität zu Köln, Cologne, 1976; Kostas Buraselis, *Theia Dorea. Das Göttlich-Kaiserliche Geschenk. Studien zur Politik der Severer und zur constitutio Antoniniana*, Verlag der Österreichischen Akademie der Wissenschaften, Vienna, 2007; Ari Z. Bryen, "Reading the citizenship papyrus (*P.Giss.* 40)", in Clifford Ando (ed.), *Citizenship and Empire in Europe 200–1900: The Antonine Constitution after 1800 years*, Franz Steiner Verlag, Stuttgart, 2015, pp. 29–37.

to expand the tax base by increasing the number of citizens who paid the full tax burden (78.9). Nevertheless, Dio's explanation does not truly hold water, because most of the members of the elite who paid the lion's share of taxes were already citizens and even non-citizens paid taxes of their own.

Ulpian wrote simply that Caracalla made all people in the Empire Roman citizens:

Everyone in the Roman world has been made a Roman citizen as a consequence of the enactment of the Emperor Antoninus.

*In orbe Romano qui sunt ex constitutione imperatoris Antonini cives Romani effecti sunt.*<sup>26</sup>

The passage is from his book *Ad edictum*, written during the reign of Caracalla. The conventional date of 212 is repeated in the textbooks, even though critics have pointed out that the date has no reliable foundation.<sup>27</sup> The true meaning of the edict has been long debated. Did it mean that Caracalla switched from the long-standing personality principle of law in favour of the area principle? Would everyone be granted citizenship, even those who were simply visiting?

According to Ulpian, the old distinctions between Romans and Latins became redundant. However, the status of the peregrine, that is foreigners, continued to be relevant. Because the Roman Empire was vast and communication between areas slow, it is highly unlikely that such a drastic reform would have been immediately applied to the administrative practices of the provinces.<sup>28</sup> A papyrus published in 1910, the Giessen papyrus 40.I, provides a crucial contemporary confirmation for the law that many had considered to be a false flag, but in doing so it raised numerous new questions about what the constitution could actually mean. In the text, there were limitations that would bar unsought persons, including in particular 'uncultured' Egyptians and primitive tribes conquered by the

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<sup>26</sup> *Digest*, 1.5.17, Watson ed. and trans., 1998, see *supra* note 6.

<sup>27</sup> Fergus Millar, "The Date of the Constitutio Antoniniana", in *The Journal of Egyptian Archaeology*, 1962, vol. 48, pp. 124–31.

<sup>28</sup> Wolff, 1976, pp. 26–28, 272–73, see *supra* note 25; Valerio Marotta, *La cittadinanza romana in età imperiale, secoli I–III d.C.: Una sintesi*, G. Giappichelli, Turin, 2009; Clifford Ando, "Introduction", in Clifford Ando (ed.), *Citizenship and Empire in Europe 200–1900: The Antonine Constitution after 1800 years*, Franz Steiner Verlag, Stuttgart, 2015, pp. 22–24.

Romans, from enjoying the benefits of citizenship, even though they were inside the Empire. Thus, they were to remain *dediciti*, vanquished enemies.<sup>29</sup> This demonstrates how persons who were incapable of cultivation and civilization, which essentially means becoming Romanized, were excluded from citizenship.

For the newly-minted citizens in the provinces of Rome, the grant of citizenship meant that they were able to petition the Emperor and bring their cases to Roman courts, appealing all the way to the Emperor. This would mean that the potential number of petitions would be expanded dramatically.

It has been claimed that this would have meant that the Roman Empire became a huge single area of legal unity, a kind of cosmopolis where each and every person was entitled to seek legal recourse equally from the Emperor.<sup>30</sup> Though this may have been true in practice, the evidence from imperial legal practice is inconclusive. The number of rescripts that have been preserved in Justinian's compilation rises considerably after 212.<sup>31</sup> Because Justinian's compilation includes only the rescripts that were considered to be valid law at the time, it is questionable whether the number of rescripts there corresponds to the total number of imperial rescripts made.<sup>32</sup>

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<sup>29</sup> Clifford Ando (ed.), *Citizenship and Empire in Europe 200–1900: The Antonine Constitution after 1800 years*, Franz Steiner Verlag, Stuttgart, 2015.

<sup>30</sup> Yan Thomas, "*Origine*" et "*commune patrie*": *étude de droit public romain (89 av. J.-C.–212 ap. J.-C.)*, L'École française de Rome, Rome, 1996; Claudia Moatti, "The notion of *res publica* in the age of Caracalla", in Clifford Ando (ed.), *Citizenship and Empire in Europe 200–1900: The Antonine Constitution after 1800 years*, Franz Steiner Verlag, Stuttgart, 2015, pp. 63–98.

<sup>31</sup> During the eight decades of the Antonine emperors, there are 648 constitutions preserved, thus on average 7.9 per year. In contrast, from the Severan period there are 1230 imperial constitutions, equalling 33.2 per year.

<sup>32</sup> Legal scholars working on legal sources (for example, Max Kaser, *Das römische Privatrecht* 2, Beck, 1975, p. 53) are very clear that the result was the removal of the distinction between *ius gentium* and *ius civile* and the extension of Roman law to all of the empire. The controversy on the CA revolves around the contradictory evidence from blanket statements and the epigraphical and papyrological evidence found in the provinces. Adrian Nicholas Sherwin-White, *The Roman Citizenship*, Clarendon Press, 1973, pp. 380–92. Even Sasse, 1958, p. 17, see *supra* note 25, was doubtful of its practical implications, but see Georgy Kantor, "Local law in Asia Minor after the Constitutio Antoniana", in Clifford Ando (ed.), *Citizenship and Empire in Europe 200–1900: The Antonine Constitution after 1800 years*, Franz Steiner Verlag, Stuttgart, 2015, pp. 52–56.

On an ideological level, there was a dramatic change in how much the law was thought to correspond with conceptions of right and justice. Based on his writings, Ulpian was one of the chief architects of this change in ideological link between law and justice. According to Ulpian, law and lawyers should cultivate “the art of goodness and fairness” (*ars boni et aequi*), the “virtue of justice and claim awareness for what is good and fair” (*iustitiam namque colimus et boni et aequi notitiam cupientes*). Ulpian expanded the realm of the law by defining it as the “true philosophy” of determining the licit from the illicit. Its task was to examine not only positive law, but also natural law and *ius gentium* (*Digest*, 1.1.1.pr–1).

Ulpian’s theory of law was founded on the idea of natural law as the morally superior corrective to the traditional sources of *ius civile* and *ius gentium*, the law between citizens and the law between citizens and foreigners (*peregrini*). Ulpian defied even the basic tenets of ancient culture, such as slavery, and took up radical positions, like the equality of man. He wrote that slavery is an institution of *ius gentium* but not of *ius naturale*, establishing the fundamental unity and equality of man. Separating the conventions of law in force from the ideals of law allowed for the simultaneous upholding of the social and legal institution as an existing fact and the philosophical statement of the equality of man. It enabled not only the introduction of possibly Stoic philosophical tenets with legal theory, but also the internal criticism of law.<sup>33</sup> For Ulpian, the conviction of the institution of the Emperor representing living law was true and necessary for the edifice of the law to function. Even though individual lawyers and emperors could be fallible, their fundamental task was to bring justice equally to all.<sup>34</sup>

The fact that the inhabitants of the Roman Empire all became citizens, and thus Roman law would have applied to them after the enactment of the *Constitutio Antoniana*, did not mean that Roman law would have been imposed on them or that local laws would have disappeared. Though, in theory, one could argue that legal centralism would have replaced legal pluralism, in practice, local laws continued their existence and validity in the provinces. Scholars working on the provincial, mostly Egyptian,

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<sup>33</sup> *Digest*, 1.1.4; Honoré, 2002, pp. 77–81, see *supra* note 3. Ulpian uses natural law and nature in a number of other instances: *Digest*, 9.2.50, 25.3.5.16, 37.15.1.1, 50.17.32.

<sup>34</sup> Crifò, 1976, p. 782, see *supra* note 3; Honoré, 2002, see *supra* note 3.

sources have maintained that local laws and customs were still in use. The two viewpoints have been reconciled through suggestions that though Roman law had, in principle, subjected other legal systems to its power and to the role of local customs, they were tolerated as long as they were not considered to be repugnant (such as endogamic marriages) or violating the rules of Roman law.<sup>35</sup> At the same time, the influence of Roman law grew because the growth of the imperial legal apparatus made it possible for more people to use Roman law to advance their claims. The use of Roman law gave access to legal protections perhaps not available in local laws. Simon Corcoran, a scholar of the later imperial administration, wrote that the efficient use of imperial adjudication was the foundation of the whole system of government and the unitary nature of the Roman Empire:

The tetrarchic emperor remained highly approachable and the system served even those of traditional low status in the ancient world, such as women and slaves.<sup>36</sup>

The provincial governors implemented the orders of the Emperor and applied his justice in the provinces.<sup>37</sup> However, one should not consider the process as a purely top-down imposition. Because there were many Roman citizens in the provinces even before the universal granting of citizenship, elements of Roman law made their way into the provinces much earlier, making the process of Romanisation a gradual one.<sup>38</sup>

Ulpian's main contribution to the debates over imperial sovereignty and jurisdiction was the combination of the practical and the ethical sides of the imperial legal role. The Emperor's will was law and thus extreme care should be exercised in the way it was used in practice, lest the doctrine of the law be disturbed. Ulpian was the first legal author to tie the

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<sup>35</sup> Mario Amelotti, "Reichsrecht, Volksrecht, Provinzialrecht: Vecchi problemi e nuovi documenti", in *Studia et documenta historiae et iuris*, 1999, vol. 65, pp. 213–14; J. Méléze Modrzejewski, "Diritto romano e diritti locali", in Aldo Schiavone (ed.), *Storia di Roma III.2*, Einaudi, Turin, 1993, pp. 988–1005.

<sup>36</sup> Simon Corcoran, *The Empire of the Tetrarchs: Imperial Pronouncements and Government AD 284–324*, Clarendon Press, 2000, pp. 293, 295.

<sup>37</sup> *Ibid.*

<sup>38</sup> L. Migliardi Zingale, "Diritto romano e diritti locali nei documenti del vicino oriente", in *Studia et documenta historiae et iuris*, 1999, vol. 65, p. 223; Kaius Tuori, "Legal Pluralism and the Roman Empires", in John W. Cairns and Paul J. Du Plessis (eds.), *Beyond Dogmatics: Law and Society in the Roman World*, Edinburgh University Press, Edinburgh, 2007, pp. 39–52.

sovereign power of the Emperor to the ethical and moral demands of justice. While many of the earlier writers were content to maintain that the Emperor should be virtuous and bring justice, Ulpian sought to posit that the Emperor should actually fulfil these demands set by the image of the ideal Emperor.

The linkage between the ideas behind Ulpian's idea of Roman imperial jurisdiction and those of international criminal law should be seen through the principles of universalisation and abstraction, not the concrete examples of the usages of the legal administration of the autocratic Emperor. The Emperor was a universal ruler and thus one of his main virtues was his approachability to petitioners. Not only did one have the theoretical possibility to gain an audience and to present one's grievance, but the Emperor also had to demonstrate the virtue of *megapsykhia*, the greatness of spirit that meant that he would need to give his subjects a sympathetic hearing. Much like the international legal order, the Emperor was a corrective, an elusive but virtuous provider of justice. While the narratives of the good king as the source of justice in the ancient world were for the main part just that – half-legendary stories of instances where a good king would right wrongs – the Roman example is quite different. The imperial legal administration, represented by jurists like Ulpian, sought to make the ideal and the illusion a reality. The imperial sovereign sought to provide the inhabitants of the universal Empire just law, law that would be uniform and would prevent local abuses of power. Justice for all. The great conundrum was how the fallible emperors would themselves often take on the challenge and engage conscientiously with the cases to bring justice that was ethically and morally sound. The sources abound with examples of direct imperial involvement, where emperors would show indignation for injustices and bring their own power to bear. For example, Paul writes of a case regarding legates in which an emperor engaged in questioning the litigants.<sup>39</sup>

#### **4.5. Universal Jurisdiction and Authority**

One of the more complicated theoretical issues of universal jurisdiction is how one could both have universal authority and refrain from using it. In modern national jurisdictions, there is a distinct tendency to compel the judiciary to resolve issues that fulfil certain criteria that fall under their

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<sup>39</sup> *Digest*, 32.97.

jurisdiction. The Roman imperial jurisdiction outlined by Ulpian was different in a number of ways that are interesting in the foundations of international criminal law. First, that the jurisdiction was apparently universal, not bound by jurisdictional boundaries. Second, that the Emperor had wide discretion regarding the cases he would take.

Under Ulpian, Roman imperial jurisdiction was both voluntary and universal, meaning that the Emperor could choose whether to hear a case and to give his ruling. However, this was a result of a long historical development and not without its peculiarities. There were no set rules that would limit imperial jurisdiction or assign certain cases exclusively to the Emperor, even though some established practices were formed. This meant that the Emperor was capable of exercising jurisdiction universally if he so wished.<sup>40</sup> Some emperors would insert themselves in cases where they had been petitioned. Indeed, there seem to be ample cases where the Emperors thought they needed to decide the course of action. Some cases are quite extraordinary in this respect. For example, Augustus, the first Emperor, was petitioned to bring to justice a person accused of manslaughter in the Greek city of Cnidos in the year 6 AD. Instead of handing the person over to local authorities, Augustus decided to investigate the matter, appointing a high-ranking official, the governor of a neighbouring province, to hear witnesses and to get to the bottom of things. After the material truth had been uncovered by his associates, Augustus gave his own ruling based on Roman legal principles. This was despite the fact that Cnidos was nominally a free Greek city that should have had independent

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<sup>40</sup> Kaius Tuori, *Emperor of Law*, Oxford University Press, Oxford, 2016; Mariagrazia Rizzi, *Imperator cognoscens decrevit. Profili e contenuti dell'attività giudiziaria imperiale in età classica*, Giuffrè, Milan, 2012; Andreas von Schilling, *Poena extraordinaria: Zur Strafzumessung in der frühen Kaiserzeit*, Duncker & Humblot, Berlin, 2010; Veronika Wankerl, *Appello ad principem*, Beck, Munich, 2009; Jean-Pierre Coriat, *Le prince législateur: la technique législative des Sévères et les méthodes de création du droit impérial à la fin du Principat*, École française de Rome, Rome, 1997; Tor Hauken, *Petition and Response: An Epigraphic Study of Petitions to Roman Emperors 181–249*, The Norwegian Institute at Athens, Athens, 1998; Honoré, 1994, see *supra* note 14; Fergus Millar, *The Emperor in the Roman World*, Duckworth, London, 1992; Jochen Bleicken, *Senatsgericht und Kaisergericht: Eine Studie zur Entwicklung des Prozessrechtes im frühen Prinzipat*, Vanderhoeck & Ruprecht, Göttingen, 1962; John Maurice Kelly, *Princeps Iudex*, Hermann Böhlhaus, Graz/Cologne, 1957; Hans Volkmann, *Zur Rechtsprechung im Principat des Augustus*, Beck, Munich, 1969.

jurisdiction.<sup>41</sup> What remains a mystery is why Augustus acted the way he did, making a claim to jurisdiction where he need not have. Was it perhaps clear that the accused would not have received a fair trial in Cnidos? Or was the real reason that Augustus wanted to demonstrate his power in a symbolic way by ensuring justice was served in a case that had caused uproar? Whatever the motivation, Augustus was suddenly claiming universal jurisdiction.

While the jurisdiction of the Roman Emperor was not defined in any concrete way, there were important elements that had a crucial impact in the way the power that the jurisdiction entailed was formulated. The primary one was *imperium*, the commanding power of the executive. Each of the higher Roman magistrates had a commanding power defined as *imperium* and as its sign, they were accompanied by lictors bearing the axe and the rods as its symbol. That *imperium* was defined through the tasks of the magistracy and thus a governor, for example, had *imperium* in the province that he was assigned to. The Emperor had *imperium maius* (a greater *imperium*) that was general and not defined temporally. Thus, imperial *imperium* (a tautology to show etymology) surpassed those of the traditional magistrates and gave the Emperor unfettered power in theory.<sup>42</sup>

The way that the Emperor used his jurisdiction varied from emperor to emperor, but though the Emperor was unequivocally the voice of the law, the draftsmen behind that voice were some of the best jurists of the era. Ulpian, Papinian and Modestinus, along with other best jurists of their day, worked as *a libellis*, the secretaries that drafted the imperial rescripts.<sup>43</sup> Within the *Digest*, there are some examples of how answers to rescripts were crafted. A famous example is *Digest*, 37.14.17pr from Ulpian, which describes the decision-making process regarding *bonorum possessio* by joint Emperors Marcus Aurelius and Lucius Verus. In the discussion, the Emperors considered the previous opinion of Proculus, their

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<sup>41</sup> The details are known through a letter of Augustus engraved in marble (*Inscriptiones Graecae*, XII 3.174; *Fontes Iuris Romani Ante Iustiniani*, III 185) found in Astypalaia. See Tuori, 2016, pp. 84–89, see *supra* note 40, on this case.

<sup>42</sup> John Richardson, *The Language of Empire: Rome and the Idea of Empire from the Third Century BC to the Second Century AD*, Cambridge University Press, Cambridge, 2008. On the later significance of the Roman concept of *imperium* for universal claims of sovereignty and jurisdiction, see, for example, James Muldoon, *Empire and Order. The Concept of Empire, 800–1800*, Macmillan Press Ltd, New York, 1999.

<sup>43</sup> On imperial secretaries and their work, see Honoré, 1994, see *supra* note 14.

own earlier decisions, the advice of Maecianus and a number of other renowned jurists after him.<sup>44</sup> The way that the Emperors refer to lawyers is a good way of deciphering their status. For example, Severus Alexander made a reference to a response by Ulpian, who is mentioned as *praefectus annonae*, jurist and his friend (*amico meo*; *Codex Iustinianus*, 8.37.4). This meant not that Ulpian and the teenage Emperor would have been best friends, but that Ulpian was a member of the imperial council.

That a State would claim to have universal jurisdiction was fairly typical in the ancient world. The Roman State, like the Greek or Hellenistic city-States, considered itself as having universal jurisdiction.<sup>45</sup> Thus, the Romans would, if necessary, extend their jurisdiction over the aliens (*peregrini*) residing in Rome, as the Greek city-State would sentence an alien in its midst without hesitation. The Roman world had numerous overlapping jurisdictions and thus an individual had numerous different obligations and rights to different parties. One could be the citizen of a nominally independent city, but still under Roman rule, the *imperium populi Romani*. This concept of rule and influence over a set province was sometimes defined through territory (such as a governor's power over a province), or on occasion it would be defined through a set of tasks or subject matter.<sup>46</sup>

The Roman idea of territoriality was thus fluid and usually based on land. There was never in the Roman political or legal discussion a claim presented that Rome should rule the waves or claim sovereignty over the sea. The sea was legally understood as a *res communis*, a shared thing. Even when Romans battled pirates that imperilled the grain imports, there was never a claim that Rome would have the exclusive right to rule the sea.<sup>47</sup>

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<sup>44</sup> A.J.B. Sirks, "Making a Request to the Emperor: Rescripts in the Roman Empire", in Lukas de Blois (ed.), *Administration, Prosopography and Appointment Policies in the Roman Empire: Proceedings of the First Workshop of the International Network Impact of Empire (Roman Empire, 27 B.C. – A.D. 406)*, J.C. Gieben, Amsterdam, 2001, pp. 124–25.

<sup>45</sup> Dieter Nörr, *Imperium und polis in der hohen Prinzipatszeit*, Beck, Munich, 1966.

<sup>46</sup> On the evolution of law in the relationship between power and sovereignty, see Luigi Capogrossi Colognesi, *Law and Power in the Making of the Roman Commonwealth*, Cambridge University Press, Cambridge, 2014.

<sup>47</sup> Cassius Dio, 36.20–36; Philip De Souza, *Piracy in the Graeco-Roman World*, Cambridge University Press, Cambridge, 2002, pp. 149–76.

The issue of piracy was also significant in another way regarding jurisdiction and the ideas behind international criminal law. Since piracy was an existential threat, with interruptions in the grain supply meaning starvation for the rapidly expanding urban population of Rome, the pirates caught were dealt with quickly and painfully. Cicero called pirates the enemies of all (*communis hostis omnium*; Cicero, *De Officiis*, 3.107, which is the probable source for the expression *hostis humani generis*, enemies of humanity). Pirates and bandits were not even granted a trial.<sup>48</sup>

The importance of the Roman conceptions of sovereignty, territoriality and jurisdiction rests in the way that they were re-used during the Middle Ages and early modern period to justify claims of universality and sovereignty. Through this usage, the Roman language slowly made its way into the modern terminology of international law. It began in the medieval battles over supremacy between emperors, kings and popes, Roman texts and precedents were used to great effect. For example, in the case of Charlemagne, the first Holy Roman Emperor, the debates over his supposed universal monarchy and authority were justified with the accounts that the Pope had named him Emperor and Augustus, using the Roman terminology and calling him the ruler of the world. Similar claims and dubious lineages were used by successors of Charlemagne such as Frederick I Barbarossa (1122–1190).<sup>49</sup> Thus, the doctrine of the Emperor being the lord of all the world, founded on the earlier mentioned statement by Antoninus Pius, reversed Pius's original meaning. The point was later taken up by the *Glossa ordinaria* (1.6.34) and spread elsewhere in the civilian literature.

Medieval legal doctrine returned to the distinction between the personality principle and the territoriality principle, but Roman law would serve as a kind of shared law, *ius commune*, which would have universal validity if no other law was applicable.<sup>50</sup> In the logic of the medieval jurists, the choice of law was equally a choice of jurisdiction, meaning that

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<sup>48</sup> Robert C. Knapp, "Legally marginalized groups", in Paul Du Plessis, Clifford Ando, and Kaius Tuori (eds.), *Oxford Handbook for Roman Law and Society*, Oxford University Press, Oxford, 2016, pp. 370–72.

<sup>49</sup> Muldoon, 1999, pp. 23–24, see *supra* note 42; Anne A. Latowsky, *Emperor of the World. Charlemagne and the Construction of Imperial Authority, 800–1229*, Cornell University Press, Ithaca, 2013.

<sup>50</sup> Ryngaert, 2008, pp. 45–47, see *supra* note 4.

according to many jurists the use of Roman law implied the acceptance of the imperial supremacy.<sup>51</sup>

In medieval discourse, universal claims were made with some regularity. Like the Holy Roman emperors, Byzantine emperors were eager to present themselves as universal rulers. Later, the Habsburg emperors and the Spanish kings of the sixteenth century had presented the idea of a universal empire in different forms. Where the doctrines of sovereignty or property were not applicable, the early scholars of international jurisdiction were sometimes at odds on how to justify the existence of jurisdiction beyond the traditional realms. Grotius resolved this issue with a theory based on natural law that sought to derive jurisdiction from the state of nature itself, meaning that it would be prior to the jurisdiction of the State. In *De iure praedae*, Grotius assigns the power to punish to the State by the law of nations:

Is not the power to punish essentially a power that pertains to the state? Not at all! On the contrary, just as every right of the magistrate comes to him from the state, so has the same right come to the state from private individuals; and similarly, the power of the state is the result of collective agreement. [...] Therefore, since no one is able to transfer a thing that he never possessed, it is evident that the right of chastisement was held by private persons before it was held by the state. The following argument, too, has great force in this connexion: the state inflicts punishment for wrongs against itself, not only upon its own subjects but also upon foreigners; yet it derives no power over the latter from civil law, which is binding upon citizens only because they have given their consent; and therefore, the law of nature, or law of nations, is the source from which the state receives the power in question.<sup>52</sup>

Using the idea of natural law, Grotius reverses the Spanish international legal doctrine based on the idea of territory (*De iure belli ac pacis*

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<sup>51</sup> Muldoon, 1999, pp. 96–97, see *supra* note 42.

<sup>52</sup> Hugo Grotius, *De Iure Praedae Commentarius*, Gwladys L. Williams and Walter H. Zeydel eds. and trans., Oxford University Press, Oxford, 1950, pp. 1:91–92. This Carnegie edition consists of both the translation and the original edition of the Latin text by H.G. Hamaker (Martinus Nijhoff, The Hague, 1868).

1625, tr. *On the Law of War and Peace*, 2.20.40.4). Until then, the Iberian rule had been to assign ownership and to derive jurisdiction from that.<sup>53</sup>

Grotius's source for natural law was mainly Roman law. He shows that institutions like ownership and property are in fact not dependent on the State, but that they are institutions in the state of nature and thus their enforcement must be universal. What Grotius proposes (*De jure belli ac pacis*, 1.3.2.1) is that, while there are now tribunals that can enforce rights, these rights must be enforceable even elsewhere. Thus, where there is no government, such as the high seas, the wilderness or desert islands, the need and legitimacy for jurisdiction remains. In extreme cases, where either the judges do not take the case or the opponents are not subject to the judge's jurisdiction, there is still the possibility of self-help.<sup>54</sup> There was thus a natural right to punish. While Grotius uses the universal and natural right to punish to justify the power of the State, his theory extends the other way, to the foundation of a universal criminal law.

#### 4.6. Conclusion

The work of Ulpian forms the foundation of much of the basic framework of international jurisprudence. In their different forms, Roman jurisprudential doctrine informed theories of sovereignty and jurisdiction that are crucial to the way the legal formulation of the international criminal law was done. Universal authority, natural law and supranational jurisdiction, the ethical foundations of law in the theories of human equality and the cosmopolis have roots in the thinking of Ulpian. As is typical in developments with extraordinary length, arguments from Roman jurists and ancient authors in general were misattributed, taken out of context and sometimes used to justify opposing views.

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<sup>53</sup> Benjamin Straumann, *Roman Law in the State of Nature: The Classical Foundations of Hugo Grotius' Natural Law*, Cambridge University Press, Cambridge, 2015, pp. 28–29, 216; Richard Tuck, *The Rights of War and Peace: Political Thought and the International Order from Grotius to Kant*, Oxford University Press, Oxford, 1999.

<sup>54</sup> Straumann, 2015, pp. 188, 200, see *supra* note 53.

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*Inter Homines Esse:*  
**The Foundations of International Criminal Law  
and the Writings of Ambrose, Augustine,  
Aquinas, Vitoria and Suárez**

**Hanne Sophie Greve\***

The revolutionary aspect of human rights, as agreed upon by the world community after the Second World War, is not the many different rights but the fact that these rights belong to every member of the human family in that very capacity. Recognition of human dignity and its worth is – as asserted in the Charter of the United Nations – a pre-condition for peace and security in the world. It was the one solution that the international community could identify and agree on, after two world wars in less than thirty years that brought untold human suffering and left several tens of millions dead and many more wounded.

Some see the acknowledgement of human dignity and worth almost as part of an insurance arrangement – if you do not hurt me, I shall not hurt you. Others approve of human dignity as a value that holds religious or philosophical significance or both. Either way, the undisputed recognition of human dignity was made the foundation of international relations and international law after the Second World War. It became a first principle that one does not argue in order to prove (*ad probanda*). Rather, it constitutes a first principle from which it is argued in order to prove other elements within the ambit of human rights (*ad ostendendum*).

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The acuteness and magnitude of the human suffering that still remains – in part due to previously unknown causes – has made human rights essentially a practical remedy in constant need of being amended, rather than a subject for thorough philosophical analysis as concerns its first principle – the human dignity that belongs to every member of the human race.

International criminal law is in numerous respects distinct from human rights law – beyond the first principle of human dignity, which forms the ratio for international criminal law as well.

Having worked as a judge – nationally and internationally – for more than thirty years, and with refugee law, war crimes, human trafficking, opposing the death penalty, and dealing with general human rights issues for almost forty years, I see international law as having somehow lost sight of this first principle.

There *is* behaviour and human conduct – the issue is only who is establishing the rules, *de facto* legislating by setting the standards. There is *no normative void*, that is, nowhere in the relationship between human beings there is behaviour not following any norms. Certain moral precepts are inherent by virtue of human nature. There is a link between transcendent human dignity and the laws of nature or reason.

The theory of natural law is complex. It addresses questions such as:

- whether a law is consonant with practical reason;
- whether a legal system is morally and politically legitimate; and
- the relation between a legal system and human liberty and justice.

Natural law is normative. It provides basic standards and direction for legal thinking, but regarding the essential questions of ‘being’ – what it means to be human – it cannot possibly answer every question.

European legal thought – subsequent to the introduction of Cartesian doubt and the modern sciences – seems to have sought refuge in the two other main branches of legal philosophy: (i) legal positivism, and (ii) legal realism. Both these branches are narrow enough to be able to compete with proper science. This, however, is an illusion for more reasons than one. Most importantly, law becomes irrelevant – if not even counter-productive and dangerous – if it is unwilling to address the issue of ‘being’ human.

Humanity is comprised of the singular individual and the plurality of the whole – the two being both distinct and totally intertwined. Simultaneously simple and complex. The international community must once again find the courage to face:

- the fact that regardless of the absence of law there exists no normative void; and
- that the purpose and reason for every community (State based and international) and for all legislation is the recognition of the inherent integrity of humans which is impossible to understand, protect and uphold in separation from the plurality of humankind.

Issues such as the: essence of human life, meaning of morality, function of law, significance of justice, and the purpose of organised society, are perennial. Philosophical and religious thought concerning transcendent human dignity and its implications for basic morality and law, can be explored through the writings of five enlightened thinkers – Ambrose, Augustine, Aquinas, Vitoria and Suárez – who also provide an invaluable contribution to the understanding of the foundations of international criminal law.

Ambrose was born around 339 AD and Suárez died in 1617 AD. Each of the five embraced the disciplines of philosophy, law and theology. They were all profoundly well-versed in the philosophy and the literature of antiquity. They belonged to traditions – such as seen for example in the *Corpus iuris civilis* – where compilation of – and commenting on – all relevant sources was part of an intellectual undertaking. The goal was to honour God by explaining the Truth – not to achieve personal fame. The five were eager to further the work of their predecessors within the Catholic Church, with the magnificent contributions to knowledge found in Greek and Roman thinking in general.

The sheer magnitude of the five's writings is overwhelming. Any inconsistencies and shortcomings found in this chapter are out of the author's attempt at summarising their work to meet present day needs within a limited few pages. To do them right, their enlightened works themselves should also be consulted – their clarity of thought is outstanding and they provide superb inspiration to any scholar concerned with the philosophical foundations of international criminal law.

## 5.1. Enlightened Thinkers of the Catholic Faith

### 5.1.1. Introduction

Diverse conceptual characteristics (*ratio cognoscibilis*) make for diverse sciences. For instance, the astronomer and the natural philosopher demonstrate the same conclusion, that the earth is round. But the astronomer does this through a mathematical middle term – i.e., a middle term abstracted from matter – whereas the natural philosopher does it through a middle term considered materially. Hence, nothing prevents it from being the case that the same things that the philosophical disciplines treat insofar as they are knowable by the light of natural reason should be treated by another science insofar as they are known by the light of divine revelation.

Saint Thomas Aquinas<sup>1</sup>

This chapter focuses on elements of the thinking of five enlightened representatives of the Catholic faith. All of them were working within the field of theology, but not exclusively – philosophy and law were within their areas of inquiry. That is, their starting points were different from non-believers, but their elaborations and reflections on the basics of being human and living among fellow human beings are (save for their understanding of the absolute sanctity of each individual human life) what the philosophical discipline treats as knowable in light of human reason.

Again, in the words of Aquinas:

the philosopher and the believer consider different matters about creatures. The philosopher considers such things as belong to them by nature [...]; the believer, only such things as belong to them according as they are related to God – the fact, for instance, that they are created by God, subject to Him, and so on.<sup>2</sup>

In philosophy as such, what can be known *per se* – that is by itself upon sound and rational reflection and inquiry – concerning the public domain, are the starting points. These starting points are not the products of deductive proof.<sup>3</sup> By distinguishing reason from faith, but associating

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<sup>1</sup> Aquinas, *Summa Theologiae, Prima Pars* (First Part or part I), question 1, art. 1.

<sup>2</sup> Aquinas, *Summa contra Gentiles*, book II, chap. 4.

<sup>3</sup> Cartesian doubt is universally applicable.

the two with one another, all of the five Catholic thinkers made remarkable philosophic inquiries into the reasons and principles of the human condition hereunder with a specific view towards human behavioural responsibility. Crime and punishment in the community of humankind were also subject to their inquiries.

Each of them has become legendary for his clear definitions and distinctions, strength of argument and keen discussions. As they sought coherence between cause and effect, they applied philosophy's own methods of inquiry.<sup>4</sup>

The five were all men of their times. All took advantage of and engaged with the most profound philosophical studies available to them. Each, moreover, benefited from his predecessors in this line of illustrious Catholic thinkers. Their contributions significantly advanced the philosophy of humankind to increased depths of understanding. What started with Greek philosophy was transformed, not in the least by the five, into the broad basis for Western civilisation in the field of human relations.

### 5.1.2. Ambrose of Milan (~339–397)

Born the son of a high-ranking Roman official in Gallia, Ambrose studied Greek, rhetoric, law and literature. He started his professional career as an advocate in the court in Sirmium (Sremska Mitrovica in Vojvodina) before he continued his work in Rome. In about 372, Emperor Valentinian appointed him governor of the Province Aemilia and Liguria, where Milan was the capital. From the early fourth century, Milan had been the administrative centre of the Western Roman Empire. Ambrose proved efficient and popular as governor.

He was raised a Christian but not baptised yet when, in the midst of Church turmoil in 374, the people of Milan elected him their bishop. Ambrose resisted, but the Emperor approved of the election. Ambrose was quickly baptised and ordained as a priest before he taking up office as a bishop.

Following riots in Thessaloniki, Greece in 390, Emperor Theodosius ordered gruesome reprisals, allegedly having some 7,000 people mur-

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<sup>4</sup> The art of philosophy has developed over time. The discipline has moved from the pursuit of wisdom in Antiquity – encompassing the now separate specialities of philosophy, religion, and psychology – to the largely argument-oriented academic branch of learning we know today.

dered – many innocents among them. Ambrose insisted that the Emperor should publicly denounce the punishment. As he did, both men apparently increased their reputation.

Ambrose taught mainly through his sermons, but he wrote a large number of hymns, composed and wrote many books as well. His book on ethics written for the clergy, *De Officiis Ministrorum (On the Duties of the Clergy)*, has been particularly influential.

The Western philosophical tradition reached a decisive new stage following the pervasive merging of Greek philosophical tradition and Christian thought. Ambrose was influenced by Platonism and Stoicism, and drew on Seneca and Cicero in his philosophical inquiries.

Ambrose is known as the ‘Christian Consul’. With some other theologians of late Antiquity, he is honoured as a Father of the Church. Ambrose – like other Church Fathers – was influential in part through his original writings in complete texts (*originalia*), in part through annotations, explanations and commentaries on particular passages in the Bible and in anthologies (‘glosses’), and through extensive quotations made by later writers.

Influenced by the Stoics, the Church Fathers passed on the understanding that coercive government, slavery and property were not part of God’s original plan for humankind. Initially, human beings would have accepted the guidance of the wise, and no one would have sought to control more resources than needed to support a temperate way of life. No human being would have been treated as property. Different realities were the results of sinfulness.

On property, Gratian’s *Decretum* included a passage from Ambrose:

But he says, ‘Why is it unjust if I diligently look after my own things as long as I do not seize other people’s?’ O impudent words! ... No one should say ‘my own’ of what is common; if more than what suffices is taken, it is obtained with violence. Who is as unjust and as avaricious, as he who makes the food of the multitude not for his own use, but for his abundance and luxuries? The bread which you hold back belongs to the needy.<sup>5</sup>

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<sup>5</sup> *Decretum Gratiani*, distinction 47, 8. *Decretum Gratiani* is a collection of Canon law. It was compiled and written in the twelfth century by a canon lawyer from Bologna known as Gratian.

### 5.1.3. Aurelius Augustine (354–430)

The most influential of the Church Fathers in medieval Europe was Augustine. Aurelius Augustine was born in Thagaste (now Algeria, then a Roman North African province). He received a classical education primarily in rhetoric in North Africa, before he went as a professor in this subject to Rome and later, Milan. At a young age, his interest for philosophy was kindled as he read Cicero's *Hortensius*.<sup>6</sup> In Milan in 387, Bishop Ambrose baptised Augustine and Augustine's son, Adeodatus.

Augustine spent four years in Italy and the rest of his life in North Africa. In 391, he was reluctantly ordained as a priest in Hippo Regius (North Africa); and in 395, was made bishop in the same city where he remained for the rest of his life.

A prime focus of Augustine's thinking was how a human being can make sense of and live within an adversarial world fraught with danger where one may easily lose everything.<sup>7</sup> Evils that afflict us as human beings were also a focal point for Greek philosophers – including the Epicureans, the Stoics, the Sceptics and the Platonist and Neo-Platonist schools. Not in the least, the latter represented profound thinking – a metaphysical framework of extraordinary depth and subtlety – that Augustine combined with classical Roman thought and further developed in harmony with Christian doctrine. Augustine found much to be compatible between the traditions; on points of divergence,<sup>8</sup> he advanced the Christian understanding.

Immersed in the questions of his official functions and the controversies that confronted the Church at his time, he augmented his practical understanding of human challenges. He became utterly mindful of the powerlessness of the unaided human will; that is, the moral drama that constitutes the human condition. The latter more often than not thwarted by profound ignorance. Following Greek influence, Augustine viewed reason as exerting a dominant influence over other human capacities; and he was confident of the superiority of the rational over the non-rational.

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<sup>6</sup> Augustine, *Confessiones*, book III, chap. iv, 7–8. *Hortensius* or *On Philosophy* is a now-lost dialogue written by Marcus Tullius Cicero. The core idea is that human happiness is to be found by using and embracing philosophy.

<sup>7</sup> Cf., for example, *ibid.*, book IV, chap. x, 15.

<sup>8</sup> Cf. *ibid.*, book VII, chap. xx, 26.

Augustine is a prime early thinker merging Greek philosophy and Christian thinking, adding significant contributions of his own. His influence has been widespread and enduring. He wrote extensively – authoring more than one hundred titles. For later generations, the most influential of Augustine’s writings has been the *Confessiones*, *De Libero Arbitrio* (*On Free Choice of the Will*) and *De Civitate Dei* (*On the City of God*).

The peace of all things lies in the tranquillity of order, and order is the disposition of equal and unequal things in such a way as to give to each its proper place.<sup>9</sup>

#### 5.1.4. Thomas Aquinas (1225–1274)

Over the centuries after the Fathers of the Church, there was limited philosophical and political writing, the old Greek language was neglected and much of the Greek heritage with it. Significant thought was however, given to conceptions of the role of a king and the difference between a king and a tyrant. The era saw some writings in the ‘mirror of princes’ genre. The king was considered to have a duty to do justice – both to enforce and to obey the law. In part, law was based on the consent of the people. If a king failed to do justice and lost the consent of the people, he might be deposed of.

The twelfth century saw a renaissance with the re-appropriation of the culture of Antiquity. The Aristotelian *corpus* became available in Latin translation together with other Greek and Arabic philosophical and scientific writings. Simultaneously, there was a renewed interest in the Roman law as codified by Justinian (*Corpus iuris civilis*, dated 533–34 AD). As universities opened, the works of Aristotle became a main element of the arts curriculum. The question of the correlation between the faith and reason resurfaced.

Thomas Aquinas was born near Montecassino where he began his education. Furthering his studies in Naples, he became familiar with the Dominican Order<sup>10</sup> he joined. Thence at Cologne, he studied with Albertus Magnus who had written an interpretation of the Aristotelian *corpus*. Aquinas completed his studies at the University of Paris and taught there for the following three years. For the next ten years he worked with the

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<sup>9</sup> Augustine, *De Civitate Dei*, book XIX, chap. 13.

<sup>10</sup> The Order was founded in 1215 to propagate and defend the Christian faith.

mobile papal court in Italy, before a new tenure of three years in Paris. Upon return to Italy, he was assigned to Naples – still teaching.

Scholasticism is a method of learning. It utilises thorough conceptual analysis and careful drawing of distinctions; in combination with rigorous dialectical reasoning to gain knowledge by inference and to resolve contradictions. It was the method then applied to reconcile Christian doctrine with Greek philosophy, especially that of Aristotle.

Beginning with *On the Soul* in 1268, Aquinas made an immense contribution to Western thinking by creating profound commentaries on twelve of Aristotle's main works. As a philosopher, Aquinas is an Aristotelian. He referred to Aristotle as *the philosopher* and adopted his analyses in numerous fields.<sup>11</sup> In certain respects, Neo-Platonism influenced him as well, in others he broke with Neo-Platonic and, to some extent Augustinian thinking, or rather he developed it further into increased understanding.

Aquinas's *magnum opus*, *Summa Theologiae*,<sup>12</sup> was conceived of as a summary of theology "in a way consonant with the education of beginners". It includes nevertheless, *inter alia*, inquiries into dominion in the state of innocence; divine, natural and human law; the best form of government; and war. When Aquinas took recourse to *the Jurist* or *the Legal Expert* when writing *Summa Theologiae*, the reference is to the Roman jurist Ulpian – the single most quoted contributor to Justinian's *Digest* in the *Corpus iuris civilis*.<sup>13</sup>

In *Summa Theologiae*, Aquinas collected, rearranged and enhanced with important additions the philosophical and spiritual heritage from the Fathers of the Church. Aquinas referred to Augustine as *the Theologian*. Aquinas seems, it has been said, through his immense knowledge of this inheritance in a certain way to have obtained the intellect of them all. *Summa Theologicae* is the pinnacle of Scholastic, Medieval, and Christian philosophy.

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<sup>11</sup> Aquinas denounced the understanding of a chief Muslim commentator on Aristotle at the time, the Andalusian philosopher Averroes.

<sup>12</sup> The *Summa Theologiae* was written from 1265 to Aquinas's death in 1274 – when it was not yet completed. It is a compilation of the main theological teachings of the Catholic Church. At the same time, it is one of the classics of philosophy and among the most influential works of Western literature.

<sup>13</sup> Justinian's *Digest* (or *Pandects*) is the centrepiece of the *Corpus iuris civilis*. It is akin to a legal encyclopaedia. The *Digest* is considered to be by far the most significant source of Roman law.

The thinking of Aquinas established a new *modus vivendi* between faith and philosophy. Over the centuries, the Catholic Church has consistently reaffirmed the central importance of the works of Aquinas both in theology and in philosophy. *Mutatis mutandis* as to the discoveries of a later age, Aquinas still provides an immense source of the most profound understanding – the seeds of almost infinite truths.

#### **5.1.5. Francisco de Vitoria (1486–1546)**

Francisco de Vitoria was a Spaniard living at the time of the Reformation. He belonged to the Dominican Order like Aquinas before him and was professor of theology at the University of Salamanca in Spain. Vitoria was central to the revitalised philosophical and theological inquiry of the sixteenth and seventeenth centuries. It followed the methods applied by the medieval Scholastics – Aquinas first among them – adapted to the developments in theology. The era is known as Second or Early Modern Scholasticism, simultaneously representing late Scholasticism.

What ignited Vitoria’s intellect more than anything else was the news of the brutality and the lawlessness of the Conquistadores following the discovery of America by Christopher Columbus:

The whole of this controversy and discussion was started on account of the aborigines of the New World, commonly called Indians, who came forty years ago into the power of the Spaniards, not having been previously known to our world.<sup>14</sup>

Vitoria insisted that *all* human beings – irrespective of race, geography or religion – have the same rights and shall perform the same duties. Vitoria examined diligently “the titles which might be alleged, but which are not adequate or legitimate” and “the legitimate titles under which the aborigines could have come under the sway of the Spaniards”.

Vitoria did not understand the State as spontaneously generated, but as a human organisation in accordance with the law of nature. A main topic for his inquiries and analyses was the ‘State’ – its origins, its sources and its attributes in relation to the people composing it.

Vitoria’s reasoning illustrates that he was fully familiar with Roman law. In matters pertaining to the State, he frequently invoked the philosophy of Aristotle and Cicero. In general, Vitoria found strong support for

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<sup>14</sup> Vitoria, *On the Indians Lately Discovered*, opening lines.

his analyses in the thinking of Augustine and Aquinas. Vitoria was keen to find authoritative support for the elements of his thinking from his predecessors and in Roman law.

Like the individual, the State can neither exist nor prosper in isolation. Vitoria thus reasoned:

International law has not only the force of a pact and agreement among men, but also the force of law; for the world as a whole, being in a way one single state, has the power to create laws that are just and fitting for all persons, as are the rules on international law. Consequently, it is clear that they who violate these international rules, whether in peace or in war, commit a mortal sin; moreover, in the gravest matters, [...] it is not permissible for one country to refuse to be bound by international law, the latter having been established by the authority of the whole world.

Vitoria considerably advanced the ‘just war’ theory. War, the ultimate remedy, being less desirable and less efficient as compared to international justice to avenge a serious wrong by a State or its people.<sup>15</sup>

Vitoria is considered as the founder of the modern law of nations. His main works are *De Indis Recenter Inventis* (*On the Indians Lately Discovered*) and *De Iure Belli Hispanorum in Barbaros* (*On the Law of War*). Vitoria belongs to ‘The Spanish School of International Law’ that evolved from his chair at the University of Salamanca – the School of Salamanca movement.

### 5.1.6. Francisco Suárez (1548–1617)

Francisco Suárez was born in Spain. He joined the Society of Jesus and became a Jesuit priest. Suárez was a leading figure of the School of Salamanca movement, but arrived to the University of Salamanca only after the death of Vitoria. As a philosopher and theologian, Suárez is regarded as the greatest Scholastic after Aquinas.

With Suárez, Scholasticism left its Renaissance phase for its Baroque phase. The works of Suárez were comprehensive, exhaustive and systematic – few subtleties escaped him. He addressed almost every aspect of philosophy, metaphysics in particular: ethics, law and theology. He

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<sup>15</sup> Cf. Augustine, *De Civitate Dei*, book XIX, chap. 7 on the misery of wars, even of those called just.

added profound original ideas to what was already available. Suárez was extremely creative, producing a vast amount of work, writing twice as much as Aquinas.

Suárez first taught philosophy at Salamanca. From 1574, he switched to teaching theology, first at the Jesuit College in Valladolid, thence at the University of Coimbra where he remained for the rest of his life save for a brief tenure in Rome. Suárez's most significant philosophical achievements were in metaphysics and philosophy of law. *Disputationes Metaphysicae* (*Metaphysical Disputations*) is probably his most profound work where he developed metaphysics as a systematic method of enquiry. Suárez compiled and analysed the views of the main Western philosophers on a vast range of problems, concluding with his own interpretations. His treatises on law – twenty books – *Tractatus de Legibus ac Deo Legislatore* represents an illustrious philosophical achievement.

Suárez was regarded in his time as the most eminent living philosopher and theologian, called *Doctor Eximius et Pius* (Exceptional and Pious Doctor).

The School of Salamanca movement embraced a huge number of thinkers on the Iberian Peninsula, elsewhere in Europe and in Iberian America. Jesuit missionaries also brought the thinking of Suárez to Asia and Africa. At one time, a missionary attempted to write *Disputationes Metaphysicae* with Chinese characters.

In contradistinction to Vitoria, Suárez discoursed in the abstract that is without reference to any particular event. Beyond his philosophical works, he did however write extensively on issues raised in the political upheavals of his time. Suárez' thinking was an adapted form of Aquinas'. Like Vitoria before him, Suárez was highly focused on the 'State', international relations and war:

It is impossible that the Author of nature should have left human affairs, governed as they are by conjecture more frequently than by sure reason, in such a critical condition that all controversies between sovereigns and states should be settled only by war; for such a condition would be contrary to wisdom and to the general welfare of the human race; and therefore it would be contrary to justice.

Suárez is seen as the founder of the modern philosophy of law and the law of nations.

## 5.2. The Actors

### 5.2.1. God

#### 5.2.1.1. Genesis 1:27

So God created man in his own image, in the image of God he created him; male and female he created them.

*Genesis 1:27*

Here the Judeo-Christian ‘worldview’ is summarised in its extraordinary simplicity and absolute complexity:

- God the Creator, the divine Author and the First Mover.
- The individual human being as created in the image of God.
- Each and every individual human being as created in the image of God.
- The plurality of human beings – humankind – as created by God each in God’s image.

In the words of Augustine, God is the ultimate source and point of origin for all that comes below, equated with Being,<sup>16</sup> Goodness,<sup>17</sup> and Truth.<sup>18</sup> God is the unchanging point that unifies all that comes after and below within an abiding and rational hierarchy that is ordained providentially.

Aquinas reasoned thus,

Even though we cannot know the real definition (*quid est*) of God, nonetheless, in the science of sacred doctrine we use His effects, whether effects of nature or effects of grace, in place of a definition in regard to the things that are considered about God in this doctrine – just as in the other philosophical sciences, too, something is demonstrated about a cause through its effect, where the effect takes the place of a definition of the cause.<sup>19</sup>

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<sup>16</sup> Augustine, *Confessiones*, book VII, chap. x, 16.

<sup>17</sup> Cf. Augustine, *De Trinitate*, book VIII, chap. 3, 4.

<sup>18</sup> Augustine, *Confessiones*, book X, chap. xxiii, 33; Augustine, *De Libero Arbitrio*, book III, chap. 16.

<sup>19</sup> Aquinas, *Summa Theologiae*, part I, question 1, art. 7.

### **5.2.1.2. Jesus Christ the Redeemer**

Jesus Christ, Son of the Eternal Father, who came on earth to bring salvation and the light of divine wisdom to the human beings, raised human beings to immortality and eternal life. The Redemption promotes mortal human life to the position of immortality – an immortality that thus far was understood to pertain to the cosmos only. In consequence, the Redemption reversed the ancient relationship between the human being and the world. Previously, human life had been appreciated but as one among several ‘goods’. The Redemption replaced the old worldview with a Christian fundamental belief in the sacredness of life – the individual human life being an absolute value.

‘Equal is not same’ as the old Roman legal maxim goes. In the Christian faith, each individual human being is unique and irreplaceable – not a mere specie of the human race.

Augustine insisted that the God of the Old Testament is the same God as the God of the New Testament. The Christian belief in Jesus Christ the Redeemer is that the Redemption is for each and every human being and not exclusively for Christians or followers of the three Abrahamic religions.

### **5.2.1.3. A Comprehensive Understanding of the Universe as Created by God and Inhabited by Human Beings**

All the five enlightened thinkers of the Catholic faith begin their theological discourse with what God has revealed about Himself and His action in creating and redeeming the world. They understand the world in this light. Principles that are held to be true on the basis of faith – the truths that are authoritatively conveyed by Revelation, as revealed by God – are said to be known *per alia*; but the principles involved are not immune to rational inquiry and analysis.

The five illustrious thinkers commence their philosophical discourse with knowledge of the world. If it speaks of God, what it says is conditioned by what is known of the world. They observe however, extensive commonality between the properties of theology and those of philosophy. Numerous elements of what God has revealed, can be known and investigated without the precondition of faith – such elements are, formally speaking, philosophical and subject to philosophical analysis. This category includes topics such as but not limited to, the nature of the human

person; and what is necessary for a human being to be good and to fulfil her or his destiny. The common fount is the reality of human life as such.

## 5.2.2. The Individual Human Being

### 5.2.2.1. The Essence and Existence of Finite Beings

In line with Aristotelian thinking, Suárez limited metaphysics to the study of real being, its properties, division and causes.<sup>20</sup> A cause is responsible for the existence or features of some being beyond itself. An exercise of causality is the activity by which a cause imparts existence to another, by creating it, or altering its features once it exists. The question of (i) what a cause is, differs from the question of (ii) how a cause brings about its effects. To understand being both questions must be answered: what is responsible for being (*ens*); and what causes individual beings (*entia*) to come into existence, or to change their mode of existence.

Suárez resolved that the most appropriate and fundamental classification by distinction was between *ens infinitum* (God) and *ens finitum* (created beings) – having explored numerous other ways to indicate the distinction between the Supreme Author and the human being.

According to Suárez, the essence and existence of finite beings are not really distinct. It is only conceptually that essence and existence can be logically conceived of as separate. He insisted the only absolute and real unity in the world of existences is the individual. The singular is the object of direct intellectual cognition. Every single individual is both true and good. If one alleges that the universal exists separately *ex parte rei*, then individuals are reduced to mere accidents of one indivisible form.

Suárez's thinking (as I attempted to summarise in the previous paragraph) appears to be immensely important. If one tries to reformulate it in line with the reasoning of Aquinas on a slightly different issue, it may be said that the only time the immediate principle of an operation is the very essence of a thing, is when the operation itself is the things *esse*. Hence, in the case of a human being its *being* – its life – is its essence that is the same as its *esse*. Life in consequence is the essence of the human being and not just one among several human 'goods'.

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<sup>20</sup> Suárez, *Disputationes Metaphysicae*, vol. I, 1.26.

### 5.2.2.2. ‘*Imago Dei*’ – Dignity and Worth

In Catholic doctrine, it is ascertained that only in reference to the human person in the individual’s unified totality – as a soul that expresses itself in a body, and a body informed by an immortal spirit – can the specifically human meaning of the body be understood.

According to the Greek philosophical tradition, the soul was primarily the principle that accounts for the obvious distinction between things that are living and things that are not. To be alive is to have a soul, and death involves a process leading to the absence one.

As in Neo-Platonism, Augustine understood the individual human being as a combination of body and soul. He identified the soul with neither the substance of God, nor with the body, nor with any other material entity.<sup>21</sup> The soul being a spiritual entity, Augustine viewed it as superior to the body. The soul should rule the body.<sup>22</sup> The soul is the principle of unity of the human being, whereby it exists as a whole – *corpore et anima unus* – as a person.

Augustine perceived of the human soul as open to amendment and adaptation. This he saw as a prerequisite to explain the possibility of moral change – advancement as much as deterioration.<sup>23</sup> Aquinas addressed the essence of the human soul having ascertained that the soul is the first principle of life,

In order to inquire into the nature of a soul, one must take for granted that what is called a ‘soul’ (*anima*) is the first principle of life in those things around us that are alive; for we say that living things are ‘ensouled’ (*animata*) and that things that lack life are ‘non ensouled’ (*inanimata*). There are two operations by which life is especially made manifest, cognition and movement.<sup>24</sup>

The theological truth that God created the human being in His own image (*‘Imago Dei’*) implies that the human person cannot be understood apart from God. The human person partakes in the divine nature by the act of creation. The human person has been willed for her or his own sake in the likeness of God. The fact that God has created every human being in

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<sup>21</sup> Augustine, *Letters*, 166, cf. 143.

<sup>22</sup> Cf., for example, Augustine, *De Quantitate Animae*, chap. 13.

<sup>23</sup> Augustine, *Letters*, 166, 3; *Confessiones*, book IV, chap. xv, 26.

<sup>24</sup> Aquinas, *Summa Theologiae*, part I, question 75, art. 1.

His own image, signifies that every human being in that very capacity has a divine origin. In this, all human beings are equals – no one is beyond creation in the image of God. The sanctity of human life belongs to every human being. This is so regardless of sex and age, physical and mental capacities, regardless of productivity and the ability to contribute to the society in which the individual lives.

The human being is a person not just an individual. When an individual dies, the species remain; when a person dies, someone unique is lost. The human person holds a unique dignity. No human beings are marked out by nature for subordination to the interests of others regardless of there being individuals naturally lacking in intelligence and in capacity to achieve virtue or happiness. Augustine taught,

Having created man a reasonable being, and after His own likeness, God wished that he should rule only over the brute creation; that he should be the master, not of men, but of beasts.<sup>25</sup>

Roman law prescribed that “slaves are in the power of their masters, and this power is derived from the law of nations; for we find that among all nations masters have the power of life and death over their slaves, and whatever a slave earns belongs to his master”.<sup>26</sup> In wording attributed to Caesar, “It is for the sake of the few that humankind in general lives”.<sup>27</sup>

From the beginning, Christian doctrine was in direct opposition to the institution of slavery. Treating human beings as objects wanting in reason and sense furthermore outraged the common feeling of humankind.

Ambrose emphasised that as human beings we consider ourselves to be equal as we measure all human things by the spirit – in spirit no one is a slave to us.<sup>28</sup> Slavery was viewed as opposed to religion, humanity, and

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<sup>25</sup> Augustine, *De Civitate Dei*, book 19, chap. 15.

<sup>26</sup> Justinian, *Institutes*, book I, VIII-1. Justinian reorganised the legal education. The *Digest* (cf. *supra* note 13) was intended to form the core of the new curriculum. As the *Digest* was likely to be too demanding for beginners, Justinian ordered the preparation of an introductory textbook. The book was named *Institutes* and was promulgated as law. The *Institutes* drew on the elementary works of the classical era, the *Institutes* of Gaius in particular. Gaius’s exposition of the law – a textbook for students – had gained fame due to its combination of simplicity and lucidity. Gaius presented a seminal division of the law into: (i) persons; (ii) things; and (iii) actions.

<sup>27</sup> Marcus Annaeus Lucanus, *Pharsalia*, book 5, 264.

<sup>28</sup> Cf., for example, Ambrose, *De Jacob et de vita beata*, chap. 3.

justice alike.<sup>29</sup> If slavery was tolerated, there would be no form of cruelty and subjugation that could not be defended by invoking legality and justice.

In general, the sanctity of human life is a core value of civilisation as such. The world community professes its belief in the worth and dignity of the human being as ordained by God or by nature or both. As human beings, we share a common nature. The worth of the human being is inherent – not to be gained or lost. Human dignity is both a norm and an ideal.

### 5.2.2.3. The Human Condition

A key characteristic of the human condition is its frailty. The human being is essentially vulnerable in every respect. Physically and mentally, the individual needs to protect her- or himself to secure means of sustaining life and the relevant human habitat.

In certain periods of life (in particular, infancy and tender age; in cases of ill health; and in the infirmity of old age) the individual may not survive without the assistance of fellow human beings. Even the strongest and the brightest individual at the zenith of her or his life, is likely to be defeated if outnumbered by people of ill intent. Arms and ingenuity may be used in a devastating manner against the individual. Nature may be no more clement with its many dangers. In short, the problems are legion. The individual needs fellow human beings – their assistance and protection – to face otherwise threatening challenges.

It is ingrained in all living creatures, first of all, to preserve their own safety, to guard against what is harmful, to strive for what is advantageous.<sup>30</sup>

Human life is a conditioned reality. Literally, *everything* that the individual encounters thereby becomes a condition for her or his existence – for richer or poorer for better or worse.

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<sup>29</sup> Pope Paul III declared in 1559, with reference to the Indians and the Moorish slaves, that each one of them was master of his own person, that they could live together under their own laws, and that they could acquire and hold property for themselves: see Paul III, *Veritas ipsa*. In 1537, Pope Paul III promulgated the encyclical *Sublimis Deus* – the sublime God – that banned the enslavement of the indigenous peoples of the Americas and all other people.

<sup>30</sup> Ambrose, *De Officiis Ministrorum*, book I, chap. 27, 128.

The individual human being is her- or himself a party to conditioning the individual's circumstances, and a party to conditioning the circumstances of fellow human beings. Every human act and omission will have a role to play in this context. One act or omission may suffice to change every constellation.

Similarly, to achieve happiness and prosperity human life is conditioned as described.

#### **5.2.2.4. Who is the Individual Human Being?**

As far as the human being is concerned, the essential question is *who* and not *what* that individual human being is. According to Aquinas, as a finite being, the human being is participating in being her- or himself by the act of existence (*actus essendi*).<sup>31</sup> Not even the total condition of an individual human being's existence can ever answer the question of *who* that individual is, as an individual is never conditioned absolutely. Throughout the millennia, this has been the understanding among philosophers.

For example, the human being always exists in a particular culture, but is not exhaustively defined by that culture. The progress of cultures shows that human nature transcends cultures. In reality, human nature is the very measure of culture.

#### **5.2.2.5. The Different Human Faculties**

As emphasised by Augustine,<sup>32</sup> it is regularly the acquisition of language that is the instrument by which the human being is immersed in the world. The human ability to speak advances the interchange with fellow human beings and makes it feasible to pass on thoughts and experiences. Moreover, as Augustine highlights, language and the ability to speak are instrumental to transcend the world of the senses and to ascend to the realm of comprehension. The ability to speak in this latter sense is a uniquely human faculty.

Speech (*logos*) may be identified as a specific kind of action. Action is however, an immensely wide expanse, encompassing essentially every aspect of living and interacting between the individual human being and her or his fellow human beings, the outside world and the human envi-

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<sup>31</sup> Aquinas, *Summa Theologiae*, holds a *Treatise on Human Nature*, cf. part I, questions 75–102.

<sup>32</sup> Augustine, *Confessiones*, book I.

ronment. It may be said that to act is any human activity – act or omission, or a combination of the two in the singular or the plural – that sets events unfolding, conditioning the life of the self and others.

No wind is good if one does not know where to sail. Similarly, any kind of action or omission regularly needs direction – not in the least as it is conditioning the lives of people, the lives of self and others. The human faculties of reason and contemplation can provide such direction. It is in the very nature of the human being to follow the guide of reason in its actions.

According to Augustine, the senses are co-ordinated by an ‘inner sense’.<sup>33</sup> This faculty combines and judges – in an organisational and criterial manner – information (perception) obtained by the other senses, and for this reason is superior to them.<sup>34</sup> The inner sense the human being shares with non-rational beings. Reason however, is distinctively human.

For there is nothing in which man excels all other living creatures more than in the fact that he has reason, seeks out the origin of things, thinks that the Author of his being should be searched out.<sup>35</sup>

In all men, then, there lies, in accordance with human nature, a desire to search out the truth, which leads us on to have a longing for knowledge and learning, and infuses into us a wish to seek after it.<sup>36</sup>

In line with Greek intellectualism, Augustine perceived reason as having dominance over other human capacities – the superiority of the rational over the non-rational. To Augustine, reason is the mind’s ability to engage in deductive reasoning, where logical necessity is the criterion of adequacy. This sets it apart from instrumental reasoning found in other species. Reason is the tool whereby the human soul can access truths that are devoid of the mutability afflicting the objects of the senses.<sup>37</sup>

Humankind possesses a common heritage of natural truths being the principles of nature and whatever is derived from them immediately by

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<sup>33</sup> Augustine, *De Libero Arbitrio*, book II, chap. 3. Cf. Aristotle’s ‘common sense’: Aristotle, *De Anima*, book II, chap. 6.

<sup>34</sup> Augustine, *De Libero Arbitrio*, book II, chap. 5.

<sup>35</sup> Ambrose, *De Officiis Ministrorum*, book I, chap. 26, 124.

<sup>36</sup> *Ibid.*, 125.

<sup>37</sup> Augustine, *De Libero Arbitrio*, book II, chap. 8.

reason. This provides a foundation for morality and justice, and acts as one of the pillars of human society. Reason, like the other human faculties, is available to the individual in that very capacity. Addressing the issue of who can give consent to a legal custom, Suárez ascertained (having excluded juveniles) that:

Some would also exclude women entirely, on the ground that they can exercise no legislative authority. Among men, they exclude everyone below the age of twenty-five years. However, I cannot find any basis in law or any justification in reason for the exclusion of these last two groups.

Augustine saw an ontological dimension in the truths of reason – an isomorphism between the necessity that governs thinking and the necessity that governs the structure of the object of the thinking. That is, a kind of isomorphism between the truths of reason and the structure of being.

Augustine saw God as playing an active role in human cognition by illuminating the mind so that it can perceive the intelligible realities that God simultaneously presents to it. The grace of divine wisdom is available to every human being and does not detract the mind from its own activity and insight.

Human reason has a role to play in discovering and applying moral law. Reason draws its own truth and authority from the eternal law, which is divine wisdom itself.<sup>38</sup> Reason teaches that the truths of divine revelation and those of nature cannot be opposed to one another.

To Aristotle, neither speech nor reason, but *nous* – the capacity for contemplation – is the primary human faculty. According to Aquinas, truth can reveal itself only in complete human stillness. Every kind of activity – thinking no less than anything else – must culminate in the absolute quiet of contemplation.<sup>39</sup> The main characteristic of contemplation is that its content cannot be represented in speech.

#### 5.2.2.6. Moral Choice and Free Will

Every human act and omission has a role to play in conditioning the circumstances for the self and others. The human condition constitutes in

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<sup>38</sup> Cf. Aquinas, *Summa Theologiae, Pars Prima Secundae* (First Part of the Second Part or part I-II), question 93, art. 3.

<sup>39</sup> *Ibid., Pars Secunda-Secundae* (Second Part of the Second Part or part II-II), question 179, art. 1.

this sense a moral drama. Without freedom of the soul, there would be fatalism, as the human being would be totally controlled by outside forces. Natural liberty is distinct and separate from moral liberty, the former being the fountainhead from which every liberty flows. Liberty is the faculty of choosing means – one out of more than one – suited for the end pursued.

The human being is capable of moral choice – it has power over its actions, a power that may be termed liberty. On the use of moral liberty, the good and the evil is similarly contingent. The predicament of irreversibility is frequently linked to moral choice. Acts and omissions as soon as they belong to the past cannot be undone (even when they may be ‘repaired’ before having an effect). The person is the subject of her or his own moral acts.

Freedom of choice is a property of the will – identical with the will as far as it has the faculty of choice. The will acts informed by the knowledge possessed by the intellect. In every voluntary act, choice is subsequent to a judgment concerning the truth of the good presented, determining to which good to give preference to. Judgment is an act of reason, not of will. The object both of the rational will and of its liberty is that good which is in conformity with reason. In consequence, the human liberty is in need of guidance to direct its actions to good and to restrain them from evil.

Augustine, adhering to Greek intellectualism, understood nature as governed by patterns accessible to the human mind, and emphasised the role played by reason in a life that is in keeping with the larger order. Reason is capable of acts of theoretical representation. The application of reason is of utmost practical significance. In a disciplined life, non-rational factors of human preferences are to be constrained by reason. Natural law – as dictated by human nature – does not allow for a separation between freedom and nature. The two are intertwined, each intimately linked with the other. Augustine defined God’s eternal law as “the reason or the will of God, who commands us to respect the natural order and forbids us to disturb it”.<sup>40</sup> The eternal law is instilled in the human being as endowed with reason, and is inclining the person towards its right ac-

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<sup>40</sup> Augustine, *Contra Faustum Manichaeum*, book 22, chap. 27.

tion and end. Aquinas argued that divine wisdom's conception has the character of 'law' insofar as it moves all things to their appropriate ends.<sup>41</sup>

The will is what makes an action one's own, placing the burden of responsibility on the one performing the action.<sup>42</sup> Regardless of the ignorance and difficulties that attend the human condition, will serves as the pivot of moral responsibility. The human being is the source and cause of her or his own deliberate acts.

The problem that plagues the human condition, Augustine explained, is that the human being is susceptible to view everything materialistically and perceive of the sensible world as a self-contained arena within which all questions of moral concern are to be resolved, unaware that the sensible world is but a tiny portion of what is real.<sup>43</sup>

To moral reflection, the issue of human freedom is crucial – there is a profound and intimate relationship between the two.

God left man in the power of his own counsel.

*Sirach* 15:14.

*Genuine freedom* is a manifestation of the divine image in the human being. The human being shares in God's dominion – dominion extending in a certain sense over the individual itself. Human nature is by its likeness to the Supreme Author of the universe made as it were a living image, partaking with the archetype both in dignity and in name. It is within the ambit of human dignity to enjoy the use of the individual's own responsible judgment and freedom, and decide on its actions on grounds of duty and conscience. All in accordance with the truth – a universal truth about the good, knowable by human reason and in keeping with the very idea of human nature.

According to Aquinas,

Now among all creatures, the rational creature is subject to divine providence in a more excellent manner, because he himself participates in providence, providing for himself and for others. Hence, in him, too, there is a participation in eter-

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<sup>41</sup> Aquinas, *Summa Theologiae*, part I-II, question 93, art. 1.

<sup>42</sup> Cf. Augustine, *De Libero Arbitrio*, book I, chap. 11; book III, chaps. 18 and 22.

<sup>43</sup> Cf., for example, Augustine, *Confessiones*, book IV, chap. xv, 24.

nal reason through which he has a natural inclination to his due act and end.<sup>44</sup>

Conscience is an act of a person's intelligence. The function of the conscience is to apply the universal knowledge of the good in concrete situations and thereupon to express a judgment about the right conduct to be chosen.

### **5.2.3. The Plurality – Humankind**

#### **5.2.3.1. Created 'Them' – The Social Dimension**

The relational aspect of human life is introduced from the beginning. The human being was placed in the company of others like itself, so that what was wanting in its nature, and beyond its attainment if left to its own resources, it might obtain by association with others.

The human being is a social creature. Each and every one is both 'self' and 'the other'. An indelible bond unites all human beings. Already, the interchange between the singular and the plural in the quote from Genesis – 'created him' and 'created them' – emphasises the unity of the human race.

The Romans captured the situation well with the words '*inter homines esse*' ('to be among people') to signify life and to be synonymous with life, and '*inter homines esse desinere*' ('to cease to be among people') to signify death and to be synonymous with death.

Aquinas, in line with the thinking of Aristotle, ascertained that man is by nature political, that is, social (*homo est naturaliter politicus id est, socialis*).<sup>45</sup> The human being cannot live in solitude either for its own comfort – friendship requires plurality – or for the perpetuation of the species. Speech and other kinds of action correspond to the human condition of plurality. It is practiced and experienced in intercourse with other human beings. That is, in the presence of other human beings who can understand it and recognise the uniqueness of the actor. There is an interdependence of action among human beings. Without it, there could be no continuity under the characteristically uncertain human condition. Survival, protection, happiness and prosperity all require more than one person.

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<sup>44</sup> Aquinas, *Summa Theologiae*, part I-II, question 91, art. 2.

<sup>45</sup> *Ibid.*, part I, question 96, art. 4.

While all aspects of the human condition are somehow related to politics, the human plurality is *the* condition – the *conditio per quam* – of political life.

### 5.2.3.2. The Fundamental Equality of the Members of Humanity

Human plurality has the dual character of equality and distinction. Human beings are all the same but in such a manner that nobody is ever the same as anybody else.

The human plurality consists of the many singular human beings, each person with an individuality and absolute uniqueness.

The human race – people from all walks of life – is strongly bound together in kinship. As every human being partakes the likeness of God, all human beings are equals – no one is superior or inferior to anyone else.

The latter idea entails a belief in *the one liberty* of all human beings – the idea that all humans are equal and that slavery (by whatever name) is contrary to human nature.<sup>46</sup>

### 5.2.3.3. The State

Human beings live together in civil society. A society is recognised by: its component parts, its form implying authority, the object of its existence and the many services that it provides to the people. The human being was created for and to live in society.

The shared view of all five enlightened thinkers on the origin and nature of the State is the Aristotelian one: the human being, as a social and political animal, must live in organised society.<sup>47</sup> There must be government because the people would fall apart if the rights of each person were not accompanied by their corresponding duties. Nature proclaims the necessity of the State to provide means and opportunities empowering the community to live well.

Aquinas ascertained that in the state of innocence, there would exist no coercion, but there would exist government in the sense of wise leader-

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<sup>46</sup> A belief in the one liberty of all human beings is in line with the Roman legal saying that ‘by nature, from the outset, all human beings were born free and equal’ (Justinian, *Institutes*, book I, II-2).

<sup>47</sup> Aristotle taught that life in political society is natural to humankind. The state exists not just for security and trade but to foster the ‘good life’ – the life according to virtue (*Politics*, book III, part 9). Aquinas wrote significant commentaries on Aristotle’s *Politics*.

ship voluntarily accepted by the less wise,<sup>48</sup> a view held for example by Seneca:

Therefore since human societies have been established for this purpose – namely, that we should bear one another’s burdens – and civil society is of all societies that which best provides for the needs of men, it follows that the community is, so to speak, an exceedingly natural form of intercommunication.

Vitoria, *De Potestate Civili (On the Civil Power)*

The members of a society may have different ultimate values, but they will have similar intermediate ends such as a desire for justice and peace. The peace of all things lies in the tranquillity of order, and order is the disposition of equal and unequal things in such a way as to give to each its proper place.<sup>49</sup> A minimum of justice is essential to qualify as a commonwealth. According to Aquinas, ‘justice’ is the constant and perpetual will to render to others what is due to them.<sup>50</sup>

When Alexander the Great asked a pirate whom he had seized what he meant by infesting the sea, the pirate defiantly replied: “The same as you do when you infest the whole world; but because I do it with a little ship I am called a robber, and because you do it with a great fleet, you are an emperor”.<sup>51</sup>

The standard of human liberty in civil society, that human beings constitute when united, follows the same reasoning as for individual liberty adopted *mutatis mutandis* to the prerequisites of the plurality.

The origin, subject and purpose of all social institutions is and should be the human person. The fundamental moral rules of social life thus entail specific demands to which both public authorities and fellow human beings are required to pay heed.

‘The rule of law’ is better than ‘the rule of men’. It is better to have rules impartially applied than to leave every decision to the unfettered discretion of the rulers. The good forms of government seek ‘the common good’ that is the good of both ruler and ruled.

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<sup>48</sup> Aquinas, *Summa Theologiae*, part I, question 96, art. 4.

<sup>49</sup> Augustine, *De Civitate Dei*, book XIX, chap. 13.

<sup>50</sup> Aquinas, *Summa Theologiae*, part II-II, question 58, art. 1.

<sup>51</sup> Augustine, *De Civitate Dei*, book IV, chap. 4 (addressing how kingdoms without justice are like robberies).

Aristotle proposed that in good government there is a role for ordinary people. If ordinary people deliberate as a body, they may make sound decisions.<sup>52</sup> Later, this was used in support of the proposition that the people are the ultimate political authority, an idea also found in Roman law.

By submitting to just law, the members of a community are simultaneously protected from the wrongdoing of others in that community. According to Aquinas, though there is a general duty to obey the law and the government, an unjust law is not a law that binds in conscience (*non obligant in foro conscientiae*).<sup>53</sup>

Absolute, uncontested rule and a proper political realm is mutually exclusive. Public authority exists for the welfare of those whom it governs. It is always for a purpose that a person is entrusted with an office. In contradistinction, a tyrant is a usurper of power:

Although the aborigines in question are [...] not wholly unintelligent, yet they are little short of that condition, and so are unfit to found or administer a lawful state up to the standard required by human and civilian claims. [...] It might, therefore, be maintained that in their own interests ... the sovereigns of Spain might undertake the administration of their country. [...] And surely this might be founded on the precept of charity, they being our neighbours. [...] Let this, however, [...] be put forward without dogmatism and subject to the limitation that any such interposition be for the welfare and in the interest of the Indians and not merely for the profit of the Spaniards.<sup>54</sup>

#### 5.2.3.4. The International Community

Vitoria held that the world is in a way akin to a single State with power to make laws and to secure their enforcement. The international community could not hold together without there being a power and authority to deter wrongdoers and prevent them from injuring the good and the innocent. International law does not only have the force of a pact and agreement among people, but also the force of law. The law of nations is made by the

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<sup>52</sup> Cf. Aristotle, *Politics*, book III, part 11.

<sup>53</sup> Aquinas, *Summa Theologiae*, part I-II, question 96, art. 4.

<sup>54</sup> Vitoria, *On the Indians Lately Discovered*, pp. 160–61.

entire world,<sup>55</sup> with the overarching aim of preserving peace and tranquility.

Vitoria recognised and defined the existence of the international community – a community that exists of itself irrespective of the will or the action of any person or any group. The international community exists according to Vitoria due to the law of necessity (*ex jure necessitates*).

Suárez followed suit, he explained that despite the fact that a State might appear as constituting a perfect community in itself, it is in a certain sense a member of the universal society. No State standing alone is that self-sufficient that it does not need some mutual assistance, association and intercourse – at times for its greater welfare and advantage at times because of some moral necessity or lacuna.<sup>56</sup>

### **5.3. The Rules**

#### **5.3.1. Morality**

##### **5.3.1.1. The Concept of Morality**

Every aspect of life has a moral connotation as conditioning the life of the self and others. Aquinas equated human behaviour as such with moral acts: “For moral acts are the same as human acts” (*Idem sunt actus morales et actus humani*).<sup>57</sup> The pivot of morality is the transcendent human dignity innate in everyone, and the fact that living is being among fellow human beings.

‘Morality’ is a code of conduct. Normatively speaking, morality is the code of conduct that all rational persons will endorse. The code embodies the principles of human practical rationality.

There is a primordial moral requirement of respect for the person as an end and never as a mere means. This implies respect for certain fundamental goods – for life, the person’s true good and the individual’s authentic freedom. A core concern in morality minimising harm to others. Prohibitions against killing, inflicting pain, mutilating, not to mention genocide and crimes against humanity, undoubtedly fall within this ambit.

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<sup>55</sup> Vitoria, *On the Civil Power*, sect. 21.

<sup>56</sup> Suárez, *Tractatus de Legibus ac Deo Legislatore*.

<sup>57</sup> Aquinas, *Summa Theologiae*, part I-II, question 1, art. 3.

As far as morality is concerned, no one can legitimately rescind from the actual human condition and an objective reference to the truth about the human good.

The unconditional respect due to the personal dignity of every human being is protected by moral norms that prohibit without exception actions that are intrinsically evil. Such overarching precepts are – like the human being itself – universal and immutable. Respect for norms that prohibit such acts oblige *semper et pro semper*, that is, without any exception. When moral norms prohibit intrinsic evil, there are no privileges or exceptions for anyone. Every human being is equal before such demands of morality.

The Golden Rule – whether formulated as a positive or negative dictum (do to others, as you want them to do to you, or in the alternative, do not to others what you do not want them to do to you) – exists worldwide. Understanding of self leads to reciprocity.

Morality is for individuals, groups, communities and States. The origin, subject and purpose of all social institutions is the individual. The fundamental moral rules of social life entail specific demands that public authorities must observe. Moreover, there are objective moral demands of the functioning of States. These norms assist in preserving and strengthening the social fabric and social cohesion. They are preconditions for just and peaceful coexistence.

To obey the absolute validity of negative moral precepts is in the very dignity of the human being and a confirmation of its personal uniqueness. All things move in conformity with their nature. Human freedom is real but not unlimited. Its absolute and unconditional represents for it both a limitation and a possibility. It is an essential part of the dignity of the person. Freedom is rooted in the truth about the human being, and it is ultimately directed towards communion – in passing beyond the self to knowledge and love of the other.

#### **5.3.1.2. Law in Contradistinction to Morality**

Law is distinguished from morality by having explicit written rules, penalties, and officials who interpret laws and dispense punishment. Roman law states that the explanatory reason for law is the human persons for whose sake it is made – all members of the community regulated by the law and all other persons within the law's ambit.

According to Suárez, law is of God whether derived directly or through a human legislator. “The authority of all laws must ultimately be ascribed to Him”.<sup>58</sup>

As to the elements of law (*lex*), Suárez explained them as follows:

1. its binding force with respect to the conscience – its directive force;
2. its coercive force – in consequence a violation of the law is punishable; and
3. the force by which a definite form is laid down for contracts and similar legal acts – for what reason an act contrary to the prescribed form is invalid.

Aquinas’s philosophy of law is strongly influenced Suárez.<sup>59</sup> “Law”, Aquinas explained, “is a certain rule and measure of acts in accord with which one is either induced to act or restrained from acting. For ‘law’ (*lex*) is derived from ‘to bind’ (*ligare*), since law obligates (*obligare*) one to act”.<sup>60</sup> Suárez argued that this definition is slightly broad, because it applies to things that are not strictly laws, such as counsels. Suárez saw counsels as clearly distinct from precepts and thus not included in ‘law’. In addition to the three aforementioned elements, Suárez added to Aquinas’ definition that ‘law’ is that which pertains to customary conduct – ‘law is a measure so to speak of moral acts’. ‘Law’ is a rule of action.

Related but distinct, ‘*ius*’, according to Suárez: “is a certain moral faculty that every human being has, either over its own property or with respect to that which is due it [such as wages]”. *Lex* may justify possession – *ius* is the right itself. Where *lex* is appropriate, *ius* is also appropriate. “But the word *ius* has come to possess certain other connotations which have not been transferred to the term *lex*” – “The act of a judge is thus wont to be designated by the term *ius*. [...] so that the judge, when he exercises his office, is said to declare the law (*ius dicere*)”.<sup>61</sup> Suárez referred to Roman jurist Ulpian, quoting with approval Celsus’s definition to the effect that: ‘*ius* is the act of the good and the equitable’.<sup>62</sup> “This definition would be suited, not so much to law (*lex*) itself, as to jurispru-

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<sup>58</sup> Cf. Suárez, *Tractatus de Legibus ac Deo Legislatore*.

<sup>59</sup> Aquinas, *Summa Theologiae*, holds a *Treatise on Law*, cf. part I-II, questions 90–108.

<sup>60</sup> *Ibid.*, part I-II, question 90, art. 1.

<sup>61</sup> Cf. Justinian, *Digest*, book II, i.

<sup>62</sup> *Ibid.*, book I, i.

dence (*juris prudentiae*)”, Suárez added. *Ius* advances from the material domain of command to enter that of ‘justice’.

‘Equity’ in one sense stands for natural equity that is identical with natural justice. To Aristotle it was the emendation of that which is legally just. Suárez’s conception is that it is rather the source or rule thereof. The Latin term ‘*aequitas*’ may however, be taken in another sense as being a prudent moderation of written law (*lex*) – transcending the exact literal interpretation of the law. In this sense, ‘*aequitas*’ is opposed to the strict meaning of *ius*. “The terms ‘equitable’ (*aequum*) and ‘good’ (*bonum*) are applied ... to that which does indeed of itself possess these qualities, even though it may appear to be at variance with the letter of the law (*lex*)”. In a judgment *ex aequo et bono* the application of the law is tempered on the basis of right reason and justice. As summarised by Suárez:

In the interpretation of the laws, the good and the equitable should always be regarded; even if it be needful at times to temper the rigor of the words, in order not to depart from what is naturally equitable and good.

Suárez thus explained that law: “is a kind of rule, establishing or pointing out, in regard to its own subject matter or the operation with which it is concerned that mean which is to be preserved for the sake of right and fitting action”. In short, “Law is a common, just [equitable and moral] and stable precept, sufficiently promulgated”.

As to Aquinas’s more formal definition of ‘law’ as “an ordering by reason directed toward the common good, made by one who is in charge of the community, and promulgated”,<sup>63</sup> Suárez emphasised that law is primarily an act of will rather than an act of reason. Orders to particular individuals are not laws.

The force of law consists in its authority to impose duties, to confer rights and to sanction certain behaviour.

### 5.3.2. Natural Law

#### 5.3.2.1. The Eternal Law

In Roman law – *Corpus iuris civilis* – there is a distinction between different kinds of law:

1. natural law (*ius naturale*);

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<sup>63</sup> Aquinas, *Summa Theologiae*, part I-II, question 90, art. 4.

2. law of nations (*ius gentium*); and
3. civil law (that is the law of a particular community).

The idea of natural law can be traced back to Aristotle,<sup>64</sup> the Stoics<sup>65</sup> and Cicero, and is also found in Gratian's *Decretum*. Among the medieval thinkers, Aquinas holds the prime position of having invigorated and developed the concept of natural law. In his view, there are two main characteristics of natural law:

1. God is the giver of natural law; and
2. for the human being natural law constitutes the principles of practical rationality.<sup>66</sup>

It is a fundamental thesis that natural law is a participation in the eternal law – that rational plan by which all creation is ordered.<sup>67</sup> Through natural law, the human being participates in the eternal law. As a rational being, the human being is able to understand her or his part in the eternal law and freely act on it. Thus, this is 'law' – a rule of action put into place by the Supreme Author who has care of the entire community of the universe – in line with Aquinas's definition.<sup>68</sup> As God provides for the universe, God's choosing to bring into existence beings who can act freely and in accordance with principles of reason suffices to justify a classification of these principles of reason as law. According to Aquinas,

Now among all creatures, the rational creature is subject to divine providence in a more excellent manner, because he himself participates in providence, providing for himself and

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<sup>64</sup> Aristotle focused on the insight of the person of practical wisdom as setting the final standard for right action.

<sup>65</sup> The concepts *ius naturale* and *ius gentium* saw both significant changes in their contents already as used in Roman law. Influenced by Stoic philosophy especially, Gaius in the second century wrote:

Every people that is governed by statutes and customs observes partly its own peculiar law and partly the common law of all mankind. That law which a people establishes for itself is peculiar to it and is called *ius civile* (civil law) as being the special law for that *civitas* (state), while the law that natural reason establishes among all mankind are followed by all peoples alike, and is called *ius gentium* (law of nations or law of the world) as being the law observed by all mankind. Thus the Roman people observe partly its own peculiar law and partly the common law of all mankind.

Here *ius gentium* is used as synonymous almost to *ius naturale*.

<sup>66</sup> Cf. Aquinas, *Summa Theologiae*, part I-II, question 94.

<sup>67</sup> *Ibid.*, part I-II, question 91, arts. 1–2.

<sup>68</sup> *Ibid.*, part I-II, question 90, art. 4.

for others. Hence, in him, too, there is a participation in eternal reason through which he has a natural inclination to his due act and end. And the rationale creature's mode of participation in the eternal law is called natural law.<sup>69</sup>

Natural law is but one aspect of divine providence. According to Suárez, 'the eternal law' is the source of all laws and occupies the first place on account of its dignity and excellence. In his view, "Natural law is the first system whereby the eternal law has been applied or made known to us ... in a twofold way, first through natural reason, and secondly through the law of the Decalogue written on the Mosaic tablets". The eternal law safeguards the human good.

Suárez agreed that natural law required an act of *imperium*, a command by the legislator expressing his will. Therefore, any obligation falling under natural law derives its moral force from God's legislative act.<sup>70</sup> Suárez described natural law as creating obligations that would otherwise not exist – the force to oblige (*vis obligandi*) can only come from an act of will.

The introduction to the commandments in the Decalogue is the basic clause: "I am the Lord your God".<sup>71</sup> This opening impresses upon the particular prescriptions their primordial meaning, and gives the morality of the Covenant its quality of completeness, harmony and profoundness. The Covenant is seen to secure God's love for humanity and the whole of creation.

The Ten Commandments are part of God's Revelation. They are reflections of the one commandment about the good of the person, at the level of the many different goods that characterise the human being's identity as a spiritual and bodily being in relationship with God, with its neighbour and with the material world. The commandments shed light on the fundamental rights inherent in the nature of the human person. The commandments thus represent the basic condition for and the proof of the love of one's neighbour. "You shall love your neighbour as yourself".<sup>72</sup> This commandment articulates the singular dignity of the human being.

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<sup>69</sup> *Ibid.*, part I-II, question 91, art. 2.

<sup>70</sup> Suárez, *Tractatus de Legibus ac Deo Legislatore*, I, 5. 13.

<sup>71</sup> *The Bible*, Exodus 20:2.

<sup>72</sup> *Ibid.*, Matthew 19:19; cf. Mark 12:31.

“And who is my neighbour?”<sup>73</sup> Every single member of the human race is my neighbour.<sup>74</sup>

Commenting on Paul’s statement that “Christ is the end of the law”,<sup>75</sup> Ambrose wrote:

end not in the sense of a deficiency, but in the sense of the fullness of the Law: a fullness which is achieved in Christ (*plenitudo legis in Christo est*), since he came not to abolish the Law but to bring it to fulfilment. In the same way that there is an Old Testament, but all truth is in the New Testament, so it is for the Law: what was given through Moses is a figure of the true law. Therefore, the Mosaic Law is an image of the truth.<sup>76</sup>

God’s commandments are brought to fulfilment – particularly the commandment of love of thy neighbour – by internalising their demands and by bringing out their fullest meaning. As Aquinas pointed out, it is because divine grace comes from the Author of nature that it is so admirably adapted to be the safeguard of all natures, and to maintain the character, efficiency, and operations of each.

### **5.3.2.2. The Precepts of Natural Law Are Universally Identifiable by Nature**

Natural law constitutes the principles of practical rationality for human beings. This is a status that natural law has by nature.<sup>77</sup> These are the principles by which human action is to be judged as reasonable or unreasonable. Because natural law constitutes the basic principles of practical rationality, the precepts of natural law are universally identifiable by nature.<sup>78</sup> With respect to the universal principles of natural law there is the same truth or correctness for everyone and it is equally well known to every human being.<sup>79</sup>

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<sup>73</sup> *Ibid.*, Luke 10:29.

<sup>74</sup> See Augustine, *De Doctrina Christiana*: “When it is said ‘Love your neighbour’, it is clear that every man is our neighbour”.

<sup>75</sup> *The Bible*, Romans 10:4.

<sup>76</sup> Ambrose, *Expositio in Psalmum CXVIII*.

<sup>77</sup> Aquinas, *Summa Theologiae*, part I-II, question 94, art. 2.

<sup>78</sup> *Ibid.*, part I-II, question 94, arts. 4 and 6.

<sup>79</sup> *Ibid.*, part I-II, question 94, art. 4.

The natural is nothing other than the light of understanding placed in us by God, whereby we understand what must be done and what must be avoided. God gave this light and this law to man at creation.<sup>80</sup>

The human being, reflecting on and analysing the human condition, can discover by the activity of reason the truth of various fundamental moral principles that are self-evident (known *per se*) – these principles are common but cannot be proved.<sup>81</sup>

Natural law is intrinsic to human nature and is in a sense identical with human reason. Natural law is ‘the law of reason’ or ‘the requirements of reason’. Aquinas explained explicitly that in this context ‘natural’ is predicated of something (for instance law) only when and because that of which it is predicated is in line with reason or the requirements of reason.

The equation of ‘natural’ and ‘rational’ is based on a distinction between ontology and epistemology. In the order of being, what is good and reasonable is a consequence of what is foundational, given human nature. In the order of coming to know, the knowledge of human nature is in significant part a result of the understanding of what kinds of the possible objects of choice are good. The content of natural law is fixed – either wholly or in part – by human nature. A strong linkage between law and reason in Roman law, can be seen from adages such as:

- *Lex est dictamen rationis* (The law is the dictate of reason).
- *Lex est ratio summa, quae jubet quae sunt utilia et necessaria, et contraria prohibet* (The law is the highest form of reason which commands what is useful and necessary and forbids the contrary).
- *Lex spectat naturae ordinem* (The law regards the order of nature).
- *Lex semper intendit quod convenit rationi* (The law always intends what is agreeable to reason).

Aquinas imparted that morality is known to all those whose behaviour is subject to moral judgment. Thus, he ascertained that knowing what morality prohibits and requires does not involve knowing *why* this is so. Endorsement amounts to acceptance as reason endorses acting morally.

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<sup>80</sup> Aquinas, *In Duo Praecepta Caritatis et in Decem Legis Praecepta Expositio*; cf. Aquinas, *Summa Theologiae*, part I-II, question 91, art. 2.

<sup>81</sup> Aquinas, *Summa Theologiae*, pt. I-II, question 91, art. 3, question 94, art. 2.

This knowledge is exhibited in our inherent directedness toward the various human goods that natural law enjoins us to pursue. All human beings have a core of practical knowledge, according to Aquinas. This is true even if reason may be impeded from applying a universal principle to a particular action because of sensual desires or some other passion.<sup>82</sup> Natural law thus constitutes a set of naturally binding and knowable precepts of practical reason.

Natural law theory is value based. The transcendent human dignity that is innate in every human being is axiomatic.

### 5.3.2.3. Intrinsic Goods – Aspects of Human Flourishing

The fundamental principle of natural law is that good is to be done and evil avoided.<sup>83</sup> There are a variety of things that human reason naturally appreciates as goods and thus as things to be pursued – such as life, procreation, knowledge, social life, and reasonable conduct.<sup>84</sup> Aristotle argued that every human action and pursuit is aimed at some good. That is, it is in pursuit of some end that the human being wants for its own sake, and for the sake of which it wants all the other ends.

Focusing on the good in general, Aquinas argued:

*Good and being* are the same in reality and differ only conceptually. This is clear from the following line of reasoning: The nature of the good consists in something's being desirable; thus in *Ethics* 1 the Philosopher says, 'The good is what all things desire.' But it is obvious that each thing is desirable to the extent that it is perfect, since all things desire their own perfection. But each thing is perfect to the extent that it has actuality. Hence, it is clear that something is good to the extent that it is a being, since, as is obvious from what was said above, being (*esse*) is the actuality of each thing. Hence, it is clear that *good* and *being* are the same in reality, but that *good* expresses the nature of being desirable, whereas *being* does not.<sup>85</sup>

Furthering this line of thought, Aquinas added:

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<sup>82</sup> *Ibid.*, part I-II, question 94, art. 6.

<sup>83</sup> *Ibid.*, part I-II, question 94, art. 2.

<sup>84</sup> *Ibid.*, part I-II, question 94, arts. 2 and 3.

<sup>85</sup> *Ibid.*, part I, question 5, art. 1.

Since the good is that which everything desires, and since [being desired] has the character of an end, it is clear that *good* expresses the nature of an end. Still, the concept of the good presupposes the concept of an efficient cause as well as the concept of a formal cause. For we notice that what is first in causing is last in being caused. ... Now in causing, the first thing we find is the good and the end, which moves the efficient cause; next is the action of the efficient cause, moving [the patient] toward the form; and third is the appearance of the form. Thus, the converse must be the case in the thing caused: First comes the form itself, through which there is being; next we see the form's effective power, by virtue of which it has perfection in being (since, as the Philosopher says in *Meteorologia* 4, a thing is perfect when it can make something similar to itself); and third follows the nature of the good, through which the perfection is grounded in the entity.<sup>86</sup>

There are some things that are universally and naturally good. Like Aristotle, Aquinas considered that what makes it true that something is good is not that it stands in some relation to desire, but rather that it is somehow perfective or completing of a being – with what is perfective or completing of a being depends on that being's nature. It makes sense to speak of universal goods thusly:

Acts are called human insofar as they are voluntary. But among voluntary acts there are two sorts, (a) an *interior act* of willing and (b) an *exterior act*, and each of these acts has its own object. Now the end is, properly speaking, the object of the interior voluntary act, whereas the object of the exterior action is what that action has to do with. Therefore, just as the exterior act takes its species from the object that it has to do with, so the interior act of willing takes its species from the end as from its proper object. The result is that what exists on the side of the will is like a form (*se habet ut formale*) with respect to what exists on the side of the exterior act, since the will uses the members of the body as instruments in order to act. Nor do the exterior acts have the nature of moral acts except insofar as they are voluntary. And so the species

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<sup>86</sup> *Ibid.*, part I, question 5, art. 4.

of a human act is thought of *formally* in accord with *the end* and *materially* in accord with *the object of the exterior act*.<sup>87</sup>

It may be said that to Aquinas, human nature is understood by understanding the human being's capacities, which are understood through understanding its acts, which are further understood via understanding its objects. The objects of chosen acts are the intelligible intrinsic goods – aspects of human flourishing – which human beings are directed to by practical reason's first principles.

The innate desirability of flourishing in life and health, in knowledge and in friendly relations with fellow human beings, is enunciated in first and original principles of practical reasoning. Such foundational principles direct the human being to actions, dispositions and arrangements that foster such comprehensible goods. In the words of Aquinas: “to choose is to desire something for the sake of attaining something else, and so, properly speaking, choice is directed toward the means to an end”.<sup>88</sup>

The understanding of the fundamental goods follows in part from the persistent pursuit of certain ends that are perceived as good, and in part from observation of human nature and its potentialities. The one approach may serve to correct and refine the other. It may nevertheless be difficult to find full agreement on a catalogue of basic goods.<sup>89</sup>

The foundation of the duty of absolute respect for human life is to be found in inherent human dignity and not simply in the natural inclination to preserve one's own physical life. Human life acquires a moral significance in reference to the good of the person, who must always be affirmed for her or his own sake.

Most philosophers would rank human life as a primary good. Without rejecting this proposition, it may nevertheless be argued that human life is the essence of that being, and that in the case of human life there is no distinction to be made other than between the ‘essence’ of being human and ‘being’, cf. Suárez' definition of *ens finitum*.<sup>90</sup> A separation of

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<sup>87</sup> *Ibid.*, part I-II, question 18, art. 6.

<sup>88</sup> *Ibid.*, part I, question 83, art. 4.

<sup>89</sup> Augustine reports another philosopher having ascertained that 288 sects of philosophy might be formed by the various opinions regarding the supreme good; cf. Augustine, *De Civitate Dei*, book XIX, chap. 1.

<sup>90</sup> Cf. Augustine, *De Civitate Dei*, book XIX, chap. 1.2.2.

*corpore et anima* leads to death and is distinct from an end desired for the sake merely of human flourishing. Every other good is but to give quality and perfection to the life upheld. This is no less so even if in other contexts many will reject the notion of a real essence and the derivative idea that some among the properties true of an object are essential to that object. Life is the *conditio per quam* – the condition by means of which – *inter homines esse*.

The prohibition against killing the innocent, oblige *semper et pro semper*, that is, all without any exception.

The ‘good’ is fundamental and prior to the right within natural law. One way or another the human being is able to reason from the principles about the goods to an understanding of how these goods are to be pursued. There are certain ways of acting in response to the basic human goods that are essentially defective. For an act to be reasonable and thus right it should in no way be intrinsically imperfect.<sup>91</sup> Right action is action that responds in a flawless manner to the good.

The question is how to identify the ways in which an act can be essentially flawed. Aquinas advised that one has to look at the features that distinguish the acts – such as, but not limited to: their objects, ends and circumstances.<sup>92</sup> It is not possible to exhaustively state principles of conduct that determine right course of action in every situation. There are however, some principles of right conduct that hold universally. A paramount example is that killing of the innocent is always wrong. Like Aristotle before him, Aquinas agreed that given the particulars of many concrete situations of choice, a person needs virtue and practical wisdom to act properly.<sup>93</sup> General rules concerning the appropriate response to the goods can on occasions be made out by people of special sagacity.

Reason attests that there are objects of the human act which are by their very nature ‘incapable of being ordered’ to God, because they radically contradict the good of the person made in His image. These are the acts that in the Church’s moral tradition have been termed ‘intrinsically evil’ (*intrinsece malum*) – acts that in themselves, independently of circumstances, are always seriously wrong. Sometimes, however, it is deemed lawful to tolerate a lesser moral evil in order to avoid a greater

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<sup>91</sup> Aquinas, *Summa Theologiae*, part I-II, question 18, art. 1.

<sup>92</sup> *Ibid.*, part I-II, question 18, arts. 2–4.

<sup>93</sup> Aquinas, *Commentary on Nicomachean Ethics*, book II, lecture 2, 259.

evil. It is never lawful, even for the gravest reasons, to do evil that good may come of it. All distinct basic goods are not seen as having equal value.

Aquinas' natural law theory identified principles of right to be grounded in principles of good; but he rejected that the principles of the right direct the human being to maximise the good. Considerations of the greater good may not any the less have a role in practical reasoning.

The morality of human actions, Suárez held, is that by virtue of which a human action can contract the species of goodness or badness.<sup>94</sup> In his view, neither the nature of an act, nor its normative evaluation can be divorced from the mode of its production. He argued that the morality of human action belongs to the act itself.<sup>95</sup> This he saw as a precondition for ascertaining the moral goodness or badness of actions regardless of the presence of commanding or prohibiting divine law. If acts are to have pre-positive moral properties, they must also have a pre-positive aptitude to be morally good or bad.

Suárez believed that what is naturally good is necessarily commanded by God; and that what is naturally bad is necessarily prohibited. Therefore, *the content* of natural law, *unlike its binding force*, does not have a positive source. Rather, it is dictated by nature itself, to which God's commands respond.

With reference to the Decalogue, it is appreciated that the commandments shed light on the fundamental rights inherent in human nature. The commandments thus represent the basic condition for and the proof of the love of one's neighbour. It has been argued that Aquinas used: "You shall love your neighbour as yourself" as what in later theory has become known as a 'master rule'.

Such a 'superior rule approach' on the part of Aquinas would be fully in line with and a natural follow-up to the transcendent truth of the human dignity inherent in every human being, the first and correct principle of morality.

"You shall love your neighbour as yourself" is however, much more than a master rule. It is *the* commandment of the New Testament, and it

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<sup>94</sup> Suárez, *Opera Omnia*, vol. IV, *De bonitate et malitia actuum humanorum*, disp. 1, proem.

<sup>95</sup> The morality of the act consists in its dependence on volition as the productive impetus behind the act and on reason as the guiding set of rules that the agent takes her or himself to be guided by in shaping the precise characteristics of the act. Cf. Suárez, *Opera Omnia*, vol. IV, *De bonitate et malitia actuum humanorum*, sect. 2, n. 15.

articulates the singular dignity of the human person. It thus contains the basic *reason for* and *purpose of* the law. At the same time, it represents an ordered complex of personal goods that serve the good of the person – the good that is the person itself and her or his perfection. These are the goods safeguarded by the commandments, which, according to Aquinas, contain the whole of natural law.<sup>96</sup>

A master rule relates to a good in a general manner. From this general rule, numerous provisions concerning reasonable responses in specific concrete situations may be derived. The correlation has some semblance to what pertains to the relationship between a *lex generalis* and a *lex specialis*. “You shall not kill”<sup>97</sup> may serve as an example of a master rule.<sup>98</sup>

#### 5.3.2.4. Universal – Common to Humankind

As previously indicated, natural law theory is value based. The transcendent human dignity that is innate in every member of the human family, is axiomatic. This status is not relative either to community or to convention. Because natural law expresses the dignity of the human person and lays the foundation for her or his fundamental rights and duties, it is universal in its precepts and its authority extends to all humankind. Natural law unites in the same common good of all people, created for the same destiny.

This universality is not in conflict with the absolute uniqueness of each person. Natural law corresponds to things known through practical wisdom by all human beings. As natural law constitutes the basic principles of practical rationality, Aquinas reasoned that the precepts of natural

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<sup>96</sup> Cf. Aquinas, *Summa Theologiae*, part I-II, question 100, art. 1.

<sup>97</sup> *The Bible*, Exodus. 20:13.

<sup>98</sup> Addressing the basis in reason of changes of whatsoever kind which may affect the obligation of natural law without changing the nature of the law, Suárez applied an illustration drawn from Augustine:

Just as the science of medicine lays down certain precepts for the sick, and others for the well, certain ones for the strong, and others for the weak, although the rules of medicine does not therefore undergo essential change, but merely become multiple in their number, so that some serve on one occasion, and others, on another occasion; even so, natural law, while it remains the same, lays down one precept for one occasion, another, for another occasion; and is binding at one time, and not binding previously and subsequently, and this without undergoing any change in itself because of a change in the subject-matter.

law are universally binding by nature.<sup>99</sup> That is, its norms are naturally authoritative over all human beings.

Augustine wondered:

Where then are these rules written, except in the book of that light which is called truth? From thence every just law is transcribed and transferred to the heart of the man who works justice, not by wandering but by being, as it were, impressed upon it, just as the image from the ring passes over to the wax, and yet does not leave the ring.<sup>100</sup>

It is because of this ‘truth’ that natural law involves universality. As it is inscribed in the rational nature of the person, it makes itself felt to all human beings endowed with reason. In order to perfect itself in its specific order, the human being must do good and avoid evil, be concerned for the transmission and preservation of life, refine and develop the riches of the material world, cultivate social life, seek truth, practise good and contemplate beauty.<sup>101</sup>

Natural law is intended to be part of a comprehensive theory of practical reason based on a sound understanding of the human being and of the lasting characteristics of the human condition. Natural law is suitable to direct the human beings to the good for human flourishing both as individuals and as members of the plurality.

Given human nature, no human being is exempt from the precepts of natural law. This is so because these precepts direct the human being toward the good as such and various particular goods.<sup>102</sup> The good and goods provide reasons for the rational human being to act, to pursue the good and these particular goods. As good is what is perfective of the human being given the human nature,<sup>103</sup> the good and these various goods have their status as such naturally. It is sufficient for certain things to be good that the human being has the nature that it has. The common human nature means that the good for the human being is what it is.

The negative precepts of natural law oblige every human being in all circumstances. It is prohibitions that forbid a given action *semper et*

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<sup>99</sup> Aquinas, *Summa Theologiae*, part I-II, question 94, art. 4.

<sup>100</sup> Augustine, *De Trinitate*, book XIV, chap. 15, 21.

<sup>101</sup> Cf. Aquinas, *Summa Theologiae*, part I-II, question 94, art. 2.

<sup>102</sup> *Ibid.*, part I-II, question 94, art. 2.

<sup>103</sup> Cf. *ibid.*, part I, question 5, art. 1.

*pro semper*, without exception, because the choice of this kind of behaviour is in no case compatible with the goodness of the will of the acting person and with its vocation to communion with her or his neighbour.

### 5.3.2.5. Immutable – In Principio, Nunc et Semper

The precepts of natural law unite in the same common good not only humankind at any given time but all people of every period in history. Every human being is created for the same destiny. As long as human nature remains unchanged, natural law is unchanging.

Inasmuch as natural law expresses the dignity of the human person and lays the foundation for its fundamental rights and duties, it is universal in its precepts and its authority extends to all humankind throughout time – in the beginning, at present and in the future (*in principio, nunc et semper*). As stated by Suárez:

No human power [...] can abrogate any proper precept of natural law, nor truly and essentially restrict such a precept, nor grant a dispensation from it.

The immutability of natural law entails the existence of objective norms of morality valid for all people. This is possible as natural law not only lays down rules but also recommends ideals. Natural law embraces a distinction between commands or prohibitions, to which there are no exceptions, and ‘indications’ (*demonstrationes*) pointing out what is better but not always obligatory. The indications do not impose strict obligations. Dependent on the circumstances, human laws can for good reasons set aside indications.

As Augustine explained, the same God is the Author of the Old Law and of the New. Under changing circumstances, the same principles may require different particular rules. Said differently: whereas some principles of natural law apply everywhere and always, some apply only ‘on supposition’, unless those concerned agree on something else.

Even though the human being always exists in a particular culture, the human being is not exhaustively defined by that culture. There are permanent structural elements of the human being that are connected with her or his own bodily dimension. There are things in this that do not change.

There will nevertheless be a constant need to seek out and to discover the most adequate formulation for universal and permanent moral norms in the light of different cultural contexts. That is, formulations most

capable of ceaselessly expressing their historical relevance, of making them understood and of authentically interpreting their truth. The truth of the moral law unfolds down throughout the centuries. The norms expressing that truth remain valid in their substance, but must be specified and determined in the light of historical circumstances.

In the words of Aquinas:

As was explained above, those things to which man is naturally inclined belong to the law of nature – and, among other things, it is proper to man that he be inclined to act in accord with reason. Now as is clear from *Physics* 1, it belongs to reason to proceed from what is universal (*ex communibus*) to what is particular (*ad propria*). However, speculative reason and practical reason behave differently on this score. For since speculative reason deals principally with necessary things, which are such that it is impossible for them to be otherwise, truth is found without exception (*absque aliquo defectu*) in the particular conclusions in just the way it is found in the universal principles. By contrast, practical reason deals with contingent things, which include human actions, and so even if there is some sort of necessity in the universal principles, nonetheless, the further down one descends to particulars, the more exceptions there are. So, then, in speculative matters there is the same truth for everyone both in the principles and in the conclusions, even though the truth is known to everyone only in the principles, which are called common conceptions, and not in the conclusions. By contrast, in practical matters, there is the same practical truth or correctness (*rectitudo*) for everyone only with respect to the universal principles and not with respect to the particulars. [...]

So, then, it is clear that *with respect to the universal principles of either speculative reason or practical reason*, there is the same truth or correctness for everyone and it is equally well known to everyone.

Again, *with respect to the particular conclusions of speculative reason*, there is the same truth for everyone, though it is not equally known to all of them.

[...]

However, *with respect to the particular conclusions of practical reason*, there is not the same truth, i.e. correctness,

for everyone, and even in the case of those for whom it is the same, it is not equally known to everyone.<sup>104</sup>

Suárez disagreed with Aquinas's claim that God can change or suspend some of the secondary precepts of natural law, such as the prohibitions on murder, theft, and adultery.<sup>105</sup> As long as human nature remains unchanged, Suárez argued that natural law is immutable. What may appear to be divinely-made changes in natural law are in reality alterations of subject matter.

### 5.3.3. Civil Law

#### 5.3.3.1. Must Conform to the Eternal and Natural Law

[L]aw implies a certain plan that directs acts to their end. [...] Therefore, since the eternal law is the plan of governance that exists in the highest governor, all the plans of governance found in the lower governors must flow from the eternal law. Now these plans of the lower governors consist in all the kinds of law besides eternal law. Hence, all laws flow from the eternal law to the extent that they participate in right reason.<sup>106</sup>

Aquinas followed the Roman law tradition of observing a distinction between natural law, the law of nations (*ius gentium*) and civil law (that is the law of a particular community).<sup>107</sup> The first issue that Aquinas raised about civil law is whether human law is beneficial. Might the communities of human beings not do better with admonitions and warnings, or with judges appointed to 'living justice', or with wise leaders rendering 'judgements' as they see appropriate?<sup>108</sup>

Natural law theory has throughout understood civil law as morally challenging, but as an indispensable instrument of great good. To ensure that the very same instrument does not become an apparatus of great evil, the lawmakers are under a moral obligation to amend the civil law continuously so that it is appropriate and beneficial to the needs of its subjects. The duty pertains not only to settling the content of the rules and the principles, but relates to establishing the procedures and institutions of the

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<sup>104</sup> *Ibid.*, part I-II, question 94, art. 4.

<sup>105</sup> *Ibid.*, part I-II, question 94, art. 5.

<sup>106</sup> *Ibid.*, part I-II, question 93, art. 3.

<sup>107</sup> *Ibid.*, part I-II, question 95, art. 4.

<sup>108</sup> *Ibid.*, part I-II, question 95, art. 1.

legislative power and of the administration of justice as well. Human law is the remedy against the great evils of, on the one side lawlessness (the law of the stronger), and on the other side tyranny. One characteristic element of tyranny is a sham legal system – that is, the abuse of law as a disguise for fundamentally lawless decisions cloaked in the forms of law and legality.

The individual human being is the ultimate unit of all law – being: her, him and them. Law, in according to Aquinas, has to do properly, primarily and principally with an ordering toward the common good, which belongs to all people.<sup>109</sup> All civil law precepts must be in accordance with natural law.<sup>110</sup> That is, the civil law cannot altogether abolish the original commonness of things under natural law. This is pivotal for balancing between the evils of lawlessness and tyranny.

While the civil law rules should be derived from natural law, these precepts have their legal force from their part in a civil law system.<sup>111</sup>

According to Aquinas, at any time and place a very large portion of human law could reasonably have been different. Beyond the prohibitions of natural law, it is for the peoples to decide for themselves under which laws they want to live given all relevant circumstances such as time, place and societal factors. Distinguishing right and wrong on this level, context is everything. Human law is said to permit certain things not in the sense that it approves of them, but rather in the sense that it is incapable of directing them.<sup>112</sup>

### **5.3.3.2. Agreed upon by Human Beings for their Entity**

Suárez argued that human beings have a social nature bestowed upon them by God, and this includes the potential to make laws. “Man is a social animal, and cherishes a natural and right desire to live in a community”. In whom or in what however, does the power to make human laws reside? “The power in question exists by the sole force of nature, not in any individual man, but in men, viewed as a whole”.

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<sup>109</sup> *Ibid.*, part I-II, question 90, art. 3. Roman law repeatedly emphasised that the explanatory reason for law is the human persons for whose sake it is made.

<sup>110</sup> *Ibid.*, part I-II, question 95, art. 2.

<sup>111</sup> *Ibid.*, part I-II, question 95, art. 3.

<sup>112</sup> *Ibid.*, part I-II, question 93, art. 3.

All men are by the force of nature born free, so that no person is endowed with political jurisdiction over another person; even as no one is endowed with dominion over another, nor is there any reason why such dominion should be bestowed upon certain persons with respect to others, rather conversely.

When people form a political society, the authority of the State is of human origin. From the fact that people establish a community, the entire community becomes endowed with the power of establishing human laws – the civil law of that community. The people chose the nature of their political entity, and they opt for how to dispense their natural legislative power. Natural law does not make it obligatory that the people exercise their power to legislate directly by the community as a whole. Conversely, it would be demanding from a practical viewpoint if that were the case. Legislation to be adopted by universal vote – save for in the rare cases – would be challenging and, in particular, be costly in pecuniary terms. A delegation of the legislative power to a limited group is the sensible option.

Civil law in consequence may vary considerably not only over time, but from one community and civil society to another. If a government is imposed on people, they have the right to defend themselves by revolting against it and even killing the tyrannical ruler, Suárez reasoned.

Any kind of government should be of the people and for the people. The people are the source of power in the State. This understanding has a bearing both on the human relations within States and between States. Political authority is the remedy for anarchy, injustice and impoverishment in communities. The rule of law is as well the remedy for the dangers in having rulers. The liberty of those who are in authority does not consist in the power to enact contrary to the precepts of natural law.

Aristotle held that in almost all societies, on almost all occasions and issues, it is preferable that government be by and in accordance with law. The reasons being:

1. laws are products of reason not passion,
2. the sovereignty of a ruler or assembly tends to rule in the interests of a section and not for the common good;
3. equality demands that each mature person have some share in governing; and

4. the rotation of offices and officeholders is desirable and can hardly be managed without legal regulation.

That is, government by law and legally regulated rulers are usually desirable.

To Aquinas, the ideal is the self-government of a free people by the rulers and institutions that that people has appointed for that purpose. Law ideally fosters the co-ordination of willing subjects. Each individual left to strive exclusively for its personal good, is unlikely to be conducive to the accomplishment of the common good. A precondition for its harmonising effect is that the law by its public promulgation, clarity, generality, stability and practicability, treats its subjects as partners in public reason.<sup>113</sup> Laws are practical propositions conceived by the legislative power and communicated to the reason of the people so that they, as subjects of the law, will treat these propositions as reasons for action. That is – ideally speaking – as reasons decisive for each of them as if each had conceived and adopted the reasons by personal judgment and choice. The standard and rule of human liberty in the community should as far as possible be in line with that of the individual, so that through the injunctions of the civil law all may more easily conform to the prescriptions of natural law.

Civil law is positive law enacted by a proper designated legislature. As long as the binding precepts of natural law are not violated, legislation in civil law may well be, and normally is, adopted by a majority decision. In the words of Vitoria: “for the state has the power of self-government, and the act of the greater part is the act of the whole”.

For if two parties disagree, it must necessarily result that the sentiment of one party should prevail; and inasmuch as their desires conflict, the sentiment of the party which is in the minority ought not to prevail; therefore, it is the sentiment of the majority which should dominate.

### **5.3.3.3. Interpretation, Equity and Mutability**

Fairness – a core element of the rule of law – demands that equal situations are handled in a similar manner regardless of the persons involved. The law is the main equaliser – no one shall be above or beyond the law, and everyone shall have equal standing before the law. Even-handedness

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<sup>113</sup> Cf. *ibid.*, part I-II, question 90, art. 4; question 95, art. 3; question 96, art. 1; question 97, art. 2.

in law in contradistinction to arbitrariness was recognised in ancient times as a property of a well-organised legal system. Some of the old Roman law adages illustrate this:

- The first part of equity is equality.
- Reason in law is perfect equality.
- Laws should bind their own author.
- To adhere to precedents and not to leave established principles.

It is appreciated that ‘such is not the same, for nothing similar is the same thing’. This, however, does not imply that it is impossible to have some agreed and more objective standards for identifying similarity and differences between cases – to avoid arbitrariness and discrimination.

Due to its general character, law cannot however regulate every situation with all its particularities in every detail. To some extent, legal precepts must be subject to interpretation. This is captured in the Roman maxim, “The law does not define exactly, but trusts in the judgment of a good man” (*Lex non exacte definit, sed arbitrio boni viri permittit.*) As for the interpretation as such – and fully in line with the subsequent natural law theory as well, Roman law advised: “The law always intends what is agreeable to reason” (*Lex semper intendit quod convenit rationi*).

Moreover, all things subject to change never remain constant, but continually pass from one State to another. Human life itself is always subject to change. Since no legislator can foresee every case that may arise, it will not always suffice with interpretation of the law. The rule of law entails that the law is tempered by ‘equity’ (*epieikeia*). When exceptional cases arise, there must be room for the making of exceptions to general rules.<sup>114</sup> This is different from, and goes beyond, interpretation.

Most importantly, civil law is subject to change – it is mutable following the legislative procedure of the actual community. This is an absolute requirement for the law to appropriately address changing circumstances. A civil law system should be stable and predictable, but never stagnant. The law is there to provide for the needs of the human beings – for protecting and preserving mortals. Least the laws are aimed at regulating the actual conditions of life, their value will be limited and the laws may lead to injustice if not to lawlessness or tyranny.

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<sup>114</sup> Cf. Aristotle, *Politics*, book III, part 16; *Nicomachean Ethics*, book V, part 10 and *supra* Section 5.3.1.2.

#### 5.3.3.4. Territorial Jurisdiction

Where there is law, there must be a remedy. Unless the laws are enforceable, they may have no chastening and regulating force and thus fail in providing for the common good of the subjects. In the single State there are laws prescribing rights and their correlative duties, and a means of protecting these rights and enforcing the performance of these duties. No society could hold together unless there exists a power and authority to deter wrongdoers and prevent them from injuring the good and the innocent. Thus, Vitoria ascertained:

Everything needed for the government and preservation of society exists by natural law, and in no other way can we show that a state has by natural law authority to inflict pains and penalties on its citizens who are dangerous to it.<sup>115</sup>

A government has a general power to exercise authority over all the members of the community regulated by the law and all other persons within that law's ambit. That is, the individual State's jurisdiction is, in general, limited to its territory. This corresponds to the area for which the people have legislated and for which the civil laws have been adopted. The courts of the State take charge of violations of the law committed within their jurisdiction by offenders on their territory or available to be returned to their territory.

The civil law of one State is neither valid nor enforceable in another.

#### 5.3.4. *Ius Gentium*

##### 5.3.4.1. Character and Rationale

Vitoria, supported by a reference to *Institutes*, asserted that *ius gentium* is either natural law or derived from natural law, "What natural reason has established among all nations is called the *ius gentium*" (*Quod naturalis ratio inter omnes gentes constituit, vocatur ius gentium*).

The full text in *Institutes* reads: "*Quod vero naturalis ratio inter omnes homines constituit, id apud omnes populos peraeque custoditur vocaturque ius gentium, quasi quo iure omnes gentes utuntur*" (The law that natural reason has established among all persons, that law is observed uniformly among all, and is called the *ius gentium*).<sup>116</sup>

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<sup>115</sup> Vitoria, *On the Law of War*, p. 172.

<sup>116</sup> Justinian, *Institutes*, book I, II-1.

Vitoria adapted his quote from Roman law by equating the words *gentes* and *nationes* – that is making them synonymous. Thereby he identified the *ius gentium* as law applicable to nations and not only to individuals.<sup>117</sup> The reason is that the State, like the individual, cannot exist and prosper in isolation.

Vitoria acknowledged the international community that had come into being of itself, irrespective of the will or the action of any man or group. The international community is comprised of each and every State and exists, according to Vitoria, *ex jure necessitates*.

International law has not only the force of a pact and agreement among men, but also the force of a law; for the world as a whole, being in a way one single state, has the power to create laws that are just and fitting for all persons, as are the rules of international law. Consequently, it is clear that they who violate these international rules, whether in peace or in war, commit a mortal sin; moreover, in the gravest matters, such as the inviolability of ambassadors, it is not permissible for one country to refuse to be bound by international law, the latter having been established by the authority of the whole world.

Suárez also considered the existence of States as isolated and unrelated entities as impossible.

The rational basis for this branch of law, indeed, consists in the fact that the human race, howsoever many the various peoples and kingdoms into which it may be divided, always preserves a certain unity not only as a species, but also, as it were, a moral and political unity called for by the natural precept of mutual love and mercy, which applies to all even to strangers of any nation.

Therefore, although a given sovereign state, commonwealth, or kingdom, may constitute a perfect community in itself, consisting of its own members, nevertheless, each one of these states is also, in a certain sense, and viewed in relation to the human race, a member of that universal society; for never are these states when standing alone, so self-sufficient that they do not require some mutual assistance,

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<sup>117</sup> *Ius gentium* initially having been rules and principles found in similar or identical forms in most legal systems. These were precepts necessary, according to reason, for individuals, families and other groups to live together in some kind of harmony.

association and intercourse, at times for their greater welfare and advantage, but at other times because also of some moral necessity or lack, as is clear from experience.

Consequently, such communities have need of some system of law whereby they may be directed and properly ordered with regard to this kind of intercourse and association; and although this law is in large measure provided by natural reason, it is not provided in sufficient measure and in a direct manner, with respect to all matters; therefore, it was possible for certain special rules of law to be introduced through the practice of these same nations.

For just as in one state or province law is introduced by custom; so among the human race as a whole it was possible for laws to be introduced by the habitual conduct of nations, and all the more because the matters comprised within this latter system of law are few, and very closely related to the natural law, and most easily deduced therefrom in a manner so advantageous and so in harmony with nature itself, that while this derivation may not be self-evident, that is, not essentially and absolutely required for moral rectitude, it is nevertheless quite in accord with nature, and universally accepted for its own sake.

Suárez saw international law as largely based on custom.

#### 5.3.4.2. Sources

Aquinas, Vitoria and Suárez all saw the relationship among States as ordered in part by natural law. To them it was self-evident that any regulation in this sphere – be it custom or human law – would have to conform to binding precepts of natural law. Beyond that, *ius gentium* would have the same mutability as civil law in order to provide for the common good of the peoples of the whole world.

In the context of international criminal law, it is important to note that Aquinas, with basis in natural law, drew conclusions (entailments) of the very highest level concerning the most general moral principles. These wrongs are referred to as *mala in se* (things wrong in themselves), as distinct from *mala prohibita* (wrong only because prohibited by law). Aquinas recognised *mala in se* (such as but not limited to the crime now identified as genocide) as norms that prohibit such acts *semper et pro semper*, that is, without any exception. This may be described as *ius cogens erga*

*omnes* – law that is compelling in relation to everyone without agreement or enactment or other forms of adoption.

Suárez saw international law as having developed rather slowly through customs and somehow followed among the inorganic community of States.

Vitoria, recognised the commonwealth of nations, as a legislature – having the power to create laws and to enforce them. As he saw the law of nations: “even if we grant that it is not always derived from natural law, yet there exists clearly enough a consensus of the greater part of the whole world, especially in behalf of the common good of all”. Vitoria acknowledged that a majority of humankind possess the right to incorporate in the law of nations as it exists at any one time, any further rules and principles to adapt to changing circumstances. The world community (by some significant majority) has not only the authority to make laws, but also to secure their enforcement.

#### **5.3.4.3. Jurisdiction in Relation to Transnational and International Wrongs**

Where there is law, there must be a remedy – whether international or national arenas.<sup>118</sup> There is an absolute need for jurisdiction in relation to transnational and international wrongs. It no more suffices that avenging a serious wrong that is not redressed by the State of the culprits, is an accepted reason for a just war.

Unless laws are enforceable, they have no regulating force and thus fail in providing for the common good of their beneficiaries. Where there are laws prescribing rights and their respective duties, there is a practical need for means of protecting these rights and enforcing the performance of these duties. The harmonious and peaceful relation among nations presupposes that wrongs can be rectified according to law and not merely by force. Therefore, according to Vitoria, in disputes among States, jurisdiction may be said to be conferred by international law.

As for the *mala in se*, it may be questioned whether Aquinas’ reasoning according to natural law has not already made such crimes as genocide, crimes against humanity and major breaches of the law of war into

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<sup>118</sup> Cf. Hanne Sophie Greve, “*Ubi Ius Ibi Remedium*”, FICHL Policy Brief Series No. 80 (2017), Torkel Opsahl Academic EPublisher, Brussels, 2017 ([www.toaep.org/pbs-pdf/80-greve/](http://www.toaep.org/pbs-pdf/80-greve/)).

*ius cogens erga omnes*. This understanding can be seen as endorsed by the adoption of the Charter of the United Nations – whereby this part of the law *ipso facto* was made an integrated part of international law as such.

Jurisdiction in relation to transnational and international wrongs may today be had by individual States with some relation to the wrong to be judged, or it can be administered by international courts.

#### 5.4. Concluding Remarks

Certain moral precepts are inherent by virtue of human nature. There is a link between transcendent human dignity and the law of nature or the law of reason. This law by no means settles all questions. But it testifies to the crucial truth that humankind has, in a sense, a common patrimony in terms of an understanding of the basics of human life – that of *the singular human being* and that of *the plurality*.

There *is* behaviour and human conduct – the issue is only who is establishing the rules, *de facto* legislating by setting the standards. There is *no normative void*, that is, nowhere in the relationship between human beings there are behaviour not following any norms.

The world community may continue to accept serious disagreements on a transnational or international level settled by ‘fire and fury’ – by force suit and not lawsuit, that is. In the alternative, the world may opt to promote the common good of people everywhere by settling also the most severe differences by the rule of law. Political leaders may feel inhibited by the rule of law – as any local tyrant would be – but it does not change the basic fact that for the common good the rule of law is preferable also in the international arena. There is, furthermore, no reason for political power beyond that in the service of the well-being of the people.

Although the members of a society may have different ultimate values, they will have intermediate ends in common such as a desire for justice and peace. The peace of all things lies in the tranquillity of order, and order is the disposition of equal and unequal things in such a way as to give to each its proper place.<sup>119</sup>

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<sup>119</sup> Augustine, *De Civitate Dei*, book XIX, chap. 13.

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# **Buddhist Philosophy and International Criminal Law: Towards a Buddhist Approach to Reckoning with Mass Atrocity**

**Tallyn Gray\***

## **6.1. Introduction**

International criminal law is a relatively new field, having emerged in the wake of European atrocities of the last century. Hence it is to be expected that the philosophical fundamentals of contemporary international criminal law emerge out of Greco-Roman and Judaeo-Christian tradition. The presence of a vast index of Western thinkers – Plato, Augustine, Aquinas, Grotius, Hobbes, Kant and so on – is detectable within its nucleus; they are the formative intellectual tradition from which international criminal law emerged. The teachings of Plato’s near-contemporary Siddhatta Gotama,<sup>1</sup> better known as the Buddha, the ancient Indian prince on whose teachings Buddhism was founded, are not a part of these philosophical origins. This chapter outlines a speculative framework for a specifically Buddhist jurisprudence for dealing with mass atrocity crimes.

In an increasingly globalised world, humankind has no choice but to respond to atrocities across the globe. Hence international criminal law needs to reflect on its ability to respond across cultural difference and to become aware of its own limitations. International criminal law is a product of the European Enlightenment, as the Enlightenment is itself a product of Western classical texts. International criminal law in the globalised world has to move away from insular preoccupation with its own foundational European texts to remain relevant. As Werner Menski argues, uni-

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<sup>1</sup> Gill Farrer-Halls, *The Illustrated Encyclopedia of Buddhist Wisdom*, Godsfield Press, New Alresford, 2000, p. 12.

versalised outlooks of law and of justice must be conscious of their positivistic and Eurocentric preconceptions and the necessity to understand law in a pluralistic world:

With the Eurocentric, positivistic and modernistic blinkers removed, we are free to explore the legal world in its complexity and richness and we need not worry about politicking over the nature of law.<sup>2</sup>

International criminal law at the very least needs to be aware of other, extra-legal, disciplines; as Gideon Boas argues, “while as international lawyers we have raised important questions about legitimacy and coherence, we do not always open ourselves to a genuinely multidisciplinary approach to international criminal justice”.<sup>3</sup>

Hence, this chapter is embedded in Yasuaki’s call for “inter-civilisational discourse” to achieve the widest possible global consensus on human rights,<sup>4</sup> through an open-ended discourse on core ideas. As such it is not attempting to demonstrate universality across philosophical traditions, or even synergy between value systems, although such an endeavour would certainly be possible and perhaps even successful: obviously, the fact that two intellectual traditions are unconnected does not preclude them from reaching similar conclusions. But the goal here is to take core concepts explicitly tackled by international criminal law and understand how those issues can be addressed in Buddhist thought.

International criminal law is a way to systematically examine, and reckon with, mass atrocities. This chapter explores how such events are conceptualised in Buddhist thought and scrutinises what prescriptions could be imagined within that philosophical framework. Common ground may be apparent between different traditions; however, it is important to avoid ventriloquising international criminal law principles through a Buddhist framework; instead, it is necessary to seek out Buddhist perceptions and conceptions of, as well as responses to, mass violence. The chapter

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<sup>2</sup> Werner Menski, *Comparative Law in a Global Context: The Legal Systems of Asia and Africa*, 2nd edition, Cambridge University Press, Cambridge, 2006, p. 613.

<sup>3</sup> Gideon Boas, “What is International Criminal Justice”, in William A. Schabas *et al.* (eds.), *International Criminal Justice: Legitimacy and Coherence*, Edward Elgar Publishing, Cheltenham, 2012, p. 1.

<sup>4</sup> Onuma Yasuaki, “Toward A More Inclusive Human Rights Regime”, in Joanne R. Bauer and Daniel A. Bell (eds.), *The East Asian Challenge for Human Rights*, Cambridge University Press, Cambridge, 2010, pp. 118–23.

moves to go beyond the letter of international criminal law to seek an affirmation of the spirit of the ideas that drive the desire for post atrocity justice.

This is not an easy task, not least because, as Huxley has shown, European intellectual history makes a clear demarcation between religious knowledge (church fathers) and classical knowledge (pagan philosophers); in the Buddhist world, this segregation has not occurred along such strict lines.<sup>5</sup> This means that a discussion of Buddhist jurisprudence may move across some unfamiliar disciplinary boundaries. In particular, I would adduce Gotama's assertion that the prohibitions against violence, theft, drunkenness, lying and sexual misconduct – enforceable under the law – must be balanced by their positive counterparts; enjoining loving-kindness is given equal weight rather than being placed in a religious rather than a legal context.<sup>6</sup>

I would also contend that, in Buddhist terms this is 'the moment' to establish such a discussion. I will go on later to consider 'engaged' Buddhism more fully; however, it is worth noting at this stage that Buddhism in the mid-twentieth century began explicitly to open up intellectually to new paradigms, which have tended to be the preserve of non-religious disciplines and discourses – human rights, development economics, environmental protection, and nuclear weapons disarmament amongst others.

In some ways this will be a very basic chapter – a 'beginner's guide' to those within Western legal studies (and especially international criminal law) who may be unfamiliar with the foundational concepts of Buddhism. The chapter paints a picture with broad strokes.<sup>7</sup> However, I also hope that it may animate other students of Buddhist philosophy to consider how Buddhist principles can be used to contemplate humankind's response to atrocity. It is worth noting here that a majority of the

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<sup>5</sup> Andrew Huxley, "Buddhist Law as a Religious System?", in Andrew Huxley (ed.), *Religion, Law and Tradition: Comparative Studies in Religious Law*, Routledge, London, 2002, p. 144.

<sup>6</sup> Karen Armstrong, *The Great Transformation: The World in the Time of Buddha, Socrates, Confucius and Jeremiah*, Atlantic Books, London, 2006, p. 277.

<sup>7</sup> At this stage, it is important to state that indeed there is no such thing as 'Buddhism' any more than there is a single 'Christianity'; there is Buddhism in its historical, cultural and intellectual contexts. There are three major schools of Buddhism – Theravada, Mahayana and Vajrayana. This chapter addresses Buddhist thought in a very general sense rather than exploring a specific school in specific terms and, for the purposes of this chapter, this is all that a general reader need know.

world's Buddhists do not live in nations that are States Parties to the Rome Statute.<sup>8</sup> The countries with the largest Buddhist populations are in the Asia-Pacific region; these collectively are home to 95 percent of all Buddhists. Half of the world's Buddhists live in one country, China. The largest Buddhist populations outside China are in Thailand (13 percent), Japan (9 percent), Burma (Myanmar) (8 percent), Sri Lanka (3 percent), Vietnam (3 percent), Cambodia (3 percent), South Korea (2 percent), India (2 percent) and Malaysia (1 percent). Seven countries have Buddhist majorities: Cambodia, Thailand, Burma (Myanmar), Bhutan, Sri Lanka, Laos and Mongolia. Therefore, for many in Buddhist countries – including some current zones of conflict – there is no automatic ‘go to’ institutional framework in which to discuss the issues that the International Criminal Court (‘ICC’) is mandated to handle.

## 6.2. Existing Work

Almost nothing has been written on a philosophical level about Buddhism's relationship with international criminal law.<sup>9</sup> There are several explanations for this.

Until comparatively recently, Buddhism could have been said to lack a philosophical framework adaptive to modernist political concepts. Buddhism's focus in terms of governance, insofar as it had one, was primarily concerned with the personal qualities that make good and moral monarch, rather than with establishing a philosophical framework of State governance.<sup>10</sup> This is not to say that Buddhism has made no impact on law. However, Western scholarship has tended to assert that Buddhist philosophy (and indeed many non-Western cultures) lacks a legal tradition equivalent to that in societies where legal frameworks have emerged out of the

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<sup>8</sup> Pew Research Centre, “Global Religious Landscape: Buddhists 2012”, available on the web site of the Pew Research Centre.

<sup>9</sup> Although there are a number of works around transitional justice in Buddhist nations, and in particular Cambodia, a Buddhist nation that has been the first to use international criminal law in the modern sense to prosecute senior leaders of the ‘Khmer Rouge’ regime. There is a level of interaction between international criminal law, transitional justice and Buddhist discourses in Cambodia. A discussion on this would be rooted more in legal anthropology and sociology of law than philosophy. See my own work from this perspective: Tallyn Gray, “Research on Justice and the Khmer Rouge”, available on the personal site of Tallyn Gray.

<sup>10</sup> Karma Lekshe Tsomo, “Buddhist Perspectives on Human Rights”, in Steven M. Emmanuel (ed.), *A Companion to Buddhist Philosophy*, John Wiley & Sons, 2015, p. 651.

Abrahamic civilisations.<sup>11</sup> This is a product of Western ‘legal orientalism’ described by Teemu Ruskola as “a set of interlocking narratives about what is and what is not law and who are and are not its proper subjects”; he sees these narratives as “enjoy[ing] global circulation”.<sup>12</sup> This orientalism explains the gap in Western legal literature detected by Rebecca French, what she terms ‘The Case of the Missing Discipline’.<sup>13</sup>

Only recently has Western legal scholarship begun to address that gap and look seriously at one of Asia’s most significant philosophical traditions and its impact on the political and legal conscience of Asian societies, addressing Buddhist jurisprudence as a ‘legal family’ and demonstrating how Buddhist societies order themselves in a distinct Buddhist legal tradition in both State codification and in the Ehrlichian sense of ‘living law’.<sup>14</sup> The emerging body of literature on ‘Buddhist jurisprudence’ is exhibiting how systems rooted in Buddhist philosophy, discourse and semiotics answer questions of law and justice. These scholars assert the huge impact of Buddhism on the philosophical ancestries of legal systems in Asia at a variety of levels. Rebecca French, for example, has worked on the ontologies, epistemologies, cosmologies and day-to-day operations of law in Tibet.<sup>15</sup> Andrew Huxley carried out historical analysis of pre-colonial legal systems of Buddhist law in Myanmar;<sup>16</sup> in his work he has identified the Buddhist origins of Thai law emergent from the *Vinaya* (that is, the canonical law code that governs the community of Monks (*Sagha*), stories of the Buddha’s earlier life (*Jatakas*) and the

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<sup>11</sup> Rebecca Redwood French and Mark A. Nathan, “Introducing Buddhism and Law”, in Rebecca Redwood French and Mark A. Nathan (eds.), *Buddhism and Law: An Introduction*, Cambridge University Press, Cambridge, pp. 14–15.

<sup>12</sup> Teemu Ruskola, *Legal Orientalism: China, the United States, and Modern Law*, Harvard University Press, 2013, p. 5.

<sup>13</sup> Rebecca R. French, “The Case of the Missing Discipline: Finding Buddhist Legal Studies”, in *Buffalo Law Review*, 2004, vol. 52, no. 3, pp. 679–99.

<sup>14</sup> Eugen Ehrlich, *Fundamental Principles of the Sociology of Law*, Walter Lewis Moll trans., Routledge, 2017.

<sup>15</sup> Rebecca Redwood French, *The Golden Yoke: The Legal Cosmology of Buddhist Tibet*, 2nd edition, Snow Lion Publications, Ithaca, 2002.

<sup>16</sup> Andrew Huxley, “The Importance of the Dhammathats in Burmese Law and Culture”, in *The Journal of Burma Studies*, 1997, vol. 1, no. 1; Andrew Huxley, “Is Burmese Law Buddhist?”, in Melissa Crouch and Tim Lindsey (eds.), *Law, Society and Transition in Myanmar*, Hart Publishing, Oxford, 2014.

Buddha's discourses (*Suttas*).<sup>17</sup> David and Jaruwan Engel's work focuses on the legal consciousness of ordinary people in Thailand, and how Buddhist-influenced mediation processes are often chosen in preference to the legal structures of the State, for instance in cases of personal injury.<sup>18</sup>

An additional reason for the lack of encounter between Buddhism and international criminal law is that Buddhism has historically lacked a 'social gospel' comparable to other religious philosophical structures.<sup>19</sup> Over the course of the twentieth century, however, 'engaged Buddhism' (a term coined by the Vietnamese monk, scholar, and peace activist Thích Nhất Hạnh)<sup>20</sup> has emerged as a way to apply Buddhist teaching to the social, political, environmental and economic spheres. Emerging from this major intellectual development in modern Buddhism has been a growing body of work around Buddhism and human rights; indeed, there are powerful Buddhist human rights movements.<sup>21</sup> Perhaps the best known in the West is the 'Saffron Revolution', which took place between 2007–2008 in Myanmar. The notion of Buddhism working in the sphere of international legal regimes and institutions dealing with the aftermath of mass human rights abuses is thus a fairly new concept for international criminal law to absorb.

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<sup>17</sup> Andrew Huxley, "Introduction", in Andrew Huxley (ed.), *Thai Law: Buddhist Law: Essays on the Legal History of Thailand, Laos and Burma*, White Orchid Press, Bangkok, 1996, pp. 1–31.

<sup>18</sup> David M. Engel and Jaruwan Engel, *Tort, Custom, and Karma: Globalization and Legal Consciousness in Thailand*, Stanford Law Books, Stanford, 2010.

<sup>19</sup> Damien Keown, "Buddhism and Human Rights", in Damien Keown (ed.), *Contemporary Buddhist Ethics (Routledge Critical Studies in Buddhism)*, Routledge, London, 2000, pp. 57–58.

<sup>20</sup> Thích Nhất Hạnh, *Vietnam: Lotus in a Sea of Fire – A Buddhist Proposal for Peace*, Hill and Wang, New York, 1967.

<sup>21</sup> L.P.N. Perera, *Buddhism and Human Rights: A Buddhist Commentary on the Universal Declaration of Human Rights*, Karunaratne and Sons, Colombo, 1991; Christopher S. Queen and Sallie B. King (eds.), *Engaged Buddhism: Buddhist Liberation Movements in Asia*, State University of New York Press, Albany, 1996; Tenzin Gyatso, His Holiness the 14th Dalai Lama, "Human Rights, Democracy and Freedom", 2008, available on the web site of His Holiness the 14th Dalai Lama of Tibet; Damien Keown, "A Bibliography on Buddhism and Human Rights", in Wayne R. Husted, Damien Keown and Charles S. Prebish (eds.), *Buddhism and Human Rights (Routledge Critical Studies in Buddhism)*, Routledge, London, 2015, pp. 223–37.

### 6.3. Points of Comparison

This chapter builds on the works discussed above to explore how concepts within international criminal law can be thought about in a Buddhist frame. This is clearly a huge task, but this chapter will try to lay a few general foundations. I will focus on broad themes of international criminal law rather than specific concepts; hence the most useful intellectual touchstone for a comparative analysis is probably the list of core crimes set out in the Rome Statute of the ICC. This list expresses what international criminal law sets out to tackle: genocide, war crimes, crimes against humanity, and crimes of aggression. These are crimes so massive in scale as to be called crimes against the essence and meaning of what it is to be part of our species.<sup>22</sup>

International criminal law provides a prescription for working through the consequences of mass violence; it does so by establishing a record, holding those responsible to account and punishing them. International criminal law also acknowledges that the extremities of violence are ultimately so enormous that to deny a process of reckoning or accountability is, to repurpose the words of Robert Jackson in his final summation at the Nuremberg Military Tribunal in 1946, to “*say that there has been no war, there are no slain, there has been no crime*”.<sup>23</sup> Not to account for mass violence is to ignore it or to hold the view that it does not matter.

Exploring how the Buddhist intellectual tradition can conceive extremities of violence, what its goal in reckoning with mass bloodshed might be, and what processes it may or may not find useful, requires that I set out Buddhism’s primary ontological foundations.

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<sup>22</sup> David Luban, “A Theory of Crimes Against Humanity”, in *The Yale Journal of International Law*, 2004, vol. 29, no .1, pp. 85–167; M Cherif Bassiouni, *Crimes Against Humanity: Historical Evolution And Contemporary Application*, Cambridge University Press, Cambridge, 2011, p. 42.

<sup>23</sup> Robert Jackson, quoted in Telford Taylor, *The Anatomy of the Nuremberg Trials: A Personal Memoir*, Alfred Knopf, New York, 1992, p. 4.

#### 6.4. Some Basics of Buddhism<sup>24</sup>

To do this requires the shedding of some initial linguistic preconceptions. Words central to the international criminal law lexicon – ‘punishment’, ‘responsibility’, ‘accountability’, ‘mental state’ – are understood very differently in the Buddhist ontologies and epistemologies.

It is also important to point out the highly figurative nature of much of the terminology I am introducing here. Concepts of time, eternity, *nirvana*, and existence are framed in narratological and/or metaphorical terms in order to facilitate understanding, rather than being literal descriptions. The use of narratological devices occurs frequently in Buddhist philosophy. Indeed, as French argues, in Buddhist jurisprudence narratives “encode social concepts, meanings and structures in the legal cosmology”.<sup>25</sup> Nor are the stories I discuss later in this chapter to be taken literally. They are parables, and are subject to reinterpretation and what may seem like radical re-writing in order to accommodate for specific messages, issues and/or points in time and context.

Buddha is a title meaning ‘enlightened one’.<sup>26</sup> Gotama, however, actively eschewed a focus on himself; his person was not the key to personal salvation or redemption, nor did he prescribe religious doctrine; he revealed no creation stories and no prophecies of end times, but rather taught what he had discovered about the nature of the *dharma*,<sup>27</sup> that is, the ‘law’ of the universe, the nature of reality applicable to all planes of existence – to Gods, humans and animals. *Dharma* also refers to the teachings of Gotama on practice towards attaining *nirvana*.<sup>28</sup>

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<sup>24</sup> Aspects of these basic descriptions have appeared in Tallyn Gray, *Justice and the Khmer Rouge: Concepts of a Just Response to the Crimes of the Democratic Kampuchean Regime in Buddhism and the Extraordinary Chambers in the Courts of Cambodia at the Time of the Khmer Rouge Tribunal*, Working Paper No. 36, Centre for East and South-East Asian Studies, Lund University, Lund, 2012.

<sup>25</sup> French, 2002, p. 85, see *supra* note 15.

<sup>26</sup> Karen Armstrong, *Buddha*, Phoenix, London, 2000, p. xi; There are also other Buddhas. The *Buddhavamsa* describes the lives of the twenty-four other Buddhas who preceded Siddhatta Gotama.

<sup>27</sup> *Dharma* is a complex term with multiple meanings across Hinduism, Buddhism, Sikhism and Jainism.

<sup>28</sup> Peter Harvey, *An Introduction to Buddhism: Teachings, History and Practices*, 2nd edition, Cambridge University Press, Cambridge, 2013, p. 2; Christmas Humphreys, *A Popular Dictionary of Buddhism*, 3rd edition, Curzon Press, London, 1994, pp. 65–66.

*Karma* is one of the laws of the universe. *Karma* is the law of cause and effect – any action (good or bad), will produce a karmic response. *Karma* is linked to the concept of ‘re-birth’; when an individual comes into life (human or animal), their character and situation (poverty/wealth, stupidity/brilliance) will be a result of their actions of the past; the individual’s destiny is self-created. One constructs one’s future destiny by reacting to present circumstances. If one were poor in the present existence, but charitable, this would make for good merit (good *karma*) that will be received in kind at some point, in one’s present or future existences. *Karma* is not something that one is bound to forever. *Karma* is also linked to the process of transmigration and rebirth; indeed, *karma* is its cause. *Karmic* justice does satisfy those who believe that people who have committed great acts of wickedness and seemingly escaped justice will receive back what they have done in kind. Being reborn in a miserable existence, as a hungry ghost or an animal, or suffering in one of the hells until rebirth occurs after a long time, is in itself a retribution for one’s crimes, and in this sense may satisfy the desire to see one who has caused misery receive the just reward for their actions. *Karma* is the process of receiving like-for-like, a cause (an action) and effect (*karmic* wages) relationship; performing a good action cannot expunge the effects of a bad one (and vice-versa); rather, *karma* is a process of receiving the ‘fruits’ of one’s actions, good or bad, at some point, in some existence.<sup>29</sup> This can be usefully summed up as the ‘three recompenses’: in the present life for deeds already done, in the *next rebirth* for deeds now done, and in subsequent lives.<sup>30</sup>

The Four Noble Truths are key to understanding the nature of *dharma*. They are effectively a diagnosis of the problems of humankind and a pathway out of those problems.<sup>31</sup>

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<sup>29</sup> Peter Harvey, *An Introduction to Buddhist Ethics: Foundations, Values, and Issues*, Cambridge University Press, Cambridge, 2000, pp. 15–18.

<sup>30</sup> For the modern reader (especially one working in relation to law) unfamiliar with how this principle can be understood, Yukio Mishima’s tetralogy of novels *The Sea of Fertility* (*Spring Snow* (1969), *Runaway Horses* (1969), *The Temple of Dawn* (1970), and *The Decay of the Angel* (1971)) would be a helpful insight. The novel series follows the career of Shigekuni Honda, a jurist, between 1912 and 1975. Throughout the novels, Honda believes he is encountering successive reincarnations of a school friend. See Yukio Mishima, *The Sea of Fertility*, Michael Gallagher *et al.* trans., Penguin Modern Classics Edition, London, 1986.

<sup>31</sup> Armstrong, 2000, pp. 94–95, see *supra* note 26.

1. Life is suffering. Buddhism defines life in terms of *dukkha*, roughly translated from Pali as unsatisfactoriness/suffering. Birth is *dukkha*, as it begins the cycle of pain and suffering characterising human life, followed by illness, sickness, and death; these are compounded by the sorrow, pain, grief, and despair that accompany the cycle of life and the pain inherent in human existence in its five aspects (body, feeling, memory, thoughts, and consciousness).<sup>32</sup> Suffering here is not just the horrific occurrence of disease and warfare, but also mundane minor disappointments. By contrast, joy and happiness are also in the moment and will also inevitably fade.
2. Suffering (*dukkha*) is caused by craving: desires leave one unsatisfied. This is attachment to impermanent factors such as wealth, power, and pleasure. Human beings chase these things throughout their existences despite the impermanent nature of these things. Similarly, humankind maintains anger, resentment and regret – also attachments to fleeting states. Attachments to delusory desires in the political realm can result in what the Nuremberg Principles encode as crimes. War and killing are linked to attachment to political power, wealth, territory, or even to ‘views’.<sup>33</sup> The core attachment is the attachment to the illusion of the self: myself, my identity, my religion, my nation, my race. Mass killings are products of this egocentric way of thinking. “My racial superiority, the primacy of my political ideology, the liberation of my class.” Genocidal regimes can be interpreted as illusory attachments to the idea of racial and national identity, sentiments which are the products of what can be described as a wrong understanding of the nature of the world. Loy argues that war against an external enemy or group is a means to affirm identity and counter humankind’s “most problematic anxiety [...] the sense of lack that shadows a deluded sense-of-self”.<sup>34</sup> War becomes an appealing option in context of a mistaken sense of existential lack, as it offers something to which the ego can attach itself; or, rather, a sense of self

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<sup>32</sup> Laurence-Khantipalo Mills, *Buddhism Explained*, Silkworm Books, Chiang Mai, 1999, pp. 20–26.

<sup>33</sup> Harvey, 2000, p. 240, see *supra* note 29.

<sup>34</sup> David R. Loy, *Money, Sex, War, Karma: Notes for a Buddhist Revolution*, Wisdom Publications, Somerville, 2008, p. 137.

can be obtained by defining oneself and one's immediate community in opposition to another group, country or race.<sup>35</sup>

3. Desire is the cause of attachment, hate and illusion, and can be transcended. Letting go of attachments and ending the cycle of suffering is achieved through the attainment of *nirvana*.
4. The path out of *dukkha* is achieved through following the Noble Eightfold Path (right understanding, intention, speech, action, livelihood, effort, mindfulness, and concentration.) It is the 'goal' of Buddhism to escape from the cycle of *dukkha* and attain *nirvana* by following the Noble Eightfold Path. This is a guide for living as a practical way of lessening individual attachments.<sup>36</sup> The aim in Buddhism is the abandonment of self/the ego – the ultimate attachment; once someone is not attached to him/herself as an individual, they can be liberated from *dukkha* and the woes of being attached to something impermanent (for instance, a human body).

Meditation moves one along the path towards enlightenment (*Bodhi*) – the state of awakening to full knowledge of the *dharma* in process of attaining *nirvana*, in which all attachment and delusion and ego are extinguished as in a fire. *Nirvana* is where the *dukkha* cycle is broken and liberation is attained.

### 6.5. Cyclic Time and Timelessness

It is therefore important to understand the way time is conceived in Buddhist thought. The universe, time and *karma* are narratological constructs through which timelessness is made accessible.

Modernist epistemologies, and in no small part the very notion of international criminal law, are rooted in a progressive vision of linear time. The enduring Liberal/Marxist/Abrahamic faith that society will emerge from a bad state (sin, slavery, class oppression) to a better one (salvation, Passover, socialism) is, in Buddhist terms, a delusion. Some sections of Western philosophy would come to similar conclusions, but for different reasons. To assist readers in evaluating the ontological 'distance' between modern international criminal law and Buddhism, I present two contrasting images.

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<sup>35</sup> *Ibid.*, pp. 137–38.

<sup>36</sup> Harvey, 2000, pp. 33–37, see *supra* note 29.

Walter Benjamin's description of 'the angel of history' sums up both the Western notion of linear time in history and the failings of faith in progressive Whiggish historiography.

His eyes are opened wide, his mouth stands open and his wings are outstretched. The Angel of History must look just so. His face is turned towards the past. Where we see the appearance of a chain of events, he sees one single catastrophe, which unceasingly piles rubble on top of rubble and hurls it before his feet. He would like to pause for a moment so far to awaken the dead and to piece together what has been smashed. But a storm is blowing from Paradise, it has caught itself up in his wings and is so strong that the Angel can no longer close them. The storm drives him irresistibly into the future, to which his back is turned, while the rubble-heap before him grows sky-high. That which we call progress, is this storm.<sup>37</sup>

Benjamin's angel exists in linear time, disasters of the past "piling up at his feet". Benjamin was writing in context of the encroachment of total war and genocide enveloping history. He is describing the collapse of the Enlightenment values of reason and narratives of liberal progress held with such great certainty in the pre-Holocaust period.<sup>38</sup> Fundamentally, international criminal law is an exercise in dealing with some of the bodies at the feet of the Angel of History – an attempt to deal with human-kind's violent irrationality in a rational way. International criminal law trials reflect the Angel's desire to "pause for a moment [...] to awaken the dead and to piece together what has been smashed".

In contrast to this philosophy of history, Buddhism is rooted in the idea of *samsāra* – the beginningless, repetitious cycle of birth, death and rebirth.<sup>39</sup> This is frequently illustrated as a wheel, in which the planes of existence (Heaven, the Demonic Realm, the Realm of Hungry Ghosts, Hell, the Animal Realm and Human Realm) are placed between the 'spokes'. The linear narratives of time of liberal institutions are difficult to

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<sup>37</sup> Walter Benjamin, "On the Concept of History", in Howard Eiland and Michael W. Jennings (eds.), *Walter Benjamin: Selected Writings Volume 4, 1938-1940*, Edmund Jephcott et al. trans., Harvard University Press, Cambridge, 2003, p. 392.

<sup>38</sup> Karen Armstrong, quoted in Loy, 2008, p. 134, see *supra* note 34.

<sup>39</sup> Graham Coleman and Thupten Jinpa (eds.), *The Tibetan Book of the Dead*, Gyurme Dorje trans., Penguin Books, London, 2006, p. 457.

place in dialogue with Buddhism's ultimate aim to attain *nirvana* and leave *samsāra* altogether.

Buddhists see time as going through cycles. *Karma* narrative is cognisant of being a device to comprehend unreality and impermanence. Transmigration/reincarnation is not the goal in Buddhism: *nirvana* is. *Karma* is a concept by which people are able to situate themselves in time, unreality and impermanence, and the eventual attainment of *nirvana*. In this frame, they can develop the ability to see the past as past and not to dwell in it attached to an unreal notion of existence.

Within Buddhist thought, the universe, time and *karma* are narratological constructs through which timelessness is made accessible. *Nirvana* does not depend on the existence of the universe: the universe, time, existence, are all narrative frameworks which contain the idea of *nirvana*. Attaining *nirvana* is an individual experience. Thus, time is configured in the 'Pali *imaginaire*' as a device to enable understanding. In Buddhism, there can be no 'end of history', since there is no beginning to it; time in Buddhism is simultaneously non-repetitive (linear and unfolding like the passage from birth to death) and repetitive (like a pulse or the ticking of a clock across eons). Steven Collins stresses that these similes must be seen as complementary.<sup>40</sup> The universe, time and *karma* are narratological constructs through which timelessness is made accessible – a difficult concept for Westerners who perceive the linear but not the cyclic.

## 6.6. Buddhism and War

I now move to discuss how the extremities of violence are perceived in Buddhism.

The Buddhist religion is popularly seen (especially in the West) as an entirely pacifist one. Even a superficial glance at the history of Buddhist societies demonstrates the incongruity of this assertion. Wars and, more importantly for this chapter, wars justified in Buddhist terms, have been a permanent feature of Asian societies, as much as wars with religious justifications in Christian Europe or the Islamic world.<sup>41</sup> Buddhism

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<sup>40</sup> Steven Collins, *Nirvana: Concept, Imagery, Narrative*, Cambridge University Press, Cambridge, 2010, pp. 106–08.

<sup>41</sup> Michael K. Jerryson, "Introduction", in Michael K. Jerryson and Mark Juergensmeyer (eds.), *Buddhist Warfare*, Oxford University Press, Oxford, 2010, p. 3. In the appendix to the same volume, there is a short list of examples of Buddhist warfare in China, Korea, Tibet, Japan, Sri Lanka and Thailand ranging from 402 CE to the present.

as a philosophical framework preaches against violence; however, this ‘absolute’ is not so closely observed in practice. Buddhist states have advanced arguments that war and violence are ultimately justifiable in specific contexts. Where there is justification, it follows that there are limits to what is and is not acceptable within the context of that justification—that is, “war is only acceptable in circumstances ‘X’ and ‘Y’, but not ‘Z’”. The logical outcome, once that justification is made, is that if rules of engagement are agreed upon, there must be consequences for any transgression of those rules. While many Buddhists would contend that a Buddhist justification of war is of itself a heresy and a perversion of Buddhist teaching (as indeed would many peoples of all faiths), a strain has existed that provided for, if not a just war, then at least war in which the consequences to one’s own *karma* are acceptable and justifiable in a situation of fighting a great evil.<sup>42</sup>

What emerges here, at least in some cases, is a set of regulations that have resonance with the concepts of *jus ad bellum* and *jus in bello*. If even in a philosophy that holds non-violence as its highest principle there are areas of justification for war, then, by extension, the next logical step is that there is reasonable and unreasonable conduct in such a situation and an idea of appropriate redress in the wake of unjustifiable war or transgressive wartime conduct.

### 6.6.1. Leave It to *Karma*?

Given a core tenet of Buddhist philosophy is that life is characterised by suffering and that as such violence, misery and pain are features of being human, to think about how human beings can provide earthly redress for an act performed within an impermanent state of being, on a plane of existence itself characterised by such suffering, could be seen as a pointless exercise. The centrality of *karma* to the law of the universe invalidates the need for redress or the punishment of perpetrators – the existence of those who suffer and those who inflict suffering both operate in context of the “three recompenses [...] in the present life for deeds already done, in the next rebirth for deeds now done, and in subsequent lives”.<sup>43</sup>

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<sup>42</sup> Elizabeth J. Harris, quoted in Harvey, 2000, p. 252, see *supra* note 29.

<sup>43</sup> Lewis Hodous and William E. Soothill, *A Dictionary of Chinese Buddhist Terms: With Sanskrit and English Equivalents and a Sanskrit-Pali Index*, Motilal Banarsidass Publishing, 1937, p. 62.

One could question the value of any earthly process, as *karma* will resolve the imbalances that are a product of mass violence. Indeed, it could even be logically argued that any process attempted is tying people more tightly to the attachments that keep them in the *dukkha* cycle. Furthermore, it can be argued that individuals may feel that the abuses and calamities they have endured are their *karmic* fruits, perhaps not from this life but another. This is a sentiment which is sometimes deeply shocking to Westerners, and perhaps particularly to Western jurists; but it is one I have encountered in numerous conversations with victims of the Khmer Rouge ('KR') regime in Cambodia, for instance; so, I would argue that, from an anthropological or sociological perspective at least, it is a widely expressed feeling and one that can be seen as a logical conclusion within a popular understanding of the Buddhist framework.

Given that *karma* is part of the *dharmā*, (the cosmic truth of the universe) then it is not, as Jackson says, "*that there has been no war, there are no slain, there has been no crime*",<sup>44</sup> but that the war, the crime, the slain are inevitable but ultimately irrelevant – they do not matter as they are only part of a cosmic cycle that is timeless.

One can see from this that Buddhist thought could be accused of allowing for total earthly impunity through a 'leave it to *karma*' approach. This would be a mistaken view. *Karma*, it can be argued, provides for redress; however, it is in the process of letting go of attachment that the obligation to deal with consequences of actions can be realised. Buddhism is not a philosophy that instructs its adherents that only the cosmos is able to deal with suffering and injustices; indeed, Gotama himself was constantly engaged with dealing with the suffering of life as doing so assisted in a process of letting go of attachment.

Gotama intervened in wartime in order to prevent violence. The Buddha set the example that intervention in human affairs to stop violence is an important duty. For example, the Buddha intervened in wars between King Kosala and King Ajāsatta, between Sākya and Koliya, between Vidudabha and the Sākya clan and between King Ajāsatta and Vajjis.<sup>45</sup>

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<sup>44</sup> Robert Jackson, quoted in Taylor, 1992, p. 4, see *supra* note 23.

<sup>45</sup> Ven. Karagaswewe Wajira, *Live and Let Others Live: Buddhist Aspects in regard to International Humanitarian Law for the Resolution of War and Conflict* (on file with the author).

What is significant here is that the Buddha used a process of dialogue to help people come to a realisation of the reality of the *dharma*.

Within the realms of international law, the Sri Lankan peace activist Ahangamage Tudor Ariyaratne has written of Buddhism and international humanitarian law ('IHL'). Ariyaratne explicitly rejects the idea of humanity's natural inclination towards cruelty, which powerful legal bodies must then control. Instead, Ariyaratne argues that emotional states of hatred or love are states of the mind that determine how people behave, and ultimately, it is in the minds of humankind that behaviour is regulated. Ariyaratne argues that as human minds have evolved this has "led to various customs and conventions regulating their conduct at times of conflicts and war. Today these have developed into a universally accepted system of laws we collectively call International Humanitarian Law [IHL]".<sup>46</sup> Even if conflict is already taking place, the way people respond to the outbreak of violence can be either with more violence or in keeping with the notion of the sanctity of life.<sup>47</sup> Ariyaratne is making the point that IHL is a concept synergetic with philosophies of peaceful and right behaviour that have evolved in peoples' minds for thousands of years before the codification of IHL.

So far, it might appear that many of the concepts discussed would be more appropriate to a discussion on Buddhism and the principles of international humanitarian law rather than international criminal law. However, this chapter is specifically highlighting the strong tradition of violence prevention and peace-making in Buddhism, which is grounded in the assumption that violence is always the source of further violence. Total victory is a fallacy; it is ultimately the laying down of arms that can end violence – a conscious acquiesce by those engaged in violence to the fact that violence itself cannot be stopped through violence.<sup>48</sup> The cyclic nature of the concepts of *dukkha* and *karma*, and Buddhism's ultimate goal of escape from this cycle, mean that the prevention of violence and reckoning with its consequences are the same process.

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<sup>46</sup> Ahangamage Tudor Ariyaratne, "Buddhism and International Humanitarian Law", in *Sri Lanka Journal of International Law*, 2003, vol. 15, no. 1, pp. 11–15.

<sup>47</sup> *Ibid.*

<sup>48</sup> Sallie B King, "War and Peace in Buddhist Philosophy", in Steven M. Emmanuel (ed.), *A Companion to Buddhist Philosophy*, John Wiley and Sons, 2015, p. 633.

I illustrate this point with a parable that deals with *karma*, transmigration, and breaking the *dukkha* cycle through a process of letting go of attachment.

### 6.6.2. Breaking the Cycle: *The Lady and the Ogress* (The Story of Kalayakkhini)

A man greatly desired a baby, but his wife was barren. Fearing that he would leave her, the wife decided that her husband should have a child by another woman. However, she grew fearful of the consequence of this. So each time the husband's mistress became pregnant the wife would drug her food, so that the mistress would miscarry. After several times the mistress figured out what was happening; but by this point the wife had administered so much poison to her that the mistress died. On her deathbed, the mistress swore vengeance on the wife in another life. Throughout many incarnations as animals (a cat and a hen, a tiger and a deer etc.) the women perpetually sought out the other so as to kill each other's children.

Eventually they were reborn, one as an aristocratic lady, the other as an ogress. The ogress (the eponymous Kalayakkhini) went to eat the lady's baby. The lady ran to the Buddha and begged him to protect her child. The Buddha explained to both the lady and the ogress that they had been chasing each other for centuries, doing the same thing again and again. The suffering they inflicted on each other would continue unless they renounced this now, and forgave each other, thus breaking the cycle of perpetual vengeance and killing.

This story places the concept of transmigration and the cyclic nature of cosmological existence in Buddhist thought into narrative. It demonstrates that violence prevention and resolution are part of the same process. These two women were existing through various incarnations over various transmigrations in a cycle of revenge across eons, broken only by the intervention of the Buddha, which prevented further acts of violence. The moral of this story is: "Hatred in the world is indeed never appeased by hatred. It is appeased only by loving-kindness. This is an ancient law".<sup>49</sup>

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<sup>49</sup> The story of Kalayakkhini, Dhammapada Verse 5 in *The Dhammapada: Verses and Stories*, Daw Mya Tin trans., Burma Tipitaka Association, Rangoon, 1986.

This illustrates the central point of ‘Buddhist jurisprudence’ – that a case is never resolved until both parties are at peace with its decision. French argues that the true ‘end point’ of process in a Buddhist jurisprudence is the ultimate departure of both parties in a calm state of mind – not shutting down a case until there is no further avenue of appeal (such as a supreme court).<sup>50</sup> Rather, the process sees itself as part of a *karmic* cycle: letting go of anger releases the plaintiff from the cycle of revenge, which would otherwise continue.

*Karma* narratives encapsulate an awareness that they are devices to assist the comprehension of unreality and impermanence. Stories such as *The Lady and the Ogress* enable the listener to grasp Buddhist concepts through the use of chronological and classificatory systems, and to emplot existence in a comprehensible narrative frame.<sup>51</sup>

*The Lady and the Ogress* is not readable as a redemptive story with a single clear arc from suffering to joy. It is a story of *karma* manifesting itself in an extremely violent way. It is used to show how, in taking revenge, you become like the one inflicting it on you, and that by breaking the cycle of violence the individual releases both self and enemy from a perpetual cycle of destruction. Retaliation for violence is often sought through more violence; conflict goes in cycles. In Buddhism, the main purpose is always the break away from these vicious circles; rather than dealing with transgressions against the codified law which has been broken, it seeks to establish a harmony between “the offender and the offended”<sup>52</sup> that prevents future violence.

Like international criminal law, Buddhism considers discursive process to be important. But in Buddhism, process has a different focus. Buddhist legal process is not a tool to encourage people to forget the past, but a way to help survivors (and indeed perpetrators) not to dwell endlessly within that past. *Karma* is not a cosmological excuse for war criminals to enjoy earthly impunity. Buddhists do not abdicate the need to make perpetrators account for their actions to society by counselling that *karma* will catch up with perpetrators eventually. However, within Buddhist jurisprudence, punishment, accountability and the establishment of a histor-

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<sup>50</sup> French, 2004, p. 684, see *supra* note 13.

<sup>51</sup> Collins, 2010, pp. 16–20, see *supra* note 40.

<sup>52</sup> David R. Loy, “A Different ‘Enlightened’ Jurisprudence?”, in *Saint Louis University Law Journal*, vol. 54, no. 4, 2010, p. 1253.

ical record are not held in such high esteem as they are in the Western judicial tradition (although these concepts are by no means ignored). The priority of a Buddhist process is to deal with the aftermath of violence as a means of conflict prevention, thus ensuring that future atrocities do not take root in current wars or those of the immediate past.

Preventing further conflict is not achieved via the concept of deterrence (punishing someone who has broken the law as an example to other would-be offenders) but by demonstrating that violence has its roots in a wrong understanding of *dharma* and mistaken thinking about the nature of existence. Buddhism attempts to make people understand the nature of their false attachments and then to assist them to shed those attachments in order to prevent further crimes.

### 6.6.3. Angulimala

The story of Angulimala offers guidance within Buddhist thought for dealing with perpetrators of mass atrocity. The story of Angulimala and the Buddha featured in the *Theragatha* ('Verses of the Elder Monks')<sup>53</sup> and the Angulimala *Sutta* in the *Majjhimanikaya* ('Middle Length Discourses').<sup>54</sup> These early *Suttas* provide relatively little information about Angulimala; later commentaries by the scholar Buddhaghosa (b. approximately fifth century CE) and the group of scholars known as Dhammapāla, writing commentary in the eleventh and/or twelfth centuries,<sup>55</sup> build Angulimala into a more rounded character, ascribing motivations for his actions rather than depicting him as violent for the sake of being violent. I focus here on the most basic elements of the story.

Angulimala had killed 999 people; he was told that if he killed 1,000 people he would be the most prolific killer in history. His name – literally Finger (*anguli*) Necklace (*mala*) – came from his habit of wearing a necklace of the severed fingers of those he had slain. Angulimala decided to kill

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<sup>53</sup> Theragāthā, 16.8 on Aṅgulimāla: see *Elders' Verses*, vol. 1 (*Translation of Theragāthā and Therīgāthā*), 2nd edition, Kenneth Roy Norman trans., Pali Text Society, Oxford, 2007, verses 705–948.

<sup>54</sup> Majjhimanikaya, 86 (the Majjhimanikaya are 152 discourses attributed to the Buddha and his disciples): see *The Middle Length Discourses of The Buddha: A New Translation of The Majjhima Nikaya*, Bhikkhu Nanamoli and Bhikkhu Bodhi trans., Buddhist Publication Society, Sri Lanka, 1995, pp. 710–17.

<sup>55</sup> E. Hardy (ed.), *The Netti-pakarana with extracts from Dhammapāla*, The Pali Text Society, London, 1902.

his mother as his thousandth victim, but upon coming across the Buddha, he changed his mind and decided to kill the Buddha instead. Angulimala frantically ran after the Buddha. Yet despite running as fast as he could, Angulimala was unable to catch up with the Buddha, who was walking at normal speed. The Buddha had willed a mental power over Angulimala. Angulimala called after the Buddha, demanding that he stop. Buddha explained that he had already stopped and told Angulimala to do the same. This statement confused Angulimala. The Buddha explained that by renouncing the killing of all living things he had stopped, unlike Angulimala who was obsessed with killing and thus would never be able to stop.

Angulimala became a monk and a good man, yet people were still afraid of him. Part of a monk's life is the collection of alms – in this way they get the food they need. Yet when Angulimala went out to collect alms, people fled in fear when they saw him approach, knowing his reputation as a killer. Angulimala acknowledged to the Buddha that this was inevitable given his past actions. The Buddha told Angulimala that he had created so much suffering, and that people shunning him was part of the fruits of his karma, which he was now reaping for his past actions. Every day, Angulimala went out to collect alms. Every day he was shunned and not given food; people attacked him, as they realised that in his present position as a monk he would not retaliate. Responding to the demands of his own subjects, King Pasenadi Kosala sought out Angulimala as a criminal and terroriser of innocent people. He came to the Buddha to seek his blessing to kill Angulimala. The Buddha asked the King, “Would you kill him if he were dressed as a monk? If he has renounced violence and has become a virtuous man?” The King said no. The Buddha then revealed that the man who was sitting next to him during their meeting was indeed Angulimala. The Buddha explained that the King had to see Angulimala in the present moment.<sup>56</sup>

The Angulimala story is one traditionally told for multiple reasons. It is meant to convey the message that even the most cruel, and violent of

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<sup>56</sup> This story has been told to me by Buddhist monks many times across the world. This is my own re-telling.

people can “change for the better”<sup>57</sup> and that positive *karma* can neutralise bad *karma*.<sup>58</sup> Another major lesson of the Angulimala story concerns the way someone reacts to the inevitable return of the bad *karma* to him or her. During his time as a monk Angulimala reaped the *karma* he generated through his career of violence – even after he had seen the error of his actions and changed his behaviour. People shunned him, refused to give him alms, and physically attacked him; however, he accepted that these actions were a product of his own actions returning to him.

Satish Kumar, former Jainist monk, thinker and peace activist, explicitly retells the Angulimala story giving him the modern label of ‘terrorist’;<sup>59</sup> he presents the story in light of this modern concept familiar to jurists working in and around transnational crime and the application of international criminal law towards non-State armed groups. In his version of the Angulimala narrative, Kumar concludes with a description of a trial. In the story King Pasenadi Kosala is the force of State law. The original Pali canons do not provide so much detail on these parables as the later commentaries and retellings. Kumar draws on these extensively. The King’s chosen process for upholding the law is not explicitly discussed in Kumar’s retelling; instead he re-imagines the legal process of Angulimala’s encounter with the rule of law. Kumar recounts the process of the King’s legal officer prosecuting the case against Angulimala:

If we set Angulimala free we will be guilty of damaging the social order [...] the affairs of state cannot be run according to religious rules. The state must impose the rule of law [...] Angulimala must be hanged, nothing less will do, sir. The enforcement of the Law is paramount.<sup>60</sup>

The case the prosecutor presents here is that despite Angulimala’s having renounced violence, his crimes have to be accounted for and punished in Law.

The acceptance of the Buddha that Angulimala is subjected to a process that could result in his execution is significant. The Buddha ac-

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<sup>57</sup> Harvey, 2013, p. 266, see *supra* note 28. It is interesting to note that a British prison chaplaincy is named after *Angulimala* for this very reason, see “Angulimala”, available on Angulimala, the Buddhist Prison Chaplaincy’s web site.

<sup>58</sup> Gunapala Piyasena Malalasekera, *Dictionary of Pāli Proper Names*, Pali Text Society, London, 1960.

<sup>59</sup> Satish Kumar, *The Buddha and the Terrorist*, Green Books, Dartington, 2004, p. 10–17.

<sup>60</sup> *Ibid.*, p. 77.

cedes to the earthly process. Process is not seen here as irrelevant; rather, the story makes clear that it can be viewed in a variety of ways. In Kumar's retelling, many of the citizens present at the trial call for amnesty, after witnessing how, despite his crimes, Angulimala has finally changed. This is agreed to by the King. However, not all are satisfied with this outcome. The dissatisfaction described here is, within the internal logic of the narrative, indicative that more process is required in order for the dissatisfied persons to further loosen their ties to the crimes of the past – a process that could take the rest of their lives. For others, the process is shown to offer a forum for airing the suffering of victims and helping them to be no longer attached to their pasts, breaking the cycle of punishment and revenge. Accepting that letting go of the past is necessary as further violence will generate neither peace or justice. Angulimala has to face up to the reality that the *karmic* consequence of his actions are unpleasant for him, but he must accept his *karma*. He has to face the fact that others still hate him and he is brought to trial facing the death penalty as a potential outcome. Rather than being exempt from consequences in his current incarnation, Angulimala is subject to two separate forms of Law – cosmic justice (the law of *karma*) and earthly justice, which takes the form of the King.

Law is a process that can help to break the cycle by revealing the nature of the *dharma*. Buddhism is at ease with legal process as part of breaking the cycle of *dukkha*. This is needed as much for the perpetrators of violence as it is for the victims and the restoration of social equilibrium.

A creative Buddhist author might at this point follow Satish Kumar's example and retell the Angulimala story as that of a war criminal. This would be an interesting exercise that could allow a narratological exploration of a key Buddhist text and be illustrative of Buddhist philosophy – but it is an exercise perhaps best done in a less traditional academic forum than this volume.

#### **6.6.4. Philosophy in Action: Breaking the Cycle in the Modern World**

I end here with an account of how a process of breaking the cycle can work, to bring the philosophy of trying to break the *dukkha* cycle into a modern post atrocity context. In 1992, very much in the spirit of 'engaged Buddhism', Ven. Maha Ghosananda (former Supreme Patriarch of Cambodia and four-time Nobel Peace Prize nominee) led the first of several

Dhammayatra Peace Walks during the repatriation of thousands of Cambodian refugees from Thailand. At this time, Cambodia was emerging from decades of civil war, atrocity and genocide; it seemed very unlikely that the KR leadership would be brought to any kind of international trial – nor was Ghosananda calling for one.<sup>61</sup> The civil war had not yet come to an end. Peace was the priority. Ghosananda, with 500 others, walked over 120 miles from the Thai border to the capital (Phnom Penh), through minefields and KR-controlled areas of Cambodia. Ghosananda himself, and his followers, had lost family and friends in the course of the genocidal KR regime and in the decades-long civil wars. Ghosananda’s primary message to the millions of Cambodians who had suffered under the KR regime concerning the attitude they should hold towards their former persecutors was reminiscent of the Dhammapada Verse 5.<sup>62</sup>

Hatred can never overcome by hatred; only love can overcome hatred.<sup>63</sup>

Ghosananda employed (and deployed) the concept of *metta* (loving kindness): active goodwill, the radiation of love to all – friend, enemy or a person towards whom one feels ambivalent.<sup>64</sup> Meditation is a central aspect of Buddhist practice, and *metta* is a meditative state; it does not require one to be static – indeed one can meditatively walk in order to disseminate this active goodwill. *Metta* underpins all the positive prescriptions with which the Buddha balanced the traditional ‘five prohibitions’, demanding active love rather than the simple avoidance of aggressive acts. Employing this ambulant *metta* was an explicitly proactive process on Ghosananda’s part that sought to destroy anger, revenge, and hatred, seeking to “shoot people with bullets of loving kindness”.<sup>65</sup> Anger and the desire for revenge are both identified by Ghosananda’s movement as a

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<sup>61</sup> Sallie B King, *Socially Engaged Buddhism*, University of Hawaii Press, Honolulu, 2009, p. 93–94.

<sup>62</sup> Dhammapada Verse 5, see *supra* note 49.

<sup>63</sup> Maha Ghosananda, quoted in Venerable Santi, “Somdech Preah Maha Ghosananda Ghandi of Cambodia: The Buddha of the Battlefields”, available on Somdech Preah Maha Ghosananda’s web site.

<sup>64</sup> Christmas Humphreys, *Buddhism: An Introduction and Guide*, Pelican Books, London, 1990, pp. 105–27.

<sup>65</sup> Maha Ghosananda, quoted in Kathryn Poethig, “Locating the Transnational in Cambodia’s Dhammayatra”, in John Marston and Elizabeth Guthrie (eds.), *History, Buddhism, and New Religious Movements in Cambodia*, University of Hawaii Press, Honolulu, 2004, p. 203.

source of conflict. Ghosananda used the metaphor of boiling water: “If we leave boiling water sitting for some time, it naturally begins to cool. Sometimes we boil with anger, but we can cool down gracefully by contemplating loving kindness, anger’s opposite”.<sup>66</sup> The ‘cooling’ is accomplished through the willingness of Ghosananda and his fellow walkers to make themselves vulnerable to the potential violence of the KR, just as the unarmed and unguarded Buddha chose to be vulnerable to Angulimala in search of his thousandth victim. It is an overt invitation to dialogue. The *metta* of the peace walks offers a clear instance of what Huxley identifies as Buddhism’s ability to blur boundaries between the law of the classical texts and religion, here achieving a new relationship between victim and perpetrator that law alone cannot accomplish.

In Buddhism, there are three universal factors: impermanence, suffering and non-self; if one can understand this and reconcile it with life’s experiences, one can understand how to be liberated from *dukkha*. This is ‘seeing things as they really are’. Seeing the world as other than impermanent and unsubstantial will only heighten the delusion of a false reality that in turn creates illusory desires and attachments which heighten *dukkha*. The Buddhist response to this is that acknowledging impermanence is the key to freedom from the past.<sup>67</sup>

Ghosananda’s Dhammayatra Peace Walks are one of the most potent examples of restorative action within a Buddhist framework, providing a way for people to deal with the past through Buddhist rooted philosophies on forgiveness, seeing things as they are, alleviating anger, and quelling the desire for revenge.<sup>68</sup> *Metta* is a way for the victim to let go of attachment to resentment in the present moment; it may leave that victim safe in the knowledge that *karma* will return; but it is also a vital strategy for reckoning with mass violence within a present crisis. The walk is also a process of stopping conflict; it is part of a process of reckoning in an ontological framework, rooted in circular time rather than linear time, breaking free from the *dukkha* cycle by letting go of attachment to the past. It is thus peace-building and justice combined.

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<sup>66</sup> Maha Ghosananda, *Meditations on Wisdom and Compassion: Step By Step*, Jane Sharada Mahoney and Philip Edmonds (eds.), Parallax Press, Berkeley, 1992, p. 58.

<sup>67</sup> *Ibid.*, p. 41.

<sup>68</sup> Alex Hinton, “Truth, Representation, and the Politics of Memory after Genocide”, in Alexandra Kent and David Chandler (eds.), *People of Virtue: Reconfiguring Religion and Moral Order in Cambodia Today*, NIAS Press, Copenhagen, 2008, pp. 62–64.

It should be noted that Ghosananda's walk did not depend on how the KR reacted to it. Their reaction was their own affair. Some reacted positively, others did not. But at their core, the walks required a letting go of the past and an aspiration for the future; if the act of letting go of the past was possible for the victims, then peace could be accomplished. This was not an exercise to ignore the past, or forget it, but a way to deal with the past to prevent future conflict. This is the very core of Buddhist jurisprudence – breaking the cycle. The peace walk is an example of the central element in Buddhist thought when dealing with the aftermath of mass atrocity – that violence prevention and reckoning with its consequences are parts of the same process. Ghosananda argued:

It is a law of the universe that retaliation, hatred, and revenge only continue the cycle and never stop it. Reconciliation does not mean that we surrender rights and conditions, but rather that we use love in our negotiations. Our wisdom and our compassion must walk together. Having one without the other is like walking on one foot; you will fall. Balancing the two, you will walk very well, step by step.<sup>69</sup>

In both this example and the Angulimala story, what emerges is a Buddhist jurisprudence related to crimes of mass violence, a jurisprudence which has two sides to it. Atrocity is not forgotten, and indeed must be understood as a product of wrong thinking. Revenge must be avoided so that the whole cycle can be stopped. Criminals do not go unpunished but retributive justice is not a priority; however, *karma* is something with which the perpetrator must deal, on earth or in another life. Survivors should look on their former persecutors with some pity. Ghosananda said of the former KR:

We have great compassion for them, because they do not know the truth. They destroy Buddhism. They destroy themselves.<sup>70</sup>

Both victim and criminal are parties to a process here – one of shedding attachment from the past to ensure the prevention of future violence. Both parties can work together to enhance the result; or one party can work alone with the aspiration that this unilateral approach will radiate to the other party – as happened with those who did not accept the

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<sup>69</sup> Ghosananda, 1992, p. 69, see *supra* note 66.

<sup>70</sup> Maha Ghosananda, quoted in Venerable Santi, see *supra* note 63.

changed Angulimala, and those KR who did not appreciate Ghosananda's "bullets of loving kindness".<sup>71</sup>

### 6.7. Conclusion – A Beginning

This chapter has explored how a process of reckoning with mass atrocity crimes and war crimes might be conceived and enacted within the Buddhist philosophical tradition; it has established the basis for such a process using both the myths of the philosophy and the conscious performance of its key tenet *metta* as a foundation on which to build. Discussing concepts such as *dharma*, *karma* and *metta* places it somewhat out of the realm of the Western philosophical foundations of modern jurisprudence. However, many Buddhist thinkers, human rights activists and jurists would assertively argue that since there is no contradiction between Buddhist principles and international criminal law, there is no problem in term of acceptance of international criminal law as a universally applicable and useful tool. Others would perhaps contend that the practice of Buddhism is for the individual alone, and that legal processes dealing with the past are a waste of time, tying one to the attachments that inhibit enlightenment.

Some Western jurists may view the framework of this chapter with a great deal of scepticism, even perhaps a degree of shock. Robert Jackson's summation echoes when dealing with mass atrocity crime:

If you were to say of these men that they are not guilty, it would be as true to say that *there has been no war, there are no slain, there has been no crime.*<sup>72</sup>

However, the processes of establishing a clear account of what happened, and of reaching a verdict of guilty on those who have orchestrated atrocity, are in no way contradictory to Buddhist thought. Indeed, Angulimala had his guilt established in the story. In Western jurisprudence, the process concludes at the point when the legal procedure comes to its final decision. Buddhism sees the risk here: if a process leaves parties unsatisfied with the outcome, they will maintain attachment to past resentment and there will be a perpetuation of cycle of violence. For Western jurists, linear time creates a finite moment in history: there is little incentive to proceed further than the verdict. The arguments are made, guilt is or is not established, sentence is passed. The Buddhist understanding of time and

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<sup>71</sup> Maha Ghosananda, quoted in Kathryn Poethig, 2004, p. 203, see *supra* note 65.

<sup>72</sup> Robert Jackson, quoted in Telford Taylor, 1992, p. 4, see *supra* note 23.

history makes it highly conscious of the repetitious and cyclic nature of mass violence – in terms of its own logic, Buddhism cannot cease the process of justice until the events of the past are no longer predominant in the minds of society. The point is that discourse, which leaves both parties in a calm state of mind, is the true ‘end point’ of the process. In practical terms, the act of letting go of the past could take a victim of mass atrocity the rest of their natural life to achieve; indeed, they may never achieve it. This, however, is the main aim of Buddhist jurisprudence.

Retributive justice in the Buddhist sense is the prerogative of *karma*; however, this does not mean that *karma* is a concept that can simply be invoked to allow earthly impunity for international crimes. The Buddhist tradition very clearly understands violence prevention and reckoning with its consequences as being parts of the same process. Violence cannot be ended if attachment to anger about a crime committed remains. Cooling the boiling anger that follows upon mass atrocity or war is urgently needed so as to prevent revenge. Breaking the cycle is key. In the Buddhist tradition, there is a clear recognition that some sort of process is necessary to accomplish this. To understand the nature of *dharma* facilitates that process – whether it is meditative or procedural in form. But Buddhist philosophy does not assume that this kind of understanding and the act of de-linking from attachment are things that happen spontaneously; rather, they require work and thought. It is also important to aid the process through which a perpetrator comes to acknowledge that they will face karmic consequences for their actions.

Buddha taught the *dharma* in order to understand it; he did this through teaching and dialogue. The Angulimala story clearly demonstrates that this man, who was a perpetrator of mass atrocity, needed to understand the *dharma*, *karma* and a sense of justice. This understanding was reached partly through *Karma*, but also by being confronted by his victims in the context of a legal trial.

Angulimala was a mass murderer with a victim tally akin to that of a contemporary war criminal. In modern times, Ven. Maha Ghosananda lived out the philosophical idea of *metta* – as shown by the Buddha in the Angulimala story – in order to quell a recent decades-long period of war atrocity and genocide. In these two examples at least, there is a clear Buddhist approach to reckoning with mass atrocity crimes. I would argue that processes and dialogues are emphasised in the Buddhist framework as primarily a means of letting go of the past. Punishment, individual ac-

countability, a historical record and a time-bound expeditious proceeding are not given so much priority as dealing with the aftermath of violence as a means of conflict prevention – ensuring that the ‘next’ war does not take root in the present or recent war and the associated war crimes. One limitation of international criminal law (which it has just begun to recognise) is that its focus on accountability gives the victims of core crimes little stake in the justice process; witnesses are there solely to provide enough evidence for a conviction. The Buddhist emphasis on the need for both parties to reach a calm state of mind recognises the importance of testimony as an essential part of the process; victims need to speak and to be heard for their own well-being and in order to place their stories in the memory of their community, not simply to secure a conviction. It is impossible to ‘punish’ genocide – as a crime it is too great. But it is possible to offer a symbolic ‘reparation’ which properly acknowledges the victim and provides a language to frame a dialogue between victim and perpetrator.

This is the beginning of a discussion that should take place between legal cultures.

Benjamin’s ‘Angel of History’, looking to the past as a single catastrophe which unceasingly piles up, as the Angel watches, unable to redeem what is destroyed or to pause his relentless crossing into the future,<sup>73</sup> could be a description of the problems faced by the modern international criminal law practitioner. Ceaseless atrocities continue to pile up with each passing generation, faster than international criminal law processes can begin to reckon with them. Buddhism, by contrast, could offer a different way think about justice after atrocity. Justice could be defined as a mode of conflict prevention –not through deterrence in the Western sense, but through an attitude to dealing with the past which sees its major task as assisting the minds of survivors and perpetrators to unshackle themselves from a past in which they still dwell, from which they cannot escape or forgive and from which new horrors may spring. Certainly, this is a significant contribution to thinking on post atrocity justice that would bear further dialogue.

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<sup>73</sup> Benjamin, 2003, p. 392, see *supra* note 37.

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## Hugo Grotius on War, Punishment, and the Difference Sovereignty Makes

Pablo Kalmanovitz\*

Hugo Grotius (1583–1645) has been variously portrayed as founding father of modern international law; one of the first, if not the very first, modern theorist of individual rights and of the social contract; the originator of a distinct conception of international society; and one of the most influential humanist defenders of Dutch republicanism.<sup>1</sup> However deceiving or inaccurate these labels may be, they nonetheless convey the range and depth of Grotius’ contributions to legal and political philosophy. The ‘miracle of Holland’ – as the French king Henri IV called Grotius while he was on a diplomatic mission in Paris at the age of fifteen – did make a remarkable number of path-breaking contributions to legal and political philosophy.<sup>2</sup>

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<sup>1</sup> See respectively Peter Haggemacher, “Hugo Grotius (1583–1645)”, in Bardo Fassbender and Anne Peters (eds.), *The Oxford Handbook of the History of International Law*, Oxford University Press, Oxford, 2012; Martine Julia Van Ittersum, “Hugo Grotius: The Making of a Founding Father of International Law”, in Anne Orford and Florian Hoffmann (eds.), *The Oxford Handbook of the Theory of International Law*, Oxford University Press, Oxford, 2016; Richard Tuck, “The ‘Modern’ Theory of Natural Law”, in Anthony Pagden (ed.), *The Languages of Political Theory in Early-Modern Europe*, Cambridge University Press, Cambridge, 1987; Knud Haakonssen, “Hugo Grotius and the History of Political Thought”, in *Political Theory*, 1985, vol. 13, no. 2; Hedley Bull, “The Grotian conception of international society”, in Herbert Butterfield and Martin Wight (eds.), *Diplomatic Investigations*, Harvard University Press, Cambridge (MA), 1966; Richard Tuck, *Philosophy and government 1572–1651*, Cambridge University Press, Cambridge, 1993, pp. 154–201.

<sup>2</sup> The secondary literature on Grotius is vast, but for overviews of his life and work, see Renée Jeffery, *Hugo Grotius in International Thought*, Palgrave Macmillan, London, 2006,

Grotius lived and worked in times of great upheaval and deep transformations in Europe, and a good deal of his writings tried to make sense of new emerging political realities. He died shortly before the Peace of Westphalia was agreed, which created a new order for Europe as it ended the appalling violence of the Thirty Years War, through which Grotius lived. Concerns with war and religious controversy are at the heart of his great work *De Iure Belli ac Pacis* (1625), as are also the legitimacy of nascent colonial enterprises and the rights of overseas trading companies, which at the end of the sixteenth century were building trade networks and transforming the world.<sup>3</sup> Grotius' first important commission as a lawyer had to do precisely with the coercive rights of the Dutch East India trading company on the open seas; his first widely acclaimed publication, *Mare Liberum* (1609), came out as a result of this commission.<sup>4</sup>

In this chapter, I want to discuss some of Grotius' ideas on war and punishment. Specifically, I want to examine the neglected concept of 'solemn war' that Grotius introduced in the third and last book of *De Iure Belli ac Pacis*. The concept, as will be seen in what follows, was presented as an alternative to the older and now more familiar concept of 'just war'. As Grotius himself was often keen to point out, the legal doctrine of solemn war is in fundamental respects inconsistent with that of just war, particularly regarding the application of punishment. Most notably, while just wars were typically punitive affairs, actions taken in the context of solemn wars, under the mandate of a sovereign ruler and following a formal declaration of war, should be left largely unpunished.

My central goal in what follows is to elucidate and comment on the reasons why Grotius thought it was necessary to introduce the concept of

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and Charles Edwards, *Hugo Grotius: The Miracle of Holland*, Nelson Hall, 1981. For a valuable recent comprehensive discussion and historical reappraisal of Grotius' ideas and sources, see Benjamin Straumann, *Roman Law in the State of Nature: The Classical Foundations of Hugo Grotius' Natural Law*, Cambridge University Press, Cambridge, 2015. Still useful is the eclectic set of perspectives contained in Hedley Bull, Benedict Kingsbury, and Adam Roberts (eds.), *Hugo Grotius and International Relations*, Oxford University Press, Oxford, 1990.

<sup>3</sup> See respectively Edward Keene, *Beyond the Anarchical Society: Grotius, Colonialism and Order in World Politics*, Cambridge University Press, Cambridge, 2004, and Martine Julia Van Ittersum, *Profit and Principle: Hugo Grotius, Natural Rights Theories and the Rise of Dutch Power in the East Indies 1595–1615*, Brill, Leiden, 2006.

<sup>4</sup> Hugo Grotius, *Commentary on the Law of Prize and Booty*, Liberty Fund, Indianapolis, 2006, pp. xiii–xxi.

solemn war in his great work on the rights of war and peace. Specifically, I want to reconstruct Grotius' argument as to why 'impunities' were intrinsic to solemn warfare. I will show that Grotius introduced the solemn war concept in response to what he perceived to be fundamental problems in the doctrine of just war. Contrary to canonical interpretations of Grotius as a defender of just warfare and universal criminal jurisdiction, my claim will be that Grotius was in fact ambivalent and torn between two competing normative conceptions of war and punishment. I will further argue that Grotius' ambivalence reflects genuine value trade-offs in the project of regulating war in the law of nations, trade-offs that he identified and that are still with us in contemporary forms.

The chapter begins with a discussion of the contrasting concepts of just war and solemn war and the role of punishment in each (Sections 7.1. and 7.2.). It then turns to reconstructing and discussing Grotius' reasons for introducing the concept of solemn war and why impunity had to be part of it (Section 7.3.). It concludes with some remarks on the extent to which Grotius' reasons for solemn war may be relevant today (Section 7.4.).

Before I proceed, a caveat is in order: there is no denying that *De Iure Belli ac Pacis* is a complex and rich book; its incomplete arguments and loose ends often allow for defensible yet conflicting interpretations. Nonetheless, in what follows I will argue that the solemn war concept was Grotius' solution to the value trade-offs he identified, and that *in this sense* he was a defender of solemn rather than just war.

## 7.1. Just War

Grotius is often read as a theorist of just war, and there is certainly ample textual evidence for that.<sup>5</sup> Like his distinguished predecessors, the Spanish scholastics (discussed in Chapter 5 above), Grotius argued that a war could be justified only as a proportional response to a serious violations of

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<sup>5</sup> By far the strongest case for Grotius' debt to the just war tradition, in particular to medieval canonists and early modern scholastic theologians, is Peter Haggemacher, *Grotius et la doctrine de la guerre juste*, Presses Universitaires de France, Paris, 1983. See additionally James Turner Johnson, *Ideology, Reason, and the Limitation of War: Religious and Secular Concepts, 1200–1740*, Princeton University Press, Princeton, 1975, pp. 223–31; Alex Bellamy, *Just wars: from Cicero to Iraq*, Polity, Cambridge, 2006, pp. 71–74; and Stephen Neff, *War and the Law of Nations: A General History*, Cambridge University Press, Cambridge, 2005, pp. 96–102.

right – to injuries imminent or received (II.i.2–6, II.ii.1).<sup>6</sup> He thought of just wars as forms of legal enforcement and means of judicial redress, and along these lines postulated three broad types of *iusta causa* in just warfare: “self-defence, recovery of property, and punishment” (II.ii.2, p. 171).<sup>7</sup> Book II of *De Iure Belli ac Pacis* contains a detailed catalogue of the injuries that would merit war. Arguably, one of Grotius’ central goals in writing his *magnum opus* was to build a complete doctrine of *ius ad bellum* around a full system of subjective rights.<sup>8</sup>

An important feature of this understanding of war is that warring parties stand in an unequal relationship: one is in the right and the other in the wrong. Before the *casus belli* – the injury that justifies the war – the parties stood as equals before the law of nature and nations. But after the injury, and by reason of the injury, the victim of aggression comes to have jurisdiction over the aggressor, including criminal jurisdiction. Following Francisco Vitoria, Grotius clarified that an ‘injurer’ in war need not always be at fault, notably not when he could not possibly have known that he was in the wrong. But even if the unjust side is faultless, his war remains objectively wrong, and consequently his enemy is just and entitled at least to reparations. Grotius’ careful line of argument is worth quoting in full:

We must distinguish various interpretations of the word ‘just’. Now a thing is called just either from its cause, or because of its effects; and again, if from its cause, either in the particular sense of justice or in the general sense in which all right conduct comes under this name. Further, the particular sense may cover either that which concerns the deed, or that which concerns the doer; for sometimes the doer himself is said to act justly so long as he does not act unjustly, even if that which he does is not just [...] In the particular sense and with reference to the thing itself, a war cannot be just on

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<sup>6</sup> All references to Grotius are to *De Iure Belli ac Pacis*. References indicate book number, chapter, and section number, so the first passage cited above is to sections 2–6 of chapter i of book II. When quoting, I include the page number of Francis Kelsey’s translation for the Carnegie Endowment for International Peace edition, although in some cases I have amended the translation. Hugo Grotius, *De Iure Belli ac Pacis Libri Tres* (Law of War and Peace), vol. 2, Francis W. Kelsey trans., Clarendon Press, Oxford, 1925 (1625).

<sup>7</sup> For a detailed discussion of this triad of causes for just war, with particular emphasis on their Roman sources, see Straumann, 2015, pp. 170–220, *supra* note 2.

<sup>8</sup> Peter Haggemacher, “On Assessing the Grotian Heritage”, in *International Law and the Grotian Heritage*, T.M.C. Asser Institute, The Hague, 1985.

both sides, just as a legal claim cannot; the reason is that by the very nature of the case a moral quality cannot be given to opposites as to doing and restraining. Yet it may actually happen that neither of the warring parties does wrong. No one acts unjustly without knowing that he is doing an unjust thing, but in this respect many are ignorant. Thus either party may justly, that is in good faith, plead his case. For both in law and in fact many things out of which a right arises ordinarily escape the notice of men. (II.xxiii.13, p. 565)

Notwithstanding the important caveat he took from Vitoria, Grotius argued that, as a matter of logic or “by the very nature of the case”, a war could be objectively just at most for one side. Actions by the injurer were unjust even if not done unjustly, that is, even if they lacked the required *mens rea* and could be excused in the eyes of criminal justice, and for that reason reparations must be paid to victims of injury. Culpable aggressors and their accomplices should be punished (II.xxiii.13; II.xxvi.4).

In this conception of just war, punishment has a role to play beyond being one of the just causes for war. In arguing for the expansion of punitive justice in war contexts, Grotius explicitly parted ways with most Spanish scholastics and in effect justified what today would be called universal criminal jurisdiction and humanitarian intervention (see II.xx.40 and II.xxv.1–8 respectively). Not only did the just side in war have criminal jurisdiction over the aggressor, but every sovereign power had it too, and in some cases, private actors with a clean criminal record could have it as well.<sup>9</sup> As was famously the case for Locke later on, for Grotius a private right to punish had to exist because only in this way could sovereign powers have come to have it. It was a matter of principle that anyone had the right to punish violations of perfect natural rights in virtue of natural law, at any rate “anyone who is not subject to vices of the same kind” as the aggressor (II.xx.3, p. 465, also II.xx.6).<sup>10</sup>

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<sup>9</sup> Richard Tuck, *The Rights of War and Peace: Political Thought and the International Order from Grotius to Kant*, Oxford University Press, Oxford, 1999, pp. 78–108; Straumann, 2015, pp. 208–18, see *supra* note 2.

<sup>10</sup> According to Straumann, this novel argumentative move by Grotius came as an adaptation of Ulpian’s private law dictum that no one can transfer greater rights than he possesses, see *ibid.*, pp. 208–09. On Grotius and the right to punish, see further Benjamin Straumann, “The Right to Punish as a Just Cause of War in Hugo Grotius’ Natural Law”, in *Studies in the History of Ethics*, February 2006, and Gustaaf van Nifterik, “Grotius and the Origin of the Ruler’s Right to Punish”, in *Grotiana*, 2007, vol. 26, no. 1. On Grotius and humanitarian intervention, see Raymond John Vincent, “Grotius, Human Rights, and Intervention”, in

Grotius' expansive views on punishment in effect turned aggressors into universal criminals. Criminal jurisdiction was for him by no means a matter of just desserts – and certainly not a privilege of revenge in the victim of aggression – but a global public good. In chapter xx of book II of *De Iure Belli ac Pacis*, the long chapter on punishment, Grotius justified punishment from the perspectives of the wrongdoer, the victim, and the community of mankind. Punishment could serve to correct and rehabilitate aggressors, and as such it was inflicted for their own good (II.xx.6.2); it could protect the victim from renewed attacks by incapacitating the aggressor; and it could also serve to protect all potential victims of that aggressor. In addition, by being exemplary, “public and conspicuous”, punishment could deter all potential aggressors (II.xx.8, p. 472).

This normative understanding of war and punishment relies on a strong analogy with the domestic legal order. Since in international society there is no supra-national authority that could have exclusive criminal jurisdiction, all public authorities are called on to judge and determine the wrongfulness of an aggressor's actions, and to exact punishment accordingly. For Grotius, universal criminal jurisdiction was in effect a decentralised substitute for State criminal jurisdiction in international society. Despite their important differences, punishment within the State and in international society shared analogous fundamental goals: deterrence of prospective wrongdoers and enforcement of the law of nature and nations. Just war itself is seen as a form of law enforcement analogous to police action within a State.

## 7.2. Solemn War

In book III of *De Iure Belli ac Pacis*, this expansive use of the domestic analogy and its concomitant robust understanding of universal criminal jurisdiction, were essentially rescinded. A different picture of war and punishment emerges in that book, one that raises questions regarding the extent to which Grotius was really a just war theorist and an advocate of universal criminal jurisdiction.<sup>11</sup> While Grotius' views on just war were

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Hedley Bull, Benedict Kingsbury and Adam Roberts (eds.), *Hugo Grotius and International Relations*, Oxford University Press, Oxford, 1990, and Peter Pavel Remeč, *The Position of the Individual in International Law According to Grotius and Vattel*, Martinus Nijhoff, Leiden, 1960, pp. 221–25.

<sup>11</sup> Hedley Bull characterises Grotius' position as “hesitant”, oscillating between two extremes. On the one hand, there is Grotius' strong reliance on the domestic analogy, on the basis of which the doctrine of just war was articulated, but on the other hand, there are his arguments

indebted to a great deal of scholastic thinking, the idea of solemn war was arguably novel in the natural law tradition and alien to scholasticism. Solemn wars are rooted in State practice, as established by Grotius, mostly on the basis of ancient sources and, more importantly, based on the logic of reason of State (*raison d'état*) which Grotius drew from humanist sources and translated into the modern language of natural law and the law of nations.<sup>12</sup>

But not only do the concepts of solemn war and just war have different genealogies, they also had markedly different historical impacts. While the revival of the doctrine of just war is a relatively recent phenomenon, the concept of solemn war – and subsequent variations, including ‘regular’ and ‘lawful’ war – had a profound impact on the evolution, form, and content of public international law generally, and of the laws of war in particular. The conceptual apparatus developed by Grotius around the concept of solemn war was subsequently picked up and elaborated further by the most influential early publicists of the modern law of nations, including Samuel Pufendorf, Christian Wolff, and Emer de Vattel, and eventually provided some of the intellectual foundations for the codification of the laws of war in the nineteenth and early twentieth century.<sup>13</sup>

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emphasising the dangers of treating a pluralist international society as a centralised State, on the basis of which the alternative concept of solemn war was introduced. There is no denying that Grotius was hesitant, but I would argue that ultimately, for all his caveats and seeming ambivalences, he was a defender of the prerogatives of sovereign States and as such willing to suspend fundamental tenets of just war doctrine. But cf. Hedley Bull, “The Grotian conception of international society”, in Herbert Butterfield and Martin Wight (eds.), *Diplomatic Investigations: Essays in the Theory of International Politics*, Harvard University Press, Cambridge (MA), 1966, pp. 64–65.

<sup>12</sup> Grotius’ sympathy and indebtedness to Renaissance republican ideas have been amply documented and emphasised by Richard Tuck in Tuck, 1993, pp. 154–201, see *supra* note 1, and also Tuck, 1999, pp. 1–15, see *supra* note 9. Drawing on Tuck and on his own work on the history of reason of State, Istvan Hont has suggestively characterised Grotius’ jurisprudence as a form of “juridically reformatted reason of state” in which the universal imperative of State protection comes to shape decisively the form of international law, in Istvan Hont, *Jealousy of Trade*, Harvard University Press, Cambridge (MA), 2005, pp. 14–15. Compare Peter Haggemacher’s somewhat forced attempt to unearth the scholastic roots of Grotius’ solemn war concept in Haggemacher, 1983, pp. 426–37, 595, see *supra* note 5.

<sup>13</sup> So I argue in my forthcoming book (see *supra* biographical note). For overviews of the development of this tradition of international legal thinking, see Peter Haggemacher, “Mutations du concept de guerre juste de Grotius à Kant”, in *Cahiers de Philosophie Politique et Juridique*, 1986, vol. 10; Pablo Kalmanovitz, “Early Modern Sources of the Regu-

In the introduction of *De Iure Belli ac Pacis*, Grotius described book III on solemn wars as a book on “what is done with impunity” in war (*Prolegomena*, 35, p. 22). Indeed, in solemn wars, punishment has a very limited role to play; such wars are, said Grotius, largely constituted by impunities, that is, exemptions from punishment in principle deserved. If a defining aspect of just wars is that culpable aggressors and their accomplices must be punished, a defining aspect of solemn wars is that fighters under the command of a sovereign ruler must be immune to punishment. In solemn wars, Grotius wrote,

it is permissible to harm an enemy, both in his person and in his property, not merely for him who wages war for a just cause, and who injures within that limit, a permission which is granted by the law of nature, but for either side indiscriminately. As a consequence, he who happens to be caught in another’s territory cannot for that reason be punished as a murderer or thief, and war cannot be waged upon him by another on the pretext of such an act. (III.iv.3, pp. 643–44).

In this crucial passage, Grotius decouples the doctrines of *ius in bello* and *ius ad bellum*, and makes the former symmetrical. In solemn wars, enemy States stand as legal equals, as equal belligerents rather than aggressor and victim. Moreover, the *ius in bello solenne* includes not only symmetrical privileges to harm and kill enemies, but also correlative obligations in third parties to abstain from punitive justice. The universal criminal jurisdiction that accompanies just wars, Grotius tells us here, must be suspended in solemn wars. In addition to immunity from criminal jurisdiction, solemn wars have other, more active legal effects, which Grotius argued had to be “defended as lawful” in domestic courts, in particular with regard to the enforcement of property and territorial rights acquired during war (III.vii.7, p. 695). So solemn wars are characterised not only by widespread ‘impunities’ but also by the sanction of certain particular ‘legal effects’.

What, then, are these solemn wars? They are essentially wars fought among sovereign States, formally and publicly declared as such; they are regulated by the positive law of *nations*, not nature; and their special regulations in a sense suspend obligations derived from the law of nature in virtue of the belligerents’ status as sovereigns.

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lar War Tradition: Grotius to Vattel”, in Seth Lazar and Helen Frowe (eds.), *Oxford Handbook of Ethics and War*, Oxford University Press, Oxford, 2016.

For each normative period of war, there are important contrasts between the doctrines of solemn and just war. First, regarding the doctrine of *ius ad bellum*, from the principle of sovereign equality follows the principle of belligerent equality: enemies stand as equals before the law, as formal enemies rather than as aggressor and victim of aggression. Aside from having the standing of sovereignty, the most important *ad bellum* obligation in solemn wars is to publicly declare the reasons for resorting to war in formal ‘war manifestoes,’ which serve the two-fold purpose of showing that it is indeed a sovereign that declares the war and of explaining and trying to persuade “the whole human race” of the justice of the war (II.xxvi.4; III.i.5).

However, the fact that solemn wars have to be publicly declared and justified does not mean that the belligerents would have to prove beyond doubt to others that they are just and their enemies unjust. In this respect, solemn and just wars differ fundamentally. While public declarations must contain the reasons why war is waged – and while presumably Grotius expected sovereigns to follow the canon of *casus belli* that he articulated in book II of *De Iure Belli ac Pacis* – both sides in a solemn war could present plausible reasons for war. The doctrine of solemn war in fact *assumes* that both sides will be able to offer plausible reasons for war, and that the law of nations allows sovereigns to make such contradictory claims. Plausibility of public reasons is a weaker standard than objective justice, which means that a war could be objectively unjust and yet solemn. Aggressors with the skill to present valid public reasons, even if in bad faith, pass the test of solemn warfare, and consequently must be treated as belligerent equals and given immunity to punishment.

Secondly, from equality *ad bellum* follows equality *in bello*: all sides in solemn wars have equal privileges and obligations in the conduct of warfare. Consistent with the priority assigned to the status of sovereignty in the practice of publicly declaring war, Grotius construed the doctrine of *ius in bello solemne* on the basis of (what he determined to be) recorded State practice. Indeed, the rules that govern solemn warfare belong not to natural law but to the “voluntary law of nations”, which emanates not from right reason but from the will and practice of States, or “of many states” (I.i.14, p. 44). Apparently conceiving of the voluntary law of solemn wars as a sort of lowest common denominator in State practice,

Grotius described shockingly broad privileges and meagre restrictions, though oft-qualified and somewhat limited in subsequent commentary.<sup>14</sup>

Among the few restrictions in solemn wars discussed by Grotius are proscriptions on the use of poison during war (III.iv.15); the use of undercover or ‘treasonous’ assassins (III.iv.18); rape (III.iv.19); and the killing of enemies in neutral territories (III.iv.8). None of these but rape, Grotius noted, are forbidden in the course of just wars, so in these respects solemn wars are more restrictive. Overall, however, solemn wars in Grotius are far more permissive than just wars.<sup>15</sup> Drawing on biblical and classical Greek and Roman sources, he construed the category of lawful enmity and legitimate force very broadly. While in just wars only those who were in some way morally responsible for violations of right can be targeted – force should be directed only at aggressors and their accomplices – in solemn wars, the *whole State* constitutes an enemy and legitimate target following a declaration of war. Grotius’ long catalogue of permissions in solemn wars includes a denial of the applicability of the rule of proportionality (III.iii.9) as well as the principle of distinction: all members of the enemy State, including women and children, are legitimate targets in solemn wars (III.iv.6, III.iv.9). It is permissible in such wars to injure or kill those who surrender and depose arms as well as prisoners of war (III.iv.11, III.iv.10). There is neither an obligation to give quarter nor a prohibition of torture in solemn warfare (III.iv.18). The property of all subjects of an enemy State, as well as public property, can be taken, spoiled, or destroyed (III.v.1).

Finally, regarding the doctrine of *ius post bellum*, solemn wars conclude on the basis of a negotiated peace treaty, not with the vindication of a violated pre-existing right, as in just wars. In fact, Grotius argued that peace treaties should be free of any necessary connections with matters of *ius ad bellum* and *ius in bello*, as such connections could play out as obstacles in peace negotiations (III.xix.19). Peace treaties should be assumed to include blanket amnesties, unless the parties explicitly stipulated oth-

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<sup>14</sup> On the sources of the laws of solemn war and Grotius’ ambivalence, see Remec, 1960, pp. 114–15, see *supra* note 10.

<sup>15</sup> Later sources and publicists, including Christian Wolff and Emer de Vattel, were to deplore Grotius’ broad permissions and to deny any weight of precedent to his humanist sources. Nonetheless, and explicitly following Grotius, both Wolff and Vattel embraced the basic structure of belligerent equality and restricted legitimate force to official armies or militia under the command of sovereign rulers.

erwise. Property and territory taken in the course of solemn wars should be recognised as the legitimate property of their takers, unless peace negotiations stipulated otherwise (III.vi.2; III.vi.8). Third parties should recognise such property and territorial acquisitions, which is to say that they should recognise the right of conquest in the law of nations and sanction it in domestic courts if disputes over property or territory arose (III.vi.25).

### 7.3. Why Solemn Wars

So how could these morally appalling legal effects ever be justified – the impunities, the indiscriminate killings of innocent people, the theft and destruction, the enslavement of the vanquished? To begin with, it is important to be clear that Grotius did not justify these wrongs or those fighting unjust wars under the guise of solemnity, *pace* Jean-Jacques Rousseau’s famous denunciations in the first chapters of *On the Social Contract*.<sup>16</sup> On the contrary, Grotius repeatedly condemned and expressed dismay at the appalling effects of solemn warfare. Thus, when in the Prolegomena of *De Iure Belli ac Pacis* he characterised the third book as a book on impunities, he emphasised that, in his argumentation, he always tried to distinguish clearly between the legal effects of solemn wars and moral rightness or “freedom from fault” (§35, p. 22). He states repeatedly in book III that the legal effects of solemn wars are valid only in ‘external’ relations, not binding as a matter of conscience. On the contrary, as he often clarifies, conscience dictates against taking full advantage of the external legal privileges of solemn warfare (for example, III.iv.5, III.x.1).

And yet, Grotius did offer some reasons and indeed provided a novel conceptual apparatus, to show why the impunities and legal effects associated with solemn wars should be recognised in the law of nations. Grotius’ reasons contributed to creating and upholding a system of legal rights and obligations that was certain to have the regrettable feature of permitting and sanctioning moral wrongs. Grotius’ ambivalence between the normative framings of just war and solemn war reflects real value trade-offs in the project of regulating war in the law of nations, trade-offs that became ingrained in the constitutive fabric of public international law.

Grotius’ defence of the principle of belligerent equality gives a good sense of the motivation for his apparent change of mind in the third book

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<sup>16</sup> Jean-Jacques Rousseau, *The Social Contract and The First and Second Discourses*, Yale University Press, New Haven, 2002 (1762), pp. 156–62.

of *De Iure Belli ac Pacis*. In solemn wars, he wrote, both sides should be treated as if they were justified in waging war. As we have seen, this means that third parties should abstain from punishing aggressors. But why should aggressors be immune to punishment? Grotius reasoned as follows:

To undertake to decide the justice of a war between two peoples had been dangerous for other peoples, who were on this account involved in a foreign war [...] Furthermore, even in a just war, from external indications it can hardly be adequately known what is the just limit of self-defence, of recovering what is one's own, or of inflicting punishments; in consequence, it has seemed altogether preferable to leave decisions in regard to such matters to the scruples of the belligerents rather than to have recourse to the judgment of others. (III.iv.4, p. 644).

There are two separate strands of argument in this far-reaching passage; one has to do with the adjudication of *casus belli*, the other with political prudence, the first and foremost virtue of sovereign rulers. I discuss each in turn.

The undertakings to which Grotius refers – “the just limit of self-defence, of recovering what is one's own, or of inflicting punishments” – are of the essence of just wars. Grotius says in this passage, and reiterates elsewhere in *De Iure Belli ac Pacis*, that for any given war, one should expect that accurately establishing the *ad bellum* justice will be difficult. Not only may external indications be insufficient, but also the law of nature, which governs just wars, is inherently intricate, sometimes as intricate as advanced mathematics.<sup>17</sup> Furthermore, the decisions of statesmen are typically contested internally and subject to disagreement:

[t]he moral goodness or badness of an action, especially in matters relating to the state, is not suited to a division into parts; such qualities frequently are obscure, and difficult to analyse. In consequence the utmost confusion would prevail in case the king on the one side, and the people on the other, under the pretext that an act is good or bad, should be trying to take cognizance of the same matter, each by virtue of its

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<sup>17</sup> As in mathematics, the law of nature contains basic principles that should be evident to any intelligent being, but also complex theorems that only few are equipped to grasp (II.xx.63).

power. To introduce so complete disorder into its affairs has not, so far as I know, occurred to any people. (I.iii.9, p. 111)

Clearly, similar if not more acute contestation must be expected in foreign affairs among sovereign rulers.<sup>18</sup>

Adjudication being so demanding epistemically, it follows that it would be excessive, dangerous, and unfair to require third parties to adjudicate foreign wars. It would expose them to the moral risk of fighting on the basis of mistaken beliefs about a disputed right, and in this way force them to add to the injustice of war. If third parties lack the moral confidence to ascertain the justice of a foreign conflict, their best response is to abstain from judgment.

Furthermore, and this is the second strand of Grotius' argument, it would be excessive to ask third parties to adjudicate foreign wars because doing so would put them in physical danger and cause wars to spread. Even if third-party States could accurately adjudicate a given war, they should be allowed to declare their neutrality if it were in their best interest to do so (III.i.5, III.iv.8, III.xvii.1–3). Since the defining vocation of sovereign rulers is to protect the lives and well-being of their own subjects, they cannot be asked to take the risks involved in crossing a powerful aggressor. In such cases, writes Grotius, "it was not safe for those who desired to preserve peace to intervene" and therefore they were "unable to do better than to accept the outcome [of an unjust war] as right" (III.ix.4, p. 704).<sup>19</sup>

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<sup>18</sup> It is not the case then, as Hedley Bull has argued, that "the distinction between just and unjust causes of war is one which Grotius takes to be apparent to all men, by virtue of their endowment with reason". While a great deal of Grotius' discussion of just wars does seem to depend on the assumption of epistemic accessibility, his discussion of solemn wars shows that he was well aware of the intricate and contested nature of applied *ius ad bellum*. Compare Hedley Bull, "The Importance of Grotius in the study of international relations", in Hedley Bull, Benedict Kingsbury, and Adam Roberts (eds.), *Hugo Grotius and International Relations*, Oxford University Press, 1990, p. 87.

<sup>19</sup> In shifting to this form of prudential thinking, Grotius in effect moved away from the predominantly deontological normativism of scholastic natural law and embraced a form of rule-consequentialism commonly associated with the reason of State tradition. For insightful discussions of the novelty and significance of this move, see Friedrich Meinecke, *Machiavellism: The Doctrine of Raison d'État and its Place in Modern History*, Westview Press, Boulder, 1984, pp. 208–10; Tuck, 1987, see *supra* note 1; and David Armitage, *Foundations of Modern International Thought*, Cambridge University Press, Cambridge, 2012, pp. 156–58.

This, I would argue, is for Grotius the fundamental difference that sovereignty makes. Sovereigns are for him first and foremost in charge of their own subjects' security and well-being, not of international justice or the safety and well-being of mankind. This is the source of the moral value of sovereignty and the basis for sovereign authority. Political prudence can dictate that in some cases the "good of the people" may require that a sovereign not interfere or judge in a foreign war: *salus populi*, not international justice, is the sovereign's *suprema lex*.<sup>20</sup> Sovereign States arose out of the social need for co-ordinated and coercive action; centralised decision-making in a sovereign is valuable and necessary for effective collective action. And just as it is important that decisions on the merits of defensive force rest in a single decision maker (I.iii.4–5), it is also important that sovereigns be able to avoid foreign armed conflicts by declaring their neutrality. Both are instances in which sovereign judgment may override disputed claims of justice.

To be clear: Grotius is not saying that States should always be agnostic about the justice of armed conflicts. On the contrary, in *De Iure Belli ac Pacis* he justified humanitarian interventions, as noted above. But what the passage quoted above indicates is that, when it comes to adjudication, each State should have the power to decide autonomously on how to judge foreign wars, and indeed should decide whether or not to make a judgment in the first place.

By contrast, the just war framework in effect requires third parties to take sides in armed conflicts. As Grotius himself often notes, there is a duty in natural law to take the side of justice, and to make reasonable sacrifices in order to realise justice. Minimally, third parties should not recognise property or territory acquired by aggressors, and if they have the necessary means, they should actively take action to end and revert wrongful states of affairs, notably unjust occupation. Furthermore, if the law of nations gave the right to use force exclusively to the just side, then all *in bello* and *post bellum* rights would have to be made conditional on that right. The unjust side would be criminally liable for wrongful killings and materially liable for property destruction and takings, and third-party States would have the obligation to enforce or minimally not obstruct the enforcement of these liabilities. However, and this is Grotius' central point,

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<sup>20</sup> To use Cicero's famous phrase. On Cicero's large influence on Grotius, see Straumann, 2015, pp. 76–77, see *supra* note 2.

when the *ad bellum* justice of a war is unclear or disputed, which it often should be expected to be, then the dispute would spill over to matters of *ius in bello* and *ius post bellum*, which would then necessarily drag third parties in virtue of their obligations of justice. Disputes over *ius ad bellum* would infect criminal liability and the validity of property transactions and of territorial rights. This potential spread of conflict is something Grotius sought to avoid by turning to the solemn war framework.

When articulating the doctrine of solemn war, Grotius recognised that conflict spill-over was a serious danger, and consequently that there are fundamental trade-offs between the values of justice and international order based on sovereign States. The pursuit of justice, in particular of criminal justice, could exacerbate conflict and spread war. Conversely, the cost of containing war, and of preserving the freedom of States to decide whether or not to get involved in war, is to let injustices pass, even to let manifest but powerful aggressors get away with their crimes.

Similar trade-offs can be detected in Grotius' discussion of peace treaties and of the right of conquest. In both cases, the basic normative thesis is that, for the sake of peace and the rule of international law, sheer power must be allowed to dissolve and reconstitute rights. Ideally, a contract signed under coercion should be null and void, but not, Grotius argued, in the case of peace treaties. For if duress were an exemption to the obligations of peace treaties, then the very institution of peace treaties would dissolve. "[U]nless this rule had been adopted [the exclusion of a duress exemption], no limit nor termination could have been fixed for these wars [solemn wars] which are extremely frequent. Yet it is to the interest of mankind that such bounds be set" (III.xix.11, p. 799). If the strong party knew that the weak party would later renege on the terms of peace, it would continue fighting until a bitter unconditional surrender rather than negotiate the terms of peace.

For Grotius, the closure function of peace treaties had the additional implication that they should not be made conditional on the satisfaction of the belligerents' *ius ad bellum* claims. Peace treaties must set aside the reasons why the war was waged, as well as any liabilities stemming from the costs and harms of war-making (III.xix.19). Claims for damages incurred during war should be presumed forgone and punishment for wrongs remitted, for "a peace will be no peace if the old causes for war are left standing" (III.xix.17, p. 811; also III.xix.15). Amnesties are of the essence in peace treaties.

In the case of conquest, aggressors unjustly occupying foreign territory should ideally be expelled by coalitions of law-enforcing States, instead of being given recognition for their unjust territorial acquisitions. But if no coalition is forthcoming, recognition is the only way to reinstate the rule of international law and get on with life. Relative to territorial and property rights, Grotius argued that the default principle should be *uti possidetis*: things remain as they were *de facto* upon signature of the peace treaty, except if the treaty stipulates otherwise (III.ix.4; III.ix.10–11). As unsatisfactory as this solution may be, essentially might must be allowed to make right for the sake of the restoration of an international rule of law.

In both coerced peace treaties and the right of conquest, the law of nations must confront two realities: that the justice of a war may be hard to establish, and that victory in war may favour the unjust side. Insisting on justice in the face of the crushing victory of an aggressor would be ill-fitting to the practical project of ruling nations by law. The law of nations must recognise the status of the parties and their actual relationship of power, as revealed partly through war, and allow them to freely contract the terms of future peace, recognising these terms regardless of previous claims of justice. For similar reasons, the law of nations must be ready to recognise *de facto* possessions when there is no foreseeable challenge from an altruistic law-enforcing power. The first imperative of *ius post bellum* in the law of nations is to re-establish the rule of law while upholding the formal consent and status of the parties.

To reiterate the initial observation I made in this section: Grotius was torn and agonised over these fundamental dilemmas. It is admittedly hard to tell from what he says in *De Iure Belli ac Pacis* which one of the two normative frameworks he proposed was supposed to apply as the law of armed conflicts, as he did not integrate the different frames and competing concepts and principles in a clear and systematic legal theory. One may argue, as Hersch Lauterpacht famously did, that Grotius left open the fundamental question of what the law *is*, and in this sense, he belongs to a pre-classical era of international law.<sup>21</sup> But I would nonetheless argue that the concept of solemn war is Grotius' somewhat ambivalent solution to the dilemmas he recognised.

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<sup>21</sup> Hersch Lauterpacht, "The Grotian Tradition in International Law", in *British Yearbook of International Law*, 1946, vol. 23.

A fundamental premise implicit in solemn war doctrine is that peace and deference to sovereign judgment should be allowed to prevail over justice in international society, in particular over criminal justice. Put differently: in international affairs, impunity (and worse) is the cost to pay for deference to sovereign judgment and political prudence. Furthermore, the driving imperative behind the arguments for belligerent equality, the right of conquest, and the validity of coerced peace treaties is that conflict and violence must be contained in space and time. For the sake of peace, or at least the mitigation of war, the law of nations should not keep records of old wrongs and grievances. Losses must be forgone, amnesties granted.

#### **7.4. Grotius and the Criminalisation of Aggression**

To what extent are these arguments relevant today? Analogous predicaments are evidently still with us, if in contemporary clothing, as readers familiar with the dilemma between peace and justice in transitional justice would immediately recognise.<sup>22</sup> For purposes of this volume, perhaps one valuable ‘teaching’ we can gain from Grotius is to recover a sense of the fundamental value trade-offs and dilemmas that are constitutive of the project of judging war in international criminal justice.

I have argued that Grotius recognised that the very logic of State sovereignty may often have to exclude imperatives of criminal and international justice. He faced a fundamental predicament between two ways of seeing war and punishment. On the one hand, through the just war lens, it is assumed that the justice of a *casus belli* can be established, and that there is a universal duty to support the just side and to condemn and prosecute aggressors. On the other hand, through the solemn war lens, it is seen that both sides in war can offer plausible reasons to fight, and that the justice of a war, in particular criminal justice *vis-à-vis* alleged aggressors, may be either indeterminate or have to be sacrificed for the sake of war containment and deference to sovereign power.

The tension between these two ways of understanding the relationship between war and punishment is of course particularly acute today in the project of codifying the crime of aggression in the Rome Statute of the

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<sup>22</sup> See, for example, Jon Elster, “Justice, Truth, Peace”, in Melissa Williams, Rosemary Nagy and Jon Elster (eds.), *Transitional Justice*, New York University Press, New York, 2012; Mark Kersten, *Justice in Conflict*, Oxford University Press, Oxford, 2016, pp. 19–36.

International Criminal Court, which came into effect in 2018. This project is arguably inscribed within the just war framework, according to which it should be possible to establish which side is the aggressor in any given war, and aggressors should be punished so that, progressively, aggression ceases to happen in international society.

Grotius would not have opposed the aspiration to codify the crime of aggression, as he was very much involved in a somewhat similar enterprise. But he may have been very cautious about the actual prospects of applying any definition of aggression in a centralised manner, and hence about the prospects of an international court to effectively pursue criminal justice for aggression in a society of sovereign States. In this respect, Grotius may be aligned with some contemporary scholars who have been skeptical of the project of criminalising aggression in international law.

Contemporary critics have emphasised the fact of widespread disagreement with regard to the legal status of actual cases of resort to force. To be enforceable in practice, any workable definition of the crime of aggression would have to rely on a general consensus which appears to be lacking in the world today. Furthermore, the inherent complexity of political crises that can potentially escalate to war would seem to necessarily exceed the conceptual boundaries of any definition suitable for criminal prosecutions. Political crises that lead to war are too unique and complex, and typically too deeply important for the parties involved, for a criminal statute or court to be able to determine fairly and impartially the lawfulness of, or responsibility for, actions taken in the midst of crisis.<sup>23</sup>

Neither these critics nor Grotius would deny that certain uses of force by States are manifestly unjust or aggressive, nor would they oppose the project of broadly defining what such unlawful uses are, but they would be very cautious when it comes to designating a third party to adjudicate matters of *ius ad bellum* in a centralised fashion, all the more if

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<sup>23</sup> See Martti Koskeniemi, “‘A Trap for the Innocent ...’”, in Claus Kress and Stefan Barriga (eds.), *The Crime of Aggression: A Commentary*, Cambridge University Press, Cambridge, 2017, pp. 1360–70; also Andreas Paulus, “Second Thoughts on the Crime of Aggression”, in *European Journal of International Law*, 2009, vol. 20, no. 4; and Michael Reisman, “Reflections on the Judicialization of the Crime of Aggression”, in *The Yale Journal of International Law Online*, 2014, vol. 39. For an older but still valuable critique of the 1974 General Assembly Definition of Aggression, Resolution 3314 (XXIX) of 14 December ([www.legal-tools.org/doc/752c30/](http://www.legal-tools.org/doc/752c30/)), which provided the basis for the Kampala process, see Julius Stone, *Conflict through Consensus: United Nations Approaches to Aggression*, Johns Hopkins University Press, Baltimore, 1977.

this is done with the intent of criminally prosecuting individuals. The reasons for this caution have to do not only with the need for widespread international consensus to proceed jointly in such sensitive matters, but also with the logic of State sovereignty and the nature of decisions about war and peace.

The imperatives of state sovereignty, as we have seen, were at the heart of Grotius' reluctance to fully embrace the just war approach. It is in the very nature of sovereignty that states should have the prerogative to decide on the necessity of resort to armed force. Prosecuting the crime of aggression at the International Criminal Court would directly confront this old (Grotian) imperative. The outcome of an eventual clash between the Court and a State on the lawfulness of force is hard to predict, but the very prospect raises hard questions. As Martti Koskeniemi has put them,

Are we ready to accept the superiority of 'general law-obedience' to a preference so important that we would normally go to war over it? In fact *is there any case where we would be inclined to endorse the Court's verdict on aggression that would differ from our own view of the matter?* I find it hard to think of any case where we would be inclined to think that the scandal of failing to comply with the Court's determination of aggression were greater than the scandal of somebody suffering innocently from such determination. Following our own determination of the nature of the act – whether or not it was aggression – is always more important than obeying the Court.<sup>24</sup>

There are passages in *De Iure Belli ac Pacis* that resonate with this line of questioning and critique. Grotius was preoccupied in particular with one implication, namely, that States cannot and should not be forced to align behind any determination of aggression in concrete cases. Thus, not only may favouritism for one's cause over a court's ruling be understandable, but also political reluctance on the part of third parties to stand by a court's determination. If Grotius were really a 'solidarist', as he has often been portrayed by members of the English School of International Relations, he would perhaps have full-heartedly supported a centralised international criminal court. But, as we have seen, Grotius was much more of a pluralist than is usually recognised. A plural world that values

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<sup>24</sup> Koskeniemi, 2017, p. 1377, see *supra* note 23, emphasis in the original.

State sovereignty is still the very constraining political stage within which the International Criminal Court has to operate.

Much has been written about the political entanglements of the International Criminal Court, often in the spirit of regret if not despair. Grotius may have been ambivalent about this regret. On the one hand, it would be a good thing if States could align behind an eventual determination by the International Criminal Court on the crime of aggression. But, on the other hand, it was valuable and important for Grotius that States retain the freedom to decide whether or not to support any such determination. I think Grotius would have argued that this choice cannot and should not be taken away from States.

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## Hobbes et la Cour pénale internationale : la fiction du contrat social global

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Comment la fiction, et son support, la parole, deviennent-elles force agissante, source de mouvement, d’empreinte sur les corps et les sociétés ? Comment le droit, traduction de la parole du souverain, codification de sa volonté, passe-t-il d’être une simple variation de la pression atmosphérique, une vibration de l’air produite par un organisme, une construction du langage énoncée par le corps d’un homme, éventuellement transcrite par l’écrit à une force capable d’êtreindre, contraindre, atteindre des réalités infinies ? Comment une matière originellement formée exclusivement par des mots et marquée par l’oralité peut-elle, et réussit-elle, à faire disparaître et naître, structurer, écraser, nourrir de la matière ? Le droit – *stricto sensu* – n’a lui-même qu’un vecteur, un outil pour imprimer sa marque sur le réel : celui de la parole. La matérialisation des décisions de justice – énonciations portées par un ou plusieurs corps individuels dénués de la moindre capacité coercitive directe – ne subsiste qu’à travers une incertitude, un espoir toujours renouvelé dont le flottement entre sa formulation et sa réception par les puissances exécutantes menace à tout moment de le faire vriller : celui de la croyance en ces et ses mots. Croyance au sens le plus primaire du terme – non pas en leur *justice*, leur *objectivité* ou même leur *désintéressement*. Croyance plus simplement, plus fondamentalement, en leur capacité auto-performative. En leur matérialité, assurée avant même d’être exécutée. Réfléchir à la question des fondements qui font naître cette fiction, c’est donc en quelques sortes en

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interroger la nature profonde, les sources non seulement virtuelles, mais bel et bien réelles, c'est-à-dire dans leur capacité à agir sur le réel. Or le droit international pénal, par son éloignement des processus classiques de souverainisation, mais aussi par sa difficulté à effectuer cette transmutation, pose avec une acuité particulière la question de ses fondements.

Les mots portés *au nom du souverain* par un juge, un procureur ou un greffier sont des contenants dont la coquille est formée de toutes les apparences que nous venons de mentionner mais qui doivent porter en eux la certitude de leur réalisation au moment de leur énonciation – réalisation sans laquelle tous ces éléments seraient vains. Que les mots du créateur de droit soient porteurs de *peines* – au sens le plus corporel du terme, de *douleurs* – d'emprisonnement, de torture – ou tout simplement d'humiliations, d'exclusions symboliques, ils n'en deviendront droit que parce qu'ils seront perçus comme le premier acte d'un travail sur la matière.

Il n'y a dès lors théoriquement de fiction qui tienne que parce que l'on *sait* qu'elle pourrait à tout moment devenir réalité – ou plutôt qu'elle est réalité alors qu'elle est encore fiction. Le droit est en quelque sorte cet espace intermédiaire – disons superposant – entre l'art et la science, un espace où le tragique de la scène menace à tout moment de se matérialiser sur le spectateur dans toute sa systématité et son implacable rationalité causale. Une fiction qui dépend de cette matérialisation – et donc du dépassement immédiat de sa qualité de fiction – pour tout simplement devenir tragique, et donc s'imposer *comme* fiction. Les jeux de scène du Tribunal – personnifications de ces différentes fictions que sont la société, la justice, l'autorité publique – leurs costumes et la codification de leur parole font de ce théâtre particulier un espace où l'accusé – resté avec la victime éventuelle et le jury seul dépouillé, dans son enveloppe charnelle et sa parole nue, dénué d'un quelconque attribut scénique – plie face à la puissance du seul mot, face à la puissance d'un monde où les puissants, les détenteurs de cette contrainte qui l'a amené et le retirera de la salle du tribunal, se lèvent, s'assoient et se taisent sur simple énonciation de corps producteur de droit – qui, pourtant, est lui dénué d'une quelconque puissance.

Le droit est donc un espace, un espace confiné où domine le mot et que les *Tribunaux* – la scène de cet espace – et les juges – metteurs en scène et principaux acteurs – vont chercher à étendre à la société dans son ensemble par la mise en scène de ses effets, dans une logique de contami-

nation, en montrant à ce corps étranger – à ce corps qui a décidé de s'exclure de la société en commettant un délit ou un crime, et qui en le faisant a aussi exclu la victime de cet espace, lui retirant un des droits qui lui était garanti par la société et que la société s'apprête à lui rétribuer – à ce corps étranger qu'est l'accusé, que l'autorité de la société demeure et s'apprête à s'affirmer implacablement sur lui par la simple puissance du mot – de ces mots qu'il devra une fois réintégré à la société respecter quand bien même ils aient été énoncés par des autorités dénuées de capacité d'action immédiate sur le réel – sous peine de se retrouver à nouveau dans une scène similaire et d'assister à une démonstration de la force de la parole et de sa matérialité.<sup>1</sup> Les jurés, les familles et plus largement les spectateurs se chargeront de rapporter le résultat de ce *spectacle*, de cette démonstration du pouvoir magique de la parole, de la réalité de la puissance de cette fiction qu'est l'État, et dès lors de la nécessité pour tous les autres de respecter à tout moment sa parole sous peine de devenir un jour la victime expiatoire, monstrative, réelle, de cette extraordinaire sorcellerie. Le droit, parole mise en scène, ne peut ainsi exister sans la violence qui l'accompagne, l'étend sans se confondre tout à fait avec lui. Cette transmutation est donc centrale, à la fois que révélatrice de la séparation nette entre les deux sphères.

L'ensemble ne fonctionne que si un discours relie les différents acteurs de cette scène, les actes qui autrement apparaîtraient isolés et dénués de sens. Interroger les fondements philosophiques du droit international pénal, et en particulier de sa création ultime, la Cour pénale internationale, telle qu'abordée dans le cadre du colloque organisé à New Delhi les 25 et 26 Août 2017 par le CILRAP,<sup>2</sup> c'est de ce fait s'interroger sur la capacité d'accès au réel, et dès lors de modification de celui-ci, à un mo-

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<sup>1</sup> Pierre Legendre rappelle que ce rapport dépasse le lieu et le temps du jugement :

Dans ces conditions de détour obligé aux fins d'accéder au monde – l'exigence symbolique comme telle – les constructions normatives ont forcément une base théâtrale, un enracinement dans des mises en scène, dont la fonction est de façonner sans fin le point de néant, ou, pour reprendre une expression de Dante, nommer « le principe qui manque ». Ainsi, les monuments de légalité ne sauraient être détachés de leur portage esthétique, lequel nous renvoie à la logique de la représentation, autrement dit au jeu des images, y compris inconscientes, et à la traduction de celui-ci dans les productions mythologiques et religieuses, scénarios et rites destinés à faire vivre la vie

Pierre Legendre, *Sur la question dogmatique en occident*, Fayard, Paris, 1999, p. 17.

<sup>2</sup> CILRAP, « Philosophical Foundations of International Criminal Law: Its Intellectual Roots, Related Limits and Potential », New Delhi, 25–26 August 2017.

ment où l'institution tangué à la fois dans son action que dans sa capacité à énoncer.

Notre postulat principal sera le suivant : la Cour pénale internationale a moins à voir avec l'universalisme des Lumières qu'avec les intérêts des chefs d'État et souverains. Le Statut de Rome instituant la Cour porte dans son texte la recherche d'un équilibre entre les desseins kantien et hobbesiens, les premiers gardant une importante dimension symbolique et discursive – très largement dénuée d'effets – les seconds permettant d'établir des dispositions assurant que la nature de l'institution ne dévie pas de l'intérêt de ses créateurs. Cette double articulation traverse la Cour au quotidien. Ses prises de position sont longtemps restées formellement comme sur le fond très proches de celles des ONG qui s'en considèrent comme des cofondatrices, mais son action n'a cessé de répondre à une logique mal identifiée, bien éloignée à la fois des espoirs de la société civile et de ceux des États, qui pensaient s'être assurés du contrôle sur la Cour. Sa jurisprudence elle-même, dans la droite ligne de celle des tribunaux pénaux internationaux, est un mélange audacieux de proclamations faisant appel à des fondements éternels et à une légalité universelle et de compromis juridiques lui permettant d'atteindre ses objectifs, fussent-ils instrumentaux et éloignés de l'universalisme systématique que l'on serait en mesure d'en attendre.<sup>3</sup>

Notre propos est de démontrer que, éloignée de la filiation kantienne qu'on lui prête pourtant obstinément et qu'elle invoque régulièrement, la CPI est avant tout un système d'autorégulation mis en place par les principaux dirigeants du monde afin de répondre à la pression populaire et à la nécessité de s'autolégitimer, voire de se protéger des conséquences d'un état de nature interétatique trop incontrôlé. Il s'agissait au lendemain de la guerre froide de trouver un moyen de répondre au

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<sup>3</sup> Cet équilibre est une donnée essentielle pour défendre l'action de la Cour, éloignée du « fondamentalisme juridique » d'inspiration kantienne que craint Mireille Delmas-Marty, qui appelle en retour à minima à une rationalité instrumentale, et plus largement à la fondation d'une « communauté mondiale sans fondations » pour éviter les pièges d'une telle structuration. Voir notamment à l'égard de ces inquiétudes la conclusion de ses Cours au collège de France, « Interdits fondateurs et fondamentalismes », prononcée le 2 Avril 2007 : ce premier exemple ne dispense pas d'examiner, même si la symétrie apparente est trompeuse car le risque est encore hypothétique, le cas du crime contre l'humanité, s'il devait être conçu et appliqué sans exception, comme un fondamentalisme en ce qu'il interdirait toutes les transgressions sans rien justifier et les sanctionnerait sans rien pardonner.

risque d'effondrement du système international suite à la multiplication des violences de masse et des défaillances des États sans mettre à bas le monopole de ceux-ci sur les relations internationales. En d'autres termes, de rétablir l'ordre alors que l'équilibre des pouvoirs branlait. Alors que les tentatives d'institutionnalisation des relations internationales respectant pleinement la primauté absolue des États et leur laissant en toute circonstance une possibilité de revenir en arrière ont échoué au cours du XX<sup>e</sup> siècle, il s'agissait de faire un pas supplémentaire, bien qu'apparemment contrôlé, avec l'instauration d'une institution partiellement autonome dans son fonctionnement.

Contrintuitive, l'association de la théorie hobbesienne à la Cour pénale internationale se comprend plus facilement lorsque, par le truchement d'une reformulation qui n'affecte pas le sens de la liaison, on tente de rapprocher l'idée de contrat social à celle d'une instance chargée de sanctionner les plus graves violations d'un pacte fondateur. L'une comme l'autre impliquent une forme d'organisation politique dans laquelle les individus cèdent leur droit à la violence à une autorité supérieure, contre une régulation de leurs relations « juste », car fondée sur le droit.

Comme le relève Pierre Hazan, l'action de la justice transitionnelle, terme recouvrant l'ensemble des mécanismes de punition et de réconciliation suite à des violences politiques, a toujours eu pour but principal de « refaire société » là où les crimes avaient dissous le lien entre les individus,<sup>4</sup> c'est-à-dire agir là où le contrat social s'est effondré. La Cour n'a pas d'autre but qu'intervenir là où, du fait de violences trop importantes, la société menace de n'être plus. Ces désagrégations qui menacent toujours n'interviennent pas lorsqu'une comptabilité particulière est atteinte, mais tiennent à leurs modalités d'exercice, et à leur qualification théorique. Nous reviendrons afin de l'expliquer tout d'abord sur le lien entre la fiction de contrat social et les violences de masse (*infra* sect. 8.1), avant de tenter de comprendre en quoi la théorie hobbesienne peut être utilisée pour comprendre aujourd'hui les relations internationales (*infra* sect. 8.2), et plus particulièrement la Cour pénale internationale (*infra* sect. 8.3).

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<sup>4</sup> Helen Fein, en sociologue, a montré comment la désidentification provoquant la dissolution du contrat social est une étape essentielle dans l'élaboration des crimes de masse. Voir notamment Helen Fein, *Genocide: A Sociological Perspective*, SAGE Publications, New York, 1993.

## 8.1. La Notion de Contrat Social et les Violences de Masse

### 8.1.1. Les Conditions des Violences de Masse

La commission des crimes contre l'humanité, *a fortiori* de génocide, peut prendre différentes formes. Secrète et surinstitutionnalisée, comme dans le cas nazi,<sup>5</sup> elle cherche alors à réduire les responsabilités, à taire un projet pourtant senti de tous, et s'appuie sur la technologie et le non-dit pour faire son œuvre avec un minimum de moyens humains *sachants*. La population y est mêlée, complice directe ou indirecte, sans que pourtant jamais le projet qui unit l'ensemble des participants ne soit dévoilé, les exécutants, réduits à un minimum, étant isolés,<sup>6</sup> conditionnés et tenus au silence.

À l'extrême inverse, le génocide peut être une œuvre populaire, incitée et planifiée par une élite restreinte mais appliquée village après village, foyer après foyer, par des dizaines de milliers de bourreaux directement impliqués, et plus ou moins encadrés par des troupes surarmées. C'est le cas rwandais, où près d'un tiers de la population du pays a été directement ou indirectement impliqué dans le génocide, en tant que victime ou criminel,<sup>7</sup> et où pourtant l'ignorance reste encore aujourd'hui clamée pour mieux échapper aux responsabilités et à la culpabilité. Les grandes lignes du projet sont alors toujours énoncées en jouant de l'euphémisme, afin de pouvoir donner à tout moment l'impression d'actes criminels localisés, individualisés, que la sauvagerie incontrôlée permet-

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<sup>5</sup> Il faut cela dit distinguer le génocide concentrationnaire de sa première phase, sur le front Est, mêlant pogroms et Einsatzgruppen au vu et au sus de tous, et notamment de l'opinion publique allemande, informée entre autres par le truchement des correspondances des centaines de milliers de soldats mobilisés. Voir sur les Einsatzgruppen l'ouvrage de Christopher R. Browning, *Des hommes ordinaires*, Texto, Paris, 2005, et sur le rapport des populations allemandes à la violence génocidaire, Ian Kershaw, *L'opinion allemande sous le nazisme*, CNRS éditions, Paris, 2002.

<sup>6</sup> Placés pour la plupart à l'extérieur du territoire national ou dans des zones désertées, à l'existence ou l'action niées, ils font alors l'objet d'un contrôle strict et permanent par l'État.

<sup>7</sup> Lors duquel la volonté de faire société, ou plutôt faire corps, des Hutus fut amenée à une telle extrémité et à un tel degré d'exclusivité qu'elle provoqua la désagrégation de toutes les structures sociales fondamentales, y compris la famille, cadre par lequel des milliers d'individus trouvèrent la mort du fait de la dénonciation par l'un de leurs parents. C'est en cela un exemple unique, sans compter que la communauté cherchant à recomposer ce nouveau contrat social par le génocide ne fut elle-même pas épargnée, plusieurs dizaines de milliers de Hutus modérés étant exterminés pour les « besoins de la cause ». Voir sur l'implication massive de la population, l'ouvrage d'Hélène Dumas, *Le génocide au village*, Seuil, Paris, 2014.

trait d'(in)expliquer. Des *inyenzi* (cafards) rwandais à la *solution finale* nazie, en passant par l'abstraction logorrhéique des Khmers rouges, la langue est toujours codée pour servir de vecteur à la fois que de masque, désigner l'ennemi et en faire un extérieur à la fiction dominante tout en préparant déjà l'après qui émergera nécessairement de l'échec d'un projet déjà pensé comme surhumain. D'une certaine manière, le génocide ne peut que naître avec l'idée de son échec, préparé tout aussi activement que sa mise en œuvre. Contrairement aux idées reçues, il ne tient ni de la folie ni de la primitivité, mais d'un appareil de pouvoir suffisamment puissant et capable de modifier intimement le récit dans lequel s'inséraient jusqu'alors toutes les communautés sous sa tutelle. La violence génocidaire est une machine de mort implacable, froide, systématique et dominée par la parole bureaucratifiée. La mort ne se démultiplie pas jusqu'aux limites du concevable dans l'anarchie. L'ordre est la condition de son déploiement.

Dans tous les cas, et que ce soit par le truchement d'une participation active ou passive, « l'œuvre » ne peut se faire sans impliquer une large partie de la population, elle-même conditionnée par une organisation étatique ou para-étatique et ne pouvant accepter *les événements* que sous condition qu'ils soient tus – ou du moins travestis.<sup>8</sup> L'on *sait* toujours, dans une plus ou moins grande mesure ; savoir qui vaut acquiescement

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<sup>8</sup> Le secret est nécessaire au crime de masse parce que l'adhésion est condition de réussite du projet de génocide : il faut donc absolument que les conditions minimales d'adhésion au contrat social soient maintenues – du moins en apparence – le plus longtemps possible pour les victimes, les bourreaux (à qui la nature du projet, bien qu'évidemment sous-entendue, ne sera jamais explicitée) et les masses indifférentes, qui ont besoin d'un prétexte pour justifier qu'elles n'aient pas fait appel à leur conscience (prétexte qui peut n'être qu'un maigre déguisement du génocide par des stratégies rhétoriques d'euphémisation et de dramatisation discursives détournant la langue et jouant sur les polysémies, stratégies qui permettront d'invoquer par la suite la duperie ou la méconnaissance et se désponsabiliser – et qui mettent en relief et par contraste l'importance de la mise en mots de la nature des événements et de la création d'une terminologie juridique qualifiante, allant du génocide aux différents crimes contre l'humanité, interdisant de prétendre à la méconnaissance de la spécificité des actes commis) afin de pouvoir exécuter le dessein sans rencontrer de résistance – résistance qui annihilerait la possibilité de réalisation du génocide – voire la simple tentative de sa mise en œuvre. Le crime de masse n'existe pas en dehors d'un contrat social, fût-il purement fictionnel. Celui-ci doit être systématiquement, en permanence, postulé, quand bien même il se trouve en pleine dissolution. C'est ce qui permet de comprendre, simplement et rationnellement, ce que les exégèses théologico-morales sur l'inconcevable, l'indicible, et autres lieux communs donnant une nature quasi-sacrale aux actes en question, considèrent comme relevant de l'ordre de l'impensable, à savoir une l'adhésion massive, ordinaire et hallucinée à de telles violences.

tacite, mais savoir qui doit pouvoir rester suffisamment ambigu pour pouvoir être nié en toute circonstance, condition que résume parfaitement cette phrase devenue totémique : « la route du nazisme fut construite par la haine mais pavée par l'indifférence. »<sup>9</sup> Pour susciter l'adhésion latente de la majorité, qui peut prendre la forme d'un acquiescement tacite, il faut un état de guerre qui permette de créer des lignes hiérarchiques parallèles, la crainte d'un ennemi extérieur prêt à surgir et la destruction de tous les relais sociaux et contrepouvoirs locaux.<sup>10</sup> Loin d'être soudain, le génocide murit lentement, développant son emprise au vu et au sus de tous jusqu'à naître au bénéfice d'un événement déclencheur, et sidérer alors par sa rapidité et son efficacité.

Parce qu'il implique de larges pans de la population et qu'il en exclut d'autres à de larges échelles, le crime de masse pose, lorsque le dessein a failli – et il faillit toujours – la question de la reconstitution du contrat social. En effet, pendant la période criminelle, le pacte unissant les individus pour *faire société* s'est virtuellement dissous pour se reformer sur de nouveaux fondements. Les victimes – choisies selon leur origine, leur appartenance politique ou religieuse ... – autrefois indifférenciées dans la masse, sont devenues l'*autre* qui menaçait la cohésion de la société et qu'il fallait « rendre étranger », soit par expulsion, soit par extermi-

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<sup>9</sup> Kershaw, 2002, p. 19, voir *supra* note 5. Cette nécessité du consentement a été mise en exergue par Jacques Sémelin à partir de travaux historiques sur la Seconde Guerre mondiale, qui a montré comment des protestations pacifiques et une « résistance latente » (jugement moral, protestations isolées, expression publique...) ont suffi à mettre fin au projet eugéniste du nazisme. La non-protestation contre l'holocauste, qui montrait que les Juifs étaient déjà considérés comme se trouvant en dehors du contrat social – ce qui montre la réussite au-delà de toute espoir de la stratégie discursive nazie mise en place dès 1933 –, aura servi d'encouragement aux autorités allemandes. C'est certainement là un succès de la politique de ségrégation mise en place progressivement à partir de 1933, et qui montre à quel point les génocides sont des processus à maturation lente. La progression de l'anodin et la banalisation conséquente du mal par mouvements de relativisation successifs, coupant progressivement une partie de la population de l'autre et détruisant toute possibilité de mouvement d'empathie ou de sentiment d'altérité, jouent un rôle considérable.

<sup>10</sup> Ainsi, ironiquement, si l'on peut utiliser ce terme, la monstruosité du génocide est toujours attribuée au génocidé, dans un parallélisme aussi saisissant que brutalement banal où l'oppressé, afin de se donner les moyens de son oppression qui passent par une large adhésion, se présente en opprimé au bord du fossé, pour mieux justifier l'utilisation de tout moyen à sa disposition, qui aurait été perçu comme illégitime dans un quelconque autre état que celui d'exception. La violence et la persistance de ces discours expliquent que de nombreux participants aux génocides ne réussissent pas à admettre, des années plus tard, l'illégitimité du projet qu'ils ont servi.

nation, soit par mise en minorité<sup>11</sup> – toujours par le langage avant les armes. Or, on ne peut être partie à un contrat social qu'en étant considéré comme l'égal de l'autre, avec les mêmes droits et devoirs. La violence de masse implique donc une dissolution initiale – *a minima* postulée – de la société – du contrat social – qui unissait auparavant des personnes considérées comme égales. Ce contrat social, une fois le processus enclenché, va être progressivement réattribué selon de nouveaux critères d'exclusion, qu'ils soient ethniques, religieux ou sociaux, pour refaire une *nouvelle* société que l'on dira purifiée et donc régénérée. Partant du postulat que le vivre-ensemble n'est plus envisageable, les sociétés vont faire de la violence un outil au service de leur politique de reformation – et se réattribuer ainsi le droit de punir sur différentes bases.<sup>12</sup>

C'est alors qu'importe la *manière* dont le génocide, ou la violence de masse, a été mise en œuvre. Lorsque les violences ont été commises à l'étranger ou par des forces étatiques, et exclusivement ou quasi-exclusivement par celles-ci, on peut considérer que la nouvelle société qui en naîtra est établie par « simple expulsion » des victimes, sans que la nature du pacte unissant la majorité étant restée fidèle aux commettants en soit véritablement affectée.<sup>13</sup> La continuité est alors *parfaite* et le contrat social n'ayant pas été dissous, tout peut continuer comme avant. L'État et ses dirigeants ayant maintenu à tout moment leur monopole de la violence légitime, les structures demeurent, et il n'est nulle raison de refonder une société. C'est bien au contraire sa permanence qui a été soi-disant « préservée » par l'exclusion de ceux qui la menaçaient et qui s'en étaient de toute façon eux-mêmes exclus auparavant par leur *trahison*, leur *double jeu* qui a légitimé leur extermination. L'État peut continuer à exercer son magistère sur la société enfin purifiée sans voir son autorité remise en cause. Voilà du moins le calcul effectué par les instigateurs des violences,

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<sup>11</sup> Au sens spinoziste, c'est-à-dire en étant « du droit d'autrui », et donc non partie à la souveraineté, soit par mise en esclavage, soit par retrait des droits à la citoyenneté, bien que, dans la théorie de l'état civil de Spinoza, la multitude doit être « en minorité » (vis-à-vis de la Cité), c'est alors un état d'égalité et non pas, comme dans le cas étudié, une mesure d'exclusion du contrat social, c'est-à-dire, une sorte de double mise en minorité. Voir Baruch Spinoza, *Traité politique*, chapitre II, article 9.

<sup>12</sup> Réattribution que la création de la CPI cherchera à limiter en imposant au droit pénal, par sa définition des crimes de guerre, crimes contre l'humanité et crimes de génocide, des invariants tabous, soit autant d'actes qu'une quelconque reconfiguration du droit de punir ne pourra pas, sous aucune condition, autoriser.

<sup>13</sup> Ce serait le cas allemand jusqu'en 1945.

calcul dont ils transmettent les promesses à la population qui, soulagée et déresponsabilisée, peut se contenter de regarder ailleurs pendant que l'*ouvrage* est commis. Nul hasard à ce que le régime nazi ait fait de la Pologne la terre d'accueil de ses centres d'extermination plutôt que d'utiliser son propre territoire, et qu'en retour il n'y ait pas eu la moindre révolte contre ce projet, mené de façon *civilisée* à l'intérieur des frontières du Reich, au sein de la population comme des différentes structures de pouvoir allemandes.

Mais dès lors qu'une participation active peut être notée de la part de larges pans de la population, devenue, c'est un pléonasse, criminelle sans autorisation étatique explicite – puisque l'explicite est toujours interdit dans ces *affaires* –, c'est l'ensemble du contrat social qui va se dissoudre sans possibilité de rémission immédiate. En effet, faire société implique de renoncer à son droit à faire violence par soi-même, au profit exclusif de l'État ou de la structure souveraine. Dès lors que les populations s'arrogent à nouveau ce droit, même si elles y ont été incitées par l'État, celles-ci n'ont pu le faire qu'à défaut d'autorisation explicite, sous peine que l'État ait pris la décision de s'auto-dissoudre. Elles ont dès lors acté leur sortie du contrat social qui ne leur convenait *de facto* plus et doivent s'organiser d'elles-mêmes dans une nouvelle société. Il ne s'agit plus alors d'exclure une partie de la société, mais de s'exclure soi-même pour se reconstituer différemment, sur d'autres fondements, et exterminer ceux restés *en dehors*, devenus subitement barbares dénués du moindre droit. La forme étatique faisant encore le lien, le *contenant* de ces deux sociétés brusquement séparées, peut bien se maintenir et avoir été à l'origine de cette rupture, sa substance lui a été retirée et sa capacité à faire récit lui est niée par sa propre intention : ne reconnaissant pas les victimes, et n'étant pas reconnu par les bourreaux, sa désagrégation est entière.<sup>14</sup> Cela posera la question, une fois le conflit achevé, non seulement de la réconciliation entre bourreaux et victimes, mais des fondements mêmes de la société « restante ». Celle-ci pourra être alors considérée comme dissoute, dès lors que tous se sont attribués une violence que l'entrée en société leur avait justement retirée. Elle n'en aura pas moins été immédiatement reconstituée autour de nouvelles structures de pouvoir, pour ainsi « devenir nouvelle ». Quant aux structures qui ont

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<sup>14</sup> Phénomène qui justifie notamment que l'État nazi, ou dans une autre mesure le régime de Vichy, ne soient pas considérés comme des épisodes des histoires respectives de leurs pays et soient présentés comme des ruptures de nature en leur sein.

subsisté malgré cette liquidation, à commencer par l'État, devenues dans la transition un outil sans objet, elles vont jusqu'à l'obsession chercher à retisser le lien qui a été subitement retiré.

Nous voyons là l'importance de la distinction entre ces deux modalités, bien que nous montrerons par la suite qu'elle s'appuie largement sur un artifice. Dans le cadre de violences de masse, ceux qui se sont arrogés les moyens de l'État pour commettre leurs crimes seront jugés et punis par ce dernier une fois cet épisode achevé, sans que cela ne pose problème, puisqu'ils ont cessé de reconnaître son autorité et son monopole.<sup>15</sup> Ainsi la Cour ne semble-t-elle pas avoir à agir dans ces circonstances.

Mais qu'en est-il des situations où la violence ne s'est pas libérée de l'autorité étatique ? Comment punir les bourreaux qui n'ont cessé de clamer qu'ils continuaient d'incarner l'autorité donnée par le contrat social, comment réparer et réconcilier, alors que ceux-ci continuent de croire en une *autre* fable, un autre contrat social qu'ils considèrent usurpé par ceux qu'ils avaient exclus et qu'ils avaient traités en barbares ? Comment penser leur réintégration au contrat social sans nier le *changement de nature* inévitable qu'a subi ce dernier ? Seuls l'appel à un extérieur, l'assujettissement par une puissance étrangère, ou par une autorité clamant avoir toujours incarné la réalité du contrat social et de la souveraineté usurpée par les criminels, c'est-à-dire renversant l'accusation d'usurpation, semble alors être envisageables, sans jamais être tout à fait satisfaisants. Il aura ainsi fallu à Paul Kagamé reconquérir militairement le Rwanda comme il l'aurait fait d'un pays étranger, épurer son administration, réécrire ses textes fondateurs et le diriger d'une main de fer, autoritaire et violente pendant plusieurs décennies, pour contraindre les Hutus récalcitrants à un *modus vivendi* contre lequel ils avaient pris les armes et rendre crédible une fiction qui, vingt ans plus tard, reste malgré

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<sup>15</sup> L'arrêt de la reconnaissance de l'État comme seul dépositaire de la violence légitime fonde d'ailleurs le droit de punir dans toutes les théories du contrat social, à commencer par celle de Hobbes : nous nous trouvons donc dans un cas presque « classique » de réhabilitation de l'État. Il reste une limite, et non des moindres, qui peut lui être opposée : la continuité de l'État suggère celle de ses pratiques, à commencer par l'immunité pour les actes commis dans le cadre des fonctions. Cette constante dans tout dispositif souverain créé un État hybride qu'il est impossible de traiter « classiquement » dans ce type de transition. C'est l'une des raisons première de la création de la CPI, qui comme nous le verrons vise à « combler » cette faille.

tout contestée voire tout simplement niée par toute une partie de la population.<sup>16</sup>

Ces conflits et insuffisances qui pourraient sembler purement théoriques – que devrait changer en pratique qu’un État appelle explicitement à la violence ou qu’il en fasse tout autant, sinon plus, pour provoquer *de facto* la violence sans ne s’être jamais prononcé tout à fait clairement sur la question ? – ont donc de graves conséquences réelles, et transforment fondamentalement les modalités de dépassement d’un état nécessairement transitoire. Toute organisation et tout projet, même *totalitaire* – si le mot a un sens – et à la recherche d’un absolu, trouvent leurs limites dans leur incapacité à transformer tout à fait la fiction en réalité,<sup>17</sup> imposant alors d’avoir recours à la création de nouveaux édifices fictionnels, chargés de venir dépasser ce qui devient progressivement autant de défaillances de la parole devenues insoutenables. Confrontées à la violence des masses, les sociétés qui s’y sont impliquées et souhaitent en sortir, et nous insistons, elles le souhaitent toutes à terme, n’ont d’alternative que de faire appel à un nouveau langage, fut-il extérieur, pour reconfigurer leur espace politique.

### **8.1.2. Le Rapport Paradoxal à la Souveraineté**

L’action de la Cour pénale internationale vise à combler ces failles en introduisant un tiers objectif<sup>18</sup> dans le règlement de la question des violences de masse afin de dépasser les limites des édifices nationaux. L’institution établit un contrat social à l’échelle supranationale, de portée très limitée, couvrant les points aveugles des pactes nationaux, en poursuivant ceux qui, par leur rôle passé dans la société, ne se considèrent pas comme partie prenante des contrats sociaux, et ne peuvent pas, dès lors,

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<sup>16</sup> L’exemple de l’Allemagne – dont l’occupation, doublée d’épurations à tiroirs et d’une véritable refondation démocratique, se révéla nécessaire au lendemain de la Seconde Guerre mondiale – est tout aussi significatif.

<sup>17</sup> Le plus souvent, la volonté même de transformer la fiction en réalité est inexistante, faisant du fantasme génocidaire et purificateur un simple outil au service d’une politique plus large nécessitant un bouc émissaire transitoire.

<sup>18</sup> Cette forme du tiers objectif est une constante, sinon universelle, du moins très largement répandue dans de nombreuses cultures, à des échelles tant politiques qu’interindividuelles. Il est ainsi possible de tracer un parallèle entre le rôle du psychanalyste et celui du juge dans le processus de mise en place d’un dialogue et de l’objectivation d’une situation permettant la création d’un terrain d’entente sur la définition du réel, préalable indispensable à l’acceptation, voire le dépassement du traumatisme et la résolution du conflit.

être jugés par les représentants de ceux-ci.<sup>19</sup> Cette mission n'en pose pas moins question tant sa tâche semble démesurée. Sans pouvoir de contrainte direct, ni de moyens d'accompagnement des processus de réconciliation locaux, la Cour invoque l'existence d'une communauté humaine – nous retrouvons là l'intérêt de l'*idéologie* cosmopolitique – qui permettrait à tout moment de punir les criminels, quand bien même ils se seraient exclus eux-mêmes de leur contrat social originel. Devenus barbares par choix, comptant le rester et pensant dès lors pouvoir échapper à toute autorité autre que la leur, ils seraient en quelque sorte rattrapés par le col par cette communauté ultime, la seule dont il ne soit possible de s'exclure en aucune circonstance,<sup>20</sup> où les responsabilités peuvent être exigées quel que soit le contexte et le temps passé.<sup>21</sup> Complexe entreprise, nécessitant un pouvoir symbolique si pur et étendu qu'il ne pourrait être en aucune circonstance nié, et dont le véritable objectif peut être interrogé. L'instance, établie par les chefs d'États, tirerait en effet dérivativement sa légitimité de la leur, jusqu'à englober l'ensemble des sociétés et individus qu'ils représentent, de façon *absolue*. Mais comment impliquer d'office ceux qui auraient refusé de se soumettre à l'autorité de ces mêmes chefs d'État, voire à la suprématie même de l'idée d'État, ou qui auraient décidé, après une période de croyance, de s'en retirer ? Comment faire accepter la spécificité imprescriptible et impardonnable des crimes de masse à ceux qui les ont justement commis et qui se réfugient derrière une valeur supérieure, spécifique à leur culture et au contexte de leur action, pour les justifier ?<sup>22</sup> La défense d'un pluralisme ordonné, passant par un rejet de l'absolu judiciaire et l'utilisation d'une rationalité instrumentale, qui permettraient d'y répondre, entrent en contradiction flagrante avec

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<sup>19</sup> Le jugement impliquant nécessairement la réintégration, fut-elle symbolique suite à une condamnation à mort.

<sup>20</sup> C'est ce qui nous permettra de lier cosmopolitisme et contractualisme hobbesien, le seul qu'il ne soit pas possible de nier à autrui.

<sup>21</sup> D'une certaine façon, la Cour pénale internationale fait des chefs d'État et des rebelles – contre ce qu'ils pensent être leur nature même – des sujets de droit pour la première fois dans leur histoire.

<sup>22</sup> La question se pose seulement pour ceux qui refusent de reconnaître la Cour, et donc le contrat social qu'elle implique, et non pour ceux qui rejettent le fait d'avoir commis les crimes en question sans pour autant nier l'autorité de la CPI et leur insertion dans ce tissu social. Elle n'est résolue que dans le cas où l'État reste reconnu universellement comme la forme suprême, même par ceux qui en refusent l'autorité pour des questions politiques ou même qui sont entrés en rébellion, sans renoncer à tenter d'en conquérir l'exercice : dès lors l'adhésion de cet État au Statut de Rome implique celle de ses intégrants.

l'impératif catégorique et systématique de la lutte contre l'impunité que la Cour est, selon *l'idéologie* cosmopolitique, censée incarner.<sup>23</sup> Cette ambition, faite d'une capacité au compromis et défendue par Mireille Delmas-Marty,<sup>24</sup> est pourtant dans les faits celle qui domine l'action du Procureur et plus largement de l'institution, par impératif de survie. Mais elle se trouve mise au service, nous serions tentés de le dire *naturellement*, des plus puissants de l'ordre qu'elle sert, renvoyant tout espoir d'une reconfiguration des rapports juridiques prenant en compte une altérité culturelle à un espoir vain. Derrière les énonciations humanistes, la nature réelle de l'institution renvoie à une autre réalité.

Les difficultés apparues dans l'exercice quotidien de la Cour nous ont montré que, bien plus que la pression des opinions publiques ou de la société civile, ce sont les intérêts des États qui dictent l'agenda et la temporalité de l'action de l'institution, parfois du fait de l'anticipation même de leurs désirs par les propres fonctionnaires de l'institution. Son absence d'autonomie *réelle* pourrait dès lors la disqualifier, bien qu'elle ne concerne *a priori* que le Procureur et non les procédures judiciaires elles-mêmes.<sup>25</sup> Loin de rechercher la création d'un sentiment humain universel, qui passerait par une action incontestable par chacun, la Cour cherche systématiquement l'approbation d'entités fictionnelles et de représentants

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<sup>23</sup> Il est possible de nuancer cette affirmation en montrant que la Cour peut être exclusive dans l'action de ces juges et plurielle dans celle de son Procureur.

<sup>24</sup> Voir, entre de nombreux autres développements sur la question, la conclusion de ses Cours au Collège de France, le 2 Avril 2007, voir *supra* note 3 :

Eviter le fondamentalisme politique du paradigme de la guerre contre le crime impliquerait une ouverture aux principes juridiques, nationaux et internationaux, afin d'introduire une rationalité à la fois instrumentale et éthique.

<sup>25</sup> Ce qui rend vaines les plaidoiries, une fois dans la salle d'audience, mettant en cause l'impartialité de l'institution et sa capacité à prendre des décisions autonomes, les défenses s'appuyant pour cela sur la sélectivité des poursuites ou l'inaction du Procureur dans telle ou telle situation : ainsi, non seulement cela ne change rien à la culpabilité ou l'innocence de l'accusé pour les crimes en question, mais encore moins à la gravité des actes présomptivement commis. Mais cette politisation n'est censée avoir concerné à aucun moment les juges qui traitent eux des cas d'espèce, sans une quelconque contrainte diplomatique ou stratégique, et sans n'avoir à craindre l'impact de leurs décisions qui sera *a priori* nul pour leur action, contrairement à celle du Procureur. Si les polémiques entourant la fermeture du TPIY viennent nuancer ce jugement, le juge-président américain ayant fortement influencé un certain nombre de verdicts sur influence américaine, elles sont censées rester très largement exogènes à la CPI dont la structure et les modalités d'action rendent théoriquement improbable la répétition d'un tel scénario.

dont le pouvoir l'est tout autant. L'écart et la duplicité pourtant naturels à l'institution ne cessent de surprendre.

Il faudrait pour l'expliquer tout à fait commencer par changer de perspective. Les compromis passés entre la Cour et les États ne tiennent pas qu'à des questions budgétaires ou d'organisation. Éloignée des populations, la CPI se concentre sur les principaux responsables politiques qui président à leurs destins. Qu'ils soient rebelles ou chefs d'État, ces individus s'étaient déjà placés en dehors du contrat social initial en s'arrogeant le droit à la violence, en cherchant son monopole, bref en se faisant ou en prétendant devenir Léviathan. La CPI n'a théoriquement ni les moyens, ni l'intention de s'attaquer aux intermédiaires, au bas de la hiérarchie, à la masse, qui ne s'est jamais pensée en dehors des sociétés et qui relève du droit commun. Elle est programmée pour agir exclusivement contre ceux qui se placent individuellement en dehors de la société, par choix ou par défaut, et exclusivement contre eux, sans qu'ait été envisagée l'éventualité que tout un peuple, ou une grande partie de celui-ci, puisse se placer de lui-même en dehors de sa propre société, dispositif rendant dérisoire l'hypothèse d'une réaction pénale impossible à mener contre des milliers de personnes – et pourtant parfois nécessaire dans les cadres de génocide. Voilà donc le rôle de la Cour philosophiquement, et dès lors pratiquement circonscrit, à des violences commises par des appareils étatiques ou, dans le cadre des crimes de guerre et crimes contre l'humanité, des rebelles, et n'ayant pas impliqué activement l'ensemble des populations.

Ces modalités d'action qu'auraient dû illustrer les onze premières années d'action de la CPI renvoient à la philosophie hobbesienne et non à celle des Lumières. Elles ont été cependant parfois étrangement interprétées par l'institution, qui pour *se faire les dents*, pour reprendre le mot d'un représentant de la Cour, s'est attaquée à de petits rebelles, responsables accessoires de violences mal délimitées, et très largement inférieures à ce que l'on pourrait considérer comme des « violences de masse ». Cela a été notamment le cas dans l'affaire Katanga.<sup>26</sup>

Dans un contexte où les opportunités d'intervention ne manquent pas, la CPI a pu certes théoriser juridiquement, voire budgétairement, les raisons de son inaction en Afghanistan, en Palestine, voire même en Irak –

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<sup>26</sup> Voir Juan Branco, *De l'affaire Katanga au contrat social global : critique de la Cour pénale internationale*, IUV-LGDJ, Paris, 2015.

pour préserver sa façade cosmopolitique et la fiction dans laquelle l'ont inscrite ses défenseurs. Cette inaction reste cependant directement liée à son fondement contractualiste et à son inféodation aux États les plus influents, et en particulier à ses dirigeants, c'est-à-dire ceux les plus à même de subir son action. Le lien que la Cour entretient avec les puissances souveraines est évidemment organique, par le truchement de l'Assemblée des États parties qui en élit à échéances régulières les principaux dirigeants, juges, greffier et Procureurs. C'est aux États et aux États seulement que les officiels de la Cour doivent rendre compte. Mais ce lien joue aussi à un niveau plus implicite – déterminant le quotidien de la Cour. Si l'activité judiciaire et procédurale de la CPI n'est pas visiblement politisée pour un regard occidental,<sup>27</sup> sa sélectivité préalable répond bel et bien explicitement à des standards parfaitement subjectifs et étonnamment en accord avec les intérêts des grandes puissances. Quelle que soit l'appréciation que l'on porte sur l'institution, le constat doit être tiré : à aucun moment, la CPI n'a cherché à se confronter frontalement aux puissances dominantes, tant à l'échelle mondiale qu'au sein des situations mêmes où elle a décidé d'agir. Parce que dénuée de puissance, elle s'est sentie dans l'obligation de n'attaquer que ceux qui, parmi les *pires criminels qui soient*, étaient déjà marginalisés, pour se donner une chance d'agir. Reste à rendre compréhensible le pourquoi de cette action.

## **8.2. Sur l'interprétation Hobbesienne de l'école Réaliste des Relations Internationales**

### **8.2.1. La Notion de Contrat Social chez Hobbes**

Revenons pour cela à la question des fondements. S'inspirant des transformations politiques dont il est contemporain, Thomas Hobbes construit un état fictionnel, qui ne correspond pas à un moment historique déterminé, qu'il dénomme *état de nature* et qu'il utilise en contrepoint des sociétés modernes pacifiées où règne l'état de droit, assuré par la figure politique de l'État. L'état de nature se caractérise par une violence permanente, « de guerre de tous contre tous » pour utiliser la formule consacrée. Les

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<sup>27</sup> Elle est surtout influencée par une volonté farouche de « défendre le système » et de ne rien faire qui pourrait nuire à son *imperium* moral, quitte pour cela à accepter toutes les compromissions mises en œuvre par les autres organes. Idéologique, l'action des juges l'est clairement, comme le montre l'expansion permanente du droit international pénal, jusqu'à des tréfonds inattendus et pour le moins surprenants, montrant une ambition qui ne saurait être intégralement issue des textes fondateurs de ce nouveau pouvoir.

hommes, égaux par nature dès lors qu'ils peuvent s'entre-tuer<sup>28</sup> et se reconnaissant comme tels, détiennent tous par essence les mêmes droits sur le monde qui les entoure. Or à égalité d'aptitudes, égalité de désirs,<sup>29</sup> ce qui entraîne, comme dans les relations internationales, des conflits réguliers concernant l'appropriation des ressources disponibles et par nature limitées.<sup>30</sup> Les pulsions humaines ne sont pas régulées par une entité supérieure ou par des préceptes moraux : ceux-ci sont inexistants, étant donné « qu'il n'y a rien dont on ne puisse faire usage contre ses ennemis, qui ne soit de quelque secours pour se maintenir en vie ». <sup>31</sup> Cela créé en conséquence un état d'insécurité, de précarité et de rapport de force permanent qui met en jeu à tout moment la survie de chacun. Si la *guerre* est ponctuelle, et correspond à des moments de cristallisation, l'état de guerre est lui permanent : en effet, l'insécurité provoque un désir illimité de puissance, qui ne trouve pas sa fin en soi ou dans la nature humaine (contrairement à la vision proposée par Rousseau), mais dans la crainte permanente de se trouver plus faible que son voisin et de ne plus pouvoir être en mesure de conserver sa vie. L'accumulation de puissance devient le seul but de l'existence afin de la préserver, et la guerre est perçue comme le seul moyen de protéger sa liberté d'agir en vue de sa conservation. Nous retrouvons jusqu'ici une description parfaite des relations internationales telles que consacrées par le modèle européen jusqu'au XX<sup>e</sup> siècle.

Il est cependant intéressant de noter que la pertinence de la réflexion hobbesienne ne se limite pas à ce constat initial, contrairement à l'interprétation de la théorie réaliste qui en a fait une situation idéale. Selon Hobbes, cet état de nature, considéré comme nuisible, amène les

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<sup>28</sup> Les différences de force physique ou d'intellect se compensent, et le plus faible utilisera la ruse pour se défaire du plus fort. Cf. Thomas Hobbes, *Léviathan*, chapitre XIII :

La nature a fait les humains si égaux quant aux facultés du corps et de l'esprit que, bien qu'il soit parfois possible d'en trouver un dont il est manifeste qu'il a plus de force dans le corps ou de rapidité d'esprit qu'un autre, il n'en reste pas moins que, tout bien pesé, la différence entre les deux n'est pas à ce point considérable que l'un d'eux ne puisse s'en prévaloir et obtenir un profit quelconque pour lui-même auquel l'autre ne pourrait prétendre aussi bien que lui.

<sup>29</sup> « Cette égalité des aptitudes engendre l'égalité dans l'espérance que nous avons de parvenir à nos fins », *ibid.*, p. 222.

<sup>30</sup> Il n'y existe pas de droit de propriété, étant donné que seul le rapport de force circonstanciel permet l'appropriation « toute chose [dans l'état de nature] appartient donc à celui qui l'obtient et la garde de force ; ce qui n'est ni propriété ni communauté mais incertitude », *ibid.*, chapitre XXIV, p. 384.

<sup>31</sup> *Ibid.*, chapitre XIV, p. 231.

hommes à élaborer des stratégies afin d'en sortir. La plus commune est celle des *alliances* : les hommes, dans une stratégie d'accumulation de puissance, se réunissent entre eux afin de faire front vis-à-vis d'autres groupements. Or ces alliances, qui sont permises par l'entremise de conventions passées entre les différentes parties, n'offrent aucune garantie, étant donné qu'elles ne reposent que sur la simple promesse que se font mutuellement les parties prenantes.<sup>32</sup> Conséquence de ces mécanismes purement intéressés : toute évolution des rapports de force défavorable à l'alliance poussera une partie de ses membres à s'allier avec les ennemis d'antan et à dissoudre leurs liens passés. Il n'y a aucune morale, aucun jugement à porter. L'instabilité ne peut que demeurer dès lors que les conventions ne sont pas d'application immédiate et doivent faire appel à la confiance entre les différentes parties. Les alliances demeurent donc des stratégies de guerre de tous contre tous, permettant de compenser les inégalités naturelles qui peuvent exister entre les hommes. L'état de nature prévaut. Difficile de ne pas percevoir dans cette description les différentes tentatives d'organisation des puissances occidentales autour de systèmes de sécurité aussi précaires que faillibles, dont l'illustration la plus flagrante est celle du Congrès de Vienne, et dont l'équilibre et la réussite dépendaient d'un *statu quo* impossible à maintenir sur le temps long – *a fortiori* dans l'hétérogénéité de la mondialisation.

La problématique est rapidement discernée : en l'absence d'une autorité supérieure chargée de veiller à la bonne exécution des conventions, toute promesse mutuelle est vaine et donc vouée à être rompue. Il n'est nulle possibilité de se faire confiance, étant donné qu'à l'état de nature, les hommes, mus par leur désir de puissance et de préservation, ne font que poursuivre la satisfaction de leurs intérêts immédiats sans encadrement moral.

### **8.2.2. Le Pouvoir Faussement *Illimité* du Souverain**

Pourquoi est né l'État – pourquoi naissent les institutions ? Selon Hobbes, le passage de l'état de nature à l'état civil relève d'un acte volontaire, né

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<sup>32</sup> Spinoza propose la même interprétation dans l'article 14 du chapitre III de son *Traité politique*, voir *supra* note 11. Selon le philosophe, il n'y a jamais entre cités que des alliances conjoncturelles (jamais les cités ne parviennent à faire une, elles s'allient mais demeurent en état d'hostilité). Les éléments qui lui permettent d'arriver théoriquement à cette conclusion se trouvent en creux, notamment dans l'article 9 du chapitre II, une cité étant comme un homme à l'état naturel.

d'un calcul rationnel effectué par les individus. Il s'agit pour ces derniers d'accepter de renoncer à leur droit naturel – qui leur offre une liberté d'action illimitée dès lors qu'il s'agit de la préservation de leur être – afin d'accroître leur durée et leur confort de vie.<sup>33</sup> Les individus contractent entre eux et acceptent de céder le *jus utendi* de leur puissance à une entité à laquelle ils s'assujettissent, la puissance souveraine. La mécanique classique des traités internationaux créant une entité *ad hoc* et autonome dans son fonctionnement est ici respectée. Le contenu de la convention passée est le suivant : « J'autorise cet homme ou cette assemblée d'hommes, et je lui abandonne mon droit de me gouverner moi-même, à cette condition que tu lui abandonnes ton droit et autorises toutes ses actions de la même manière. »<sup>34</sup> Ce choix, purement horizontal, peut être effectué soit sous la menace – la puissance souveraine nouvellement créée le sera par acquisition – soit par un commun accord – le processus sera alors dit d'institution.<sup>35</sup>

Bien entendu, la création de la CPI est le résultat d'un mélange de contraintes et d'accords, certains États, ou chefs d'État, n'ayant eu d'autre choix au moment de la rejoindre que de suivre l'opinion majoritaire, voire l'opinion tout court – c'est-à-dire les intérêts – des grandes puissances auxquelles ils sont inféodés. Les grandes puissances ont elles-mêmes effectué un calcul rationnel à l'heure de décider de leur position, prenant en compte la pression de la société civile, des médias et de l'opinion

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<sup>33</sup> Comme indiqué précédemment, cette interprétation propre à Hobbes diffère selon les penseurs qui ont repris son modèle, en l'appuyant sur d'autres critères, à commencer par la préservation de la propriété chez Locke. Il reste que tous, à un moment ou un autre, font de la sûreté un principe fondateur, qui se retrouve par ailleurs à l'échelle internationale.

<sup>34</sup> Hobbes, *Léviathan*, chapitre XVII, p. 288, voir *supra* note 28. Bien que l'hypothèse ne soit pas envisagée par Hobbes – nous verrons pourquoi en montrant comment le droit pénal concentre de fait le substrat du contrat social –, cette cession peut *a priori* être partielle et ne concerner qu'une partie du « gouvernement de soi », dans un domaine délimité.

<sup>35</sup> *Ibid.*, p. 289 :

Il existe deux moyens pour parvenir à cette puissance souveraine. Le premier, par la force naturelle : tout comme un homme le fait de ses enfants afin qu'ils se soumettent, et leurs enfants, à son gouvernement, en tant qu'il peut les exterminer s'ils refusent ; ou bien que, par la guerre, il assujettisse ses ennemis à sa volonté, leur laissant la vie sauve à cette condition même. Le second est quand les humains sont d'accord entre eux pour se soumettre à un homme quelconque, ou à une assemblée d'hommes, volontairement, lui faisant confiance pour qu'il les protège contre tous les autres. Ce dernier peut être appelé un État politique et État d'institution ; et le premier, un État d'acquisition.

Paris, principe qu'il ne soit in.

publique – pour le Statut de Rome, les massacres en Yougoslavie et au Rwanda jouèrent un rôle négligeable – avant d’accepter cette limitation de leurs propres pouvoirs. Les États autoritaires, *inconscients* de leur société mais sans pour autant en être moins dépendants, ont eux pour la plupart décidé de s’en exclure à leurs risques et dépens. D’autres, qui considèrent que l’acceptation d’une telle juridiction mettrait en jeu leur existence – Israël face au conflit asymétrique avec les Palestiniens, la Chine face à ses menaces séparatistes, l’Inde face aux éventuelles conséquences d’un conflit nucléaire avec le Pakistan ... – ou qui connaissant des contraintes d’opinion faibles du fait de la nature de leur régime trouvent leur intérêt dans leur propre exclusion du système mis en place.

La puissance nouvellement créée veille à la bonne application des conventions passées entre les contractants et donc de la justice interindividuelle, assurant par là même la durabilité des conventions et des alliances. Les volontés individuelles et multiples se fondent au sein de la personne civile nouvellement créée, entité qui ne peut que s’exprimer au nom de tous et donc les actes sont assumés individuellement par tous ceux ayant participé à sa formation.<sup>36</sup> C’est là un formalisme que la CPI adopte aussi, celle-ci devenant une instance autonome s’exprimant au nom de l’ensemble de son corps social (en l’occurrence l’ensemble des États membres), par le biais de son Président ou de son Procureur, qui ne peuvent être (théoriquement, et très largement dans les faits) contredits par ceux qui la composent – ni destitués. Ils n’en doivent pas moins rendre des comptes et s’assurer de l’appréciation de leur action par leur base, non pas du fait d’un quelconque formalisme ou obligation, mais pour s’assurer ainsi de la préservation de leur autorité et de l’absence de velléités de renversement – en l’occurrence de dissolution de la Cour. Ainsi, contrairement aux apparences, et comme cela a été esquissé, le Léviathan dispose certes théoriquement d’une puissance absolue sur ses sujets<sup>37</sup> – condition de son autorité – mais risque, en en faisant un usage arbitraire ou excessif, de la perdre tout aussi absolument. La conséquence est – elle est plus largement explicitée par Spinoza dans son *Traité politique* – que l’autorité nouvellement créée devra à tout moment veiller à l’intérêt de ses populations, en faisant un usage *optime* de son pouvoir, c’est-à-dire permettant à

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<sup>36</sup> Et dès lors, ce souverain ne peut léser personne, ce qui explique l’immunité dont il dispose. Sur le passage de la multiplicité à l’unité de la personne représentante, voir Yves Charles Zarka, *Hobbes et la pensée politique moderne*, chapitre « De l’État ».

<sup>37</sup> C’est en quelque sorte une « autorisation absolue ».

la fois de garder la paix et la sécurité de ses concitoyens sans devenir oppressant au point de menacer la survie du contrat social.<sup>38</sup> Une fois encore, comment ne pas voir dans l'action du Procureur de la CPI, ses dilemmes et compromis permanents malgré l'absolutisme et la systématisme juridique auxquels il a *en théorie* droit, le résultat de ces mêmes contraintes ? Et comment ne pas voir, dans les propositions tant hobbesiennes que spinozistes, des théorisations qui ressemblent en tout point à la rationalité instrumentale à laquelle appelle Delmas-Marty pour la justice internationale et que ses Procureurs ont mis en œuvre ?

La souveraineté politique trouve donc son fondement dans le contrat passé entre chaque individu et dans leurs cessions respectives de leurs droits les plus essentiels, une innovation conceptuelle qui permet à Hobbes de se détacher des régimes patriarcaux fondés sur la propriété jusqu'alors dominants. La souveraineté réside toujours dans le « corps » des individus, qui n'en cèdent que le droit d'usage, une « autorisation d'action » en son nom au souverain – au Léviathan. Dans la continuité de Machiavel et de Bodin, Hobbes considère ainsi que, fût-il tout puissant, un monarque absolu, le chef d'État ne détient qu'un pouvoir délégué dont il ne peut s'emparer pour son intérêt personnel : l'État, ou toute autre forme dépositaire du bien commun, restera *nolens volens* l'objet de son action.<sup>39</sup> La CPI répond à ce schème : elle n'est que la détentrice ponctuelle de son *jus utendi*,<sup>40</sup> principe inscrit dans son texte fondateur sous le

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<sup>38</sup> Spinoza détaille cette proposition dans le chapitre V de son *Traité politique* (je reprends ici son vocabulaire plutôt que celui de Hobbes, sans que le sens ne diffère entre l'un et l'autre), tandis que Hobbes revient sur cette question à de nombreuses reprises dans ses ouvrages, voir *supra* note 11. Spinoza défendra la nécessité d'écrire des constitutions telles que moins le souverain fasse le bonheur de son peuple, plus il soit fragile. Il s'agit d'une différence d'interprétation *politique* avec Hobbes partant d'un constat commun, celui de la nécessité d'un État absolu en tout. Le philosophe anglais défend lui le fait que le Léviathan gouverne par la crainte – le moins bon modèle selon Spinoza, qui ne le rejette pas pour autant entièrement – sans que cela ne remette en cause sa nécessité de veiller en permanence à un équilibre.

<sup>39</sup> L'autonomisation de la forme étatique dont nous parlerons plus en avant trouve sa source dans cette primauté qui transforme le souverain tout puissant en un simple outil au service de la structure dans laquelle il s'insère. Structure qui n'hésitera pas à le sacrifier le cas échéant, plutôt que de sombrer avec lui pour assurer sa pérennité, par le biais de dispositifs dont la Cour pénale internationale est une illustration forte.

<sup>40</sup> Détention qui ne commence que lorsque le souverain transforme ce droit d'usage en abus, *jus abutendi*.

nom de complémentarité. Cet élément est déterminant dans la compréhension du fonctionnement de la Cour.

Qu'elle soit acquise ou instituée, l'autorité nouvellement créée s'impose également à tous et de façon illimitée, ne tolérant *a priori* aucune résistance.<sup>41</sup> Le souverain tranche par l'intermédiaire de la loi et de ses institutions judiciaires, au pouvoir simplement délégué, des conflits jusqu'alors résolus par la guerre interindividuelle. Nous trouvons là le cœur du principe d'institution de la CPI, qui est de remplacer la violence par le droit comme mode de résolution des conflits. Dans le même temps, nous concevons la problématique d'une instance judiciaire mise en place sans souverain équivalent, c'est-à-dire d'une souveraineté judiciaire. Au contraire des institutions judiciaires classiques, il ne s'agit pas pour la Cour de recevoir une délégation d'un souverain resté en surplomb, mais au contraire d'un processus où le souverain créé une instance qui le surplombe, changeant ainsi leurs rapports sans que la source ne diffère. La Cour va devoir s'appuyer sur la coopération des États déjà formés – situés en quelque sorte à l'échelon inférieure – pour faire exécuter ses décisions. L'intégration de son action au sein de l'ordonnement judiciaire interne des États lui permettra de trouver un relais médiatisant et couvrant l'ensemble de la souveraineté – d'autant plus puissant que l'État de droit se développe au sein de ses constituants.<sup>42</sup> Ce relais est efficace : les décisions des États ne sont pas contestables, et ce ni en fait – le souverain est plus puissant que le plus puissant de ses sujets – ni en droit, la convention ayant institué l'État étant formée *entre* les individus parties au contrat social. Ceux-ci ne peuvent se défaire de leur sujétion par une rupture de convention, le souverain n'étant justement lié avec eux par le biais d'aucune convention.<sup>43</sup> Cette disposition justifiera de fait longtemps le pouvoir discrétionnaire de l'État et l'immunité de ses agents.<sup>44</sup>

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<sup>41</sup> Si l'on excepte les moments où, par défaillance de la puissance souveraine ou du fait de son fonctionnement (condamnation à mort), la vie du sujet est en jeu : celui-ci recouvre alors sa totale liberté d'action et peut légitimement résister à l'autorité.

<sup>42</sup> La généralisation du principe de l'État de droit et de la séparation des pouvoirs assure ainsi une automaticité dans l'exécution de la CPI, ses décisions étant traitées sans filtre politique par les instances judiciaires, qui ne feraient que s'assurer du respect des formes juridiques avant de les faire exécuter par les forces de police. On perçoit là un fonctionnement idéal que le Statut de Rome tente de développer par différents moyens – du Statut de Rome en lui-même aux mesures d'intégration de celui-ci en droit interne en passant par les accords de coopération et d'immunité.

<sup>43</sup> Hobbes, *Léviathan*, chapitre XVIII, p. 292, voir *supra* note 28 :

### 8.2.3. La Transposabilité de la Théorie Hobbesienne

En dehors de sa pertinence procédurale que nous allons étudier, le contractualisme s'accorde remarquablement bien avec la réalité du système international. Hobbes a été un contemporain de la genèse de ce dernier, au XVII<sup>e</sup> siècle, lors duquel ont été fixés les principes modernes des relations internationales, ainsi que l'affirmation de l'État comme unité politique dominante, aux dépens des pouvoirs féodaux et religieux. C'est ce qui explique encore aujourd'hui la pertinence de sa pensée pour comprendre et montrer les limites de notre système. L'auteur anglais affirme que sa théorie est une transposition à une échelle supérieure du contrat implicite établi entre l'enfant et l'autorité paternelle lors des premières années de toute vie, le premier promettant obéissance à la seconde en échange des garanties d'existence qui lui sont offertes.<sup>45</sup> Or si cette comparaison lui permet d'ancrer sa proposition dans une réalité observable par tous et considérée comme relevant de l'ordre « naturel », elle n'en reste pas moins insatisfaisante car très librement interprétative.<sup>46</sup> Il est plutôt probable que la proposition philosophique de Hobbes se soit avant tout inspirée de l'état des relations internationales au moment de l'écriture de ses œuvres, c'est-à-dire lors de la mise en place du système westphalien, état de nature par excellence à l'échelle des États, qu'il aurait ensuite transpo-

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Parce que le droit d'être le support de la personne de tous est donné à celui qui ont fait souverain, uniquement par une convention passée entre eux par chacun d'eux, et pas du tout par une convention qu'il aurait passée avec chacun d'eux, aucune rupture de la convention ne peut advenir de la part du souverain, et par conséquent aucun de ses sujets, prétextant une quelconque déchéance, ne peut se libérer de sa sujétion.

<sup>44</sup> Il faudra attendre en France la fin du XIX<sup>e</sup> siècle pour qu'émerge enfin une justice administrative que pouvaient saisir les sujets.

<sup>45</sup> *Ibid.*, chapitre xxx, p. 502 :

À cette fin, il faut apprendre [aux enfants] que le père de chacun était originairement aussi son seigneur souverain, ayant sur chacun pouvoir de vie et de mort, et quand les pères de familles renoncèrent à cette puissance absolue, lors de l'institution de l'État, il n'a jamais été entendu qu'ils perdraient l'honneur qui leur est dû pour leur rôle d'éducateurs.

Voir aussi *ibid.*, chapitre xx, « De l'autorité paternelle », p. 329 :

Par là, on voit qu'une grande famille, si elle ne fait pas partie d'un État, est par elle-même, pour ce qui est des droits de souveraineté, une petite monarchie.

<sup>46</sup> L'accord étant forcément fictionnel ou du moins unilatéral (l'enfant n'ayant ni conscience ni choix possible) et ce, bien que la comparaison puisse être filée de façon cohérente, l'adolescence correspondant alors à la fois au moment de l'émancipation physique (l'adolescent acquiert progressivement ses moyens de survie propres) et du refus de l'autorité patriarcale.

sé à l'échelle individuelle. La concordance historique se double d'un parallélisme génétique pour le moins signifiant.

La transposition de l'état de nature au niveau des relations internationales est ainsi envisagée à plusieurs reprises par Hobbes lui-même au sein de son *Léviathan*, où il utilise le parallèle entre l'état de guerre inter-individuelle et l'état de guerre internationale pour montrer, « par le réel », ce à quoi peuvent ressembler les comportements à l'état de nature. Ces changements d'échelle ne sont pas seulement rhétoriques ou illustratifs, bien que l'auteur ne s'aventure à aucun moment dans l'élaboration d'une théorie générale des relations internationales ou explicite le degré d'équivalence qu'il attribue aux relations entre puissances souveraines et entre individus.

Le rapport d'équivalence peut être cependant justifié par la théorie de la représentation qu'il met en place, et qui montre qu'il est « procéduralement » possible de transposer la théorie du contrat social à un niveau supra-individuel. La capacité *conventionnelle* ou *contractuelle* est étendue par Hobbes lui-même à toute *personne* entendue au sens juridique du terme, concernant dès lors tant les individus que des organisations entendues au sens large,<sup>47</sup> à la seule condition que ces dernières soient en capacité de s'exprimer en représentation d'individus (elles sont alors actrices) ou de porter leur propre parole (elles sont alors auteurs).<sup>48</sup> Toute entité ayant une autorité<sup>49</sup> de *représentation*, qu'elle ait une existence réelle ou purement fictionnelle, est en mesure de passer des conventions en son nom propre ou au nom de ses représentés.<sup>50</sup> Les acteurs auxquels fait référé-

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<sup>47</sup> Considérées comme des personnes civiles dans le *De Cive*, et personnes fictives dans le *Léviathan*, et pouvant être tant des cités que des compagnies de marchandes (Thomas Hobbes, *De Cive*, Chapitre V, paragraphe 9, p. 214).

<sup>48</sup> Hobbes, *Léviathan*, chapitre XVI, p. 270, voir *supra* note 28 :

Une personne est celui dont les mots et les actions sont considérés soit comme étant les siens propres, soit en ce qu'ils représentent les mots et les actions d'un autre, ou de toute autre chose à quoi ils sont attribués véritablement ou fictivement.

Le Procureur de la CPI peut être considéré comme un *auteur*, les autres organes, à commencer par le Président, comme des acteurs.

<sup>49</sup> « Authority », traduit en français selon les versions par « pouvoir » ou « autorité ».

<sup>50</sup> *Ibid.*, chapitre XVI, p. 274 :

Par conséquent, tout ce qui a été précédemment établi quant à la nature des conventions passées entre des hommes jouissant de leur faculté naturelle, est également vrai quand elles sont passées par leurs acteurs, représentants ou fondés de pouvoir qui tiennent d'eux leur pouvoir dans la limite fixée par leur procuration, mais non au-delà.

rence Hobbes peuvent être tant des personnes naturelles que des personnes fictives : ces dernières peuvent contracter, bien qu'elles ne puissent le faire qu'au nom des individus qu'elles représentent et non en leur nom propre. Cela implique que les États puissent passer des conventions, mais seulement au nom des individus formant le contrat social (*le peuple français* par exemple) et non en tant qu'États.

Ces développements de la théorie de la représentation permettent d'envisager un premier élargissement du cadre d'application de sa pensée politique, pertinente non plus seulement à l'échelle interindividuelle mais potentiellement au-delà. Par exemple, dans le cas qui nous intéresse, une signature d'un traité donnant naissance à une institution supra-étatique – prenons la Cour pénale internationale – puis la ratification de la dite signature par voie parlementaire ou référendaire pourrait être considérée, dans une perspective hobbesienne, comme une procuration offerte par le peuple<sup>51</sup> à une personne fictive (la CPI) pour agir en son nom dans un domaine limité (la punition et réparation des crimes contre l'humanité). Dès lors, l'utilisation de la théorie contractualiste du passage de l'état de nature à l'état de droit entre puissances souveraines dotées d'instances de représentation semble pouvoir se calquer sur la description faite par Hobbes dudit processus pour les individus.<sup>52</sup>

Ces obstacles formels levés, il reste que l'utilisation de la notion de contrat social global fondé par la Cour pénale internationale peut sembler paradoxale, voire franchement incongrue au premier abord. Thomas Hobbes s'était directement élevé contre toute tentation cosmopolitique, et en particulier contre tout fantasme d'une justice non reliée à des entités souveraines, entités dont le rôle est de donner sens aux notions de juste et d'injuste.<sup>53</sup> Dit autrement, si les critères « procéduraux » semblent tout à

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<sup>51</sup> Ou plutôt par son intermédiaire, lui aussi fictif, à savoir le représentant souverain. Nous analysons plus en avant la double intermédiation opérée pour permettre la constitution d'institutions comme la CPI et les problèmes qu'elle fait naître.

<sup>52</sup> Reste cependant à déterminer si ce sont les États en tant que personnes autonomes qui contractent, ou les individus par l'intermédiation de l'État.

<sup>53</sup> *Ibid.*, chapitre 17 :

Car si nous pouvions supposer qu'une grande multitude d'individus s'accordent pour suivre la justice et les autres lois de nature, sans qu'une puissance commune les tienne tous en respect, nous pourrions tout aussi bien supposer que le genre humain ferait de même, ainsi il n'y aurait ni un quelconque gouvernement civil, ni aucun État, et il n'y en aurait pas besoin, parce qu'il y aurait la paix sans sujétion.

fait adaptés à un changement d'échelle, il reste à questionner la possibilité de penser un contrat social à une autre échelle qu'interindividuelle – ainsi que son intérêt conceptuel.

### 8.2.4. De la Possibilité Théorique d'un État Mondial chez Hobbes

En l'absence d'un mécanisme de délégation de souveraineté qui permettrait aux États de maintenir leur forme actuelle tout en donnant la légitimité suffisante à la puissance nouvellement instituée d'exister, il semble vain d'envisager la création d'une institution de gouvernance mondiale souveraine, à savoir un État mondial sans abolir les États westphaliens. Le transfert d'une quelconque attribution politique à une entité souveraine distincte reviendrait en effet pour ces derniers à transférer partie ou totalité de leurs *droits essentiels*, et signifierait ainsi abdiquer immédiatement leur raison d'être, rendant aux individus le plein usufruit de leur existence et invalidant de fait toute convention passée au niveau interétatique : « Puisque l'État est dissous si les droits essentiels de souveraineté sont annulés, tout le monde retournant alors à l'état de guerre de chacun contre tous, et à ses calamités, la charge du souverain est de conserver ses droits intégralement ; et donc, il est contre son devoir, premièrement, de les transférer à un autre, ou de s'en défaire. »<sup>54</sup> Bien entendu, la faculté de juger (ou *puissance ultime de juger*, telle que définie par Hobbes) fait *a priori* partie de ces droits essentiels,<sup>55</sup> qui correspondent aujourd'hui aux

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Il est à noter que, malgré tout, ce rejet nous semble moins explicite que celui qu'oppose Locke, au sein de ses deux traités du gouvernement, à l'idée d'une gouvernance inter ou transnationale. C'est en partie ce qui explique notre choix de la théorie hobbesienne au détriment de celle de Locke, dont la dominante économiste nous a par ailleurs semblé être un obstacle à la transposition que nous envisageons. Cela ne rend pas moins la question de la transposition de la théorie lockéenne procéduralement proche de celle de Hobbes : dans les deux cas, un refus explicite d'une gouvernance supranationale est exprimé tout en semblant entrer en contradiction avec le cheminement théorique de leur pensée (voir à ce sujet Richard H. Cox, *Locke on war and peace*, Oxford University Press, Oxford, 1960 et Léo Strauss, *Droit Naturel et Histoire*, Plon, Paris, 1954). Faut-il y voir la crainte d'ouvrir une porte qu'ils tentaient de refermer par ailleurs à la domination du pouvoir politique par le spirituel, seul « empire » ou entité politique non-souveraine envisageable à leur époque?

<sup>54</sup> Hobbes, *Léviathan*, chapitre xxx, p. 495, voir *supra* note 28. Voir aussi *ibid.*, chapitre xviii, p. 301 : « Un royaume divisé en lui même ne peut subsister ».

<sup>55</sup> Il s'agit du huitième droit essentiel défini par Hobbes au sein du chapitre xviii « Des droits des souverains » :

Huitièmement, est une attribution de la souveraineté le droit de juger, c'est-à-dire d'entendre et de trancher les litiges qui peuvent survenir au sujet de la loi, qu'elle soit civile ou naturelle, ou sur une question de fait.

fonctions régaliennes de l'État et à ses attributions inaliénables.<sup>56</sup> La formation d'un État mondial, ou du moins d'une institution judiciaire mondiale plénipotentiaire dotée de moyens coercitifs est dès lors impossible dans une perspective contractualiste à l'échelle interétatique. Seule semble théoriquement concevable à cette étape la formation d'un contrat social entre individus à l'échelle mondiale assujettissant, par acquisition ou institution,<sup>57</sup> l'humanité toute entière à une même entité souveraine qui abolirait alors les États. Cette perspective, qui est celle de l'Empire, est théoriquement pensable sans souffrir de contradictions majeures, bien que le philosophe anglais fasse de « l'appétit insatiable, ou boulimie, d'élargissement du dominion » l'une des maladies des *commonwealths*. Cependant, elle n'est guère envisageable aujourd'hui *en faits*, et n'est d'ailleurs à l'évidence pas aux fondements de la création de la Cour pénale internationale et des institutions de gouvernance globale.<sup>58</sup> Elle ne pourrait par ailleurs pas s'accommoder du maintien d'un double niveau de souveraineté, les États survivant et se subordonnant à un État mondial, tout individu déjà assujéti à une puissance souveraine ne pouvant s'assujéti à une autre entité sans dissoudre ses liens avec la première.<sup>59</sup> Il

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<sup>56</sup> Il est par ailleurs à noter que Hobbes considère qu'abandonner la *militia* reviendrait *de facto* à abandonner la faculté de juger, l'un ne pouvant aller sans l'autre.

<sup>57</sup> Hobbes distingue, nous l'avons vu, les États formés par acquisition, par exemple par la soumission de peuples après une victoire guerrière, et par institution, où les individus acceptent d'eux-mêmes et non sous la contrainte de se soumettre à l'entité en question.

<sup>58</sup> Il est cependant possible de contester cette affirmation, en considérant la période de formation et d'effectivité du *rêve cosmopolitique*, c'est-à-dire la dernière décennie du XX<sup>e</sup> siècle, qui correspondait « étrangement » à un moment d'hégémonie absolue des États-Unis sur le monde (ou du moins pensée comme telle, de nombreux exemples, comme l'opération en Somalie de 1994 contredisant la réalité de cette proposition, sans pour autant effacer sa prégnance idéologique, comme le montre la production hollywoodienne de l'époque, capable d'incarner le bien dans l'ONU comme dans *Street Fighter* en 1994, sans ne jamais se saisir des échecs de cet ordre, *Black Hawk Down*, sur l'échec somalien, n'étant produit qu'après le 11 Septembre 2001).

<sup>59</sup> Il faudrait alors, pour accepter cette possibilité, sortir du cadre hobbesien et de ses fondamentaux. Ainsi par exemple, Alexander Wendt imagine la création d'un État mondial à l'horizon de 100 ou 200 ans, en suivant une logique opposée à Hobbes : les individus réclament une égalité de droits, ce qui les mène à rompre les logiques de classes au sein des États (émergence de la démocratie libérale), puis, lorsque celle-ci est généralisée, ils mènent leur lutte au niveau mondial pour que les citoyens de tous les États soient égaux en droits, et non seulement au sein des États, moment où enfin la paix adviendra sur le monde. Alors que chez Hobbes le désir de sécurité est le moteur, A. Wendt fait du désir de reconnaissance le moteur de son processus devant amener à la formation d'un état supranational.

n'est donc pas dans notre propos d'envisager la CPI comme préalable à la formation d'un État ou d'un empire mondial – non seulement parce qu'il ne s'agit pas des circonstances réelles de formation de la Cour, mais aussi parce que Hobbes et nombre de ses interprètes rejettent cette hypothèse.<sup>60</sup> Ce qui ne revient pourtant pas à invalider la théorie du contrat social global.

### **8.3. Hobbes pour Penser la CPI**

Loin de chercher à faire face à la désagrégation des sociétés, face à laquelle elle est désarmée, la CPI défend donc un « contractualisme des chefs » qui vise à prévenir ces processus et à en désamorcer les causes. Formée dans le but de préserver les contrats sociaux nationaux, c'est-à-dire les sociétés étatisées, par la réduction des violences de masses, la Cour est elle-même le résultat d'un contrat social passé entre élites, qui y trouvent un organe autorégulateur et une garantie face à aux tentatives de remise en cause de leur pouvoir.

Pour comprendre pourquoi cette création a été nécessaire, il faut revenir de façon précise sur la théorie hobbesienne de la souveraineté, progressivement dénaturée et marquée de différentes scories interprétatives, et les dérives du modèle qu'elle a contribué à créer, ou du moins à conceptualiser. Amorcée dans les ouvrages *Elements of Law* et *De Cive*, elle fut développée et raffinée au sein du *Léviathan* alors que l'Europe faisait face à de nombreux bouleversements politiques. Dans ce dernier texte particulièrement, Hobbes développe un contractualisme fictionnel novateur qui permet encore aujourd'hui de comprendre le fonctionnement du politique moderne. Vertige des siècles qui n'ont pas altéré la valeur d'un raisonnement pourtant intrinsèquement lié à une forme d'organisation politique contingente – l'État – qui constitue un salutaire rappel de l'archaïsme et des insuffisances des édifices qui nous dominent.

#### **8.3.1. La Théorie de la Souveraineté chez Hobbes**

Hobbes envisage le passage de l'humanité d'un état de nature proche de l'anarchie à un É(é)tat de droit (dit de « *commonwealth* ») régulé par des « puissances souveraines ». Cette fiction est d'autant plus intéressante pour notre propos qu'elle se trouve être facilement transposable à diffé-

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<sup>60</sup> Voir notamment Yves Charles Zarka, *Hobbes et la pensée politique moderne*, Chapitre De la guerre, p. 133, voir *supra* note 36.

rentes échelles, comme l'auteur l'a lui-même montré en prétendant s'être inspiré du modèle familial pour le transposer à l'échelle sociétale. Plutôt qu'une tentative de rupture avec le paradigme décrit par le philosophe anglais, qui domine le monde occidental et les relations internationales depuis le XVII<sup>e</sup> siècle, la CPI n'en serait qu'une extension logique, visant à en compenser les limites apparues avec le temps et l'évolution des formes souveraines. Loin de consacrer une nouvelle ère dans les relations internationales, la CPI marque ainsi une nouvelle étape dans la construction de cet édifice souverain, et peut-être la dernière avant sa dissolution définitive, prédite par Carl Schmitt dès 1952 (« L'élévation du concept d'État au rang de concept-norme universel [...] prendra probablement bientôt fin avec l'ère de la forme-État elle-même »<sup>61</sup>) et envisagée, voire encouragée, par de nombreuses écoles de pensée depuis.

Les similitudes, pour ne pas dire l'exacte ressemblance, entre la description faite par Hobbes de l'état de nature interindividuel et les relations internationales dans l'ordre westphalien sont si évidentes qu'elles ont fait l'objet de nombreuses récupérations spécieuses, dont celle menée par l'école réaliste des relations internationales n'est pas la moindre. La comparaison par l'auteur lui-même des comportements des États et des individus<sup>62</sup> ainsi que la transposition du droit naturel à l'échelle des puis-

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<sup>61</sup> Carl Schmitt, « Staat als ein konkreter, an eine geschichtliche Epoche gebundener Begriff », in *Verfassungsrechtliche Aufsätze aus den Jahren*, Duncker und Humblot, Berlin, 1985, p. 376, cité et traduit par Jean-François Kervegan dans *L'effectif et le rationnel : Hegel et l'esprit objectif*, Paris, Vrin, 2008, p. 263. Cette assertion n'est pas isolée dans sa pensée. Voir aussi par exemple, au sein de Carl Schmitt, *La notion de politique*, Marie-Louise Steinhauser trans., Calmann-Lévy, Paris, 1972, « L'ère de l'Etat est à son déclin [...] L'Etat est détrôné », pp. 44 et 45.

<sup>62</sup> Ainsi Hobbes utilise-t-il l'échelle interétatique pour mieux illustrer sa théorie et argumenter de sa véracité, en admettant la fictionnalité de l'état de nature interindividuel :

Mais s'il n'y eut jamais d'époque où les individus particuliers se trouvaient les uns les autres en état de guerre, il n'en reste pas moins qu'en tout temps les rois et les personnes détentrices de l'autorité souveraine, en raison de leur indépendance, s'envient en permanence et se mettent dans l'état et l'attitude des gladiateurs, pointant leurs armes l'un vers l'autre et s'épiant l'un l'autre, avec leurs forteresses, leurs armées, leurs canons massés aux frontières de leurs royaumes.

Hobbes, *Léviathan*, chapitre XIII, p. 227, voir *supra* note 28. Hobbes tire en quelque sorte une fiction philosophique de la réalité observable, une opération que nous renverserons en tirant de sa fiction philosophique un projet pour le réel. Une mise en équivalence de deux niveaux de réflexion que l'on retrouve à de nombreuses reprises dans ses ouvrages, par exemple, *ibid.*, chapitre XXX, p. 518 :

sances souveraines trouvent leur extension dans les théories et pratiques qui régissent aujourd'hui les relations internationales.<sup>63</sup> À l'image des individus au sein de l'état de nature théorisé par Hobbes, les États se reconnaissent mutuellement exactement les mêmes droits et possibilités d'existence<sup>64</sup> malgré leurs grandes différences, tant en termes de ressources, de puissance que de capacités d'influence : comme dans l'état de nature, leur égalité est autant postulée que naturelle,<sup>65</sup> bien qu'elle ait été codifiée par la suite,<sup>66</sup> et c'est de cette égalité que naît l'état de guerre.<sup>67</sup> De même, chaque État détient la pleine souveraineté sur son

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[...] loi des nations et loi de nature sont une même chose. Tout souverain a le même droit pour procurer la sécurité à son peuple qu'un individu quelconque peut avoir pour se procurer sa propre sécurité.

<sup>63</sup> Nous utilisons ici ce terme par convention, bien que *interétatique* serait à privilégier.

<sup>64</sup> Ainsi la Charte des Nations Unies postule-t-elle l'égalité de principe de l'ensemble des États souverains et leur pleine souveraineté sur leurs territoires et affaires intérieures.

<sup>65</sup> Si les États sont égaux entre eux en principe, car pleinement souverains, il est tout à fait possible de postuler que cette proposition correspond à une réalité de fait qu'il s'agissait d'entériner : les capacités des États s'équilibrent comme pour les individus, la force brute d'un État important pouvant par exemple être contrebalancée par une stratégie d'alliances d'États plus vulnérables, entre eux ou avec un État fort rival.

<sup>66</sup> Yves Charles Zarka propose une interprétation radicalement opposée dans *Hobbes et la pensée politique moderne*, p. 132, voir *supra* note 36 :

Il n'y a pas entre États de principe d'égalité naturelle de puissance au maximum. Quel que soit la fragilité des corps politiques, on ne peut dire que le plus faible peut détruire le plus robuste, parce qu'on ne détruit pas un État comme on tue un homme, fût-ce le souverain d'une monarchie.

Nous sommes en désaccord avec cette interprétation de la théorie hobbesienne qui s'appuie sur un postulat qu'on peut détourner. En effet, la capacité destructive « directe » des petits États est nulle, tout comme celle des faibles individus, mais que penser de leur influence et leur impact indirect, notamment dans le cas où ils disposent de ressources importantes, moyens qui peuvent devenir un outil de destruction radicalement efficace, volontairement ou non, comme l'ont montré les événements ayant mené aux deux guerres mondiales ou plus récemment la mise sous tutelle de Saddam Hussein après l'invasion du Koweït, protégé par sa ruse et ses alliances. Quant au fait que la non-destruction effective des États (les guerres débouchant, la plupart du temps, sur des accords, des assujettissements voire sur la dissolution de l'« acteur » souverain et non de l'institution) ne soit pas la donnée habituelle des guerres internationales, il est possible de répondre qu'il en est de même dans l'état de nature interindividuel, la destruction mutuelle étant tout aussi peu rendue effective, voire effectivement recherchée, par les parties prenantes au conflit.

<sup>67</sup> La transposition erronée et inachevée de cet enchaînement causal à l'échelle internationale par l'école réaliste a donné lieu à la théorisation du dilemme de John Herz, qui affirme que lorsqu'un État renforce sa sécurité, il en inquiète nécessairement un autre en raison de la structure anarchique et compétitive des relations interétatiques, amenant *de facto* à une augmentation des tensions et éventuellement une conflagration. Un fait auquel, nous le

territoire et ses affaires intérieures, comme les individus en leurs corps, interdisant en droit toute ingérence extérieure.

Ce même constat produit de mêmes effets : sans organes de gouvernance mondiale, la précarité et l'insécurité dominent les relations internationales comme elles dominaient les relations interindividuelles. Dès lors, l'état de guerre, sous une forme latente, est permanent. Les alliances comme les traités de paix n'ont de valeur que ponctuelle et transitoire, la course à l'armement et à l'appropriation des ressources préside aux destinées des nations, et les stratégies coopératives, qu'elles soient commerciales, militaires ou d'autre nature, sont réduites à leur plus simple expression.<sup>68</sup> Le droit naturel décrit par Hobbes se retrouve dans les relations entre puissances souveraines, pour lesquelles toute action est permise dès lors qu'elles considèrent que leur survie est en jeu, sans aucune sorte de limite morale ni d'organe permettant de juger si leur comportement est abusif ou non.<sup>69</sup>

### 8.3.2. Fiction de la Fiction chez Hobbes

À l'énoncé de ce qui apparaît être un parfait parallélisme, et après avoir démontré les erreurs d'une interprétation fixiste de la théorie hobbesienne,<sup>70</sup> il devient évident et nécessaire d'envisager les relations entre puissances souveraines fondées sur le modèle westphalien comme un état de nature non plus fictionnel, mais réel. L'émergence de la forme étatique telle que théorisée par Hobbes dans le *Léviathan*, c'est-à-dire comme

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verrons, la CPI répond bien mieux que toutes les théories communicationnelles qui ont été élaborées à cette fin, ce qui ne manque pas d'être ironique.

<sup>68</sup> Si dans l'état de nature la guerre est préférée au commerce dès qu'on se trouve en situation de domination (ce qui explique que Hobbes considère qu'il n'y a pas d'échanges dans l'état de nature), il en va de même dans le système westphalien, où les accords commerciaux seront principalement établis à la faveur des rapports de forces, et correspondront pour une grande majorité aux échanges entre métropoles et colonies, fondamentalement inégaux et résultant de conflits.

<sup>69</sup> Nous excluons ici volontairement les limites apparues à la fin du XIX<sup>e</sup> siècle en codifiant le droit de la guerre, ces conventions étant d'un point de vue tant hobbesien (elles n'ont aucune force exécutoire) que factuel comme nulles et non avenues, comme l'a montré leur non-respect systématique, lors des deux conflits mondiaux notamment. Quant aux développements du droit international qui ont suivi la Seconde Guerre mondiale, ils peuvent être considérés comme des amorces du contrat social global dont il est question, et constituent donc une phase transitoire dont il sera question ultérieurement, sans pour autant permettre un dépassement de l'état de nature ; leur seul moment d'effectivité continue ayant été la période d'*empire* post-Berlin et pré-Twin Towers – et encore, de façon limitée.

<sup>70</sup> Nous renvoyons ici au chapitre précédent.

modèle politique dominant et à vocation universelle, a impliqué une évolution majeure des relations entre puissances civiles et imposé de fait la formation d'un état de nature international. Dit autrement, le développement de l'état de droit interindividuel a eu, du moins transitoirement, cette conséquence paradoxale de donner vie à un état de nature, pourtant au départ pensé comme purement fictionnel, à un échelon supérieur, l'échelon interétatique. La souveraineté, captée, n'agissant plus dans les relations interindividuelles, a vu sa conflictualité transposée à l'échelle des puissances souveraines exécutantes nouvellement créées, à savoir les États.

Les conséquences sont importantes, car la violence portée par l'État peut aujourd'hui démultiplier celle de l'état de nature, ce qui n'était pas le cas au moment de la rédaction du *Léviathan*. L'anarchie interétatique avait pu être considérée comme un facteur stabilisant dans un premier temps, limitant les dommages et exposant beaucoup moins les populations que les formes précédentes d'organisation sociale.<sup>71</sup> Plusieurs phénomènes dont Hobbes n'avait pas anticipé l'ampleur<sup>72</sup> – la fusion de l'État et de la nation au sens moderne du terme,<sup>73</sup> le développement conséquent et

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<sup>71</sup> Jouant par là même le rôle qu'en attendait Hobbes, c'est-à-dire de réduire dans l'ensemble la violence globale en inhibant les conflits à l'échelle des factions, des seigneuries et des églises (à la fois à l'origine de guerres civiles et continentales, sur fond de velléités impériales, lorsque Hobbes rédigeait *Le Léviathan*) au profit d'une violence, dont l'espoir était qu'elle soit mieux régulable et dès lors garantie d'une plus grande stabilité et sécurité, à l'échelle étatique, c'est-à-dire à l'époque et pour l'auteur à l'échelle continentale – l'extérieur de l'Europe n'étant pas concerné par les régulations et limitations de la guerre mises en place par le système de Westphalie, et servant en quelques sortes de « défouloir » pour celui-ci.

<sup>72</sup> Selon Mark Levene, les génocides sont liés à l'émergence de l'État-nation et à la volonté de ce dernier de se défaire de tout obstacle à sa volonté de puissance. Ce sont des « restructurations avancées » de son espace. C'est presque une tautologie : la fin de l'empire amène celle de la cohabitation de différentes entités politiques, de différentes « civilisations ». Le nationalisme catalan naît de l'effondrement de l'empire espagnol et de son refus de sa transformation progressive en un État-nation. Faire du *statu quo* des frontières un absolu et combiner ce principe à celui de l'État-nation ne peut amener qu'au nettoyage ethnique sous toutes ses formes (expulsions, génocide, mise en minorité, and so on). Voir à ce sujet : Mark Levene, *Genocide in the Age of the Nation State : The Meaning of Genocide*, I.B. Tauris, London, 2005.

<sup>73</sup> Voir à cet égard et sur la séparation progressive du corps du roi et de celui de l'État : Jean-Marie Carbasse, *La monarchie française du milieu du XVI<sup>e</sup> siècle à 1715, l'esprit des institutions*, Paris, Sedes, 2002 et Serge Audier, *Les théories de la république*, La découverte, Paris, 2004.

toujours plus important des armées de masse, doublé<sup>74</sup> d'un renforcement de l'emprise et des moyens de destruction à disposition des États – ont cependant transformé dès la fin du XVIII<sup>e</sup> siècle le rapport à l'espace et à la violence sur le continent européen.<sup>75</sup> Pensons seulement, en citant Fernand Braudel, qu'« en 1792, en Corrèze, une trentaine de kilomètres sont considérés comme un obstacle sérieux aux relations villageoises. À partir de cette distance, les différences linguistiques deviennent considérables » et ce, alors que « de 1765 à 1780, la « grande mutation routière » a raccourci parfois de moitié les distances à travers la France [...] », <sup>76</sup> pour tenter d'imaginer à quel point les formes politiques pensées hier ont été mises à l'épreuve par les ruptures industrielles de ces deux derniers siècles.

Ces transformations successives ont donné naissance, après une premier phénomène de distanciation des dangers qui renforçait le sentiment de sécurité issu de l'appartenance à un État, à une démultiplication des risques d'être atteint par les violences liées à l'État, mettant en jeu de manière toujours plus aiguë la vie des individus<sup>77</sup> et transformant un rap-

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<sup>74</sup> Et certainement en grande partie provoqué par.

<sup>75</sup> Pour reprendre un mot célèbre, si les armées napoléoniennes marchaient encore au même rythme que celles d'Alexandre, les bouleversement politiques puis technologiques ont non seulement démultiplié les capacités de destruction, mais aussi de projection, en seulement quelques décennies. La remise en question de l'État-nation comme échelon protecteur idéal du fait de ces transformations historiques ne pouvait être évitée, et a été esquissée par Fernand Braudel, qui montrait ainsi en creux sa valeur au moment de la théorisation hobbesienne et de la constitution du monde westphalien :

Jusqu'ici, j'ai considéré l'espace comme un invariant. Or il varie évidemment, la véritable mesure de la distance étant la vitesse des déplacements des hommes. Hier, leur lenteur était telle que l'espace emprisonnait, isolait. [...] Alors ne nous étonnons pas si la guerre dite de Cent Ans n'a, à aucun moment, submergé l'ensemble de notre territoire ; pas plus que les guerres de Religion qui durèrent cependant plus d'un tiers de siècle. La distance, à elle seule, est obstacle, défense, protection, interdiction [...].

Fernand Braudel, *L'identité de la France*, Tome I, Chapitre III, p. 95. Si la distance varie selon les progrès technologiques, et ne peut être mesurée objectivement mais en ce qu'elle permet de comparer la vitesse de déplacement des hommes, comment, donc, la penser aujourd'hui, à l'heure où cette distance devient nulle pour une grande partie de nos actes, et en particulier pour la formation de notre espace politique ? La politique peut-elle se passer de distance ?

<sup>76</sup> *Ibid.*, p. 100.

<sup>77</sup> Il n'est pas ici question de nier les conséquences qu'avaient les violences européennes sur les populations, qui mettaient elles aussi largement en jeu leur possibilité de survie, mais, d'une part, de mettre en exergue la distanciation de la violence qu'elles ont induite dans un premier temps pour une majorité de la population européenne (au prix d'une concentration

port jusque-là lâche, distant et principalement symbolique en un rapport physique et de plus en plus régulier.

Les conséquences qui en découlent ont touché aux prémisses mêmes de la théorie hobbesienne et dès lors de l'ordre mondial : si les risques de mourir par ou pour l'État devenaient plus grands que ceux qui seraient théoriquement encourus à l'état de nature, le contrat social ne trouverait plus sa justification.<sup>78</sup> La multiplication des failles dans les édifices souverains, et des conflits au XIX<sup>e</sup> et au XX<sup>e</sup> siècle, toujours plus intenses (évolutions qui amèneront à un détournement de la fameuse locution latine, reprise notamment par Kant dans son ouvrage *Vers la paix perpétuelle* « Que la justice soit faite le monde dût-il en périr » – (*fiat iustitia et pereat mundus*) – en « Que justice soit faite ou le monde périera »<sup>79</sup> sont venus remettre fondamentalement en cause la prééminence de

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de ces violences sur des zones géographiques plus restreintes et délimitées, le « champ de la bataille »), et d'autre part d'en noter l'accroissement de la prévisibilité, et dès lors de leur effet sur le consentement des populations au contrat social. De guerres de factions prenant aléatoirement pour cible les civils, on passe à une « guerre ordonnée », aux cheminements relativement traçables et pouvant être mise en récit, et dès lors justifiée et acceptable. La massification de cette forme de guerre change fondamentalement sa nature, devenue *chose de tous* – alors qu'elle était *chose de chacun* dans la période pré-hobbesienne. Du début du XIX<sup>e</sup> siècle au début du XX<sup>e</sup> siècle, la classe d'âge sous les drapeaux passe d'un tiers à près de 100%, et la guerre, que l'on avait réussi à limiter à des terrains de batailles prédéfinis, s'étend à nouveau dans sa visibilité et ses conséquences à l'ensemble de la société pour devenir « totale ». Qu'importe alors que les victimes spécifiquement civiles soient moindres, puisque toute la population devient impliquée dans la guerre, et que tous les civils en âge de l'être ont été militarisés par la conscription, rendant la distinction sans objet dans l'optique qui est la nôtre. Il faut lire, au sujet du rapport entre absolutisme et éloignement de la guerre, et en déduire au-delà le rapport entre développement du *Léviathan* et expansion coloniale dans *l'autre-monde*, l'œuvre de Joël Cornette et en particulier son ouvrage *Le roi de guerre, essai sur la souveraineté dans la France du grand siècle*, Payot, Paris, 2000, qui rappelle que les contrées qui refusèrent l'étatisation furent celles qui, avec les régions frontalières, subirent de plein fouet la violence de ce processus.

<sup>78</sup> Ce constat pourrait être étendu à toutes formes d'insécurisations, y compris économiques, climatiques ou sanitaires, dont la visibilité n'est cependant que plus récente, ce qui explique en partie le sous-développement institutionnel sur ces questions.

<sup>79</sup> Largement reprise et liée sous cette forme à Hegel, notamment par les tribunaux internationaux (voir notamment le premier Rapport d'activité annuel du TPIY : Rapport du Tribunal International Chargé de Poursuivre les Personnes Présumées Responsables de Violations Graves du Droit International Humanitaire Commises sur le Territoire de l'ex-Yougoslavie Depuis 1991, UN Doc. A/49/342, 29 Août 1994, p. 12 ([www.legal-tools.org/doc/d79ad7/](http://www.legal-tools.org/doc/d79ad7/))), la citation est, ainsi présentée, inexacte tant sur le fond que sur la forme. Hegel avait en fait cherché à récuser la vision kantienne de la justice qui déconnecte l'idée

la forme étatique, dès lors qu'elle se montre incapable de mettre fin à l'état de guerre permanent, sa transposition à une échelle supérieure l'ayant rendue certes plus organisée – mais *in fine* plus sanglante.<sup>80</sup> Le diagnostic s'est aggravé à l'échelle mondiale au XX<sup>e</sup> siècle avec la multiplication des formes non conventionnelles de la guerre, des groupes terroristes et plus largement la fragmentation de la puissance – ajoutant aux problèmes nés de la monopolisation de la souveraineté ceux que diagnostiquait Hobbes dans l'état précédant au Traité de Westphalie, et doublant la violence étatique d'une incapacité étatique à préserver ses sujets des autres formes de violence qu'il était censé étouffer. La contamination des formes de violences jusque-là limitées aux territoires de « l'autre monde » et les attentats terroristes au cœur des capitales européennes rompent, à partir de la fin du XX<sup>e</sup> siècle, avec la séparation jusqu'alors préservée

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du Bien à celle d'utilité – et en aucun cas à prétendre que la justice était la condition de survie du monde :

Das Wohl hat in dieser Idee keine Gültigkeit für sich als Dasein des einzelnen besonderen Willens, sondern nur als allgemeines Wohl und wesentlich als allgemein an sich, d. i. nach der Freiheit ; – das Wohl ist nicht ein Gutes ohne das Recht. Ebenso ist das Recht nicht das Gute ohne das Wohl (*fiat iustitia soll nicht pereat mundus* zur Folge haben)

Georg Wilhelm Friedrich Hegel, « Grundlinien der Philosophie des Rechts », in Eva Moldenhauer and Karl Markus Michel (eds.), *Werke*, Suhrkamp Verlag, Frankfurt, 1979, vol. 7, para. 130, p. 243). Soit, pour traduire simplement cette allusion transparente à Kant, que la justice ne doit pas amener à l'effondrement du monde (« le droit n'est pas le Bien sans l'utilité »).

<sup>80</sup> Si Schmitt voit comme de nombreux autres penseurs dans le *Nomos de la terre* (notamment pp. 142 et 143) comme une *civilisation* positive le fait que la guerre « intraeuropéenne » ait été transformée entre le XVI<sup>e</sup> et le XIX<sup>e</sup> siècle en une forme de duel impliquant une reconnaissance mutuelle par les acteurs de leur valeur et de leur droit à l'existence (il reconnaît, de fait que cette reconnaissance n'a pas lieu vis-à-vis des acteurs extérieurs à ce théâtre géographique), cette évolution n'est sur ce point pas forcément bénéfique. Ce qu'il semble ignorer volontairement ou non, c'est que cette reconnaissance ne vaut que pour les formes politiques, les contenant, voire les détenteurs ponctuels du pouvoir (les souverains), et non pas pour les constituants qui ne sont pas inclus dans ce pacte et deviennent dès lors des dommages collatéraux en puissance, et très vite dommages collatéraux en faits. Intermédiée par des acteurs qui en sont protégés, la violence n'en est que démultipliée. On peine donc à voir l'avantage théorique de cette *régulation* par rapport aux états précédents – seuls étant protégés ceux participant directement à l'exercice de la souveraineté (soldats, généraux, princes, etc : les *magni homines* et les *personae morales* tels que Schmitt les décrit lui-même) et l'on perçoit déjà les évolutions d'un système au profit des souverains aux conséquences par la suite catastrophiques – et qui se montreront en contradiction complète avec les théories de l'auteur, la Première Guerre mondiale agissant comme révélateur non pas des dommages d'une disparition du modèle vanté par Schmitt, mais de ses excès et insuffisances manifestes.

entre un *extérieur* dérégulé et un continent, dans lequel nous incluons les États-Unis, à la violence monopolisée, demandant un réinvestissement sécuritaire dans cet au-delà jusque-là considéré comme un simple réservoir à ressources et où se déversaient les luttes pour la souveraineté. Le passage de la « guerre de cabinet » à la « guerre du peuple », pour reprendre les expressions de Clausewitz, avait déjà fait disparaître le théâtre de la guerre, codifié, au profit d'une guerre totale et industrialisée<sup>81</sup> dont l'émergence avait accompagné celle des nations dans les relations internationales. La réduction de l'importance de cette dernière – que son ordre apparent rendait au départ relativement tolérable, avant que la démultiplication de la puissance de mobilisation et de feu la délégitime définitivement sans pour autant en effacer la possibilité d'existence, et donc l'inquiétude suscitée – et la dispersion progressive des foyers de violence en une multiplicité de « petits conflits » asymétriques rendent la situation insoutenable. Remise en cause fondamentale de l'ordre westphalien, cette multiplication des strates crée une double dichotomie entre les détenteurs de la souveraineté et leurs représentants, et déséquilibre durablement le système, jusqu'à donner à l'état de nature du XVI<sup>e</sup> siècle une apparence rétrospective de monde ordonné.

### **8.3.3. Réinterpréter Hobbes pour y Rester Fidèle : la Nécessaire Limitation de la Souveraineté**

Il ne s'agit dès lors nullement d'un hasard si c'est – alors que sont ressentis les premiers symptômes de cette aporie – qu'émerge pour la première fois, en 1872, l'idée d'une Cour pénale mondiale.<sup>82</sup> Ayant expérimenté les

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<sup>81</sup> Alors que longtemps la capacité de tuer correspondait à un ratio très proche de 1 par soldat, et en toutes circonstances inférieur à 3, l'invention de nouvelles armes, à commencer par la mitrailleuse, décuplent la mortalité et ouvrent la voie à des conflits d'autant plus sanglants. Voir les travaux d'Alain Gras pré-cités. Hervé Drévilion avance, sans qu'il soit nécessaire de rappeler les précautions avec lesquelles il faut manier ces chiffres, que lors de la guerre de 1870, 90% des pertes allemandes et 70% des pertes françaises furent le fait de balles, c'est-à-dire à de très rares exceptions près d'armes individuelles. Lors de la Première Guerre mondiale, les obus provoquèrent 70% des morts dans chaque camp (Hervé Drévilion, *L'individu et la guerre, Du chevalier Bayard au Soldat inconnu*, Belin, Paris, 2013, p. 14).

<sup>82</sup> La proposition sera alors le fait de Gustave Moynier, l'un des co-fondateurs du CICR, sous la forme d'une « Institution judiciaire internationale » exposée dans le *Bulletin international des sociétés de secours aux militaires blessés*, concernant les crimes de la première convention de Genève de 1864. Voir Véronique Harouel, « Aux origines de la justice pénale internationale : la pensée de Moynier », in *Revue historique de droit français et étranger*, 1999, vol. 77, no. 1, pp. 71–83.

limites de la terreur, avec les guerres mondiales, puis un équilibre tout relatif qui aurait pu amener à la destruction du monde pendant la guerre froide, avant de faire face à la dissolution effective de leurs monopoles, les souverains auront tardé un siècle pour s'engager dans un processus similaire à celui des individus cherchant à sortir de l'état de nature, et dont on ne sait encore si la CPI constitue un aboutissement potentiel ou une simple étape. Considérant que leur survie est en jeu – et de nombreux éléments justifient cette analyse –, ils ont en parallèle à l'établissement de dizaines de conventions visant à réguler leur pouvoir, d'un côté multiplié la création de dispositifs de pouvoir « invisibles » – interventions armées extérieures sans conscription sur des territoires désertés pour tuer la menace « à la source », multiplication des dispositifs de surveillance, démultipliés par le numérique, délégitimation de la gestion de pans entiers de la société à des corps privés – et de l'autre proposé un sacrifice symbolique de leurs prérogatives afin de parer à leur délégitimation progressive, dans un mouvement qui n'a rien de linéaire, en transférant une partie limitée, mais symboliquement fondatrice, de leur pouvoir à une instance extérieure, dotée d'un droit de punir.<sup>83</sup> La raison de cette dualité apparente entre démultiplication de l'emprise étatique et de l'exercice de la violence d'un côté, et réduction symbolique et progressive de ses prérogatives de l'autre, est simple. La dislocation du monopole étatique se nourrit naturellement des excès de sa toute-puissance, comme l'avait montré Hobbes. À côté de la réémergence des pouvoirs religieux, économiques ou des vellétés impérialistes, certains croient ainsi déjà deviner le développement dans cette nouvelle phase de la mondialisation d'un nouvel ordre féodal, dont des éléments tangibles apparaissent au sein des émergents.<sup>84</sup> Les tenta-

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<sup>83</sup> Au risque, au final, de légitimer la contestation de leur toute-puissance et d'accélérer leur effondrement.

<sup>84</sup> L'« émergence », loin d'être celle des diplomaties ou des États, est avant tout celle de structures économiques privées qui se sont nourries de la financiarisation, de la libéralisation du commerce et des politiques monétaristes mises en place dans les années 1980 avec l'aide des grandes agences internationales. Celles-ci reposent sur l'absence d'État, maintenu sous tutelle, qui leur offre des monopoles nationaux et une puissance de projection démultipliée, avec les implications que cela peut avoir sur l'autonomie du politique, les relations internationales, et l'incapacitation à se projeter diplomatiquement pour les éternelles puissances émergentes. Il est ainsi notable de rappeler, à titre d'exemple, que le chiffre d'affaire de Samsung, devenue une multinationale sous la dictature de Park Chung-Hee, pèse pour le quart du PIB sud-coréen. Voir, sur la description de cette véritable *privatisation de l'émergence* et ses sources historiques, Coralie Raffenne, *La souveraineté marchandisée*, Armand Colin, Paris, 2012.

tives de répondre à ces menaces par la mise en œuvre d'une toute-puissance ont été délégitimées par l'Histoire. La renonciation entière est inenvisageable. La réponse se loge naturellement dans les deux extrêmes, dans un jeu de miroirs à la destinée incertaine. La Cour émerge dans ce contexte.

Ce constat effectué, il reste à déterminer si la Cour pénale internationale est en mesure de répondre, du moins partiellement, à la problématique posée qui, on l'a vu, répond avant tout aux intérêts des États. Le point est essentiel, car il touche à l'impasse actuelle de la gouvernance mondiale, incapable de trouver un point d'équilibre faute de fondements théoriques effectifs. Toutes les notions politiques qui ont scandé les quatre derniers siècles sont aujourd'hui remises en question : nation, souveraineté, État, mais aussi universalisme, état de droit, République ... Toutes ces fictions performatives ont perdu leur transcendance, et ne semblent plus en mesure de « faire ordre » de façon globale ou de présenter un horizon suffisamment attractif pour susciter l'adhésion et réprimer la contestation. Les monarchies survivent comme de simples appareils embarrassants au pouvoir de fascination bien fragile, les chefs d'État peinent à maintenir leur pouvoir symbolique<sup>85</sup> tandis que partout surgissent des groupements citoyens prétendant « incarner la société » et ne se reconnaissant pas dans les structures politiques existantes. L'absence d'assise conceptuelle actualisée amène à une dislocation et à un déficit d'autorité auxquels il semble de plus en plus difficile de répondre. Comme nous venons de le mentionner, d'un impérialisme de plus en plus assumé à des velléités théocratiques protéiformes en passant par l'émergence d'espaces politiques entièrement privatisés, c'est une reconfiguration d'ensemble des formes politiques dominantes qui cherche à émerger sans que nul ne semble s'en saisir ni accepter tout à fait le vertige de la penser. L'interrogation est dès lors naturelle : un « ordre mondial » est-il encore

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<sup>85</sup> Le film *Le pouvoir* de Patrick Rotman est symptomatique du décalage grandissant entre l'appareil souverain, qui garde son appareil et ses attributs symboliques « à l'ancienne », et les souverains de passage, en l'occurrence François Hollande, marqués par une pratique du pouvoir dénué de toute chair, décontenancés et incapables de s'en saisir, ou du moins de le faire vivre dans les formes qu'ils sont censés incarner. Ce décalage semble confirmer à merveille l'intuition de Foucault dans sa leçon du 8 février 1978 au Collège de France, qui considérait que la question de la légitimité (liée à la souveraineté, au pouvoir symbolique) était peu à peu remplacée dans le champs des pouvoirs par celle de l'efficacité (liée à la gouvernementalité, aux actes performatifs), dans un mouvement mortifère pour l'idée même du politique.

pensable, sinon désirable, et retrouverons-nous des fictions qui puissent faire récit et s'imposer à cette échelle, du moins apparemment ? Puiser chez Hobbes peut être perçu comme une dernière tentative d'actualiser les fondements de notre modernité politique et d'éviter les dérives auxquelles mènerait une scission de nos sociétés en autant d'intérêts particuliers ou illuminés. La création de la Cour pénale internationale correspond en tous cas à cette ambition, et apparaît comme une des dernières utopies pensables d'un certain « ordre du monde » acceptable et en mesure, à terme, de s'imposer universellement.

### **8.3.4. La Cour Pénale International aux Frontières de la Théorie Hobbesienne**

Il nous faut en fait nous attarder sur la spécificité de la justice pénale dans les contrats sociaux pour comprendre pourquoi la CPI, et non pas les centaines d'autres organisations internationales, pourrait être à l'origine d'un contrat social global, et de quelle nature serait celui-ci. Gérard Mairat affirme que le pouvoir judiciaire est le premier pilier de la société, en ce qu'il est son outil pour s'accomplir, c'est-à-dire éliminer la violence inter-individuelle.<sup>86</sup> Spinoza et Hobbes ont montré comment le droit pénal, au contraire des autres droits, ne peut naître qu'en société.<sup>87</sup> La CPI, contrairement à la CIJ ou à l'organe de règlement des contentieux de l'OMC, ne peut exister sans créer ou s'appuyer sur une société existante – ce qui est exclu – ou nouvelle. Elle porte en sa nature même, celle d'une institution pénale, le rejet de l'anarchie et de l'état de nature. Elle doit donc être à l'origine d'un contrat social. Et parce qu'elle se montre en capacité de contredire l'État, lui-même censément détenteur du monopole de la définition du juste, en fait comme en droits, elle ne peut qu'inventer un nouveau modèle politique, au moins partiellement délié de la notion de souveraineté politique. Un nouveau récit.

Sans être souveraine, mais ne pouvant exister sans société et donc sans contrat social – comment aurait-elle créé et sur qui agirait-elle ? – la CPI n'est pourtant pas le fruit d'un transfert de souveraineté, partiel ou complet, des États vers ce qui serait une institution supraétatique qui serait chargée d'une gouvernance mondiale. Elle est à la fois plus et moins que cela. Notre rapport à la souveraineté politique tel que pensé par Hobbes et

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<sup>86</sup> Voir *Le principe de souveraineté*, pp. 227 et suivantes.

<sup>87</sup> Voir le Spinoza, *Traité politique*, chapitre III, paragraphe 19, voir *supra* note 11 ; qui fait écho au chapitre XXIV du Hobbes, *Léviathan*, voir *supra* note 28.

*fictionnalisé dans le réel* par les Traités de Westphalie implique que les individus ne se dessaisissent jamais de leur souveraineté au profit d'un tiers. Il ne peut y avoir d'aliénation sans annihilation de la capacité contractuelle : elle nous appartient et peut à tout instant être retirée. Dès lors, la souveraineté demeure toujours au sein des contractants qui s'entendent entre eux et non pas, comme dans le modèle rousseauiste, avec l'entité à laquelle donne naissance leur convention. La souveraineté ne peut être déléguée que dans son usage, faute de quoi l'autonomie de l'individu serait niée, et nous reviendrions à un modèle naturaliste. Or le droit pénal est l'attribut fondamental de la souveraineté. Il ne peut donc cesser de résider dans les individus. La Cour pénale internationale a été instituée en respectant ce double formalisme apparemment contradictoire, ce qui lui a permis de naître et d'être acceptée dans le système westphalien, tout en jetant les bases du dépassement progressif de cet ordre au profit, non pas d'un État, mais d'un état de droit mondial. Un objectif qui fait sens, en dehors de tout cadre théorique fermé, dans le cadre de ce qui reste au final une *pensée de l'ordre* : c'est lorsque leur souveraineté et leur sécurité sont assurées que les individus se trouveraient en mesure de se préoccuper de liberté, d'égalité, des minorités, bref d'altérité et de valeurs. La CPI, en offrant une protection minimale mais vitale à l'échelle globale, se constituerait ainsi en préalable à toute contractualisation à l'échelle globale plus générale, visant à dépasser l'ordre libéral actuellement mis en place, ou alternativement à lui donner enfin le fondement sur lequel se construire. Son échec, contrairement à celui d'institutions comme l'OMC, signifierait celui de toute espérance de politisation de la mondialisation, y compris économique et sociale.

#### **8.3.4.1. L'inconnue Procédurale : Faire Parler les Silences de Hobbes**

Si Hobbes n'envisage pas directement le dépassement de la forme étatique, il considère cependant que chaque évolution et passage d'un stade au suivant constitue un « progrès » en soi. Il n'est pas difficile d'inférer les avantages théoriques que nous tirons, en termes de capacité de survie, à repousser à des niveaux de gouvernance plus éloignés (famille, région, État, continent ... )<sup>88</sup> l'exercice politique. Ainsi, plus l'unité de gou-

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<sup>88</sup> Il faut à ce titre rappeler que la pensée de Hobbes se développe en réponse à la disparition progressive de l'échelon féodal, par essence territorialement très circonscrit, au profit de celui de l'État, aux capacités d'extension bien plus vastes.

vernance est grande, plus les rapports de force se stabilisent et voient leur impact se réduire sur l'unité principielle, l'individu. Le risque est – à moyens égaux – amoindri à mesure que les frontières s'étendent et donc éloignent le terrain de la confrontation d'une part proportionnellement toujours plus grande de la population.<sup>89</sup> Il y a là un double avantage : les unités de gouvernance créées sont à chaque fois plus fortes et, ce faisant, capables de contrôler des territoires plus importants de façon plus structurée, faisant régner l'ordre avec une facilité et une efficacité accrue et pouvant épargner à terme de l'effort de résistance une majorité de la population. Mais ces transformations ne peuvent rester sans effet sur l'art de la guerre lui-même. Nous l'avons vu, ces avantages, qui fondent encore en grande partie l'idée d'une Europe politique, ont trouvé une limite dans les évolutions politiques et conceptuelles qui ont marqué le monde à partir de la fin du XVIII<sup>e</sup> siècle, faisant de l'État une menace trop importante pour les sociétés. Son dépassement a par ailleurs fini par poser en contrepoint la question du lien entre gouvernants et gouvernés, et les risques d'une dilution de la représentativité des gouvernants due à l'extension trop importante des domaines d'exercice de la souveraineté.<sup>90</sup>

Si la CPI vise justement à répondre à la première objection, une réponse ferme et fondatrice qui permet de resituer le débat est apportée à cette dernière interrogation par Hobbes. Malgré ces extensions successives qui pourraient laisser craindre une dilution, la souveraineté ne cesse de résider dans l'unité de départ, celle du corps individuel.<sup>91</sup> Le contrat social<sup>92</sup> repose sur la théorie de l'autorisation (l'individu autorisant le

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<sup>89</sup> Nous avons mentionné la massification des armées et le rapprochement de la violence qu'elle induit en retour (par l'accroissement de la capacité de ponction de l'État en termes de vies humaines). Il faut ajouter que la révolution industrielle du XIX<sup>e</sup> siècle s'est accompagnée d'une bureaucratisation qui permet de « compenser » de façon plus importante encore l'accroissement des distances et de réduire à néant cet avantage acquis en faisant porter le risque et le poids des conflits « au sein de chaque chaumière ». Une donnée qui n'est pas sans impact sur l'applicabilité de la théorie hobbesienne au monde contemporain, et qui peut servir d'explication à la résurgence des violences de masse « organisées » comme une donnée centrale de la modernité politique, comme résultat d'un point *nécessairement* aveugle de la théorie hobbesienne.

<sup>90</sup> Au sens hobbesien d'autorité, ou capacité d'auctorialité.

<sup>91</sup> Ce qui pourrait laisser penser qu'il ne s'agirait là que d'une problématique liée et résoluble par la *technè* gouvernementale, industrielle ou communicationnelle.

<sup>92</sup> Dans la version du *Léviathan* (1651). Il en allait autrement pour le *De Cive* (1642–1647) et *Elements of Law* (1640), qui reposent sur un système de transfert de droits similaire que reprendra la théorie spinoziste, sans la représentation, et bientôt abandonné par Hobbes.

souverain à agir pour son propre compte dans le cadre d'une convention formée entre les différents sujets) et non sur un de transfert de droits. Ainsi, si les autorisations « à niveaux successifs » peuvent éventuellement dévaluer la portée de celles-ci et la légitimité qui leur est liée, l'individu reste à tout moment détenteur de sa souveraineté pleine et entière, incarnée dans son droit de résistance, et cela quels que soient les niveaux de délégation.<sup>93</sup> Ce n'est donc pas la souveraineté qui se voit potentiellement diluée, mais simplement la légitimité de l'exercice de celle-ci, par les acteurs politiques. Dès lors, plus l'échelon est étendu, plus les contrôles de l'exercice de la souveraineté se doivent d'exister et d'être diversifiés, et surtout plus les acteurs doivent prendre prioritairement en compte l'intérêt des populations qui leur délèguent ce pouvoir. Nous le verrons, la Cour pénale internationale répond partiellement à ces exigences à différents égards, contrairement à de nombreuses autres institutions dans lesquelles il est malheureusement possible de situer l'ensemble proto-politique et post-étatique le plus élaboré, à savoir le système de gouvernance mis en place à l'échelle européenne.

#### **8.3.4.2. Le Respect des Modalités d'établissement du Contrat Social**

Ces éléments résolus, la question des modalités d'établissement d'un contrat social global n'en reste pas moins en suspens, et doit être tranchée afin de déterminer quels seraient les sujets d'une telle organisation. Faire de la souveraineté un attribut inaliénable des individus rend en effet tout aussi possible l'élaboration d'un contrat social global entre États ou « représentants souverains » (dans le cadre d'un deuxième degré d'autorisation) qu'entre individus, cette dernière option étant limitée au cas où le contrat social nouvellement établi ne viendrait pas se substituer à celui qui a présidé à la formation des États-nations.<sup>94</sup>

La CPI correspond à la première modalité, en l'espèce une conférence d'ambassadeurs classique, bien qu'enrichie de la participation de

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<sup>93</sup> C'est ce qui explique par exemple que, en France, et suivant la définition de Jurieu selon laquelle « le souverain est l'autorité qui n'a pas besoin d'avoir raison pour valider ses actes », le seul corps politique resté immune à toutes les dispositions limitatives du pouvoir soit le « peuple français », dont les référendums ne sont sujet à aucun contrôle constitutionnel.

<sup>94</sup> Une perspective qui ne s'accorde donc pas avec l'école constructiviste et les propositions d'Alexander Wendt.

représentants de la société civile mondiale. Il reste alors à déterminer si les États et leurs représentants y ont agi – comme ils agissent encore aujourd’hui à l’Assemblée des États Parties – en tant qu’entités autonomes où s’ils devaient y être considérés comme de simples interfaces relayant sans interférence la volonté des sujets ou citoyens.

S’il peut sembler au premier abord paradoxal de considérer les États comme des entités aux intérêts propres partiellement ou entièrement déliés de ceux des individus qui s’y sont confiés,<sup>95</sup> il reste que la puissance souveraine, et notamment dans l’exercice des relations diplomatiques, est le plus souvent mue par des logiques autocentrées, par exemple d’appareil, qui l’amènent à se construire une existence propre. Ainsi le rôle du récit et du symbole dans la construction des États-nations permet-il d’assurer la cohésion d’une population par le biais d’incarnations artificielles dans le même temps qu’il donne à l’État une transcendance qui l’autonomise. Le choix de la figure biblique du Léviathan par Hobbes, que l’on peut retrouver dans l’illustration originale de son ouvrage, montre comment ce processus d’incarnation symbolique se trouve au centre de la formation d’un « commonwealth », d’un bien commun, et est nécessaire à la matérialisation du contrat social. Monstre composé de la multitude il est, dans le même temps, « un » – capable d’agir seul et de mouvoir ainsi la volonté de chacun dans sa direction.

Sachant le niveau d’intermédiations et de représentations qui ont conduit à la formation de la CPI,<sup>96</sup> l’hypothèse cosmopolitique qui envisagerait la Cour comme une création permise par les individus à travers les États devient caduque. Bien que représentés lors des négociations par le biais des ONG et autres organisations censées peser au nom des citoyens à l’échelle mondiale – et qui, souvent, *tenaient les plumes* des États les moins puissants qui n’y étaient représentés que par elles – les individus n’ont pas été à l’origine directe de la Cour pénale internationale, ni n’ont participé à son organisation. Ce sont bien les représentants des souverains réunis en conférence, en tant que représentants du représentant de leurs

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<sup>95</sup> Nous avons notamment vu comment le souverain n’avait aucun intérêt à agir en défaveur de sa population d’où il tire sa puissance, si ce n’est ponctuellement ou comme moyen visant à permettre une amélioration de plus long terme. Cela n’interdit en rien de penser l’autonomie des deux sujets, liés mais différenciés.

<sup>96</sup> Des diplomates négociaient au nom des ministères, eux-mêmes négociant en représentation des gouvernements nationaux, eux-mêmes issus d’élections, afin d’obtenir un accord qui devait être ensuite, le plus souvent, signé par le chef d’État et ratifié par le parlement.

populations mais surtout en tant qu'entités propres, chargées de défendre leurs intérêts étatiques, qui ont permis la création effective de la CPI.<sup>97</sup> La Cour pénale internationale est donc bien cosmopolitique, mais en ce qu'elle impose une *cosmopolitique des chefs* par le truchement d'un contrat social global élaboré entre souverains. Une donnée qui remet en perspective l'ensemble des discours portés sur et par l'institution et éclaire d'un jour nouveau l'ensemble de son action.

### 8.3.5. La Spécificité du Droit Pénal, Clef de l'ancrage de la CPI dans la Théorie Hobbesienne

Reste un dernier point central, pour ne pas dire capital, afin d'achever l'édifice théorique et déterminer définitivement les fondements de la Cour. Nous nous sommes jusqu'ici intéressés à la CPI comme potentielle *commonwealth*, chargée de l'établissement d'un nouveau contrat social, sans vraiment nous interroger sur le rôle du droit de punir dans le faire société, et dès lors de la place de la CPI dans cet éventuel contrat social. En somme, il s'agit d'expliquer pourquoi la CPI, et non pas une quelconque autre organisation internationale, serait à l'origine d'un contrat social global, c'est-à-dire d'un nouvel ordre fictionnel du monde, fût-il entre souverains. Qu'est-ce qui justifie notre intérêt si marqué pour une institution qu'il serait *a priori* difficile de distinguer de toute autre, et dont on voit mal en quoi elle pourrait incarner un nouveau regard sur le monde, à l'heure de la multiplication d'instances somme toute similaires ?

La réponse se trouve à la fois par une présentation de la fiction philosophique et de son dérivé « dans le réel ». L'une des spécificités nécessaires à l'établissement d'une fiction politique de nature contractualiste, et peut-être de toute fiction, est que ceux qui ont formé le *pacte* donnant naissance à ce récit récupèrent toute leur liberté dès qu'une mesure attendant à la raison de leur association (c'est-à-dire dans le cas d'un contrat social hobbesien, à la préservation de leur propre vie) est prise par l'instance chargée de veiller au respect de ce pacte, en l'occurrence le souverain.<sup>98</sup> le droit de sanctionner les manquements à la règle – le droit

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<sup>97</sup> Il faut donc envisager la formation du contrat social global en considérant les souverains comme les acteurs fondateurs de celui-ci, en tant qu'entités partiellement autonomes.

<sup>98</sup> Hobbes, *Léviathan*, chapitre XXI, p. 346, voir *supra* note 28 :

Si le souverain ordonne à quelqu'un (bien que justement condamné) de se tuer, se blesser ou se mutiler lui-même, ou de ne pas résister à ceux qui l'agressent, ou de renoncer à l'usage de la nourriture, de l'air, de la médecine ou de toute autre chose,

de punir – constitue donc une arme à double tranchant pour ce dernier, qui se voit obligé de le manier avec prudence. Cette situation est d'autant plus paradoxale que l'État est bien cette machine de mort capable de tenir ensemble l'ensemble des individus formant la société par la peur<sup>99</sup> de son action, par essence punitive. Ce paradoxe, entre l'attribution d'une puissance théoriquement illimitée et le contrôle, voire l'autocontrôle que s'infligent volontairement les puissances souveraines, trouve son explication non seulement dans la nécessaire prise en compte des ressentis de la population, mais aussi dans les fondements de ce droit de punir, dont on n'a jusqu'ici interrogé ni la spécificité ni le mystère qui le fait au final se confondre avec l'idée même de pouvoir, tant il en conditionne l'existence.

### 8.3.5.1. L'origine du Pouvoir Absolu du Souverain

Nous avons rappelé à quel point droit de punir et droit d'énoncer une fiction politique sont au final les mêmes versants d'un même fait. La subtilité avec laquelle Hobbes explique, non pas fonctionnellement le fait que le droit de punir soit attribué de façon monopolistique au souverain, mais *comment* les souverains présidant aux sociétés se sont originellement saisis de ce pouvoir, permet de comprendre la fonction fondatrice de la CPI comme pourvoyeuse de récit politique sur la mondialisation, et dès lors de pouvoirs afférents. En décidant d'entrer en société, les individus renoncent au droit de défendre leur vie « préventivement », c'est-à-dire en prenant des mesures punitives contre d'autres personnes. Cette renonciation est mutuelle : l'ensemble des individus entrant en société y renoncent à condition que les autres en fassent de même. Or le souverain, qui était un individu parmi d'autres dans l'état de nature, et donc possédait ce droit, n'est pas partie au contrat social qui, rappelons-le, est établi entre les individus et non entre les individus et l'instance créée. En tant qu'individu non-contractant, mais partie à la société qui en est issue,<sup>100</sup> le souverain

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sans laquelle il ne peut vivre, néanmoins, celui-ci a la liberté de désobéir [...]. Quand donc, notre refus d'obéir met en péril la fin en vue de laquelle la souveraineté fut établie, la liberté de refuser n'existe pas – autrement elle existe.

<sup>99</sup> Et non terreur, contrairement à ce qu'avance Derrida. La différence est importante : la peur doit être prévisible, pour permettre une régulation, alors que le passage de la peur à la terreur provoque la panique, l'hystérie, et dissout le lien social. C'est justement pour se maintenir du côté de la peur plutôt que de celui de l'instable – l'instantané éternel de la terreur – qu'est institué l'État.

<sup>100</sup> La précision est importante, en effet le souverain est partie au contrat social sans avoir renoncé à aucun de ses droits. Autrement, il serait un « barbare » pour reprendre la termi-

conserve le droit naturel de mort sur tous, droit auquel ont renoncé ses sujets. Il devient donc – une fois la fiction créée, parce qu’il ne s’est pas plié à ses règles d’énonciation tout en en faisant partie – le seul à même de pouvoir en modifier la nature en conditionnant la participation à celle-ci, excluant ou intégrant les parties à cette fiction *dans le réel*, en impartissant des sanctions attentatoires à la liberté des individus, ou pour utiliser un terme qui permet de mesurer l’à-cheval entre les deux mondes, en décidant de leur *sort*. Dès lors, le droit pénal devient un attribut propre à l’acteur de la souveraineté, à la personne ou groupe de personnes l’incarnant, et non à l’État, c’est-à-dire à la fiction, en lui-même, limité par les règles édictées par les parties ayant présidé à sa création.<sup>101</sup>

Tirant les conclusions de ce fait, nous ne pouvons dès lors envisager la formation du contrat social permise par la CPI que comme étant le fait des individus *acteurs* de la souveraineté (le monarque, le Président, leurs ambassadeurs en représentation, eux-mêmes en représentation de l’État), qui acceptent de renoncer partiellement au *droit de punir* dont ils étaient jusqu’alors les seuls détenteurs, et dont ils étaient immunisés, au bénéfice d’une fiction supérieure nouvellement créée et des organes l’incarnant, comme l’avaient auparavant volontairement fait les individus entre eux, pour les instituer comme leurs souverains.<sup>102</sup> La plus importante conséquence des éléments que nous venons de présenter est que le contrat social global formé par les États ne peut être qu’un contrat d’attribution d’exercice de compétences de souveraineté de second degré.

Derrière cette définition opaque se cache la spécificité la plus importante, fondatrice, de la Cour. Les citoyens ne *peuvent* être parties au

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nologie aristotélicienne, et ne pourrait se prévaloir d’un quelconque droit sur ses concitoyens.

<sup>101</sup> Hobbes, *Léviathan*, Chapitre XXVIII, p. 464, voir *supra* note 28 :

Les sujets, en effet, n’ont pas donné [le droit de punir] au souverain, mais en abandonnant le leur, ils lui ont donné la force d’user du sien de la façon qu’il pensera adaptée à la préservation de tous. Ainsi le droit ne lui a pas été donné, mais lui a été laissé, et à lui seulement, et (sauf dans les limites que lui impose la loi naturelle) aussi complètement qu’à l’état de nature et de guerre de chacun contre son voisin.

Voir aussi chez Spinoza, *Traité politique*, chapitre III, paragraphe 2, voir *supra* note 11.

<sup>102</sup> La possibilité d’un contrat social global entre individus trouvant son fondement dans la CPI est ainsi définitivement écartée. Ce faisant nous laissons une interrogation fondamentale en suspens et résolue plus tard : quel intérêt les acteurs souverains recherchaient-ils en acceptant de céder leur immunité contre une mesure qui servira principalement à protéger leur population d’eux-mêmes ?

contrat social global dont elle est issue, puisqu'ils ont renoncé à l'usage de leur droit de punir au moment d'entrer en société, et ne peuvent pas, dès lors, transférer cet usage à une instance supra-étatique. Seuls les acteurs de la souveraineté, ceux qui se sont trouvés en situation de monopole de ce droit de punir suite à la création des sociétés, se trouvent en mesure d'établir un contrat social à l'échelle globale concernant le droit pénal – de créer un récit qui organisera la limitation de leur propre pouvoir. Il s'agit bien des chefs d'État. Dénuées de lien politique direct avec les individus,<sup>103</sup> les institutions qui en naissent, en l'occurrence la CPI, ne peuvent dès lors exister, pour être légitimes et avoir une force exécutoire, que si elles remplissent deux conditions : avoir pour terrain et objet d'action principaux, voire exclusifs, les acteurs de la souveraineté qui l'ont formée, c'est-à-dire les chefs d'État et les rebelles ; ou bien agir dans le sens de l'intérêt le plus essentiel, et directement déterminable, des individus assujettis, c'est-à-dire en les préservant des excès des premiers. En d'autres termes, l'existence des *commonwealths* ainsi institués ne peut se justifier auprès des populations (qui ne disposent d'aucun contrôle de premier degré sur l'activité de ces institutions, mais peuvent à tout moment sortir du contrat social et ainsi retirer aux acteurs de la souveraineté leur droit de les représenter) que si lesdites institutions permettent d'assurer un plus grand respect du droit naturel de celles-ci par les entités souveraines auxquelles elles se sont confiées, sans apporter de restrictions supplémentaires aux populations elles-mêmes.

Cette dichotomie est fondatrice dans le cas de la Cour pénale internationale. Elle explique pourquoi la Cour ne fait non pas appel à des jurys, mais à des juges professionnels dont la candidature a été présentée par un État. Invoquant systématiquement la protection des populations, la Cour ne peut agir pour cela que sur et par les souverains,<sup>104</sup> qui choisissent eux-mêmes leur propre Procureur.<sup>105</sup> Il lui faudra en permanence jongler avec

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<sup>103</sup> Les victimes et accusés ont un lien procédural, judiciaire avec l'institution. Seuls les représentants des souverains, mais en tant qu'acteurs et non en tant qu'individus, ont ainsi un lien *politique* avec la Cour.

<sup>104</sup> Ainsi que les « ennemis » extérieurs au contrat social, c'est-à-dire les rebelles, qui se pensent, par leur quête du pouvoir politique, équivalents des souverains en puissance.

<sup>105</sup> Les victimes sont reléguées à un rôle symbolique, n'ayant que peu de poids dans les procédures, à l'instar des ONG censées représenter l'opinion publique mondiale et qui ne peuvent que transmettre des *amicus curiae*. Le circuit marche en vase clos, et l'absence de jury (qui pourrait incarner symboliquement l'*humanité*) est à ce titre révélateur, au-delà des prétextes techniques et politiques qui justifient son inexistence (prétextes techniques eux-

cette contradiction. Elle explique pourquoi la Cour invoque l'humanité comme cœur de son action, dans ce qui a pu apparaître à tort comme un écho cosmopolite, alors qu'elle n'est *qu'une* parole incantatoire visant à rappeler les limites négatives de son action. L'action de la CPI se situe en effet en dehors du degré d'appréciation direct, et donc politique, des souverains originels, le peuple, puisque ceux-ci sont exclus du contrat social nouvellement formé. Il est troublant de pouvoir penser que la *réalité* s'en soit tenue aux limites édictées par la fiction, et que le système juridique institué par le Statut de Rome soit *pratiquement* interdit, en droit comme en faits, d'agir au-delà des souverains et prétendants à la souveraineté, c'est-à-dire des rebelles et des chefs d'État, comme la fiction – qui l'a silencieusement instituée et dont elle n'est au final qu'une extension – le lui imposait. C'est en fait là une nécessité, qui explique tout autant le rôle « fondateur » des Traités de Westphalie, non pas tant en tant que créateurs d'une réalité qu'en tant que *formalisateurs* imposant des limites dorénavant irréfragables. Les rêves cosmopolitiques sont loin, et c'est là peut-être le plus flagrant paradoxe de la théorie contractualiste, et de la Cour. Si la Cour, parce qu'elle ne peut pas les prendre en cible, ne *peut* qu'agir positivement à l'égard des populations, elle ne fera jamais de cette positivité instrumentale sa finalité – finalité qui n'est pas, ainsi, la protection des populations, mais celle des acteurs qui l'ont instituée, à savoir les chefs d'État.

Tout porterait à croire *moralement* que l'État devrait être particulièrement contrôlé par les populations sur l'exercice du seul droit qui ne lui a pas été transféré mais dont il a *de facto* l'usage, à savoir le droit de punir. C'est pourtant à une autorégulation bien éloignée des populations que la CPI donne lieu – faute d'alternative démocratique à une échelle globale.<sup>106</sup> Quatre siècles plus tard, la théorie hobbesienne permet d'éclairer ce que l'on aurait pu considérer comme des erreurs ou des défaillances de l'institution, et que l'on découvre être des failles systémiques, pour ainsi dire naturelles à la Cour.

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mêmes révélateurs de l'inexistence d'une communauté humaine aujourd'hui organisée ou organisable politiquement à l'échelle interindividuelle).

<sup>106</sup> On peut, à partir de cette charpente théorique, comprendre la gravité du déficit démocratique dans l'Union Européenne et ses récentes dérives à l'aune de l'impossible contrôle de son action par les individus.

### 8.3.5.2. L'Idée Face aux Ruptures du Réel : du Coût en Vie Humaines des Limites d'une Abstraction

Ce retour sur les conditions d'émergence et d'exercice du droit de punir – et donc de contrôler le *dire du réel* – telles que décrites par Hobbes, nous permet par ricochet de trouver, par l'une de ses failles, une des explications fondamentales à l'explosion des violences de masse et à la centralité politique que ces dernières ont progressivement acquises au fil de ces dernières décennies, et dès lors à la raison pratique de l'émergence d'une fiction (la Cour pénale internationale) venant surplomber et inhiber celle qui a dominé ces quatre derniers siècles, l'État. Si nous avons vu quelles évolutions pratiques ont provoqué un accroissement de l'emprise de l'État et de sa capacité de destruction, nous n'avons pas encore cherché à comprendre pourquoi cet accroissement posait problème dans le cadre de nos récits collectifs, ou pour le dire autrement, pourquoi ces changements d'échelle ont amené à un point de rupture systémique.

L'explication de cet effondrement partiel de la fiction est une nouvelle fois à trouver dans une insuffisance théorique *imperceptible* à l'époque de son énonciation et que la Cour se propose de combler par un *complément de récit*.

En règle générale, la définition du droit de punir est sujette à un arbitrage permanent entre désirs des individus et acteurs de la souveraineté. Il s'agit de la source de tensions principale entre l'État et ses sujets : loin de s'appuyer sur des fondements fixes et atemporels, il est le résultat d'un compromis politique permanent.<sup>107</sup> Lorsque la tension est trop forte, et que le souverain ne semble plus à même de pouvoir protéger ses populations ou devient lui-même trop menaçant, une révolte ou une révolution se déclenchent, les hommes se libèrent du contrat social, et le pouvoir est renversé. Le modèle westphalien s'est senti, jusqu'à se voir menacé dans sa subsistance, de l'incapacité des populations, et en particulier des minorités, à limiter autrement que par la violence l'extension *extérieure* du droit de punir<sup>108</sup> des souverains – restée sans le moindre contrepouvoir alors que des limites étaient progressivement imposées au droit de punir

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<sup>107</sup> Le contractualisme rejoint là, non seulement les positivistes, mais tout simplement l'histoire du droit pénal, qui est venue confirmer ces prémisses.

<sup>108</sup> Précisions immédiatement la portée de cette notion de *droit de punir* extérieur, qui n'a aucune portée normative. Il s'agit purement et simplement dans la perspective hobbesienne du droit naturel qu'a toute personne de défendre son existence par tous les moyens dans l'état de nature.

*intérieure*, dénommé, codifié le plus souvent au sein d'un domaine, le *droit pénal*, et par conséquence délimité jusqu'au point où de nombreux acteurs de la souveraineté ne détiennent aujourd'hui, en *temps normal*, qu'un pouvoir d'exécution extrêmement encadré en la matière par d'autres pouvoirs. Devenu un droit de massacre collectif, du fait des processus historiques et technologiques que nous avons mentionnés, le droit de punir extérieur n'a lui cessé d'accroître son emprise sans ne jamais voir son monopole ni son extension retirés aux acteurs de la souveraineté, malgré la multiplication d'accords conventionnels sans véritable portée. L'extension des espaces d'exception n'a de plus cessé de contaminer les espaces, permettant de plus en plus au souverain d'invoquer un droit de mort resté absolu sur toute personne extérieure à son contrat social pour l'appliquer au sein de celui-ci, contre des individus censés en être protégés.<sup>109</sup>

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<sup>109</sup> Il est à ce titre particulièrement intéressant d'étudier le modèle américain. Souhaitant lutter contre une « menace extérieure », et alors que la jurisprudence de ses Cours s'ouvrait de plus en plus à celle de leurs sœurs étrangères, l'administration a cherché à créer des exceptions toujours plus nombreuses à l'État de droit et au contrôle judiciaire de son action. D'abord concentrées sur son action extérieure, la légalité internationale et les ressortissants non-américains, ces exceptions se sont progressivement étendues à l'ordre interne, comme nous l'avons vu dans une précédente note. Les instances judiciaires ont tenté d'arbitrer entre la volonté de l'État d'accroître ses marges de manœuvre contre les menaces extérieures afin de préserver son contrat social et la nécessité de préserver les droits individuels afin de ne pas dissoudre la raison même de la formation du contrat social, à savoir la protection de la population contre l'arbitraire (ce qui a amené à des batailles légales inconnues jusqu'alors, comme par exemple lors de la saga qui a suivi la décision *Ramdan v. Rumsfeld* de la Cour suprême, qui confirmait l'inconstitutionnalité des commissions militaires de Guantanamo et qui fut suivie par l'adoption fulgurante du *Military Commission Act* pour les préserver, avant que l'édifice judiciaire n'y réponde par d'autres décisions, notamment *Boumediene v. Bush*). Mais en cédant sur la portée du droit international (dont la décision de la Cour suprême *Medellin v. Texas*, refusant d'intégrer aux procédures judiciaires internes une décision de la CIJ malgré l'acceptation de sa compétence par l'État américain, reste la plus symbolique) les juges ont progressivement affaibli leurs marges de manœuvre sur la scène intérieure. En fragilisant les ébauches de contrat social à l'échelle mondiale qui avaient été pourtant lourdement portées pendant des décennies par l'État américain dans l'objectif de renforcer sa sécurité, c'est le principe fondateur du contrat social lui-même qui a fini par être atteint : la protection de la vie de leurs citoyens. Le livre blanc 020413 du *Department of Justice*, rédigé par Harold Koh, autorise ainsi l'assassinat extrajudiciaire de citoyens américains dans le cadre de frappes de drone. En multipliant les espaces juridiques d'exception, gouvernement comme juges prennent progressivement le risque d'un retour de l'anarchie non plus seulement au niveau international, mais aussi national, dans une contamination aussi inquiétante que prévisible.

Il n'est pas paradoxal de considérer que, bien que la puissance souveraine suive en règle général et dans le long cours l'intérêt de sa population, et en particulier dans l'exercice du droit de punir, le cas contraire puisse se produire ponctuellement, avec des conséquences terribles pour les sociétés qui lui ont sacrifié les pleins pouvoirs. Car si l'éventualité de ces désajustements temporaires avait été pensée par Hobbes, c'était alors que leur intensité ne *pouvait pas* être imaginable dans sa dimension actuelle. Le pouvoir discrétionnaire du souverain, qui lui vaut une immunité pour tous les actes commis dans ses fonctions, a toujours eu pour objectif de permettre ces diachronies temporaires afin d'assurer une stabilité à la fiction qui encadre la société, dans une foi quasi-hégélienne dans la capacité des souverains à assurer le meilleur pour les sociétés sur le long terme, quitte à en sacrifier ou à en exclure régulièrement des minorités. En retour de cette extension sans limite du pouvoir du chef, en toute situation où la vie d'un individu est mise en péril par le souverain, fût-il condamné dans le respect des normes, le droit de résistance se fait jour, le souverain se *désautorise* de fait vis-à-vis de ceux qu'il a condamnés, c'est-à-dire exclus de la société. Ce droit de résistance, essentiel, ne s'est cependant jamais déployé à l'échelle collective, à la rare exception de la constitution française de 1793 qui instaura éphémèrement un droit d'insurrection impossible à maintenir pratiquement.

C'est que le fondement même du principe de souveraineté tel qu'il a été interprété par notre modernité politique l'interdit. Si Hobbes avance des critères permettant d'évaluer si notre situation personnelle nous autorise à faire exercice de ce droit de rébellion et de nous extraire du contrat social,<sup>110</sup> il n'en va pas de même pour le « sort collectif ». Ainsi, dans le système hobbesien aussi bien que dans la réalité, il serait impossible de déterminer lorsqu'un droit de soulèvement contre le souverain se fait effectif, autrement que dans le cas où un grand nombre de personnes – suffisant pour déposer le souverain – se trouveraient directement et en même temps individuellement menacées de mort par le souverain. Le droit positif et la détermination des notions de justice et d'injustice restant en tous cas des attributions de ce dernier, il ne semble exister de possibilité *réelle* de renversement politique collectif autre que par l'accumulation d'une puissance telle qu'elle dépassera celle du Léviathan, ce qui revient à

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<sup>110</sup> En précisant un élément essentiel pour l'autorité de l'État : l'interdiction absolue de toute rébellion en faveur d'un autrui condamné par l'État qui ne soit pas directement partagé par nous.

une guerre civile et non à une révolution.<sup>111</sup> Bien plus grave, il n'est aucune possibilité de le renverser, ou de récuser l'une de ses décisions, sans faire usage de la violence et donc revenir à l'état de nature. L'explication de l'apparition des violences de masse à l'intérieur des contrats sociaux et non comme résultat d'un conflit interétatique ou une campagne d'assujettissement,<sup>112</sup> et leur explosion à mesure que les appareils étatiques s'étendaient, est à trouver dans cette insuffisance.

Sans possibilité d'établir un critère moral alternatif à celui du souverain, toute résistance autre qu'individuelle à celui-ci est *de facto* condamnable, qu'elle soit violente ou pacifique.<sup>113</sup> Portant dans sa propre mise en œuvre la négation du souverain, ne pouvant donc être criminalisée, elle est même terrorisme.<sup>114</sup> Hobbes envisage seulement comme porte de sortie la possibilité exceptionnelle où un groupe de personnes se trouverait en même temps menacé de mort du fait d'une injuste résistance au souverain : ceux-ci auraient alors « la liberté de se regrouper, de se prêter main-forte et de se défendre les uns les autres ». Mais la réalité de leur état serait alors évidente : leur droit provient du fait qu'ils se bannissent ainsi eux-mêmes de la société et sortent du contrat social, autorisant une action violente à leur encontre et entraînant une lutte à mort propre à l'état

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<sup>111</sup> C'est ce qui explique en partie la multiplication des dispositions constitutionnelles et législatives offrant des « voies légales » de contestation, comme les théories concernant la résistance et la désobéissance civile.

<sup>112</sup> Celles-ci ayant déjà été expliquées précédemment.

<sup>113</sup> Hobbes le traduit ainsi :

Nul n'a liberté de résister au glaive de l'État pour défendre un autre, qu'il soit coupable ou innocent, parce qu'une liberté semblable prive le souverain des moyens de nous protéger et détruit, par conséquent, l'essence même du gouvernement.

Hobbes, *Léviathan*, chapitre XXI, p. 348, voir *supra* note 28.

<sup>114</sup> Nous entendons ici le terrorisme comme un acte considéré comme criminel (au sens le plus neutre du terme, c'est-à-dire en rupture avec l'édifice normatif) sur le territoire où il est commis, et dont la commission vise explicitement à subvertir un ordre établi. Contrairement à la position prise par J. Derrida – qui affirme que la notion est d'autant plus utilisée qu'elle est indéfinissable –, il nous semble que cette proposition permet d'englober l'ensemble des formes de terrorisme, qu'il soit étatique, individuel, etc. Parce qu'il dépend de chaque contexte – le droit pénal définissant la notion de « crime » évolue très largement selon les sociétés et les périodes –, il s'agit d'une notion par essence neutre, amoral et précaire, qui exclut cependant un certain nombre de dérives (ainsi tout acte commis dans le cadre du droit de la guerre ne pourra être considéré comme terroriste car appartenant à un ordre légal propre et extra-territorial).

de nature.<sup>115</sup> En quelque sorte, à moins que les destinées individuelles et prises séparément de l'ensemble, ou d'une majorité des membres d'une société ne soient en danger immédiat, il n'est nulle possibilité légitime de se rebeller collectivement. Le droit de rébellion individuel, point central de notre modernité politique, ne se prolonge pas en un droit collectif sans dissolution du contrat social.

Cette impasse, condition supposée de l'autorité du souverain, ignore comme on l'a dit les conséquences dramatiques de la dichotomie temporaire<sup>116</sup> qui peut se faire jour entre les populations et l'État et de la lutte violente qui s'ensuit. Notre époque en a évidemment démultiplié ses dommages potentiels, mais déjà Wippon, dans son récit de la vie de l'empereur du Saint-Empire Conrad II, racontait la stupéfaction de celui-ci face à la foule de Pavie, venue justifier la destruction de son palais royal par le fait qu'elle avait eu lieu alors que le précédent empereur était mort et Conrad II pas encore sacré. Le discours était tenu par un *ambassadeur* de la ville dépêché auprès du nouveau pouvoir, dans un acte signifiant, volontairement ou non, la séparation *a minima* temporaire de celle-ci avec le corps du souverain. Conrad II, en guise de réponse à cette résistance collective, drapée d'une lecture alternative de la notion de souveraineté, détruisit la ville, massacrant ses habitants et réaffirmant par là même la prééminence de l'Empire comme fiction permanente, concept atemporel dont les incarnations humaines ne seraient que des objets transitifs, séparant en somme les deux corps de la souveraineté pour consacrer la domination de la *forme* de l'Empire comme principe éternel et véritable objet de la soumission, seule garante de l'impossibilité d'une faille dans laquelle pourraient s'engouffrer les populations pour récupérer

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<sup>115</sup> La distinction entre ces différentes sortes de résistance, l'une que l'on pourrait qualifier de politique et l'autre d'individualiste, a notamment fait l'objet d'une théorisation chez Max Stirner, qui s'est attaché à différencier la notion de révolte, individuelle et ne cherchant pas à remettre en cause « directement » la puissance souveraine (celle-ci pourrait être réprimée « de l'intérieur » de la société), et la révolution, d'essence directement politique et collective (qui entraînerait le bannissement). Cette distinction, très discutée, a fait l'objet de longs développements chez Marx, qui la réfutait, insistant sur le caractère essentiellement similaire des deux sortes d'actes, fondés sur l'égoïsme.

<sup>116</sup> Qui correspond à ce moment de « transition souveraine », qui peut certes agoniser, comme dans le cas syrien, mais constitue généralement un « *momentum* ». C'est bien là où nous touchons les limites de la théorie hobbesienne : si ces dérives limitées étaient, ou pouvaient être, considérées comme un « moindre mal » acceptable au XVII<sup>e</sup> siècle, l'accroissement du pouvoir de destruction des États au XX<sup>e</sup> siècle les rend bien trop mortifères pour ne pas chercher à établir toute une série de limitations au Léviathan tout puissant.

leur autonomie.<sup>117</sup> Il rappelait, par l'exercice arbitraire et sans limite de sa toute-puissance, son monopole sur l'énonciation de fictions politiques et leurs interprétations, son rôle exclusif d'oracle d'une forme qui lui était prééminente.<sup>118</sup> La tentative d'échapper à son monopole se paya dans le sang d'une population qui comprit trop tard que la fonction du Saint Empire était justement d'interdire toute possibilité de *faille* au sein des édifices souverains dont elle avait la charge et de créer un espace où la permanence d'un pouvoir supérieur avait pour but de préserver un ordre ininterrompu aux échelons inférieurs.

Face à l'impossibilité du soulèvement, d'une contestation même temporaire de l'édifice fictionnel sans lutte à mort, une alternative a été progressivement pensée. Il s'agit de la judiciarisation de l'espace politique, et de ce *non-lieu* en particulier qu'est le droit de punir, qui pourrait permettre d'assurer la continuité de l'autorité politique, et dès lors du *faire société*, en cas d'excès de la part du souverain – offrant un droit positif collectif de résistance à ses abus, qui ne remettrait pas en cause le contrat social dans son ensemble. C'est la proposition de la Cour, qui a émergé après que ce qui n'a jusqu'ici été traité que comme une impasse théorique s'est traduit par la multiplication de massacres qui ont marqué le XX<sup>e</sup> siècle. L'ensemble des évolutions ayant eu cours depuis l'énonciation de la théorie hobbesienne permettent aujourd'hui d'envisager de façon poli-

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<sup>117</sup> Ce récit historique, peut-être partiellement fabulé, concerne un phénomène qui a d'évidence traversé l'ensemble des édifices souverains européens, et qu'on retrouva par exemple en France dans la transformation des hommages liges, qui n'étaient pas héréditaires et devaient être renouvelés à la mort des vassaux et des suzerains, par Philippe Auguste qui, devenu Roi, devait subir les hommages de l'ensemble de ses vassaux, y compris les vassaux de ses vassaux et ainsi de suite, et décida de créer une forme de *méta-hommage* lige qui ne concernait que les grands seigneurs, qui lui offraient la fidélité de l'ensemble de leurs vassaux par cette même cérémonie, et qui était systématiquement considéré comme prioritaire sur toute autre soumission. Cette première fictionnalisation d'actes qui jusqu'alors devaient être systématiquement réalisés servit de premier préalable, déterminant puisqu'il impliquait pour la première fois une virtualisation de l'acte, à la décorporalisation complète de la soumission au roi, puis à la couronne, jusqu'à ce que soit conceptualisée la *dignitas non moritur* et ses succédanés décrits par Kantorowicz dans son ouvrage sur les deux corps du roi – ouvrages dans lesquels il rappelait que le roi ne mourait pas, mais se *démisait*. Voir sur la théorisation de ce passage qui fut, sans être totalement explicité, abordé par Hobbes : Philippe Crignon, *De l'incarnation à la représentation : l'ontologie politique de Thomas Hobbes*, Garnier, Paris, 2012.

<sup>118</sup> Il fallut plusieurs autres siècles à la Couronne pour remplacer, théoriquement, la violence par le droit comme mode de résolution des conflits et de pacification au sein de son espace, par le truchement d'un acte impérial pris lors de la Diète de Worms, en 1495.

tiquement rationnelle – et applicable sur des temps extrêmement courts – la commission de violences de grande ampleur, annihilant la possibilité même de sortie du contrat social pour construire une résistance collective, et pouvant provoquer en retour l’effondrement de la puissance souveraine comme de sa population en seulement quelques semaines si cette sortie était finalement arrachée. Les guerres mondiales, fruits de l’extension de la toute-puissance des Léviathans et de leur affrontement dans le cadre de l’état de nature qu’ils avaient contribué à créer, sont la conséquence directe de la négation par ceux-ci de la possibilité de résistance collective et de la primauté de la notion de « souveraineté ». Ces guerres totales et modernes se sont ajoutées à la multiplication des violences de masse « intrasociétales ». L’inévitable lien entre le développement de la forme étatique hobbesienne et la progressive transformation des relations internationales, voire des intérieurs étatiques eux-mêmes, en un vaste état de nature, s’est vu confirmé par la pratique, retournant de façon de plus en plus radicale le modèle hobbesien contre ceux qu’il était censé protéger au départ, les contractants.<sup>119</sup>

Il est devenu aujourd’hui difficile de différencier à cet égard les échelles nationales et internationales, dans une spirale catastrophante rendant le rôle protecteur de l’État chaque fois plus virtuel. Les révolutions arabes sont la dernière illustration de la fusion toujours plus récurrente des différents échelons et de ses conséquences, dont le droit international pénal a pris acte en cessant de distinguer conflits internationaux et internes : confondant leur destin à celui de leur État,<sup>120</sup> les dirigeants contestés, notamment Mouammar Kadhafi et Bachar El-Assad, ont fait usage de la force contre leurs citoyens de façon toujours plus indiscriminée et intense à mesure qu’ils sentaient leur échapper leur emprise politique. La société étant censée s’incarner en eux, les corps se présentaient inséparables, et dès lors toute excroissance devait et pouvait être éliminée. La fa-

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<sup>119</sup> Les stratégies d’alliance, censées être protectrices selon la théorie réaliste, ont été à l’origine des guerres mondiales (directement dans le cas de la première), qui n’étaient censées être que des « conflits limités » visant à rééquilibrer les rapports de force similaires à ceux ayant eu lieu depuis le Congrès de Vienne, et qui n’ont pris leur ampleur finale que par les déclenchements successifs des accords d’assistance. À ce premier phénomène s’ajoute le déséquilibre causé par le colonialisme et l’universalisation de l’horizon étatique européen, ce sur quoi nous reviendrons.

<sup>120</sup> « Mouammar Kadhafi n’a pas de poste officiel pour qu’il en démissionne. Mouammar Kadhafi est le chef de la révolution, synonyme de sacrifices jusqu’à la fin des jours » (intervention de Kadhafi à la télévision d’État, le 22 février 2011).

ble n'a pas tenu. La situation syrienne a permis de revivre la période pré-onusienne : soutenu régionalement et par une *grande puissance*, le souverain a pu faire fi de toute pression internationale et déclencher un feu illimité sur sa population, visant non pas tant à se maintenir comme souverain de la société qu'à détruire le contrat social pour en reconstruire un nouveau sur de nouvelles bases, certainement territorialement et communautairement réduites – et dépendante de tutelles étrangères. Plus généralement, aucun des Léviathans touchés par les révolutions arabes n'aura récupéré le contrôle sur la société qu'il dirigeait initialement, la plupart partant du fait d'une perte de contrôle sur leur appareil répressif (Tunisie, Égypte, Yémen) suite à la dissolution de la croyance dans le pacte social fondant leur droit de punir ou voyant leur emprise se transformer suite à une guerre civile (Libye, Syrie, Bahreïn)<sup>121</sup> jusqu'à atteindre la forme même de leur gouvernement. Ne disposant pas des outils permettant de négocier une alternative (constitutions libérales déconnectant l'acteur de la souveraineté, contre-pouvoirs sociétaux capables d'intermédiaire, Cour pénale internationale), ils n'auront eu d'autre *choix* que la répression, sans faire de distinction entre protestations pacifiques et armées, entre contestation politique et rébellion militaire. Dans le même temps, aucun outil n'aura été offert aux citoyens cherchant à renverser leur représentant souverain pour leur permettre d'agir *dans le droit*, les forçant à répondre à la violence de la répression par une autre forme de violence, visant le corps du souverain et ses extensions institutionnelles, dès lors que les rares interstices démocratiques existant étaient bafoués et que la contestation pacifique ne permettait pas l'établissement d'un rapport de force fictionnel suffisant pour provoquer l'effondrement du régime,

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<sup>121</sup> Les souverains de ces deux derniers cas restant au pouvoir, mais au prix pour le premier d'une renonciation à contrôler une large partie de son territoire, et pour le second d'une mise sous tutelle *de facto* par une puissance étrangère, l'Arabie Saoudite. D'autres pouvoirs ont eux réussi à inhiber les contestations naissantes, comme l'Algérie, le Maroc (qui a par ailleurs *capté* les élites potentiellement révolutionnaires en les intégrant au système par une libéralisation d'apparat) et le Soudan, tous s'appuyant sur d'importantes mesures sociales mais aussi une puissance symbolique (traumatisme de la guerre civile récente en Algérie, fusion du pouvoir politique et religieux au Maroc, menace d'un ennemi intérieur au Soudan) et un quadrillage policier de leur population alimenté par des ressources *extraordinaires* mobilisées avant que la contestation puisse se structurer.

comme ce fut le cas en Tunisie et en Égypte.<sup>122</sup> L'aporie syrienne trouve là ses racines.

### 8.3.5.3. La Condition d'exercice du Pouvoir Devenue Aporie

La seule réponse « classique » possible à cette situation, dans laquelle l'État ne menace plus d'un « moindre mal » mais d'un mal bien plus terrible que l'état de nature, est la dissolution du récit formant la société et le retour à l'état de nature. Ce point de basculement de la puissance fait de celle-ci, censée rendre passif le rapport au droit de punir, un excitant qui dissout de façon accélérée la société. « Mettre à mort les sujets, les dépouiller, user de violence contre les vierges, et autres choses semblables, c'est changer la crainte en indignation, et conséquemment l'état civil en état de guerre », écrit Spinoza avec les mots qui résonnent particulièrement quatre siècles plus tard.<sup>123</sup> Les jeux de visibilité sur le pouvoir et la terreur diffuse qu'il devait inspirer pour maintenir l'ordre en temps normal deviennent – par leurs excès, pensés comme nécessaires – la cause de la propre perte de ces régimes en temps de contestations. L'exhibition symbolique de la puissance, lorsqu'elle ne produit plus les effets escomptés, reprend le chemin inverse qui l'avait amenée à *s'invisibiliser*, réinvestissant le champ de la parole menaçante, la mise à mort publicisée et spectaculaire, et dans un dernier stade les violences *sidérantes* contre les plus innocents, les « vierges » dont parlait Spinoza, victimes expiatoires montrant la détermination du pouvoir à porter le combat jusqu'à ses dernières extrémités pour, une dernière fois, tenter de réinstaurer leur autorité. L'arbitraire<sup>124</sup> et la barbarie ne sont que des techniques de préservation de l'ordre, de la capacité à faire récit et à faire croire en ce récit, techniques naturellement investies par des pouvoirs aux abois lorsqu'ils ne pensent avoir plus d'autre choix, au risque de

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<sup>122</sup> Certains penseurs, notamment J. Habermas, postulent que la démocratie permet de répondre à cette aporie, en intégrant en elle-même son propre dépassement, par son acceptation de la critique. Différents arguments y ont été opposés, notamment dans le cadre des démocraties formelles, toujours plus nombreuses, que nous ne développerons pas ici. Il reste que, même dans cette perspective, cette proposition est toujours rattachée à un regard *in fine* cosmopolitique insuffisant à de nombreux égards – à commencer par la réponse à une éventuelle et brutale crise provoquant une velléité de changement de régime.

<sup>123</sup> Spinoza, *Traité politique*, chapitre IV, paragraphe 4, voir *supra* note 11.

<sup>124</sup> Dont l'idée même porte en elle celle d'une reconfiguration du contrat social sur des bases différentes, considérées comme injustes ou incompréhensibles par ceux qui s'en trouvent lésés, ou parce que le souverain a décidé, pour une raison ou une autre, de ne pas expliciter le contenu de ce nouveau contrat social.

l'effondrement du système dans son ensemble, que de tenter de parer à la dissolution du contrat social par un réinvestissement *réel* de leur puissance jusqu'ici demeurée fictionnelle. Cette puissance exercée n'atteint évidemment que très rarement les proportions mythologiques de son récit, amenant dans le cas où les populations se trouvent excitées plutôt qu'apeurées, à en tester les limites, voir à provoquer des renversements. Si les pouvoirs les plus *modernes*, dont les démocraties, sont moins prompts aux massacres contre leur propre peuple, c'est que le système, la fiction, ne se confond pas avec son détenteur transitoire, et que ce dernier peut être sacrifié pour la survie de celle-ci sans qu'un effondrement ne soit systématiquement à craindre.

Cet angle mort théorique, l'impossibilité de trouver une alternative au passage de la fiction aux corps, rend l'intérêt du *faire société* dépendant d'une question d'appréciation permanente et sape la pérennité du contrat social. Certains penseurs iront jusqu'à affirmer que, étant donnée la capacité de nuisance nouvelle de l'État, s'y soumettre est devenu un jeu de dupes, les risques pour la vie des individus étant au moins aussi importants que dans l'état de nature.<sup>125</sup> De nombreux activistes les suivront. Aujourd'hui, la guerre civile est le type de confrontation armée le plus répandu dans le monde.<sup>126</sup> La forme elle-même de l'État, par son incapacité à considérer collectivement le droit de résistance des individus et les risques qu'elle fait peser sur ces derniers, s'en trouve menacée dans son format westphalien, c'est-à-dire fictionnellement absolue. La nécessité de trouver d'autres fondements donne naissance à de nombreuses écoles pensées qui de l'anarchisme, du libertarisme, ou son courant minarchiste, en philosophie, au néolibéralisme en économie et peut-être d'une certaine façon de certains foucauldismes, tenteront de penser *en dehors de l'État*. Le marxisme lui-même se donnera pour horizon le dépassement de l'État, tandis que les utopies de la deuxième moitié du XIX<sup>e</sup> siècle cherchent à construire autant d'espaces politiques exo-étatiques. La fin du XX<sup>e</sup> siècle et le début du XXI<sup>e</sup> se chargeront de montrer que le monopole étatique sur les relations internationales, qui restait considéré comme une évidence,

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<sup>125</sup> Nombreuses de ces écoles forment paradoxalement d'excellents outils de pensée d'un ordre mondial à venir. Ainsi en est-il notamment des travaux de Robert Nozick sur l'État minimal qui dressent des ébauches que nous considérons potentiellement transposables de façon pertinente à l'échelle internationale.

<sup>126</sup> En moyenne, un peu plus de deux guerres civiles ayant provoqué plus de mille morts se déclenchent chaque année depuis la fin de la Seconde Guerre mondiale.

défaillait depuis de nombreuses années sans que personne n'ait été en mesure de le voir ni de le penser.

Est-il possible de sortir de cette alternative cornélienne sans pour autant mettre à bas un ordre westphalien pluriséculaire ? Est-il possible de limiter la toute-puissance de l'État, principalement en ce qui concerne son droit de punir, en l'amenant à reconnaître le droit de résistance collectif ? Ou du moins en lui refusant le droit de le réprimer ? Est-ce qu'un contrat social global est envisageable, et satisfaisant, non plus seulement en théorie, mais dans les faits ?

En s'attaquant aux acteurs de la souveraineté, ceux qui personnifient l'État, plutôt qu'aux États eux-mêmes, la CPI reprend à son compte la séparation entre les deux corps du souverain. Elle permet ainsi d'envisager un contrôle « doux » et limité de l'exercice de la souveraineté qui viendrait compenser l'évolution des systèmes politiques depuis la théorisation hobbesienne et empêcher les violations les plus exagérées, imprévisibles à l'époque de la rédaction du *Léviathan*, du droit naturel par les puissances souveraines. Cette évolution est notamment le fait de la matérialisation implicite par l'institution du « droit de résistance collectif » nié par la théorie hobbesienne.

La CPI crée une situation intermédiaire dans les relations entre souverain et sujets : si un souverain ne garantit plus l'exécution des droits « naturels » de ses sujets,<sup>127</sup> à savoir assurer des conditions matérielles et de sécurité suffisantes à la préservation de leur vie, elle permet, au lieu de replonger dans l'état de nature par une rupture légitime du contrat social et la dissolution de la puissance civile, une déchéance « partielle » et personnalisée. C'est en cela qu'elle forme une réponse directe à l'aporie hobbesienne qui empêchait toute remise en cause collective du souverain : excluant de son champ d'action les violations isolées des droits individuels, contre lesquelles les hommes ont *par nature* un droit de résistance individuel, elle n'entre en action que lorsqu'un crime « suffisamment grave »,<sup>128</sup> et donc d'essence politique et collective, est commis, ouvrant ainsi le droit à une reconnaissance « collective » des victimes, et par voie de conséquence au renversement, ou plutôt au *dessaisissement temporaire*,

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<sup>127</sup> Que cela soit du fait de sa propre action criminelle ou du fait qu'il laisse prospérer des groupes criminels qui mettent en péril la vie des individus.

<sup>128</sup> C'est-à-dire concernant un nombre élevé de personnes, ou à défaut ayant une portée symbolique telle qu'il puisse être considéré comme attentant à la communauté humaine dans son ensemble de façon particulièrement exemplaire.

du souverain criminel.<sup>129</sup> La Cour trouve ainsi en elle-même le fondement de son action lui permettant de s'attaquer à des entités – fruit d'un héritage hobbesien – pourtant *a priori* immunes à toute poursuite ou renversement légitime autre que celui inscrit dans le pacte social. Elle vient ainsi compléter les évolutions internes de la représentation de la souveraineté allant vers un contrôle accru du pouvoir, notamment au sein d'un certain nombre de sociétés occidentales ayant institué des démocraties constitutionnelles dont le modèle reste l'élection ou les régimes parlementaires sans exécutif bicéphale.<sup>130</sup> Elle permet par ailleurs de

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<sup>129</sup> Ou du bannissement, ce qui revient à la mort dans un système où l'ensemble de l'espace géographique est occupé par des entités politiques fortes (les situations où des entités politiques faibles provoquant des résultats d'autant plus pénibles, comme peut le montrer la déstabilisation de la région des Grands lacs à la suite du génocide rwandais et l'expulsion de millions de Hutus dans les pays limitrophes, provoquant une guerre de vingt ans ayant coûté la vie à des millions de personnes).

<sup>130</sup> Il reste que ce mouvement de « conditionnement interne » ne prévoit au final que des modalités d'évolution institutionnelles pré-agrées et limitant fortement les capacités de contestation contre le souverain. Le droit de rébellion n'a ainsi été que parcimonieusement – et la plupart du temps très temporairement – accordé, comme le montre la destinée de la constitution de 1793 et de l'article 35 de sa déclaration des droits de l'homme. Les dispositifs constitutionnels ou politiques les plus communs n'offrent aucun moyen d'action pour les individus contre la répression exagérée qu'ils subiraient, sauf la dissolution, à moins d'envisager qu'un pouvoir politique commettant des crimes de masse soit prêt à se plier aux contraintes préétablies d'un contrat social qu'il est lui-même en train de violer. Les violences de masse, celles qui constituent le cœur de notre propos, sont le fait d'un régime dans son ensemble, ou d'un mouvement rebelle, et non d'un seul ou d'un petit groupe d'individu : l'auto-renversement semble inenvisageable et le respect des règles constitutionnelles dans une telle situation illusoire. Ces conditions n'offrent de plus aucune possibilité de « dépôt » ou de délégitimation du détenteur de la souveraineté suprême pour des actes de violence commis dans l'exercice de ses fonctions, et ce *a fortiori* vis-à-vis de populations extérieures ou minoritaires, ce qui en compose la deuxième limite, essentielle dans notre réflexion : elles sont nulles et non avenues dans les relations internationales. Mises en place par la majorité, ces règles sont l'outil de la majorité, ce qui rend leur effectivité aléatoire et conditionnée au contexte. Il s'agit donc au final d'un outil à double tranchant, son renversement, par des voies tout à fait légales, pouvant permettre de « rendre étranger » et de mettre en minorité des parties de la population afin de s'autoriser à les traiter inhumainement, comme le montrent notamment les exemples de la colonisation, de l'esclavage et de la guerre contre le terrorisme, toujours soigneusement légalisés. Si donc les instruments légaux nationaux constituent des inhibiteurs bienvenus, ces limitations n'apportent qu'une réponse partielle, et complémentaire à la CPI, au fond du problème, comme le montrent d'innombrables exemples historiques et la constance des violences de masses au XX<sup>e</sup> siècle malgré leur plein développement (inclusive en Allemagne). La nécessité de créer une instance extérieure à la souveraineté et au contrat social découle du constat d'insuffisance de ces outils, et de la complémentarité que trouvent ces deux dé-

comblent ce deuxième vide qu'est l'impossibilité de sanctionner autrement que par les repréailles l'agresseur qui aurait commis des violences de masse en dehors de son contrat social, au sein d'un pays envahi.

En s'attaquant aux « plus responsables » des crimes commis, la CPI isole le mauvais « acteur » incarnant le souverain. Elle le remplace temporairement et de façon très limitée dans l'exécution de certaines de ses obligations les plus essentielles (celle de juger et de réparer). Reprenant la doctrine des deux corps, elle s'attaque au représentant du souverain pour empêcher une remise en cause de sa superstructure, l'État, et la dissolution du contrat social. Étant donné que les obligations de juger et de réparer, découlant du droit naturel, fondent la légitimité du souverain, leur non-exécution est un crime commis par celui-ci à l'encontre de son peuple : la substitution est, pour le moins en principe, légitimée, et sert d'alternative valable à la désautorisation violente.<sup>131</sup> Le Système de Rome établit ainsi des mécanismes visant à compenser ce manquement sans annihiler toute la structure étatique, en dépassant les immunités de juridiction que s'attribuent naturellement les souverains.<sup>132</sup> Alors qu'elle se fonde sur un contrat social entre souverains, la Cour garantit par ce biais la sauvegarde des contrats sociaux nationaux, et *in fine* de l'ordre existant tout autant que des vies des populations. Dit autrement, elle apporte une réponse judiciaire à un problème autrefois traité (ou absorbé) politiquement, c'est-à-dire par le rapport de force.<sup>133</sup> Elle propose une alternative

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marches, l'établissement de l'État de droit à l'échelle interne garantissant l'exécution des décisions prises en conformité avec ce droit par des instances externes.

<sup>131</sup> Nous verrons par la suite par quels biais la CPI intervient et quels sont les mécanismes de contrôle existants.

<sup>132</sup> Le souverain étant la source de la justice et déterminant ce qui est bon ou non, il ne peut être soumis. Cette vision est à l'origine des immunités de juridiction encore aujourd'hui largement en place. Ces immunités ne sont pas prises en compte par la Cour pénale internationale, au même titre que les amnisties : dans le cas d'atteintes si évidentes et graves à la vie de ses sujets, le souverain ne peut s'abriter derrière une interprétation propre de ses actes, ceux-ci atteignant directement à la source du contrat social, et donc à sa capacité à dire le juste et l'injuste. Hobbes propose par ailleurs une deuxième justification à l'immunité de juridiction dont bénéficient les souverains : il fonde en effet le droit pénal sur le principe qu'il n'est pas possible de commettre un crime contre soi-même, or, tout acte commis par le souverain l'est conséquemment par tous ses sujets. Le souverain s'attaque lui-même en attaquant son peuple, et ne peut en conséquence être tenu pour responsable.

<sup>133</sup> Cela a une conséquence périphérique. En situant hors de l'espace politique certains actes de violence autrefois acceptés, en les faisant appeler « crimes les plus graves » (pour les

au renversement illégitime et violent, alternative qui préserve les deux corps, l'un dans sa continuité, l'autre dans son intégrité physique : une logique de dessaisissement temporaire et limité, accompagné le cas échéant d'un renversement légitimé. La sécurité fondamentale des individus,<sup>134</sup> source du contrat social auquel ils ont décidé de se lier, est protégée par l'institution. Le système politique voit quant à lui sa continuité assurée. Le souverain lui-même, ou plutôt le représentant de la souveraineté, se voit garantir à la fois la permanence du pouvoir qu'il incarne – bien qu'il puisse en être déchu – et l'intégrité de sa vie.

On perçoit rapidement les limites d'un tel fonctionnement, en mesure de renforcer des régimes pour peu qu'ils fassent respecter le cadre finalement très limité de l'institution – voire de sacrifier quelques rares éléments pour préserver un système sans en corriger les injustices fondamentales. Une préservation de l'ordre étatique, qui renforce à son tour le système international, provoquant un mouvement essentiel mais restreint au profit d'une préservation de la stabilité d'ensemble. Dès lors, on y voit aussi assez naturellement les possibilités d'extension qu'aurait l'action de la Cour, appelée à prendre sous son aile, ou par le truchement d'institutions sœurs, bien plus de violations des contrats sociaux que celles incluses dans son socle minimal. Cette normativisation d'une partie, limitée, de l'espace politique, loin d'attenter à la souveraineté des États et au contenu du contrat social qui en est à l'origine, les renforce logiquement. S'appuyant exclusivement sur le droit naturel, dont dérive le droit pénal, et sur le principe objectivable de préservation des populations, le fondement de la CPI ne *peut* pas être remis en cause en soi par des sociétés fondées sur la même fiction à une échelle inférieure ; il remplit l'objectif assignable à la justice, celui d'être l'outil utilisé par le souverain

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placer dans le juridique), leur amnistie devient inenvisageable, l'amnistie étant justement un processus politique.

<sup>134</sup> Le souverain étant la source de la justice et déterminant ce qui est bon ou non, il ne peut y être soumis. Cette vision est à l'origine des immunités de juridiction encore aujourd'hui largement en place. Ces immunités ne sont pas prises en compte par la Cour pénale internationale, au même titre que les amnisties : dans le cas d'atteintes si évidentes et graves à la vie de ses sujets, le souverain ne peut s'abriter derrière une interprétation propre de ses actes, ceux-ci atteignant directement à la source du contrat social, et donc à sa capacité à dire le juste et l'injuste. Hobbes propose par ailleurs une deuxième justification à l'immunité de juridiction dont bénéficient les souverains : il fonde en effet le droit pénal sur le principe qu'il ne soit possible de commettre de crime contre soi-même. Or, tout acte commis par le souverain l'étant par tous ses sujets, le souverain s'attaque lui-même en attaquant son peuple, et ne peut en conséquence être tenu pour responsable [...]

pour répondre à l'aspiration profonde de ses sujets : la régulation de la violence et la préservation de leur vie. Il force seulement le souverain à confier à un organe partiellement extérieur à sa structure le contrôle de la bonne exécution de cette obligation.<sup>135</sup> Parce qu'il devient partie du nouveau contrat social (global) l'acteur souverain, le chef d'État, renonce en adhérant au Système de Rome à son droit de punir sur tous au profit de l'instance supérieure, la CPI, qui à son tour va mettre en place un système complémentaire en autorisant à nouveau le souverain à exercer par délégation son pouvoir avec la possibilité à tout moment de lui retirer cette autorisation.<sup>136</sup> C'est à ce titre que se révèle être particulièrement importante la notion de *subsidiarité*, affirmée dès l'article 1<sup>er</sup> du Statut de Rome, la Cour n'intervenant qu'en dernier recours, après que l'État a fait montre de son incapacité ou de son absence de volonté à traiter les crimes commis par l'acteur de la souveraineté. Cela permet en théorie de résoudre les éventuelles contradictions concernant le principe de souveraineté au niveau fondamental, en faisant de la CPI un acteur de dernier recours.<sup>137</sup> Les importantes limitations du Statut de Rome, qui ne peut traiter que des crimes de guerre, crimes contre l'humanité et crimes de génocide, étaient censées contribuer à leur tour, du moins dans cette première phase, à légitimer la Cour et ses prérogatives et à réduire les risques de partialité ou d'interventionnisme exagéré.<sup>138</sup> Il semblerait que la perception de l'institution démontre l'échec de ces limitations.

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<sup>135</sup> Cette logique est finalement en tous points similaires à celle qui a amené Montesquieu à théoriser la séparation des pouvoirs et à prôner l'indépendance de l'institution judiciaire. D'un juge indépendant au sein de l'institution souverain, nous passons à un juge souverain en dehors de ses structures, dont les lois (qui assurent son contrôle politique) sont élaborées par un parlement composé de représentants d'États (l'AEP) et non plus de représentants d'individus.

<sup>136</sup> Une interprétation alternative bien que similaire dans ses conséquences consisterait à envisager que le souverain ne fasse qu'accepter l'éventualité d'une intervention de la CPI, et dès lors de son dessaisissement du droit de punir dès que l'institution en décide.

<sup>137</sup> La subsidiarité consiste en l'activation de la compétence de la Cour dans les seuls cas où la justice des pays concernés ne soit en état, ou en volonté, de livrer justice de façon impartiale, voire de livrer justice tout court.

<sup>138</sup> Un argumentaire non hobbesien et similaire en tous points permet d'expliquer la légitimité d'une action limitée de la CPI. Richard Posner prétend que le développement des instances juridiques, comme la Cour européenne des droits de l'homme ou la CJCE, est dû au fait que le *legalism*, que l'on pourrait traduire en utilisant le néologisme « juridicisme », est la meilleure solution pour résoudre les conflits entre des communautés ne partageant que partiellement un passé et des traditions communes tout en se reconnaissant dans le projet de

#### 8.4. Conclusion

Le pouvoir naissant est sans pitié, féru d'action plutôt que de mythologies peu assurées qui n'apparaîtront *avec la force de l'évidence* que par la suite, pour légitimer, justifier, renforcer ce pouvoir s'exerçant, « né en marchant ». Difficile de théoriser sans caricaturer ou sans servir des processus qui s'autoalimentent, s'entremêlent et n'ont de caractère définitif et annonciateur que longtemps après leur commission, le plus souvent du fait d'un mélange de hasards et d'incompréhensions.

Tout appareil de pouvoir suscite le dégoût lorsque la proximité à ses dispositifs d'exécution se fait trop grande et que les corps émergent sous le verni des idées. Une fois ses entrailles découvertes se construit avec lui un rapport par trop insupportable dès lors que le pouvoir est réel, c'est-à-dire *réellement* capable de contrainte sur les corps. C'est là le prix à payer du passage de l'abstraction, de l'idée, à sa concrétisation, sa mise en mouvement, qui explique la distance systématiquement mise entre le décideur et l'exécutant, seul ce dernier ayant un rapport au réel – et quelque chose à *dire* – tout en étant paradoxalement le seul à ne rien savoir.

Il en va de la Cour pénale internationale comme de toute autre structure ayant pour ambition d'ordonner le réel.

La CPI est un outil au service d'un ordre qui avait besoin d'un tiers objectif pour éviter que ses contestations endogènes, toujours plus visibles mais dénuées de fictions suffisamment structurantes ou universalisables, ne finissent par s'auto-habiller, et amènent le monde à ce qui est devenu la principale figure de l'angoisse contemporaine, l'anarchie. Qu'importe que cette dernière soit potentiellement moins injuste, moins violente, et peut-être même ironiquement plus ordonnée que nos formes d'organisation politique contemporaines. Qu'importe que l'ordre que défend la CPI – celui de Westphalie – soit le seul à même de susciter

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société dans lequel elles se sont volontairement insérées : plus l'entité dans laquelle ils ont accepté de se fendre est grande, plus les principes sur lesquels les juges peuvent s'appuyer se réduisent (ainsi les Cours américaines ont une légitimité et capacité d'action d'autant plus grande vis-à-vis des couches immigrées qui sollicitent leur action que ces différentes vagues d'immigration qui ont fini par constituer la société américaine avaient, *a priori*, accepté de se fondre dans le projet sociétal américain défini par la constitution ; ainsi les Cours européennes se trouvent-elles déjà plus limitées, tant dans leur modalité d'action que sur les questions de fond, et se contentent de contrôler les violations des droits fondamentaux et procéduraux ; ainsi la Cour pénale internationale doit-elle se limiter aux violations les plus graves des droits de l'homme).

l'expression ultime du « mal » qu'il est censé combattre, le génocide. Faute de fiction de substitution universelle – car il nous sera difficile d'échapper dorénavant à cette idée qui a tout contaminé,<sup>139</sup> c'est bien à l'anarchie comme fiction, et donc comme ensemble enveloppant et inévitable, fatalité répulsive, impossibilité d'ordre quelconque, à laquelle tous se croiraient condamnés en cas de renoncement. L'État, forme vide dont les racines latines se réduisent à un *tenir debout* évocateur, dit le futur en maîtrisant la production de droit.<sup>140</sup> La lui retirer, c'est voir s'effondrer toute prévisibilité, et faire naître un sentiment d'absolue insécurité. Nous n'y sommes pas encore autorisés.

En ne s'attaquant qu'à des *barbares* appartenant à un espace conçu comme incivilisé par une modernité à laquelle il résiste depuis plusieurs siècles, la Cour a parfaitement joué son rôle pendant sa première décennie d'existence : tenir à distance, délégitimer et disqualifier cet *étranger* ensauvagé, incarnation de l'anarchie qui menace, qui inquiète tant nos sociétés, et, en l'excluant de l'humanité, former autant de boucs émissaires capables de nous aider à traverser une période troublée. Aux mythologies d'hier s'est substituée une rationalité juridique d'autant plus efficace qu'elle se drape de l'objectivité et de l'appel à la défense non pas d'une société, mais de l'humanité toute entière. *Puisque nous ne pouvons plus incarner le monde, nous nous muerons en son universel défenseur.*

Contrairement aux apparences, l'ennemi n'a pas changé. Notre étude de l'affaire Katanga a démontré l'inanité de procédures dont plus aucun des acteurs ne percevait le sens, et qui ne savaient y trouver d'autre explication que par l'élaboration d'un raisonnement autoréférentiel.<sup>141</sup> Ne

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<sup>139</sup> Et dont on peut se demander si cet universel n'a jamais été qu'au service de l'ordre dominant, comme le rappelle Alain Badiou, qui lui donne pour origine première le paulinisme qui appelait déjà les esclaves à ne pas remettre en cause l'ordre du monde.

<sup>140</sup> Ce que Pierre Legendre présentait sans tout à fait le dire, parlant de l'État comme *prédicteur de l'avenir symbolique des générations à venir* et le garant de la transmission de *l'humanité* (Pierre Legendre, *Sur la question dogmatique en Occident*, Fayard, Paris, 1999, p. 15, voir *supra* note 1), sans prendre en compte que cet « avenir symbolique » était la dimension la plus réelle et matérialisable de celui-ci, c'est-à-dire le *seul* avenir.

<sup>141</sup> Laissant ainsi place à un fondamentalisme *d'opportunité* justement dénoncé par Antoine Garapon :

On peut parler de fondamentalisme juridique lorsque le procès trouve en lui-même sa propre finalité, lorsque la satisfaction de juger le monde prime le souci de le transformer.

Antoine Garapon, *Des crimes qu'on ne peut ni punir ni pardonner*, Odile Jacob, Paris, 2002, p. 64.

craignons pas d'affirmer que même face à ce vague intérêt énoncé par défaut, leur objectif ne fut ni atteint ni véritablement recherché, et qu'il n'y avait en leur propos que rationalisations conscientes ou inconscientes d'une inertie qui a tenté, loin des idéaux, d'offrir à notre collectivité *exactement* ce dont elle avait besoin, fût-ce au prix de la satisfaction de trop noirs désirs, c'est-à-dire à une morale instrumentalisée dont nous avons évoqué les racines.

Nous l'avons vu, la période actuelle est, depuis la perspective de la Cour pénale internationale, celle de la formation d'une métafiction, le contrat social global, mise au service d'une mise en récit du monde à vocation universaliste, et donc monopolistique : l'État. Aujourd'hui cette dernière défaille, non pas tant du fait de la multiplication du terrorisme et autres contestations qu'elle ne cesse de mettre en scène, que par la multiplication de leurs qualifications, qui leur donne chaque jour une omniprésence fictionnelle et une puissance d'énonciation supplémentaire, offrant à leurs récit la charpente nécessaire pour pouvoir concurrencer à des niveaux intermédiaires celles de l'État. Face à ces excroissances démultipliées, il fallait disqualifier au plus vite les éléments déviants autant que les principaux contestataires. La Cour, initialement pensée comme un outil d'autorégulation, a accepté de jouer ce rôle supplémentaire.

La CPI s'est ainsi retrouvée impliquée dans ce qui est devenu une véritable guerre des fictions. Elle-même, dont la puissance symbolique reste suffisamment grande pour dépasser bien de ses insuffisances *réelles*, doit s'affirmer afin de protéger celle qui l'a créé. Doit-on, à notre tour, dès aujourd'hui et en forme de conclusion de notre recherche, *choisir notre camp* ? Le moment serait-il venu où l'État et l'ensemble des structures qui lui sont accolées auraient atteint l'âge qui précipitera leur Chute et leur effondrement, et où il nous faudrait mettre en scène une Annonciation d'une ère alternative ? Contentons-nous, dans le cadre de ce colloque organisé par le CILRAP et s'en tenant à une vocation scientifique, d'observer tout autour de nous la multiplication des discours, hier impensables ou rejetés dans un *ailleurs*, qui nient de l'intérieur même de l'État sa légitimité à être ce qu'il est. La Cour pénale internationale n'en est au final qu'un avatar, bien que pensée au service de la survivance de la forme. Elle s'est cependant trop rapidement découverte pour aspirer à un rôle monopolistique. Regroupant encore un peu moins de deux tiers des États-membres de l'ONU, et largement contestée au dehors comme au dedans, son échec à *pénétrer le réel*, s'il reste sans grandes conséquences dans sa

*perception générale*, lui retire imperceptiblement sa capacité à prétendre à l'universalité des principes qui la sous-tendent, même au sein de la communauté des États. Il y a ainsi maintenant plusieurs années que ces derniers ont cessé de ratifier en masse un Statut de Rome devenu source de méfiance pour tous ceux restés à la lisière des deux mondes, incapables ou ne souhaitant pas faire de cette forme une fiction absolument dominante dont ils savent quels *Léviathans* en bénéficient principalement, et préférant, sans la contester trop ouvertement, partager son règne de façade avec d'autres structures politiques plus adaptées à l'échelle locale. En cela, la Cour était déjà née en quelque sorte en dehors du temps qui aurait dû être le sien, celui où l'État gardait toute sa prédominance théorique, et pensait encore s'imposer non seulement universellement en tant qu'idée, mais aussi *réellement*, sur chaque portion de territoire existante.

Tout en étant soigneusement préservée et parfois soutenue à *toutes fins utiles*, la Cour a donc démontré par son *échec institutionnellement réussi* non seulement qu'elle servait un ordre, mais que cet ordre lui-même était au service de dominants, et que la rationalité instrumentale dans le cadre d'un pluralisme ordonné qu'on aurait souhaité la voir servir ne tient pas même comme fiction. C'est là ce qui explique notre attachement premier à l'institution. Derrière une justice qui n'a trouvé ses limites et dès lors sa *déformation* que par la constante primauté des intérêts immédiats de ses défenseurs, c'est à une myriade d'injustices que nous – et ce *nous* répond cette fois à la qualification en tant que *dominants* de l'ordre établi – nous sommes montrés prêts à accepter dans le simple objectif de préserver un ordre qui ne croyait déjà plus en lui-même, mais dont l'artificialité nous convenait si bien, au point de nous aveugler sur l'ampleur de sa brutalité extérieure. Comme l'édifice pénal national longtemps resté source principale de légitimation d'un certain *ordre bourgeois* et de sa tranquillité d'apparence, voilà que la Cour pénale internationale nous a proposé la naissance d'une souveraineté juridictionnelle chargée de définir facticement, de façon intéressée, les *seuils d'acceptabilité* des dominations politiques et des moyens mis en œuvre pour les assurer, alors que de bout en bout, la violence contre les plus faibles se généralise par des formes plus discrètes, dans le silence de cet ordonnancement. Et voilà que nous l'avons accepté. Luis Moreno Ocampo l'a affirmé : pour lui, la

Cour n'était qu'une « fiction certes, mais d'une fiction nécessaire qu'il faut continuer à nourrir ». <sup>142</sup> Il est probablement temps de s'en détacher.

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<sup>142</sup> Échange électronique, 3 Octobre 2014.

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## An Analysis of Lockean Philosophy in the Historical and Modern Context of the Development of, and the Jurisdictional Restraints Imposed by, the ICC Statute

Daniel N. Clay\*

International political theory presents numerous visions of the state of war and the state of peace, yet international law is silent as to their philosophical underpinnings.<sup>1</sup> Instead, one must rely upon theoretical perspectives which not only *may* have played a role in the creation of the laws of nations but also the history and development of the International Criminal Court ('ICC'). To this end, this analysis traces the historical development of the ICC, its jurisdictional limitations, and its possible philosophical underpinnings, including the works of: Thomas Hobbes, Immanuel Kant, and John Locke; ultimately concluding that Locke provides the most complete, implicit support for the ICC and international criminal law in general.

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<sup>1</sup> Michael W. Doyle and Geoffrey S. Carlson, "Silence of the Laws? Conceptions of International Relations and International Law in Hobbes, Kant, and Locke", in *Columbia Journal of Transnational Law*, 2008, vol. 46, no. 3, p. 648.

## 9.1. Introduction

The ‘grandfather’ of the ICC, Gustave Moynier (1826–1910), was not a utopian idealist. Instead, as a realist, Moynier recognised the demand of *Realpolitik*<sup>2</sup> and, as a result, introduced the first international humanitarian framework during the Geneva International Conference of 1863, which would later evolve into a proposal for the establishment of a permanent, international criminal tribunal.<sup>3</sup> However, at the time, due to prevailing implicit Hobbesian political philosophy emphasising ‘sovereignty’ above all else, the proposal was rejected and not fully revived until the international *ad hoc* tribunals following World War II (that is, the Nuremberg and Tokyo Tribunals).<sup>4</sup>

Following the success of the post-World War II *ad hoc* tribunals and the creation of stable international bodies such as the United Nations,<sup>5</sup> the prevailing political philosophy began to implicitly shift towards a Lockean perspective, in which States surrendered a portion of their sovereignty in exchange for dispute resolution and accountability mechanisms such as the ICC – a singular adjudicator – in a peace-oriented manner.<sup>6</sup> However, now that the ICC is finally sitting, history may be repeating itself as politics and ‘sovereignty’ concerns in the form of ‘personal jurisdiction’ and ‘territorial jurisdiction’ have undermined the Court’s ultimate, implicit Lockean philosophical goal – “the peace and preservation of all mankind”.<sup>7</sup>

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<sup>2</sup> “Realpolitik”, in Merriam-Webster Dictionary:

[P]olitics based on practical and material factors rather than on theoretical or ethical objectives.

<sup>3</sup> Mark Kersten, “Where it all Began – Tracing the Birth of the ICC”, in *Justice In Conflict*, 10 January 2013; Resolutions of the Geneva International Conference, 26–29 October 1863 ([www.legal-tools.org/doc/aec5e5/](http://www.legal-tools.org/doc/aec5e5/)); Gustave Moynier and Louis Appia, *La Guerre et la Charité*, Librairie Cherbuliez, Paris, 1867; Christopher Keith Hall, “The First Proposal for a Permanent International Criminal Court”, in *International Review of the Red Cross*, 1998, no. 322.

<sup>4</sup> Kersten, 2013, see *supra* note 3.

<sup>5</sup> Compared to the largely ineffective League of Nations following World War I: see US Office of the Historian, “The League of Nations, 1920”, available on its web site.

<sup>6</sup> This implicit shift represents a sharp contrast to the pre-World War II Hobbesian method of dispute resolution in which a state’s sovereignty prevailed above all else.

<sup>7</sup> John Locke, “State of Nature”, in *Second Treaties of Government*, Awnsam Churchhill, London, 1690, chap. 2, para. 7 ([www.legal-tools.org/doc/bd4102/](http://www.legal-tools.org/doc/bd4102/)).

Specifically, in practice, the Court's jurisdictional limitations implicitly embody Hobbesian-styled sovereignty by permitting State-level criminal justice systems (deemed 'willing and able') to investigate and prosecute a case in place of the Court.<sup>8</sup> Thus, instead of a single body adjudicating violations of international humanitarian law, the Rome Statute allows for 196 possible adjudicating authorities – a clear nod to Kantian liberalism in which liberal States can and should be trusted to conduct their own investigations,<sup>9</sup> while violating a central Lockean principle requiring a 'common judge' (one authority) for all adjudications.

As a result of the ICC's deviation from implicit Lockean philosophical principles in favour of Kantian and Hobbesian jurisdictional restraints, the Court – which fully adjudicating less than ten defendants since 2002<sup>10</sup> – is a hostage to its own weak statutory foundation. Thus, the Court is at a functional and philosophical crossroads, in which it may follow one of two paths: (1) the Court may continue its divesture of power and authority, thereby supporting a return to a post-Moynier, implicitly Hobbesian-based *ad hoc* tribunal system; or (2) the Court may embrace the Lockean principle that a 'common judge' (authority) is necessary to prevent a return to an international 'state of war'.<sup>11</sup>

## **9.2. The Three Primary Philosophical Foundations of the International Criminal Court and Related Obstacles**

### **9.2.1. The 'State of Nature'**

To contextualise both the evolution and the modern role of the ICC, one must first understand the philosophical foundations that led to its creation; specifically, the nature of international relations in the absence of man-made legal order ('positive law') or any enforcement mechanisms therein. As detailed below, understanding relationships in this so-called 'state of

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<sup>8</sup> International Criminal Court, "How the Court Works: Jurisdiction", available on its web site:

The ICC is intended to complement, not to replace, national criminal systems; it prosecutes cases only when States do not are unwilling or unable to do so genuinely.

<sup>9</sup> United States Department of State, "Lists for Independent States and Dependencies and Areas of Special Sovereignty: Independent States in the World", available on its web site. This figure includes the 195 independent states in the world and the International Criminal Court.

<sup>10</sup> International Criminal Court, "Reparation/Compensation Stage", available on its web site.

<sup>11</sup> John Locke, "Of the State of War", in *Second Treaties of Government*, Awnsham Churchill, London, 1690, chap. 3 ([www.legal-tools.org/doc/bd4102/](http://www.legal-tools.org/doc/bd4102/)).

nature’ is a largely philosophical exercise as it is ‘unknowable’, yet it necessarily implicates the true nature of humankind, and thus the development of positive international law.

More specifically, the ‘state of nature’ describes life under a condition of ‘absolute freedom’ in which all positive law ceases to exist;<sup>12</sup> as a result, each individual – or State, as we will see – is accountable only to his or her instincts, physical needs, and individual sense of morality, without any recourse by traditional legal authorities at the State or international level. Thus, the ‘state of nature’ represents the truest denotation of ‘anarchy’.<sup>13</sup> Whether this definition is in fact merely the sixteenth century socio-political theory of the absence of government, or the more sinister modern connotation of ‘chaos’, is subject to interpretation.<sup>14</sup>

In deciphering both domestic and international relations in the ‘state of nature’, philosophers generally fall along a spectrum between the theories of Thomas Hobbes, Immanuel Kant, and John Locke. Specifically, whereas Hobbes envisioned the ‘state of nature’ as a never-ending war between all, necessitating the formation of a powerful and sovereign State un-beholden to the international community, Kant envisioned a similar state of war, but called upon the international community to form ‘peace organisations’ to prevent future wars. In sharp contrast to Hobbes and Kant, Locke argued the ‘state of nature’ was governed by a higher, natural law which dictated peace and co-operation among the world’s inhabitants (to an extent); however, this peace and co-operation was subject to a check by an ultimate, single sovereign.<sup>15</sup> Yet, despite their differing views, Hobbes, Kant, and Locke each called for the creation of positive law (be it at the State level or the international level) to promote and maintain

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<sup>12</sup> Amer N. Shatara, “On the Hypothetical State of Nature of Hobbes and Kant; Same Premise, Different Conclusions”, in *European Scientific Journal*, 2016, vol. 12, no. 23, pp. 209–10. See, on p. 210:

The state of nature is the condition under which individuals lived prior to the existence of society.

<sup>13</sup> “Anarchy”, in Bryan A. Garner (ed.), *Black’s Law Dictionary*, 10th edition, Thomson West, St. Paul, 2014, p. 104 (“[a]bsence of government; lawlessness”). This term is used as derived from its sixteenth century definition (above), not its more modern definition of a “sociopolitical theory holding that the only legitimate form of government is one under which individuals govern themselves voluntarily, free from any collective power structure” (*ibid.*).

<sup>14</sup> *Ibid.*

<sup>15</sup> *Infra* Sections 9.2.2.–9.2.4. In so providing, Locke is laying the foundation for international bodies such as the UN as well as the ICC.

peace – providing humanity an escape from the state of nature, whether defined by war or natural law.

Following the creation of the State and its corresponding positive law, Hobbes, Kant, and Locke again divide with regard to the issue of ‘sovereignty’ and international relations.<sup>16</sup> Specifically, Hobbes and Kant note that, while liberal States should strive for peace, they must retain their sovereignty; thus, States should only be bound by mutual, self-interested contracts (peace treaties) to the degree they still retain independence and the right of self-defence. To the contrary, Locke advocates for States to surrender a portion of their sovereignty to a higher authority (a ‘common judge’) to resolve disputes and, in turn, ensure peace and the “protection of the innocent”.<sup>17</sup> To date, as discussed below, it is the latter Lockean philosophy which theoretically legitimises the ICC – a form of world governance dismissed by both Hobbes and Kant – in that the ICC represents a single, ultimate sovereign.

### **9.2.2. Escaping the ‘State of Nature’ through Hobbesian State Sovereignty**

As noted above, according to Realist philosopher Thomas Hobbes (1588–1679), the ‘state of nature’, humanity’s natural condition, was at best described as “nasty, brutish, and short”, in which its inhabitants were engaged in a never-ending “war of all against all”.<sup>18</sup> Specifically, Hobbes noted:

Whether for gain, safety, or reputation, power-seeking individuals w[ould] thus ‘endeavor to destroy or subdue one another’ [...]. In such uncertain conditions, in which everyone [was] a potential aggressor, making war on others [was] a more advantageous strategy than peaceable behavior, and one need[ed] to learn that domination over others is necessary for one’s own continued survival.<sup>19</sup>

As such, Hobbes believed the only manner in which this ‘state of war’ would cease is for humankind to give their unquestioning obedience

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<sup>16</sup> *Infra* Sections 9.2.2.–9.2.4.

<sup>17</sup> Locke, “Of the State of War”, 1690, see *supra* note 11.

<sup>18</sup> Thomas Hobbes, “Of the Natural Condition of Mankind as Concerning their Felicity and Misery”, in *Leviathan*, Andrew Crooke, London, 1651, p. 78 ([www.legal-tools.org/doc/bcffb3/](http://www.legal-tools.org/doc/bcffb3/)); Shatara, 2016, p. 211, see *supra* note 12.

<sup>19</sup> *Ibid.*, quoting Hobbes, 1651, p. 76.

to a sovereign (the domestic State), which, through positive law, would control “every social and political issue” to avoid the “universal insecurity [...] [and] fear [of] violent death” accompanying the state of nature. Therein, an individual would be forced to surrender their “absolute freedom” and autonomy in exchange for order and security; thus vesting the State with powers once held by the individual, including the power to: (1) “prescribe [...] the rules”; (2) “decide all controversies which may arise”; and (3) “punish [...] every subject according to the law”.<sup>20</sup> In essence, the State would retain absolute freedom and autonomy, surrendered by its citizens.

In consideration of this exchange, the State was entrusted with two eternal precepts: (1) seek peace with other nations, and (2) ensure its natural right to defend itself.<sup>21</sup> Specifically, a State, while having no duty to recognise or surrender its rights to another sovereign (as was required of the individual in the creation of the State), should “mak[e] [...] peace with other nations and [c]ommonwealths [,] [through a mutual transferring of rights (treaties)] [...] when it is for the public good”. However, implied in each agreement must be a condition of self-defence – the ultimate act of State sovereignty – because “covenants, without the sword, are but words, and no strength to secure a man at all”.<sup>22</sup> Thus, for a State to fully realise

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<sup>20</sup> Garrath Williams, “Thomas Hobbes: Moral and Political Philosophy”, in *Internet Encyclopedia of Philosophy*. Hobbes’s bleak view of the natural state of man and his subsequent writing were largely influenced by his surroundings – the English Civil War – in which King Charles I and his heir, King Charles II, were engaged in a series of armed conflicts to determine the absolute rule of the monarch versus the rights of people in the English Parliament. In supporting the monarch as an absolute sovereign for fear that division could result in the ‘state of nature’, Hobbes was undoubtedly impacted by his loyalist views and the violent uncertainty of the time; hence equating the ‘state of nature’ to a ‘civil war’. Thus, *Leviathan* should not merely be read as philosophical prose, but also a plea to the populace for peace and their investiture of their natural rights and liberties into a single sovereign.

<sup>21</sup> Thomas Hobbes, “Of the First and Second Natural Laws, and Contract”, in *Leviathan*, Andrew Crooke, London, 1651, chap. XIV, pp. 79–82 ([www.legal-tools.org/doc/bcffb3/](http://www.legal-tools.org/doc/bcffb3/)). See John Rick, “Historical Context for *Leviathan*”, in *The Core Curriculum* ([www.legal-tools.org/doc/5f5837/](http://www.legal-tools.org/doc/5f5837/)):

For Hobbes, it is the rationality of living within a political state that ultimately justifies [...] the legitimacy of sovereign authority [...]. As Part I of the *Leviathan* argues, the inevitable dreadfulness of the state of nature renders it rational for individuals to relinquish most of their basic freedoms in order to obtain the valuable security provided by a political state, even one with absolute power.

<sup>22</sup> Thomas Hobbes, “*Leviathan*”, in Austin Sarat (ed.), *The Social Organization of Law*, Oxford University Press, New York, 2004, p. 41; Thomas Hobbes, “Of the Rights of Sov-

these precepts, it must possess an absolute authority that is neither divided nor limited.

Absent the vesture of unquestionable sovereignty, Hobbes warns the State, weak and unable to protect its subjects, would collapse and the ‘state of war’ would again prevail, because:<sup>23</sup>

[I]n all times kings and persons of sovereign authority, because of their independency, are in continual jealousies, and in the state and posture of gladiators, having their weapons pointing, and their eyes fixed on one another; that is, their forts, garrisons, and guns upon the frontiers of their kingdoms, and continual spies upon their neighbours, which is a posture of war.<sup>24</sup>

As a result, from a Hobbesian perspective, any perceived diminution in a State’s sovereignty, especially through the recognition of a ‘higher authority’ (a world government), would be a threat not only to the State as an entity and its citizenry, but the entire ordered international system predicated upon the agreements (or treaties) crafted among these self-interested sovereigns. However, in a Hobbesian world, such agreements “would be limited by national egoism and the degree to which material common interests overlap” (that is, aviation safety or mail delivery).<sup>25</sup> Absent the overlap of material common interests, there would be no need for, and no State would adhere to, an international law.<sup>26</sup> In short, according to Hobbesian philosophy, the State must seek peace, but not at the expense of its own sovereignty.

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ereigns by Institutions”, in *Leviathan*, Andrew Croke, London, 1651, chap. XVIII, pp. 107–11 ([www.legal-tools.org/doc/bcffb3/](http://www.legal-tools.org/doc/bcffb3/)); Hobbes, “Of the First and Second Natural Laws, and Of Contract”, 1651, chap. XIV, pp. 79–82, see *supra* note 21.

<sup>23</sup> Sharon A. Lloyd and Susanne Sreedhar, “Hobbes’s Moral and Political Philosophy”, in *Stanford Encyclopedia of Philosophy*, available on the Stanford Encyclopedia of Philosophy’s web site; André Munro, “State of Nature”, in *Encyclopedia Britannica*, 2016.

<sup>24</sup> Hobbes, “Of the Natural Condition of Mankind as Concerning their Felicity and Misery”, 1651, chap. XIII, p. 79, see *supra* note 18.

<sup>25</sup> Doyle and Carlson, 2008, p. 654, see *supra* note 1.

<sup>26</sup> *Ibid.*, p. 655:

The key message of Hobbesian Realism is that law is weak, but relevant. Any law that reflects the material, prestige, or security interests of a state would be complied with. Moreover, even when those interests dictate defection, states will be reluctant to acquire the reputation of faithlessness when they rely on cooperation for survival.

### 9.2.3. Escaping the ‘State of Nature’ through Kant’s Treaty Law of Liberal Republics

Building upon Hobbes, Immanuel Kant (1724–1804), a transcendental Idealist yielding a form of Realism at the empirical level, assumed there was a direct analogy between the state of nature amongst individuals and the one between States. According to Kant, both States and individuals live in constant insecurity in the ‘state of nature’ because of its lawless condition.<sup>27</sup> Specifically:

The state of peace among men living side by side is not the natural state (*status naturalis*); the natural state is one of war. This does not always mean open hostilities, but at least an unceasing threat of war. A state of peace, therefore, must be *established*, for in order to be secured against hostility it is not sufficient that hostilities simply be not committed; and, unless this security is pledged to each by his neighbor (a thing that can occur only in a civil state), each may treat his neighbor, from whom he demands this security, as an enemy.<sup>28</sup>

In this theoretical perspective, “*States do not plead their case before a tribunal*, instead, war alone is their way of bringing suit. But by war and its favourable issue, in victory, right is not decided, and though by a treaty of peace this particular war is brought to an end, the state of war, of always finding a new pretext to hostilities, is not terminated”.<sup>29</sup> Instead Kant argues, *without foregoing sovereignty* and without material overlap, except security, States must form:

[A] league of a particular kind, which can be called a league of peace (*foedus pacificum*), and which would be distinguished from a treaty of peace (*pactum pacis*) by the fact that the latter terminates only one war, while the former seeks to make an end of all wars forever. This league does not tend to any dominion over the power of the state but only to the maintenance and security of the freedom of the state

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<sup>27</sup> Arash Heydarian Pashkahanlou, “Kant’s Writing on the States of Nature and Coercion: The Domestic Analogy and the Level of Analysis”, in *E-International Relations Student*, 2009, available on E-International Relations’ web site.

<sup>28</sup> Immanuel Kant, “Section II: Containing the Definitive Articles for Perpetual Peace Among States”, in *Perpetual Peace: A Philosophical Sketch*, 1795 ([www.legal-tools.org/doc/dc079a/](http://www.legal-tools.org/doc/dc079a/)).

<sup>29</sup> *Ibid.* (emphasis added).

itself and of other states in league with it, *without there being any need for them to submit to civil laws and their compulsion, as men in a state of nature must submit.*<sup>30</sup>

Kant does *not* propose a global government because he deems such an entity a ‘Leviathan’ and considers its unchecked sovereignty as unnecessary to maintain ordered governance;<sup>31</sup> instead, he considers that peace can *only* be achieved through peace treaties and organisations among *liberal* States – defined by three conditions: (1) represented, republican government, (2) a principled respect for human rights, and (3) social and economic interdependence.<sup>32</sup> In his view:

It is self-enforced international law, enforced by a mutual restraint and respect among liberal republics that is produced by the domestic institutions, and the interests and ideas of the citizenry those institutions reflect.<sup>33</sup>

In short, the framework of international law is secured by ‘Perpetual Peace’ – “[merely] a peace treaty among [‘]qualifying[’] liberal nations” – to the exclusion of non-liberal States in which the ‘state of war’ still prevails.<sup>34</sup>

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<sup>30</sup> *Ibid.* (emphasis added).

<sup>31</sup> Garrett Wallace Brown, “State Sovereignty, Federation and Kantian Cosmopolitanism”, in *European Journal of International Relations*, 2005, vol. 11, no. 4, pp. 495–522. See, at p. 599:

Kant wants to challenge the natural law doctrine supporting state sovereignty while also dismissing arguments advocating the creation of a world state. In this regard, Kant’s international theory tries to navigate a middle passage between the idea that states can act as the ultimate protector of human freedom, while also aware of the fact that states are often the primary violators of this very freedom.

<sup>32</sup> Specifically, Kantian cosmopolitanism provides a normative ethical global order without the existence of a world government. Instead, the combination of treaty-law is an effective deterrent to aggression by non-liberal states.

<sup>33</sup> Doyle and Carlson, 2008, p. 657, see *supra* note 1.

<sup>34</sup> *Ibid.*, see in particular p. 656. To this end, Kant notes an important trend in world politics: the tendencies of liberal states to be peace-prone among themselves and war-prone in their relations with non-liberal states. As such, for peace to prevail, absent a true Leviathan, *three conditions* must be met:

1. Representative, republican government, which includes an elected legislative, separation of powers and the rule of law. Kant argued that together those institutional features lead to caution because the government is responsible to its citizens. This does not guarantee peace, but selects for popular wars.
2. A principled respect for human rights all human beings can claim. This should produce a commitment to respect the rights of fellow liberal republics because

To this end, modern social science data adds value to Kant's arguments in that it suggests liberal democracies do not engage in warfare with one another.<sup>35</sup> Thus, for Kant, liberal republics could protect themselves from the hostilities of non-liberal republics without the need of a so-called 'world government'; instead, multilateral peace treaties (that is, organisations such as the North Atlantic Treaty Organisation) are enough to secure liberal States on an international level.<sup>36</sup>

#### 9.2.4. Escaping the 'State of Nature' through a Lockean Recognition of a Common Judge

Contrary to the bleak 'state of war' described by Realists Hobbes and Kant, John Locke (1632–1704), an unquestionable Idealist, argued the

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they represent free citizens who constrain their state and thus those states represent individuals' rights who deserve our respect. It also produces a distrust of non-republics because if they cannot trust their own citizens to rule, why should we trust them?

3. Social and economic interdependence; trade and social interaction generally engender a mix of conflict and co-operation. A foreign economic policy of free trade tends to produce material benefits superior to optimum tariffs (if other states will retaliate for tariffs, as they usually do). Liberalism produces additional material incentives to bolster co-operation because, among fellow liberals, economic interdependence should not be subject to security-motivated restrictions ('Trading with the Enemy' acts) and, consequently, will be more extensive, varied, and robust.

<sup>35</sup> John R. Oneal and Bruce Russett, "The Kantian Peace: The Pacific Benefits of Democracy, Interdependence, and International Organizations, 1885–1992", in *World Politics*, 1999, vol. 52, no. 1, pp. 1–2.

<sup>36</sup> However, according to Kant, when liberal states act collectively to maintain peace, they are bound by at least six articles of perpetual peace (set out in Immanuel Kant, "Section II: Containing the Definitive Articles for Perpetual Peace Among States", 1795, see *supra* note 28):

1. No treaty of peace shall be held valid in which there is tacitly reserved matter for a future war;
2. No independent states, large or small, shall come under the dominion of another state by inheritance, exchange, purchase, or donation;
3. Standing armies (*miles perpetuus*) shall in time be totally abolished;
4. National debts shall not be contracted with a view to the external friction of states;
5. No state shall by force interfere with the Constitution or government of another state; and
6. No state shall, during war, permit such acts of hostility which would make mutual confidence in the subsequent peace impossible: such are the employment of assassins (*percussores*), poisoners (*venefici*), breach of capitulation, and incitement to treason (*perduellio*) in the opposing state.

‘state of nature’ was not a state of ‘anarchy’ at all, but was instead governed by a ‘natural law’ in which the ability of warring parties to lay down their arms for the sake of “true love of mankind and society, and from the charity [...] owe[d] to one another” was innate.<sup>37</sup> To this end, the ‘natural law’ restrained individuals from invading the rights of others and encouraged mutual support for the basic protections of life, liberty, and property.<sup>38</sup>

However, Locke concedes that conflict still arose in the ‘state of nature’ as the ‘natural law’ was not subject to a singular moral interpretation nor did it sufficiently protect property interests, thus:

mak[ing] [the individual] willing to quit this condition [(the state of nature)], however free, is full of fears and continual dangers; and it is not without reason that he seeks out and is willing to join in a society with others who are already united [...] for the mutual preservation of [...] property [...] [because] [f]irst, there wants an established, settled known law [(positive law)]. Received and allowed by common consent to be the standard of right and wrong, and the common measure to decide all controversies between them [...]. Secondly, in the state of nature there wants a known and indifferent judge, with authority to determine all differences according to established law.<sup>39</sup>

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<sup>37</sup> John Locke, “Political or Civil Society”, in *Second Treaties of Government*, Awncsham Churchill, London, 1690, chap. VII, para. 93 ([www.legal-tools.org/doc/bd4102/](http://www.legal-tools.org/doc/bd4102/)). See Roscoe Pound, *The Formative Era of American Law*, Little, Brown and Company, Boston, 1936, pp. 15–16:

This natural law was variously conceived: sometimes as a vaguely outline ideal order of society, sometimes as a body of moral ideals to which conduct should be constrained to conform, sometimes as a body of ideal legal precept [...] [b]ut whatever meaning was given to the ideal or the body of ideals, the interpretation and application of existing rules were to be guided by it, and lawmaking, judicial reasoning, and doctrinal writings were to be governed by it.

<sup>38</sup> Gregory Bassham, *The Philosophy Book: For Vedas to the New Atheists, 250 Milestones in the History of Philosophy*, Sterling Publishing Company Inc., Toronto, 2016, p. 232. These basic protections were later incorporated in the American Declaration of Independence as ‘inalienable rights’, but have seen been universally recognised as ‘human rights’.

<sup>39</sup> John Locke, “Of the Ends of Political Society and Government”, in *Second Treaties of Government*, Awncsham Churchill, London, 1690, chap. IX, para. 123 ([www.legal-tools.org/doc/bd4102/](http://www.legal-tools.org/doc/bd4102/)).

In so stating, Locke acknowledges an inevitable need for positive law to govern all humankind.<sup>40</sup> However, even with the creation of positive law, absent a singular interpretation, a ‘state of war’ may still exist due to private judgments regarding the law and its application. As such, “by consent [to the law], each man incurs an obligation to submit to public judgment and thereby puts an end to the continual controversies that result when each has an equal right to a judge”.<sup>41</sup> Thus, according to Locke, “the peaceful resolution of controversies requires both a common law and a common judge to execute the law”.<sup>42</sup>

In application, Locke “envison[ed] a basis for international norms derived from natural law and conventions that regulate conflict and cooperation among independent societies in a broader international society”.<sup>43</sup> Specifically, as derived from his writing on domestic relations, Locke’s perceived international regulatory scheme consists of two parts: (1) the positive law (that is, treaties, accords, and so on), and (2) an “indifferent judge, with authority to determine all differences according to established law”; therein requiring sovereigns (States) to relinquish their absolute sovereignty.<sup>44</sup> To this end, Locke notes:

Men living together according to reason without a common superior on earth, with authority to judge between them, is

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<sup>40</sup> Michael J. Sandel, *Justice: What’s the Right Thing to Do?*, Farrar, Straus, and Girox, New York, 2009, p. 140 (citing John Locke, “The Beginning of Political Societies”, in *Second Treaties of Government*, Awnsham Churchill, London, 1690, chap. VIII, p. 38 ([www.legal-tools.org/doc/bd4102/](http://www.legal-tools.org/doc/bd4102/))). For those resistant to obligations of society and its positive law, Locke declare the use of any social good (that is, a highway) to be implicit consent to the surrender of his or her ‘absolute freedom’. *Ibid.* Unfortunately, Locke provides very little insight into international precepts of the commonwealth because “[i]nternational relations were not the primary focus of his [Locke’s] work, and foreign affairs is treated less systematically by Locke than other modern political philosophers”. Lee Ward, “Locke on the Moral Basis of International Relations”, in *American Journal of Political Science*, 2006, vol. 50, no. 3, pp. 691–705. However, Locke does speak of sovereignty, self-defence, and national interests in which, when applied broadly speaks to the relationships between States. *Ibid.*

<sup>41</sup> Ruth W. Grant, *John Locke’s Liberalism*, University of Chicago Press, Chicago, 1991, p. 74.

<sup>42</sup> *Ibid.*

<sup>43</sup> Mareike Oldemeinen, “John Locke and the Possibility of a ‘Global Commonwealth’”, in *E-International Relations*, 2011, available on E-International Relations’ web site.

<sup>44</sup> John Locke, “The Purposes of Political Society and Government”, in *Second Treaties of Government*, Awnsham Churchill, London, 1690, chap. IX, paras. 123–25 ([www.legal-tools.org/doc/bd4102/](http://www.legal-tools.org/doc/bd4102/)).

properly the state of Nature. But force, or a declared design of force upon the person of another, where there is no common superior on earth to appeal to for relief, is the state of war; and it is the want of such an appeal gives a man the right of war even against an aggressor, though he be in society and a fellow-subject [...]. Want of a common judge with authority puts all men in a state of Nature [...].<sup>45</sup>

Further:

To avoid this state of war (wherein there is no appeal but to Heaven [...] where there is no authority to decide between the contenders) is one great reason of men's putting themselves into society, and quitting the state of nature. For where there is an authority, a power on earth from which relief can be had be appeal, there the continuance of the war is excluded, and the controversy is decided by that power".<sup>46</sup>

Therefore, Lockean philosophy dictates: to prevent the 'state of war', the State must surrender some of its sovereignty to a 'higher authority' ('common judge') empowered to hear disputes and prevent conflicts between both liberal republics and non-liberal governments (therein breaking from Kant). Specifically, for Locke, the idea of legal supremacy replaces sovereignty as the central organising principle of legitimate government,<sup>47</sup> because "once war arises, it is difficult to put an end to it unless there is a common judge between contending parties".<sup>48</sup>

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<sup>45</sup> Locke, 1690, chap. III, para. 19, see *supra* note 11.

<sup>46</sup> *Ibid.*, para. 16.

<sup>47</sup> Ward, 2006, pp. 691–705, see *supra* note 40:

While the supreme power is a delegated authority given by society and held in trust [...] Unlike the individual person, the supreme power of the independent commonwealth is incapable of surrendering its natural executive power, at least in any significant sense, to a higher institutional authority [...] [however] legal supremacy, as Locke conceives of it, implicitly undermines the idea of sovereignty by offering no theoretical or moral obstacle to natural law authorization for the defensive use of force broadly conceived to include not only repulsing aggression, but even permitting a form of conquest and occupation.

To the contrary, through a piece-meal interpretation, "Locke attains on the whole[,] a sound theory of sovereignty which is the single supreme and yet limited legal authority in the state", see Raghuvver Singh, "John Locke and the Idea of Sovereignty", in *Indian Journal of Political Science*, 1959, vol. 20, no. 4, p. 329. Specifically, to those who oppose Locke's 'common judge' based upon notions of sovereignty, Locke implores:

### 9.3. All Roads Lead to Rome: The Development of International Law Prior to the Rome Statute

#### 9.3.1. The First Attempt to Establish an International Criminal Court

Much to the dismay of Idealist philosophers such as Locke, conceptually, the Hobbesian and, to an extent, Kantian emphasis on ‘State sovereignty’ is merely a reflection of millennia of international relations. As a result, and reflecting upon the “international state of nature” as articulated by Kant, international contracts (treaties) governing warfare were rare prior to the nineteenth century.<sup>49</sup> Instead, it was not until the Geneva International Diplomatic Conference of 1863, that Gustave Moynier, co-founder of the Red Cross, with the help of fellow philanthropist, Henry Durant,<sup>50</sup>

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Consider what civil society is for. It is set up to avoid and remedy the drawbacks of the state of nature that inevitably follow from every man’s being judge in his own case, by setting up a known authority to which every member of that society can appeal when he has been harmed or is involved in a dispute – an authority that everyone in the society ought to obey. *So any people who don’t have such an authority to appeal to for the settlement of their disputes are still in the state of nature.*

See Locke, 1690, chap. VII, para. 90, see *supra* note 37 (internal citations omitted) (emphasis added).

<sup>48</sup> Peter A. Anstey, *The Philosophy of John Locke: New Perspectives*, Routledge, London, 2004, p. 77; Rome Statute of the International Criminal Court, 17 July 1998, in force 1 July 2002 (‘ICC Statute’) ([www.legal-tools.org/doc/7b9af9/](http://www.legal-tools.org/doc/7b9af9/)). Specifically, the ‘Preamble’ of the Rome Statute provides in relevant part:

The State Parties to this Statute [...] [are:] [m]indful that during this century millions of children, women, and men have been victims of unimaginable atrocities that deeply shock the conscience of humanity[;] [...] [d]etermined to put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevent of such crimes[; and] [...] [r]esolved to guarantee lasting respect for the enforcement of international justice.

<sup>49</sup> See Grant Niemann, *Foundations of International Criminal Law*, LexisNexis Butterworths, New York, 2014, p. 3. See also, p. 1:

The Laws of War date back to ancient Greece and possibly even earlier [...] the 6<sup>th</sup> Century warrior Sun Tzu may have [even] ‘influenced’ the development [...] when he famously proclaimed ‘[t]here is no instance of a country having benefited from prolonged warfare’.

<sup>50</sup> Kersten, 2013, see *supra* note 3: Durant’s manifest, *A Memory of Solferino* (1859), detailing “Dunant’s feelings towards the dying soldiers on the French battlefields and enshrine[ing] his vision for an international organisation”, to alleviate such suffering was the original inspiration for Moynier (who had previously “spent his days pursuing his passion for the law and philanthropy[,] [...] producing numerous books, pamphlets and folders of correspondence on various topics ranging from the laws of war to geography in the Congo Basin”).

and several influential benefactors “dedicated to the alleviation of suffering for wounded combatants in the spirit of universal brotherhood”,<sup>51</sup> proposed the first international humanitarian framework;<sup>52</sup> which would, in turn, evolve and set the stage for the creation of international tribunals such as the ICC.

Specifically, during the Geneva Conference, of the sixteen States represented, twelve<sup>53</sup> ultimately agreed to the First Convention for the Amelioration of the Condition of the Wounded in Armies in the Field, providing: “relief to the wounded without any distinction as to nationality; neutrality (inviolability) of medical personnel and medical establishments and units; [and] the distinctive sign of the red cross on a white ground”.<sup>54</sup> While, upon first blush, the Convention seemingly marked a shift in the law of nations to an implicit Kantian perspective (that is, peace through treaties and treaty organisations), Kant believed that treaties and treaty organisations were to be made to *prevent* all wars – not to expound the rules governing wartime actions. As such, Hobbesian sovereignty concerns continued to prevail, even among men such as Moynier.

As noted in Moynier’s 1870 Commentary on the Convention:

He considered whether an international court should be created to enforce it. However, he rejected this approach in favour of relying on the pressure of public opinion, which he thought would be sufficient. He noted that ‘a treaty was not a law imposed by a superior authority on its subordinates (but) only a contract whose signatories cannot decree penalties against themselves since there would be no one to implement them. The only reasonable guarantee should lie in the creation of international jurisdiction with the necessary power to compel obedience, but, in this respect, the Geneva Convention shares an imperfection that is inherent in all internation-

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<sup>51</sup> *Ibid.*

<sup>52</sup> The humanitarian law dictates the rules and laws of war, especially in relation to the treatment and protection of civilians and non-combatants. It is this law that morphed into the ‘international criminal law’ which is adjudicated by the International Criminal Court, but still retains its humanitarian roots (that is, war crimes, crimes against humanity, and so on).

<sup>53</sup> Baden, Belgium, Denmark, France, Hesse, Italy, Netherlands, Portugal, Prussia, Spain, Switzerland, and Württemberg, see International Committee of the Red Cross, “Convention for the Amelioration of the Condition of the Wounded in Armies in the Field, Geneva, 22 August 1864”, available on the International Committee of the Red Cross web site.

<sup>54</sup> Hall, 1998, see *supra* note 3.

al treaties'. Nevertheless, he believed that public criticism of violations of the Geneva Convention would be sufficient, 'because public opinion is ultimately the best guardian of the limits it has itself imposed. The Geneva Convention, in particular, is due to the influence of public opinion on which we can rely to carry out the orders it has laid down [...]. The prospect for those concerned of being arraigned before the tribunal of public conscience if they do not keep to their commitments and of being ostracized by civilized nations, constitutes a powerful enough deterrent for us to believe ourselves correct in thinking it better than any other.'<sup>55</sup>

Thus, Moynier sought merely to regulate war via an implicit Hobbesian approach to international governance. Specifically, instead of establishing a world court (Lockean model) or a preventative treaty body (Kantian model), Moynier, and the Convention by implication, favoured a Hobbesian model that rejected Lockean and Kantian threats to sovereignty and, instead, favoured the court of "public opinion" along with the uncertain hope that the States would, pursuant to their sovereign power, "enact legislation imposing serious penalties for violations".<sup>56</sup> As a result, parties to the Convention merely agreed to police themselves during times of war – a proposition that would prove to be an abysmal failure.

The short-sightedness of Moynier's implicit Hobbesian philosophy would be revealed when the Franco-Prussian War (1870–71) began over rival claims in connection with the Grand Duchy of Luxembourg.<sup>57</sup> Both France and Prussia were signatories to the Convention, yet largely due to ignorance of the covenants and nationalistic-inspired malice (attributable in considerable part to public opinion and the press), during the course of the war, the provisions of the Convention were largely abandoned.<sup>58</sup> Instead, "French medics refused to treat the enemy and civilians painted the Red Cross on bedsheets at random to protect their homes. The Germans – reacting to the poor behaviour of the French – kidnapped French doctors and accused them of espionage"; yet there were no prosecutions following

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<sup>55</sup> *Ibid.*

<sup>56</sup> *Ibid.* Kant would have likely rejected such an agreement. Specifically, while Kant emphasises state sovereignty, he believed that treaties and treaty organisations were made to prevent all wars – not to expound the rules governing wartime actions.

<sup>57</sup> Kersten, 2013, see *supra* note 3; Hall, 1998, see *supra* note 3.

<sup>58</sup> Kersten, 2013, see *supra* note 3.

the end of the war.<sup>59</sup> As a result, the war exposed the weaknesses in both the Convention and Moynier's implicit Hobbesian belief that public opinion and/or the domestic laws of each sovereign would be a sufficient enforcement mechanism.<sup>60</sup>

In response, Moynier began to slowly relinquish his Hobbesian-styled assumptions regarding the need for State sovereignty "that is neither divided nor limited", in favour of an implicitly, mixed Kantian<sup>61</sup> and Lockean<sup>62</sup> perspective on the creation of an international tribunal, believing:

an international institution was necessary to replace national courts. Since the States had been reluctant to pass the criminal legislation which he believed that they were morally obligated, as parties to the Geneva Convention, to enact in order to *prevent* violations, he argued that the creation of international criminal law was necessary, [...] [also] it was appropriate to leave judicial remedies to the belligerents because, no matter how well respected the judges were, they could at any moment be subjected to pressure. An international institution composed of judges from both belligerent and neutral States, or exclusively neutral States, would, theoretically at least, offer better guarantees of impartiality, and this would encourage belligerents to use it.<sup>63</sup>

However, in his conclusion, Moynier did implicitly provide a limited Hobbesian-styled reassurance to States, specifically,

he argued that the *governments themselves had nothing to fear from such a court* since they would not be directly implicated in the violations. Indeed, 'it would be absurd to imagine a superior order in contempt of international obliga-

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<sup>59</sup> *Ibid.*

<sup>60</sup> Hall, 1998, see *supra* note 3:

Moynier was forced to recognize that 'a purely moral sanction' was inadequate 'to check unbridled passions'. Moreover, although both sides accused each other of violations, they failed to punish those responsible or even to enact the necessary legislation.

<sup>61</sup> Moynier, similar to Kant, called for an international treaty-based institution that would prevent violations of international law, instead of merely acting as a response mechanism.

<sup>62</sup> Moynier, similar to Locke, called upon states to surrender some of their sovereignty in favour of an ultimate, international sovereign.

<sup>63</sup> Hall, 1998, see *supra* note 3 (emphasis added).

tions formally recognized.’ The executive function of carrying out sentences, however, should be left to States.<sup>64</sup>

Thus, at the 3 January 1872 meeting of the International Committee of the Red Cross, Moynier presented one of the first Lockean-styled (with limited, implicit Kantian objectives)<sup>65</sup> treaty-based proposals for the establishment of a permanent international tribunal,<sup>66</sup> modelled after the arbitral tribunal established by the 1871 Treaty of Washington;<sup>67</sup> which provided a means of amicable settlement between the United States and Great Britain for Britain’s role in supporting the Southern rebellion during the American Civil War.<sup>68</sup> Specifically, Moynier’s proposal consisted of ten articles, in relevant part:

The tribunal would have been [...] a permanent institution, which would be activated automatically<sup>69</sup> in the case of any war between the parties (Article 1). The President of the Swiss Confederation was to choose by lot three adjudicators [...] from neutral States party and the belligerents were to choose the other two (Art. 2, para. 1). If there were more than two belligerents, those that were allied would select a single adjudicator [...]. There would be no permanent seat for the tribunal, but the five adjudicators would meet as quickly as possible at the location chosen provisionally by the President of the Swiss Confederation (Art. 2, para. 2). The judges would decide among themselves the place where they would sit (Art. 3, para. 1), thus permitting the tribunal

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<sup>64</sup> *Ibid.*

<sup>65</sup> *Ibid.*

<sup>66</sup> *Ibid.:*

Moynier was not discouraged by the failure of other proposals to establish international criminal courts because they were designed to enforce ill-defined customary law, rather than a convention.

<sup>67</sup> *Ibid.*

<sup>68</sup> Allan Nevins, “Washington, Treaty of”, in *Dictionary of American History*. The treaty was especially significant in that it provided:

[An] [a]greement on three rules of international law for the guidance of the Geneva tribunal in interpreting certain terms used in the treaty. The most important of these rules asserted that ‘due diligence’ to maintain absolute neutrality ‘ought to be exercised by neutral governments’ in exact proportion to the risks to which belligerents were exposed by breaches.

<sup>69</sup> A Kantian-styled preventive measure to prevent and/or immediately effect the cessation of war.

to sit at the place most convenient to the defendants and witnesses.

The proposal left it to the adjudicators each time the tribunal was convened to decide upon the details of the tribunal's organization and the procedure to be followed (Art. 3, para. 1). Certain aspects of the procedure were to be the same, however, in all cases. The tribunal would conduct an adversarial hearing (Art. 4, para. 3) and it would reach its decision in each case by a verdict of guilty or not guilty (Art. 5, para. 1). The complainant State would perform the role of prosecutor. If the guilt of the accused was established (suggesting that the burden of proof remained on the complainant), the court would hand down a sentence, in accordance with international law, which would be spelled out in a new treaty separate from the Geneva Convention (Art. 5, para. 2).<sup>70</sup>

In response, Moynier received significant criticism from many well-established experts in the international legal community, most of whom exhorted Hobbesian-styled concerns regarding State sovereignty.<sup>71</sup> As a result, States, “unwilling to yield their sovereign prerogatives and unprepared to relate any of their powers to an international enforcement institution”,<sup>72</sup> refused to publicly support or even attempt Moynier's proposal.<sup>73</sup> Ultimately defeated, Moynier noted “[i]t is doubtful that the court can be achieved in a satisfactory manner due to the obstacles in international law, which seem too difficult to overcome”.<sup>74</sup>

### **9.3.2. The Second Attempt to Establish an International Criminal Court**

Nearly thirty years after Moynier's proposal, the Hague Conventions of 1899 and 1907 convened and marked a shift in international perspec-

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<sup>70</sup> Hall, 1998, see *supra* note 3:

In addition to imposing punishment, the court could award victims compensation, but only if the complainant government sought compensation (art. 7, para. 1) [...] The government of the offender would be responsible for implementing the award (art. 7, para. 2).

<sup>71</sup> *Ibid.*

<sup>72</sup> Kersten, 2013, see *supra* note 3.

<sup>73</sup> Hall, 1998, see *supra* note 3.

<sup>74</sup> Kersten, 2013, see *supra* note 3.

tives.<sup>75</sup> Beginning with a Lockean-styled recitation of the natural law, via the Martens Clause,<sup>76</sup> the Convention with Respect to the Laws and Customs of War on Land was established, detailing the treatment of prisoners of war and the wounded as well as forbidding the use of poisons, killing of enemy combatants who have surrendered, looting of towns, attacking or bombarding undefended towns or habitation, and so on.<sup>77</sup> However, similar to Moynier's Geneva Conference, these obligations were only imposed upon States in general, and therefore, did not impose individual criminal accountability for transgressions of the "rules of war"<sup>78</sup> – yet another example of Hobbesian-styled sovereignty prevailing in international law. As a result, the horrors of World War I ensued shortly thereafter, including the Armenian genocide, chemical warfare, looting, the attack of undefended towns, and so on<sup>79</sup>

Due in large part to the atrocities of World War I, but now seemingly immune to the Hobbesian-styled sovereignty concerns that extinguished Moynier's proposal, during the 1918 armistice through the negotiations of the Paris Peace Conference in 1919, "the first call in modern times for having war crime trials came from *civil society*, not from governments".<sup>80</sup> Specifically, under pressure from both the public and the press, both the United States and the British governments were outwardly supportive of a treaty that would establish permanent international criminal tribunal that would sit in The Hague.<sup>81</sup> In other words, at least two States abandoned the prevailing Hobbesian-styled sovereignty concerns of

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<sup>75</sup> Errol P. Mendes, *Peace and Justice at the International Criminal Court: A Court of Last Resort*, Edward Elgar Publishing Limited, Northampton, Massachusetts, 2010, p. 3.

<sup>76</sup> *Ibid.*:

Until 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 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 (the Martens Clause).

<sup>77</sup> Convention (II) with Respect to the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land, 29 July 1899 ([www.legal-tools.org/doc/7879ac/](http://www.legal-tools.org/doc/7879ac/)).

<sup>78</sup> Mendes, 2010, p. 3, see *supra* note 75.

<sup>79</sup> *Ibid.*, p. 4.

<sup>80</sup> Niemann, 2014, p. 123, see *supra* note 49 (emphasis added).

<sup>81</sup> *Ibid.*, pp. 123–24.

the time in favour of a Lockean-styled ‘common judge’. However, because of internal relationships and remaining Hobbesian-styled sovereignty concerns by other States, such a tribunal was never instigated.<sup>82</sup>

Instead, the Treaty of Versailles quelled public demand by providing a ‘special tribunal’ to try Kaiser Wilhelm for “the supreme offence against international morality and the sanity of treaties”.<sup>83</sup> However, due to clever drafting, the Treaty of Versailles “ensured that the Kaiser would never be tried for international crimes and ordinary soldiers with be dealt with (if at all) by national courts”.<sup>84</sup> As a result, not only did the trials which did occur amount to nothing more than a sham, but the international community also missed yet another opportunity to install a Lockean-styled international criminal court.<sup>85</sup>

However, in lieu of an international criminal court, the Paris Peace Conference resulted in the creation of the League of Nations and with it, the Permanent Court of International Justice (‘World Court’).<sup>86</sup> The Court was tasked with the implicitly Kantian goal of “retaining peace” by asserting jurisdiction

in all or any of the classes of legal disputes concerning: the interpretation of a treaty; any question of international law; the existence of any fact which, if established, would constitute a breach of an international obligation; the nature or ex-

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<sup>82</sup> *Ibid.*, p. 124.

<sup>83</sup> Leila Sadat, “The International Criminal Court”, in William A. Schabas (ed.), *The Cambridge Companion to International Criminal Law*, Cambridge University Press, Cambridge, 2016, p. 137.

<sup>84</sup> Niemann, 2014, p. 125, see *supra* note 49. Not only was the Kaiser related to the British Royal Family, but “the American members of the Commission on the Responsibility of the Authors of the War expressed reservations about the legality and the appropriateness of such an exercise”, see Sadat, 2016, pp. 137–38, *supra* note 83.

<sup>85</sup> Niemann, 2014, p. 125, see *supra* note 49.

<sup>86</sup> The Covenant of the League of Nations, 28 June 1919, Article 14 ([www.legal-tools.org/doc/106a5f/](http://www.legal-tools.org/doc/106a5f/)):

The Council shall formulate and submit to the Members of the League for adoption plans for the establishment of a Permanent Court of International Justice. The Court shall be competent to hear and determine any dispute of an international character which the parties thereto submit to it. The Court may also give an advisory opinion upon any dispute or question referred to it by the Council or by the Assembly.

ment of the reparation to be made for the breach of an international obligation.<sup>87</sup>

While the jurisdiction of the World Court was largely optional – applying only to States – resulting in primarily advisory opinions, the Court did retain compulsory jurisdiction over certain matters for signatories of the Optional Clause of the League of Nations as well as approximately thirty international conventions.<sup>88</sup> Thus, whilst retaining Hobbesian-styled sovereignty for non-signatories, the creation of the World Court marked a significant shift in international relations and its philosophical underpinnings by: (1) adopting a quasi-Lockean-styled single adjudicator that (2) was tasked with the Kantian-goal of preventing war, instead of merely responding to its aftermath.

### **9.3.3. The Third, and Successful, Attempt to Establish an International Criminal Court**

Despite the signatories to the World Court signalling an openness to diminished Hobbesian-styled sovereignty – as would be required by any Lockean-style tribunal – it would not be until the conclusion of World War II that the concept of an international criminal court, applicable to individual offenders, would receive any sustained political momentum.<sup>89</sup> Specifically, “[i]n the aftermath of the slaughter and genocidal horrors of

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<sup>87</sup> Statute of the Permanent Court of International Justice, 16 December 1920, Article 36 ([www.legal-tools.org/doc/a0bb78/](http://www.legal-tools.org/doc/a0bb78/)):

The jurisdiction of the Court comprises all cases which the parties refer to it and all matters specially provided for in treaties and conventions in force. The Members of the League of Nations and the States mentioned in the Annex to the Covenant may, either when signing or ratifying the Protocol to which the present Statute is adjoined, or at a later moment, declare that they recognize as compulsory ipso facto and without special agreement, in relation to any other Member or State accepting the same obligation, the jurisdiction of the Court in all or any of the classes of legal disputes concerning: the interpretation of a treaty; any question of international law; the existence of any fact which, if established, would constitute a breach of an international obligation; the nature or extent of the reparation to be made for the breach of an international obligation. The declaration referred to above may be made unconditionally or on condition of reciprocity on the part of several or certain Members or States, or for a certain time. In the event of a dispute as to whether the Court has jurisdiction, the matter shall be settled by the decision of the Court.

<sup>88</sup> Manley O. Hudson, “The Work and the Jurisdiction of the Permanent Court of International Justice”, in *Proceedings of the Academy of Political Science in the City of New York*, 1923, vol. 10, no. 3, pp. 115–23.

<sup>89</sup> Sadat, 2016, p. 138, see *supra* note 83.

World War II, the victorious Allies finally seemed to realise the importance of linking justice with sustainable peace in the future”.<sup>90</sup> As a result, in the Moscow Declaration of 1943, the Allies announced a renewed determination to try those who initiated the war and committed war crimes – ultimately culminating in the Charter of International Military Tribunals (‘Nuremberg Charter’) on 8 August 1945, establishing the ‘Nuremberg Trials’ and setting the stage for the ‘Tokyo Trials’.<sup>91</sup> Thus, “[w]hile the Nuremberg and Tokyo Trials were *ad hoc* tribunals,<sup>92</sup> in the immediate aftermath of these trials, the idea of a permanent international criminal court seemed feasible”.<sup>93</sup>

To this end, following the war, the newly created United Nations<sup>94</sup> – a Kantian-style body created through a treaty with the ultimate goal of preventing war instead of merely responding to it (with limited State sovereignty surrendered) – adopted a series of conventions based upon the Nuremberg Charter. One such convention, adopted in 1948, designed as a response mechanism when the United Nations could not prevent a war, was the Convention on the Prevention and Punishment of Genocide and an accompanying resolution which:

[I]nvited the International Law Commission<sup>95</sup> to “study the desirability and possibility of establishing an international judicial organ for the trial of persons charged with genocide or other crimes”. Thus instructed, the International Law Commission embarked upon a fifty-year long odyssey, voting initially in 1950 to support the desirability and feasibility

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<sup>90</sup> Mendes, 2010, p. 4, see *supra* note 75.

<sup>91</sup> *Ibid.*; Sadat, 2016, p. 138, see *supra* note 83.

<sup>92</sup> Thus retaining little-to-no deterrent value – as would be required under any Kantian court, to prevent war.

<sup>93</sup> Niemann, 2014, p. 134, see *supra* note 49.

<sup>94</sup> The United Nations ultimately replacing the inherently flawed, weak, and ineffectual League of Nations. However, it did not supersede the World Court, instead under Article 93 of the UN Charter, all UN members are automatically parties to the statute of the World Court ([www.legal-tools.org/doc/6b3cd5/](http://www.legal-tools.org/doc/6b3cd5/)).

<sup>95</sup> On 21 November 1947, the UN General Assembly passed Resolution 174 ([www.legal-tools.org/doc/c2a5c3/](http://www.legal-tools.org/doc/c2a5c3/)), establishing the ‘International Law Commission’ in order to fulfil the obligations of the Charter on the UN to initiate studies and make recommendations for the purpose of “encouraging the progressive development of international law and its codification”. Attached to the resolution was the Statute of the International Law Commission, which defined its purposes as the promotion of the codification of international law and solving of problems within both public and private international law.

of creating an international criminal court, only to have the question of the court's establishment taken away from it [...]. Although [...] a successor Committee did produce drafts of a statute for a new international criminal court, their work was shelved as the Cold War made it impossible to achieve consensus.<sup>96</sup>

Despite the stalemate, in the interim, significant progress was made towards a Lockean-styled common judge model, a fact that would become clear following (1) the end of the Cold War in 1989; (2) the successful creation of the *ad hoc* International Criminal Tribunal for the former Yugoslavia and the *ad hoc* International Criminal Tribunal for Rwanda in the early 1990s; and (3) the resumption of drafting by the International Law Commission. To this end, in 1994 the International Law Commission adopted a final draft statute that would service as the basic text upon which the establishment of the ICC would ultimately be debated at Rome Conference.<sup>97</sup>

When the Rome Conference ultimately commenced on 15 June 1998, it faced the seemingly impossible challenge of achieving a consensus among the 160 countries convened, each conflicted by the desire to retain Hobbesian-style sovereignty and the aspiration to achieve a lasting peace and the “protection of the innocent” in-line with Lockean philosophical principles.<sup>98</sup> Yet, to this end, self-interested concerns of Hobbesian-style sovereignty initially prevailed during the Rome Conference as one of the first underlying principles established during negotiations was the creation of a new legal concept: the complementary principle (or doctrine of complementary jurisdiction)<sup>99</sup> which provides that the ICC may be competent to investigate and try a case only if ability or will to do so is lacking in relevant national jurisdictions.<sup>100</sup>

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<sup>96</sup> Sadat, 2016, p. 140, see *supra* note 83 (citing Study by the International Law Commission of the Question of an International Criminal Jurisdiction, UN General Assembly Resolution 260B(III)) ([www.legal-tools.org/doc/49794f/](http://www.legal-tools.org/doc/49794f/)):

The idea of legal supremacy replaces sovereignty as the central organizing principle of legitimate government, in order to ensure the ‘safety of the innocent’.

<sup>97</sup> *Ibid.*

<sup>98</sup> Ward, 2006, pp. 691–705, see *supra* note 40.

<sup>99</sup> Sadat, 2016, p. 142, see *supra* note 83.

<sup>100</sup> Oscar Solera, “Complementary Jurisdiction and International Criminal Justice”, in *International Review of the Red Cross*, March 2002, vol. 84, no. 845, p. 184 ([www.legal-tools.org/doc/b069c4/](http://www.legal-tools.org/doc/b069c4/)):

Specifically, for States seeking to fulfil their implicit Hobbesian requirement that a State “seek peace” while retaining its own independence, the retention of this sovereignty was so important in each State’s “posturing for war”,<sup>101</sup> that the doctrine of complementary jurisdiction was ultimately included twice in the Preamble of the Rome Statute; once implicitly: “[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 once explicitly: “Emphasizing that the ICC established under *this Statute shall be complementary to national criminal jurisdictions*”.<sup>102</sup> Further, the doctrine was explicitly restated in Article I of the Rome Statute:

An ICC (‘the Court’) is hereby established. It shall be a permanent institution and shall have the power to exercise its *jurisdiction* over persons for the most serious crimes of international concern, as referred to in this Statute, and *shall be complementary to national criminal jurisdictions*.<sup>103</sup>

This did still not satisfy the theoretically most Lockean of all the States at the Rome Conference – the United States – which viewed even complementary jurisdiction as jeopardising its own sovereignty.<sup>104</sup> Instead,

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States continue to play the central role [in investigations]. But [*only*] if they fail or find it impossible to assume that role, or show disinterest or bad faith, the [International Criminal Court] will step in to ensure that justice is done (emphasis added).

<sup>101</sup> Hobbes, “Of the Natural Condition of Mankind as Concerning their Felicity and Misery”, 1651, chap. XIII, p. 79, see *supra* note 18.

<sup>102</sup> ICC Statute, Preamble, see *supra* note 48.

<sup>103</sup> *Ibid.*, Article 1 (emphasis added). Specifically, the ICC must decline jurisdiction where:

- (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; or
- (d) The case is not of sufficient gravity to justify further action by the Court.

<sup>104</sup> As one observer notes in Foundations of American Government, “Foundations of American Government”, in *American Government Online Textbook*, 2017:

The single most important influence that shaped the founding of the United States comes from John Locke, a 17th century Englishman who redefined the nature of government. Although he agreed with Hobbes regarding the self-interested nature of hu-

negotiators from the United States “were not convinced that their military personnel could still avoid being hauled before the ICC”; this was largely due to Article 17 under which the ICC could break complementary jurisdiction where a State was “genuinely unwilling or unable to carry out its own investigations and prosecutions”.<sup>105</sup> Thus, the United States, whose own government was established nearly singularly under Lockean idealism,<sup>106</sup> rejected the possibility in its entirety and the promise of peace

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mans, he was much more optimistic about their ability to use reason to avoid tyranny. In his *Second Treaties of Government*, Locke identified the basis of a legitimate government. According to Locke, a ruler gains authority through the consent of the governed. The duty of that government is to protect the natural rights of the people, which Locke believed to include life, liberty, and property. If the government should fail to protect these rights, its citizens would have the right to overthrow that government. This idea deeply influenced Thomas Jefferson as he drafted the Declaration of Independence.

<sup>105</sup> Mendes, 2010, p. 21, see *supra* note 755:

Such a fear would almost be a fantastical admission that the much lauded American justice system is not to be regarded as legitimate.

However, this provision was not without guiding language; specifically, see ICC Statute, Article 17(2), *supra* note 48:

2. In order to determine unwillingness in a particular case, the Court shall consider, having regard to the principles of due process recognized by international law, whether one or more of the following exist, as applicable:
  - (a) The proceedings were or are being undertaken or the national decision was made for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court referred to in article 5;
  - (b) There has been an unjustified delay in the proceedings which in the circumstances is inconsistent with an intent to bring the person concerned to justice;
  - (c) The proceedings were not or are not being conducted independently or impartially, and they were or are being conducted in a manner which, in the circumstances, is inconsistent with an intent to bring the person concerned to justice.
3. In order to determine inability in a particular case, the Court shall consider whether, due to a total or substantial collapse or unavailability of its national judicial system, the State is unable to obtain the accused or the necessary evidence and testimony or otherwise unable to carry out its proceedings.

Despite this guiding language, the United States sought the inclusion of a provision that would permit the UN Security Council, of which it is a permanent member, a veto over *any* prosecutions; a thinly veiled attempt to protect itself and its allies from investigation and prosecution, see Mendes, 2010, p. 16, *supra* note 75.

<sup>106</sup> Barbara Arneil, *John Locke and America: The Defense of English Colonialism*, Clarendon Press, Oxford, 1998. John Locke even acknowledged in his *Second Treatise on Govern-*

above all else – an ideal articulated in the preamble of the Rome Statute which implies “without a permanent institution dedicated to justice against impunity[,] the chances of sustainable peace [...] [are] greatly diminished”.<sup>107</sup> In other words, the existence of the ICC would be a general deterrent to war and war crimes that were not otherwise prevented by the Kantian-style United Nations.

In response to the Hobbesian-style objections by the United States, negotiators attempted to garner its support by adopting two more jurisdictionally restrictive covenants. First, negotiators adopted Article 5 which further attempted to balance national sovereignty and justice by limiting the ICC’s subject-matter jurisdiction to “the most serious of crimes of concern to the international community as a whole” (that is, genocide, crimes against humanity, war crimes, and the crime of aggression).<sup>108</sup> Second, negotiators adopted Article 12 which provided personal jurisdiction only when: (1) the crime occurred by a national of a State who has accepted the jurisdiction of the ICC, or (2) the crime occurred on the territory of a State who has accepted the jurisdiction of the ICC.<sup>109</sup> However, the United States was not swayed.<sup>110</sup>

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*ment*, p. 1, that “thus, in the beginning all the World was America”, for Locke viewed America as the world’s second chance for paradise. See Arneil, 1998, p. 169:

[Most] scholars claim Locke to be a single and all powerful influence on the early American republic [...] [specifically,] the implications of civil man and his society [...] on the separation of legislative and executive powers within government, and on the conditions under which it may be dissolved.

<sup>107</sup> Mendes, 2010, p. 21, see *supra* note 75.

<sup>108</sup> *Ibid.*; ICC Statute, Article 5, see *supra* note 48.

<sup>109</sup> ICC Statute, Article 12, see *supra* note 48. Article 13 of the ICC Statute also permits the Security Council to make referrals of non-parties to the Statute. However, more specifically, the UN Security Council comprises ten elected member States and five permanent member States – China, the United States, France, the United Kingdom, and the Russian Federation – each with ultimate veto power over any Security Council resolutions or recommendations, including referrals to the ICC. Of these five States, only two acquiesced to the ICC’s jurisdiction (France and the United Kingdom). As such, while the Security Council has granted jurisdiction over non-ICC members on two previous occasions, such referrals are rare and place non-ICC member nations (China, the United States, and the Russian Federation) in an awkward position, often resulting in their abstention from such votes. Further, the ultimate veto power of non-ICC member nations is a *de facto* conflict of interests, ultimately ensuring that nationals of China, the United States, and the Russian Federation will never fall under the jurisdiction of the ICC, even in cases where such individuals have committed grave atrocities.

<sup>110</sup> Instead,

Though its efforts are retained in Articles 1, 5, and 12, ultimately, the United States' abandonment of its historical Lockean foundation was in vain. On 17 July 1998, the Rome Statute was adopted with 120 States voting in favour, twenty-one abstaining, and only the United States, China, Libya, Iraq, Israel, Qatar and Yemen declaring their opposition. Therein the "Rome Conference [...] called upon the United Nations General Assembly to [...] draft the Elements of the Crime and the Rules of Procedure and Evidence which would give further definitions to the crimes listed in the ICC Statute".<sup>111</sup> On 1 July 2002, the Statute received its requisite number of ratifications and came into full-force and effect; the work of the Court began almost immediately.

#### **9.4. The Conflict between Lockean Philosophy and the Jurisdictional Restraints Imposed by the Rome Statute**

Arguably, because of its lengthy genesis and debate during the Rome Conference, the ICC Statute implicitly adopts Lockean ideals executed through Hobbesian and Kantian means. Specifically, the largely Lockean stylings of the Preamble of the Rome Statute emphasise the protection of the innocent:

The States Parties to this Statute,

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the United States [...] had argued throughout the negotiations that the Statute should not permit any trials of individuals without the consent of their state of nationality unless the Security Council referred the case (thereby insulating nationals of the United States from prosecution before the Court).

Sadat, 2016, p. 140, see *supra* note 83. See also Doyle and Carlson, p. 664, see *supra* note 1:

Following the ICC's creation, the United States sought to secure bilateral agreements with other nations pledging that they would not surrender U.S. personnel to the court, which essentially meant that the other country would refuse to honor its ICC treaty obligations *vis-à-vis* the United States. Using quantitative analysis, [researchers] discovered a number of interesting patterns among nations in this context. First, states with a 'high rule of law' were not especially likely to sign onto the ICC relative to 'low rule of law' states. Yet if they had ratified the ICC treaty, the former were significantly more likely to decline to sign the bilateral agreements with the United States than the latter. Second, low rule of law states were actually more likely to sign the bilateral treaties with the U.S. if they had ratified the ICC than if they had not. And third, [researchers] conclude [...] that the states that refused to sign the U.S. bilateral agreements did so for one or two reasons: respect for the ICC itself and respect for their treaty compliance in general. In sum, a general respect for the rule of law impelled many states to rebuff U.S. requests.

<sup>111</sup> Mendes, 2010, p. 21, see *supra* note 75.

9. An Analysis of Lockean Philosophy in the Historical and Modern Context of the Development of, and the Jurisdictional Restraints Imposed by, the ICC Statute

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Conscious that all peoples are united by common bonds, their cultures pieced together in a shared heritage, and concerned that this delicate mosaic may be shattered at any time,

Mindful that during this century millions of children, women and men have been victims of unimaginable atrocities that deeply shock the conscience of humanity,

Recognizing that such grave crimes threaten the peace, security and well-being of the world,

Affirming that the most serious crimes of concern to the international community as a whole must not go unpunished [...],

Determined to these ends and for the sake of present and future generations, to establish an independent permanent ICC [...] with jurisdiction over the most serious crimes of concern to the international community as a whole.<sup>112</sup>

In so noting, the Rome Statute then establishes in Articles 5 (aggression),<sup>113</sup> 6 (genocide),<sup>114</sup> 7 (crimes against humanity),<sup>115</sup> and 8 (war

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<sup>112</sup> ICC Statute, Preamble, see *supra* note 48.

<sup>113</sup> The Court's jurisdiction over the crime of aggression was conditioned upon the ratification of the Kampala Amendments by at least thirty States and agreement by a consensus or two-thirds majority of the parties to the Rome Statutes, but not before 2 January 2017. See Sadat, 2016, p. 145, *supra* note 83.

<sup>114</sup> ICC Statute, Article 6, see *supra* note 48:

[...] '[G]enocide' means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

- (a) Killing members of the group;
- (b) Causing serious bodily or mental harm to members of the group;
- (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
- (d) Imposing measures intended to prevent births within the group;
- (e) Forcibly transferring children of the group to another group.

<sup>115</sup> *Ibid.*, Article 7:

1. [...] '[C]rime 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:

- (a) Murder;
- (b) Extermination;
- (c) Enslavement;
- (d) Deportation or forcible transfer of population;
- (e) Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law;
- (f) Torture;

crimes),<sup>116</sup> the first half of Locke’s regulatory scheme – the ‘positive law’.<sup>117</sup> Yet, the Court’s ability to enforce this positive law to ensure peace “for the sake of present and future generations” is subject to Hobbesian jurisdictional limitations which undermine the implicit Lockean guiding principles (“protection of the innocent above all else”) of the Court and fails to establish the second half of Locke’s regulatory scheme – a ‘common judge’.

Instead of a ‘common judge’, the Rome Statute provides for ‘complementary jurisdiction’ three times in order to protect “[n]ational sovereignty and the ability to conduct genuine domestic investigative and judi-

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- (g) Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity;
  - (h) 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;
  - (i) Enforced disappearance of persons;
  - (j) The crime of apartheid;
  - (k) Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.

<sup>116</sup> *Ibid.*, Article 8:

2. [...] ‘[W]ar crimes’ means:

- (a) Grave breaches of the Geneva Conventions of 12 August 1949, namely, any of the following acts against persons or property protected under the provisions of the relevant Geneva Convention:
  - (i) Wilful killing;
  - (ii) Torture or inhuman treatment, including biological experiments;
  - (iii) Wilfully causing great suffering, or serious injury to body or health;
  - (iv) Extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly;
  - (v) Compelling a prisoner of war or other protected person to serve in the forces of a hostile Power;
  - (vi) Wilfully depriving a prisoner of war or other protected person of the rights of fair and regular trial;
  - (vii) Unlawful deportation or transfer or unlawful confinement;
  - (viii) Taking of hostages [...].

<sup>117</sup> *Ibid.*, Articles 6–10. The ‘positive law’ expounded by the ICC Statute was extremely limited, to a degree well below the standard articulated by Locke. Specifically, see Sadat, 2016, p. 145, *supra* note 83:

[A]lthough the negotiators of the Rome Statute contemplated adding many crimes to the Court’s jurisdiction including terrorism, drug trafficking, hostage-taking, and aggression, it was ultimately decided that it would be preferable to begin with universal ‘core crimes’ defined in treaties or found in the customary international law.

cial proceedings in civil conflicts”.<sup>118</sup> As noted by the Court, this doctrine “seeks to complement, not replace, national courts”.<sup>119</sup> Thus, instead of a single body adjudicating violations of international humanitarian law, the Rome Statute of the ICC allows for 196 possible adjudicating authorities (each State).<sup>120</sup> This lack of a ‘common judge’ is only furthered by Hobbesian-style ‘territorial jurisdiction’ limitations which protects sovereignty at the expense of the ICC’s ability to intervene in even the most serious and obvious of cases. Specifically, Article 12 of the Rome Statute gives the Court jurisdiction only if (1) the defined crime occurred by a national of a State who has accepted the jurisdiction of the Court, (2) the defined crime occurred on the territory of a State who has accepted the jurisdiction of the ICC; thus, limiting the role of Court.

Due to the Court’s jurisdictional limitations, the Rome Statute calls upon every State to exercise its criminal jurisdiction over those responsible for international crimes. However, as predicted by Locke, the lack of recognition of a single judge has historically permitted impunity for great atrocities. Specifically, “[a]lthough almost two-thirds of all states have national legislation permitting their courts to exercise universal jurisdiction over certain conduct committed abroad amounting to one or more of the following crimes: war crimes, crimes against humanity, genocide, torture, extrajudicial executions or ‘disappearances’”, very few States have taken action under their respective statutory grants.<sup>121</sup>

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<sup>118</sup> Mendes, 2010, p. 21, see *supra* note 75.

<sup>119</sup> International Criminal Court, “About”, available on the ICC web site.

<sup>120</sup> United States Department of State, “Independent States in the World”, see *supra* note 9.

<sup>121</sup> Amnesty International, “Overcoming obstacles to implementing universal jurisdiction”, in *Universal Jurisdiction: The duty of states to enact and enforce legislation*, 2001 ([www.legal-tools.org/doc/7fb02a/](http://www.legal-tools.org/doc/7fb02a/)). See also Daniel N. Clay, “Protecting Due Process During Terrorism Adjudications: Redefining ‘Crimes Against Humanity’ and Eliminating the Doctrine of Complementary Jurisdiction in Favor of the International Criminal Court”, in *Arkansas Law Review*, 2018 (forthcoming):

In 2002, Germany began asserting jurisdiction over international cases involving at least some German connection – be it as a victim, offender, or a third party affected by genocide, war crimes, or crimes against humanity. In many respects, German ‘universal jurisdiction’, was predicated upon Spain’s historical allowance for its national courts (Audiencia Nacional) to pursue criminal cases outside of its territorial jurisdiction since 1985. Pursuant to Organic Law 6/1985 on the Judiciary (Ley Organica del Poder Judicial) Article 23, sect. 4, Spanish Criminal Courts could assert jurisdiction over “offenses of an international nature or with an international dimension”. This provision was broadly conceived to provide Spanish courts with “absolute jurisdiction, no

As a result, in application, complementary and territorial jurisdiction appear to be resulting in a patchwork of Hobbesian-style quasi-*ad hoc* tribunals (consisting of both ‘victor’s justice’ and ‘sham proceedings’) in which most States refuse to even exercise their respective deferred jurisdiction, without any response from the ICC under its Article 17(2) jurisdictional powers to intervene.<sup>122</sup> Thus, depending on one’s perspective, international humanitarian law is either governed by 196 independent judges on the basis of complementary jurisdiction or, more accurately, zero judges on the basis of territorial jurisdiction – in direct opposition to the singular judge required by Locke. Therefore, according to Lockean philosophy, the international community remains in the ‘state of nature’.<sup>123</sup>

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links with Spain were required and no criteria of subsidiarity applied; furthermore, anybody could file a claim”. Spain justified this unparalleled jurisdiction as a ‘necessity’ following the Nuremberg Trials in which a “general consensus [...] formed [...] that acts of horror should [not] go unpunished, especially when they [cannot] be prosecuted in the country where they occurred. [However], [i]n response [to political pressures], Spanish lawmakers drafted, presented, and passed Organic Law 1/2014 [...] Spanish law now provides that that the country’s criminal courts may only assert jurisdiction when “in cases of genocide, crimes against humanity or war crimes, [...] the alleged perpetrator [must] be a Spanish national, a foreigner who habitually resides in Spain or a foreigner who happens to be in Spain and whom the Spanish authorities have refused to extradite [...] for crimes of torture and enforced disappearance if the alleged perpetrator is a Spanish citizen or, the victim is a Spanish citizen at the time the act was committed and the alleged perpetrator is on Spanish territory[, and] for crimes not covered by the law itself, Spain shall respect the rules of jurisdiction provided by treaties to which it is a party.

<sup>122</sup> Since 2002, the court has only fully-adjudicated eight individuals (three convictions and five acquittals).

<sup>123</sup> This state of war is largely exemplified by the 2015 statement of the Chief Prosecutor of the International Criminal Court regarding ISIS, in which she noted:

The atrocities allegedly committed by ISIS undoubtedly constitute serious crimes of concern to the international community and threaten the peace, security and well-being of the region, and the world. They also occur in the context of other crimes allegedly committed by other warring factions in Syria and Iraq. However, Syria and Iraq are not Parties to the Rome Statute, the founding treaty of the International Criminal Court (‘Court’ or ‘ICC’). Therefore, the Court has no territorial jurisdiction over crimes committed on their soil.

Therein declining action to prosecute members of ISIS until territorial or personal jurisdiction could be established. See “Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, on the alleged crimes committed by ISIS”, 8 April 2015 ([www.legal-tools.org/doc/b1d672/](http://www.legal-tools.org/doc/b1d672/)).

### 9.5. Conclusion Regarding the Philosophical Future of the International Criminal Court

As a result of its inherent weakness and minimal number of prosecutions, the Court is at a crossroad in which it can either (1) continue its divesture of power and authority, thereby supporting a return to a post-Moynier, Kantian/Hobbesian-based *ad hoc* tribunal system; or (2) embrace the Lockean principle that a ‘common judge’ is necessary to prevent a return to the ‘state of nature’. Upon first blush, the quasi-Lockean Court appears to be suffering from a revival of Hobbesian-style sovereignty, pushing for a Hobbesian-based *ad hoc* tribunal system. To this end, in 2017, the African Union, representing thirty-four signatories to the Rome Statute passed a non-binding resolution to withdraw from the ICC based on accusation of undermining African sovereignty and selective prosecution of African leaders.<sup>124</sup> While the resolution only calls upon countries to consider how to implement the decision, in the meantime, the countries of the African Union are continuing to push for reforms of the Court and strengthening their own judicial mechanisms, because “if [this mass exodus] were to occur, it would constitute a [...] blow to the legitimacy and credibility of the ICC”.<sup>125</sup>

Fortunately, the withdrawal of the African Union alone is not enough to facilitate a collapse of the Court; however, if the Court cannot recover its credibility as a fair and effective institution, more States may withdraw, citing Hobbesian-style sovereignty concerns or in solidarity with the African Union. In such a case, under pressure of non-ICC members (that is, the United States, China, and Russia), the United Nations Security Council may again utilise *ad hoc* tribunals, in which both Hobbesian sovereignty and Locke’s required positive law are preserved,<sup>126</sup> but Locke’s ‘common judge’ requirement is violated and thus the international community would returned to a Lockean ‘state of nature’.

However, notwithstanding the non-binding withdrawal of the African Union, this possibility is remote as Lockean idealism appears to be

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<sup>124</sup> *BBC News*, “African Union backs mass withdrawal from ICC”, 1 February 2017.

<sup>125</sup> Mendes, 2010, p. 157, see *supra* note 75; Elias Meseret, “African Leaders Approve a Strategy for Mass Withdrawal From the ICC”, *Time*, 31 January 2017.

<sup>126</sup> For instance, the International Criminal Tribunal for the former Yugoslavia and the International Criminal Tribunal for Rwanda both applied law (that is, genocide, crimes against humanity, and war crimes) that has since been codified in the ICC Statute.

slowly, but continuously expanding in other parts of the world, specifically:

[A]s awareness of the gravity of certain forms of conduct grows not only in domestic fora but also within the international community, States have realized that in certain circumstances their national apparatus or internal legislation is insufficient to deal with crimes that undermine the most essential principles of humanity. In order to preserve the ideal of justice, but above all to avoid impunity, *States have consequently come to accept the fact that their systems, being imperfect, are in need of new mechanisms to complement them. The idea of international jurisdiction is thus viewed as a way to reinforce efforts against impunity, always with preservation of the ideal of justice in mind.*<sup>127</sup>

It is for this reason that States are generally trending away from the Kantian/Hobbesian protection of their sovereignty above all else. Instead, the evolution toward the Court, beginning with the negotiations of the Rome Statute, suggest civil society is progressing towards the preservation of peace through the recognition of a Lockean ‘common judge’ – the ICC.<sup>128</sup> While this recognition occurs at the expense of State sovereignty, as noted by Locke: “when all cannot be preserved, the safety of the innocent is to be preferred”.<sup>129</sup>

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<sup>127</sup> Solera, 2002, p. 149, see *supra* note 100 (emphasis added). This might also explain why the African Union’s resolution was not binding and only designed to begin discussions about what an exit from the ICC would entail. To this end, the African Union appears to be sending a message to the ICC without a well-defined plan to leave it.

<sup>128</sup> Niemann, 2014, p. 125, see *supra* note 49.

<sup>129</sup> Locke, 1690, chap. III, see *supra* note 11.

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**“The friend of all nations”:  
Punishment and Universal Jurisdiction in  
Emer de Vattel’s *Law of Nations***

Elisabetta Fiocchi Malaspina\*

### 10.1. Introduction

Francis Stephen Ruddy argued that the acceptance of Emer de Vattel’s *Law of Nations* is mainly due to three factors:

The first was his readability, which was the vehicle whereby the Law the Nations gained a popular significance it had never entertained before and [...] left the narrow circle of the doctrinaire to enter the wide and more influential circle of the man of letters. The second factor was the relevance of his work to the political facts of the day, especially state sovereignty, and the third factor was the system borrowed almost *in toto* from Wolff, whereby Vattel’s system was given coherence as well as grace and relevance.<sup>1</sup>

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<sup>1</sup> Francis Stephen Ruddy, *International Law in the Enlightenment: The Background of E. de Vattel’s ‘Le Droit des Gens’*, Oceana Publications, New York, 1975, pp. 309–10; Francis Stephen Ruddy, “The Acceptance of Vattel”, in Charles Henry Alexandrowicz (ed.), *Grotian Society Papers: Studies in the History of the Law of Nations*, Martinus Nijhoff, The Hague, 1972, pp. 177–96. See also: Charles G. Fenwick, “The Authority of Vattel”, in *The American Political Science Review*, 1913, vol. 7, no. 3, pp. 395–410; Charles G. Fenwick, “The Authority of Vattel”, in *The American Political Science Review*, 1914, vol. 8, no. 3, pp. 375–92; Paul Guggenheim, *Emer de Vattel et l’étude des relations internationales en*

The ‘legibility’, clarity and apparent linearity are reflected in the elaboration of fundamental concepts concerning both the State, as the need to have a constitution, and the international community, represented by the principle of balance of international power and the war in due form.<sup>2</sup>

One of the unique aspects of the treatise lies in its extraordinary ability to regulate the State: political power – especially in the first book dedicated to the nation – is the result of many legal mechanisms of ‘governability’, taking place in the relation between the sovereign and his citizens at a national level and among sovereigns at the international level, through what Michel Foucault calls ‘bio-competency’.<sup>3</sup> Vattel organises the social realm of the nation by promoting research for good government, for its own perfection and happiness, which coincides with the maintenance of security and welfare of its citizens.<sup>4</sup>

There is a need to have laws able to create life without repressing it. This principle, applied at the international level, is based on rules to be respected both in times of peace and war, as they are simultaneously functional and vital to the survival of each nation. Constitutional law, domestic and international law are held together by the need to write for practical application, exclusively for the sovereigns and for those who, like diplomats and practitioners, need to address issues related to the law of nations on a daily basis:

The law of nations is the law of sovereigns. It is principally for them and for their ministers that it ought to be written. All mankind are indeed interested in it; and, in a free country, the study of its maxims is a proper employment for every citizen: but it would be of little consequence to impart the

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*Suisse*, Georg et Cie, Geneva, 1956, p. 23; Henri Thévenaz, “Vattel ou la destinée d’un livre”, in *Schweizerisches Jahrbuch für Internationales Recht*, 1957, vol. 14, pp. 9–16.

<sup>2</sup> Vincent Chetail, “Vattel and the American Dream: An Inquiry into the Reception of the Law of Nations in the United States”, in Pierre-Marie Dupuy and Vincent Chetail (eds.), *The Roots of International Law: Liber Amicorum Peter Haggemacher*, Martinus Nijhoff, Leiden, 2014, p. 295.

<sup>3</sup> Michel Foucault, in François Ewald, Alessandro Fontana and Michel Senellart (eds.), *Nascita della biopolitica: Corso al Collège de France (1978-1979)*, Mauro Bertani and Valeria Zini trans., Feltrinelli, Milan, 2005, p. 221.

<sup>4</sup> Emanuelle Jouannet, “What is the Use of International Law?”, in Héléne Ruiz Fabri, Emanuelle Jouannet and Vincent Tomkiewicz (eds.), *Select Proceedings of the European Society of International Law, Volume 1, 2006*, Hart Publishing, Portland, 2008, p. 58.

knowledge of it only to private individuals, who are not called to the councils of nations, and who have no influence in directing the public measures. If the conductors of states, if all those who are employed in public affairs, condescended to apply seriously to the study of a science which ought to be their law, and, as it were, the compass by which to steer their course, what happy effects might we not expect from a good treatise on the law of nations!<sup>5</sup>

According to Vattel, the *Law of Nations* serves as a compass for those who have roles in the government, since the principles of a State are crucial to the development of subsequent rules in international relations. Studying Vattel’s theories, the importance of constitutional and national law becomes evident as the prerequisite from which international law follows as an inevitable consequence.

In 2008, on the occasion of 250<sup>th</sup> anniversary of the publication of the *Law of Nations* (1758–2008), there was a veritable ‘bloom’ of monographs, papers and conferences about his person, his work and his thought.<sup>6</sup> This is not to mention the international seminars, workshops and

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<sup>5</sup> Emer de Vattel, “Preface”, in Bela Kapossy and Richard Whatmore (eds.), *The Law of Nations, or, Principles of the Law of Nature, Applied to the Conduct and Affairs of Nations and Sovereigns, with Three Early Essays on the Origin and Nature of Natural Law and on Luxury*, Liberty Fund, Indianapolis, 2008, p. 18.

<sup>6</sup> Among many contributions: Vincent Chetail and Peter Haggemacher (eds.), *Vattel’s International Law in a XXIst Century Perspective: Le droit international de Vattel vu du XXIe Siècle*, Brill, Leiden, 2011; Christoph Good, *Emer de Vattel (1714–1767) – Naturrechtliche Ansätze einer Menschenrechtsidee und des humanitären Völkerrechts im Zeitalter der Aufklärung*, Dike, Zurich, 2011; Tetsuya Toyoda, *Theory and Politics of the Law of Nations: Political Bias in International Law Discourse of Seven German Court Councilors in the Seventeenth and Eighteenth Centuries*, Brill, Leiden, 2011, pp. 161–90; Yves Sandoz (ed.), *Réflexions sur l’impact, le rayonnement et l’actualité du ‘Droit des gens’ d’Emer de Vattel: Reflections on the Impact, Influence and Continuing Relevance of the ‘Law of Nations’ by Emer de Vattel*, Bruylant, Brussels, 2010. See also Béla Kapossy (ed.), in *Grotiana*, 2010, no. 31 dedicated to Vattel. In 2008, Richard Whatmore and Béla Kapossy republished the English edition of Vattel’s treatise of 1797, providing a dense introductory note in Vattel, 2008, p. ix–xx, see *supra* note 5; in the same year a Portuguese edition was published, with an introductory essay written by Francesco Mancuso in Emer de Vattel, *O direito das gentes ou Princípios da lei natural aplicados à condução e aos negócios das nações e dos governantes*, in Francesco Mancuso (ed.), Unijuí, Ijuí, 2008, pp. 17–67; in 2011, the English version of the treatise curated by Chitty in 1834 was republished: Emer de Vattel, *The Law of Nations, or Principles of the Law of Nature, Applied to the Conduct and Affairs of Nations and Sovereigns*, new edition, Joseph Chitty (ed.), Cambridge University Press, Cambridge, 2011 (1834).

conferences organised in Switzerland and other European countries on the occasion of Vattel's 300 years anniversary (1714–2014).<sup>7</sup>

International lawyers, legal historians and historians of international relations have reconstructed the historical and political context in which Vattel wrote. They have critically provided a re-reading of the *Law of Nations*, bringing out the decisive features of the work for the creation of international law during the eighteenth and nineteenth centuries.

In fact, in the last decade, interest in Vattel has increased incredibly, and publications – mainly in the form of articles – have surged around the world. The result is an extraordinary and vibrant array of studies surrounding Vattel's thinking. There has been, for example, extensive research on the various readings of the book,<sup>8</sup> on the concept of legal entity of the State,<sup>9</sup> on the reason of State,<sup>10</sup> on good government,<sup>11</sup> on the system of the *Law of Nations*,<sup>12</sup> on war,<sup>13</sup> on the enemy,<sup>14</sup> on the right of re-

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<sup>7</sup> There were several conferences and seminars, for example the Neuchâtel encounter of 30 April 2014 “*Neuchâtel La genèse et l’impact du Droit des Gens. A l’occasion du 300<sup>ème</sup> anniversaire de la naissance d’Emer de Vattel*” (organised by André Bandelier and Yves Sandoz). See also the newspaper articles: Harro von Senger, “Schweizer Gesetzestexte für China”, in *Neue Zürcher Zeitung*, 22 April 2014, p. 22; Harro von Senger, “Un Neuchâtelois adopté par l’Empire du Milieu”, in *Le Temps*, 25 April 2014, p. 12.

<sup>8</sup> Béla Kapossy, “Rival Histories of Emer de Vattel’s Law of Nations”, in *Grotiana*, 2010, vol. 31, no. 1, pp. 5–21.

<sup>9</sup> Ben Holland, “The Moral Person of the State: Emer de Vattel and the Foundations of International Legal Order”, in *History of European Ideas*, 2011, vol. 37, no. 4, pp. 438–45.

<sup>10</sup> Marti Koskeniemi, “International Law and *Raison d’État*: Rethinking the Prehistory of International Law”, in Benedict Kingsbury and Benjamin Straumann (eds.), *The Roman Foundations of the Law of Nations: Alberico Gentili and the Justice of Empire*, Oxford University Press, Oxford, 2011, pp. 297–339; also Richard Devetak, “Law of Nations as Reason of State: Diplomacy and the Balance of Power in Vattel’s Law of Nations”, in *Parergon*, 2011, vol. 28, no. 2, pp. 105–28.

<sup>11</sup> Santiago Legarre, “Police and Police Power: Domestic and International Law at the Crossroads”, in Luigi Nuzzo and Miloš Vec (eds.), *Constructing International Law: The Birth of a Discipline*, Klostermann, Frankfurt am Main, 2012, p. 431–45.

<sup>12</sup> Marti Koskeniemi, “International Community from Dante to Vattel”, in Vincent Chetail and Peter Hagggenmacher (eds.), *Vattel’s International Law in a XXI<sup>st</sup> Century Perspective, Le droit international de Vattel vu du XXI<sup>e</sup> Siècle*, Brill, Leiden, 2011, pp. 51–75.

<sup>13</sup> Gabriella Silvestrini, “Giustizia della guerra e disuguaglianza: Vattel, l’aggressore ingiusto e il nemico del genere umano”, in *Filosofia politica*, vol. 22, no. 3, pp. 381–400; Gabriella Silvestrini, “Justice, War and Inequality. The Unjust Aggressor and the Enemy of Human Race in Vattel’s Theory of the Law of Nations”, in *Grotiana*, 2010, vol. 31, no. 1, pp. 44–68; also Simone Zurbuchen, “Vattel’s Law of Nations and Just War Theory”, in *History of European Ideas*, 2009, vol. 35, no. 4, pp. 408–17; see also the writings of Hunter: Ian

sistance,<sup>15</sup> on trade,<sup>16</sup> on non-intervention,<sup>17</sup> on colonialism,<sup>18</sup> on the reception in the United States,<sup>19</sup> on international treaties,<sup>20</sup> on the role of

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Hunter, “Law, War, and Casuistry in Vattel’s Jus Gentium”, in *Parergon*, 2011, vol. 28, no. 2, pp. 87–104; Ian Hunter, “Vattel’s Law of Nations: Diplomatic Casuistry for the Protestant Nation”, in *Grotiana*, 2010, vol. 31, no. 1, pp. 108–40.

- <sup>14</sup> Francesco Mancuso, “*Le Droit des gens* come apice dello *jus publicum europaeum*? Nemico, guerra, legittimità nel pensiero di Emer de Vattel”, in *Quaderni Fiorentini per la storia del pensiero giuridico moderno*, 2009, vol. 38, no. II, pp. 1277–310; and also the more recent contributions: Francesco Mancuso, “L’altro, il selvaggio, il pirata: Emer de Vattel e l’eccezione del ‘politico’”, in *Iura and legal systems*, 2015, vol. 2, pp. 65–81; Francesco Mancuso, “Vattel: l’altro, il selvaggio, il pirata, il nemico, la costituzione”, in Giuseppe Foscarini (ed.), *L’Europa e la scoperta dell’Altro*, Ipermedium Libri, S. Maria Capua Vetere, 2012, pp. 29–51; and Michel Senellart, “La qualification de l’ennemi chez Emer de Vattel”, in *Astéris*, 2004, vol. 2.
- <sup>15</sup> Alberto Carrera, “Il diritto di resistenza nella dottrina giuridica di Emer de Vattel”, in Alberto Sciumè (ed.), *Il diritto come forza, la forza del diritto: Le fonti in azione nel diritto europeo tra Medioevo ed età contemporanea*, Giappichelli, Torino, 2012, pp. 81–109.
- <sup>16</sup> Isaac Nakhimovsky, “Vattel’s Theory of the International Order: Commerce and the Balance of Power in the Law of Nations”, in *History of European Ideas*, 2007, vol. 33, no. 2, pp. 157–73; Ileana Porras, “Appropriating Nature: Commerce, Property, and the Commodification of Nature in the Law of Nations”, in *Leiden Journal of International Law*, 2014, vol. 27, no. 3, pp. 641–60.
- <sup>17</sup> Simone Zurbuchen, “Vattel’s ‘Law of Nations’ and the Principle of Non-Intervention”, in *Grotiana*, 2010, vol. 31, no. 1, pp. 69–84; Jennifer Pitts, “Intervention and Sovereign Equality: Legacies of Vattel”, in Stefano Recchia and Jennifer M. Welsch (eds.), *Just and Unjust Military Intervention: European Thinkers from Vitoria to Mill*, Cambridge University Press, Cambridge, 2013, pp. 132–53.
- <sup>18</sup> Georg Cavallar, “Vitoria, Grotius, Pufendorf, Wolff and Vattel: Accomplices of European Colonialism and Exploitation or True Cosmopolitans?”, in *Journal of the History of International Law*, 2008, vol. 10, no. 2, pp. 181–209; Antony Anghie, “Vattel, Internal Colonialism, and the Rights of Indigenous Peoples”, in Robert Nichols and Jakeet Singh (eds.), *Freedom and Democracy in an Imperial Context*, Routledge, New York, 2014, pp. 81–99; Antony Anghie, “Vattel and Colonialism: Some Preliminary Observations”, in Vincent Chetail and Peter Haggemacher (eds.), *Vattel’s International Law in a XXIst Century Perspective, Le droit international de Vattel vu du XXIe Siècle*, Brill, Leiden, 2011, pp. 237–53.
- <sup>19</sup> Brian Richardson, “The Use of Vattel in the American Law of Nations”, in *The American Journal of International Law*, 2012, vol. 106, no. 3, pp. 547–71, in particular pp. 548–50; Ian Hunter, “A *Jus gentium* for America. The Rules of War and the Rule of Law in the Revolutionary United States”, in *Journal of the History of International Law*, 2012, vol. 14, no. 2, pp. 173–206; Chetail, 2014, see *supra* note 2.
- <sup>20</sup> Pierre-Marie Dupuy, “Vattel et le droit des traités”, in Vincent Chetail and Peter Haggemacher (eds.), *Vattel’s International Law in a XXIst Century Perspective, Le droit international de Vattel vu du XXIe Siècle*, Brill, Leiden, 2011, pp. 151–66; Randall Lesaffer, “A Schoolmaster Abolishing Homework? Vattel on Peacemaking and Peace Treaties”, in Vincent Chetail and Peter Haggemacher (eds.), *Vattel’s International Law in a XXIst*

different translations of the work<sup>21</sup> and on the comparison of its theories with important eighteenth century jurists as well as philosophers.<sup>22</sup>

In addition, there have been important and relevant monographs focusing on delicate topics, thus highlighting Vattel's contribution in rela-

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*Century Perspective/Le droit international de Vattel vu du XXIe Siècle*, Brill, Leiden, 2011, pp. 353–84.

- <sup>21</sup> On the spread of the *Law of Nations*, for example, in the Italian peninsula of the eighteenth century and the first Italian edition of 1781 see Antonio Trampus, “Il ruolo del traduttore nel tardo illuminismo: Lodovico Antonio Loschi e la versione italiana del *Droit de gens* di Emer de Vattel”, in Antonio Trampus (ed.), *Il linguaggio del tardo illuminismo. Politica, diritto e società civile*, Edizioni di storia e letteratura, Rome, 2011, p. 89; Antonio Trampus, “The Circulation of Vattel's *Droit des gens* in Italy: the Doctrinal and Practical Model of Government”, in Antonella Alimento (ed.), *War, Trade and Neutrality: Europe and the Mediterranean in Seventeenth and Eighteenth Centuries*, Franco Angeli, Milan, 2011, pp. 217–32; Antonio Trampus, “La traduzione toscana del *Droit des gens* di Emer de Vattel (circa 1780): contesti politici, transferts culturali e scelte traduttive”, in Giulia Cantarutti and Stefano Ferrari (eds.), *Traduzione e Transferts nel XVIII secolo tra Francia, Italia e Germania*, Franco Angeli, Milan, 2013, pp. 153–74. See the following contributions on Vattel's international system: Antonio Trampus, “Dalla libertà religiosa allo Stato nazione: Utrecht e le origini del sistema internazionale di Emer de Vattel”, in Frédéric Ieva (ed.), *I trattati di Utrecht: una pace di dimensione europea*, Viella, Rome, 2016, pp. 93–106; on Vattel and Italian constitutions before Cadiz: Antonio Trampus, “Le costituzioni italiane prime di Cadice: Vattel e le radici democratiche italiane”, in Fernando Garcia Sanz *et al.* (eds.), *Cadice e oltre: costituzione, nazione e libertà. La carta gaditana nel bicentenario*, Istituto per la Storia del Risorgimento italiano, Rome, 2015, pp. 161–72; and for the *Law of Nations* in Europe of the eighteenth century: Koen Stapelbroek and Antonio Trampus, “Vattels *Droit des gens* und die europaischen Handelsrepubliken im 18. Jahrhundert”, in Olaf Asbach (ed.), *Der moderne Staat und 'le doux commerce': Politik, Ökonomie und internationale Beziehungen im politischen Denken der Aufklärung*, Nomos, Baden-Baden, 2014, pp. 181–206.
- <sup>22</sup> Frederik Dhondt, “Historical Exempla in Legal Doctrine, Vattel and Réal de Curban on the War of the Spanish Succession”, in Dave De Ruyscher *et al.* (eds.), *Rechtsgeschiedenis op nieuwe wegen: Legal History, moving in new directions*, Maklu, Antwerp, 2015, pp. 367–94; Frederik Dhondt, “Vattel's *le Droit des gens*”, in Serge Dauchy *et al.* (eds.), *The Formation and Transmission of Western Legal Culture*, Springer, Heidelberg, 2016, pp. 285–88. See also: Ian Hunter, “Kant and Vattel in Context: Cosmopolitan Philosophy and Diplomatic Casuistry”, in *History of European Ideas*, 2013, vol. 39, no. 4, pp. 477–502; and Nardin's subsequent response: Terry Nardin, “Historian or Philosopher? Ian Hunter on Kant and Vattel”, in *History of European Ideas*, 2014, vol. 40, no. 1, pp. 122–34. On Rousseau and Vattel see Theodore Christov, “Vattel's Rousseau: *Ius gentium* and the Natural Liberty of States”, in Quentin Skinner and Martin van Gelderen (eds.), *Freedom and the Construction of Europe: Free Persons and Free States, Volume II*, Cambridge University Press, Cambridge, 2013, pp. 167–87; and Gabriella Silvestrini, “Vattel, Rousseau et la question de la justice de la guerre”, in Vincent Chetail and Peter Hagggenmacher (eds.), *Vattel's International Law in a XXIst Century Perspective, Le droit international de Vattel vu du XXIe Siècle*, Brill, Leiden, 2011, pp. 101–29.

tion to his predecessors, his contribution to modern public international law, the dualism in the *Law of Nations*,<sup>23</sup> the attention to humanitarian law,<sup>24</sup> Vattel’s revolutionary perspective in his attempt to rationalise international relations,<sup>25</sup> the dynamics related to the *Law of Nations* which lasted until the twentieth century<sup>26</sup> and the complex and very current concept of enemy of mankind.<sup>27</sup>

These pages aim to contextualise and analyse Vattel’s thought with respect to the development of international criminal law. Vattel’s position, as it will be demonstrated, is particularly interesting for its elaboration of ‘crime against the law of Nations’ and the possibility of ‘universal jurisdiction’ to be resorted to by any nation, without territorial limitations.

This chapter will present Vattel’s theories as they emerged both in practice and in the doctrine of international law: the first section is dedicated to contextualising Vattel’s life and thought. The second section will show Vattel’s theories on punishment and his idea of universal jurisdiction that he developed in his *Law of Nations*. The analysis will concentrate on studying the development of his theories taking into consideration the thoughts of his predecessors and the legal and philosophical sources of his theories, and also studying how the idea of nation and State elaborated by Vattel is important for understanding the concept of ‘universal jurisdiction’.<sup>28</sup> A conclusive section will investigate how Vattel’s theories contributed to the development of a modern doctrine of *jus cogens*, war crimes and crimes against humanity and to the doctrine of military inter-

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<sup>23</sup> Emmanuelle Jouannet, *Emer de Vattel et l’émergence doctrinale du droit international classique*, Pédone, Paris, 1998. See also: Emmanuelle Jouannet, “Les dualismes du droit des gens”, in Vincent Chetail and Peter Haggemacher (eds.), *Vattel’s International Law in a XXIst Century Perspective, Le droit international de Vattel vu du XXIe Siècle*, Brill, Leiden, 2011, pp. 133–50; Emmanuelle Jouannet, *The Liberal-Welfarist Law of Nations. A History of International Law*, Christopher Sutcliffe trans., Cambridge University Press, Cambridge, 2012; Emmanuelle Jouannet, “Emer de Vattel (1714–1767)”, in Bardo Fassbender and Anne Peters (eds.), *The Oxford Handbook of the History of International Law*, Oxford University Press, Oxford, 2012, pp. 1118–21.

<sup>24</sup> Good, 2011, see *supra* note 6.

<sup>25</sup> Francesco Mancuso, *Diritto, Stato, Sovranità: Il pensiero politico-giuridico di Emer de Vattel tra assolutismo e rivoluzione*, Edizioni Scientifiche Italiane, Naples, 2002.

<sup>26</sup> Diego Lazzarich, *Stato moderno e diritto delle genti. Vattel tra politica e guerra*, Edizioni Labrys, Benevento, 2012.

<sup>27</sup> Walter Rech, *Enemies of Mankind: Vattel’s Theory of Collective Security*, Brill, Leiden, 2013.

<sup>28</sup> *Ibid.*

vention for humanitarian purposes, looking at some recent examples in the practice of international law.

## 10.2. Vattel's Life: The Historical and Intellectual Context

Emer de Vattel was born in Couvet, in Neuchâtel, on 25 April 1714,<sup>29</sup> to David, a minister of the Protestant Church and Marie de Montmollin, daughter of Jean, *receveur à Valangin* and sister of Emer de Montmollin, one of the most zealous supporters of the Prussian government of which he became Councillor and Chancellor.<sup>30</sup> He began to follow in his father's footsteps by studying theology in Basel and even though he performed brilliantly on the exams for his admission to the faculty of theology, he declined this opportunity, deciding to enrol at the Academy of Geneva to devote himself to the study of law instead.

We do not know the reasons for his decision, maybe his refusal was linked to the excessive length of theological studies, or perhaps more likely it was the premature death of his father in April 1730, which motivated his change of mind.<sup>31</sup> He then moved to Geneva, where he dedicated himself to legal-philosophical studies through the works of Leibniz, Wolff and Barbeyrac, having probably as master Jean Jacques Burlamaqui.<sup>32</sup> After

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<sup>29</sup> The most important text on Vattel's life is the contribution of Béguelin: Edouard Béguelin, "En souvenir de Vattel (1714–1767)", in Faculté de droit et des sciences économiques, Université de Neuchâtel (ed.), *Recueil de travaux offert par la Faculté de Droit de l'Université de Neuchâtel à la Société Suisse de Juristes à l'occasion de sa reunion à Neuchâtel, 15–17 Septembre 1929*, Imprimerie P. Attinger s. a., Neuchâtel, 1929, pp. 35–176. Among many writings about the life of Vattel: Paul Guggenheim, "Emer de Vattel und das Völkerrecht", in Emer de Vattel, *Das Völkerrecht oder Grundsätze des Naturrechts, angewandt auf das Verhalten und die Angelegenheiten der Staaten und Staatsoberhäupter*, Wilhelm Euler trans., J.C.B. Mohr, Tübingen, 1959, pp. XV–XXXII; Johannes Jacobus Manz, *Emer de Vattel: Versuch einer Würdigung unter besonderer Berücksichtigung seiner Auffassung von der individuellen Freiheit und der souveränen Gleichheit*, Schulthess Polygraphischer Verlag, Zurich, 1971, pp. 9–54; Jouannet, 1998, pp. 13–14, see *supra* note 23; Jouannet, 2012, pp. 1118–21, see *supra* note 23. See also: Stéphane Beaulac, "Emer de Vattel and the externalization of Sovereignty", in *Journal of the History of International Law*, 2003, vol. 5, no. 2, pp. 237–92, in particular pp. 242–47; Stéphane Beaulac, *The Power of Language in the Making of International Law: The Word Sovereignty in Bodin and Vattel and the Myth of Westphalia*, Martinus Nijhoff, Leiden, 2004, pp. 128 ff.; Vattel, 1758, pp. IX–XX, see *supra* note 5. On the context of Neuchâtel and the Principality: Tetsuya Toyoda, "La doctrine vattellienne de l'égalité souveraine dans le contexte neuchâtelois", in *Journal of the History of International Law*, 2009, vol. 11, no. 1, pp. 103–24.

<sup>30</sup> Toyoda, 2011, pp. 166 ff., see *supra* note 6.

<sup>31</sup> Béguelin, 1929, p. 40, see *supra* note 29.

<sup>32</sup> *Ibid.*

his studies, in 1741, he published his first philosophical essay, *La défense du système leibnizien*, in which he firmly supported Leibniz and his thoughts.<sup>33</sup> The text was dedicated to Frederick II, in the hope perhaps to receive support for his diplomatic career – a path which he was unable to pursue for the time being. Béguelin describes Vattel’s arrival in Berlin in March 1742 as “sur l’invitation de l’ambassadeur de France et dans l’Espoir d’y trouver quelque employ”.<sup>34</sup> He was hosted by Jean Henry Samuel Formey, a friend with whom he would maintain an epistolary relationship for a lifetime.<sup>35</sup>

However, Vattel did not find a lucrative job in Berlin and therefore changed his perspective and – as a Prussian subject – moved to Dresden and the home of Count Heinrich von Brühl, the Prime Minister of the Electorate of Saxony, where he obtained temporary employment, and was awarded with the title of *conseiller d’ambassade*.<sup>36</sup> In 1747, he was sent on a diplomatic mission to Berne, as *ministre accrédité du Grand Electeur de Saxe*.<sup>37</sup> Unfortunately, this assignment brought him no financial gain and he was therefore forced to return to Neuchâtel.<sup>38</sup>

For Vattel the saddest time was, when he was living in Berlin, Dresden and Neuchâtel, as Béguelin describes: the work was precarious, and the salary was paltry and sporadic,<sup>39</sup> although other sources claim that

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<sup>33</sup> On the essay see Simone Zurbuchen, “Die schweizerische Debatte über die Leibniz–Wolffsche Philosophie und ihre Bedeutung für Emer von Vattels philosophischen Werdegang”, in Patrick Von Coleman and Anne Hofmann (eds.), *The Swiss Enlightenment: Reconceptualizing Science, Nature, and Aesthetics*, Slatkine, Geneva, 1998, pp. 91–113; Simone Zurbuchen, “Das Prinzip des Naturrechts in der *école romande du droit naturel*”, in B. Sharon Byrd, Joachim Hruschka and Jan C. Joerden (eds.), *Jahrbuch für Recht und Ethik*, Duncker & Humblot, Berlin, 2004, vol. 12, pp. 189–211.

<sup>34</sup> Béguelin, 1929, p. 44, see *supra* note 29.

<sup>35</sup> *Ibid.*

<sup>36</sup> Toyoda, 2011, p. 169, see *supra* note 6.

<sup>37</sup> *Ibid.*

<sup>38</sup> The Mission in Bern lasted very short: according to letters sent to both Formey and Brühl it did not last more than four months: Béguelin, 1929, p. 77, see *supra* note 29.

<sup>39</sup> *Ibid.*, p. 49.

in those years Vattel led a comfortable life;<sup>40</sup> although, despite the living conditions he carried on writing even more exquisite literary texts.<sup>41</sup>

In 1758, however, after the publication of the *Law of Nations* his success was considerable to his own surprise: he was called to Dresden in 1759 to take up the diplomatic position he had envisioned for a long time and was appointed by Augustus III, King of Saxony, as his private advisor on Foreign Affairs.<sup>42</sup> This was the only and long-awaited opportunity for Vattel to demonstrate his abilities in the diplomatic sphere: strongly influenced from his new work, he published an essay on natural law in 1762 entitled *Questions de Droit Naturel*.<sup>43</sup> The work, in fact, was finished in March 1753 even before the publication of the *Law of Nations*. The delayed publication of *Questions de Droit Naturel* was mainly due to the difficulties of Vattel in finding a publisher and was also related, according to some sources, to Wolff's death which occurred in 1754.<sup>44</sup>

The essay is not a diatribe, rather, it presents a constructive critique towards the *Jus naturae* by the German philosopher, indeed “comme un commentaire, destiné à rendre [le] Traité [de M. Wolff] plus utile”.<sup>45</sup> All reflections and observations on Wolff's doctrine that the jurist of Neuchâtel developed over the years are collected in these pages: “à mesure que j'avançois, et que je les voyois s'étendre sur des matieres intéressantes, je commençai à penser, qu'il ne seroit peut-être pas inutile de les donner au

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<sup>40</sup> Philippe Godet, “Emer de Vattel”, in Société d'histoire et d'archéologie du canton de Neuchâtel (ed.), *Musée Neuchâtelois: Recueil d'histoire nationale et d'archéologie XXXme année*, Imprimerie de H. Wolfrath & Cie, Neuchâtel, 1893, pp. 221–22; also Manz, 1971, p. 16, fn. 15, see *supra* note 29.

<sup>41</sup> It should be noted also that between 1746 and 1761 he published several literary essays: *Loisir philosophique, ou pièces diverses de Philosophie de Morale et d'Amusemens* in 1747 (place was stated as Geneva, but was actually Dresden) and in 1757 *Poliergie au mélange de littérature et de poesie* (in Amsterdam). At that time Vattel also wrote: *Mélanges de littérature, de morale et de politique*, published in 1760, which had a further reprint in 1765, with the title *Amusemens de littérature, de morale et de politique*: Béla Kapossy, Richard Whatmore, “Emer de Vattel's *Mélanges de littérature, de morale et de politique* (1760)”, in *History of European Ideas*, 2008, vol. 34, no. 1, pp. 77–103.

<sup>42</sup> Béguelin, 1929, p. 49, see *supra* note 29.

<sup>43</sup> Emer de Vattel, *Questions de droit naturel et observations sur le Traité du droit de la Nature de M. le Baron de Wolff*, Société typographique, Berne, 1762, p. 439.

<sup>44</sup> André Bandelier, *Emer de Vattel à Jean Henry Samuel Formey: Correspondance autour du Droit des gens*, Honoré Champion, Paris, 2012, pp. 52–53.

<sup>45</sup> De Vattel, 1762, *Avertissement*, VIII, see *supra* note 43.

public”.<sup>46</sup> Vattel’s stated purpose was to try to refine and clarify the discipline of natural law on the basis of the definitions provided by Wolff,<sup>47</sup> and accordingly to achieve “une petite remarque ce qui peut prévenir mal”.<sup>48</sup> The essay is dedicated to a young audience and Vattel puts a purely didactic intent into it, using many examples, clear and precise logical reasoning, however it did not have the resonance of the *Law of Nations*.<sup>49</sup>

In 1764, already of mature age, he married Marie-Anne de Chêne, a young woman descended from a noble French family. They moved to Dresden and from their marriage Charles Adolphe Maurice de Vattel was born in Dresden, on January 30 1765.<sup>50</sup>

Maybe the efforts or attention required by his challenging assignment as Advisor of Augustus III caused the deterioration of his health to such an extent that he wrote to Formey: “l’air de Dresde ne me convient pas [...], et je ne suis point content de ma santé. Depuis huit ou neuf mois, [des incommodités] me tracassent et commencent à m’affaiblir. Cela, joint à mes occupations de devoir, me laisse à-peine le temps de jeter quelquefois les yeux sur Homère et Cicéron”.<sup>51</sup>

He returned to his hometown, when he perhaps already sensed that he was losing his strength and on 28 December 1767, at only 53 years, he died.<sup>52</sup> The death of the jurist of Neuchâtel did not diminish his fame, which instead carried on growing, with unique characteristics and peculiarities.

### **10.3. The *Law of Nations*: National and International Order to Achieve Security and Peace**

The genesis of the *Law of Nations* was in the year 1747, eleven years before its actual publication: all the steps, hesitations and difficulties are enclosed in correspondence, now available in print, between Vattel and

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<sup>46</sup> *Ibid.*, III. See also Beaulac, 2003, p. 246, see *supra* note 29.

<sup>47</sup> De Vattel, 1762, *Avertissement*, IV–V, see *supra* note 43.

<sup>48</sup> *Ibid.*

<sup>49</sup> *Ibid.*, III.

<sup>50</sup> Béguelin, 1929, pp. 62–63, see *supra* note 29.

<sup>51</sup> *Ibid.*, p. 64.

<sup>52</sup> *Ibid.*, pp. 65, 140, fn. 191.

Jean Henry Samuel Formey,<sup>53</sup> who was likewise busy writing an essay on natural law.<sup>54</sup> Both, Formey and Vattel, argued the need for the renowned jurist of Halle, Christian Wolff, to be appreciated in francophone countries and aimed to spread his thought. In June 1749, in the footsteps of Jean Barbeyrac, Vattel suggested translating and adapting into French Wolff's just published *Ius gentium methodo scientifica pertractatum*, transforming it to make the theories of Wolff accessible to a wider audience.<sup>55</sup>

However, the project was unexpectedly set aside. The perception of translation as 'manipulative' choice that circulated in the so-called *Ecole Romande* did not seem apt for Vattel's objectives. Vattel wanted his own law of nations.<sup>56</sup>

The work published at Neuchâtel in 1758, under Vattel's eyes, saw many editions, which, as we will see hereinafter, are inextricably linked with the concepts of crime and universal jurisdiction.

The heart of Vattel's theories includes the creation of an interstate juridical order with certain principles: it presupposes a deep and analytical constituency of everything that belongs to a State and to a nation. Vattel builds up a concept of nation, including strict precepts to govern the life of the State and its citizens. Vattel's profound attention to detail even assumes for the individual a pronounced political connotation that allows him to contribute to his own wealth along with the communal one, thus creating an analogy between the private and public sphere comparable to the state regarding his internal and external actions.<sup>57</sup>

According to Jouannet:

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<sup>53</sup> Bandelier, 2012, see *supra* note 44; also André Bandelier, "De Berlin à Neuchâtel: la genèse du Droit des gens d'Emer de Vattel", in Martinus Fontius and Helmut Holzhey (eds.), *Schweizer im Berlin des 18. Jahrhunderts*, De Gruyter, Berlin, 1996, pp. 45–56.

<sup>54</sup> Samuel Henri Formey, *Principes du droit de la nature et des gens, Extrait du grand ouvrage latin de Mr de Wolff*, Rey, Amsterdam, 1758.

<sup>55</sup> Bandelier, 2012, p. XII, see *supra* note 44. See Vattel's letter to Formey of 27 June 1749, transcribed in *ibid.*, pp. 103–05.

<sup>56</sup> *Ibid.*, p. XIII.

<sup>57</sup> Francesco Piro, "Leibniz tra i due Thomasius. Identificare o differenziare 'Honestum' e 'Justum'?", in Giuseppe Cacciatore *et al.* (eds.), *La filosofia pratica tra metafisica e antropologia nell'età di Wolff e Vico*, Guida, Naples, 1999, pp. 441–43; Francesco Piro, "Il corpo politico dell'Europa: da Leibniz a Vattel", in Lorenzo Bianchi and Alberto Postigliola (eds.), *Un 'progetto filosofico' della modernità: 'Per la pace perpetua' di Immanuel Kant*, Liguori, Naples, 2000, pp. 65–94; Italo Birocchi, *Alla ricerca dell'ordine: Fonti e cultura giuridica nell'età moderna*, Giappichelli, Torino, 2002, p. 219, fn. 342.

En 1758, émerge réellement le droit des gens classique au sens d’un ensemble de règles individualisées et autonomisées, destinées à régir une société internationale non hiérarchisée dont le fondement est la notion de souveraineté étatique et dont la finalité est d’assurer le respect d’un certain nombre de droits et devoirs parfaits des États.<sup>58</sup>

He uses some of the theories on the law of nations developed by his predecessors. He establishes and ‘endorses’ with the *Law of Nations* a legal dialogue with political power. There are a few key words in Vattel’s book that anticipate the themes and concepts of the nineteenth century: think of the distinction between State and nation, the Constitution, in its singular meaning, as ‘fundamental rules’ and the rights and obligations of a State towards its citizens. At the same time there is the creation of a specific international language in relation to universal jurisdiction, to the war in due form, and to the enemy of mankind. Paradoxically there is an innovation starting from the tradition; tradition marked by natural law and enlightenment *topoi*, but thanks to Vattel, they assume a completely different significance as they are distinguished by a more marked political and legal connotation.

In this sense, Norberto Bobbio’s idea which characterises the diffusion of natural law theories of the eighteenth century through their exit from the strictly doctrinal sphere is instructive: “the doctrine of natural law, closed in universities, academics, and relegated to become massive textbooks or manuals, far from the social and political problems (think of Grotius, Thomasius, Hobbes), was a dead culture. Montesquieu, Voltaire, Rousseau, the Encyclopaedia was the living culture. Although the tools they used were mostly the same, the spirit had changed”.<sup>59</sup> Vattel falls within this ‘live culture’. His fame is mainly due to the development of the concepts of sovereignty, independence, equality of States and of bal-

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<sup>58</sup> Jouannet, 1998, p. 419, see *supra* note 23.

<sup>59</sup> Author’s translation:

[L]a dottrina del diritto naturale, chiusa ormai nelle Università, diventata togata ed accademica, relegata in voluminosi trattati o in manuali istituzionali ad uso delle scuole, lontana dai problemi sociali e politici da cui da cui era pure sorta (si pensi a Grozio e ad Hobbes), era una cultura morta. Montesquieu, Voltaire, Rousseau, l’Enciclopedia rappresentavano la cultura viva. Anche se gli strumenti che essi adoperavano erano gran parte gli stessi, lo spirito era cambiato.

See Norberto Bobbio, *Il Giusnaturalismo moderno*, in Tommaso Greco (ed.), Giappichelli, Torino, 2009, p. 265.

ance of power; even if all these definitions have not been ‘created’ newly, he specified many of them in content and spread them through the *Law of Nations*.

The increased accessibility of legal theories, in this case the theories of natural law and law of nations, is not synonymous with ‘simplicity’ and ‘spread’ but with attention to a change, even judicial, which takes place in a particular historical and social context affecting both European and global levels.

It is not about having outlined *tout court* the political and legal characteristics, but to have given rise to a real need that began to take its shape in the eighteenth century with the *Law of Nations*. Vattel writes for those who are called to exercise a role in political power: it is an important awareness, his message is intended for those who govern, and therefore the language is structured in a very incisive way, and this is evident from the very beginning of the book.

In this respect, it should be noted that the historical context had a decisive influence on the *Law of Nations*: the work, as illustrated by Tetuya Toyoda, was written during the seven years’ war, which took place between 1756 and 1763 and involved the major European powers of the time, including Great Britain, Prussia, France, Austria and Russia.<sup>60</sup> On 28 February 1757, Vattel sent an open letter to *Avoyer et Conseil* of Berne to protest against the invasion of Saxony by Prussia;<sup>61</sup> later he wrote to Count Henrich Brühl saying that there was a precise passage in his work, in which he illustrated the obligation of all powers to come together to stop anyone who wanted to introduce “baleful [international] practices”;<sup>62</sup>

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<sup>60</sup> Toyoda, 2011, pp. 178–79, see *supra* note 6.

<sup>61</sup> “C’est un principe reconnu de toute la Terre, et sur lequel repose la sûreté et la tranquillité des Nations, que quand un Souverain croit avoir quelque sujet de plainte contre un autre, il doit proposer ses griefs, faire ses demandes, avant que de courir aux armes, et c’est seulement après qu’on lui a refusé une juste satisfaction, ou lorsqu’il ne peut raisonnablement l’espérer, que naît pour lui le droit de faire la guerre: Ou si le cas pressant l’oblige de pourvoir sans délai à sa sûreté, au moins doit-il être toujours prêt à accepter les conditions équitables qui lui seront offertes. La Saxe avoit désarmé, bien loin de faire des préparatifs menaçants. Le Roi de Prusse ne se plaignoit de rien; il faisoit des protestations d’amitié et de bon voisinage au moment qui a précédé son invasion dans ce pays. Il a requis même le passage”, see letter edited in Béguelin, 1929, pp. 172–73, see *supra* note 29; now also edited in Bandelier, 2012, pp. 181–84, see *supra* note 44.

<sup>62</sup> “Il se trouve justement dans mon Droit des Gens, un passage où je fais voir que toutes les Puissances doivent se réunir pour châtier celle qui veut introduire des coutumes si funestes”, see Béguelin, 1929, p. 57, see *supra* note 29. For Vattel’s reference on his passage

and it is precisely through the explicit position taken by Vattel to support Saxony that a year after the publication of his *Law of Nations*, in 1759, he was appointed private advisor to Augustus III and in 1763 he was transferred to the foreign affairs department in Dresden.<sup>63</sup>

From a formal point of view, there is a long *Preface* introducing the four books of the *Law of Nations* (dedicated to the Nation, the relations between them, war and peace); it contains the main principles of doctrine and sources, through a brief *excursus* on the various theories of the law of nations made by his predecessors.<sup>64</sup> Central and illuminating is the definition which Vattel gives of the law of nations, intended as “a particular science, consisting in a just and rational application of the law of nature to the affairs and conduct of nations or sovereigns”.<sup>65</sup> The law of nations, to be defined as such, regulates the ‘affairs’ and the conduct of nations and sovereigns, before reaching the international level, even within the State itself.

According to Vattel, however, the law of nations has not been approached with the necessary care and was bound to a vague and imprecise notion, stating that in all prior and contemporaneous treatises before his own, the law of nations was “confused” with the natural law and therefore (those books) are not sufficient to define it in a legal sense.<sup>66</sup>

The main source of the *Law of Nations* is the doctrine of Wolff on which the law of nations is based. Vattel, in fact, stresses that he never would have thought of drafting such a book if he didn’t had the honour to study the work of Wolff, which clarified the scope of the foundation of the

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related to the chapter entitled “Of the Right of War, with regard to things belonging to the Enemy”, see Vattel, 2008, Book III, chap. IX, sect. 168, pp. 571–72, see *supra* note 5.

<sup>63</sup> Count Brühl on 15 January 1759 wrote to Vattel:

Sa Majesté agréé de vous employer doresnavant à la Chancellerie du Conseil privé pour des expéditions françoises (letter transcribed into).

Béguelin, 1929, pp. 131–32 fn. 156, see *supra* note 29. Vattel answered the 8 October 1759:

Je ne trouve point de termes, Monseigneur, pour vous bien exprimer toute l’étendue de ma reconnaissance. [...] Daignez, Monseigneur, assurer Sa Majesté de toute ma fidélité et du zèle qui me feroit exposer mille fois ma vie avec joie, pour son service.

Letter (1929), transcribed in *ibid.*, p. 132, fn. 156.

<sup>64</sup> See the analysis of the *Preface* written by Mancuso: Mancuso, 2002, pp. 248 ff., see *supra* note 25.

<sup>65</sup> Vattel, 2008, *Preface*, p. 5, see *supra* note 5.

<sup>66</sup> *Ibid.*

law of nations and the concept of natural law.<sup>67</sup> Accordingly, Vattel resumes in his *Preface* what he had confided to his friend Formey, that he writes the *Law of Nations* along the lines of Wolff's work, taking as corollaries his definitions and general principles, but at the same time, however, he points out that from the very moment he decided to write his treatise, he had diverged from Wolff's thinking, thus avoiding to simply translate the work of the German jurist into French.<sup>68</sup>

At the base of the thought of the German jurist there is the classical parallel between natural society of individuals and of States: "natura civitates diversae inter se spectantur tanquam personae liberae"<sup>69</sup> and "ad eadem officia tum erga se ipsas, tam erga gentes alias obligantur, qua singuli singulis tenentur".<sup>70</sup> Consequently, States focus on natural law, which is by definition immutable and perfect. However, as it happens among men, who are otherwise imperfect, a right with the intrinsic characteristics

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<sup>67</sup> *Ibid.*, pp. 10–11:

This glory was reserved for the baron de Wolff. That great philosopher saw that the law of nature could not, with such modifications as the nature of the subjects required, and with sufficient precision, clearness, and solidity, be applied to incorporated nations or states, without the assistance of those general principles and leading ideas by which the application is to be directed;—that it is by those principles alone we are enabled evidently to demonstrate that the decisions of the law of nature respecting individuals must, pursuant to the intentions of that very law, be changed and modified in their application to states and political societies,—and thus to form a natural and necessary law of nations: whence he concluded, that it was proper to form a distinct system of the law of nations,—a task which he has happily executed.

<sup>68</sup> *Ibid.*, p. 13:

From Monsieur Wolff's treatise, therefore, I have only borrowed whatever appeared most worthy of attention, especially the definitions and general principles; but I have been careful in selecting what I drew from that source, and have accommodated to my own plan the materials with which he furnished me. Those who have read Monsieur Wolff's treatises on the law of nature and the law of nations, will see what advantage I have made of them. Had I every-where pointed out what I have borrowed, my pages would be crowded with quotations equally useless and disagreeable to the reader. It is better to acknowledge here, once for all, the obligations I am under to that great master. Although my work be very different from his (as will appear to those who are willing to take the trouble of making the comparison), I confess that I should never have had the courage to launch into so extensive a field, if the celebrated philosopher of Halle had not preceded my steps, and held forth a torch to guide me on my way.

<sup>69</sup> Christian Wolff, *Institutiones iuris naturae et gentium in quibus ex ipsa hominis natura continuo nexu omnes obligationes et iura omnia*, officina Rengeriana, Halae-Magdeburgicae, 1750, pars III, sectio II, caput I, sect. 977, p. 600.

<sup>70</sup> *Ibid.*, pars IV, caput I, sect. 1088, p. 679.

of immutability and perfection is not in itself enough to regulate all human relationships. Accordingly, it is necessary to have a law between States that is less strict than *ius naturae* and can therefore better adapt to the complexity of international relations. This right has a very different origin from ‘States’ consensus’ worked out by Grotius: to Wolff, the law of nations does not derive from either an agreement or a custom, but by the fact that people find themselves in a sort of *civitas gentium maxima*, which imposes certain standards of conduct.<sup>71</sup>

According to Wolff, this society derives from the need to “gather the forces” in order to reach their own perfectibility “cum gentes conjunctis viribus se statumque suum perficere obligentur; ipsa natura societatem quandam inter gentes instituit, in quam ob obligationis naturalis indispensabilem necessitatem consentire tenetur, ut quasi pacto contracta videatur”.<sup>72</sup>

As argued by Scipione Gemma, in the theory of Vattel the so-called voluntary right is such only in name, while in substance it has almost all characteristics of a right of nature such as necessity and absoluteness.<sup>73</sup> Not necessary and at the same time not absolute, it is a law based on consensus. This consensus can be explicit such as in law of nations treaties “jus quod ex pactis oritur inter gentes diversas initis cum obligationibus

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<sup>71</sup> *Ibid.*, sect. 1090, pp. 680–81. On the concept of *civitas maxima*, see: James Leslie Brierly, *The Law of Nations*, 6th edition, Oxford University Press, Oxford, 1967, pp. 38–40; Nicholas Greenwood Oluf, “Civitas Maxima: Wolff, Vattel and the Fate of Republicanism”, in *The American Journal of International Law*, 1994, vol. 88, no. 2, pp. 280–303; Nicholas Greenwood Oluf, *The Republican Legacy in International Thought*, Cambridge University Press, Cambridge, 1998, pp. 59 ff.; Mancuso, 2002, pp. 259 ff., see *supra* note 25; Ian Hunter, “Natural law, Historiography, and Aboriginal Sovereignty”, in *Legal History*, 2007, vol. 11, no. 2, pp. 146–47; Reinhard Brandt, “Hobbes, Locke, Wolff”, in Jean Ecole *et al.* (eds.), *Wolffiana II. Christian Wolff und die europäische Aufklärung, Akten des 1. Internationalen Wolff-Kongresses, Halle (Saale), 4.-8. April 2004. Herausgegeben von Jürgen Stolzenberg und Oliver-Pierre Rudolph. Teil 1: Vorwort, Nachruf auf Hans Werner Arndt, Einleitung, Ehrenpromotion von Jean Ecole, Plenums- und Abendvorträge*, Georg Olms, Hildesheim, 2007, pp. 113–32; Hasso Hofmann, “Sull’idea di legge fondamentale dello Stato”, in Agostino Carrino (ed.), *La libertà dello stato moderno: Saggi di dottrina della Costituzione*, Guida, Naples, 2009, p. 116.

<sup>72</sup> Wolff, 1750, pars IV, caput. I, sect. 1090, pp. 680–81, see *supra* note 69.

<sup>73</sup> Scipione Gemma, *Introduzione allo studio del diritto pubblico internazionale considerato nel suo svolgimento scientifico, Fascicolo II: La scuola del diritto naturale*, Zanichelli, Bologna, 1902, p. 16.

respondentibus vel adhaerentibus”,<sup>74</sup> or tacit such as in the formation of the customary law of nations.<sup>75</sup>

Wolff’s legal thought is a corollary of scientific deductions, without an anthropological view, but a socio-political one which must relate to a strictly geometrical setting and is less accessible.<sup>76</sup> Jouannet speaks of a “fixisme méthodologique”, because in her view the entire doctrine can be summarised as an uninterrupted succession of connecting rights and obligations through which the civil law and the law of nations remain anchored to natural law,<sup>77</sup> noting that the law of nations is not a law that regulates relations between nations, but it is the right of States considered first as individuals and only then, consequently, in their external relations.<sup>78</sup>

Namely, Vattel himself places the law of nations at the centre of his work, as law between States; and by placing it in a national and international dimension, the law of nations definitively acquired its classical meaning.<sup>79</sup> In the *Preface*, he criticises his master’s thinking, especially in the classification of different forms of law of nations, stating that Wolff’s law of nations is a kind of civil law, thus dwelling on the concept of *civitas maxima*, which allows to identify in the law of nations (the content of which is natural law), the equivalent of civil law in force within the individual nations.<sup>80</sup> Vattel does not agree with this idea, as he sees nations as

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<sup>74</sup> Wolff, 1750, pars. IV, caput I, sect. 1091, p. 682, see *supra* note 69.

<sup>75</sup> *Ibid.*, p. 683.

<sup>76</sup> Bobbio, 2009, p. 140, see *supra* note 59.

<sup>77</sup> Jouannet, 1998, pp. 129–30, see *supra* note 23.

<sup>78</sup> *Ibid.*, pp. 400–01:

Le droit des gens wolffien possède un champ d’application déjà beaucoup plus étendu que notre droit international public contemporain car même s’il est vrai que le domaine réservé des États varie en fonction de leurs engagements internationaux, une distinction de principe n’en demeure pas moins établie entre ce domaine et celui du droit international. [...] Le droit des gens devient réellement avec Wolff, fondateur à ce titre des grands principes de la vision classique du droit international, un droit autonome, destiné à régir la conduite de ceux qui seront désormais les sujets traditionnels du nouveau droit international, à savoir les États souverains.

<sup>79</sup> *Ibid.*

<sup>80</sup> Vattel, 2008, *Preface*, p. 14, see *supra* note 5.

subjects qualitatively different from individuals because of their perfect independence and therefore their sovereignty.<sup>81</sup>

According to Carl Schmitt, there is a decisive strengthening of awareness and consciousness of modern States in Vattel’s work, with State sovereignty taking centre stage.<sup>82</sup> The law of nations, although still anchored to natural law, is the science to be applied exclusively to relations between nations and it is with this claim that Vattel indirectly admits a number of characteristics, as apply to all science: its dynamism, the ability to make ‘progress’ and its conformation to the contingent historical reality, foreseeing the overcoming and the achievement of its perfectibility. This position allows one to trigger a lot of legal mechanisms which bring the law of nations to its maximum expression, through the construction of nation, which relies *primarily* on the concept of constitution, as an essential precondition for the admission of the same within the international community.

On one side there is the so-called necessary law of nations, which derives from nature and is an inner law and related to consciousness,<sup>83</sup> on the other side stands the voluntary law of nations, subordinate to the first, which recommends the observance “in consideration of the state in which

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<sup>81</sup> Mancuso, 2002, p. 262, see *supra* note 25; Otfried Nippold, “Einleitung”, in James Brown Scott (ed.), Christian Wolff, *Jus gentium methodo scientifica pertractatum*, Clarendon Press, Oxford, 1934, p. XLIV:

Gerade so wie im Staate die bürgerlichen Gesetze sich auf die natürlichen zurückführen, und wie dort das Naturgesetz selbst vorschreibt, auf welche Weise dies zu geschehen habe, so müssen auch in der *Civitas Maxima*, in der Staatengesellschaft, aus den natürlichen Gesetzen die bürgerlichen Gesetze abgeleitet werden, auf dieselbe Weise, wie im einzelnen Staate das Naturgesetz dies vorschreibt.

See also: Ian Brownlie, “The Expansion of International Society: The Consequences for the Law of Nations”, in Hedley Bull and Adam Watson (eds.), *The Expansion of International Society*, Clarendon Press, Oxford, 1984, pp. 358–69, in particular p. 358; Martti Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument*, Cambridge University Press, Cambridge, 2005, pp. 76 ff.; also Koskenniemi, 2011, pp. 51–75, see *supra* note 12; Frederick G. Whelan, “Vattel’s Doctrine of the State”, in Knud Haakonssen (ed.), *Grotius, Pufendorf and Modern Natural Law*, Ashgate, Aldershot, 1999, pp. 403–34, in particular p. 404; Theodore Christov, “Liberal Internationalism Revisited: Grotius, Vattel and the International Order of States”, in *The European Legacy*, 2005, vol. 10, no. 6, pp. 561–84, in particular pp. 571 ff.

<sup>82</sup> Carl Schmitt, *Il nomos della terra nel diritto pubblico internazionale dello ‘ius publicum europaeum’*, Franco Volpi ed., Emanuele Castrucci trans., Adelphi, Milan, 1991, p. 132.

<sup>83</sup> Vattel, 2008, *Preface*, p. 17, see *supra* note 5.

nations stand with respect to each other, and for the advantage of their affairs”.<sup>84</sup>

Within the voluntary law of nations, there is the arbitrary law of nations that constitutes the law of treaties and customary law contributing decisively, in the words of Francesco Mancuso, to the “consolidation of fundamental legal and political concepts of the contemporary age, both as regards public internal law and in terms of international law”.<sup>85</sup>

Koselleck argues that the division created by Vattel between the necessary and voluntary law of nations was the basis for the rationalisation of the State and of war, appointing “in the primacy of politics the chance that even moral needs [...] would have found their fulfilment”.<sup>86</sup>

In this perspective the duties and the rights of nations are traced, stating that nations are political bodies, societies of man held together in order to get, with such a meeting of forces, their salvation and advantage.<sup>87</sup>

Jouannet investigates the dual tension contained in the *Law of Nations* in its relationship between natural law and positive law and the voluntary law of nations.<sup>88</sup> But the *Law of Nations* locates – and this will be central to the upcoming arguments – additional dualisms: an initial di-

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<sup>84</sup> *Ibid.*

<sup>85</sup> Author’s translation:

[C]onsolidamento di alcuni concetti politico-giuridici fondamentali dell’età contemporanea, sia per quanto riguarda il diritto pubblico interno, sia per quanto concerne il diritto internazionale.

Mancuso, 2002, p. 265, see *supra* note 25. On this topic, see also: Ernst Reibstein, “Die Dialektik der souveränen Gleichheit bei Vattel”, in *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht*, 1958, vol. 19, pp. 607–36; Andrew Linklater, *Men and Citizens in the Theory of International Relations*, Palgrave Macmillan, New York, 1982, pp. 84–95; Timothy J. Hochstrasser, *Natural Law Theories in the Early Enlightenment*, Cambridge University Press, Cambridge, 2000, pp. 176–83; Nakhimovsky, 2007, p. 158, see *supra* note 16.

<sup>86</sup> Reinhart Koselleck, *Critica illuminista e crisi della società Borghese*, Giuseppina Panzieri trans., Il Mulino, Bologna, 1972, p. 46.

<sup>87</sup> Vattel, 2008, Book I, chap. I, sect. 1, p. 81, see *supra* note 5. Rafael Domingo highlights that the structure of the *Law of Nations* can be accessed in a comparative perspective with institutions of Gaius, creating an alternative paradigm to Gaius tripartite with an international scope. It is made up of the State, the relationship between the States and war. See Rafael Domingo, “Gaius, Vattel, and the New Global Law Paradigm”, in *European Journal of International Law*, 2011, vol. 22, no. 3, pp. 627–47, in particular p. 635.

<sup>88</sup> Jouannet, 1998, pp. 85 ff., see *supra* note 23.

chotomy compares the duty of conservation with the duty of perfection; a second one the intra- and inter-nations duties; the third compares a State’s rights towards itself and the others; and finally there is a comparison of perfect and imperfect rights and duties (internal and external).<sup>89</sup>

The negation of the *civitas maxima* is an important aspect of divergence from Wolff’s thought, but it is necessary to note that the binomial Wolff/Vattel, must be deepened even under a different perspective: that of the similarity between the two books. In 1785, Dietrich Ludwig von Ompteda printed his *Literatur des gesammten positiven Völkerrechts sowohl als positiven Völkerrechts* which was then continued and completed by Karl Albert Kamptz and published in 1817. The author devotes several pages to Vattel’s work, focusing especially on comparing the *Law of Nations* with Wolff’s work.<sup>90</sup>

Ompteda comprehensively reports the contents of Wolff’s work and compares the positions of Wolff and Vattel in a table with reference to chapters of their work, stressing the many areas where the latter has reduced and simplified the work of the former, ordering or grouping the chapters and making them easier to read.<sup>91</sup> Ompteda illustrates how the nine chapters of the *Ius gentium* correspond to the four books of the *Law of Nations*, where the first book coincides with the first chapter, the second with the third, the fourth and fifth chapters; the third with the sixth and seventh chapters and finally the fourth with the remaining chapters of Wolff’s treatise.<sup>92</sup>

In fact, Vattel admitted to have written the book along the lines of Wolff’s work: he does not hesitate to say that he prefers to specifically acknowledge at the outset his great debt to Wolff’s theories, which he has largely drawn upon.<sup>93</sup> He wrote the treatise for the men of government

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<sup>89</sup> Jouannet, 2011, pp. 135–36, see *supra* note 23.

<sup>90</sup> Dietrich Heinrich Ludwig Ompteda, *Literatur des gesammten sowohl natürlichen als positiven Völkerrechts*, J.L. Montag, Regensburg, 1785, pp. 339–45; Johann Gottlieb Buhle, *Histoire de la philosophie moderne depuis la renaissance des lettres jusqu’à Kant, Tome Quatrième, Section Quatrième: Histoire de la Philosophie au dix-huitième siècle*, Fournier, Paris, 1816, p. 217.

<sup>91</sup> Ompteda, 1785, p. 345, see *supra* note 90; the table is also listed in the famous text of: Henry Wheaton, *History of the Law of Nations in Europe and America: From the Earliest Times to the Treaty of Washington*, 1842, Gould, Banks & Co., New York, 1845, p. 185.

<sup>92</sup> Ompteda, 1785, p. 345, see *supra* note 90.

<sup>93</sup> Vattel, 2008, *Preface*, p. 17, see *supra* note 5.

and his intent was to create a text that was easy to read and in which all subjects were contained that could serve that purpose. In fact, despite drawing heavily from Wolff's work, he made a significant step forward compared to his predecessors and his teacher. The adaptation of Wolff's theories in a more real and concrete dimension, as Vattel managed, allows him to create a system of rules to be applied both to the State and to relations between other States and consequently to secede inevitably from Wolff's thought.

Furthermore, it is important to note that there are many other passages of the *Law of Nations* borrowed from the works of other natural lawyers. The famous quote, for example, for which Vattel is very often remembered "A dwarf is as much a man as a giant; a small republic is no less a sovereign state than the most powerful kingdom",<sup>94</sup> is the Latin translation of a quote by Wolff<sup>95</sup> but appears as well in a similar form in the *Principes du droit politique* of Burlamaqui.<sup>96</sup> However, it was Jean Bodin who, much earlier in 1576, affirmed that "un petit Roy est autant souverain que le plus grand monarque de la terre".<sup>97</sup>

Even more popular is the elaboration of the principle of balance of power and the analysis of the situation in Europe during the first half of the eighteenth century. The idea that States should create a society and have to entertain a number of relationships – a specific matter of the law of nations – has been further developed in the *Law of Nations* in the light of historical reality and politics, arguing that Europe serves as an example of a system of independent States, placed together in a political equilibrium. Underlying these theories there is a reasoned position by Vattel, who became aware of the reality of international politics of his time. Conse-

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<sup>94</sup> *Ibid.*, *Preliminaires*, sect. 18, p. 75, see *supra* note 5.

<sup>95</sup> Christian Wolff, "Prolegomena" [Prologue], in *Ius gentium methodo scientifica pertractatum in quo ius gentium naturale ab eo quod voluntarii pactitii et consuetudinarii est, accurate distinguitur*, officina Rengeriana, Halae Magdeburgicae, 1749, p. 13, § 16:

Quemadmodum itaque homo procerissimus non magis homo est, quam nanus; itaque quoque Gens, quantumvis parva non minus Gens est, quam Gens maxima.

See: Toyoda, 2011, p. 162, see *supra* note 6.

<sup>96</sup> Jean Jacques Burlamaqui, *Principes du droit politique*, Zacharias Chatelain, Amsterdam, 1751, vol. 2, part 4, chap. I, sect. 5, p. 3:

Toutes les Nations doivent se regarder comme naturellement égales et indépendantes les unes des autres.

<sup>97</sup> Jean Bodin, *Les six livres de la République*, Du Puys, Paris, 1583, Book 1 ("Livre premier"), chap. II, p. 13.

quently he developed, although in an almost utopian way, the principle of balance of power among nations, which is understood as alliances, created specifically for policy needs.<sup>98</sup>

The system of states is therefore focused on the activities of the sovereigns, built on a plot of uninterrupted negotiations, and creates a kind of Republic, whose members are independent but at the same time linked by the common interest for the preservation of peace and order. The balance of power is based on the principle that there is no a sole authority able to dominate in an absolute and exclusive way in the realm of states.<sup>99</sup>

Vattel is placed at the end and at the same time at the beginning of a new legal concept as much doctrinal as practical. It was noted that while Wolff is the largest epigone of Leibniz’s thinking, Burlamaqui is of a Puf-

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<sup>98</sup> Vattel, 2008, Book III, chap. III, sect. 47, p. 496, see *supra* note 5:

Europe forms a political system, an integral body, closely connected by the relations and different interests of the nations inhabiting this part of the world. It is not, as formerly, a confused heap of detached pieces, each of which thought herself very little concerned in the fate of the others, and seldom regarded things which did not immediately concern her. The continual attention of sovereigns to every occurrence, the constant residence of ministers, and the perpetual negotiations, make of modern Europe a kind of republic, of which the members—each independent, but all linked together by the ties of common interest—unite for the maintenance of order and liberty. Hence arose that famous scheme of the political balance, or the equilibrium of power; by which is understood such a disposition of things, as that no one potentate be able absolutely to predominate, and prescribe laws to the others.

The same quote is also present in the edition made by De Felice: Jean Jacques Burlamaqui, *Les Principes du droit de la nature et des gens de J.J. Burlamaqui avec la Suite du Droit de la nature qui n’avait point encore paru, le tout considérablement augmenté par Mr le professeur De Felice*, in Fortunato Bartolomeo de Felice (ed.), Yverdon, 1768, vol. VI, p. 345. It should be noted that Michel Foucault dealing with the balance of power, defined it as a “historically false” practical situation but this idea, in a sense, went beyond the reality becoming a sort of principle, see Michel Foucault, *Security, Territory, Population: Lectures at the Collège de France 1977–1978*, Palgrave Macmillan, New York, 2010, p. 221. For a complete discussion of the relationship between balance of powers and rights in the eighteenth century, see Dhondt’s monograph: Frederik Dhondt, *Balance of Power and Norm Hierarchy: Franco-British Diplomacy after the Peace of Utrecht*, Brill, Leiden, 2015; Frederik Dhondt, “The Law of Nations and Declarations of War after the Peace of Utrecht”, in *History of European Ideas*, 2016, vol. 42, no. 3, pp. 329–49; Frederik Dhondt, “Équilibre Et Hiérarchie: L’argument Juridique Dans La Diplomatie Française Et Anglaise Après La Paix d’Utrecht”, in Nicolas Drocourt and Eric Schnakenbourg (eds.), *Thémis En Diplomatie: L’argument Juridique Dans Les Relations Internationales De L’antiquité Tardive Au XVIIIe Siècle*, Presses universitaires de Rennes, Rennes, 2016, pp. 67–83.

<sup>99</sup> Vattel, 2008, Book III, chap. III, sect. 47, p. 496, see *supra* note 5.

endorfian tendency, handed down to Switzerland through Barbeyrac's translation and interpretation. And it is in this environment as complex and lively that Vattel seizes a winning bridge through dialogue with political power and through a theoretical and legal construction.<sup>100</sup>

This analysis allows us to narrow down the scope of Vattel's thought to a sustained and substantial group of lawyers, whom he considered valid and esteemed masters and his predecessors from which he drew for his *Law of Nations*, but with whom he did not identify himself completely. The relevant difference becomes apparent at the end of the treatise. Indeed, at the time, Vattel deliberately chose to write a work for those in positions of power. He explains the political and legal strategy, contained mainly in the first book, which aims at sociability and the achievement of happiness of a nation – an objective which was not explicitly pursued by the earlier treatises of natural law, allowing Vattel to distinguish himself also in international criminal law.

#### **10.4. Vattel's *Law of Nations* and his Concepts of International Crimes: Universal Jurisdiction**

Chapter I of book I of the *Law of Nations* deals with the problem of public sovereignty: nations have their own free will and the law of nations sets out their rights and obligations. Every nation that governs itself, in whatever form, republican or monarchy, defines itself as a sovereign State, without being dependent on any other State, having the same rights any other State.<sup>101</sup> Only a sovereign and independent nation, namely governing itself with its own authority and laws can enter and join the society of nations.<sup>102</sup>

By arguing that a State which “has passed under the dominion of another is no longer a state, and can no longer avail itself directly of the law of nations”,<sup>103</sup> Vattel departs once again from Wolff's thought, which on the other hand, had traced the concept of addiction, according to the

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<sup>100</sup> Bobbio, 2009, p. 161, see *supra* note 59.

<sup>101</sup> Vattel, 2008, Book I, chap. I, sect. 4, p. 83, see *supra* note 5.

<sup>102</sup> *Ibid.*:

To give a nation a right to make an immediate figure in this grand society, it is sufficient that it be really sovereign and independent, that is, that it govern itself by its own authority and laws.

<sup>103</sup> *Ibid.*, sect. 11, p. 85.

“*summum imperium*” and “*rector civitatis*”, with special attention to the unequal treaties and federal unions.<sup>104</sup>

If Vattel considers States to be composed of free and independent men, nations must similarly be considered to be free and independent from each other, and it is by this approach that he criticises Wolff’s position on the so-called ‘patrimonial States’. Wolff devoted a lot of space in his work arguing for the existence of States or patrimonial kingdoms, accepting the positions of previous and contemporary authors, without rejecting or correcting them— to use Vattel’s words – by defending such a humiliating theory for humanity,<sup>105</sup> he does not even admit the denomination that is improper, offensive and dangerous in its effects.<sup>106</sup>

Vattel submits that the State cannot possibly be considered as an asset, because any sovereignty has in itself the feature of inalienability; in fact when a Prince elects his successor or when he gives to another his crown, he does nothing else but nominate by virtue of the power conferred upon him either expressly or by implication, the one who will rule in his place.<sup>107</sup> It follows that the State is not an object but a subject and cannot under any circumstances be regarded as an asset in the hands of a sovereign.<sup>108</sup>

Moreover, he outlines the general principles of the duties of a nation to itself, which are included in the binomial “preservation and perfection”.<sup>109</sup> Preservation refers to the duration of the political association that determines the nation. If it ends, the nation or State, according to Vattel, no longer exists, but only individuals of which it was composed do so

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<sup>104</sup> On this topic, see also Hanns-Martin Bachmann, *Die naturrechtliche Staatslehre Christian Wolffs*, Duncker und Humblot, Berlin, 1977, pp. 158 ff.

<sup>105</sup> Vattel, 2008, *Preface*, p. 13, see *supra* note 5.

<sup>106</sup> *Ibid.* See also Mancuso, 2002, pp. 205 ff., see *supra* note 25.

<sup>107</sup> Vattel, 2008, Book I, chap. V, sect. 69, pp. 123–25, see *supra* note 5.

<sup>108</sup> Emmanuelle Jouannet, “Vattel et la sujétion directe de l’état au droit international”, in Simone Goyard-Fabre (ed.), *L’État moderne 1715–1848*, Librairie Philosophique J. Vrin, Paris, 2000, p. 161.

<sup>109</sup> Vattel, 2008, Book I, chap. II, sect. 13, p. 85, see *supra* note 5:

A nation is a being determined by its essential attributes, that has its own nature, and can act in conformity to it. There are then actions of a nation as such, wherein it is concerned in its national character, and which are either suitable or opposite to what constitutes it a nation; so that it is not a matter of indifference whether it performs some of those actions, and omits others. In this respect, the Law of Nature prescribes it certain duties.

exist; while the perfection of a nation lies in everything that allows it to reach its end.<sup>110</sup>

The aim of a civil society is understood as being the provision of citizens with all things they need for their convenience and comfort of life and, contributing in a more general way to happiness and – even more important – it is necessary that everyone can enjoy themselves, receive justice through security and defence against any external violence.<sup>111</sup>

To identify the aim of a civil society as the realisation of citizen happiness and as obtaining justice through security provides extremely important principles and contributes to the transition from a conception of a State that imposes itself upon the people, to a State that regulates and enables the lives of its citizens. This means that a set of mechanisms, which was designed in the eighteenth century, and was according to Foucault determined by the principle of “governability”, manifests itself internally and externally, both in the public and private spheres, and allows the State, as an abstract entity, to determine itself and to take substance in the nation.<sup>112</sup>

Vattel’s thought takes strength within this eighteenth century movement: the *Law of Nations* traces the essential features of the Constitution of a State, reaffirming the principle that every society should establish a public authority that organises public affairs and prescribes one’s conduct bearing in mind the public welfare; an authority belonging to the body of the society, although it can be exercised in different ways. The Constitution is a fundamental text for a State which arises from an act of sovereignty of the nation itself, it determines the way through which the public authority must be exercised:

In this is seen the form in which the nation acts in quality of a body-politic, how and by whom the people are to be gov-

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<sup>110</sup> *Ibid.*, sect. 14, p. 86:

We know that the perfection of a thing consists, generally, in the perfect agreement of all its constituent parts to tend to the same end. A nation being a multitude of men united together in civil society, if in that multitude all conspire to attain the end proposed in forming a civil society, the nation is perfect; and it is more or less so, according as it approaches more or less to that perfect agreement. In the same manner its external state will be more or less perfect, according as it concurs with the interior perfection of the nation.

<sup>111</sup> *Ibid.*, sect. 15, p. 86.

<sup>112</sup> Foucault, 2010, p. 89, see *supra* note 98.

erned, and what are the rights and duties of the governors. This constitution is in fact nothing more than the establishment of the order in which a nation proposes to labour in common for obtaining those advantages with a view to which the political society was established.<sup>113</sup>

The Constitution of the State decides its perfection, its ability to attain the aims of society. With its enactment, the foundations for the preservation of the State, its security and happiness are laid down.<sup>114</sup> For the first time, the concept of Constitution is attributed to “an autonomous definition, independent of other contexts, and a new content dimension, although this partly relies on traditional elements such as the form of state, public good, State body, fundamental laws and binding effect”.<sup>115</sup>

The public authority establishes laws, some of which regulate relations between individuals and therefore are called civil laws, while others are directly oriented towards the attainment of public welfare. The laws in the latter class were described by Vattel: “those that concern the body itself and the being of the society, the form of government, the manner in which the public authority is to be exerted, those, in a word, which together form the constitution of the state, are the fundamental laws”.<sup>116</sup> As stated by Heinz Mohnhaupt, the jurist from Neuchâtel, just as Montesquieu had argued, denies the existence of a constitution that can be valid for all peoples, as adaptation to particular conditions and individual circumstances is an indispensable and necessary requirement.<sup>117</sup>

Vattel specifies his theories stating once again that the State Constitution and its laws are the basis of public tranquillity, “the firmest support of political authority and the pledge of freedom of citizens”; however, its destiny is to remain dead letter, a statue, if not strictly observed. The nation must constantly watch over it, and it must guarantee its respect by both those ruling and the people. Assaulting the Constitution, violating its laws is a “capital crime” against the society and the people who have committed such a crime must be punished.<sup>118</sup>

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<sup>113</sup> Vattel, 2008, Book I, chap. III, sect. 27, pp. 91–92, see *supra* note 5.

<sup>114</sup> *Ibid.*, sect. 28, p. 92.

<sup>115</sup> Heinz Mohnhaupt and Dieter Grimm, *Costituzione: storia di un concetto dall’antichità a oggi*, in Mario Ascheri and Simona Rossi (eds., Italian ed.), Carocci, Rome, 2008, p. 103.

<sup>116</sup> Vattel, 2008, Book I, chap. III, sect. 29, pp. 92–93, see *supra* note 5.

<sup>117</sup> Mohnhaupt/Grimm, 2008, p. 104, see *supra* note 115.

<sup>118</sup> Vattel, 2008, Book I, chap. III, sect. 29, p. 93, see *supra* note 5.

Starting from Vattel's considerations, there is a very important passage of the law, understood as abstract, to the establishment of a State as positive law, that is, as a "réglement fundamental" or as a collection of positive and fundamental laws.<sup>119</sup>

By identifying the constitution as a 'plan', he departs from the conception of a Constitution as a pact of affiliates: the pact for most Naturalists was the instrument by which the social pact was realised and formed, while for Vattel it is the instrument with which civil society determines itself politically and seeks its advantage, its fortune and its happiness in its socialisation.<sup>120</sup> As Hofmann wrote "this is the concretely modern version of the previous conception of the state of nature and of the political association that is realized through the social contract and as an authority free from utilitarian calculations".<sup>121</sup>

Moreover, there is a constant in the drafting of the *Law of Nations*: it is driven by the extraordinary ability to regulate and organise the State which takes form and substance in the nation, and aspires to the creation of a State with a non-repressive, indeed regulative, function. Laws for Vattel are nothing but rules established by the public authorities to be observed by the society and directed to the benefit of the State and its citizens.<sup>122</sup>

The regulation and organisation of society in spatial and social terms is a priority for Vattel and a State can only be considered a nation and converse with others, articulating its international relations, when a State has fulfilled its internal duties. The State represents the abstract entity, the so-called container whose content is the nation itself, which is determined through the promulgation of the constitution, good government, seen as the consequential achievement of happiness and well-being of citizens.

Once the so-called internal system of a State is determined, establishing its sovereignty and Constitution, Vattel illustrates the three main

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<sup>119</sup> Francisco Tomás y Valiente, *Genesi di un costituzionalismo euro-americano, Cadice 1812: Con un'autobiografia dell'autore*, Antonella M. Cocchiara trans., Giuffrè, Milan, 2003, pp. 34–35.

<sup>120</sup> Hasso Hofmann, "Riflessioni sull'origine, lo sviluppo e la crisi del concetto di Costituzione", in Sandro Chignola and Giuseppe Duso (eds.), *Sui concetti giuridici e politici della costituzione dell'Europa*, Franco Angeli, Milan, 2005, p. 231.

<sup>121</sup> *Ibid.*

<sup>122</sup> Vattel, 2008, Book I, chap. III, sect. 29, p. 93, see *supra* note 5.

objectives of good government: the first is to provide the needs of a nation in which the duty is to encourage both labour and industrialisation, the circulation of coins, the cultivation of land (which he considers a duty imposed by nature), freedom of trade and the freedom to refuse foreign trade.<sup>123</sup> Once again it is reaffirmed that the nation must be activated for “providing for all the wants of the people, and producing a happy plenty of all the necessaries of life, with its conveniences, and innocent and laudable enjoyments”. He further specifies that “as an easy life without luxury contributes to the happiness of men, it likewise enables them to labour with greater safety and success after their own perfection, which is their grand and principal duty, and one of the ends they ought to have in view when they unite in society”.<sup>124</sup>

The second object is to procure true happiness to the nation through education, love for the country, defined, almost anticipating the nineteenth-century meaning as: “the State where one is a member”.<sup>125</sup> It should be pointed out that the term ‘happiness’ appears many times in the *Law of Nations*, more than fifty times within the four books. This application denotes how ‘happiness’ includes security and well-being and is a focal point for the organisation of the State: anything that can give a man true happiness deserves the most serious attention from the rulers who must long for good government. Happiness is the core to which all the duties of a man and a people should be aligned to and it is also the highest end of the natural law. The desire to be happy is that vigorous force that makes man move and it is up to those who govern to engage and try to realise it, “promoting it through the exercise of their power”.<sup>126</sup>

Also, in this section, Vattel deals with piety and religion, focusing the attention on tolerance;<sup>127</sup> and other means for achieving happiness are

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<sup>123</sup> On the analysis of the relationship between trade, property and common good of the nation, see Porras, 2014, pp. 655 ff., see *supra* note 16.

<sup>124</sup> Vattel, 2008, Book I, chap. VI, sect. 72, p. 126, see *supra* note 5.

<sup>125</sup> *Ibid.*, chap. XI, sect. 122, pp. 153–54.

<sup>126</sup> *Ibid.*, chap. X, sect. 110, p. 145.

<sup>127</sup> *Ibid.*, chap. XII, sect. 125, pp. 155–56:

Piety and religion have an essential influence on the happiness of a nation, and, from their importance, deserve a particular chapter. Nothing is so proper as piety to strengthen virtue, and give it its due extent. By the word piety, I mean a disposition of soul that leads us to direct all our actions towards the Deity, and to endeavour to please him in everything we do. To the practice of this virtue all mankind are indispensably obliged: it is the purest source of their felicity; and those who unite in civil society, are

*justice* and *polity*, which are expressed in terms of the need for a State to have the right laws, and to institute tribunals. Regulations should prescribe anything that aspires to safety, utility and public convenience: “By a wise police, the sovereign accustoms the people to order and obedience, and preserves peace, tranquillity, and concord among the citizens”.<sup>128</sup>

From this definition originate a number of circumstances in which good government is manifested, such as: the reasons leading to the prohibition of the duel; the norms that the sovereign, like a good father, must emanate in order to prevent the subject from being subjected to economic manipulation; the limits of private property and the respect of rules, especially in economic matters; and the repression of commercial monopolies and of all operations that try to increase the prices of food and goods of primary necessity.<sup>129</sup>

Santiago Legarre rightly observed that the focus on the obligation of the sovereign to maintain internal order, had helped decisively the passage between “police into police power – what today is a settled legal category of the constitutional law of the Western states”, elevating it to “one of the great exponents of the idea of police – a domestic concept”.<sup>130</sup>

Carrying on with the illustration of the contents of Vattel’s first, third and last group of items essential to ‘good government’, there is a need for a State “to defend itself with its combined strength against all external insult or violence”, because “if the society is not in a condition to repulse an aggressor, it is very imperfect, it is unequal to the principal object of its destination, and cannot long subsist. The nation ought to put itself in such a state as to be able to repel and humble an unjust enemy: this is an important duty, which the care of its own perfection, and even of its preservation, imposes both on the state and its conductor”.<sup>131</sup> Into this

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under still greater obligations to practise it. A nation ought then to be pious. The superiors intrusted with the public affairs should constantly endeavour to deserve the approbation of their divine master; and whatever they do in the name of the state, ought to be regulated by this grand view. The care of forming pious dispositions in all the people should be constantly one of the principal objects of their vigilance, and from this the state will derive very great advantages.

<sup>128</sup> *Ibid.*, chap. XIII, sect. 174, p. 194.

<sup>129</sup> See *ibid.*, chap. XX, sect. 255, pp. 236–37.

<sup>130</sup> Legarre, 2012, pp. 437–38, see *supra* note 11; Santiago Legarre, “The Historical Background of the Police Power”, in *University of Pennsylvania Journal of Constitutional Law*, 2007, vol. 9, no. 3, pp. 753 ff.

<sup>131</sup> Vattel, 2008, Book I, chap. XIV, sect. 177, p. 198, see *supra* note 5.

category falls everything that competes with the exercise of power as is evident from “the number of the citizens, their military virtues, and their riches”, comprising in turn “fortresses, artillery, arms, horses, ammunition, and, in general, all that immense apparatus at present necessary in war”.<sup>132</sup>

The focus in the following sections is on all that needs to be protected in order to guarantee the best internal security of the nation, including the relationship between a country and the *status* of its citizens, immigrants and exiles. Subsequently, we will consider public goods (that is, State-owned assets) with regard to their alienation and taxes, and finally end with a detailed treatise on the law of the sea, lakes, rivers, and spatial limits of the coastal State over the seas.<sup>133</sup>

In this last section of the book, Vattel deals not only with the question concerning the legality of territorial expansion, but also with the identification of threats to the security of a State, focusing on the concept of interior and exterior enemy, and the enemy of mankind, which is the subject of a recent analysis by Walter Rech.<sup>134</sup>

Enemies are those who violated the law of Nations, and the need to be punished comes directly from a State requirement that extends on the international front: “for Vattel [...] the ultimate essence of law was to preserve the basic conditions without which human society would be impossible, or unthinkable. This utilitarian conception of law – classical, modern and anti-medieval – lies at the basis of Vattel’s theory of international law enforcement”.<sup>135</sup>

Vattel deals with the limits of territorial jurisdiction regarding refugees or exiles in the land of origin: “if an exile or banished man has been driven from his country for any crime, it does not belong to the nation in which he has taken refuge, to punish him for that fault committed in a foreign country. For nature does not give to men or to nations any right to inflict punishment, except for their own defence and safety; whence it follows, that we cannot punish any but those by whom we have been injured”.<sup>136</sup>

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<sup>132</sup> *Ibid.*, sects. 178 ff., pp. 198 ff.

<sup>133</sup> *Ibid.*, chap. XXIII, sect. 279, p. 416.

<sup>134</sup> Rech, 2013, p. 228, see *supra* note 27.

<sup>135</sup> *Ibid.*

<sup>136</sup> Vattel, 2008, Book I, chap. XIX, sect. 232, p. 227, see *supra* note 5.

He further argues that the right to punish is based solely on the right to security and the maintenance of the latter is nothing else but a task delegated by the citizens to those who govern. The State, as a moral person, must keep security, punish those who offend, and pursue all public offences.<sup>137</sup>

However, the principle of territoriality does not apply in one case, namely the prosecution of those who are identified as enemies of humanity: “Poisoners, assassins, and incendiaries by profession, may be exterminated wherever they are seized; for they attack and injure all nations, by trampling under foot the foundations of their common safety”.<sup>138</sup>

Similarly, this concept is repeated in the third book dedicated to war: “Assassination and poisoning are therefore contrary to the laws of war, and equally condemned by the law of nature, and the consent of all civilised nations. The sovereign who has recourse to such execrable means, should be regarded as the enemy of the human race; and the common safety of mankind calls on all nations to unite against him, and join their forces to punish him. His conduct particularly authorises the enemy whom he has attacked by such odious means, to refuse him any quarter”.<sup>139</sup>

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<sup>137</sup> *Ibid.*, chap. XIII, sect. 169, pp. 190–91:

Now, when men unite in society, as the society is thenceforward charged with the duty of providing for the safety of its members, the individuals all resign to it their private right of punishing. To the whole body, therefore, it belongs to avenge private injuries, while it protects the citizens at large. And as it is a moral person, capable also of being injured, it has a right to provide for its own safety, by punishing those who trespass against it; that is to say, it has a right to punish public delinquents.

<sup>138</sup> *Ibid.*, chap. XIX, sect. 233, p. 228:

Thus pirates are sent to the gibbet by the first into whose hands they fall. If the sovereign of the country where crimes of that nature have been committed, reclaims the perpetrators of them in order to bring them to punishment, they ought to be surrendered to him, as being the person who is principally interested in punishing them in an exemplary manner. And as it is proper to have criminals regularly convicted by a trial in due form of law, this is a second reason for delivering up malefactors of that class to the states where their crimes have been committed.

<sup>139</sup> *Ibid.*, Book III, chap. VIII, sect. 155, p. 562. Also in another point he wrote:

Nations that are always ready to take up arms on any prospect of advantage, are lawless robbers: but those who seem to delight in the ravages of war, who spread it on all sides, without reasons or pretexths, and even without any other motive than their own ferocity, are monsters, unworthy the name of men. They should be considered as enemies to the human race, in the same manner as, in civil society, professed assassins and incendiaries are guilty, not only towards the particular victims of their nefarious deeds, but also towards the state, which therefore proclaims them public enemies. All nations

According to Walter Rech, Vattel presents an analogy between the enemy of the State and the enemy of the entire international community. Vattel argues that the international community is legitimized and is called upon to act in the repression of those who are enemies of humanity, in order to maintain a level of security and tranquillity both nationally and internationally, thus anticipating the delicate issue of universal jurisdiction:

Vattel’s advocacy for the repression of the heinous international crimes has, directly or indirectly through the medium of later publicists familiar with it, contributed to the shaping of a modern doctrine of *jus cogens*, war crimes and crimes against humanity and to the doctrine of military intervention for humanitarian purposes.<sup>140</sup>

### 10.5. The Law of Nations Now

In the *Law of Nations* Vattel does not hesitate to praise his native land, Switzerland, proud to have been born there:

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have a right to join in a confederacy for the purpose of punishing and even exterminating those savage nations. Such were several German tribes mentioned by Tacitus, such those barbarians who destroyed the Roman empire: nor was it till long after their conversion to Christianity that this ferocity wore off. Such have been the Turks and other Tartars, Genghis-khan, Tembec or Tamerlane, who, like Attila, were scourges employed by the wrath of heaven, and who made war only for the pleasure of making it. Such are, in polished ages and among the most civilised nations, those supposed heroes, whose supreme delight is a battle, and who make war from inclination purely, and not from love to their country.

*Ibid.*, chap. III, sect. 34, p. 487. And also in the book IV he spoke about the disturbers of the public peace:

But those disturbers of the public peace, those scourges of the earth, who, fired by a lawless thirst of power, or impelled by the pride and ferocity of their disposition, snatch up arms without justice or reason, and sport with the quiet of mankind and the blood of their subjects, those monstrous heroes, though almost deified by the foolish admiration of the vulgar, are in effect the most cruel enemies of the human race, and ought to be treated as such. Experience shews what a train of calamities war entails even upon nations that are not immediately engaged in it. War disturbs commerce, destroys the subsistence of mankind, raises the price of all the most necessary articles, spreads just alarms, and obliges all nations to be upon their guard, and to keep up an armed force. He, therefore, who without just cause breaks the general peace, unavoidably does an injury even to those nations which are not the objects of his arms; and by his pernicious example he essentially attacks the happiness and safety of every nation upon earth.

*Ibid.*, Book IV, chap. I, sect. 5, pp. 653–54.

<sup>140</sup> Rech, 2013, p. 221, see *supra* note 27.

I was born in a country of which liberty is the soul, the treasure, and the fundamental law; and my birth qualifies me to be the friend of all nations.<sup>141</sup>

Vattel defines himself as the “friend of all nations”, meaning that his thoughts are directed towards peace and aimed towards the safety of nations at the national and international levels. All nations have as a goal and obligation to respect the rules of the law of nations “if any one openly tramples it under foot, they all may and ought to rise up against him; and, by uniting their forces to chastise the common enemy, they will discharge their duty towards themselves, and towards human society, of which they are members”.<sup>142</sup>

This idea remained and continues to date, albeit modified in its language and in its manifestations. Types of crimes prosecuted at an international level are clearly changed from the eighteenth century to the present day. States are prosecuting international crimes through new forms of judicial co-operation and an intensive development of international humanitarian law. Matters relating to public security and punishment for crimes against humanity are current topics at the heart of the debate in the international community, especially after the disastrous events of World War II.<sup>143</sup>

Let us only think about the ‘core international crimes’: genocide, crimes against humanity or war crimes. The need to pursue and suppress international crimes has led the international community to take an alternative route, with the participation of the community, the international doctrine, individual States and the European Union.

International criminal tribunals have been created, such as those of Nuremberg (1945–1946) and Tokyo (1946–1948), for the former Yugoslavia (1993–2017) and for Rwanda (1995–2015). In 1998, the diplomatic conference established the International Criminal Court through the Rome Statute, which entered into force on 1 July 2002. There were also the Residual Special Court for Sierra Leone (2002–2013), the Special Panel for

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<sup>141</sup> Vattel, 2008, *Preface*, p. 141, see *supra* note 5; Guggenheim, 1956, p. 24, see *supra* note 1: Fut Emer de Vattel le premier auteur suisse de droit international à être conscient de sa nationalité. Son sens de mesure, sa prudence, mais aussi son amour de l’humanité ont été le précieux héritage qu’il a légué à ceux qui sont venus après lui.

<sup>142</sup> Vattel, 2008, Book I, chap. XXIII, sect. 283, p. 251, see *supra* note 5.

<sup>143</sup> Bartam Brown, “The Evolving Concept of Universal Jurisdiction”, in *New England Law Review*, 2001, vol. 35, no. 2, pp. 383–97.

Serious Crimes in East Timor (2000-2006) and the Extraordinary Chambers in the Courts of Cambodia (2006 and ongoing).<sup>144</sup>

At a doctrinal level, within this conclusive historical excursus, there was an effort made in 2000 by leading experts and lawyers to realise a series of principles of universal jurisdiction, the so-called *Princeton principles on universal jurisdiction*, “for the purposes of advancing the continued evolution of international law and the application of international law in national legal systems”.<sup>145</sup>

Meanwhile, at the national level, a singular example of universal jurisdiction was created in Belgium, which was one of the first European countries to have introduced a specific piece of legislation directed toward universal jurisdiction. On 16 June 1993, the Act concerning Punishment for Grave Breaches of International Humanitarian Law was enacted, later changed in 1999 with the extension of the cases relating to crimes against humanity and genocide, in addition to war crimes. This law had the “compétence de juge interne pour connaître d’une infraction quels que soient le lieu de l’infraction, nationalité de son auteur ou celle de la victime”,<sup>146</sup> but was then restricted and applied only in cases where Belgian nationality applies.<sup>147</sup>

Finally, at the European level, it should be noted as an example that the decision of the European Court of Human Rights relating to universal

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<sup>144</sup> See: Carmelo Domenico Leotta, *Il genocidio nel diritto penale internazionale: Dagli scritti di Raphael Lemkin allo Statuto di Roma*, Giappichelli, Torino, 2013; Chiara Ragni, *I tribunali penali internazionali. Fondamento, giurisdizione e diritto applicabile*, Giuffrè, Milan, 2012; Emanuele Cimiotta, *I tribunali penali misti*, Cedam, Padova, 2009, pp. 293–318; Ornella Ferrajolo, *Corte Penale Internazionale: aspetti di giurisdizione e funzionamento nella prassi iniziale*, Giuffrè, Milan, 2007; Ana Peyro Llopis, *La compétence universelle en matière de crimes contre l’humanité*, Bruylant, Brussels, 2003.

<sup>145</sup> Maria Antonella Pasculli, *Una umanità una giustizia. Contributo allo studio sulla giurisdizione universale*, Cedam, Padua, 2013, pp. 239–41; see also Brussels Group for International Justice, *Brussels Principles Against Impunity and for International Justice*, 2002; and Africa Legal Aid, *Cairo-Arusha Principles on Universal Jurisdiction in Respect of Gross Human Rights Offences: An African Perspective*, 2002.

<sup>146</sup> Antoine Bailleux, “L’histoire de la loi belge de compétence universelle. Une valse à trois temps: ouverture, étroitesse, modestie”, in *Droit et Société*, 2005, vol. 59, no. 1, p. 111. See also: Éric David, “La compétence universelle en droit belge”, in *Annales de droit de Louvain*, 2004, vol. 64, no. 1–2, pp. 83–150; Olivier Corten, “De quel droit? Place et fonction du droit comme registre de légitimité dans le discours sur la compétence universelle”, in *Annales de droit de Louvain*, 2004, vol. 64, no. 1–2, pp. 51–82.

<sup>147</sup> Bailleux, 2005, p. 129, see *supra* note 146.

jurisdiction and compatibility with the European Convention on Human Rights: the judgment of 17 March 2009, through which the Court, for the first time enshrined the principle of universal jurisdiction and the enforcement of the criminal law of the country where the accused is located, specific to cases of torture.<sup>148</sup>

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<sup>148</sup> Gabriele della Morte, *Le amnistie del diritto internazionale*, Cedam, Padua, 2011, p. 200; Velia Corzani, “Giurisdizione universale e amnistia di fronte alla Corte europea dei diritti umani [Nota a sentenza: Corte Europea Diritti dell’Uomo, 17 marzo 2009 (Ould Dah c. Francia)], ricorso n. 13113/03”, in *Diritti umani e diritto internazionale*, 2009, vol. 3, no. 1, pp. 636–39.

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# The Statute of the International Criminal Court as a Kantian Constitution

Alexander Heinze\*

## 11.1. Introduction

On 26 February 2018, in his final address to the Human Rights Council, the United Nations ('UN') High Commissioner for Human Rights, Prince Zeid, declared in a blunt and rather frustrated remark:

Eastern Ghouta, other besieged areas in Syria; Ituri and the Kasais in the Democratic Republic of Congo; Taiz in Yemen; Burundi; Northern Rakhine in Myanmar have become some of the most prolific slaughterhouses of humans in recent times, because not enough was done, early and collectively, to prevent the rising horrors.<sup>1</sup>

In fact, the toll for Syria – for instance – is a tragic account of inaction. Over ten million people have fled the country, and several hundred thousand have been killed.<sup>2</sup> Apart from these shocking numbers, the situa-

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<sup>1</sup> Coalition for the International Criminal Court, "For the love of mercy, end the pernicious use of the veto", 26 February 2018.

<sup>2</sup> Christian Wenaweser and James Cockayne, "Justice for Syria? The International, Impartial and Independent Mechanism and the Emergence of the UN General Assembly in the

tion in Syria is an example of a failure for especially two reasons. First, because of the “terrifying brutality and systemic disrespect for the most basic rules of international humanitarian law, ranging from the promotion of enslavement on an industrial scale, to indiscriminate attacks on civilians”.<sup>3</sup> Second, because the entire world is watching through mass media. Yet, the war in Syria has exposed the limits of current attempts to maintain international peace and security, and international justice.<sup>4</sup> On several occasions, the UN Security Council has failed to resolve the situation, for example through a referral to the International Criminal Court (‘ICC’). It is the grist to the mill of those who already reject the ICC as ineffective or even biased.<sup>5</sup> A majority of the accused and suspects before the ICC are African, while the ICC has ignored situations not only in Syria but also in Afghanistan, Iraq, North Korea, Palestine, Sri Lanka, Ukraine, and the United States with respect to methods used in interrogations and detention since 9/11.<sup>6</sup>

The tensions between the ICC and especially African States do not stem from a sudden aversion of African States to the Court, but rather from reservations of the African Union (‘AU’) regarding the UN Security Council and its inconsistent decisions<sup>7</sup> as well as from particular interests of certain African leaders not to be investigated by the Court. It was the formal independence of the ICC from the Security Council that made many African States support the creation of the Court.<sup>8</sup> The AU, however, has been sceptical ever since about the Security Council’s referral deci-

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Realm of International Criminal Justice”, in *Journal of International Criminal Justice*, 2017, vol. 15, no. 2, p. 211.

<sup>3</sup> *Ibid.*, p. 212.

<sup>4</sup> *Ibid.*

<sup>5</sup> Wolfgang Kaleck, *Double Standards: International Criminal Law and the West*, Torkel Opsahl Academic EPublisher, Brussels, 2015, pp. 89 ff. ([www.toaep.org/ps-pdf/26-kaleck](http://www.toaep.org/ps-pdf/26-kaleck)).

<sup>6</sup> Manisuli Ssenyonjo, “State Withdrawal Notifications from the Rome Statute of the International Criminal Court: South Africa, Burundi and the Gambia”, in *Criminal Law Forum*, 2018, vol. 29, no. 1, p. 63.

<sup>7</sup> Juliet Okoth, “Africa, the United Nations Security Council and the International Criminal Court: The Question of Deferrals”, in Gerhard Werle, Lovell Fernandez and Moritz Vormbaum (eds.), *Africa and the International Criminal Court*, T.M.C. Asser Press, The Hague, pp. 195 ff.

<sup>8</sup> Jean-Baptiste Jeangène Vilmer, “The African Union and the International Criminal Court: counteracting the crisis”, in *International Affairs*, 2016, vol. 92, no. 6, p. 1330 with further references.

sions (even though they were made with the support of African States),<sup>9</sup> which proved – in the AU’s eyes – that this independence could be circumvented by *Realpolitik*. While the Libya referral may be viewed as the starting point of the reservations against the ICC by African States, the tensions came to a head when an arrest warrant was issued against Sudan’s sitting President Omar al-Bashir<sup>10</sup> and reached a new escalation level when South Africa failed to arrest and extradite al-Bashir in July 2015<sup>11</sup> and declared its withdrawal from the ICC pursuant to Article 127(1) of the ICC Statute in October 2016.<sup>12</sup> The withdrawal announcement set an example for Burundi and the Gambia that made similar declarations (although a new president of the Gambia later pulled back from the withdrawal declaration).

Even though the withdrawals do not affect pending trials and they “shall take effect one year after the date of receipt of the notification” (per Article 127(1) of the ICC Statute), making further decisions not to withdraw likely (as in the case of the Gambia and South Africa), the political damage for the Court cannot be overstated. In 2016, the AU called for a mass withdrawal of African States from the ICC, following a declaration that granted sitting heads of State immunity over prosecutions of international criminal tribunals.<sup>13</sup>

Notwithstanding the political motivation behind the accusations, they certainly have to be taken seriously, not least because a world criminal court is expected to investigate at a global level and without any bias. As manifold as the attacks are against the ICC, equally numerous are

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<sup>9</sup> *Ibid.*

<sup>10</sup> Kai Ambos, “Expanding the Focus of the ‘African Criminal Court’”, in William A. Schabas, Yvonne McDermott and Niamh Hayes (eds.), *The Ashgate Research Companion to International Criminal Law: Critical Perspectives*, Ashgate, Farnham, 2013, pp. 499–529.

<sup>11</sup> Tim Murithi, “Between Political Justice and Judicial Politics: Charting a Way Forward for the African Union and the International Criminal Court”, in Gerhard Werle, Lovell Fernandez and Moritz Vormbaum (eds.), *Africa and the International Criminal Court*, T.M.C. Asser Press, The Hague, 2014, pp. 179–94.

<sup>12</sup> Max du Plessis and Guénaél Mettraux, “South Africa’s Failed Withdrawal from the Rome Statute: Politics, Law, and Judicial Accountability”, in *Journal of International Criminal Justice*, 2017, vol. 15, no. 2, pp. 361 ff.

<sup>13</sup> Dire Tladi, “The Immunity Provision in the AU Amendment Protocol: Separating the (Doctrinal) Wheat from the (Normative) Chaff”, in *Journal of International Criminal Justice*, 2015, vol. 13, no. 1, pp. 3 ff.

those who jump to its defence. I would like to provide a similar defence, however, based on a Kantian approach.

### 11.2. Waves of Internationalism

In times of growing nationalism and increasing popularity of political realism,<sup>14</sup> a reminder as to what the ICC is and what it is not, why it was established and what it is intended to achieve, is timely. And it is worth bringing to mind that world history is not faced with nationalist and realist challenges for the first time. In the seventeenth century, continental Europe was overrun by the Thirty Years' War, resulting in the famous Peace of Westphalia and "the birth of the modern, non-ecclesiastical nation-state".<sup>15</sup> Parliament and the King were at war in England, inspiring Thomas Hobbes and John Locke to "reconsider political philosophy and relocate man – natural man, frail but ambitious – to the centre of the political and moral universe".<sup>16</sup> Human rights, however, were generally considered to be a matter within the exclusive domestic sovereignty of States until 1945. The first significant conceptual revolution, a vague 'internationalising' of human rights, came only with the United Nations Charter of 1945.<sup>17</sup> After World War II, the Allies set up the International Military Tribunal in Nuremberg to prosecute the "Major War Criminals". The creation of both the IMT and the International Military Tribunal for the Far East were milestones in the development of international criminal law and international accountability for serious crimes.<sup>18</sup> The IMT was also a symbol of the universality of law.<sup>19</sup>

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<sup>14</sup> See, for instance, the Remarks by US-President Trump to the 73rd Session of the United Nations General Assembly in New York on 25 September 2018:

America's policy of principled realism means we will not be held hostage to old dogmas, discredited ideologies, and so-called experts who have been proven wrong over the years, time and time again ([www.legal-tools.org/doc/6e3d04/](http://www.legal-tools.org/doc/6e3d04/)).

<sup>15</sup> Alan Sussman, "Why Human Rights Are Called Human Rights", in *Ethics & International Affairs Journal*, 2014, vol. 28, no. 2, pp. 171–82.

<sup>16</sup> *Ibid.*

<sup>17</sup> Douglass Cassel, "Does International Human Rights Law Make a Difference?", in *Chicago Journal of International Law*, 2001, vol. 2, no. 1, pp. 121, 134.

<sup>18</sup> Madelaine Chiam, "Different Models of tribunals", in David A. Blumenthal and Timothy L.H. McCormack (eds.), *The Legacy of Nuremberg: Civilising Influence or Institutionalised Vengeance?*, Martinus Nijhoff Publishers, Leiden, 2008, p. 205; Richard D. Heideman, "Legalizing Hate: The Significance of the Nuremberg Laws and The Post-War Nuremberg Trials", in *Loyola of Los Angeles International and Comparative Law Review*, 2017, vol. 39, no. 1, pp. 5 ff.; Stefanie Schmahl, "Human Dignity in International Human Rights,

After this wave of idealism and universalism, its support reached a low with the Cold War. State leaders mostly ignored human rights violations, which were still marginalised issues in international relations. These leaders had little incentive to prevent and stop the gross violations of human rights by risking the mutual respect for sovereignty. In a number of countries, the struggle over whether and how to limit the application of the concept of ‘universality’ in the post-war human rights regime went hand in hand with related limiting jurisdictional principles based on particularist notions of identity, such as nationality and ethnicity. Whereas offences at Nuremberg were prosecuted as ‘crimes against humanity’ on a universal basis, in the subsequent national trials of the 1950s and 1960s, these offences were prosecuted in terms of the collective. The conflicts focused in particular on the conception of the State and the extent of its commitments to and agenda regarding economic security. Another wave of universalism and human rights protections came with the fall of the Berlin Wall, the end of the Soviet Union and therefore the end of the Cold War.<sup>20</sup> The 1990s marked the birth of the ‘age of accountability’, somewhat euphemistically announced by the UN Secretary General at the ICC’s Kampala Review Conference, evoking the establishment of the International Criminal Tribunal for the former Yugoslavia (‘ICTY’) and the International Criminal Tribunal for Rwanda (‘ICTR’) in 1993 and 1994 and – eventually – the ICC in 1998. International human rights norms have now ‘gone global’ and the ICC’s Statute is seen by many as the constitution of international criminal justice. The ICC was established with the concept of universal jurisdiction in mind, although some of the parties who worked on the ICC Statute rejected the idea of universal ju-

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Humanitarian and International Criminal Law: A Comparative Approach”, in Eric Hilgendorf and Mordechai Kremnitzer (eds.), *Human Dignity and Criminal Law*, Duncker & Humblot, Berlin, 2018, pp. 79, 101.

<sup>19</sup> Robert H. Jackson, “The Influence of The Nuremberg Trial on International Criminal Law”, available on the web site of the Robert H. Jackson Center.

<sup>20</sup> See Jorrik Fulda, “Eine legitime Globalverfassung? Die US-Hegemonie und die weltgesellschaftlich gerechte Vollendung des Kantischen Projektes”, in *Archiv des Völkerrechts*, 2016, vol. 54, no. 3, p. 334:

Seit dem Ende des Kalten Krieges drängt der Westen verstärkt auf die weitere Vollendung des Kantischen Projektes – der Errichtung einer Weltfriedensordnung.

In a similar vein Héctor Olásolo, *International Criminal Law, Transnational Criminal Organizations and Transitional Justice*, Brill, Leiden, 2018, p. 3.

risdiction.<sup>21</sup> The Preamble of the ICC Statute notes that the purpose of the ICC was to have jurisdiction over “the most serious crimes of concern to the international community as a whole”, and that the aim of the ICC is to “guarantee lasting respect for and the enforcement of international justice”.<sup>22</sup> The ICC Statute is not only the “culmination of international law-making”.<sup>23</sup> Rather, it codifies the customary international humanitarian laws,<sup>24</sup> and the jurisprudence of previously established international or internationalised tribunals such as the ICTY and ICTR.<sup>25</sup> Thus, the law with regard to grave international crimes, customary and treaty-based international law, the applicable general principles of law and internationally recognised human rights, “consolidated over a century’s worth of jurisprudence and customary law”, have been ‘constitutionalised’ by the ICC Statute.<sup>26</sup>

### 11.3. Methodology

If the conception of the ICC is viewed as an expression of the intention to get the cycle of international universalist movements going, the current attacks against the Court and nationalist movements all over the world can be seen as another recession. In such times, it is worth looking back at those who first provided an exit strategy to the *perpetuum mobile* of hegemony and armed conflict. One of those who did so was Immanuel Kant. Unsurprisingly, his moral and political philosophy is currently experiencing a “broad revival”, including a “sustained effort to build a broader, rights-based cosmopolitanism, in part by extending Kant’s ideas”.<sup>27</sup> However, what is the Kantian approach to international law and cosmopolitan-

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<sup>21</sup> See Hans-Peter Kaul and Claus Kreß, “Jurisdiction and Cooperation in the Statute of the International Criminal Court: Principles and Compromises”, in *Yearbook of International Humanitarian Law*, 1999, vol. 2, pp. 143–75.

<sup>22</sup> Rome Statute of the International Criminal Court (‘ICC Statute’), 17 July 1998, in force 1 July 2002, Preamble ([www.legal-tools.org/doc/7b9af9/](http://www.legal-tools.org/doc/7b9af9/)).

<sup>23</sup> Marc Weller, “Undoing the Global Constitution: UN Security Council Action on the International Criminal Court”, in *International Affairs*, 2002, vol. 78, no. 4, p. 693.

<sup>24</sup> Errol P. Mendes, *Peace and Justice at the International Criminal Court*, Edward Elgar Publishing, Cheltenham, 2010, p. 22.

<sup>25</sup> *Ibid.*

<sup>26</sup> *Ibid.*, pp. 15, 21–22; Yvonne McDermott, “The Influence of International Human Rights Law on International Criminal Procedure”, in Philipp Kastner (ed.), *International Criminal Law in Context*, Routledge, London, 2018, p. 282.

<sup>27</sup> Alec Stone Sweet, “A Cosmopolitan Legal Order: Constitutional Pluralism and Rights Adjudication in Europe”, in *Global Constitutionalism*, 2012, vol. 1, no. 1, pp. 53–54.

ism? The answer to that is not as easy as it sounds. Kant published only a few writings that explicitly addressed the issue of international relations. They were written mainly during the later part of his life, and “have sometimes been criticized by scholars for their supposed lack of seriousness stemming from rather suspicious remarks Kant made about them”.<sup>28</sup> The best example is what became (in)famous as Kant’s “sorry comforters” remark:

For Hugo Grotius, Pufendorf, Vattel and the rest (sorry comforters as they are) are still dutifully quoted in justification of military aggression, although their philosophically or diplomatically formulated codes do not and cannot have the slightest legal force, since states as such are not subject to a common external constraint. (*Perpetual Peace*, p. 103)

Kant’s rather sarcastic remark in his seminal *Zum ewigen Frieden* (*Toward Perpetual Peace* – in a version translated by H.B. Nisbet and edited by Hans Reiss) is *prima facie* not only a mockery of the undoubtedly great thinkers Grotius, Pufendorf and Vattel but also of scholars and teachers of international law in general. Moreover, and even more importantly, it – again, *prima facie* – questions the mere existence of international law as envisioned by Grotius, Pufendorf and Vattel, since this law can hardly be enforced. Kant targeted Grotius’s, Pufendorf’s and Vattel’s understanding of natural law that paid lip service to ‘right’ and a legal order,<sup>29</sup> promoting instead “a system for calculating happiness and constraint on the basis of an empirically defined ‘human nature’ so as to produce an optimally robust social order”.<sup>30</sup> Comparing Kant’s above-mentioned quote to the situation today, it could certainly be argued that Kant was wrong: international criminal law has developed as a unique form of law and “the teachings of the most highly qualified publicists of the various nations” are explicitly mentioned as a source of law in Article 38 of the Statute of the International Court of Justice (‘ICJ’).

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<sup>28</sup> Eric S. Easley, *The War Over Perpetual Peace*, Palgrave Macmillan, New York, 2004, p. 5.

<sup>29</sup> Immanuel Kant, “Perpetual Peace: A Philosophical Sketch”, *Kant: Political Writings*, H.S. Reiss ed., H.B. Nisbet trans., Cambridge University Press, Cambridge, 1991, p. 103 ([www.legal-tools.org/doc/dc079a/](http://www.legal-tools.org/doc/dc079a/)); Dietmar von der Pfordten, “On Kant’s Concept of Law”, in *Archiv für Rechts- und Sozialphilosophie*, 2015, vol. 101, no. 2, pp. 191–92.

<sup>30</sup> Martti Koskeniemi, “Constitutionalism as Mindset: Reflections on Kantian Themes About International Law and Globalization”, in *Theoretical Inquiries in Law*, 2007, vol. 8, no. 1, pp. 9, 17.

However, a synopsis of Kant's writings on moral and political philosophy provides useful guidelines on how to ensure peace and security in the world, and how to protect gross human rights violations. On the subject of international relations, there exist not only Kant's unpublished reflections from 1764 to 1768 and from 1773 to 1789, but also published works, of which the most influential are dated between 1784 and 1797. These latter publications are: *Idea for a Universal History with a Cosmopolitan Purpose* (1784); *On the Common Saying: This May be True in Theory but It Does not Apply in Practice* (1793); *Perpetual Peace* (1795); and *The Metaphysics of Morals* (1797).<sup>31</sup> They all deal with matters that Kant confronts in *Perpetual Peace*.<sup>32</sup> In fact, it is the other writings – rather than *Perpetual Peace* – that provide an answer to the question of whether Kant would have supported an institution such as the ICC.

In this chapter, I argue that Kant would have welcomed the establishment of a permanent international criminal court (that is, the ICC) and the adoption of the ICC's Statute in Rome as a Constitution of international criminal justice. To support this argument, I will conduct a detailed analysis of the following of Kant's writings:

- *The Metaphysics of Morals*, translation by Mary J. Gregor, Cambridge University Press, Cambridge, 1991;
- *Groundwork of the Metaphysics of Morals*, translation by Mary J. Gregor (ed.), Cambridge University Press, Cambridge, 1997;
- *Anthropology from a Pragmatic Point of View*, translation by Robert B. Loudon (ed.), Cambridge University Press, Cambridge, 2006;
- *Critique of Judgement*, translation by James Creed Meredith, Nicholas Walker (ed.), Oxford University Press, Oxford, 2007;
- *Political Writings*, translation by H.B. Nisbet, 2nd edition, Hans Reiss (ed.), Cambridge University Press, Cambridge, 1991:
  - a) "An Answer to the Question: 'What is Enlightenment?'"', pp. 54 ff.;

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<sup>31</sup> Easley, 2004, p. 6, see *supra* note 28; Benedict Vischer, "Systematicity to Excess: Kant's Conception of the International Legal Order", in Stefan Kadelbach, Thomas Kleinlein and David Roth-Isigkeit (eds.), *System, Order, and International Law: The Early History of International Legal Thought from Machiavelli to Hegel*, Oxford University Press, Oxford, 2017, pp. 303–04.

<sup>32</sup> Easley, 2004, p. 6, see *supra* note 28.

- b) “Perpetual Peace: A Philosophical Sketch”, pp. 93 ff.; and
- *Toward Perpetual Peace and Other Writings on Politics, Peace, and History*, Pauline Kleingeld (ed.), Yale University Press, New Haven, 2006,

to answer the following questions:

1. What are human rights violations (in the nation State)?
2. Are human rights violations conceivable at an international level?
3. Should perpetrators of gross human rights violations be punished?
4. Is the ICC a legitimate platform to punish these perpetrators?; and, if it is,
5. does the ICC as it is institutionalised and organised today live up to Kant’s expectations?

Methodologically, this chapter will in a way be an interpretation of those of Kant’s writings that are relevant to answer the five questions above. This almost exegetical textualist exercise is necessary to both decode and de-mystify Kant’s approach to international criminal law. As such, selected quotes from Kant, derived from several sources, form the backbone of this chapter. These quotes inform the common theme of the chapter. To highlight them, I set out the quotes in separate paragraphs, with a short reference (title, page number(s)) to the respective publication underneath. The words I deemed important for my interpretation I have underlined. Those underlinings are not in the original. Even though the quotes take up much space and are challenging for both the reader’s eyes and focus, they are necessary due to the fact that Kant can be read and understood in different ways, which is in part due to Kant’s rather complicated language – a deliberate choice he made to communicate his *a priori* concepts – and the fact that translations of Kant’s works necessarily carry an interpretive element. Unsurprisingly, as it is the case with many old writings that leave a margin of interpretation, there is a temptation to view Kantianism as “some kind of cult with strange rituals and jargon”.<sup>33</sup>

#### **11.4. Punishment: Kantian Freedom and its Hindrance**

During the Rome Conference, where the Statute of the ICC was negotiated, it was made rather clear that the ICC should not be established as a

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<sup>33</sup> R. Lanier Anderson, “Lucy Allais, Manifest Reality: Kant’s Idealism and His Realism”, in *Philosophical Review*, 2017, vol. 126, no. 2, p. 278.

human rights court. The head of the U.S. delegation, Ambassador David Scheffer, noted just a few weeks before the conference: “This is not a human rights court; it is an international criminal court”.<sup>34</sup> The U.S. pointed out early in the conference that “every human rights violation is not a crime”,<sup>35</sup> and U.S. delegates repeated: “an international court of human rights is unacceptable, lock, stock, and barrel”.<sup>36</sup> The ICC Appeals Chamber itself has emphasised that the ICC “was not established to be an international court of human rights, sitting in judgment over domestic legal systems”.<sup>37</sup> We shall see in the course of this chapter that this is only half of the truth. As I already noted in the introduction to this chapter, the establishment of the *ad hoc* tribunals and the ICC are perceived as a success story of human rights law. The ICC was praised as “the first standing global human rights court”.<sup>38</sup> In fact, the perception of the ICC has always been closely linked with human rights protection. In November 2000, the BBC asked: “Do we need a worldwide human rights court, with its own powers of arrest, giving no safe havens for former dictators?”, making no distinction between a human rights court and this court’s punishment of individuals.<sup>39</sup> If international media reports were an indication of this perception, human rights issues only made the front pages in a criminal law context: when Baltazar Garzon on 10 October 1998 issued an international warrant for the arrest of former Chilean President Augusto Pinochet for the alleged deaths and torture of Spanish citizens;<sup>40</sup> when Slobodan Mi-

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<sup>34</sup> Marcus R. Mumford, “Building upon a Foundation of Sand: A Commentary on the International Criminal Court Treaty Conference”, in *Michigan State University-Detroit College of Law Journal of International Law*, 1999, vol. 8, pp. 151, 170.

<sup>35</sup> *Ibid.*, pp. 151, 189.

<sup>36</sup> *Ibid.*, pp. 151, 204.

<sup>37</sup> Jacob N. Foster, “A Situational Approach to Prosecutorial Strategy at the International Criminal Court”, in *Georgetown Journal of International Law*, 2016, vol. 47, no. 2, pp. 439, 463.

<sup>38</sup> Michael Contarino and Selena Lucent, “Stopping the Killing: The International Criminal Court and Juridical Determination of the Responsibility to Protect”, in *Global Responsibility to Protect*, 2009, vol. 1, no. 4, pp. 560, 567.

<sup>39</sup> BBC World Service, “Should there be one court for the world?”, 3 November 2007, transcript.

<sup>40</sup> David Connett, John Hooper and Peter Beaumont, “Pinochet arrested in London”, in *The Guardian*, 18 October 1998:

The Spanish judges who requested his arrest had initially sought only to question Pinochet as part of an investigation into human rights violations in Chile and Argentina.

lošević, Radovan Karadžić, Ratko Mladić stood trial before the ICTY;<sup>41</sup> when the ICC was established; when former ICC Prosecutor Moreno-Ocampo issued an arrest warrant against Omar al-Bashir; and more recently, when African States threatened to leave the ICC.<sup>42</sup>

The ICC's dual nature as a human rights (monitoring)<sup>43</sup> body and a criminal court warrants a short separate analysis of Kant's view of punishment, even though this view will be touched upon in other parts of this chapter. Unfortunately, as I hinted in the introduction, Kant does not paint a clear and consistent picture of his approach to punishment.<sup>44</sup> As Hill noted more than twenty years ago: "Kant's expressed views on punishment are like intriguing pieces of a large jigsaw puzzle. It is obvious enough how some pieces fit together, but not quite how others complement and unite the rest. Moreover, there seem to be gaps, and so some pieces may be missing".<sup>45</sup> And more than thirty years ago, in a paper provocatively titled "Does Kant have a Theory of Punishment", Jeffrie G. Murphy remarked in a rather blunt account (it is worth reading the entire section): "As I now return to examine Kant's theory of punishment, I find that this proves to be an occasion of anxiety and disenchantment rather than the indulgence in affectionate nostalgia that I had expected. Not only am I no longer confident that the theory is generally correct; I am also not at all sure that I understand (or find understandable) much of what Kant says on crime and punishment. It is no longer clear to me to what extent it is proper to continue thinking of Kant as a paradigm retributivist in the theory of punishment. Indeed, I am not even sure that Kant develops anything that deserves to be called a *theory* of punishment at all. I genuinely wonder if he has done much more than leave us with a random (and not

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<sup>41</sup> CNN, "World welcomes Milosevic handover", 2 July 2001.

<sup>42</sup> Cornelius Prittwitz, "Die Rolle des Strafrechts im Menschenrechtsregime in Pilgram", in Arno Pilgram and Susanne Krasmann (eds.), *Einheitliches Recht für die Vielfalt der Kulturen?*, Lit, Vienna, 2012, pp. 23, 27.

<sup>43</sup> See *infra* sect. 11.7.3.4.

<sup>44</sup> In a similar vein, see Lucy Allais, *Manifest Reality: Kant's Idealism and His Realism*, Oxford University Press, Oxford, 2015, p. 11.

<sup>45</sup> Thomas E. Jr. Hill, "Kant on Punishment: A Coherent Mix of Deterrence and Retribution", in *Annual Review of Law and Ethics*, 1997, vol. 5, pp. 291–92.

entirely consistent) set of *remarks* – some of them admittedly suggestive – about punishment”.<sup>46</sup> So let us look at at least three of those ‘remarks’:

I ought never to act except in such a way that I could also will that my maxim should become a universal law.  
(Groundwork of the Metaphysics of Morals, p. 15 [402])

This supreme principle of ethics – the Categorical Imperative – aims at the motivation (or reasons) for acting; any consideration of external behaviour is absent.<sup>47</sup> The quote illustrates that dignity is “intrinsic, deontological and non-negotiable (replaceable), it is the basis of the individuality and the mutual recognition (inter-personal relationship) of the members of a society”.<sup>48</sup> By contrast, the principle of Kant’s legal philosophy, the Universal Principle of Right,<sup>49</sup> states (in rather ambiguous language):

Any action is *right* if it can coexist with everyone’s freedom in accordance with a universal law, or if on its maxim the freedom of choice of each can coexist with everyone’s freedom in accordance with a universal law. (*The Metaphysics of Morals*, p. 57 [231])

This “transposes the categorical imperative to the sphere of external action”.<sup>50</sup> Freedom referred to by the Universal Principle of Right is “ex-

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<sup>46</sup> Jeffrie G. Murphy, “Does Kant Have a Theory of Punishment”, in *Columbia Law Review*, 1987, vol. 87, no. 3, p. 509.

<sup>47</sup> Luke J. Davies, “A Kantian Defense of the Right to Health Care”, in Reidar Maliks and Andreas Føllesdal (eds.), *Kantian Theory and Human Rights*, Routledge, London, 2014, p. 82; Wilfried Küper, “Das Strafgesetz ist ein kategorischer Imperativ: Zum ‘Strafgesetz’ in Kants Rechtslehre”, in Michael Hettinger and Jan Zopfs (eds.), *Strafrechtliche Beiträge zu Rechtsgeschichte und Rechtsphilosophie*, Mohr Siebeck, Tübingen, 2017, pp. 397 ff.

<sup>48</sup> Marie E. Newhouse, “Two Types of Legal Wrongdoing”, in *Legal Theory*, 2016, vol. 22, no. 1, pp. 59 ff.; Ulfried Neumann, “Das Rechtsprinzip der Menschenwürde als Schutz elementarer menschlicher Bedürfnisse: Versuch einer Eingrenzung”, in *Archiv für Rechts- und Sozialphilosophie*, 2017, vol. 103, no. 3, p. 293; Julian A. Sempill, “Law, Dignity and the Elusive Promise of a Third Way”, in *Oxford Journal of Legal Studies*, 2018, vol. 38, no. 2, p. 228.

<sup>49</sup> Kai Ambos, “Punishment without a Sovereign? The *Ius Puniendi* Issue of International Criminal Law”, in *Oxford Journal of Legal Studies*, 2013, vol. 33, no. 2, pp. 293, 305.

<sup>50</sup> Vischer, 2017, p. 306, see *supra* note 31:

[W]hile the categorical imperative requires the universalizability of the voluntary maxim, the principle of right merely demands that the action – irrespectively of the agents’ motive – conforms to a universal law.

About the different interpretations of Kant’s external action, see von der Pfordten, 2015, pp. 193 ff., see *supra* note 29.

ternal freedom”, it “bars considerations of internal motivation”.<sup>51</sup> The distinction between external and internal freedom is Kant’s “most profound statement on the relationship between an autonomous morality and political practice. By reconstructing Kant’s arguments in favor of their distinction, we see the dynamics behind his theory of justice: The pure practical reason of morality (inner freedom) informs – and thereby subordinates – the structure of outer freedom and the political reality with which it is associated”.<sup>52</sup>

The difference between internal and external freedom has been well-illustrated by Antonio Franceschet:

Freedom	Negative ( <i>Willkür</i> )	Positive ( <i>Wille</i> )	Motive to Act
Internal Freedom <i>Morality</i>	Independence from nature or material causes (i.e. inclinations)	Autonomy: obedience to the objective laws that one’s reason produces	Incentive is internal and autonomous: duty or reverence for the moral law

The *moral* realm subordinates and gives *form* to the *political* realm without losing its autonomous status.

External Freedom <i>Legality</i>	Justice ( <i>Recht</i> ): The equal limitation of outer freedom of choice of subjects	Original Contract (Idea): common subordination to a republican order of laws to which one consents	Incentive is external and heteronomous: obligation an impure mixture of coercion, self-interest, and increasingly, duty
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Source (modified): Antonio Franceschet, *Kant and Liberal Internationalism: Sovereignty, Justice, and Global Reform*, Palgrave Macmillan, New York, 2002, p. 28.

Kant’s discussion of punishment – punishment in general is physical evil accruing from moral evil<sup>53</sup> – has probably generated more scholarly attention than any other aspect of his legal and political thought.<sup>54</sup> I

<sup>51</sup> Davies, 2014, p. 82, see *supra* note 47.

<sup>52</sup> Antonio Franceschet, *Kant and Liberal Internationalism*, Palgrave Macmillan, New York, 2002, pp. 23–24.

<sup>53</sup> Immanuel Kant, *Lectures on Ethics*, Cambridge University Press, Cambridge, 2001, p. 55.

<sup>54</sup> Arthur Ripstein, “Hindering a Hindrance to Freedom”, in *Annual Review of Law and Ethics*, 2008, vol. 16, p. 227.

would like to differentiate between the questions “Why should we punish?”, “Who should be punished?” and “How should they be punished?”. Kant’s answer to the second question seems relatively clear: only all those who commit crimes ought to be punished.<sup>55</sup> As Thomas Hill interprets it: “those who should be punished are all those guilty of legal offences and (so also) morally guilty (at least for violating the duty to obey the law)”.<sup>56</sup> With regard to the “why” of punishment, Kant remarks:

Now whatever is wrong is a hindrance to freedom in accordance with universal laws. But coercion is a hindrance or resistance to freedom. Therefore, if a certain use of freedom is itself a hindrance to freedom in accordance with universal laws (i.e., wrong), coercion that is opposed to this (as a *hindering of a hindrance to freedom*) is consistent with freedom in accordance with universal laws, that is, it is right. Hence there is connected with Right by the principle of contradiction an authorisation to coerce someone who infringes upon it. (*The Metaphysics of Morals*, p. 57 [231])

In other words, “[c]oercion is in general unjust because it is a hindrance of freedom, but *state* coercion following on an unjust hindrance of freedom is just, for it is a hindrance of a hindrance of freedom, which is consistent with universal freedom”.<sup>57</sup> Coercion is morally justified “when used to protect rational agency from standard threats to its existence and flourishing”.<sup>58</sup> Thus, “the use of coercion by the state to restrain the thief is right, even though it is a hindrance to the thief’s freedom, because the thief is using *his* freedom to restrain the victim’s freedom under a universal law (in this case, the victim’s peaceful enjoyment of his possession)”.<sup>59</sup>

Here again, to understand this metaphysical justification of coercion, it is important to grasp Kant’s two concepts of freedom. On the one hand, there is a “certain use of freedom”, on the other hand there is a “certain use of freedom”. The two concepts “underlie Kant’s conceptions of the

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<sup>55</sup> Hill, 1997, pp. 291, 294, see *supra* note 45.

<sup>56</sup> *Ibid.*, pp. 291, 298.

<sup>57</sup> Alan W. Norrie, *Law, Ideology and Punishment*, Kluwer, London, 1991, p. 51 (emphasis in the original).

<sup>58</sup> Brian Orend, “Kant on International Law and Armed Conflict”, in *Canadian Journal of Law and Jurisprudence*, 1998, vol. 11, no. 2, pp. 329, 335.

<sup>59</sup> Fernando R. Teson, “Kantianism and Legislation”, in *Annual Review of Law and Ethics*, 2008, vol. 16, pp. 275, 283.

will, law, justice and coercion which are all parts of the philosophical progression which eventually leads to the justification of punishment”.<sup>60</sup> According to the former concept, coercion is “a concrete negation of phenomenal freedom”, the latter concept refers to “a metaphysical affirmation of moral freedom”.<sup>61</sup>

The answer to the question of how an offender should be punished is provided by Kant in a lengthier remark:

But in what kind and what amount of punishment is it that public justice makes its principle and measure? None other than the principle of equality (in the position of the needle on the scale of justice), to incline no more to one side than to the other. Accordingly, whatever undeserved evil you inflict upon another within the people, that you inflict upon yourself. If you insult him, you insult yourself; if you steal from him, you steal from yourself; if you strike him, you strike yourself; if you kill him, you kill yourself. But only the *law of retribution (ius talionis)* – it being understood, of course, that this is applied by a court (not by your private judgment) – can specify definitely the quality and the quantity of punishment; all other principles are fluctuating and unsuited for a sentence of pure and strict justice because extraneous considerations are mixed into them. (*The Metaphysics of Morals*, p. 141 [332])

### **11.5. Human Rights Violations and Criminal Law on the International Level**

In his writings on external freedom, Kant hinted at the universal laws and the ‘right’ as he understood it. The concept of ‘right’ is especially important for the justification of an institution like the ICC.

#### **11.5.1. The Concept of ‘Right’ on the International Level**

Kant’s conception of human dignity (see above) is complemented by his vision of a ‘perpetual peace’. The structure of his work *Toward Perpetual Peace* is as follows: Six “Preliminary Articles” ban treacherous dealings

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<sup>60</sup> Norrie, 1991, p. 45, see *supra* note 57.

<sup>61</sup> *Ibid.*, p. 51.

among States, including preparation for war.<sup>62</sup> They describe steps that can be taken to “wind down” a war and avoid armed conflict. Kant’s preliminary articles basically “seek to ground the federation on measures of good faith, self-determination and non-interference”.<sup>63</sup> For the creation of a cosmopolitan constitution, “any failure to comply in good faith with any article of the constitution can be seen as unconstitutional and therefore grounds the legal basis for federal exclusion”.<sup>64</sup> Three “Definitive Articles” establish actions and institutions deemed necessary for a cosmopolitan system to sustain itself over time and end a war.<sup>65</sup> Compared to the Preliminary Articles, the Definitive Articles present “stronger terms for membership [in the federation] and the normative conditions upon which the federation stands”.<sup>66</sup>

For the purpose of this chapter, Kant’s Definitive Articles deserve closer consideration:

1. The Civil Constitution of Every State shall be Republican (principle of civil right);
2. The Right of Nations shall be based on a Federation of Free States (principle of international right);
3. Cosmopolitan Right shall be limited to Conditions of Universal Hospitality (principle of cosmopolitan right).  
(*Perpetual Peace*, p. 98)

The conceptual novelty of Kant’s doctrine of cosmopolitanism is that he recognised “three interrelated but distinct levels of ‘right’, in the juridical senses of the term”.<sup>67</sup> Definitive Article 1 defines the necessary prerequisites for the type of States that are eligible for membership in the

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<sup>62</sup> Stone Sweet, 2012, pp. 53, 56, see *supra* note 27; Garrett Wallace Brown, “Kantian Cosmopolitan Law and the Idea of a Cosmopolitan Constitution”, in *History of Political Thought*, 2006, vol. 27, no. 4, pp. 661, 678.

<sup>63</sup> *Ibid.* See also Cécile Fabre, *Cosmopolitan Peace*, Oxford University Press, Oxford, 2016, p. 16 (critic of Fabre’s “treatment (or, rather, lack thereof) of corporate moral agents” is Avia Pasternak, “Cosmopolitan Justice and Criminal States”, in *Journal of Applied Philosophy*, 2018, advance article). See also Philipp Gisbertz, “The Concepts of ‘War’ and ‘Peace’ in the Context of Transnational Terrorism”, in *Archiv für Rechts- und Sozialphilosophie*, 2018, vol. 104, no. 1, p. 9.

<sup>64</sup> Brown, 2006, pp. 661, 678, see *supra* note 62.

<sup>65</sup> Stone Sweet, 2012, pp. 53, 56, see *supra* note 27.

<sup>66</sup> Brown, 2006, pp. 661, 681, see *supra* note 62.

<sup>67</sup> Seyla Benhabib, in Robert Post (ed.), *Another Cosmopolitanism*, Oxford University Press, Oxford, 2006, p. 21.

federation.<sup>68</sup> The States have a republican constitution guaranteeing the liberty and equality of their citizens as “inalienable rights” (Definitive Article 1). This constitution depends “on a single, common legislation”, and “the law of the equality”, following “from the idea of an original contract, upon which all laws legislated by a people must be based”.<sup>69</sup> In modern terms, what is meant here is “[a] nation that has established a competitive electoral system, independent courts and the rule of law, and basic market freedoms would be included”.<sup>70</sup> The second factor (Definitive Article 2) is the sphere of rightful relations among nations (*Völkerrecht*), resulting from treaty obligations among States.<sup>71</sup> Here, Kant is only concerned with regulating international disputes among its members,<sup>72</sup> where every member would be free to decide to opt out at any time.<sup>73</sup> It is an indication of Kant’s trust in the “effectiveness of institutionally embodied international law”.<sup>74</sup>

Just like individual men, [States] must renounce their savage and lawless freedom, adapt themselves to public coercive laws, and thus form an international state (*civitas gentium*), which would necessarily continue to grow until it embraced all the peoples of the earth. But since this is not the will of the nations, according to their present conception of international right (so that they reject *in hypothesis* what is true *in thesi*), the positive idea of a world republic cannot be realised. If all is not to be lost, this can at best find a negative substitute in the shape of an enduring and gradually expanding federation likely to prevent war. (*Perpetual Peace*, p. 105)

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<sup>68</sup> Brown, 2006, pp. 661, 681, see *supra* note 62.

<sup>69</sup> Immanuel Kant, *Toward Perpetual Peace and Other Writings on Politics, Peace, and History*, Yale University Press, New Haven, 2006, pp. 74–75, 8:350.

<sup>70</sup> Stone Sweet, 2012, pp. 53, 56, see *supra* note 27.

<sup>71</sup> Benhabib, 2006, p. 21, see *supra* note 67.

<sup>72</sup> See also Jenny Martinez, “Towards an International Judicial System”, in *Stanford Law Review*, 2003, vol. 56, no. 2, pp. 429, 462; Klaus Günther, “Falscher Friede durch repressives Völkerstrafrecht?”, in Werner Beulke *et al.* (eds.), *Das Dilemma des rechtsstaatlichen Strafrechts*, Berliner Wissenschafts-Verlag, Berlin, 2009, p. 84.

<sup>73</sup> Stone Sweet, 2012, pp. 53, 56, see *supra* note 27; Jürgen Habermas, *Politische Theorie*, Philosophische Texte vol. 4, Suhrkamp, Frankfurt am Main, 2009, p. 324.

<sup>74</sup> Wade L. Huntley, “Kant’s Third Image: Systemic Sources of the Liberal Peace”, in *International Studies Quarterly*, 1996, vol. 40, no. 1, pp. 45, 50.

While in earlier writings Kant was in favour of a global State, in *Perpetual Peace* he rejects this advocacy and thereby a world State or super State.<sup>75</sup> Thus, there is a contradiction between Kant's conceptual demand for an international State (and that States must be subjected to a higher authority) and his understanding that this is more an aspiration than a realistic achievement.<sup>76</sup> In his view, a world federation "is still to be preferred to an amalgamation of the separate nations under a single power which has overruled the rest and created a universal monarchy. For the laws progressively lose their impact as the government increases its range, and a soulless despotism, after crushing the germs of goodness, will finally lapse into anarchy".<sup>77</sup> The compromise of a world federation, however, should not be understood as a "limitation of the appeal to reason" – quite

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<sup>75</sup> Patrick Capps and Julian Rivers, "Kant's Concept of International Law", in *Legal Theory*, 2010, vol. 16, no. 4, pp. 229–30 with further references; Huntley, 1996, pp. 45, 50, see *supra* note 74; Stone Sweet, 2012, pp. 53, 56, see *supra* note 27 with fn. 2; Brown, 2006, pp. 661, 682, see *supra* note 62; Vlad Perju, "Double Sovereignty in Europe: A Critique of Habermas's Defense of the Nation-State", in *Texas International Law Journal*, 2018, vol. 53, p. 52.

<sup>76</sup> Vischer, 2017, p. 323, see *supra* note 31; Pauline Kleingeld, "Kant's Cosmopolitan Law: World Citizenship for a Global Order", in *Kantian Review*, 1998, vol. 2, pp. 72–73:

Either [cosmopolitan law] is a superfluous category, and its content can simply be subsumed under international law; or, if it is to be a distinct category, it cannot be institutionalized without presupposing the kind of world republicanism that Kant rejects.

Habermas, 2009, p. 324, see *supra* note 73:

Es ist viel darüber gerätselt worden, warum [Kant] gleichwohl die schwächere Konzeption eines Völkerbundes einführt und seine Hoffnung auf eine freiwillige Assoziation friedenswilliger, aber souverän bleibender Staaten gründet.

<sup>77</sup> Kant, 1991, p. 113, see *supra* note 29; Vischer, 2017, p. 324, see *supra* note 31, see also p. 326:

Cosmopolitan law is essentially a law of borders. To be sure, it is supposed to ensure a universal legal status of the individual beyond and independent of state borders. Yet this universality cannot simply be provided through a set of rules on the global level. Every distinct legal body, even if it had a worldwide scope, implies by its very determinacy a limit that excludes and conceals claims. Universal recognition beyond borders requires therefore an unending activity of border crossing (fn. omitted).

Capps and Rivers, 2010, p. 244, see *supra* note 75. For Habermas, the reference to 'soulless despotism' is reminiscent of Foucault's fear of 'normalization', see Habermas, 2009, p. 328, *supra* note 73:

Im Hintergrund steht schon so etwas wie Foucault's Furcht vor 'Normalisierung', wenn Kant überlegt, dass in einer hochkomplexen Weltgesellschaft Recht und Gesetz nur um den Preis eines 'seelenlosen Despotism' durchgesetzt werden könnten.

the contrary, it is an inherent element: the aspiration of a global State must necessarily lead to its perversion into the opposite.<sup>78</sup>

Nevertheless, today's international treaties and the States' "new sovereignty"<sup>79</sup> that centre around the right of States to participate in the development and implementation of international norms can certainly be viewed as a product of Kant's Second Definitive Article:

For if by good fortune one powerful and enlightened nation can form a republic (which is by its nature inclined to seek perpetual peace), this will provide a focal point for federal association among other states. These will join up with the first one, thus securing the freedom of each state in accordance with the idea of international right, and the whole will gradually spread further and further by a series of alliances of this kind. (*Perpetual Peace*, p. 104)

The role of Kant's "one powerful and enlightened nation" has for a long time been filled by the United States with the NATO.<sup>80</sup> Under NATO, Western Europe became a security community, in alliance with the U.S. and Canada.<sup>81</sup> NATO membership expanded from ten members in 1949, to 29 States today.<sup>82</sup> Kenneth Waltz described this as a 'bandwagoning' versus balancing behaviour and balance of power configuration anticipated by neo-Realism.<sup>83</sup> In times of growing nationalism and anti-cosmopolitanism by the United States and Russia, it seems that a leadership role for the United States as the "enlightened nation" is less likely than ever. In fact, the speech of US President Donald Trump in Warsaw on

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<sup>78</sup> Vischer, 2017, p. 324, see *supra* note 31.

<sup>79</sup> Abram Chayes and Antonia Handler Chayes, *The New Sovereignty: Compliance with International Regulatory Agreements*, Harvard University Press, Cambridge (MA), 1995. See also Habermas' dual sovereignty thesis:

[T]he [EU-]member states, who retain their monopoly on the legitimate use of force, subordinate themselves to supranational law, albeit with an interesting proviso [...] and that they share their 'sovereignty' in a certain sense with the citizenry of the Union as a whole.

Jürgen Habermas, *The Crisis of the European Union: A Response*, Ciaran Cronin trans., Polity Press, Cambridge, 2012, p. 13, critic Perju, 2018, pp. 49 *et seq.*, see *supra* note 75.

<sup>80</sup> Huntley, 1996, pp. 45, 70, see *supra* note 74; Habermas, 2009, p. 315, see *supra* note 73.

<sup>81</sup> Stone Sweet, 2012, pp. 53, 59, see *supra* note 27.

<sup>82</sup> "NATO Member Countries", available on the NATO web site.

<sup>83</sup> Kenneth N. Waltz, *Theory of International Politics*, Addison-Wesley, Reading, 1979, p. 126; Huntley, 1996, pp. 45, 70, see *supra* note 74.

6 July 2017 showed him as a “crusader against cosmopolitanism”<sup>84</sup> who predicted a clash of civilisations.<sup>85</sup> A year later, on 10 September 2018, John Bolton, National Security Advisor of US-President Trump, continued the concerted attacks on cosmopolitanism and multilateralism by the Trump-administration in a speech before the Federalist Society.<sup>86</sup> As if this was not clear enough, in his speech during the 73rd Session of the United Nations General Assembly in New York on 25 September 2018, President Trump bluntly declared: “America is governed by Americans. We reject the ideology of globalism, and we embrace the doctrine of patriotism.”<sup>87</sup> The United States will have to return to its internationalism shortly following events in 1918 and 1945 to become again that “powerful and enlightened nation” Kant is referring to.<sup>88</sup>

The third factor is a world citizen law (*Weltbürgerrecht*) which entails the ‘right of hospitality’ (*Recht der Hospitalität*), that is, that each citizen must not be treated in a hostile way by another State.<sup>89</sup> With regard to the term hospitality, Kant himself notes the oddity of the term in this context, and therefore remarks that “it is not a question of philanthropy but of right”.<sup>90</sup> In other writings, Kant clarified that the notion of hospitality and cosmopolitan right included a wider range of rights, including “the right of citizens of the world *to try to establish community with all*”,<sup>91</sup> “engage in commerce with any other, and each has a right to make this

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<sup>84</sup> The Economist, “Donald Trump’s G20 Speech Owed a lot to Putin”, 13 July 2017.

<sup>85</sup> Ishaan Tharoor, “What the Idea of Civilization Does (and Doesn’t) Mean to Trump”, in *The Washington Post*, 7 July 2017.

<sup>86</sup> The entire speech is available via Matthew Kahn, “National Security Adviser John Bolton Remarks to Federalist Society”, in *The Lawfare Blog*, 10 September 2018. For a critical account of this speech and the reaction it provoked see Alexander Heinze “Exaggerations and over-simplifications mar debate about John Bolton’s ICC Speech”, in *The Hill*, 3 October 2018.

<sup>87</sup> See *supra* note 14.

<sup>88</sup> Habermas, 2009, p. 315, see *supra* note 73.

<sup>89</sup> Ambos, 2013, pp. 293, 305–06, see *supra* note 49.

<sup>90</sup> Kant, 2006, p. 105, see *supra* note 69; Benhabib, 2006, pp. 21–22, see *supra* note 67. For a detailed analysis see Jasmine K. Gani, “The Erasure of Race: Cosmopolitanism and the Illusion of Kantian Hospitality”, in *Millennium*, 2017, vol. 45, no. 3, pp. 425 ff.; Kleingeld, 1998, p. 75, see *supra* note 76.

<sup>91</sup> Immanuel Kant, *The Metaphysics of Morals*, Mary J. Gregor trans., Cambridge University Press, Cambridge, 1991, p. 158, emphasis in the original ([www.legal-tools.org/doc/cb8e1e/](http://www.legal-tools.org/doc/cb8e1e/)); Huntley, 1996, pp. 45, 51, see *supra* note 74.

attempt without the other”,<sup>92</sup> and a free “public use of man’s reason”.<sup>93</sup> For Benhabib, therefore, human rights covenants can be qualified as cosmopolitan norms.<sup>94</sup>

Klaus Günther follows from Kant’s Third Definitive Article, that the application of public human rights is a necessary precondition for a permanent peace.<sup>95</sup> Kant justifies this precondition through a two-step argument, as indicated above. First,

[the] universal law of Right [*Rechtsgesetz*], so act externally that the free use of your choice can coexist with the freedom of everyone in accordance with a universal law, is indeed a law [*Gesetz*], which lays an obligation on me, but it does not at all expect, far less demand, that I myself should limit my freedom to those conditions just for the sake of this obligation; [...]. (*The Metaphysics of Morals*, p. 56 [231])

Second,

if (as must be the case in such a constitution) the agreement of the citizens is required to decide whether or not one ought to wage war, then nothing is more natural than that they would consider very carefully whether to enter into such a terrible game, since they would have to resolve to bring the hardships of war upon themselves [...]. (*Perpetual Peace*, [351])

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<sup>92</sup> Kant, 1991, p. 158, see *supra* note 91, fn. omitted.

<sup>93</sup> Immanuel Kant, “An Answer to the Question: What is ‘Enlightenment?’”, *Kant: Political Writings*, H.S. Reiss ed., H.B. Nisbet trans., Cambridge University Press, Cambridge, 1991, p. 55; Brown, 2006, pp. 661, 664, see *supra* note 62; Gani, 2017, p. 431, see *supra* note 90; Habermas, 2009, p. 321, see *supra* note 73:

Die Gefahr des Despotismus, die in allen von der Obrigkeit bloß auferlegten Gesetzen brütet, kann einzig durch das republikanische Verfahren einer fairen Meinungs- und Willensbildung aller potentiellen Betroffenen vorgebeugt werden.

<sup>94</sup> Seyla Benhabib, “Claiming Rights across Borders: International Human Rights and Democratic Sovereignty”, in *American Political Science Review*, 2009, vol. 103, no. 4, pp. 691, 696. Against this view with a narrow reading of hospitality, Vischer, 2017, p. 325, see *supra* note 31:

Kant’s cosmopolitan law is far from proclaiming a firm catalogue of human rights or even a world constitution. It only asserts in a rather moral than legal tone a minimal guarantee of peaceful intercourse, and explicitly presumes the ongoing asymmetry of host and visitor.

<sup>95</sup> See also Günther, 2009, p. 84, see *supra* note 72.

In sum, with this conception, Kant laid the foundations for all current conceptions of human dignity and world peace, an “international rule of law”.<sup>96</sup> Even though according to Definitive Article 2 international law is created through treaty obligations between States, cosmopolitan norms move the individual as a moral and legal person in a worldwide civil society into the centre of attention.<sup>97</sup> Nevertheless, I reiterate what was emphasised above: it is doubtful whether Kant can be read to propose a global super-State or other forms of international institutional governance of similar form.<sup>98</sup> Surely, Kant cuts the cord (of legal theory) between law and the State: for Kant, law implies the *Rechtsstaat* and “a republican form of governance”, as I have described above (“A state (civitas) is a union of a multitude of men under laws of Right”),<sup>99</sup> which is not necessarily limited to the institutional form of a nation-State, but “allows for the creation, interpretation, and, where necessary, enforcement of law”.<sup>100</sup>

Moreover, the empirical argument has been made that “Kant’s quite uncharacteristic claim that we should opt for a loose confederation of states because states will never *want* to join a transnational body with coercive powers [...] has to a large extent been falsified by twentieth-century developments”.<sup>101</sup> Habermas therefore proposes an “institutional” cosmopolitanism,<sup>102</sup> which is defined elsewhere as holding “that the

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<sup>96</sup> Huntley, 1996, pp. 45, 49, see *supra* note 74; Stone Sweet, 2012, pp. 53, 58, see *supra* note 27; Jorrik Fulda, “Eine legitime Globalverfassung? Die US-Hegemonie und die weltgesellschaftlich gerechte Vollendung des Kantischen Projektes”, in *Archiv des Völkerrechts*, 2016, vol. 54, no. 3, pp. 334, 345. About the role of human dignity in international human rights law and international criminal law, see Schmahl, 2018, pp. 79 ff., *supra* note 18.

<sup>97</sup> Benhabib, 2009, pp. 691, 695, see *supra* note 94.

<sup>98</sup> Habermas, 2009, pp. 313 ff., see *supra* note 73; Jürgen Habermas, *The Divided West*, Ciaran Cronin trans., Polity, Cambridge, 2006, pp. 115 ff.; Thomas Carson, “Perpetual Peace: What Kant Should Have Said”, in *Social Theory and Practice*, 1988, vol. 14, no. 2, pp. 173 ff.; Alexander Wendt, “Why a World State is Inevitable”, in *European Journal of International Relations*, 2003, vol. 9, no. 4, pp. 491 ff.

<sup>99</sup> Kant, 1991, p. 124, see *supra* note 91.

<sup>100</sup> Capps and Rivers, 2010, p. 234, see *supra* note 75. In the same vein, see Habermas, 2009, p. 337, *supra* note 73:

Der Staat ist keine notwendige Voraussetzung für Verfassungsordnungen.

<sup>101</sup> Kleingeld, 1998, p. 83, see *supra* note 76.

<sup>102</sup> Habermas, 2009, pp. 313 ff., see *supra* note 73; Habermas, 2006, pp. 115 ff., see *supra* note 98; Ronald Tinnevelde and Thomas Mertens, “The World State: A Forbidding Nightmare of Tyranny? Habermas on the Institutional Implications of Moral Cosmopolitanism”, in *German Law Journal*, 2009, vol. 10, no. 1, p. 65.

world's political structure should be reshaped so that states and other political units are brought under the authority of supranational agencies of some kind – a 'world government', for example, or perhaps a network of loosely associated regional bodies".<sup>103</sup> However, as promising (and worth pursuing) as institutional cosmopolitanism sounds, this is not what Kant had in mind, for whatever reason. Institutional cosmopolitanism leaves room for a pluralistic order, Kant does not.<sup>104</sup> Institutional cosmopolitanism (and Habermas in particular) feeds on systems theory,<sup>105</sup> Kant does not. Quite the opposite, systems theory provides an alternative to subjectivity and rationality.<sup>106</sup> And as convincing as it sounds that Kant might have refrained from making his empirical claim that an international State "is not the will of the nations, according to their present conception of international right",<sup>107</sup> had he enjoyed the privilege of witnessing the development of international law today,<sup>108</sup> this is and will always be hypothetical. In fact, it is common knowledge that a revolutionary idea gains more attention when it draws at least in part on realistic considerations<sup>109</sup> rather than on pure utopia. Who is to say that Kant would not have made the same claim today, considering the nationalist tendencies that conquer the world right now?<sup>110</sup> In fact, even Habermas admits that the risk of

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<sup>103</sup> Charles R. Beitz, "Cosmopolitan Liberalism and the States System", in Chris Brown (ed.), *Political Restructuring in Europe: Ethical Perspectives*, Routledge, London, 2009, pp. 119–20.

<sup>104</sup> Armin von Bogdandy and Sergio Dellavalle, "Universalism Renewed: Habermas' Theory of International Order in Light of Competing Paradigms", in *German Law Journal*, 2009, vol. 10, no. 1, p. 19.

<sup>105</sup> Tony Prosser, "Constitutions as Communication", in *International Journal of Constitutional Law*, 2017, vol. 15, no. 4, pp. 1039, 1047 ff.; von Bogdandy and Dellavalle, 2009, p. 17, see *supra* note 104. Critically Gunther Teubner, "Quod Omnes Tangit: Transnationale Verfassung ohne Demokratie?", in *Der Staat*, 2018, vol. 57, no. 2, pp. 171, 174–75.

<sup>106</sup> von Bogdandy and Dellavalle, 2009, p. 20, see *supra* note 104.

<sup>107</sup> Kant, 1991, p. 105, see *supra* note 29.

<sup>108</sup> Habermas, 2009, p. 313, see *supra* note 73.

<sup>109</sup> *Ibid.*:

Nach realistischer Auffassung ist eine normative Zählung der politischen Macht durch das Recht nur innerhalb der Grenzen eines souveränen Staates möglich, der seine Existenz auf die Fähigkeit zu gewaltsamer Selbstbehauptung stützt.

<sup>110</sup> Jürgen Habermas himself admits this:

Für die *empirische* Beobachtung, daß die Nationalstaaten auf ihrer Souveränität beharren, daß sie den Handlungsspielraum, den ihnen das klassische Völkerrecht zugesteht, 'durchaus' nicht aufgeben 'wollen', gibt es selbst heute noch genügend Evidenzen.

*Ibid.*, p. 325 (emphasis in the original).

“soulless despotism” by a world super power might be (or already is) increased through the use of mass media.<sup>111</sup>

It does not do justice to Kant’s normative work to accuse him of “a certain colour blindness” that is due to a “bias based on his contemporary horizon” and draw the hypothetical conclusion, Kant would have plead differently today.<sup>112</sup> Or to voice a demand like Fernando H. Llano does: “To overcome the chronological barrier separating us from Kant we must adapt the institutions of his project of perpetual peace to the present time and historical reality”<sup>113</sup> – as if it was certain that “the present time and historic reality” would have altered Kant’s approach considerably. I therefore agree with Capps and Julian Rivers that “those Kantians who advocate a world state, a state of peoples, a state of states, or anything that resembles the institutional form of a global state are incorrect if they consider their position to be that of Kant. And those interpreters who defend any of these institutional configurations as representative of Kant’s own view are mistaken”.<sup>114</sup> At the same time, Kant’s federation of States is certainly more than “a weak, noncoercive confederation of republican sovereign states, with minimal or no suprastate forms of institutional governance, in which states have plenary jurisdiction”, as Capps and Rivers propose.<sup>115</sup> As I will demonstrate in the course of this chapter, Kant’s federation does have the power to coerce States.

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<sup>111</sup> *Ibid.*, p. 346:

Und eine von elektronischen Massenmedien beherrschte Öffentlichkeit dient nicht weniger der Manipulation und Indoktrination als der Aufklärung (wobei oft das Privatfernsehen eine traurige Avantgardefunktion übernimmt).

<sup>112</sup> *Ibid.*:

Wenn wir der andauernden Relevanz des Kantischen Projekts gerecht werden wollen, müssen wir von den Befangenheiten absehen, die dem zeitgenössischen Horizont geschuldet sind. Auch Kant war ein Kind seiner Zeit und mit einer gewissen Farbenblindheit geschlagen.

<sup>113</sup> Fernando H. Llano, “European Constitutional Patriotism and Postnational Citizenship in Jürgen Habermas”, in *Archiv für Rechts- und Sozialphilosophie*, 2017, vol. 103, no. 4, p. 507.

<sup>114</sup> Capps and Rivers, 2010, pp. 230–31, see *supra* note 75.

<sup>115</sup> *Ibid.*, p. 230. Capps and Rivers draw their conclusion from a comparison of Kant’s remarks on the federation of states with “those made in support of a coercive and permanent federation of states set out in the Federalist Papers. Although geographically a substantial leap, this, at least, provides an exposition and critique of arguments for and against various forms of international governance at the time Kant was writing” (p. 246).

### 11.5.2. Protection of Human Rights on the International Level

Having understood Kant's idea of 'right' on the international level, the question now is whether and how Kant justifies an international institution to both protect human rights and punish possible violations of those rights. Some have argued that the State and the international community are called upon to protect the human dignity by way of criminal law.<sup>116</sup> According to Katrin Gierhake international punishment compensates, "on the individual level, for the material injustice brought about by an international crime with regard to the inter-personal relationship of citizens; on the general, universal level, supranational punishment operates as a restitution of the universal law and peace, equally violated by the international crime".<sup>117</sup> Consequently, the international wrong has to be negated by way of (supranational) punishment.<sup>118</sup> Others interpret Kant's Definitive Articles – especially the Kantian idea of a *Weltbürgerrecht*, his concept of human dignity, focusing on people instead of States as subjects of the international order – more like a cosmopolitan vision.<sup>119</sup> Human dignity is here also understood as a moral source of subjective rights of all people, of universally recognised human rights which ultimately have to be protected by a universal, interculturally recognised criminal law. It is a form of cosmopolitanism based on principles of reason with a claim of universal validity.<sup>120</sup>

#### 11.5.2.1. A "Violation of Rights in *One Part of the World is Felt Everywhere*"

The remark that is of crucial meaning for the ICC is the following:

The peoples of the earth have thus entered in varying degrees into a universal community, and it has developed to the point where a violation of rights in one part of the world is felt everywhere. (*Perpetual Peace*, p. 108)

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<sup>116</sup> Ambos, 2013, pp. 293, 306, see *supra* note 49 with further references.

<sup>117</sup> Katrin Gierhake, *Begründung des Völkerstrafrechts auf der Grundlage der Kantischen Rechtslehre*, Duncker & Humblot, Berlin, 2005, pp. 165–66, 297, 299 and *passim*, cited in and translated by Ambos, 2013, pp. 293, 307, see *supra* note 49.

<sup>118</sup> Gierhake, 2005, see *supra* note 117; Ambos, 2013, pp. 293, 307, see *supra* note 49.

<sup>119</sup> Ambos, 2013, pp. 307–08, see *supra* note 49.

<sup>120</sup> *Ibid.*

What is ‘a violation of rights in one place that is felt throughout the world’? This is a rather “forceful declaration”.<sup>121</sup> When Kant made this statement, “European states were affirming their sovereignty and, at the same time, were colonizing all other continents”.<sup>122</sup> How can one ‘feel’ a human rights violation in Northern Uganda, Afghanistan, or Colombia? There have been several attempts to answer that question. Reinhard Merkel, for instance, opines that “felt” means more than following or noting a human rights violation – it is a symbolic harm of the validity of a *Grundnorm* (Kelsen).<sup>123</sup> This reading might indeed be supported by Kant’s understanding that the public is more than a public of reason but a coming together of citizens:<sup>124</sup> “We are here concerned only with the attitude of the onlookers as it reveals itself in public while the drama of great political changes is taking place”.<sup>125</sup> David Luban opines that it symbolises an assault on “the core humanity and that we all share and that distinguishes us from other human beings”, on “the individuality and sociability of the victims in tandem”.<sup>126</sup> This goes in the direction of what Georg Schwarzenberger expressed in 1950: international crimes “strike at the very roots of international society”.<sup>127</sup> Or in the words of Ronald Tinnevelt and Thomas Mertens: “The world truly shares a common fate”.<sup>128</sup>

However, is this not an over-interpretation of the word ‘felt’? Compared with all the complicated terminology Kant deliberately used throughout his works, why would he use such a simple and emotional word like ‘felt’ to make such an important point? This cannot be a coinci-

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<sup>121</sup> Daniele Archibugi, “A Cosmopolitan Perspective on Global Criminal Justice”, in *SSRN*, 2015, p. 5.

<sup>122</sup> *Ibid.*

<sup>123</sup> Reinhard Merkel, “‘Lauter leidige Tröster’? Kants Friedensschrift und die Idee eines Völkerstrafgerichtshofs”, in Reinhard Merkel and Roland Wittmann (eds.), *Zum ewigen Frieden: Grundlagen, Aktualität und Aussichten einer Idee von Immanuel Kant*, Suhrkamp, Berlin, 1996, pp. 309, 349.

<sup>124</sup> James Donald, “Kant, the Press, and the Public Use of Reason”, in *Javnost - The Public*, 2003, vol. 10, no. 2, p. 53.

<sup>125</sup> Immanuel Kant, “The Contest of Faculties”, *Kant: Political Writings*, H.S. Reiss ed., H.B. Nisbet trans., Cambridge University Press, Cambridge, 1991, p. 182.

<sup>126</sup> Ambos, 2013, p. 312, see *supra* note 49.

<sup>127</sup> Georg Schwarzenberger, “The Problem of International Criminal Law”, in *Current Legal Problems*, 1950, vol. 3, no. 1, pp. 263, 273.

<sup>128</sup> Tinnevelt and Mertens, 2009, p. 63, see *supra* note 102, who opine that:

These words seem to resonate with Immanuel Kant’s famous statement that ‘a violation of right on one place of the earth is felt in all’.

dence, because first, the official *a priori* character of Kant's *Critique of Judgement*<sup>129</sup> determines his language: Kant said that *a priori* knowledge is knowledge that is independent of all experience<sup>130</sup> and experience includes language.<sup>131</sup> Kant therefore had to make his language applicable to his *a priori* concepts, which turned his language into an almost mathematical tool.<sup>132</sup> Second, there is indeed an indication in Kant's writings of how he understands "felt":

Enjoyment which someone (legally) acquires himself is doubly felt. (*Anthropology*, p. 134 [238])

When [a child] starts to speak by means of "I" a light seems to dawn on him, as it were, and from that day on he never again returns to his former way of speaking. – Before he merely felt himself; now he thinks himself. (*Anthropology*, p. 15 [127])

Epistemologically, there is a difference between thinking and feeling and many authors confuse the two.<sup>133</sup> Even more important is the explanation provided by Kant: violations of rights are felt everywhere not because humans are creatures of the same God or because they belong to the same race:

[F]or all men are entitled to present themselves in the society of others by virtue of their right to communal possession of the earth's surface. Since the earth is a globe, they cannot disperse over an infinite area, but must necessarily tolerate one another's company. [...] to utilise as a means of social intercourse that right to the earth's surface which the human race shares in common. (*Perpetual Peace*, p. 106)

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<sup>129</sup> Brown, 2006, pp. 661, 664, see *supra* note 62.

<sup>130</sup> Immanuel Kant, *Critique of Judgment*, Oxford University Press, Oxford, 2007, pp. 15 ff.

<sup>131</sup> Natascha Gruber, "Sprachphilosophische Überlegungen zu Kants Transzendentalphilosophie. Zum Verhältnis von Sprache und Denken", in Martina Fürst, Wolfgang Gombocz and Christian Hiebaum (eds.), *Analysen, Argumente, Ansätze*, Editiones Scholasticae, Ontos, 2008, pp. 115, 118.

<sup>132</sup> Michael N. Forster, "Kant's Philosophy of Language?", in *Tijdschrift voor Filosofie*, 2012, vol. 74, no. 3, p. 485; Andrea Staiti, "The Neo-Kantians on the Meaning and Status of Philosophy", in Nicolas De Warren and Andrea Staiti (eds.), *New Approaches to Neo-Kantianism*, Cambridge University Press, Cambridge, 2015, p. 19 ("Kant created a new language").

<sup>133</sup> Merkel, for instance, interprets "felt" as "being aware of" or "having knowledge", see Merkel, 1996, pp. 309, 349, *supra* note 123.

Thus, Kant does not provide a metaphysical justification, but rather a social justification.<sup>134</sup> “Felt” is therefore a form of ‘social empathy’ that Kant finds in his definition of public.<sup>135</sup> As I have previously remarked, there is an important difference between Kant’s cosmopolitan law on the one hand and the much older natural law tradition on the other hand.<sup>136</sup> In the natural law tradition, “rights exist as long as humans exist. Under cosmopolitan law, rights violations are perceived everywhere because of human interconnections. In other words, they are associated to a specific historical context”<sup>137</sup>.

### 11.5.2.2. Human Rights Violations and the Global Public Sphere

The medium through which human rights violations are felt everywhere is communication on the platform of a public sphere. What Kant identifies is “a ‘world community’ manifesting moral duties beyond the state and common to all”, originating in the priority of human freedom.<sup>138</sup> The public is the collective body of all citizens, but there is no reason why it could not also be a Kantian “world at large”, which contains the viewpoint of “everyone else”:

[A]s a scholar addressing the real public (i.e. the world at large) through his writings, the clergyman making public use of his reason enjoys unlimited freedom to use his own reason and to speak in his own person. (*What is Enlightenment*, p. 57)

In this sense, we can speak of a world public opinion, and of various ways in which even this largest of publics may be politically organised.<sup>139</sup> Kant promotes a pluralistic conception of reason.<sup>140</sup> But what is this public at large?

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<sup>134</sup> Archibuigi, 2015, p. 5, see *supra* note 121.

<sup>135</sup> For a similar interpretation, albeit in a slightly different context, see Donald, 2003, p. 54, *supra* note 124.

<sup>136</sup> Archibuigi, 2015, p. 5, see *supra* note 121.

<sup>137</sup> *Ibid.*

<sup>138</sup> Huntley, 1996, pp. 45, 51, see *supra* note 74.

<sup>139</sup> About the public use of reason in detail, see Donald, 2003, pp. 45 ff., *supra* note 124.

<sup>140</sup> *Ibid.*, p. 48.

Habermas spoke of world societies because communication systems and markets have created a global context.<sup>141</sup> I wish to reiterate that I employ the Habermasian discursive theory<sup>142</sup> without adopting his rather radical interpretation of Kant that leads to an institutional cosmopolitanism.<sup>143</sup> Due to its normative dimension,<sup>144</sup> not only does Habermas's intersubjective framework<sup>145</sup> provide a fitting paradigm for the international community that is connected through mass media, but it also complements the Kantian Universal Principle of Right. However, it does not justify the crossing of Kant's red line between the federation of States and a global super-state. James Bohman proposes a cosmopolitan public sphere to change and create democratic institutions,<sup>146</sup> which functions to "keep debate open to revise decisions that have already been made".<sup>147</sup> He thereby uses the advantages of a transnational (constitutional) regime, where self-contradiction is reached through the media and not through the democratic process known in national entities.<sup>148</sup> This public sphere can eventually lead to a constitutional moment as proposed by Bruce Acker-

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<sup>141</sup> Jürgen Habermas, "Kant's Idea of Perpetual Peace with the Benefit of 200 Years' Hind-sight", in James Bohman and Matthias Lutz-Bachmann (eds.), *Perpetual Peace: Essays on Kant's Cosmopolitan Ideal*, MIT Press, Cambridge, 1997, p. 131; Habermas, 2009, p. 344, see *supra* note 73:

Es geht vielmehr um die theoretische Frage, ob die globale Meinungsbildung in einer informellen Öffentlichkeit, ohne verfassungsrechtlich institutionalisierte Wege der Umsetzung kommunikativ erzeugten Einflusses in politische Macht, der Weltbürgergesellschaft eine hinreichende Integration und der Weltorganisation eine hinreichende Legitimation verschaffen kann.

In favour also Perju, 2018, p. 67, see *supra* note 75, who, however, rejects Habermas' dual sovereignty thesis.

<sup>142</sup> Jürgen Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy*, MIT Press, Cambridge, 1996; Prosser, 2017, p. 1045, see *supra* note 105.

<sup>143</sup> See Section 11.5.1. above.

<sup>144</sup> Prosser, 2017, p. 1047, see *supra* note 105.

<sup>145</sup> von Bogdandy and Dellavalle, 2009, p. 20, see *supra* note 104.

<sup>146</sup> James Bohman, "The Public Spheres of the World Citizen", in James Bohman and Matthias Lutz-Bachmann (eds.), *Perpetual Peace: Essays on Kant's Cosmopolitan Ideal*, MIT Press, Cambridge, 1997, p. 187.

<sup>147</sup> *Ibid.*, p. 188.

<sup>148</sup> See Teubner, 2018, p. 192, see *supra* note 105:

Kommunikationsmedien machen den Unterschied. Über ihr eigenes Kommunikationsmedium entwickeln transnationale Regimes je eine idiosynkratische Episteme, die auf eine entsprechende idiosynkratische Form des demokratischen Selbst-Widerspruchs angewiesen ist.

man. Kant explicitly emphasised the freedom of the press: “Thus *freedom of the pen* is the only safeguard of the rights of the people”.<sup>149</sup> Bohman draws on this important role of the media:<sup>150</sup> “In complex societies, public deliberation is mediated not only by the powerful institutions of the state but also by the mass media, which have the capacity to reach a large and indefinite audience”.<sup>151</sup> This resonates with the following remark in Kant’s *Critique of Pure Reason*: “Our age is, in especial degree, the age of criticism, and to criticism everything must submit”.<sup>152</sup> The media today (especially social media) is not merely the channel through which opinions, and “likes and dislikes”<sup>153</sup> are exchanged. Thus, the public “that read and debated these matters read and debated about itself”, not only about its own opinions but about itself as a practically reasoning public.<sup>154</sup>

In fact, the role of the media has long changed from a mere transmitter of ideas that find its ways into the political (parliamentary) debate to being the real forum of political debate.<sup>155</sup> Bohman even goes so far to state that “media institutions are the only means powerful enough to achieve a cosmopolitan public sphere, although they are currently not part of it. [S]uch media are conceivable as channels by which to appeal to an indefinitely large audience and by which social movements in civil socie-

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<sup>149</sup> Immanuel Kant, “On the Common Saying: ‘This May Be True in Theory, But it Does Not Apply in Practice’”, *Kant: Political Writings*, H.S. Reiss ed., H.B. Nisbet trans., Cambridge University Press, Cambridge, 1991, p. 85 (emphasis in the original). As Donald interprets, however, Kant is here “actually talking about freedom of authorship and publication (*die Freiheit der Feder*, freedom of the pen) in the particular context of citizens having a right to public abuse, injustice or errors in the administration of the state. In other words, he is talking about public exposure, rather than a necessary feature of the public conceived as a forum of learned debate and communication”. See Donald, 2003, p. 50, *supra* note 124 (emphasis in the original).

<sup>150</sup> Bohman, 1997, p. 193, see *supra* note 146.

<sup>151</sup> *Ibid.*, p. 196.

<sup>152</sup> Immanuel Kant, *Critique of Pure Reason*, Norman Kemp-Smith trans., 2nd edition, Macmillan, London, 2007, A, p. xii. See also David Owen, “The Contest of Enlightenment: An Essay on Critique and Genealogy”, in *Journal of Nietzsche Studies*, 2003, vol. 25, pp. 35–36; Donald, 2003, p. 55, see *supra* note 124.

<sup>153</sup> Bohman, 1997, pp. 189–90, see *supra* note 146.

<sup>154</sup> *Ibid.*

<sup>155</sup> Karl-Heinz Ladeur, “Persönlichkeitsschutz und ‘Comedy’ - Das Beispiel der Fälle SAT 1/Stahnke und RTL 2/Schröder”, in *Neue Juristische Wochenschrift*, 2000, vol. 54, no. 28, pp. 1977–78.

ty may gain and structure international public attention to shared problems”.<sup>156</sup>

Kant’s “negative substitute” (Definitive Article 2) enables the reshaping of “political institutions in accordance with cosmopolitan right” and “may even create and then continually reshape new, international institutions based on the principle of interlinked public spheres in which world citizens exercise their sovereignty”.<sup>157</sup> In a way, this is what happened in the 1990s when the UN *ad hoc* tribunals were established and a “transition from a Kantian universalism to a more contextualised cosmopolitanism” took place.<sup>158</sup>

### **11.6. The Institutional Justification of the ICC**

After these rather abstract and descriptive accounts of those of Kant’s writings that are relevant for the justification of the ICC, I would now like to apply them to the legal regime of the Court, and especially to its Statute. This warrants a short reminder of the findings in the first section of this chapter. A wrong is a hindrance to freedom in accordance with universal laws and as a consequence, *State* coercion (punishment) is just and has to be done with the purpose of retribution. Does this, however, not only apply to State coercion but also to coercion by an international organisation?

#### **11.6.1. The *Ius Puniendi* of the ICC**

In other words, punishment can only be justified by the State’s power to punish (*ius puniendi*) and eventually by certain *purposes* of punishment. I lean towards translating *ius puniendi* as ‘power’ and not ‘right’ to punish, to avoid confusion with the *ius poenale*. Reinhard Maurach and Heinz Zipf distinguish *ius poenale* and *ius puniendi* as the objective and subjective right to punish, respectively.<sup>159</sup> The *ius poenale* describes the sum of

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<sup>156</sup> Bohman, 1997, p. 196, see *supra* note 146.

<sup>157</sup> Habermas, 1997, p. 181, see *supra* note 141; cf. Habermas, 2009, p. 344, see *supra* note 73, who opines that the alternatives of world federations v. global super-state are inconclusive. See also Vischer, 2017, p. 323, see *supra* note 31; Capps and Rivers, 2010, p. 235, see *supra* note 75; Vlad Perju, “Cosmopolitanism and Constitutional Self-Government”, in *International Journal of Constitutional Law*, 2010, vol. 8, no. 3, p. 328.

<sup>158</sup> Daniel Levy and Natan Sznaider, “The Institutionalization of Cosmopolitan Morality: The Holocaust and Human Rights”, in *Journal of Human Rights*, 2004, vol. 3, no. 2, pp. 143, 153.

<sup>159</sup> See Reinhard Maurach and Heinz Zipf, *Strafrecht: Allgemeiner Teil, Vol. 1: Grundlehren des Strafrechts und Aufbau der Straftat*, C.F. Müller, Heidelberg, 1992, p. 3.

rules about offences, sentences and other forms of punishment. The *ius puniendi* is the State power to punish, that is, the State's capacity – resulting from its sovereignty – to declare certain conduct as punishable and to determine a sentence.<sup>160</sup> Thus, the *ius poenale* is the result of a *ius puniendi*.<sup>161</sup> Others also distinguish between the subjective and objective right to punish, but for them the subjective right to punish is more of a right and less of an inherent power.<sup>162</sup> Here, the premise is different from my premise: while I agree with the above-mentioned authors that a *ius poenale* presupposes a *ius puniendi*, for Franz von Holtzendorff, for example, it is the other way around – a *ius puniendi* presupposes a *ius poenale*.<sup>163</sup> In other words: only when there exists a body of rules about offences, sentences, and other forms of punishment, does the State have the *right* to punish. This goes to Wesley Hohfeld's classical analysis of 'right' that includes – *inter alia* – a power, *in concreto*: the right to punish comprises both the normative power and the State's permissibility to punish.<sup>164</sup> Especially a State's jurisdiction stems from a State's power to punish and only indirectly from a right.<sup>165</sup>

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<sup>160</sup> *Ibid.*

<sup>161</sup> In a similar vein, Hans-Heinrich Jescheck, *Lehrbuch des Strafrechts: Allgemeiner Teil*, Duncker & Humblot, Berlin, 1978, p. 8:

Das Strafrecht beruht auf der Strafgewalt ("ius puniendi") des Staates, und diese ist wiederum Teil der Staatsgewalt (emphasis in the original, fn. omitted).

<sup>162</sup> See Hilde Kaufmann, *Strafanspruch, Strafklagerecht: Die Abgrenzung des materiellen und formellen Strafrechts*, Otto Schwartz & Co, Göttingen, 1969, pp. 71–72 with further references.

<sup>163</sup> *Ibid.*, p. 72; Franz von Holtzendorff, "Einleitung in das Strafrecht", in Franz von Holtzendorff (ed.), *Handbuch des deutschen Strafrechts in Einzelbeiträgen, Vol. 1: Die geschichtlichen und philosophischen Grundlagen des Strafrechts*, Lüderitzsche Verlagsbuchhandlung, Berlin, 1871, p. 3:

Jedes staatliche Recht auf Bestrafung (*jus puniendi*) ist an das Vorhandensein eines positiven Rechtssatzes (*jus poenale*) geknüpft, durch welchen eine Handlung als verbrecherisch erklärt und die darauf anzuwendende Strafe bestimmt wird.

<sup>164</sup> Alejandro Chehtman, "Jurisdiction", in Markus D. Dubber and Tatjana Hörnle (eds.), *The Oxford Handbook of Criminal Law*, Oxford University Press, Oxford, 2014, p. 402.

<sup>165</sup> Permanent Court of International Justice, *The Case of the S.S. "Lotus" (France v. Turkey)*, Judgment, 7 September 1927, Series A, no. 10, para. 45:

Now the first and foremost restriction imposed by international law upon a State is that – failing the existence of a *permissive rule* to the contrary – it may not exercise its *power* in any form in the territory of another State. In this sense jurisdiction is certainly territorial; it cannot be exercised by a State outside its territory except by virtue of a

For three reasons, however, the emanation of a power to punish (*ius puniendi*) from a right to punish (*ius poenale*) is not convincing. First, the Hobbesian ‘right’ to punish should not be confused with a Hohfeldian ‘right’ to punish.<sup>166</sup> According to Hobbes, State punishment stems from the right to self-preservation.<sup>167</sup> Even though, strictly speaking, this right belongs to all natural, mortal humans, the sovereign possesses it through the State’s existence in a specific state of nature *vis-à-vis* a natural person.<sup>168</sup> Second, especially at an extraterritorial and/or international level, beyond a right to punish “we must also account for a specific body having the authority to exercise that right”.<sup>169</sup> Third, should the *ius puniendi* really presuppose a *ius poenale*, the question of why a State has the right to punish is obsolete – a classical *circulus vitiosus*.<sup>170</sup>

Here, the development of the term *ius puniendi* deserves closer consideration. It originally only described the power to punish, also known as *potestas criminalis*, and included the State’s power to punish, resulting from superiority (*Selbsherrlichkeit, Imperium*), a superior right and duty to protect (*hoheitliches Schutzrecht mit Schutzpflicht*) or the *ius eminens*, comparable with Hobbes’s right to self-preservation.<sup>171</sup> The power to pun-

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permissive rule derived from international custom or from a convention (emphasis added) ([www.legal-tools.org/doc/c54925/](http://www.legal-tools.org/doc/c54925/)).

<sup>166</sup> Alice Ristroph, “Respect and Resistance in Punishment Theory”, in *California Law Review*, 2009, vol. 97, no. 2, p. 603 with fn. 8.

<sup>167</sup> Thomas Hobbes, *Leviathan*, Richard Tuck ed., Cambridge University Press, Cambridge, 1996/2003, p. 214:

[E]very man had a right to every thing, and to do whatsoever be thought necessary to his own preservation; subduing, hurting, or killing any man in order thereunto. And this is the foundation of that right of Punishing, which is exercised in every Commonwealth. For the Subjects did not give the Sovereign that right; but onely in laying down theirs, strengthened him to use his own, as he should think fit, for the preservation of them all: so that it was not given, but left to him, and to him onely; and (excepting the limits set him by naturall Law) as entire, as in the condition of meer Nature, and of warre of every one against this neighbour.

See also, Ristroph, 2009, pp. 613–14.

<sup>168</sup> *Ibid.*, p. 615, see *supra* note 166.

<sup>169</sup> Alejandro Chehtman, *The Philosophical Foundations of Extraterritorial Punishment*, Oxford University Press, Oxford, 2010, p. 6.

<sup>170</sup> In the same vein, Peter Klose, “‘Ius puniendi’ und Grundgesetz”, in *Zeitschrift für die gesamte Strafrechtswissenschaft*, 1974, vol. 86, no. 1, p. 36.

<sup>171</sup> *Ibid.*

ish had a pre-positive origin<sup>172</sup> and became successively intertwined with the positive right to punish as result of the triumph of liberal criminal law,<sup>173</sup> constructing juridical relationships between the State as a (criminal law) legislator, and the State as possessing the right to punish.<sup>174</sup> This, however, ignores that the *ius poenale* can hardly have the function of being both the criminal law (right), which is addressed to the citizens, and the basis of punishment (power), at the same time.

Be that as it may, both theoretical elements – the *ius puniendi* and the purpose of punishment – are highly disputed on an international level. International criminal law lacks a consolidated punitive power in its own right, since it does not operate pursuant to a legislative body, but instead claims the ability to punish without the status of a sovereign nation.<sup>175</sup> In fact, for Kant, law cannot exist without a public power to enforce it.<sup>176</sup> Others provided similar arguments: At the international level a normative order is absent where norms are recognised by the society as a whole and determine social communication; this, however, is a requirement for the power to punish (Günther Jakobs);<sup>177</sup> law cannot exist without the State (Thomas Hobbes).<sup>178</sup> However, a more fundamental question arises as to whether it makes sense at all to apply the theories of validity of norms, developed with classical sovereign nations in mind, to a supranational order which follows different rules of organisation.<sup>179</sup> Here, the enforcement of fundamental human rights by international criminal law come to the rescue of the international community's *ius puniendi*, eventually blurring the lines between the community's obligation to protect human rights and its power to punish human rights abuses. As previously mentioned, it

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<sup>172</sup> Heinrich Luden, *Handbuch des deutschen gemeinen und particularen Strafrechts*, vol. 1, Friedrich Luden, Jena, 1847, p. 6.

<sup>173</sup> Klose, 1974, pp. 39–41, see *supra* note 170.

<sup>174</sup> Karl Binding, *Handbuch des Strafrechts*, Duncker & Humblot, Berlin, 1885, p. 191.

<sup>175</sup> Ambos, 2013, p. 298, see *supra* note 49.

<sup>176</sup> *Ibid.*, p. 300.

<sup>177</sup> Günther Jakobs, “Untaten des Staates – Unrecht im Staat: Strafe für die Tötungen an der Grenze der ehemaligen DDR?“, in *Goldammer's Archiv für Strafrecht*, 1994, vol. 141, no. 1, pp. 13–14. Jakobs *expressis verbis* refers to the state's ‘power’ and not ‘right’ to punish, since a power to punish is a necessary requirement for the right to punish. In Jakobs's own words: “Ohne staatliche Gewalt gibt es kein staatliches Recht” (p. 13). See also Ambos, 2013, pp. 299–300, *supra* note 49.

<sup>178</sup> Jakobs, 1994, p. 300, see *supra* note 177.

<sup>179</sup> *Ibid.*, p. 303.

was Kant who had the idea of human dignity as a source of fundamental human (civil) rights which, ultimately, must be enforced by a supra- or transnational (criminal) law.<sup>180</sup> Thus, Kant's conception of human dignity, complemented by his view of 'perpetual peace' leaves the door open for a *ius puniendi* of the international community: first, a just and permanent peace is established through the recognition of and respect for the rights of the citizens, that is, human rights. Secondly, violations of human rights must be identified as serious wrongs and punished. Reinhard Merkel and Klaus Günther demand stigmatisation and punishment for these violations in service of the confirmation and reinforcement of fundamental human rights norms.<sup>181</sup>

The question now is whether it is an ICC that can punish individuals for human rights violations.

### 11.6.2. Can States Be Coerced?

However, some may rightly point out that the following remark is proof that Kant did not advocate for an international criminal court:<sup>182</sup>

[W]hile natural right allows us to say of men living in a lawless condition that they ought to abandon it, the right of nations does not allow us to say the same of states. For as states, they already have a lawful internal constitution, and have thus outgrown the coercive right of others to subject them to a wider legal constitution in accordance with their conception of right. (*Perpetual Peace*, p. 103)

Admittedly, the remark that States "have thus outgrown the coercive right of others" can easily be understood as a rejection of something like international criminal justice and an obligation to co-operate or detain.<sup>183</sup> This reading, however, ignores the fact that what Kant requires is a *de iure* coercive effect and not a *de facto* one;<sup>184</sup> Pauline Kleingeld views

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<sup>180</sup> *Ibid.*, p. 304.

<sup>181</sup> *Ibid.*

<sup>182</sup> Steven C. Roach, *Governance, Order, and the International Criminal Court: Between Realpolitik and a Cosmopolitan Court*, Oxford University Press, Oxford, 2009, p. 152, fn. 3.

<sup>183</sup> Capps and Rivers, 2010, p. 245, see *supra* note 75.

<sup>184</sup> Merkel, 1996, pp. 309, 319, see *supra* note 123.

“*Recht* (rights, rightful law) and the use of necessary coercion as two sides of the same coin”.<sup>185</sup>

[C]oercion is a hindrance or resistance to freedom. Therefore, if a certain use of freedom is itself a hindrance to freedom in accordance with universal laws (i.e., wrong), coercion that is opposed to this (as a hindering of a *hindrance to freedom*) is consistent with freedom in accordance with universal laws, that is, it is right. Hence there is connected with Right by the principle of contradiction an authorization to coerce someone who infringes upon it. (*The Metaphysics of Morals*, p. 57 [232])

A *de iure* meaning of coercion on an international level, however, cannot be found in its domestic understanding.<sup>186</sup> Right may therefore comprise more or less formalised coercion mechanisms.<sup>187</sup> Hans Kelsen, for whom – like Kant – a characteristic of laws is “that they are coercive orders”,<sup>188</sup> includes sanctions such as ‘reprisals’ in this coercive order.<sup>189</sup> These sanctions can also be used to “regulate the mutual behaviour of states”.<sup>190</sup> Kelsen’s idea of *non sub homine, sed sub lege* – the binding force emanates, not from any commanding human being, but from the impersonal anonymous ‘command’ as such<sup>191</sup> – can, in my view, also be applied to Kant: in a system of right, there is a subordination under the law, that is, the legislator:

Each nation, for the sake of its own security, can and ought to demand of the others that they should enter along with it into a constitution, similar to the civil one, within which the rights of each could be secured. This would mean establishing a *federation of peoples*. But a federation of this sort would not be the same thing as an international state. For the idea of an international state is contradictory, since every

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<sup>185</sup> Kleingeld, 1998, p. 81, see *supra* note 76.

<sup>186</sup> H.L.A. Hart, *The Concept of Law*, 2nd edition, Clarendon Press, Oxford, 1994, pp. 213 ff.; Merkel, 1996, pp. 309, 319, see *supra* note 123.

<sup>187</sup> *Ibid.*

<sup>188</sup> Hans Kelsen, *Pure Theory of Law*, Lawbook Exchange, Clark, 2005, p. 33.

<sup>189</sup> Hans Kelsen, “Sanctions in International Law under the Charter of the United Nations”, in *Iowa Law Review*, 1946, vol. 31, pp. 499–500.

<sup>190</sup> *Ibid.*

<sup>191</sup> Hans Kelsen, *General Theory of Law and State*, Transaction Publishers, London, 2006, p. 36.

state involves a relationship between a superior (the legislator) and an inferior (the people obeying the laws), whereas a number of nations forming one state would constitute a single nation. And this contradicts our initial assumption, as we are here considering the right of nations in relation to one another in so far as they are a group of separate states which are not to be welded together as a unit. (*Perpetual Peace*, p. 102)

and not under other human beings (“leave the state of nature”).

[U]nless [the individual] wants to renounce any concepts of Right, the first thing it has to resolve upon is the principle that it must leave the state of nature, in which each follows its own judgment, unite itself with all others (with which it cannot avoid interacting), subject itself to a public lawful external coercion, and so enter into a condition in which what is to be recognized as belonging to it is determined by law and is allotted to it by adequate power (not its own but an external power); that is to say, it ought above all else to enter a civil condition. (*The Metaphysics of Morals*, p. 124 [312])

The coercive authority of the ICC can therefore be justified by a combination of Kant’s *de iure* approach to coercion on the one hand, and his ‘negative substitute’ on the other. Thus, even though Kant’s cosmopolitan right requires an hierarchical authority, “its success depends upon its legitimacy, not its coercive power alone”.<sup>192</sup> Antonio Franceschet seems to borrow from Kelsen when he opines that the “ICC’s coercive authority has moral legitimacy if and when it effectively supports (or substitutes for) the default role of sovereign states in systematic rights vindication”, which basically means that the coercion of States would be legitimate as long as this establishes freedom at the national, international, and supranational level.<sup>193</sup> This resembles Koskenniemi’s reading of Kant and Kelsen:

If for Kant (and for Kelsen) the transition from the realm of nature (or from raw desire and violence) to the realm of freedom in a ‘kingdom of ends’ takes place through law, this transition depends less on the inner force of (external) legis-

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<sup>192</sup> Huntley, 1996, pp. 45, 60, see *supra* note 74. See also Franceschet, 2002, pp. 93–94, *supra* note 52.

<sup>193</sup> Franceschet, 2002, pp. 93, 98–99, see *supra* note 52.

lation than on the moral rectitude of those whose task is to apply it.<sup>194</sup>

### 11.7. Can the ICC Statute Live up to the Institutional Justification of the ICC?

Right is therefore the sum of the conditions under which the choice of one can be united with the choice of another in accordance with a universal law of freedom. (*The Metaphysics of Morals*, p. 56 [230])

Freedom (independence from being constrained by another's choice), insofar as it can coexist with the freedom of every other in accordance with a universal law, is the only original right belonging to every man by virtue of his humanity. (*The Metaphysics of Morals*, p. 63 [238])

Kant placed human rights in his doctrine of right: human beings (merely by virtue of their “humanity”) have one and only one innate right, namely the right to freedom of action.<sup>195</sup> In other words, human rights can only exist within an existing legal order, whether it is domestic or international legal order.<sup>196</sup> The latter requires a certain form of institutionalisation.<sup>197</sup> In Jürgen Habermas's view, the constitutionalisation of international law is a complementary project of cosmopolitanism – a way to renew or sustain the cosmopolitan project at a time in which it is threatened by alternative visions of world order, such as a US hegemonic liberalism or a global Hobbesian order.<sup>198</sup>

With the establishment of the ICC, the international community practically ‘amended’ the global constitutional order.<sup>199</sup> This amendment, however, must meet the requirements of constitutionalisation – “cosmopolitan ends must include cosmopolitan institutional means”.<sup>200</sup>

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<sup>194</sup> Koskenniemi, 2007, p. 11, see *supra* note 30.

<sup>195</sup> Hans Reiss, “Introduction”, *Kant: Political Writings*, H.S. Reiss ed., H.B. Nisbet trans., Cambridge University Press, Cambridge, 1991, p. 11; Habermas, 1997, p. 140, see *supra* note 141.

<sup>196</sup> Habermas, 1997, p. 140, see *supra* note 141.

<sup>197</sup> *Ibid.*

<sup>198</sup> Bardo Fassbender, *The United Nations Charter as the Constitution of the International Community*, Martinus Nijhoff Publishers, Boston, 2009, p. 162.

<sup>199</sup> Roach, 2009, pp. 196–97, see *supra* note 182.

<sup>200</sup> *Ibid.*, p. 198.

### 11.7.1. Constitution and Constitutionalism

There are numerous ways to conceptualise the term ‘constitution’.<sup>201</sup> I have described above how Kant envisioned a constitution. Read in conjunction with the Second Definitive Article, “constitutions can be seen as a conscious contract between mutually agreed participants, outlining the terms and conditions of a juridical order while also providing possible limitations to the reach of those constitutions”.<sup>202</sup> Kelsen distinguishes between a constitution in a material and formal sense.<sup>203</sup> While a formal constitution “is a certain solemn document, a set of legal norms that may be changed only under the observation of special prescriptions, the purpose of which it is to render the change of these norms more difficult”, a constitution in a material sense “consists of those rules which regulate the creation of the general legal norms, in particular the creation of statutes”.<sup>204</sup> In a formal understanding, the constitution is the “highest level of positive law” and the centre of a hierarchical system,<sup>205</sup> resting on an “ultimate source of law” called the *Grundnorm* (“basic norm”)<sup>206</sup> or a “rule of recognition”.<sup>207</sup>

Joseph Raz observes the use of the term ‘constitution’ in a “thin” and “thick” sense. As to the former, a constitution “is simply the law that establishes and regulates the main organs of government, their constitution and powers”, including “law that establishes the general principles under which the country is governed: democracy, if it establishes democratic organs of government; federalism, if it establishes a federal struc-

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<sup>201</sup> Julian Arato, “Treaty Interpretation and Constitutional Transformation: Informal Change in International Organizations”, in *Yale Journal of International Law*, 2013, vol. 38, no. 2, pp. 289, 296.

<sup>202</sup> Brown, 2006, pp. 661, 675, see *supra* note 62.

<sup>203</sup> Kelsen, 2006, p. 124, see *supra* note 191.

<sup>204</sup> *Ibid.*

<sup>205</sup> Hans Kelsen, *Introduction to the Problems of Legal Theory: A Translation of the First Edition of the Reine Rechtslehre or Pure Theory of Law*, Bonnie Litschewski Paulson and Stanley L. Paulson trans., Clarendon Press, Oxford, 1997, p. 64.

<sup>206</sup> *Ibid.*, p. xxviii. See also Andreas Paulus, “The International Legal System as a Constitution”, in Jeffrey Dunoff and Joel Trachtman (eds.), *Ruling the World? Constitutionalism, International Law & Global Government*, Cambridge University Press, Cambridge, 2009, pp. 69, 74.

<sup>207</sup> Hart, 1994, pp. 100 ff., see *supra* note 186.

ture; and so on”.<sup>208</sup> With regard to the latter, “thick” sense of a constitution, Raz identifies seven features: “constitution and powers of the main organs of the different branches of government”; a long duration and stability; the existence of a canonical formulation; the constitution of “superior law”; justiciability, that is “judicial procedures by which the compatibility of rules of law and of other legal acts with the constitution can be tested”; entrenchment, that is, constitutional amendment procedures that are legally more difficult to secure than ordinary legislation”; and principles of government (“democracy, federalism, basic civil and political rights, etc.”).<sup>209</sup>

Alec Stone Sweet differentiates between three types of constitution. First, the ‘absolutist constitution’, where “the authority to produce and change legal norms, including the constitution, is centralised and absolute”.<sup>210</sup> Constitutional norms are categorised as “meta-norms” that “reflect, rather than restrict, the absolute power of those who govern”.<sup>211</sup> The second type is the ‘legislative supremacy constitution’, where “the constitution provides for a stable set of governmental institutions and elections for the legislature”.<sup>212</sup> Within this type, the constitution is not entrenched, which means that “no special, non-legislative procedures exist for revising it”; there is no judicial review of statutes, because “any act that conflicts with a statute is in itself invalid”; and there is “no layer of substantive constraints in the form of rights”.<sup>213</sup> Sweet’s final type of constitution is the so-called ‘higher law’ constitution.<sup>214</sup> Compared to the ‘legislative supremacy constitution’, this type establishes “substantive constraints to

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<sup>208</sup> Joseph Raz, “On the Authority and Interpretation of Constitutions: Some Preliminaries”, in Larry Alexander (ed.), *Constitutionalism: Philosophical Foundations*, Cambridge University Press, Cambridge, 1998, pp. 152–53.

<sup>209</sup> *Ibid.*, p. 153.

<sup>210</sup> Alec Stone Sweet, “Constitutionalism, Legal Pluralism, and International Regimes”, in *Indiana Journal of Global Legal Studies*, 2009, vol. 16, no. 2, pp. 621, 629.

<sup>211</sup> Stone Sweet provides the French Charter of 1814 as an example, see *ibid.*

<sup>212</sup> *Ibid.*, pp. 629–30.

<sup>213</sup> *Ibid.*, p. 630. Stone Sweet uses “the Australian parliamentary system, the British system through much of the twentieth century, and the French Third (1875–1940) and Fourth (1946–1958) Republics” as examples. See also Vicki C. Jackson and Mark Tushnet, *Comparative Constitutional Law*, 3rd edition, Foundation Press, St. Paul, 2014, p. 297.

<sup>214</sup> Stone Sweet, 2009, pp. 620, 630–31, see *supra* note 210. See also John F. Hart, “Higher Law, and Property Rights: Judicial Review in the Federal Courts, 1789-1835”, in *San Diego Law Review*, 2008, vol. 45, pp. 823 *et seq.*

the exercise of public authority in the form of fundamental rights and establishes independent, judicial means of enforcing rights, even against legislative authority”.<sup>215</sup> Here, “the higher law is entrenched with this type of constitution specifying amendment procedures which, typically, make it more difficult to change the constitution”.<sup>216</sup>

The term ‘constitution’ must be distinguished from the term ‘constitutionalism’,<sup>217</sup> which can also be defined in various ways. For Kant, constitutionalism “seems to refer mainly to a condition of right under a mutually recognised collection of laws. This legal condition can include both codified law and extra-legal principles of convention that act to underpin a universal condition of right”,<sup>218</sup> as I have described above. Neil Walker suggests that “[c]onstitutionalism is the set of beliefs associated with the idea of constitutional government”;<sup>219</sup> Ulrich K. Preuss views constitutionalism as “the basic ideas, principles, and values of a polity [that] aspires to give its members a share in the government”, drawing on the “thick” features of a constitution identified by Raz.<sup>220</sup> For Jon Elster, constitutionalism is a “state of mind – an expectation and a norm – in which politics must be conducted in accordance with standing rules or conventions, written or unwritten, that cannot be easily changed”.<sup>221</sup>

### 11.7.2. Other Concepts of a Constitution on the Global Scale

In general terms, law-making at an international stage has been described in several ways, such as “legal and constitutional pluralism”,<sup>222</sup> “multi-

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<sup>215</sup> Stone Sweet, 2009, p. 630, see *supra* note 210; Jackson and Tushnet, 2014, p. 267, see *supra* note 213.

<sup>216</sup> Stone Sweet, 2009, pp. 621, 630, see *supra* note 210.

<sup>217</sup> Jon Elster, “Constitutionalism in Eastern Europe: An Introduction”, in *University of Chicago Law Review*, 1991, vol. 58, no. 2, pp. 447, 465.

<sup>218</sup> Brown, 2006, pp. 661, 673, see *supra* note 62.

<sup>219</sup> Neil Walker, “European Constitutionalism and European Integration”, in *Public Law*, 1996, vol. 40, no. 2, pp. 266–67.

<sup>220</sup> Ulrich K. Preuss, “The Political Meaning of Constitutionalism”, in Richard Bellamy (ed.), *Constitutionalism, Democracy and Sovereign*, Avebury, 1996, pp. 11–12.

<sup>221</sup> Elster, 1991, pp. 447, 465, see *supra* note 217; see also KUO Ming-Sing, “The End of Constitutionalism as We Know It? Boundaries and the State of Global Constitutional (Dis)Ordering”, in *Transnational Legal Theory*, 2010, vol. 1, no. 3, pp. 329, 334.

<sup>222</sup> See, for example, Neil Walker, “The Idea of Constitutional Pluralism”, in *Modern Law Review*, 2002, vol. 65, no. 3, p. 317; Prosser, 2017, pp. 1040 ff., see *supra* note 105.

level governance”,<sup>223</sup> “societal or civil constitutionalism”,<sup>224</sup> or “transnational government networks”.<sup>225</sup> All these terms revolve around the question of “how to conceptualize the juridification of the new world order”,<sup>226</sup> whereby “globalisation” describes “the blurring of the line” between “domestic” and “international” concerns in areas from economic policy to the environment to human rights.<sup>227</sup> In today’s globalised world, elements of international law overlap with those of a constitution, such as the setting up of legislative, executive and interpretative structures that might well be viewed as a ‘government’ in a domestic understanding.<sup>228</sup>

Thus, the question of whether the concept of a constitution can be transferred to the global stage raises fundamental questions such as law’s relationship to morality in the context of international law.<sup>229</sup> Within the myriad of scholarly works that have been produced on the matter, some main strands or traditions can be identified.

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<sup>223</sup> See, for example, Ingolf Pernice, “Multilevel Constitutionalism and the Treaty of Amsterdam: European Constitution-Making Revisited?”, in *Common Market Law Review*, 1999, vol. 36, no. 4, p. 703; Ingolf Pernice, “The Treaty of Lisbon: Multilevel Constitutionalism in Action”, in *Columbia Journal of European Law*, 2009, vol. 15, no. 3, p. 349.

<sup>224</sup> See Gunther Teubner, “Societal Constitutionalism: Alternatives to State-Centred Constitutional Theory?”, in Christian Joerges, Inger-Johanne Sand and Gunther Teubner (eds.), *Transnational Governance and Constitutionalism*, Hart, Oxford, 2004, pp. 3–28; Gunther Teubner, “Fragmented Foundations: Societal Constitutionalism beyond the Nation State”, in Petra Dobner and Martin Loughlin (eds.), *The Twilight of Constitutionalism?*, Oxford University Press, Oxford, 2010, chap. 16; see also pp. 309, 313.

<sup>225</sup> See Anne-Marie Slaughter, *A New World Order*, Princeton University Press, Princeton, 2004, p. 8; Anne-Marie Slaughter, “Sovereignty and Power in a Networked World Order”, in *Stanford Journal of International Law*, 2004, vol. 40, pp. 283, 288; KUO, 2010, pp. 329, 354, see *supra* note 221; Jean L. Cohen, “Whose Sovereignty? Empire Versus International Law”, in *Ethics & International Affairs*, 2004, vol. 18, no. 3, pp. 1–2.

<sup>226</sup> *Ibid.*, p. 2.

<sup>227</sup> Scott A. Young, “The Trouble with Global Constitutionalism”, in *Texas International Law Journal*, 2003, vol. 38, no. 3, p. 527. Another definition is provided in Rod Jensen, “Globalization and the International Criminal Court: Accountability and a New Conception of State”, in Ige F. Dekker and Wouter G. Werner (eds.), *Governance and International Legal Theory*, Hart, Oxford, 2004, pp. 159, 166.

<sup>228</sup> Jensen, 2004, pp. 159, 166, see *supra* note 227.

<sup>229</sup> Ruti Teitel, “Humanity Law: A New Interpretive Lens on the International Sphere”, in *Fordham Law Review*, 2008, vol. 77, no. 2, pp. 667–68.

The rationalist strand argues that the main motivation of States to obey international law is their own interest.<sup>230</sup> Thus, in the evolution of international law State consent plays a central role.<sup>231</sup> For Rationalists, “state practice is embedded in the institutions of diplomacy and customary international law, which articulate an ethic of coexistence based on sovereign equality and non-intervention”.<sup>232</sup> This ‘Westphalian model’, where the world consists of national jurisdictions, has widely been challenged. Globalists doubt that State consent is a necessary requirement for today’s world order.<sup>233</sup> Instead, this world order “emerges out of a global process of juridification independent of an individual state’s will as well as of its constitutional framework”.<sup>234</sup> A pluralist constitutional ordering involves “multiple sets of norms that intersect, overlap, divide the field, or relate to one another horizontally rather than vertically” and therefore differs heavily from the domestic (nation-State) constitutional order.<sup>235</sup>

Of course, the variants of constitutionalism promoted in international law are manifold. In the twentieth century, a shift can be witnessed “from a formal concept of constitutionalism – such as the existence of a formal unity of international law derived from one single, hierarchically superior source – to a more substantive conception that deals with the emergence of formal and substantive hierarchies between different rules and principles of international law”.<sup>236</sup> Drawing on what has been previously described, Kelsen assumes that “unity” of an international legal system presupposes a legal system “coordinating” State legal systems

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<sup>230</sup> Tatiana Sainati, “Divided We Fall: How the International Criminal Court Can Promote Compliance with International Law by Working with Regional Courts”, in *Vanderbilt Journal of Transnational Law*, 2016, vol. 49, no. 1, pp. 191, 215.

<sup>231</sup> Jason Ralph, “International Society, the International Criminal Court and American Foreign Policy”, in *Review of International Studies*, 2005, vol. 31, no. 1, pp. 27, 32.

<sup>232</sup> *Ibid.*, p. 30.

<sup>233</sup> KUO, 2010, p. 354, see *supra* note 221.

<sup>234</sup> *Ibid.*

<sup>235</sup> Michael Rosenfeld, “Rethinking Constitutional Ordering in an Era of Legal and Ideological Pluralism”, in *International Journal of Constitutional Law*, 2008, vol. 6, nos. 3–4, pp. 415, 417:

A pluralist constitutional ordering will require harmonization through the spread of a normative congruence that weaves together a plurality of legal regimes and of world views.

<sup>236</sup> Paulus, 2009, p. 71, see *supra* note 206.

“and separating them from each other in their spheres of validity”.<sup>237</sup> The general norms of the international legal system are, in Kelsen’s view, created “by way of custom or treaty”.<sup>238</sup> The rejection of a “national reliance on a single domestic legal order for establishing a hierarchy of norms”, however, was subjected to dispute in the years between the First and Second World War.<sup>239</sup> In its famous *Lotus* case, the Permanent Court of International Justice emphasised the importance of State sovereignty for the “family of nations”.<sup>240</sup> The principle of non-interference is now to be found in Article 2(1) of the UN Charter establishing, in turn, the sovereign equality of States.

Indeed, today Kelsen’s view is criticised as issuing the following challenge, well-articulated by the pluralist Jean L. Cohen: “Either we embrace the further integration and constitutionalisation of the global political system involving the step to a monist global legal order based on cosmopolitan principles (especially human rights), deemed primary and hierarchically superior to domestic legal orders. Or we accept a disorderly global legal pluralism that acknowledges the multiplicity of autonomous political and legal orders but renounces any attempt to construct an order of orders, leaving this up to contestation or, alternatively, to the power of the powers that be”.<sup>241</sup> Moreover, Kelsen’s above-mentioned view that the general norms of international legal systems are created “by way of custom or treaty”<sup>242</sup> was rejected by H.L.A. Hart, for whom international law dissolves the unity of primary and secondary rules, to the extent that only primary rules exist.<sup>243</sup> Nevertheless, international law today is certainly more complete than it was at the time Hart wrote his *Concept of Law*.<sup>244</sup> It can therefore certainly be said that there is something as a constitution beyond State boundaries. This, however, presupposes some sort of legal

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<sup>237</sup> Elster, 1991, pp. 447, 465, see *supra* note 217.

<sup>238</sup> *Ibid.*, p. 108.

<sup>239</sup> Paulus, 2009, p. 73, see *supra* note 206.

<sup>240</sup> *The Case of the S.S. “Lotus” (France v. Turkey)*, para. 104, see *supra* note 165. See also Paulus, 2009, p. 73, see *supra* note 206.

<sup>241</sup> Jean L. Cohen, “Constitutionalism beyond the State: Myth or Necessity? (A Pluralist Approach)”, in *Humanity*, 2011, vol. 2, no. 1, pp. 127–29.

<sup>242</sup> Kelsen, 2002, p. 108, see *supra* note 205.

<sup>243</sup> Hart, 1994, pp. 213 ff., see *supra* note 186. See also Paulus, 2009, p. 74, *supra* note 206.

<sup>244</sup> *Ibid.*, p. 75, citing Thomas M. Franck, *Fairness of International Law and Institutions*, Clarendon Press, 1995, pp. 3–6.

organisation, institutionalisation<sup>245</sup> and a higher, hierarchically superior law in Kelsen's sense.<sup>246</sup>

### 11.7.3. The ICC Statute as a Constitution?

The ICC Statute is not only the “culmination of international law-making”.<sup>247</sup> Rather, it codifies the customary international humanitarian laws,<sup>248</sup> and the jurisprudence of previously established international or internationalised tribunals such as the ICTY and ICTR.<sup>249</sup> Thus, the law with regard to grave international crimes, customary and treaty-based international law, the applicable general principles of law and internationally recognised human rights, “consolidated over a century's worth of jurisprudence and customary law”, have been “constitutionalised” by the ICC Statute.<sup>250</sup> These declarations are significant, but in terms of the constitutional elements of the ICC Statute, they are rather vague. The statute contains limitations – the complementarity principle – and describes restrictions of the organs of the ICC, especially the chambers and the Office of the Prosecutor. Those two elements are important components of the Kantian constitution.<sup>251</sup>

#### 11.7.3.1. Human Rights as a Mainstay of the Statute and Blueprint for the Common Good

Even though human rights have a dual character as constitutional norms and super-positive value,<sup>252</sup> they first took on concrete form as basic rights within constitutions or constitutional instruments.<sup>253</sup> As Habermas explains about human rights and basic rights:

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<sup>245</sup> See especially David Kennedy, “The Move to Insistutions”, in *Cardozo Law Review*, 1987, vol. 8, no. 5, pp. 841 ff.

<sup>246</sup> Paulus, 2009, p. 75, see *supra* note 206.

<sup>247</sup> Weller, 2002, p. 693, see *supra* note 23.

<sup>248</sup> Mendes, 2010, p. 22, see *supra* note 24.

<sup>249</sup> *Ibid.*, p. 24.

<sup>250</sup> *Ibid.*, pp. 15, 21–22.

<sup>251</sup> Brown, 2006, pp. 661, 675, see *supra* note 62.

<sup>252</sup> Habermas, 1997, p. 137, see *supra* note 141:

[A]s constitutional norms they enjoy a positive validity (of instituted law), but as rights they are attributed to each person as a human being they acquire a suprapositive value.

<sup>253</sup> *Ibid.*

As constitutional norms, human rights have a certain primacy, shown by the fact that they are constitutive for legal order as such and by the extent to which they determine a framework within which normal legislative activity is possible. But even among constitutional norms as a whole, basic rights stand out. On the one hand, liberal and social basic rights have the form of general norms addressed to citizens in their properties as “human beings” and not merely as member of a polity.<sup>254</sup>

Article 21(3) of the ICC Statute forms part of the provisions that identify the applicable law of the Court. It states that the “application and interpretation of law [...] must be consistent with internationally recognized human rights, and be without any adverse distinction founded on grounds such as gender [...],<sup>255</sup> age, race, colour, language, religion or belief, political or other opinion, national, ethnic or social origin, wealth, birth or other status”.<sup>256</sup> ICC judges therefore draw from a large body of human rights law with ample discretion to guarantee the most basic and important protections.<sup>257</sup> Article 21(3) thus reflects support for the view “that the nature of human rights is such that they may have a certain special status or, at a minimum, a permeating role within international law”.<sup>258</sup>

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<sup>254</sup> *Ibid.*

<sup>255</sup> As defined in Article 7(3), the term ‘gender’ “refers to the two sexes, male and female, within the context of society” (fn. added).

<sup>256</sup> ICC Statute, Article 21(3), see *supra* note 22.

<sup>257</sup> See also Adrian Bos, “1948–1998: The Universal Declaration of Human Rights and the Statute of the International Criminal Court”, in *Fordham International Law Journal*, 1998, vol. 22, no. 2, pp. 229, 234.

<sup>258</sup> Rebecca Young, “‘Internationally Recognized Human Rights’ Before the International Criminal Court”, in *International & Comparative Law Quarterly*, 2011, vol. 60, no. 1, pp. 189–90; Michael Reisman, “Sovereignty and Human Rights in Contemporary International Law”, in *American Journal International Law*, 1990, vol. 84, no. 4, pp. 866, 872:

The international human rights program is more than a piecemeal addition to the traditional corpus of international law, more than another chapter sandwiched into traditional textbooks of international law. By shifting the fulcrum of the system from the protection of sovereigns to the protection of people, it works qualitative changes in virtually every component.

James D. Fry, “International Human Rights Law in Investment Arbitration: Evidence of International Law’s Unity”, in *Duke Journal of Comparative & International Law*, 2007, vol. 18, no. 1, pp. 77, 123:

Within the context of the ICC Statute, human rights reached the status of basic rights. In this context, human rights violations “are no longer condemned and fought from the moral point of view in an unmediated way, but are rather prosecuted as criminal actions within the framework of state-organised legal order according to the institutionalised legal procedures”.<sup>259</sup> The Statute translates general human rights norms “into the language of criminal law”, not only by defining the core international crimes, but also by providing procedural guarantees and a canonical formulation of the role of internationally recognised human rights.<sup>260</sup> The Appeals Chamber of the ICC has ruled, with regard to the role of human rights in the interpretation of the Statute, that “[h]uman rights underpin the Statute; every aspect of it [...]. Its provisions must be interpreted, and more importantly applied in accordance with internationally recognized human rights; first and foremost, in the context of the Statute, the right to a fair trial, a concept broadly perceived and applied, embracing the judicial process in its entirety”.<sup>261</sup> In other words, human rights can certainly be seen as the mainstay of the ICC Statute.<sup>262</sup> The mere existence and work of the Court help to promote human rights by: creating a historical

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The possibility exists that the field of human rights is an extra-special type of specialized regime that impacts all aspects of international law, and should not be seen as just another specialized body of law that other specialized bodies might use to reinterpret their own rules in its light, but is one that requires other specialized bodies to be reinterpreted in its light.

Dinah Shelton, “Normative Hierarchy in International Law”, in *American Journal International Law*, 2006, vol. 100, no. 2, pp. 291, 294; Schmahl, 2018, p. 101, see *supra* note 18; McDermott, 2018, p. 288, see *supra* note 26.

<sup>259</sup> Habermas, 1997, p. 140, see *supra* note 141.

<sup>260</sup> See, for instance, ICC Statute, Article 21(3), *supra* note 22:

The application and interpretation of law pursuant to this article must be consistent with internationally recognized human rights.

<sup>261</sup> ICC, Situation in the Democratic Republic of the Congo, *Prosecutor v. Thomas Lubanga Dyilo*, Appeals Chamber, Judgment on the Appeal of Mr. Thomas Lubanga Dyilo against the Decision on the Defence Challenge to the Jurisdiction of the Court Pursuant to Article 19(2)(a) of the Statute of 3 October 2006, 14 December 2006, ICC-01/04-01/06-772, para. 37 (fn. omitted) ([www.legal-tools.org/doc/1505f7/](http://www.legal-tools.org/doc/1505f7/)). The ICC Pre-Trial Chamber I referred to that Judgment in ICC, Situation in the Republic of Côte d’Ivoire, *Prosecutor v. Laurent Gbagbo*, Pre-Trial Chamber I, Decision on the fitness of Laurent Gbagbo to take part in the proceedings before this Court, 2 November 2012, ICC-02/11-01/11-286-Red, para. 45 ([www.legal-tools.org/doc/4729b8/](http://www.legal-tools.org/doc/4729b8/)).

<sup>262</sup> Benjamin Perrin, “Searching for Law While Seeking Justice: The Difficulties of Enforcing International Humanitarian Law in International Criminal Trials”, in *Ottawa Law Review*, 2007–08, vol. 39, no. 2, pp. 367, 398.

record for past wrongs;<sup>263</sup> offering a forum for victims to voice their opinions and receive satisfaction and compensation for past violations;<sup>264</sup> creating judicial precedent; and deterring potential violators of the gravest crimes<sup>265</sup> while punishing past offenders.<sup>266</sup> Thus, human rights norms in the Statute “provide a blueprint for the common good of a community” in the Aristotelian sense<sup>267</sup> – which is at the same time the link to Habermas’s interpretation of Republicanism.<sup>268</sup> Kant laid the foundations for all current conceptions of human dignity and world peace. As I have explained above, for Kant, a permanent peace is predicated on the recognition and respect for human rights and gross human rights violations rights have to be stigmatised as serious wrongs and punished.<sup>269</sup> Kant’s language in this regard resonates in the following statement by the ICTY Appeals Chamber:

A State-sovereignty-oriented approach has been gradually supplanted by a human-being oriented approach. Gradually the maxim of Roman law *hominum causa omne jus constitutum est* (all law is created for the benefit of human beings)

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<sup>263</sup> United Nations Security Council, Statement of Judge Claude Jorda, UN Doc. S/PV.4161, 20 June 2000, p. 3 ([www.legal-tools.org/doc/365c3f/](http://www.legal-tools.org/doc/365c3f/)); Jens David Ohlin, “A Meta-Theory of International Criminal Procedure: Vindicating the Rule of Law”, in *UCLA Journal of International Law & Foreign Affairs*, 2009, vol. 77, no. 1, pp. 86 ff. For more detail, see Alexander Heinze, *International Criminal Procedure and Disclosure*, Duncker & Humblot, Berlin, 2014, pp. 218 ff.

<sup>264</sup> Ben Swart, “Foreword”, in *Journal of International Criminal Justice*, 2008, vol. 6, no. 1, pp. 87, 100; Minna Schrag, “Lessons Learned from ICTY Experience”, in *Journal of International Criminal Justice*, 2004, vol. 2, no. 2, pp. 427–28. For Ralph, this helps to constitute a world society: see Ralph, 2005, p. 39, *supra* note 231.

<sup>265</sup> Ambos, *Treatise on International Criminal Law*, vol. 1, Oxford University Press, Oxford, 2013, p. 71.

<sup>266</sup> International Criminal Tribunal for Rwanda (‘ICTR’), *The Prosecutor v. Omar Serushago*, Trial Chamber, Sentence, 5 February 1999, ICTR-98-39-S, para. 20 ([www.legal-tools.org/doc/e2d4db/](http://www.legal-tools.org/doc/e2d4db/)); ICTR, *The Prosecutor v. Georges Anderson Nderubumwe Rutaganda*, Trial Chamber, Judgement and Sentence, 6 December 1999, ICTR-96-3-T, para. 455 ([www.legal-tools.org/doc/f0d4bb/](http://www.legal-tools.org/doc/f0d4bb/)); ICTR, *The Prosecutor v. Emmanuel Ndingabizi*, Trial Chamber, Judgement and Sentence, 15 July 2004, ICTR-2001-71-I, para. 498 ([www.legal-tools.org/doc/272b55/](http://www.legal-tools.org/doc/272b55/)); ICTR, *The Prosecutor v. François Karera*, Trial Chamber, Judgement and Sentence, 7 December 2007, ICTR-01-74-T, para. 571 ([www.legal-tools.org/doc/7bc57f/](http://www.legal-tools.org/doc/7bc57f/)).

<sup>267</sup> John M. Czarnetzky and Ronald J. Rychlak, “An Empire of Law: Legalism and the International Criminal Court”, in *Notre Dame Law Review*, 2003, vol. 79, no. 1, pp. 55, 110.

<sup>268</sup> Llano, 2017, p. 506, see *supra* note 113.

<sup>269</sup> Ambos, 2013, pp. 293, 306, see *supra* note 49.

has gained a firm foothold in the international community as well. It follows that in the area of armed conflict the distinction between interstate wars and civil wars is losing its value as far as human beings are concerned. Why protect civilians from belligerent violence, or ban rape, torture or the wanton destruction of hospitals, churches, museums or private property, as well as proscribe weapons causing unnecessary suffering when two sovereign States are engaged in war, and yet refrain from enacting the same bans or providing the same protection when armed violence has erupted “only” within the territory of a sovereign State? If international law, while of course duly safeguarding the legitimate interests of States, must gradually turn to the protection of human beings, it is only natural that the aforementioned dichotomy should gradually lose its weight.<sup>270</sup>

### **11.7.3.2. A Public Sphere and a Constitutional Moment: Humanity as a Political Community**

As I have shown, rising public spheres create new institutions and according to Bohman, these institutions “are often radical and innovative enough to constitute new ‘constitutional regimes’ within the nation state”.<sup>271</sup> Bruce Ackerman argued that the creation of these new constitutional regimes occurs when there are unusually high levels of sustained popular attention to questions of constitutional significance.<sup>272</sup> These high levels of sustained popular attention occur in large part because actors take part in a political discourse that is both mediated and staged by mass media. In this debate, the public sphere in the context of an international society is

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<sup>270</sup> International Criminal Tribunal for the former Yugoslavia (‘ICTY’), *Prosecutor v. Duško Tadić*, Appeals Chamber, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, IT-94-1-AR72, para. 97. For an analysis, see Luigi D.A. Corrias and Geoffrey M. Gordon, “Judging in the Name of Humanity: International Criminal Tribunals and the Representation of a Global Public”, in *Journal of International Criminal Justice*, 2015, vol. 13, no. 1, pp. 100–01.

<sup>271</sup> Bohman, 1997, p. 192, see *supra* note 146.

<sup>272</sup> Bruce Ackerman, *We The People*, vol. 1, Harvard University Press, Cambridge (MA), 1991, p. 51; Daniel Taylor Young, “How Do You Measure a Constitutional Moment? Using Algorithmic Topic Modeling To Evaluate Bruce Ackerman’s Theory of Constitutional Change”, in *Yale Law Journal*, 2013, vol. 122, no. 7, p. 1990.

cosmopolitan and the ‘constitutional moments’<sup>273</sup> go hand in hand with “moral appeals, which are often said to be higher than existing law and which draw attention to the existing injustice”.<sup>274</sup> In Bohman’s words: “In these cases, the public declares its sovereignty not simply by influencing existing institutions, but by creating new frameworks in which to organise itself. To make violations of human rights public is precisely to make such a moral appeal that questions the legitimacy and sovereignty of current institutions”.<sup>275</sup>

Prior to the ICC’s establishment, the responsibility to protect humankind lied mainly in the hands of States, when the (rationalist) principle *aut dedere aut judicare* (either extradite or prosecute) was the key element of international criminal justice.<sup>276</sup> This changed dramatically with the creation of the ICC. Thus, the ICC Statute might be viewed as a “revolutionary document that helps to legally constitute a world society of humankind beyond that expressed by the society of states”.<sup>277</sup> From a cosmopolitan perspective, the ICC “was a manifestation of the international community’s self-constitutionalisation incorporating individuals as ‘world citizens’”.<sup>278</sup> Drawing on this revolutionary moment, for Sadat, therefore, the adoption of the ICC Statute represented a “constitutional moment”<sup>279</sup> – albeit in respect to the UN System and, more specifically, the UN Charter as a constitution. In her view, the adoption of the Statute was “a decision to re-equilibrate the constitutional, organic law governing international relations, albeit *sotto voce*, by making an end run around, rather than a formal amendment to, the Charter”.<sup>280</sup> It is comparable to

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<sup>273</sup> Ackerman, 1991, pp. 51, 84, see *supra* note 272; Jackson and Tushnet, 2014, p. 358, see *supra* note 213, citing Bruce Ackerman, *The Future of Liberal Revolution*, Yale University Press, New Haven, 1992.

<sup>274</sup> Bohman, 1997, p. 192, see *supra* note 146.

<sup>275</sup> *Ibid.*

<sup>276</sup> Ralph, 2005, pp. 27–28, 32–33, see *supra* note 231.

<sup>277</sup> *Ibid.*, pp. 27–28.

<sup>278</sup> Padraig McAuliffe, “From Watchdog to Workhorse: Explaining the Emergence of the ICC’s Burden-sharing Policy as an Example of Creeping Cosmopolitanism”, in *Chinese Journal of International Law*, 2014, vol. 13, no. 2, pp. 259, 287. In a similar vein, Gerben Kor, “Sovereignty in the Dock”, in Jann K. Kleffner and Gerben Kor (eds.), *Complementarity Views on Complementarity*, T.M.C. Asser Press, The Hague, 2006, pp. 53, 71.

<sup>279</sup> Ackerman, 1991, pp. 51, 84, see *supra* note 272; Jackson and Tushnet, 2014, p. 358, citing Ackerman, 1992, see *supra* note 273.

<sup>280</sup> Leila Sadat, “The Legacy of the ICTY: The International Criminal Court”, in *New England Law Review*, 2002, vol. 37, pp. 1073, 1079; Leila Sadat, *The International Criminal Court*

instruments such as the Universal Declaration of Human Rights,<sup>281</sup> “which collectively narrate a world order of independent states, each based on democratic governance and protection of individual rights, engaged in a network of trade and peaceful interaction”.<sup>282</sup> Instruments like this qualify as a ‘constitutional moment’ in the history of humankind and as a Kantian system in which States interact with each other in a context of co-operation and law, and on the basis of the respect for the ‘right’.<sup>283</sup> They speak the language of Kantian constitutional revolution, that is, his turn to worldwide rights.<sup>284</sup>

Thus, when the ICC represents humanity, it thereby represents a political community.<sup>285</sup> In Anthony Duff’s words:

We can also see the creation of the ICC as one of the ways in which the moral ideal of a human community might be given more determinate and effective institutional form: the existence of a community is often a matter more of aspiration than of achieved fact, and a recognition of human community could be a recognition of what we should aspire to create.<sup>286</sup>

This very much applies to the ICC. The list of goals outlined by international criminal courts is manifold and actors of international criminal tribunals face a herculean task to achieve these goals. Apart from retribution, deterrence and rehabilitation,<sup>287</sup> further goals include, *inter alia*: the

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*and the Transformation of International Law*, Transnational Publication, New York, 2002, p. 277. See also McAuliffe, 2014, p. 287, *supra* note 278.

<sup>281</sup> Universal Declaration of Human Rights, 10 December 1948 ([www.legal-tools.org/doc/de5d83/](http://www.legal-tools.org/doc/de5d83/)).

<sup>282</sup> Martinez, 2003, pp. 429, 462–63, see *supra* note 72.

<sup>283</sup> *Ibid.*

<sup>284</sup> Hauke Brunkhorst, “Constituent Power and Constitutionalization in Europe”, in *International Journal of Constitutional Law*, 2016, vol. 14, no. 3, pp. 680, 682; Vischer, 2017, p. 325, see *supra* note 31.

<sup>285</sup> Anthony Duff, “Authority and Responsibility in International Criminal Law”, in Samantha Besson and John Tasioulas (eds.), *The Philosophy of International Law*, Oxford University Press, Oxford, 2010, p. 600; Corrias and Gordon, 2015, p. 100, see *supra* note 270. Cf. Stein Sundstøl Eriksen and Ole Jacob Sending, “There is no Global Public: The Idea of the Public and the Legitimation of Governance”, in *International Theory*, 2013, vol. 5, no. 2, p. 225.

<sup>286</sup> Duff, 2010, p. 601, see *supra* note 285.

<sup>287</sup> Cf. Albert Alschuler, “The Changing Purposes of Criminal Punishment: A Retrospective on the Past Century and Some Thoughts About the Next”, in *University of Chicago Law*

restoration of international peace and security; strengthening the protections of international humanitarian law; to change a culture of impunity; creating a historical record of atrocities; punishing perpetrators of international crimes; to provide satisfaction to the victims of crimes committed by an offender; and to promote a process of reconciliation.<sup>288</sup> The promotion of these goals was met with criticism from the beginning. First, international criminal tribunals promote too many goals that are hardly ever achievable; even national law enforcement systems would buckle under the weight of these goals.<sup>289</sup> The UN Secretary-General recognised that “achieving and balancing the various objectives of [international] criminal justice is less straightforward”.<sup>290</sup> International criminal justice necessari-

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*Review*, 2003, vol. 70, no. 1, p. 1; see generally Leslie P. Francis and John G. Francis, “International Criminal Courts, the Rule of Law, and the Prevention of Harm”, in Larry May and Zachary Hoskins (eds.), *International Criminal Law and Philosophy*, Cambridge University Press, Cambridge, 2010, pp. 58 ff.

<sup>288</sup> Heinze, 2014, pp. 216 ff., see *supra* note 263; Flavia Lattanzi, *International Criminal Justice*, 2010, pp. 181, 205; John D. Jackson and Sarah J. Summers, *The Internationalisation of Criminal Evidence*, Cambridge University Press, Cambridge, 2012, pp. 111–12 (using the term ‘purpose’); Jens David Ohlin, “Goals of International Criminal Justice and International Criminal Procedure”, in Göran Sluiter *et al.* (eds.), *International Criminal Procedure*, Oxford University Press, Oxford, 2013, pp. 55, 58–60; Jenia I. Turner, “Plea Bargaining”, in Linda Carter and Fausto Pocar (eds.), *International Criminal Procedure*, Edward Elgar Publishing, Northampton, 2013, pp. 34, 51; Douglas Guilfoyle, *International Criminal Law*, Oxford University Press, Oxford, 2016, p. 89; Nerida Chazal, *The International Criminal Court and Global Social Control*, Routledge, London, 2016, p. 2; Olásolo, 2018, p. 7, see *supra* note 20, who divides the goals of international criminal law into two main groups:

- (i) ICL goals related to the maintenance of international peace and security as a collective value protected by international crimes; and (ii) ICL goals that have traditionally been considered by national criminal law as goals of punishment.

For arguments for restorative justice or healing, see, for example, Mark J. Osiel, “Ever Again: Legal Remembrance of Administrative Massacre”, in *University of Pennsylvania Law Review*, 1995, vol. 144, no. 2, pp. 463, 471–78, 512.

<sup>289</sup> Mirjan Damaška, “The Competing Visions of Fairness: The Basic Choice for International Criminal Tribunals”, in *North Carolina Journal of International Law and Commercial Regulation*, 2010, vol. 36, no. 2, pp. 365, 376; Jean Galbraith, “The Pace of International Criminal Justice”, in *Michigan Journal of International Law*, 2009, vol. 31, no. 1, pp. 79, 94.

<sup>290</sup> United Nations Secretary-General, Report of the Secretary-General on the Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies, UN Doc. S/2004/616, 23 August 2004, para. 39 ([www.legal-tools.org/doc/77bebf/](http://www.legal-tools.org/doc/77bebf/)).

ly exhibits a disparity between ideals and reality, between *Idealpolitik* and *Realpolitik*,<sup>291</sup> or between a Kantian and managerial mindset.<sup>292</sup>

In this political community, gross human rights violations are felt everywhere. In *Blaškić*, the ICTY held that “persecution may take forms other than injury to the human person, in particular those acts rendered serious not by their apparent cruelty but by the discrimination they seek to instil within humankind”.<sup>293</sup>

### 11.7.3.3. Solidarist Exceptions of the Statutes’ Cosmopolitan and Constitutional Dimension

Of course, Leila Nadya Sadat herself points out that this “revolution” was somehow restricted by several factors.<sup>294</sup> During negotiations of the Statute, many objections were made against a cosmopolitan dimension of the Statute, emphasising the Grotian or Neo-Grotian tradition of solidarity between sovereign States as a requirement for an international community. These objections also originate from the express rejection of the constitutional view, mainly advocated by jurists from the US.<sup>295</sup>

#### 11.7.3.3.1. Dependence on State Co-operation

For instance, contrary to the Nuremberg International Military Tribunal, the International Military Tribunal for the Far East, and the Iraqi Special Tribunal (before it was turned into a national tribunal),<sup>296</sup> ‘ordinary’ international criminal tribunals<sup>297</sup> depend, as a general rule, on the co-operation of the relevant territorial State(s), with regard to both the inves-

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<sup>291</sup> Chazal, 2016, pp. 5, 28, see *supra* note 288.

<sup>292</sup> Koskenniemi, 2007, pp. 9 ff., see *supra* note 30; Brunkhorst, 2016, pp. 680 ff., see *supra* note 284.

<sup>293</sup> ICTY, *Prosecutor v. Tihomir Blaškić*, Trial Chamber, Judgement, 3 March 2000, IT-95-14-T, para. 227 ([www.legal-tools.org/doc/e1ae55/](http://www.legal-tools.org/doc/e1ae55/)). See also Corrias and Gordon, 2015, pp. 97, 100, *supra* note 270.

<sup>294</sup> Leila Nadya Sadat, *The International Criminal Court and the Transformation of International Law*, Transnational Publishers, Ardsley, New York, 2002, p. 1079.

<sup>295</sup> Mendes, 2010, p. 22, see *supra* note 24.

<sup>296</sup> Annalisa Ciampi, “The Obligation to Cooperate”, in Antonio Cassese, Paola Gaeta and John R.W.D. Jones (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, vol. 2, Oxford University Press, Oxford, 2002, pp. 1711–12.

<sup>297</sup> On the ICC’s approach to co-operation generally, see Rod Rastan, “The Responsibility to Enforce – Connecting Justice With Unity”, in Carsten Stahn and Göran Sluiter (eds.), *Emerging Practice*, Nijhoff, Leiden, 2009, pp. 171 ff.; Karin N. Calvo-Goller, *Cour Pénale Internationale*, Gazette du Palais, Paris, 2012, p. 133.

tigation and prosecution of crimes committed on State territory, and enforcement of the respective sentences.<sup>298</sup> States remain the key actors in co-operation in criminal matters.<sup>299</sup> In this regard, the ICC Statute promotes the Grotian solidarist international society.<sup>300</sup> At the same time, the ICC's dependence on State co-operation would be supported by Kant in two ways. First, State co-operation is a characteristic of Kant's Second Definitive Article. Second, from a cosmopolitan perspective, Kant "does not share the widespread view that we can turn our attention to the issue of cosmopolitan Right only after we have settled the matter of domestic justice. The grounds of cosmopolitan justice are identical with those of domestic justice: both follow from the claim to external freedom of each under conditions of unavoidable empirical constraints".<sup>301</sup> By referring to different levels of institutionalising his cosmopolitan conception of Right,<sup>302</sup> Kant proposes constitutional pluralism "in that the system is comprised of discrete hierarchies, national and Treaty-based, each of which has a claim to autonomy and legitimacy".<sup>303</sup> State co-operation is one aspect of that and in fact a necessary requirement.

#### 11.7.3.3.2. Trigger Mechanism to Exercise the Jurisdiction of the Court

A second example of a restricted cosmopolitan dimension are the Statute's so-called trigger mechanisms. One of these trigger mechanisms is a *pro-*

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<sup>298</sup> See generally Claus Kreß and Kimberly Prost, "Part 9 – Preliminary Remarks", in Otto Triffterer and Kai Ambos (eds.), *Rome Statute of the International Criminal Court: A Commentary*, 3rd edition, C.H. Beck, Munich, 2016, mn. 1; Yvonne M. Dutton, "Bridging the Legitimacy Divide: The International Criminal Court's Domestic Perception Challenge", in *Columbia Journal of Transnational Law*, 2018, vol. 56, no. 1, pp. 76, 82.

<sup>299</sup> Darryl Robinson, "Inescapable Dyads: Why the International Criminal Court Cannot Win", in *Leiden Journal of International Law*, 2015, vol. 28, no. 2, p. 339. For a comprehensive overview of states' non-cooperation and the ensuing non-cooperation-decisions of the ICC see Alexandre Skander Galand, "A Global Public Goods Perspective on the Legitimacy of the International Criminal Court", in *Loyola of Los Angeles International and Comparative Law Review*, 2018, vol. 41, no. 2, pp. 130–31.

<sup>300</sup> Ralph, 2005, pp. 27, 37, see *supra* note 231.

<sup>301</sup> Katrin Flikschuh, *Kant and Modern Political Philosophy*, Cambridge University Press, Cambridge, 2000, p. 170.

<sup>302</sup> *Ibid.*

<sup>303</sup> Stone Sweet, 2012, pp. 53, 61, see *supra* note 27.

*prio motu* investigation of the Prosecutor,<sup>304</sup> which underlines the constitutional force of the Statute and its cosmopolitan/revolutionary impact.<sup>305</sup> However, because this trigger mechanism was passionately criticised by the same people that oppose a constitutional view of the Statute, further trigger mechanisms were established (Article 13 of the ICC Statute):<sup>306</sup> a referral of a State Party and a referral of the UN Security Council.<sup>307</sup> Moreover, the revolutionary trigger mechanism of a *proprio motu* investigation by the Prosecutor is subject to restrictions. Even if the Prosecutor were of the opinion that a reasonable basis for an investigation existed, she would have to apply to the Pre-Trial Chamber of the Court for an authorisation to proceed with the investigation.<sup>308</sup>

#### 11.7.3.4. The Complementarity Principle

Another bar to the Court's exclusive power is the so-called complementarity principle built in the Statute. The ICC regime opts for a subsidiarity approach, that is, it grants, as a matter of principle, primacy to the respective national jurisdiction.<sup>309</sup> More precisely, *any* State (not necessarily a State Party), "which has jurisdiction over" a case,<sup>310</sup> that is, which can ground its jurisdiction on one of the recognised jurisdictional titles under

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<sup>304</sup> That is the power of the Prosecutor to initiate investigations *ex officio*, Article 13(c), in conjunction with Article 15, see ICC Statute, *supra* note 22.

<sup>305</sup> Ralph, 2005, pp. 27, 36, see *supra* note 231.

<sup>306</sup> For a summary of the situations over which the Court has exercised jurisdiction and the respective mechanism that triggered it, see William Schabas, "Selecting Situations and Cases", in Carsten Stahn (ed.), *The Law and Practice of the International Criminal Court*, Oxford University Press, Oxford, 2015, pp. 366–67. On the negotiations of this "most complex and most sensitive" provision (Philippe Kirsch and John T. Holmes, "The Rome Conference on an International Criminal Court: The Negotiating Process", in *American Journal of International Law*, 1999, vol. 93, no. 1, p. 8), see William A. Schabas and Giulia Pecorella, "Article 13", in Otto Triffterer and Kai Ambos (eds.), *Rome Statute of the International Criminal Court: A Commentary*, 3rd edition, C.H. Beck, Munich, 2016, mns. 1–13.

<sup>307</sup> It should be noted that a Security Council referral cannot bind the Court, since the latter is an autonomous organ of international law whose obligations only follow from the Rome Statute. Therefore, this referral might also support (at least in part) the constitutional quality of the Statute.

<sup>308</sup> ICC Statute, Article 15(3), see *supra* note 22.

<sup>309</sup> Stressing the function of complementarity "as primary right" to investigation, prosecution and adjudication of States, Sarah M.H. Nouwen, *Complementarity in the Line of Fire*, Cambridge University Press, Cambridge, 2013, pp. 338–39.

<sup>310</sup> ICC Statute, Articles 17(1)(a) and (b), see *supra* note 22.

international law, may claim primacy towards the ICC.<sup>311</sup> This is a clear reflection of a solidarist international community promoted by Grotius and seems to stand against the constitutional quality of the Statute.<sup>312</sup> In the eyes of McAuliffe, the establishment of the complementarity regime is even a “counter-revolution”.<sup>313</sup> This, however, does not diminish the quality of the Statute as “an international constitutional organ to organize the exercise of jurisdiction in relation to universal crimes by way of multi-level international governance”.<sup>314</sup>

Moreover, the ICC developed appropriate standards in order to determine when it is allowed to supersede the judgements of national courts.<sup>315</sup> In these standards, assessing whether national proceedings are carried out genuinely, the ICC relies on human rights concepts through Article 17(1)(a) of the ICC Statute.<sup>316</sup> The term “genuinely” was included to give the unwillingness or inability test respectively a more concrete and objective meaning.<sup>317</sup> Yet, as Ambos emphasises, “the term is highly normative, calling for good faith and seriousness on the part of the respective State with regard to investigation and prosecution”.<sup>318</sup> It is human rights

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<sup>311</sup> Roger O’Keefe, *International Criminal Law*, Oxford University Press, Oxford, 2015, p. 554.

<sup>312</sup> Ralph, 2005, p. 30, see *supra* note 231.

<sup>313</sup> See also McAuliffe, 2014, pp. 259, 287, 274, *supra* note 278.

<sup>314</sup> Weller, 2002, p. 693, see *supra* note 23.

<sup>315</sup> Harmen van der Wilt and Sandra Lyngdorf, “Procedural Obligations Under the European Convention on Human Rights: Useful Guidelines for the Assessment of ‘Unwillingness’ and ‘Inability’ in the Context of the Complementarity Principle”, in *International Criminal Law Review*, 2009, vol. 9, no. 1, pp. 39, 41.

<sup>316</sup> Manisuli Ssenyonjo, “The Rise of the African Union Opposition to the International Criminal Court’s Investigations and Prosecutions of African Leaders”, in *International Criminal Law Review*, 2013, vol. 13, no. 2, pp. 385, 406.

<sup>317</sup> Cf. John T. Holmes, “Complementarity”, in Roy S.K. Lee (ed.), *The International Criminal Court: The Making of the Rome Statute*, Martinus Nijhoff Publishers, Leiden 1999, p. 50; John T. Holmes, “National Courts vs ICC”, in Antonio Cassese, Paola Gaeta and John R.W.D. Jones (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, vol. 1, Oxford University Press, Oxford, 2002, p. 674; see also Mohamed El Zeidy, *The Principle of Complementarity in International Criminal Law*, Martinus Nijhoff Publishers, Leiden, 2008, pp. 163–70 (especially p. 166); Mohamed El Zeidy, “The Principle of Complementarity: A New Machinery to Implement International Criminal Law”, in *Michigan Journal of International Law*, 2002, vol. 23, no. 4, p. 900; Claudia Cárdenas, *Die Zulässigkeitsprüfung vor dem Internationalen Strafgerichtshof*, Berliner Wissenschaftsverlag, Berlin, 2005, p. 110.

<sup>318</sup> Kai Ambos, *Treatise on International Criminal Law*, vol. 3, Oxford University Press, Oxford, 2016, p. 306 with further references.

jurisprudence that obliges the State “to use all the legal means at its disposal” to conduct serious and effective investigations and prosecutions leading to the identification and punishment of the responsible;<sup>319</sup> only then can one speak of a “genuine” investigation or prosecution.<sup>320</sup> As Harmen van der Wilt and Sandra Lyngdorf analysed in a comprehensive study of the jurisprudence of various human rights courts, the ICC and the European Court of Human Rights “both share considerable common ground in the normative assumption that states are under an obligation to conduct effective and independent criminal investigations into flagrant violations of human rights which amount to international crimes”.<sup>321</sup>

Human rights instruments also play an important role when assessing an unwillingness pursuant to Article 17(2) of the ICC Statute. Since the Statute lacks a definition of “unjustified delay” in Article 17(2)(b), human rights law provides the necessary tools to shape the contours of the concept,<sup>322</sup> taking recourse to criteria such as the complexity of the case and the conduct of the parties.<sup>323</sup> Similarly, a broad reading of

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<sup>319</sup> See, for example Inter-American Court of Human Rights (‘IACtHR’), *Case of Paniagua Morales et al. v. Guatemala*, Judgment, 8 March 1998, Series C, no. 37, para. 173 ([www.legal-tools.org/doc/99fda3/](http://www.legal-tools.org/doc/99fda3/)). See also IACtHR, *Case of Zambrano-Vélez v. Ecuador*, Judgment, 4 July 2007, Series C, no. 166, para. 123 ([www.legal-tools.org/doc/ace324/](http://www.legal-tools.org/doc/ace324/)); IACtHR, *Case of Escué-Zapata v. Colombia*, Judgment (Background, Reparations, Costs), 4 July 2007, Series C, no. 165, para. 106 ([www.legal-tools.org/doc/0af455/](http://www.legal-tools.org/doc/0af455/)). For more recent case law, see Ambos, 2016, p. 296 with fn. 661, *supra* note 318. See for an extensive study of applicable human rights standards in this context: Jo Stigen, *The Relationship Between the International Criminal Court and National Jurisdictions*, Martinus Nijhoff Publishers, Leiden, 2008, pp. 219–29; El Zeidy, 2008, pp. 175–80, see *supra* note 317.

<sup>320</sup> Harmen van der Wilt, “States’ Obligations to investigate and prosecute perpetrators of international crimes: the perspective of the European Court of Human Rights”, in Carsten Stahn and Mohamed El Zeidy (eds.), *The International Criminal Court and Complementarity: From Theory to Practice*, Cambridge University Press, Cambridge, 2011, pp. 686–705. See also El Zeidy, 2008, p. 167, *supra* note 317.

<sup>321</sup> van der Wilt and Lyngdorf, 2009, pp. 39, 74, see *supra* note 315.

<sup>322</sup> See in more detail Ambos, 2016, pp. 90 ff., *supra* note 318.

<sup>323</sup> See generally Markus Benzing, “The Complementarity Regime of the International Criminal Court: International Criminal Justice Between State Sovereignty and the Fight Against Impunity”, in *Max Planck Yearbook of United Nations*, 2003, vol. 7, pp. 610–11; Sophie Morel, *La mise en oeuvre du principe de complémentarité*, Bis et Ter, Lausanne, 2007, p. 122; Olympia Bekou, “Complementarity and the ICC: A Dangerous Gamble?”, in George Ulrich, *The International Criminal Court: Challenges and Prospect*, Marsilio Editori, Venice, 2005, p. 74; Jann K. Kleffner, *Complementarity in the Rome Statute and National Criminal Jurisdictions*, Oxford University Press, Oxford, 2008, pp. 140–41; El Zeidy, 2008, pp. 183 ff., see *supra* note 317.

“unavailability” of a State’s national judicial system pursuant to Article 17(3) of the ICC Statute – combining systematic and teleological arguments – would cover situations “where a legal system is generally in place but *in concreto* does not provide for effective judicial remedy or access to the courts, be it for political, legal, or factual reasons (capacity overload), or is not able to produce the desired result (bring the responsible to justice)”.<sup>324</sup> As a result, human rights law could provide important guidelines as to whether effective judicial remedies against serious human rights violations are in place.<sup>325</sup> Exemption provisions “conceded in processes of transition may not only be considered as a problem of unwillingness, but also as one of inability in the sense of ‘human rights unavailability’, that is, a lack of an effective judicial remedy or access to the courts”.<sup>326</sup> This *de facto* monitoring function of the ICC is reminiscent of some features of the international human rights setting, where human rights bodies engage in independent monitoring through country visits and reporting, and review States’ reports on their own compliance with human rights standards.<sup>327</sup> The ICC’s interpretation of the term “unwillingness” in Article 17(2) of the Statute has raised particular concern that the ICC would function as an appeals court.<sup>328</sup> This was especially voiced by China during the negotiations of the ICC Statute: “The Court seemed to have become an appeals court sitting above the national court. As stipulated in article 17, the Court could judge ongoing legal proceedings in any State, including a non-party, in order to determine whether the intention existed to shield the

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<sup>324</sup> Ambos, 2016, p. 319, see *supra* note 318. For a detailed discussion, see Stigen, 2008, pp. 319–24, *supra* note 319; Benzeng, 2003, p. 614, see *supra* note 323 (“capacity overload”); El Zeidy, 2008, pp. 127–28, *supra* note 317; Florian Razesberger, *The International Criminal Court: the Principle of Complementarity*, Lang, Frankfurt, 2006, p. 49; Nouwen, 2013, p. 65, see *supra* note 309; Harmen van der Wilt, “Self-Referrals as an Indication of the Inability of States to Cope with Non-State Actors”, in Carsten Stahn (ed.), *The Law and Practice of the International Criminal Court*, Oxford University Press, Oxford, 2015, p. 220.

<sup>325</sup> Ambos, 2016, p. 319, see *supra* note 318.

<sup>326</sup> *Ibid.*

<sup>327</sup> “Overview of the Human Rights Framework”, available on the web site of the International Justice Resource Center.

<sup>328</sup> ZHU Dan, “China, the International Criminal Court, and International Adjudication”, in *Netherlands International Law Review*, 2014, vol. 61, no. 1, pp. 43, 63.

criminal or whether the trial was fair, and could exercise its jurisdiction on the basis of that decision”.<sup>329</sup>

Thus, the fact that the ICC indirectly strengthens domestic human rights protections not only goes back to Kant’s admission that the rule of law can hardly be imposed by external institutions or entities, but must also develop on its own in accordance with the characteristics of each nation;<sup>330</sup> but also demonstrates that the international criminal justice system<sup>331</sup> has what Kant calls a ‘provisional right’ to coerce alongside national authorities.<sup>332</sup>

Since a state of nature among nations, like a state of nature among individual men, is a condition that one ought to leave in order to enter a lawful condition, before this happens any rights of nations, and anything external that is mine or yours that states can acquire or retain by war, is merely provisional. (*The Metaphysic of Morals*, p. 156 [61])

What Kant creates here is a “moral justification for states to be governed by an omnilateral will that matches the argument in his general legal theory”.<sup>333</sup> At any moment in time, positive laws “are not fully laws”, since the “ideal of a just world order is an intelligible ideal and as such is unachievable”.<sup>334</sup> This is something the ICTY Trial Chamber seems to hint at when it stated: “[P]rinciples of international humanitarian law may emerge through a customary process under the pressure of the demands of humanity or the dictates of public conscience, even where State practice is scant or inconsistent”.<sup>335</sup>

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<sup>329</sup> United Nations General Assembly, Statement by Qu Wensheng (China), UN Doc. A/C.6/53/SR.9, 4 November 1998, para. 42, cited in Dan, 2014, pp. 43, 63, see *supra* note 328.

<sup>330</sup> Huntley, 1996, pp. 45, 71, see *supra* note 74. See in this regard also the ICC’s Outreach Section, described by Dutton, 2018, pp. 102 *et seq.*, see *supra* note 298.

<sup>331</sup> The ‘international criminal justice system’ is a transnational regime as Gunther Teubner understands it. While the (political) system of states is based on the presumption that it has the power of a wide scale regulation into all sorts of fields, transnational regimes are specialised on one or two fields – just as the international criminal justice system is specialised on the regulation of international criminal justice (and not, for instance, trade law), see Teubner, 2018, p. 188 see *supra* note 105.

<sup>332</sup> Franceschet, 2002, pp. 93–94, see *supra* note 52.

<sup>333</sup> Capps and Rivers, 2010, pp. 229, 243, see *supra* note 75.

<sup>334</sup> Lucas Thorpe, *The Kant Dictionary*, Bloomsbury, London, 2015, p. 108.

<sup>335</sup> ICTY, *Prosecutor v. Vlatko Kupreškić et al.*, Trial Chamber, Judgment, 14 January 2000, IT-95-16-T, para. 527 ([www.legal-tools.org/doc/5c6a53/](http://www.legal-tools.org/doc/5c6a53/)). See also Corrias and Gordon, 2015, pp. 97, 101, see *supra* note 270.

Franceschet concludes from this that the “ICC’s complementary regime is appropriate to its provisional moral authority to support the reconstruction of state sovereignty in the aftermath of atrocity”.<sup>336</sup> Indeed, as long as mass atrocities are the reality and far from a just world order, the ICC’s complementarity regime is the provisional basis for a coercion of States to achieve Kant’s cosmopolitan ideal. In Franceschet’s words: “States have a default primacy in terms of preventing and punishing these crimes within their own constitutional ambit; but the complementarity principle assumes that, because states are imperfect, they often have a title without capacity or have a capacity unworthy of the title”.<sup>337</sup> In a way, the complementarity regime therefore sets limits to the Realist notion of international law being dominated by States acting as rational egoistic agents.<sup>338</sup>

On a critical note, however, this reading of the ICC’s complementarity regime pushes the ICC more into the direction of a human rights body than a criminal court. The invisible tie between the ICC’s complementarity regime and its human rights monitoring function becomes most controversial when applied to Article 17(2)(c) of the Statute. Here, the vital question is: were proceedings not conducted independently or impartially if the domestic judicial procedure did not satisfy due process standards?<sup>339</sup>

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<sup>336</sup> Franceschet, 2002, pp. 93–94, see *supra* note 52.

<sup>337</sup> *Ibid.*, pp. 93, 99–100.

<sup>338</sup> In a similar vein, see Koskenniemi, 2007, pp. 9, 15, *supra* note 30.

<sup>339</sup> See for a fundamental critique of this ‘due process thesis’, Kevin Jon Heller, “The Shadow Side of Complementarity: The Effect of Article 17 of the Rome Statute on National Due Process”, in *Criminal Law Forum*, 2006, vol. 17, nos. 3–4, pp. 260 ff. See in the same vein, Enrique Carnero Rojo, “The Role of Fair Trial Considerations in the Complementarity Regime of the International Criminal Court”, in *Leiden Journal of International Law*, 2005, vol. 18, no. 4, pp. 836 ff.; Ignaz Stegmiller, *The Pre-Investigation Stage of the ICC*, Duncker & Humblot, Berlin, 2011, pp. 306–08; Frederic Mégret, “Too Much of a Good Thing?: Implementation and the Uses of Complementarity”, in Carsten Stahn and Mohamed El Zeidy (eds.), *The International Criminal Court and Complementarity: From Theory to Practice*, Cambridge University Press, Cambridge, 2011, p. 372; Christoph Safferling and Hilde Farthofer, *International Criminal Procedure*, Oxford University Press, Oxford, 2012, pp. 102–03; Nouwen, 2013, pp. 67–70, see *supra* note 309; John Trahan, “Is Complementarity the Right Approach for the ICC’s Crime of Aggression? – Considering the Problem of ‘Overzealous’ National Court Prosecutions”, in *Cornell International Law Journal*, 2012, vol. 45, no. 3, pp. 584–86, 596–97; Carsten Stahn, “Admissibility Challenges”, in Carsten Stahn (ed.), *The Law and Practice of the International Criminal Court*, Oxford University Press, Oxford, 2015, pp. 244–46 (cf. with regard to the stricter deferral standard of ICTY, *Rules of Procedure and Evidence*, 11 February 1994, amended 22 May 2013, Rule 11*bis* ([www.legal-tools.org/doc/950cb6/](http://www.legal-tools.org/doc/950cb6/))). For a more nuanced approach, see

The wording of Article 17(2) of the ICC Statute seems to suggest this consequence (“having regard to the principles of due process recognized by international law”), as do the due process elements “unjustified delay in the proceedings” (Article 17(2)(b) of the ICC Statute) and “[t]he proceedings were not or are not being conducted independently or impartially” (Article 17(2)(c) of the ICC Statute).<sup>340</sup> If, however, the ICC was clearly a criminal court, a teleological interpretation would allow for a reduced impact of due process standards on the determination whether proceedings were conducted independently or impartially. In this vein, Ambos takes recourse to the “anti-impunity function of Article 17” that merely enables the ICC “to put pressure on States to prosecute and punish international core crimes”, but does not “guarantee [...] due process”.<sup>341</sup> Explicitly emphasising the Court’s nature as a criminal and not a human rights court,<sup>342</sup> he summarises that “Article 17 is about admissibility, not due process”.<sup>343</sup> In the ICC’s case law, PTC I clarified in *Al-Senussi* that “alleged violations of the accused’s procedural rights are not per se grounds for a finding of unwillingness or inability under article 17 of the

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Frédéric Mégret and Giles Samson, “Holding the Line on Complementarity in Libya – The Case for Tolerating Flawed Domestic Trials”, in *Journal of International Criminal Justice*, 2013, vol. 11, no. 3, pp. 574 ff., developing, on the one hand, a ten-step argument in favour of tolerance with regard to flawed domestic proceedings (pp. 577–83), but, on the other, acknowledging that minimum due process must always be fulfilled; for a moderate approach, see also Elinor Fry, *Contours of International Prosecutions: As Defined by Facts, Charges, and Jurisdiction*, Eleven International Publishing, The Hague, 2015, pp. 115–16, 120–35.

<sup>340</sup> Ambos, 2016, p. 313, see *supra* note 318; Heller, 2006, pp. 258–59, see *supra* note 339. See also Kleffner, 2008, pp. 127–52, *supra* note 323; El Zeidy, 2008, p. 169, *supra* note 317.

<sup>341</sup> Ambos, 2016, p. 313, see *supra* note 318. See also Stigen, 2008, p. 221, *supra* note 319; Jakob Pichon, “The Principle of Complementarity in the Cases of the Sudanese Nationals Ahmad Harun and Ali Kushayb before the International Criminal Court”, in *International Criminal Law Review*, 2008, vol. 8, nos. 1–2, p. 193; Kleffner, 2008, p. 152, *supra* note 323 (“blind spot vis-à-vis unfair proceedings”); Anna Bishop, “Failure of Complementarity: The Future of the International Criminal Court Following the Libyan Admissibility Challenge”, in *Minnesota Journal of International Law*, 2013, vol. 22, no. 2, pp. 411–12.

<sup>342</sup> See also Mégret and Samson, 2013, p. 581, see *supra* note 339. In the same vein, see Nouwen, 2013, pp. 67–68, see *supra* note 309; O’Keefe, 2015, p. 561, see *supra* note 311; see also Libya’s submission in ICC, Situation in Libya, *The Prosecutor v. Saif Al-Islam Gaddafi*, Pre-Trial Chamber I, Decision on the admissibility of the case against Saif Al-Islam Gaddafi, 31 May 2013, ICC-01/11-01/11-344-Red, para. 195 ([www.legal-tools.org/doc/339ee2/](http://www.legal-tools.org/doc/339ee2/)).

<sup>343</sup> Ambos, 2016, p. 313, see *supra* note 318.

Statute”.<sup>344</sup> Although the Chamber acknowledged that certain rights violations “may be relevant to the assessment of the independence and impartiality of the national proceedings”, it stated that these criteria have to be read together with the intent to bring the person to justice.<sup>345</sup> The Appeals Chamber explicitly rejected the notion of the ICC as a human rights court<sup>346</sup> and inferred that the due process part of Article 17(2) “should generally be understood as referring to proceedings which will lead to a suspect evading justice, in the sense of not appropriately being tried genuinely”.<sup>347</sup> Nevertheless, the Chamber recognised that in some circumstances the genuineness of the proceedings may be frustrated by “egregious” rights violations “so that they should be deemed, in those circumstances, to be ‘inconsistent with an intent to bring the person to justice’”.<sup>348</sup> This is symptomatic of the bifurcated nature of the ICC between a human rights court and a criminal court: the Chamber, on the one hand, downplays the role of due process rights within the complementarity regime, while, on the other hand, it leaves the door open for human rights considerations.<sup>349</sup> This might be – as Ambos rightly concludes – the best solution “one can achieve under the ambiguous wording of Article 17 (2)”, is however unsatisfactory, since it is based on the rather shaky ground that is the assumption that the ICC is not a human rights court. From a logical perspective, this also paves the way for a common circular argument: the ICC’s nature as a criminal court renders due process considerations within the complementarity regime as secondary, which leads to the conclusion that the ICC is not a human rights court.

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<sup>344</sup> ICC, Situation in Libya, *Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, Pre-Trial Chamber I, Decision on the admissibility of the case against Abdullah Al-Senussi, 11 October 2013, ICC-01/11-01/11-466-Red, para. 235 ([www.legal-tools.org/doc/af6104/](http://www.legal-tools.org/doc/af6104/)).

<sup>345</sup> *Ibid.*; Ambos, 2016, p. 313, see *supra* note 318.

<sup>346</sup> ICC, Situation in Libya, *Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, Appeals Chamber, Judgment on the appeal of Mr. Abdullah Al-Senussi against the decision of Pre-Trial Chamber I of 11 October 2013 entitled “Decision on the admissibility of the case against Abdullah Al-Senussi”, 24 July 2014, ICC-01/11-01/11-565, para. 219 ([www.legal-tools.org/doc/ef20c7/](http://www.legal-tools.org/doc/ef20c7/)).

<sup>347</sup> *Ibid.*, paras. 2–3, 230.

<sup>348</sup> *Ibid.*; Ambos, 2016, p. 314, see *supra* note 318.

<sup>349</sup> *Ibid.*

### 11.7.3.5. The ICC and the Purposes of Punishment

#### 11.7.3.5.1. Retribution

Retribution as a goal of criminal justice (just deserts) not only goes back to Immanuel Kant<sup>350</sup> but also to Georg W.F. Hegel<sup>351</sup> and basically prescribes that the offender should not be punished for any purpose but retribution,<sup>352</sup> which sees punishment as a fair balance for the wrong of the offence (*punitur, quia peccatum est*).<sup>353</sup> Consequently, Kant believed that the State has a moral duty (not just a right) to execute murderers.<sup>354</sup> This punishment is not free of criticism.<sup>355</sup> As Mark Drumbl remarks: “The retributive function is hobbled by the fact that only some extreme evil gets punished, whereas much escapes its grasp, often for political reasons

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<sup>350</sup> See, for example, Immanuel Kant, in Wilhelm Weischedel (ed.), *Kants Werke in sechs Bänden*, vol. 4, Wissenschaftliche Buchgesellschaft, Darmstadt, 1983, sect. 49 E I.; Darryl K. Brown, “The U.S. Criminal-Immigration Convergence and its Possible Undoing”, in *American Criminal Law Review*, 2012, vol. 49, no. 1, pp. 73, 89.

<sup>351</sup> See only Georg W.F. Hegel, *Grundlinien der Philosophie des Rechts*, Berlin, 1821, § 101 ([www.legal-tools.org/doc/ceb813/](http://www.legal-tools.org/doc/ceb813/)). See *infra* chap. 13 for a discussion on Hegel.

<sup>352</sup> See also BVerfGE 22, 125 (132); Brown, 2012, pp. 73, 76, 89 ff., see *supra* note 350:

Retributivists give desert a dominant, presumptively controlling role as the purpose for punishment and give the consequences of punishment no role in justifying punishment (fn omitted).

Raising questions as to whether international justice should pursue policies of retribution or policies of restorative justice, See, for example, Mark Findlay, *Transforming International Criminal Justice*, Routledge, London, 2005.

<sup>353</sup> See Ambos, 2013, p. 67, see *supra* note 265.

<sup>354</sup> Kant, 1991, p. 143, see *supra* note 91:

Accordingly, every murderer – anyone who commits murder, orders it, or is an accomplice in it – must suffer death; this is what justice, as the Idea of judicial authority, wills in accordance with universal laws that are grounded a priori.

<sup>355</sup> See, for example, Ambos, 2013, p. 68, see *supra* note 265:

Just as at the domestic level, retribution at the international level must be rejected as a ground or purpose of punishment. In the case of international mass crimes, a balance of the suffered wrong is plainly unthinkable (fn omitted).

But see Mirjan Damaška, “The Shadow Side of Command Responsibility”, in *American Journal of Comparative Law*, 2001, vol. 49, no. 3, pp. 455, 474:

[D]espite the merely anecdotal character of supportive evidence, a measure of deterrent influence on leaders appears intuitively plausible and should be conceded even for backward and lacerated corners of the world.

See generally Bernd Heinrich, *Strafrecht – Allgemeiner Teil*, Kohlhammer, Stuttgart, 2017, mn. 14 with further references.

anathema to Kantian deontology”.<sup>356</sup> Deontological retributivists have provided the theoretical tools to measure desert: by “harm-ratings”, for instance, examining the consequences of a crime under consideration of certain assumed social situations and evaluation of the “consequences in the light of certain assumed basic values”;<sup>357</sup> or by the impairment of personal interests such as “welfare interests”,<sup>358</sup> which comes close to the (rather consequentialist) *Rechtsgutslehre* in Germany<sup>359</sup> and might – in our view – not be a deontological tool after all. Whether these tools can be applied in practice, however, especially in the context of the ICC, seems doubtful.

That retribution is also a goal of international criminal justice can be seen in the case law of the *ad hoc* tribunals. In *Serushago*, the ICTR Trial Chamber argued that the punishment of an accused who is found guilty “must be directed [...] at retribution”.<sup>360</sup> Moreover, especially in the context of sentencing, the ICTY Appeals Chamber held in its judgements rendered on 24 March 2000 and 20 February 2001 in the *Aleksovski*<sup>361</sup> and *Delalić*<sup>362</sup> cases “that retribution and deterrence are the main principles in sentencing for international crimes [...], these purposive considerations merely form the backdrop against which an individual accused’s sentence

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<sup>356</sup> Mark A. Drumbl, *Atrocity, Punishment, and International Law*, Cambridge University Press, Cambridge, 2007, p. 151.

<sup>357</sup> Andrew von Hirsch and Nils Jareborg, “Gauging Criminal Harm: A Living-Standard Analysis”, in *Oxford Journal of Legal Studies*, 1991, vol. 11, no. 1, pp. 6–7.

<sup>358</sup> Joel Feinberg, *Harm to Others*, Oxford University Press, Oxford, 1987, pp. 41 ff.

<sup>359</sup> See in more detail Kai Ambos, “The Overall Function of International Criminal Law: Striking the Right Balance Between the *Rechtsgut* and the Harm Principles”, in *Criminal Law and Philosophy*, 2015, vol. 9, no. 2, pp. 301–29; Kai Ambos, “Rechtsgutprinzip und harm principle: theoretische Ausgangspunkte zur Bestimmung der Funktion des Völkerstrafrechts”, in Mark A. Zöller (ed.), *Gesamte Strafrechtswissenschaft in internationaler Dimension: Festschrift für Jürgen Wolter zum 70 Geburtstag am 7 September 2013*, Duncker & Humblot, Berlin, 2013, pp. 1285–310.

<sup>360</sup> ICTR, *The Prosecutor v. Omar Serushago*, Sentence, 1999, para. 20, see *supra* note 266; ICTR, *The Prosecutor v. Georges Anderson Nderubumwe Rutaganda*, Trial Chamber I, Judgement and Sentence, 6 December 1999, ICTR-96-3-T, para. 455 ([www.legal-tools.org/doc/f0dbbb/](http://www.legal-tools.org/doc/f0dbbb/)); ICTR, *The Prosecutor v. Emmanuel Ndindabhazi*, Judgement and Sentence, 2004, see *supra* note 266; ICTR, *The Prosecutor v. François Karera*, Judgement and Sentence, 2007, para. 571, see *supra* note 266.

<sup>361</sup> ICTY, *Prosecutor v. Zlatko Aleksovski*, Appeals Chamber, Judgement, 24 March 2000, IT-95-14/1-A, para. 185 ([www.legal-tools.org/doc/176f05/](http://www.legal-tools.org/doc/176f05/)).

<sup>362</sup> ICTY, *Prosecutor v. Zejnir Delalić et al.*, Appeals Chamber, Judgement, 20 February 2001, IT-96-21-A, para. 806 ([www.legal-tools.org/doc/051554/](http://www.legal-tools.org/doc/051554/)).

must be determined”.<sup>363</sup> The ICTY Trial Chamber in *Todorović* added that the principle of retribution “must be understood as reflecting a fair and balanced approach to the exaction of punishment for wrongdoing”.<sup>364</sup> Similarly, in *Erdemović*, retribution in this sense was deemed essential: “[T]he International Tribunal sees public reprobation and stigmatisation by the international community, which would thereby express its indignation over heinous crimes and denounce the perpetrators, as one of the essential functions of a prison sentence for a crime against humanity”.<sup>365</sup>

### 11.7.3.5.2. Deterrence

A second traditional goal is deterrence.<sup>366</sup> Deterrence emanates from Utilitarian moral philosophy and is therefore rather incompatible with Kantian views (even though this interpretation of Kant is increasingly disputed).<sup>367</sup> It may occur in two forms: general deterrence and special deterrence. The

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<sup>363</sup> See also ICTY, *Prosecutor v. Enver Hadžihasanović and Amir Kubura*, Trial Chamber, Judgement, 15 March 2006, IT-01-47-T, paras. 2071–72 ([www.legal-tools.org/doc/8f515a/](http://www.legal-tools.org/doc/8f515a/)); ICTY, *Prosecutor v. Naser Orić*, Trial Chamber II, Judgement, 30 June 2006, IT-03-68-T, para. 718 ([www.legal-tools.org/doc/37564c/](http://www.legal-tools.org/doc/37564c/)); ICTY, *Prosecutor v. Momčilo Krajišnik*, Trial Chamber I, Judgement, 27 September 2006, IT-00-39-T, paras. 1134 ff. ([www.legal-tools.org/doc/62a710/](http://www.legal-tools.org/doc/62a710/)); ICTY, *Prosecutor v. Momčilo Krajišnik*, Appeals Chamber, Judgement, 17 March 2009, IT-00-39-A, paras. 804 ff. ([www.legal-tools.org/doc/770028/](http://www.legal-tools.org/doc/770028/)); ICTY, *Prosecutor v. Dragan Zelenović*, Trial Chamber I, Sentencing Judgement, 4 April 2007, IT-96-23/2-A, para. 32 ([www.legal-tools.org/doc/2a9e0b/](http://www.legal-tools.org/doc/2a9e0b/)); ICTY, *Prosecutor v. Ramush Haradinaj et al.*, Trial Chamber I, Judgement, 3 April 2008, IT-04-84-T, para. 484 ([www.legal-tools.org/doc/025913/](http://www.legal-tools.org/doc/025913/)); ICTY, *Prosecutor v. Ljube Bošković and Johan Tarčulovski*, Trial Chamber II, Judgement, 10 July 2008, IT-04-82-T, para. 587 ([www.legal-tools.org/doc/939486/](http://www.legal-tools.org/doc/939486/)); ICTY, *Prosecutor v. Mile Mrkšić and Veselin Šljivančanin*, Appeals Chamber, Judgement, 5 May 2009, IT-95-13/1-A, para. 145 ([www.legal-tools.org/doc/40bc41/](http://www.legal-tools.org/doc/40bc41/)); ICTY, *Prosecutor v. Milan Lukić and Sredoje Lukić*, Trial Chamber III, Judgement, 20 July 2009, IT-98-32/1-T, para. 1049 ([www.legal-tools.org/doc/af5ad0/](http://www.legal-tools.org/doc/af5ad0/)); ICTY, *Prosecutor v. Vujadin Popović et al.*, Trial Chamber II, Judgement: Volume I, 10 June 2010, IT-05-88-T, para. 2128 ([www.legal-tools.org/doc/481867/](http://www.legal-tools.org/doc/481867/)); ICTY, *Prosecutor v. Vlastimir Đorđević*, Trial Chamber II, Judgement, 23 February 2011, IT-05-87/1-T, para. 2204 ([www.legal-tools.org/doc/653651/](http://www.legal-tools.org/doc/653651/)).

<sup>364</sup> ICTY, *Prosecutor v. Stevan Todorović*, Trial Chamber, Sentencing Judgement, 31 July 2001, IT-95-9/1-S, para. 29 ([www.legal-tools.org/doc/0cd4b3/](http://www.legal-tools.org/doc/0cd4b3/)).

<sup>365</sup> ICTY, *Prosecutor v. Drazen Erdemović*, Trial Chamber, Sentencing Judgment, 29 November 1996, IT-96-22-T, para. 65 ([www.legal-tools.org/doc/eb5c9d/](http://www.legal-tools.org/doc/eb5c9d/)).

<sup>366</sup> See Ambos, 2013, p. 71, *supra* note 265, who calls it “prevention”.

<sup>367</sup> Cf. Hill, 1997, pp. 291, 305 ff., see *supra* note 45; B. Sharon Byrd, “Kant’s Theory of Punishment: Deterrence in its Threat, Retribution in its Execution”, in *Law and Philosophy*, 1989, vol. 8, no. 2, pp. 151 ff.; Robert Hoffman, *A New Reading of Kant’s Theory of Punishment*, Publicly Accessible Penn Dissertations, 2015.

theory of the former was developed at the beginning of the nineteenth century by *Paul Johann Anselm v. Feuerbach*.<sup>368</sup> General deterrence serves to discourage other persons from committing or continuing to commit similar crimes to the offender (negative general deterrence/prevention).<sup>369</sup> Additionally, the punishment of the offender strengthens society's sense of right and wrong and increases trust amongst the people (positive general deterrence/prevention).<sup>370</sup> This form of deterrence "has recently been re-discovered by some common law writers under the concept of 'expressivism' focusing on the (possible) communicative function of punishment".<sup>371</sup> Discussions of special deterrence go back at least as far as *Franz v. Liszt*.<sup>372</sup> According to the theory of special deterrence, punishment may also serve to deter the perpetrator from future crimes (positive special deterrence) and the society shall be protected against this perpetrator (negative special deterrence).<sup>373</sup> In *Serushago*, the ICTR found that general deterrence would be the most important goal of sentencing offenders at the ICTR.<sup>374</sup> It should "dissuade for good others who may be tempted in the future to perpetrate such atrocities by showing them that the international community shall not tolerate the serious violations of international humanitarian law and human rights".<sup>375</sup> In *Tadić*, the

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<sup>368</sup> Cf. for instance, Anselm von Feuerbach, *Lehrbuch des gemeinen in Deutschland gültigen peinlichen Rechts*, Heyer, Giessen, 1832, paras. 12–13.

<sup>369</sup> Swart, 2008, pp. 87, 100, see *supra* note 264. See generally, Heinrich, 2017, mn. 17, see *supra* note 355; Kai Ambos and Christian Steiner, "Vom Sinn des Strafens auf innerstaatlicher und supranationaler Ebene", in *Juristische Schulung*, 2001, vol. 41, no. 1, pp. 9, 12; Carsten Momsen and Peter Rackow, "Die Straftheorien", in *Juristische Arbeitsblätter*, 2004, vol. 36, pp. 336 ff.

<sup>370</sup> Cf. BVerfGE 45, 187 (256); BVerfGE NJW 2004, 2073 (2075); Ambos and Steiner, 2001, pp. 9, 12, see *supra* note 369; Claus Roxin, *Strafrecht Allgemeiner Teil*, vol. I, C.H. Beck, Munich, 2006, sect. 3 mn. 26; Momsen and Rackow, 2004, pp. 336, 338 ff., see *supra* note 369.

<sup>371</sup> See Ambos, 2013, p. 71, see *supra* note 265 with further references.

<sup>372</sup> Cf. Franz von Liszt, *Strafrechtliche Aufsätze und Vorträge*, vol. I, De Gruyter, Berlin, 1905, pp. 126, 176.

<sup>373</sup> Swart, 2008, pp. 87, 100, see *supra* note 264; see generally Heinrich, 2017, mn. 18, see *supra* note 355; Herbert L. Packer, *The Limits of the Criminal Sanction*, Stanford University Press, Stanford, 1969, pp. 39 ff.

<sup>374</sup> See ICTR, *The Prosecutor v. Omar Serushago*, Sentence, 1999, para. 20, see *supra* note 266.

<sup>375</sup> See ICTR, *The Prosecutor v. Jean Kambanda*, Trial Chamber I, Judgment and Sentence, 4 September 1998, ICTR-97-23-S, para. 28 ([www.legal-tools.org/doc/49a299/](http://www.legal-tools.org/doc/49a299/)); ICTR, *The*

ICTY found the opposite: deterrence is a factor to be taken into consideration as a justification for sentencing, but should not be given undue prominence.<sup>376</sup> According to the Preamble of its Statute, the ICC seeks “to contribute to the prevention of [...] crimes”.<sup>377</sup>

However, read together with other utilitarian goals of the ICC, such as strengthening the protections of international humanitarian law; creating a historical record of atrocities; providing satisfaction to the victims of crimes committed by an offender; and to promote a process of reconciliation, deterrence might still be a better option for grounding punishment, since it takes into account the Court’s mandate.

### 11.7.3.5.3. Expressivism and Communicative Theories of Punishment

On the international level, retribution is clothed in an expressivist and communicative appearance,<sup>378</sup> that is, as the expression of condemnation

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*Prosecutor v. Georges Anderson Nderubumwe Rutaganda*, Judgement and Sentence, 1999, para. 455, see *supra* note 266. In *Ndindabahizi*, the Trial Chamber pointed out:

Specific emphasis is placed on general deterrence, so as to demonstrate “that the international community [is] not ready to tolerate serious violations of international humanitarian law and human rights” (fn omitted).

See ICTR, *The Prosecutor v. Emmanuel Ndindabahizi*, Judgement and Sentence, 2004, para. 498 with further references, see *supra* note 266; ICTR, *The Prosecutor v. François Karera*, Judgement and Sentence, 2007, para. 571, see *supra* note 266.

<sup>376</sup> ICTY, *Prosecutor v. Duško Tadić*, Appeals Chamber, Judgment in Sentencing Appeals, 26 January 2000, IT-94-1-A and IT-94-1-Abis, para. 48 ([www.legal-tools.org/doc/df7618/](http://www.legal-tools.org/doc/df7618/)). See also ICTY, *Prosecutor v. Dragoljub Kunarac et al.*, Trial Chamber, Judgment, 22 February 2001, IT-96-23-T & IT-96-23/1-T, para. 857 ([www.legal-tools.org/doc/fd881d/](http://www.legal-tools.org/doc/fd881d/)).

<sup>377</sup> See ICC Statute, Preamble, *supra* note 22. About the difficulty to prevent the widespread harm in the contemporary world from a practical and moral view, see Leslie Francis and John Francis, “Identifying Groups in Genocide Cases”, in Larry May and Zachary Hoskins (eds.), *International Criminal Law and Philosophy*, Cambridge University Press, Cambridge, 2010, pp. 58, 68 ff.

<sup>378</sup> Drumbl, 2007, pp. 173 ff., see *supra* note 356; Mark A. Drumbl, “International Punishment from ‘Other’ Perspectives”, in Róisín Mulgrew and Denis Abels (eds.), *Research Handbook on the International Penal System*, Edward Elgar Publishing, Northampton, 2016, p. 386; Jonathan H. Choi, “Early Release in International Criminal Law”, in *Yale Law Journal*, 2014, vol. 123, no. 6, p. 1810; Robert D. Sloane, “The Expressive Capacity of International Punishment”, in *Stanford Journal of International Law*, 2007, vol. 43, p. 44; Kirsten J. Fisher, *Moral Accountability and International Criminal Law*, Routledge, London, 2012, pp. 51, 56–63, 65; Carsten Stahn, “Between ‘Faith’ and ‘Facts’”, in *Leiden Journal of International Law*, 2012, vol. 25, no. 2, pp. 251, 279–80; Larry May, *Aggression and Crimes Against Peace*, Cambridge University Press, Cambridge, 2008, pp. 329 ff. From a German perspective, see also Klaus Günther, “Criminal Law, Crime and Punishment as Communi-

and outrage of the international community, where the international community in its entirety is considered one of the victims.<sup>379</sup> The stigmatisation and punishment for gross human rights violations in service of the confirmation and reinforcement of fundamental human rights norms can justify a right to punish of an international criminal tribunal that lacks the authority of a State. Given this justification of punishment, what the world community is trying to achieve through international criminal trials is a communicative effect: to show the world that there is justice on an international level and that no perpetrator of grave international crimes can escape it.<sup>380</sup> That is why international criminal law seeks to achieve retributive and deterrent effects of punishment through creating a certain perception of international criminal trials; that is why the protection of due process rights is perceived as crucial in order to restore international peace and strengthen the trust of the international society in legal norms; and that is why Nazi perpetrators were not shot. Instead, the former President of the US, Harry S. Truman, remarked at the start of the trials before the International Military Tribunal at Nuremberg in 1945: “[T]he world should be impressed by the fairness of the trial. These German murderers must be punished, but only upon proof of individual guilt at a trial”.<sup>381</sup>

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cation”, in Andrew P. Simester, Antje du Bois-Pedain and Ulfrid Neumann (eds.), *Liberal Criminal Theory*, Hart, Oxford, 2014, pp. 123 ff. About the communicative function within the (new) retributivist theories, see Michael Pawlik, “Kritik der präventionstheoretischen Strafbegründungen”, in Klaus Rogall *et al.* (eds.), *Festschrift für Rudolphi*, Luchterhand, Neuwied, 2004, pp. 213, 229.

<sup>379</sup> Kai Ambos, “Review Essay: Liberal Criminal Theory”, in *Criminal Law Forum*, 2017, vol. 28, no. 3, pp. 589, 601.

<sup>380</sup> International criminal law is also “educating society about its past” through the truth-telling function of international criminal trials, see Mina Rauschenbach, “Individuals Accused of International Crimes as Delegitimized Agents of Truth”, in *International Criminal Justice Review*, 2018, Advance Article, p. 3 with further references.

<sup>381</sup> Cited in Francis Biddle, *In Brief Authority*, Greenwood Press, Westport, 1962/1972, p. 372; Patricia M. Wald, “Running the Trial of the Century: The Nuremberg Legacy”, in *Cardozo Law Review*, 2005–06, vol. 27, pp. 1559, 1574. US Chief prosecutor Jackson famously argued:

Unless we write the record of this movement with clarity and precision, we cannot blame the future if in days of peace it finds incredible the accusatory generalities uttered during war. We must establish incredible events by credible evidence.

See Telford Taylor, *The Anatomy of the Nuremberg Trials*, Back Bay Books, Boston, 1992, p. 54. Or, in the words of British International Military Tribunal Judge Geoffrey Lawrence, one wanted to punish “those who were guilty”, to establish “the supremacy of international law over national law” and to prove “actual facts, in order to bring home to the German

Even though expressivism can be traced back to Hegel's theory of punishment (for Hegel punishment is the "cancellation [*Aufheben*] of crime", which "is *retribution* in so far as the latter, by its concept, is an infringement of an infringement [of right] and in so far as crime, by its existence [*Dasein*], has a determinate qualitative and quantitative magnitude, so that its negation, as existent, also has a determinate magnitude"),<sup>382</sup> Feinberg is usually named as its proponents, especially by authors from the common law system.<sup>383</sup> What is commonly overlooked is that Feinberg speaks of "expression" rather than "communication" of punishment: "[P]unishment is a conventional device for the expression of attitudes of resentment and indignation. [...] Punishment, in short, has a *symbolic significance* largely missing from other kinds of penalties".<sup>384</sup> There are several attempts to distinguish expressivist and communicative theories of punishment, revolving around the existence of a recipient (for the purpose of this Chapter, this admittedly rough and almost simplistic identification of a common criterion needs to suffice): Expressivist theories too are based on communication but that communication does not require a recipient and is audience-independent while communicative theories are based on an communicative act that is aimed at a certain recipient and is audience-dependent.<sup>385</sup> Communicative punishment theories therefore recognise social communication between offender, victim and

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people and to the peoples of the world, the depths of infamy to which the pursuit of total warfare had brought Germany", see Geoffrey Lawrence, "The Nuremberg Trial", in Guénaél Mettraux (ed.), *Perspectives on the Nuremberg Trial*, Oxford University Press, Oxford, 2008, pp. 290, 292.

<sup>382</sup> Georg Wilhelm Friedrich Hegel, *Elements of the Philosophy of Right*, Allen W. Wood ed., H.B. Nisbet trans., Cambridge University Press, Cambridge, 1821/1991, § 101, emphases in the original; see Antje Du Bois-Pedain, "Hegel and the Justification of Real-world Penal Sanctions", in *Canadian Journal of Law & Jurisprudence*, 2016, vol. 29, no. 1, pp. 37, 42; see also the analysis of Thom Brooks, *Hegel's Political Philosophy: A Systematic Reading of the Philosophy of Right*, 2nd edition, Edinburgh University Press, Edinburgh, 2013, p. 172. See also *infra* chap. 13.

<sup>383</sup> For more references see Larry May and Shannon Fyfe, *International Criminal Tribunals: A Normative Defense*, Cambridge University Press, Cambridge, 2017, pp. 61 *et seq.*

<sup>384</sup> Joel Feinberg, *Doing and Deserving: Essays in the Theory of Responsibility*, Princeton University Press, Princeton (NJ), 1974, p. 98, emphasis in the original.

<sup>385</sup> See, e.g., Andy Engen, "Communication, Expression, and the Justification of Punishment", in *Athens Journal of Humanities and Arts*, 2014, vol. 1, no. 4, pp. 299, 304 *et seq.*; Bill Wringer, "Rethinking expressive theories of punishment: why denunciation is a better bet than communication or pure expression", in *Philosophical Studies*, 2017, vol. 174, no. 3, pp. 681–708.

society through punishment.<sup>386</sup> This stems from the idea that a communication *with* (instead of about) the offender is both possible and necessary.<sup>387</sup> The theory creates the image of a “rational, reflective perpetrator”<sup>388</sup> – an image that has also been created and promoted by Kant,<sup>389</sup> as I have described above. Beyond that, through punishment society not only communicated with the offender, but also “with itself”.<sup>390</sup> In the words of Anthony Duff: “In claiming authority over the citizens, it [that is, criminal law] claims that there are good reasons, grounded in the community’s values for them to eschew such wrong [...]. It speaks to the citizens as members of the normative community”.<sup>391</sup> Thus, “communication begins with the criminal law itself”.<sup>392</sup> Here again, Habermas’ and Bohman’s public sphere, that is a necessary precondition for the creation of a Kantian constitution, is most important. The public sphere creates the platform for normative community to communicate with itself and the offender. Transferred to the level of international criminal justice: international criminal tribunals not only represent that community, they also create it. Corrias and Gordon describe this as the “paradox of representation”: “While the tribunals claim to represent a global public, they call it into being by the very same act”.<sup>393</sup>

#### 11.7.3.6. The ICC Statute as a Mix of Natural and Positive Law

For Kant, as Garrett Wallace Brown understands it, “a cosmopolitan constitution is a mixture of what is usually called natural law and positive law”.<sup>394</sup> Jeremy Waldron calls that ‘normative positivism’ – an oxymoron, as he himself admits, that refers to the combination of “the value judgments that might be required in a non-positivist jurisprudence to identify some proposition as a valid legal norm” and “the value judgments that

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<sup>386</sup> Ambos, 2017, pp. 589, 601, see *supra* note 379.

<sup>387</sup> *Ibid.*

<sup>388</sup> *Ibid.*

<sup>389</sup> Sussman, 2014, see *supra* note 15.

<sup>390</sup> Klaus Günther, “Criminal Law, Crime and Punishment as Communication”, in Andrew P. Simester, Antje du Bois-Pedain and Ulfrid Neumann (eds.), *Liberal Criminal Theory*, Hart, Oxford, 2014, p. 131.

<sup>391</sup> Anthony Duff, *Punishment, Communication and Community*, Oxford University Press, Oxford, 2001, p. 80.

<sup>392</sup> Ambos, 2017, pp. 589, 603, see *supra* note 379.

<sup>393</sup> Corrias and Gordon, 2015, p. 98, see *supra* note 270.

<sup>394</sup> Brown, 2006, pp. 661, 678, see *supra* note 62.

support the positivist position that evaluations of the former type should not be necessary”.<sup>395</sup>

International criminal law is formally part of public international law and as such can make use of the classic sources listed in Article 38 of the ICJ Statute,<sup>396</sup> that is, international conventions, international custom, and – *inter alia* – the general principles of law recognised by “civilized nations”.<sup>397</sup> The central provision in the ICC Statute that is indicative of a Kantian cosmopolitan constitution is – again – Article 21. This provision arranges for a specific hierarchy, “intertwined with the classic sources of international law”.<sup>398</sup> In the first place, the Court shall apply the Statute, the Elements of Crimes (Article 9 of the ICC Statute) and its Rules of Procedure and Evidence. According to Waldron’s categorisation, this would be the positive part of the constitution. Secondly, applicable treaties and the principles and rules of international law shall be considered, which is a direct link to Kant’s Second Definitive Article. Failing that, and if no solution to the respective legal question is achieved, general princi-

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<sup>395</sup> Jeremy Waldron, “Kant’s Legal Positivism”, in *Harvard Law Review*, 1996, vol. 109, no. 7, pp. 1535, 1541.

<sup>396</sup> Ambos, 2013, p. 73, see *supra* note 265; Roozbeh Baker, “Customary International Law in the 21st Century: Old Challenges and New Debates”, in *European Journal of International Law*, 2010, vol. 21, no. 1, pp. 176 ff.; Eberhard Eichenhofer, “Kapitel 1”, in Hans Heiner Kühne, Robert Esser and Marc Gerding (eds.), *Völkerstrafrecht*, Jonscher, Osnabrück, 2007, pp. 4 ff.; Boris Burghardt, *Die Vorgesetztenverantwortlichkeit im völkerrechtlichen Straftatsystem*, Berliner Wissenschaftsverlag, Berlin, 2008, pp. 29 ff. On the recognition of the doctrine of international law sources in international criminal law, see Otto Triffterer, *Dogmatische Untersuchungen zur Entwicklung des materiellen Völkerstrafrechts seit Nürnberg*, Albert, Freiburg, 1966, pp. 35 ff.; Otto Triffterer, “Gewalt”, in Klaus Lüderssen (ed.), *Aufgeklärte Kriminalpolitik oder Kampf gegen das Böse?*, Nomos, Baden-Baden, 1998, pp. 314 ff.; Claus Kreß, “Zur Methode der Rechtsfindung im Allgemeinen Teil des Völkerstrafrechts”, in *Zeitschrift für die gesamte Strafrechtswissenschaft*, 1999, vol. 111, no. 3, pp. 599 ff.; Bruno Simma and Andreas Paulus, “Role”, in Hervé Ascensio, Emmanuel Decaux and Alain Pellet (eds.), *Droit international Pénal*, 2nd edition, Pedone, Paris, 2012, pp. 55 ff.; Kai-Michael König, *Die völkerrechtliche Legitimation der Strafgewalt internationaler Strafjustiz*, Nomos, Baden-Baden, 2003, p. 208; Hervé Ascensio, “Banalité”, in Mireille Delmas-Marty, Emanuela Fronza and Elisabeth Lambert Abdelgawad (eds.), *Les sources du droit international penal*, Société de Législation Comparée, Paris, 2005, pp. 403 ff.

<sup>397</sup> Cf. Karl Doehring, *Völkerrecht*, Müller, Heidelberg, 2004, mns. 271 ff.; Wolff Heintschel von Heinegg, “Verträge”, in Knut Ipsen (ed.), *Völkerrecht*, C.H. Beck, Munich, 2004, sect. 9, mns. 2–3; M. Cherif Bassiouni, *International Criminal Law*, vol. 3, Nijhoff, Leiden, 2008, pp. 8 ff.

<sup>398</sup> Ambos, 2013, p. 74, see *supra* note 265.

ples of law derived from national laws can be applied, provided that those principles are not inconsistent with the ICC Statute, international law, or internationally recognised norms and standards. This might well qualify as the normative (natural law) part of the constitution. The explicit reference to “principles and rules of international law” in Article 21(1)(b) ICC Statute therefore includes customary international law and general principles in the sense of Article 38 of the ICJ Statute.<sup>399</sup>

### 11.7.3.7. The ICC Statute as ‘Higher Law’

Be that as it may, the Statute is not only the “culmination of international law-making”.<sup>400</sup> It also codifies the customary international humanitarian laws,<sup>401</sup> and the jurisprudence of previously established international or internationalised Tribunals such as the ICTY and ICTR.<sup>402</sup> Thus, the law with regard to grave international crimes, customary and treaty based international law, the applicable general principles of law and internationally recognised human rights, “consolidated over a century’s worth of jurisprudence and customary law”, have been ‘constitutionalised’ by the ICC Statute.<sup>403</sup> Unfortunately, most authors who employ this constitutional view fail to discuss the obstacle of Article 10 of the Statute: “Nothing in this Part shall be interpreted as limiting or prejudicing in any way existing or developing rules of international law for purposes other than this Statute”. At the time of its drafting, the provision was intended to secure that any further development of the ‘punishability’ of crimes under international law could not be limited by the Statute.<sup>404</sup> However, Article 10 has not been created to deny the codification of international law, but to make sure that the Statute does not bar “progressive development”.<sup>405</sup> To the

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<sup>399</sup> *Ibid.*

<sup>400</sup> Weller, 2002, p. 693, see *supra* note 23.

<sup>401</sup> Mendes, 2010, p. 24, see *supra* note 24.

<sup>402</sup> *Ibid.*

<sup>403</sup> *Ibid.*, p. 21–22.

<sup>404</sup> Otto Triffterer and Alexander Heinze, “Article 10”, in Otto Triffterer and Kai Ambos (eds.), *Rome Statute of the International Criminal Court: A Commentary*, C.H. Beck, Munich, 2016, mn. 1. See also Mahnoush H. Arsanjani and W. Michael Reisman, “The International Criminal Court and the Congo: From Theory to Reality”, in Leila N. Sadat and Michael P. Scharf (eds.), *Theory and Practice of International Criminal Law*, Nijhoff, Leiden, 2008, pp. 325, 333.

<sup>405</sup> See Statute of the International Law Commission, 21 November 1947, as amended 3 December 1955 and 18 November 1981, Article 15 ([www.legal-tools.org/doc/a2d70e/](http://www.legal-tools.org/doc/a2d70e/)).

contrary, the mere fact that a provision such as Article 10 exists, underlines the quality of the ICC Statute as a constitutional document. The Statutes of the *ad hoc* tribunals do not include a similar provision, because the jurisdiction of both tribunals, limited with regard to both the time period and territorial aspects (Article 1 of the respective Statute of the Tribunals), could neither bar the interpretation of the existing international law beyond their limited aims nor prejudice its future development.<sup>406</sup> That the ICC Statute requires a provision such as Article 10 shows that it indeed, *argumentum e contrario*, reached a level of a constitution. That the application of a constitution is externally limited is nothing unusual.<sup>407</sup> As I view it, Article 10 qualifies as such a limitation.<sup>408</sup> Moreover, in practice, since the Statute has been in force, its provisions do actually influence the evolution of international law and State practice.<sup>409</sup> Article 10 also serves as a concession for the Kantian silence on written constitutions. In both *Perpetual Peace* and *The Metaphysics of Morals*, Kant omits explicit references to written constitutions.<sup>410</sup> Brown follows from this that “Kant seems to disfavour the possibility of a drafted cosmopolitan constitutional document”.<sup>411</sup> Even if this was the case, Article 10 of the ICC Statute provides openness and flexibility and neutralises the rigid features of a written constitution.

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<sup>406</sup> Triffterer and Heinze, 2016, mn. 4, see *supra* note 404.

<sup>407</sup> See, for instance, Canadian Charter of Rights and Freedoms, Article 1. In more general terms, see Janet Hierbert, “The Evolution of the Limitation Clause”, in *Osgoode Hall Law Journal*, 1990, vol. 28, no. 1 pp. 103 ff.

<sup>408</sup> About limitations to constitutions in the Kantian sense, see *supra* sect. 11.4. That the US delegation, as a main opponent of the constitutional view, rejected a provision such as Article 10 for the Court (together with India; the majority was in favour of it, see Young Sok Kim, *The International Criminal Court*, Wisdom House, Leeds, 2003, p. 198), conveys the impression that the positive impact of Article 10 on the constitutionality debate is certainly not totally absurd.

<sup>409</sup> See Lena Grover, “A Call to Arms: Fundamental Dilemmas Confronting the Interpretation of Crimes in the Rome Statute of the International Criminal Court”, in *European Journal of International Law*, 2010, vol. 21, no. 3, pp. 543, 571 with further references in fn. 183. For examples, see Triffterer and Heinze, 2016, mn. 16, see *supra* note 404.

<sup>410</sup> Such a reference could maybe read into the following sentence:

By a *congress* is here understood only a voluntary coalition of different states that can be *dissolved* at any time, not a federation (like that of the American states) which is based on a constitution and can therefore not be dissolved.

See Kant, 1991, p. 156, see *supra* note 91.

<sup>411</sup> Brown, 2006, pp. 661, 673, see *supra* note 62.

## 11.8. Conclusion

Today, on the level of world politics, Kant's cosmopolitan ideas and the ICC are similarly unpopular. Neo-realists contend that Kant overlooks the "important and unremitting force of anarchy among states".<sup>412</sup> As if he wanted to support that statement, US President Trump recently admitted: "I like chaos. It really is good".<sup>413</sup> Trump and Fox News lead a new realist movement where Kantian cosmopolitanism and the ICC have nothing to offer and are left to utopians and conspiracy theorists.<sup>414</sup> This, however, omits a crucial factor in the equation of world politics: the human being. In this regard, the ICC enforces what Kant has designed over two hundred years ago: it is a widening and deepening of the enforcement of universal rights in line with the project of cosmopolitan citizenship.<sup>415</sup> Kant laid the foundations for current conceptions of human dignity, the human is central for him – and the same applies to the ICC. In that regard, the pleading speech UN High Commissioner for Human Rights Prince Zeid, mentioned at the beginning of this chapter, cannot be more Kantian:

Why do we not do the same when it comes to understanding the human world? Why, when examining the political and economic forces at work today, do we not zoom in more deeply? How can it be so hard to grasp that to understand states and societies – their health and ills; why they survive; why they collapse – we must scrutinise at the level of the individual: individual human beings and their rights. After all, the first tear in the fabric of peace often begins with a separation of the first few fibers, the serious violations of the rights of individuals – the denial of economic and social rights, civil and political rights, and most of all, in a persistent denial of freedom.<sup>416</sup>

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<sup>412</sup> Huntley, 1996, p. 45, see *supra* note 74.

<sup>413</sup> Telegraph, "Donald Trump jokes about White House chaos at Gridiron Dinner: 'Who will be next to leave? Steve Miller, or Melania?'" , 4 March 2018.

<sup>414</sup> Ilya Somin, "A Cosmopolitan Case Against World Government", in *The Washington Post*, 18 August 2017.

<sup>415</sup> Roach, 2009, p. 192, see *supra* note 182.

<sup>416</sup> Coalition for the International Criminal Court, see *supra* note 1.

Human dignity is also the concept that makes the racism accusation against the ICC<sup>417</sup> so ironic, since this accusation can work both ways. A large majority of the victims of crimes under the jurisdiction of the ICC are from African States (Darfur: 2.5 million people; Democratic Republic of Congo: 2 million; Uganda: 1.3 million).<sup>418</sup> It can therefore also be argued that refraining from targeting African perpetrators and thus ignoring the significant numbers of African victims might be similarly racist. In fact, when the ICTY was established in 1993, some complained that no such tribunal was set up for non-European victims.

The ICC is therefore an important enforcement mechanism of the Kantian vision and its Statute qualifies as a constitution of international criminal justice.<sup>419</sup> Establishing this Statute as a constitution helps to put the current existential debate about an institution such as the ICC into perspective. A Constitution is many things, including a “covenant, symbol, and aspiration”.<sup>420</sup> As Vicki Jackson and Mark Tushnet formulate it very fittingly: “Reverence for the constitution may transform it into a holy symbol of the people themselves. The creature they created can become their own mystical creator. This symbolism might turn a constitutional text into a semisacred covenant”.<sup>421</sup> The ICC Statute does not fall short of aspirations and symbolism. In fact, it was created as a symbol for international criminal justice and for the fight against impunity. A brief look into the Statute’s Preamble is sufficient to establish this association. It therefore does not come as a surprise that attacks against the Court by its opponents are usually answered with a counter-attack by those who passionately defend the idea of international criminal justice. The latter group defends a symbol, and rightly so. Viewing the ICC Statute as a constitution therefore mitigates the fear that the Court will cease to exist at some

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<sup>417</sup> For a recent account see Dutton, 2018, pp. 109–19, see *supra* note 298; Christian M. De Vos, “The International Criminal Court”, in Philipp Kastner (ed.), *International Criminal Law in Context*, Routledge, London, 2018, p. 253.

<sup>418</sup> Sanji Mmasenono Monageng and Alexander Heinze, “The Rome Statute and Universal Human Rights”, in Evelyn A. Ankumah (ed.), *The International Criminal Court and Africa*, Intersentia, Leiden, 2016, p. 69.

<sup>419</sup> In a similar vein, but rather general, see Habermas, 2009, p. 313, *supra* note 73:

[N]ach zwei Weltkriegen hat die Konstitutionalisierung des Völkerrechts auf dem von Kant gewiesenen Weg zum Weltbürgerrecht Fortschritte gemacht und in internationalen Verfassungen, Organisationen, Verfahren institutionelle Gestalt angenommen.

<sup>420</sup> Jackson and Tushnet, 2014, p. 238, see *supra* note 213.

<sup>421</sup> *Ibid.*, p. 239.

point. It is unlikely that the Court and its Statute will be erased, precisely because it is too much of a symbol. Even realists would admit that reversing the creation of the ICC Statute would come at a price that is disproportionate with what can be gained through such a measure. Instead, the worst-case scenario is that the Court will stop functioning at some point, due to irrelevance and the lack of funding. There will be new and innovative international criminal institutions and mechanisms.

The creation of one of these innovative institutions can currently be witnessed in the context of the conflict in Syria. When the Security Council remained inactive in ensuring accountability for international crimes committed in the war in Syria, on 21 December 2016 the UN General Assembly through Resolution 71/248 created an “International, Impartial and Independent Mechanism to Assist in the Investigation and Prosecution of Those Responsible for the Most Serious Crimes under International Law Committed in the Syrian Arab Republic since March 2011”.<sup>422</sup> The Syria IIIM is a subsidiary organ of the UN General Assembly and not a prosecutorial body but “quasi-prosecutorial”. It is required to “prepare files to assist in the investigation and prosecution of the persons responsible and to establish the connection between crime-based evidence and the persons responsible, directly or indirectly, for such alleged crimes, focusing in particular on linkage evidence and evidence pertaining to *mens rea* and to specific modes of criminal liability”.<sup>423</sup> On 25 September 2018, the UN Human Rights Council voted to establish another IIIM, this time to collect, consolidate, preserve and analyse evidence of violations of international humanitarian law and human rights in Myanmar.<sup>424</sup>

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<sup>422</sup> United Nations General Assembly, Resolution 71/48, International, Impartial and Independent Mechanism to Assist in the Investigation and Prosecution of Those Responsible for the Most Serious Crimes under International Law Committed in the Syrian Arab Republic since March 2011, UN Doc. A/RES/71/248, 21 December 2016 ([www.legal-tools.org/doc/fecaf0/](http://www.legal-tools.org/doc/fecaf0/)). For a general overview, see Wenaweser and Cockayne, 2017, pp. 211–30, *supra* note 2; Ingrid Elliott, “‘A Meaningful Step towards Accountability’? A View from the Field on the United Nations International, Impartial and Independent Mechanism for Syria”, in *Journal of International Criminal Justice*, 2017, vol. 15, no. 2, pp. 239–56; Alex Whiting, “An Investigation Mechanism for Syria: The General Assembly Steps into the Breach”, in *Journal of International Criminal Justice*, 2017, vol. 15, no. 2, pp. 231–37.

<sup>423</sup> United Nations General Assembly, 2016, see *supra* note 422; Elliott, 2017, p. 248, see *supra* note 422.

<sup>424</sup> United Nations General Assembly, Human Rights Council, Situation of human rights of Rohingya Muslims and other minorities in Myanmar: draft resolution, UN Doc. A/HRC/39/L.22, 25 September 2018 ([www.legal-tools.org/doc/da04e2/](http://www.legal-tools.org/doc/da04e2/)). See also Polina Levina

Even the way the ICC Statute was created underlines its constitutional (symbolical) quality. At the State Conference for the establishment of the Statute in Rome from 15 June to 17 July 1998, 159 governmental delegations and 250 delegations of non-governmental organisations were present.<sup>425</sup> For Weller, this “virtually universal representation” turned the Conference into an “international constitutional convention”.<sup>426</sup> For Kant, a constitution was more than an enumeration of principles and rights, it was a “symbolic entity, acting as the supreme reference point for a common sense global identity”.<sup>427</sup> The Rome Conference even provides a suitable narrative<sup>428</sup> for the Statute as a constitution. It was highly unlikely that the many delegations at the Rome Conference with their opposing views and reluctance for compromise would actually agree on a document that was about to codify the existing international humanitarian and customary law and revolutionise international criminal justice.<sup>429</sup> The draft of the Statute contained more square brackets than consolidated text – the square brackets representing the unresolved issues.<sup>430</sup> Only on the last day of the Conference did the bureau of the Conference present a “final, inter-coordinated” draft that led to further intense discussions and disagreements.<sup>431</sup> What happened then became a story that is still gladly told with verve and admiration within the halls of international criminal tribunals and wonderfully recited by Hofmann in his biography of Benjamin Ferencz:

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Mahnad, “An Independent Mechanism for Myanmar: A Turning Point in the Pursuit of Accountability for International Crimes”, in *EJIL: Talk!*, 1 October 2018.

<sup>425</sup> Ambos, 2013, p. 24, see *supra* note 265.

<sup>426</sup> Weller, 2002, pp. 700–01, see *supra* note 23.

<sup>427</sup> Brown, 2006, pp. 661, 676, see *supra* note 62.

<sup>428</sup> About the narratives as a constitutional feature (and element of interpretation), see Carolyn M. Evans, “Constitutional Narratives: Constitutional Adjudication on the Religion Clauses in Australia and Malaysia”, in *Emory International Law Review*, 2009, vol. 23, no. 2, pp. 437 ff. In his famous work, “Nomos and Narrative”, Cover defined a narrative as “a story of how the law, now object, came to be, and more importantly, how it came to be one’s own”: see Robert M. Cover, “Nomos and Narrative”, in *Harvard Law Review*, 1983, vol. 97, no. 1, p. 45. In his view, those narratives “provide resources for justification, condemnation, and argument by actors within the group, who must struggle to live their law” (p. 46).

<sup>429</sup> Ambos, 2013, p. 24, see *supra* note 265.

<sup>430</sup> *Ibid.*

<sup>431</sup> *Ibid.*

A new chairman [...], Ambassador Philippe Kirsch of Canada [...], had replaced the ailing Adrian Bos of Holland. Kirsch was called “the Magician” for the many compromises he seemed to pull out of thin air. The tension was palpable on the last day of the five-week conference – July 17, 1998. As night fell, Kirsch “stopped the clock” which is a magical way of having conference time stand still even while the earth defiantly continues to rotate. [...] Finally, after many skirmishes and midnight approaching, Kirsch called for a yes-or-no vote on the statute as a whole [...]. The Americans and some others did not wish to reveal their hand, so the vote was counted without counting the vote. Delegates just held up their hands (one to a customer) while staff members verbally tallied and shouted totals. The chairman, covered with perspiration and quivering with excitement, announced that 120 had voted in favour and only seven against adoption of the ICC Statute as the constitution for the first permanent international criminal court in human history.<sup>432</sup>

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<sup>432</sup> Tom Hofmann, *Benjamin Ferencz, Nuremberg Prosecutor and Peace Advocate*, McFarland & Company, Jefferson, 2014, p. 215.

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## Jeremy Bentham's Legacy: A Vision of an International Law for the Greatest Happiness of All Nations

Gunnar M. Ekeløve-Slydal\*

Jeremy Bentham (1748–1832), English Enlightenment philosopher, political and legal reformist, coined pivotal English legal terms and created a vision of rationally reformed legislation at the national and international levels as primary instruments of human progress, civilisation, and peace.

This study outlines Bentham's positions on the main intellectual currents of his time, distancing himself from what he perceived as a backward-looking emphasis on religion and tradition as well as from protagonists of natural rights and natural law as a basis for reforming law, government and relations between nations. He argued in favour of carefully *codified* laws, based on what he perceived to be a rationally and empirically sound basis, namely, the 'utility principle' or the principle of maximisation of pleasure and minimisation of pain for the largest possible number of affected persons.

Bentham's texts on international law – including his influential *An Introduction to the Principles of Morals and Legislation* (1789), *Of Laws in General* (1782, rediscovered in 1939) and four articles dealing specifically with international law written between 1786 and 1789 – argue in favour of the law-like quality of international law. Admitted, the 'moral' or 'religious' sanctions, as he called them, for breaches of international law were seldom of great efficacy. But still there was enough to international law that was law-like to let one call it law.

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He defined international law as the law on inter-State relations, and proposed ways to strengthen its role in preventing wars and improving inter-State relations. His idea of codifying an international legal code also led him to see the need for an international court able to decide on disputes between States.

This study discusses foundational concepts, the role and the limits of international criminal law, considering Bentham's ideas and arguments about law. His vision of international law as a vehicle for peace, replacing wars with legal decisions, is part of his legacy. In situations where peace fails, however, Bentham's zeal for perfecting and codifying laws as well as subjecting judicial processes to the test of efficiency and the principle of utility may also be of lasting relevance. These ideas may have a bearing on contemporary discussions about effects and justification of international criminal law and the prosecution of international crimes.

Bentham was influenced by Enlightenment thinkers, as well as by his opposition to William Blackstone (1723–80), famous law professor and teacher of English common law. His ideas have been influential up to the present, including on important thinkers such as John Stuart Mill (1806–73), John Austin (1790–1859), and the pivotal twentieth century legal positivist H.L.A. Hart (1907–92).

While many took inspiration from Bentham's framing of legal concepts, his rejection of natural law and scepticism towards unwritten law, fewer followed him in his idealistic vision that a world guided by law would be a world without war. However, this may be his most important and lasting contribution.

## **12.1. Introduction**

Jeremy Bentham coined terms like 'international law', 'codification' of unwritten laws, and 'maximisation' and 'minimisation' of happiness and pain, respectively. He developed a range of proposals for reform of the way England and other States at his time were governed, on how to improve the ways laws were drafted and enacted, on how to effectively fight corruption in government, and on how to improve penitentiaries, the care for poor people, and the overall functioning of the economy. He even spent time in Russia in 1786–87 to influence the reform-minded Empress Catherine II, though with little success.

Even though many of his ideas became influential at his time – in European countries like France, Spain, Portugal, and in several American

countries – Bentham remained frustrated by his lack of success in efforts to gather support for reform in his native England. The rejection of his proposal for a model prison, the ‘Panopticon’, by the English government in 1803 was a serious disappointment. After Parliament had adopted his plan in 1794, he had drafted thousands of pages of detailed plans for a prison that, in his view, would lead to less suffering among the inmates, rehabilitation of criminals, and more happiness for the society.

Bentham scholars maintain that his frustration with the government's rejection of his prison plan was pivotal in leading him to adopt ideas of representative democracy in the years after.<sup>1</sup> Long before this experience, however, Bentham as a young law student was initially reacting to what he perceived as lack of consistence and accessibility of England's legislation, which often existed only in the form of customary laws presented by lawyers, prosecutors and judges in unpredictable ways. He argued that for law to become a tool for improving society and preventing crime, it had to be codified based on sound principles, and foremost among them, the ‘principle of utility’.

After the government rejected the Panopticon and other reform proposals, Bentham realised that legislators did not always care for the well-being of society, but rather for their own interests and the interests of a group of benefactors. His democratic breakthrough seems to have come from his realisation that those in power were informed by ‘sinister interests’, rather than by the utility principle. He first applied the concept of sinister interest to the legal profession and then to the political establishment to explain their interest-based resistance to legal and political reform.

Even though Bentham found the task of legislating too complex for ordinary people, he considered that they (including women) should have a final say over who would represent them in drafting laws that benefitted society. It would also follow that people had to be given the option to scrutinise the way the government and the Parliament operated to make informed choices among candidates.

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<sup>1</sup> There exists, though, different views on what led Bentham to become a political radical, campaigning for abolition of the British monarchy and the House of Lords, the replacement of the Common Law with a codified system of law, the ‘euthanasia’ of the Anglican Church, and for universal franchise. The influence of James Mill (1773–1836), John Stuart Mill's father, and other liberals may also have played an important role. For a detailed account, see Phillip Schofield, *Utility and Democracy: The Political Thought of Jeremy Bentham*, Oxford University Press, Oxford, 2006, chaps. 5–6.

This is how Bentham the ‘legal reformer’ (the ‘Enlightenment Bentham’ of the eighteenth century) and Bentham the ‘democrat’ (the ‘radical Bentham’ of the nineteenth century) are connected. To legislate well is for expert legislators to accomplish; often based on proposals from external experts like himself. However, if legislators did not have the well-being of the people in mind, the people should have the power to replace them.<sup>2</sup>

As important as his utilitarian-based legal and political reform proposals were, Bentham had much more to offer. He was not only a legal and political reformist, but contributed to defining new foundations of ethical and legal philosophy (‘jurisprudence’), as well as presenting influential ideas in political science, philosophy of language and logic.

Much inspired by progress in the natural sciences at his time, Bentham considered his own efforts of developing and applying foundational principles of legislation and morals as parallel to developments in physics and medicine. His main contribution would be to lay out the details of the ‘principle of utility’ in law and politics, as he outlined in his most known work, *An Introduction to the Principles of Morals and Legislation* (1789).<sup>3</sup>

It could be said that Bentham devoted the first part of his long career as philosopher and publicist to developing proposals for reform of legislation, detecting obstacles for sound reforms to be implemented, and devising strategies to overcome them. From the second decade of the nineteenth century, he devoted much of his attention to proposals for democratic reform in England. During the same period, he also developed extensive contacts with legislative authorities in a range of countries to promote a rationalised code of law which could serve as a model for all nations with liberal opinions.

The present chapter outlines some of Bentham’s main ideas, and applies them to contemporary debates about the foundations of international criminal law. Benthamite concerns may – even though international law of his time was lacking important characteristics of current international criminal law – still have some bearing on current debates and ef-

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<sup>2</sup> Cf. *ibid.*, p. v.

<sup>3</sup> The first edition of the book was printed in 1780, but published only in 1789. A new version, corrected by the author, was published in 1823: Jeremy Bentham, *An Introduction to the Principles of Morals and Legislation*, new edition, printed for W. Pickering and E. Wilson, London, 1823..

forts to develop sound foundations of this branch of international law, and strengthening consensus on both the legal norms and the institutions established to uphold them, such as the International Criminal Court ('ICC').

### 12.1.1. The Principle of Utility

Bentham formulated the 'principle of utility' in 1769 while he was still a young man. Among those he took inspiration from were contemporary philosophers such as Claude-Arien Helvétius (1715–71), David Hume (1711–76) and Joseph Priestley (1733–1804). According to the principle, *the greatest happiness of the greatest number* is the only proper measure of right and wrong and the only proper end of government. In Bentham's mind, however, even if the fundamental goal for the science of legislation and politics was fixed, the science itself was complex. To succeed, one must constantly consider information and ideas as to how the defined end might best be achieved.<sup>4</sup>

Until his death, Bentham remained convinced that the principle of utility, along with supporting principles, constituted sufficient foundation for a scientific approach to morals, legislation and politics.

His faithfulness to moral reasoning based on this principle is well illustrated by his acting in the last hours of his life. On 6 June 1832, he said to a friend that was with him, "I now feel that I am dying; our care must be to minimise the pain. Do not let any of the servants come into the room, and keep away the youths; it will be distressing to them and they can be of no service. Yet I must not be alone; you will remain with me and you only; and then we shall have reduced the pain to the least possible amount."<sup>5</sup> Not much happiness was achievable at such a moment; however, making efforts to minimise the pain was still within Bentham's power.

Bentham introduced the 'principle of utility' in the form of a metaphor:

Nature has placed mankind under the governance of two sovereign masters, *pain* and *pleasure*. It is for them alone to point out what we ought to do, as well as to determine what we shall do. On the one hand the standard of right and wrong, on the other the chain of causes and effects, are fastened to

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<sup>4</sup> Cf. James Steintrager, "Bentham", in Geraint Parry (general ed.), *Political Thinkers*, vol. V, Routledge, London, 2004, p. 110.

<sup>5</sup> Quoted from Francis Charles Montague, "Introduction", in Jeremy Bentham, *A Fragment of Government*, The Lawbook Exchange, Ltd., Clark, 2001, p. 14.

their throne. They govern us in all we do, in all we say, in all we think: every effort we can make to throw off our subjection, will serve but to demonstrate and confirm it. In words, a man may pretend to abjure their empire: but in reality, he will remain, subject to it all the while. The *principle of utility* recognises this subjection, and assumes it for the foundation of that system, the object of which is to rear the fabric of felicity by the hands of reason and of law. Systems which attempt to question it, deal in sounds instead of sense, in caprice instead of reason, in darkness instead of light.<sup>6</sup>

A few comments will have to suffice to put this introduction of one of the most important principles ever proposed in moral and legal philosophy into context. *Firstly*, it should be noted, as is not always done, that Bentham explicitly States, immediately after this introduction, that “enough of metaphor and declamation: it is not by such means that moral science is to be improved”.<sup>7</sup> Even though the introduction is illustrative and pictures the principle of utility well, it may also be misleading if taken as a precise account of the new science Bentham aimed to develop.

Among Bentham’s vast body of work, such metaphoric texts are rare. He sometimes admits that his writings are too detailed, dry and long to attain a large readership. However, sciences of morals and legislation deal with highly complex subject matters and must necessarily be detailed and complex themselves.<sup>8</sup>

*Secondly*, in a note in the 1823 edition of *An Introduction to Principles of Morals and Legislation*, in which the introduction appears, Bentham indicates that the terminology might be improved. The ‘principle of utility’ should instead be named ‘*greatest happiness* or *greatest felicity*’

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<sup>6</sup> Jeremy Bentham, *An Introduction to the Principles of Morals and Legislation*, reprint of 1823 new edition, Clarendon Press, Oxford, 1876, pp. 1–2.

<sup>7</sup> *Ibid.*, p. 2.

<sup>8</sup> According to Bentham scholars, this might be one of the reasons for a seeming paradox: although Bentham became influential in his time and continues to be so, most of his texts remain unread. That may be because they often discuss, in much detail, the application of the principle of utility in different realms, and many of the controversies he engaged in are long forgotten. Many of his texts also went unpublished, or were published long after they were written. However, new and improved editions of some of his lesser known, but high-quality texts in the *Collected Works of Jeremy Bentham* may improve this situation. For more information on the *Collected Works of Jeremy Bentham* and the Bentham Project, see the web sites of Oxford University Press and the Bentham Project, University College of London, respectively.

principle'. The principle states that "the greatest happiness of all those whose interest is in question" is "the right and proper, and only right and proper and universally desirable, end of human action: of human action in every situation, and in particular in that of a functionary or set of functionaries exercising the powers of Government. The word *utility* does not clearly point to the ideas of *pleasure* and *pain* as the words *happiness* and *felicity* do".<sup>9</sup> For some, Bentham contends, the use of the word utility had therefore made acceptance of the principle harder.

It then follows that Bentham would, for pedagogical reasons, prefer to refer to his main principle as the 'principle of happiness or felicity'. However, since in the history of philosophy, Bentham is perceived as a chief proponent of *utilitarianism* – which is derived from the word utility – I will nevertheless stick to the terminology of the original version of the book.<sup>10</sup>

*Thirdly*, it should be noted that Bentham claims that the sovereign masters, pain and pleasure, both as a matter of fact, govern us in all we do, and as an ethical and legal foundational principle, *ought* to or *should* govern us in all we do. The principle both functions as a description of human nature – humans are creatures that minimise pain and maximise pleasure by their actions – and as a *prescription tool* on how each human being should act. Some have argued that Bentham in this way departs from David Hume, who in the third part of his *Treatise of Human Nature* (1739–40) argues against moral rationalism by showing that transition from premises whose parts are linked only by "is" to conclusions whose parts are linked by "ought" are "altogether inconceivable".<sup>11</sup>

In explaining Bentham's position, the above-mentioned metaphorical character of the text should be kept in mind.<sup>12</sup> More important, however, is Bentham's clarification of the epistemological status of the principle in his further explication. The principle is *not* susceptible to "any direct proof", he maintains, because any such proof must start somewhere. That which "is used to prove everything else, cannot itself be proved: a

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<sup>9</sup> Bentham, 1823, p. 1, see *supra* note 3.

<sup>10</sup> It should also be noted that Bentham kept the original terminology in the revised version of the book, despite the difficulty in comprehension.

<sup>11</sup> David Hume, *A Treatise of Human Nature*, book III, part I, Lewis Amherst Selby-Bigge (ed.), Clarendon Press, Oxford, 1888, p. 469.

<sup>12</sup> Cf. Steintrager, 2004, p. 17, see *supra* note 4.

chain of proofs must have their commencement somewhere. To give such proof is as impossible as it is needles”.<sup>13</sup>

Bentham holds that the principle nevertheless can be shown to “be a right principle to be governed by, and that in all cases, it follows from what has been just observed, that whatever principle differs from it in any case must necessarily be a wrong one”.<sup>14</sup> One of the principles opposed to the principle of utility is the ‘principle of asceticism’. Bentham’s strategy is to show that this principle, as well as another opposing principle, the ‘principle of sympathy and antipathy’, is either impossible to apply consistently or “at bottom but the principle of utility misapplied”. In contrast, the “principle of utility is capable of being consistently pursued; and it is but tautology to say, that the more consistently it is pursued, the better it must ever be for human-kind”.<sup>15</sup>

The ‘principle of sympathy and antipathy’ is, according to Bentham, hardly a principle at all. It is rather “a term employed to signify the negation of all principle”. It means approving or disapproving of “certain actions, not on account of their tending to augment the happiness, nor yet on account of their tending to diminish the happiness of the party whose interest is in question, but merely because a man finds himself disposed to approve or disapprove of them”.<sup>16</sup> In criminal proceedings, this principle boils down to approval or disapproval by way of your feelings: “If you hate much, punish much: if you hate little, punish little: punish as you hate. If you hate not at all, punish not at all”.<sup>17</sup>

Bentham admits, though, that sympathy or antipathy may be a motive or cause of an act. This must, however, be distinguished from the evaluation of the moral character of the act. Some acts which were motivated by sympathy may have bad effects, while acts committed based on antipathy may have good effects. Such sentiments can therefore never be a right ground of action.

Arguing thus, Bentham attempts to show that the “only right ground of action, that can possibly subsist, is, after all, the consideration of utility

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<sup>13</sup> Bentham, 1876, p. 4, see *supra* note 6.

<sup>14</sup> *Ibid.*, p. 8.

<sup>15</sup> *Ibid.*, p. 13.

<sup>16</sup> *Ibid.*, p. 16.

<sup>17</sup> *Ibid.*, p. 17.

which, if it is a right principle of action and of approbation [in] any one case, is so in every other".<sup>18</sup>

In conceding that there does not exist any direct proof from *psychological* to *moral* hedonism, Bentham respects Hume's argument that what 'ought' to be done cannot be deduced from what 'is' done. This lack of direct proof, is however, compatible with what John Stuart Mill later termed 'indirect proof'. Both Bentham and Mill, who was one of the main heirs of Bentham's utilitarianism, held that 'is' and 'ought' could be connected in a practical and psychological sense in the minds of humans.

In the words of another of the great architects of utilitarianism, Henry Sidgwick (1838–1900), "no cogent inference is possible from the psychological generalization to the ethical principle, but the mind has a natural tendency to pass from the one position to the other: if the actual ultimate springs of our volition are always our own pleasures and pains, it seems *prima facie* reasonable to be moved by them in proportion to their pleasantness and painfulness, and therefore to choose the greatest pleasure or the least pain on the whole".<sup>19</sup>

For Bentham, Hume's distinction between 'is' and 'ought' was important as an argument for the uncertainty of all knowledge. All statements can only admit of degrees of probability. There is no certainty in human knowledge, neither in jurisprudence nor in the natural sciences. This is an important point for Bentham. As H.L.A. Hart put it, Bentham "believed that, in general, tyranny and oppression in politics were possible only where claims to infallibility of judgment were presumptuously made and stupidly conceded. It was necessary to oppose to these arrogant claims the truth that all human judgment, 'opinion', or 'persuasion' is fallible".<sup>20</sup>

This view on the fallibility of all human knowledge became important in the further development of liberal thought. Mill in his famous book *On Liberty* (1859) maintained that because human judgments are

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<sup>18</sup> *Ibid.*, p. 23.

<sup>19</sup> Henry Sidgwick, *The Methods of Ethics*, 7th edition, Macmillan and Company, Limited, London, 1907, p. 42.

<sup>20</sup> H.L.A. Hart, "Bentham: Lecture on a Master Mind", in Robert S. Summers (ed.), *More Essays in Legal Philosophy: General Assessments of Legal Philosophies*, Basil Blackwell Publishing, Oxford, 1971, p. 31. Hart, however, criticises Bentham's position on why the claim to infallibility is always false, pointing to Bentham's limitations as a philosopher (pp. 31–32).

fallible, freedom of thought and discussion are necessary to let the best arguments win. The view contains important incentives for democracy and rule of law, since it holds that any government who suppresses free thought and speech implicitly acts in contravention of the nature of human knowledge.

In sum, Bentham neither presented the principle of utility as *self-evident* nor *possible to prove*. His strategy was rather to show that competing principles failed, and that it was a reasonable principle given how humans are motivated to act. In any case, no principle or judgment are infallible, and to pretend so leads to tyranny and oppression.

This leads to my *fourth and final comment*, namely that Bentham explicitly explains that the principle of utility accounts for all kinds of actions, including “not only of every action of a private individual, but of every measure of government”. It should be used both to “censure” existing legislation – to assess whether it tends to augment or diminish the happiness of affected parties – as well as to be applied by lawmakers to ensure that new legislation produces overall “benefit, advantage, pleasure, good, or happiness” (which are but a few of the words that Bentham used to describe his approved end goal).<sup>21</sup>

In Bentham’s system of law, the civil code is of the greatest importance for maximising happiness. This field of law is concerned with the distribution of rights and duties (or benefits and burdens), and should maximise the four sub-ends of utility: subsistence, abundance, security, and equality.

To function well, however, civil law must be supported by a well promulgated and effective implementation of ‘penal law’. The purpose of ‘penal law’, which can impose sanctions or punishment for certain acts which, because they tend to diminish happiness, are classified as offences, is to give effect to the civil law.

A State must also have a ‘constitutional code’, which is concerned with the powers, rights, and duties of public officials, and their modes of appointment and dismissal. Also, in this context, penal law plays an important role in giving effect to relevant parts of constitutional law. The penal, civil, and constitutional law together forms ‘substantive law’, which is again given effect by the ‘adjective law’, or the law of judicial

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<sup>21</sup> According to Hart, Bentham gave altogether 58 synonyms for ‘pleasure’, see *ibid.*, p. 24.

procedure. There is also the 'law concerning the judicial establishment', which gives effect to the adjective law.

All these branches of law should, according to Bentham, be designed to augment happiness and diminish pain for all affected parties.

### **12.1.2. The Relevancy of Bentham's Philosophy**

It might be apt, at this stage, to comment on the question of the relevancy of Bentham's thought to contemporary discussions of the foundational questions of international criminal law.

As a starting point, it should be noted that, for Bentham, there were no doubts about the relevance of the principle of utility and other utilitarian principles for assessing any legal system, including criminal law. To assess legislation in terms of its effects on society or for certain groups of society has become standard, not solely because of Bentham, although utilitarianism has certainly played its part in promoting the use of consequentialist criteria.

In contemporary discussions about the role and effect of international criminal law, utilitarian criteria are referred to such as in discussions about the effects of international or national prosecutions of core international crimes for the peace and/or the overall well-being of societies affected by the crimes as well as for categories of affected persons, such as victims, witnesses, suspects, and accused.

In many areas, Benthamite concerns have proved influential in the way societies perceive how legislation should be formed and applied. Relevant examples include:

1. Frequent use of utilitarian justifications of, and prescriptions on, the role of criminal law and punishment in terms of achieving positive effects for society;
2. Utilitarian-based demand for equality of everyone before the law, including women who are often provided less protection by the law, and government agents, who often remain above the law; and
3. Utilitarian-based arguments for the importance of clarity and simplification in legal language. For law and punishment to be successful in preventing crime, and thereby diminishing pain and augmenting happiness, the law has to be understood by ordinary people and punishment has to be meted out in proportion to the gravity of the crime in a comprehensible way.

A study of how Bentham reasoned about such topics may yet deepen our understanding of them, and strengthen our ability to argue in favour of sound principles. That is not to say, of course, that he should function as a moral arbiter or authority of what is good or bad in contemporary international criminal law and in the way international or national jurisdictions apply that branch of law.

A more constructive way of making use of Benthamite concerns would be to take inspiration from them to question the soundness of practices, values and ideas inherent in international criminal law. In providing answers to such questions, the foundations of international criminal law may be strengthened.

There are also other relevant aspects of Bentham's thinking, such as his criticism of the concept of 'natural rights' and his analysis of systemic corruption of the legal profession. He also presented a vision of an international legal order, including the establishment of a world court, to secure peace and co-operation among States.

Whole new fields of international law have come into existence since Bentham's times, such as international human rights law, international humanitarian law, and international criminal law. However, his reasoning on the law-like character of international law and its role in promoting overall happiness and preventing war might still be of relevance for contemporary debates about the status and role of international law.

Due to his own frustration with the English government and other governments that did not follow-up on reforms, Bentham also delved into strategic questions: how to promote reform ideas when faced with powerful groups that could lose benefits if reforms were enacted. His thinking on such issues may still have something to offer in a contemporary context.

Despite Bentham's frustrations over reluctant governments, he became increasingly influential in his own time and remains so in current times.<sup>22</sup> He inspired, *inter alia*, prominent political and legal philosophers such as Mill, Austin and Hart. Utilitarianism remains an important branch of contemporary ethical philosophy, and legal positivism remains among

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<sup>22</sup> Like few other philosophers, Bentham experienced the forming of a 'sect' of followers, establishing their own magazine, *The Westminster Review*, founded in 1823; and the establishment of a university by inspiration of his ideas, the London University College, in 1826.

the main strands of contemporary legal philosophy. Both have borrowed heavily from Bentham's ideas.

There is certainly much to question and criticise in Bentham's thinking. I maintain, however, that there is also a lot to take note of and make use of in improving democratic institutions and legislation; both on the national and the international level.

In short, I find Bentham and Benthamite concerns especially relevant to recent discussions on the philosophical foundations of international criminal law in five aspects:

*Firstly*, he presented comprehensive ideas about the civilising functions of law, including criminal law, and which conditions law must meet to fulfil such functions. He was very much aware of the *negative* aspects of laws – for instance in restricting human freedom and inflicting pain and suffering on those who were subject of lawful punishment. Based on such considerations, he contended that legislation had to be designed well and be based on sound principles to maximise overall happiness. Institutions had to be redesigned bearing these concerns in mind. Reforming and improving legislation and practice is an ongoing process, and will never end.

*Secondly*, his thinking and visions about international law as a tool to preventing wars and improving inter-State relations. His idea of codifying an international legal code also led him to see the need to establish an international court able to decide on disputes between States. He did not develop the foundations for international criminal law as such, but he clearly depicted needs for sanctioning violations of international norms by representatives and even heads of States. This means that some conditionality was inherent in Bentham's thinking when it comes to the sovereignty of States.

*Thirdly*, his thinking about creating conditions conducive of reforms and improvements of legislation may have valid points for contemporary efforts to build wider consensus on the practice of international criminal law. Politicisation, corruption and other forms of failures of legal practice may weaken popular and State support for both the norms of international criminal law as well as their application. Bentham may provide useful ideas on how to overcome obstacles to reform and mobilise wider support of the norms.

*Fourthly*, Bentham may provide useful ideas for contemporary discussions on how to reform and develop further international criminal law

to protect the most important values of humanity. He emphasised that reforming legislation should be based on a principled approach, evaluating the result or consequences of legislation in terms of protecting the well-being of the greatest number. It may be argued that, so far, international criminal law has mainly been developed as an *ad hoc* response to situations of massive crimes, and only a few States have been influential in forming it. As part of a systematic approach, more States should be invited to join discussions on how to further develop international criminal law, providing it with greater authority. An important part of the discussion should be to systematically identify the most important values of humankind to be protected by the law.

*Fifthly*, it is part of Bentham's strategy of influencing legislation that if he succeeded in one country, that country could serve as a model for legislation in other States. Transposed onto the role of contemporary international criminal law, the complementary principle of the Rome Statute may serve exactly that function. It may lead to reforms strengthening national jurisdictions because functioning States prefer to be able to prosecute crimes themselves and avoid interference by the ICC.<sup>23</sup>

In this way, the Rome Statute may serve as a model for national legislation and over time build capacity at the national level to prosecute core international crimes. This may even be the most important function of international criminal law and the ICC, since the beneficial influence on society of national prosecution of grave crimes tends to be larger than the influence of more distant international prosecution. Bentham may have applauded such an outcome, since for him the most important function of law is to influence society by producing maximum happiness and minimum pain. He would think that this could be done better domestically than internationally.

In this view, the ICC would be a successful institution if it were able to influence national jurisdictions effectively to genuinely prosecute international crimes, leaving few cases for the institution itself to deal with.

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<sup>23</sup> Articles 17 and Article 53(2)(b) of the Rome Statute of the International Criminal Court ('ICC Statute') define the principle of complementarity. The complementary nature of the ICC is stated in the Preamble of the ICC Statute:

The International Criminal Court established under this Statute shall be complementary to national criminal jurisdictions.

See ICC Statute, 17 July 1998, in force 1 July 2002 ([www.legal-tools.org/doc/7b9af9/](http://www.legal-tools.org/doc/7b9af9/)).

## 12.2. Bentham's Intellectual Profile

Bentham came from a family of lawyers. Both his father and grandfather were lawyers working in London. His father intended for him to follow and surpass them as practising lawyers. However, Bentham was not an impressive speaker, and he was not impressed himself by the state of English laws at the time. Rather than making money by practicing law, he turned to a study of what the law might be or how it could be improved.

What was so frustrating with the English laws of his time? In his first book, *A Fragment on Government* (1776), Bentham distinguishes between the 'Expositor', who explains "to us what, as he supposes, the Law is", and the 'Censor', who observes "to us what he thinks it ought to be".<sup>24</sup> The book is a critique of Blackstone's *Commentaries on the Laws of England* (1765–69). Bentham saw in Blackstone, who was a celebrated authority on English law at the time, a representative of a widespread and damaging attitude, namely that the increasing crime rate in the country had nothing to do with the state of its laws.

There were other problems with Blackstone, according to Bentham, but the main point seems to be that in his exposition of England's laws, he did not see the need for reform. Bentham was, in the words of Bentham scholar James Steintrager, convinced that "the confusions, uncertainties and obscurity of the penal law and its enforcement were causing the increasing crime rate which he saw afflicting the country".<sup>25</sup>

Blackstone's commentary contained another important fallacy. Its constitutional theory was inspired by John Locke (1632–1704), and referred to fictitious entities such as 'state of nature', 'social contract' and 'natural rights'. According to Bentham, these were dangerous fictions, which could easily result in violent and anarchical revolutions.

England experienced at Bentham's time rapid social changes due to the industrial revolution and socio-economic upheaval. For many observers, these rapid changes were an important part of explaining the increasing crime rate.

For Bentham, however, the emphasis was not on social problems but on the lacking quality of England's penal laws. They were a wholly

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<sup>24</sup> Jeremy Bentham, in F.C. Montague (ed.), *A Fragment on Government*, The Lawbook Exchange, New Jersey, 2001, p. 98.

<sup>25</sup> Steintrager, 2004, p. 15, see *supra* note 4.

unsystematic mix of customs and (often badly) codified laws. In his own copy of *A Fragment on Government*, Bentham wrote that “this was the very first publication by which men at large were invited to break loose from the trammels of authority and ancestor-wisdom in the field of law”.<sup>26</sup>

Bentham’s recipe for solving the problems was first and foremost legal reform; and then secondly political reform. He grew up in an era in which the natural sciences were making rapid strides, both in theory and in their application. His vision was to remedy the problems and conflicts of his day, by imitating the methods of the natural sciences. Like Newton had succeeded by founding on “a single law a complete science of nature”, Bentham thought he had found “an analogous principle capable of serving for the establishment of a synthetic science of the phenomena of moral and social life”.<sup>27</sup>

He thought about himself as a reformer who was destined to introduce a new scientific approach to the reform of penal codes – both in England and in any other country. He was the Newton of the moral and social sciences. His reform ambitions were not confined to England: “That which is Law, is, in different countries, widely different: while that which ought to be, is in all countries to a great degree the same. The Expositor, therefore, is always the citizen of this or that particular country: The Censor is, or ought to be the citizen of the world”.<sup>28</sup> His global ambitions are evidenced by his active promotion of reform proposals in a number of countries in Europe and America.

This self-asserting belief that by applying the principle of utility, he could reshape legislation in any country and thereby solve their main social and political problems, providing maximum happiness for the largest number, of course led to criticism. Even some of his followers, such as Mill, described him as ‘one-eyed’, lacking experience, and being overly rigid in his insistence on having discovered an Archimedean point.<sup>29</sup>

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<sup>26</sup> Quoted from *ibid.*, p. xi.

<sup>27</sup> Elie Halévy, *The Growth of Philosophic Radicalism*, Mary Morris trans., Beacon Press, Boston, 1955, p. 3.

<sup>28</sup> Bentham, 2001, p. 98, see *supra* note 24.

<sup>29</sup> John Stuart Mill, “‘Bentham’, Essays on Ethics, Religion and Society”, in J.M. Robson and F.E.L. Priestly (eds.), *The Collected Works of John Stuart Mill*, vol. X, University of Toronto Press, 1969, p. 94 and pp. 77–115 in general.

However, there is much that points otherwise. From his inspiration from natural sciences, there is certainly a great deal of optimism. He realised, however, that morals and legislation are much more complex than natural sciences. He also knew, despite his programmatic declaration of psychological hedonism, that human nature is complex. He was aware of difficulties which stood in the way of his project, such as men not having a “clear view of their own interest”. Religion, superstition and fictions could lead men astray from reason and their own best interest.

The science of calculating which legal norms or individual actions would provide maximum happiness and minimum pain is not an easy one. It can hardly be a quantitative science as indicated by such terms as ‘felicity calculus’. It might be that Steintrager is close to the truth when he says that Bentham, above all, “found the principle of utility attractive because of its heuristic nature. The principle of utility was meant to generate a system, but it was intended to be an open system, one characterised by flexibility and development through the medium of rational discourse”.<sup>30</sup>

Regardless of how Bentham is portrayed, the focus in our context should be on what is constructive and worth taking seriously today. His reaction to increasing crime rates in England at his time might have been one-sided. His optimism that he could achieve similar gains as Newton had done in natural science by applying the principle of utility may have been naïve. However, his insistence that legislation should serve the well-being of the many, not only of the rulers, or the lawyers, or other groups that benefitted from imperfect legislation, is a sound one.

### **12.2.1. The Misery of Bad Legislation and its Healing**

Bentham seems to have been convinced that there was more serious crime in England than in any other country in Europe.<sup>31</sup> The consequence of this situation was increasing unhappiness for an increasing number of victims, culprits, and for a large part of the population who suffered from an atmosphere of insecurity. For Bentham, this picture of his motherland was distressing because he believed that a lot of this unhappiness was unnecessary.

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<sup>30</sup> Steintrager, 2004, p. 11, see *supra* note 4.

<sup>31</sup> I base the outline in this section on Steintrager's reading of Bentham, based on extensive consultation of unpublished manuscripts.

Even though extreme poverty and socio-economic upheaval was partly to be blamed for the high crime rate, weaknesses in legislation and juridical praxis was a more important factor. Legislation could be compared with medicine. It was, however, an art and science of healing on a grand scale, namely, of healing the whole body politic.

In England, Bentham contended, men often committed crimes because they did not know that their actions were criminal. Even if they did know, the penal sanctions anticipated were often too lenient to deter them or the application of sanctions was uncertain. Heinous crimes went unpunished or were only subject to minor sanctions while small illegal acts could be punished with severity. Acts which were rightly classified as crimes were punished without considering the nature of the crime or its circumstances.

There were several other problems, such as overly technical and unnecessarily complicated rules of evidence. The rules of procedures led to cases taking years to be finalised, while high fees and taxes prevented just treatment for many. Another problem was that the rights and duties of the citizens were not well defined, and the law was not properly promulgated. A systematic problem was that the access to judgments that functioned as precedents was often difficult. Such precedents were often collected in books written in Latin and therefore inaccessible to anyone except judges and lawyers.

There was therefore no way in which the public could know what the law was. The legal status of an act was unclear since precedents often were inconsistent with one another.

Bentham's vivid critical exposé of the state of England's legislation at his time may at some points resonate with the current state of legislation and legal practice in parts of the world. His proposals for how to remedy the deficiencies, may at several points remind of some of the steps proposed by current legal reform movements and human rights groups.

Some of the steps Bentham proposes are obvious – such as easing access to legislation, organise and systematise legislation in reasonable and understandable terms, improve rules of procedure and evidence so that cases can be decided within reasonable time, and so on – while others are subtler and sophisticated.

In this chapter, I will refer only to a few of his most important proposals and analyses. It is pertinent to mention, however, that even if Ben-

tham thought of legislative reform – based on the principle of utility – as being of primary importance in remedying the dismal state of crime in England, he did not think that even the best legislation could completely solve the problems. Even though he was a rationalist in the sense that he believed humans apply reason in choosing to perform acts that promote their own best interests (happiness), he realised that there were plenty of passions and delusions that could lead humans astray.

He did, however, believe that crime could be reduced substantially by codifying law and systematically promulgating it. Law statues should be made so anyone of ordinary intelligence could discover with relative ease which actions constituted crimes. He had high ambitions for the completeness possible for penal law, stating that it should contain “no *terra incognitae*, no blank spaces”. It should be divided into sections so that individuals involved in certain activities can have access to a digest of relevant laws.

To succeed in reducing crime, Bentham argued that there was a need of a rational system of classifying offences. In the works of Blackstone and other legal authorities of his time there was no classificatory system to be found. The result was that their writings were as confused and complicated as the common law itself. Instead branches of law had to be divided into two parts and “then each of those parts into two others; and so on”. In this way a detailed and accurate map of the law may be achieved.<sup>32</sup>

### 12.2.2. Bentham's Concept of Law

The misery of legislation had, however, a deeper cause in the way language function in legal texts. Scholars mostly agree that Bentham's theories about law and legal language is among his most original thought.<sup>33</sup>

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<sup>32</sup> Readers of Bentham will recollect this model from his texts on legislation. Almost a third of the *Introduction to the Principles of Morals and Legislation* is devoted to a chapter on “Division of Offences”, see *supra* note 6.

<sup>33</sup> According to Hart, Bentham's theories on ‘fictions’ “anticipated by a century part of Bertrand Russell's doctrine on logical constructions and incomplete symbols. That doctrine, [...] was looked upon by many English and American philosophers as the paradigm of philosophical method and the prime solvent of philosophical perplexities”. See Hart, 1971, p. 19, *supra* note 20. Bentham also pioneered another important idea, namely that “sentences not words are the unit of meaning”, which were later re-discovered by Gottlob Frege (1848–1925) and Ludwig Wittgenstein (1889–1959) in his *Tractatus Logico-Philosophicus* (Prop. 3.3 and 3.3.4).

His view on law is dependent on his understanding of the concept of ‘human liberty’, which is founded in the liberal tradition. According to this thinking, liberty is *absence of restraint and interference from society and rulers*. To the extent that one is not hindered by others, one has liberty and is free. There has never been a natural state of freedom, according to Bentham, and since people have always lived in society there is nothing like a ‘social contract’. However, in society there is a distinction between *public* and *private* life. Liberty as non-interference by the society or the rulers is morally good since it is reflecting the greatest happiness principle.

Due to his view on liberty, Bentham followed Thomas Hobbes (1588–1679) in viewing law as ‘negative’. Based on the principle of utility, liberty must be positive because it provides happiness, while law is negative since it restricts liberty. It follows that the control which the State exerts by legislation must be limited to maintain individual freedom.

Law is nevertheless necessary to social order, and good laws, promoting happiness and well-being to the greatest number, is essential to good government. The problems that arises from bad legislation is therefore of the greatest importance to solve. Unlike many earlier thinkers, Bentham denied that there exists any ‘natural law’, which could be invoked to reject, amend or provide with authority existing law. Instead, his persuasion was that the principle of utility was the only sound basis for criticising and improving legislation.

For Bentham, law is a phenomenon of large societies with a sovereign – a person or a group of persons with supreme power. Laws in such societies are a subset of the sovereign’s commands: general orders that apply to classes of actions and people and are backed up by the threat of sanctions. This view was further developed by Austin and legal positivism. A consequence of the view is that law that contains morally questionable norms, or commands morally evil actions, or is not based on consent, is still law.

A popular misunderstanding is that legal positivism necessarily means that one must be *satisfied* with existing law. This is refuted by Bentham and other legal positivists. Understanding the phenomenon of law must be clearly distinguished from assessing or censuring (as Bentham would say) existing law. Large parts of Bentham’s publications are devoted to criticising legislation as well as juridical practice and to proposing better legislation. He also held that disobedience towards the law, stem-

ming from considerations applying the principle of utility, was sometimes justified.

However, he was convinced that invoking *natural rights* or *natural law arguments* did not lead to increase in the overall happiness of the members of society. Rather it led to revolutions, anarchy and pain, as demonstrated by developments in France after the 1789 revolution and the proclamation of the *Declaration of the Rights of the Man and of the Citizen*.

There was also another possible unwanted result of insufficient understanding of law: oppression, legal corruption and barbarism, as exemplified by the state in England.

In criticising both what he called the 'anarchical fallacies' resulting from declaring natural rights, as well as the unfortunate situation with English law, Bentham applied his theory on logical fictions.

Understanding law involves understanding concepts such as 'rights', 'obligations', 'contracts', 'property', 'immunity', 'privilege', and so on. This proves rather difficult. In the empiricist tradition, which Bentham adheres to, understanding is provided by *perception*. To allow for the understanding of things that are not directly perceived, Locke and Hume, the primary advocates of empiricism, distinguished between 'simple' and 'complex' ideas. A complex idea, such as that of a golden mountain, can be understood only because it can be analysed in terms of its simple constituents.

However, this technique does not work for legal terms. Bentham therefore invented an alternative way of giving meaning to such terms, called 'paraphrasis'. The idea is not to translate complex words into simpler words, but to translate the whole sentence of which it forms a part into another sentence. He called the legal terms in question 'fictional entities', and works out for several of them how sentences containing them can be translated to sentences that eventually only contains 'real entities'.

A much-used example is the term 'rights', which are explained by Bentham in terms of sentences about 'duties'. A right I have may be restated in terms of the imposition of duties on others who are obliged to fulfil my right. 'Duty' is of course also a 'fictional entity', never to be perceived directly, but a new paraphrasis may lead to something perceivable. Sentences about duties can be translated into sentences about the threat of moral disapproval or punishment. To have a duty is then to be

under a threat of being sanctioned if the duty is not fulfilled. Finally, being under a threat of a sanction amounts to being under a threat of imposition of pain.

In this way, we reach what Bentham calls ‘real entities’. A famous quote from *A Fragment on Government* reads: “*pain* and *pleasure* at least are words which a man has no need, we may hope, to go to a Lawyer to know the meaning of”.<sup>34</sup> With such clarifiers the law can become clear for lawyers and laymen alike.

The problem was that English common law terminology was full of fictions, and that judges, lawyers and laymen alike did not distinguish between them and real entities. There was a widespread belief that there were real objects which corresponded to the abstract words.

For Bentham, it was therefore not enough that common law was adequately codified, classified and promulgated as statutory law. The language of law should be transformed. He developed whole new sets of terms for a ‘universal jurisprudence’, with definitions consisting of simple ideas and which could replace the technical, ambiguous, obscure and fictitious language of English jurisprudence.

Even though he never presented his theory of fictions in full, it remains at the hearth of his explanations of why legal reform is necessary and how it can be done. For him the project is not limited to refining and clarifying terminology. The task of legal philosophy, which Bentham in this context calls the “metaphysics of jurisprudence”, is to clarify what is meant when we use certain words. Without such clarity, humans are destined to remain slaves to authority and the customs of barbaric times.

### **12.2.3. Bentham’s Attack on Natural Rights**

No doubt, Bentham’s criticism of the state of England’s legislation at the time had many valid points. Some of the points he made may even be valid for contemporary legislation in many States. For any State to reduce crime and create a secure environment, the task of clarifying, simplifying, systematising and making accessible its penal code remains a task of primary importance. The proposals on how what he calls ‘legal fictions’ may be translated into more readily understandable terms is also constructive, even though Bentham may have overstated the negative impact they have.

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<sup>34</sup> Bentham, 1776, p. 121, see *supra* note 24.

Also, Bentham's realisations of why his reform proposals were often not followed up on, have valid points.<sup>35</sup> He may have understood early on that reform was difficult, even though he later gave the impression that it took him a long time to fully realise how difficult it was. He realised that the people in power, adhering to the 'principle of self-preference' rather than the 'principle of utility', did not want reform. All his proposals were designed to improve the lot of the greater number, and thereby they could also threaten the interests of the few in power: the rulers and certain professional groups that benefitted from the situation, such as lawyers, judges, legislators, booksellers, and who gained financially from a confused legal situation.

He also realised that even those who would benefit the most from his proposals, people in general, in many cases were not ready to accept them because of fear of change and lack of understanding of complex matters.

Another striking feature of Bentham's reform proposals are their universal aspirations. In the same way that the laws of physics are the same everywhere, the principles of high-quality legislation and politics are valid everywhere. Of course, his main devotion was to improve the situation in England, but he made proposals for improved legislation in many other countries. In principle, Bentham was proposing a 'universal censorial jurisprudence', which criticises law as it is considering what the law ought to be, and what ought to be transcends the boundaries of any given nation. It appeals to a universal standard – the 'principle of utility' – which is valid for all human's and societies.

Strikingly, Bentham's 'censorial jurisprudence' functions similar to the way international human rights function today. Human rights have become a universal standard from where domestic legislation and juridical practice may be *censored*. International human rights institutions provide model legislation and legal advice, like Bentham and his followers did. Similar frustrations as Bentham experienced also exist. National authorities often disregard or cheat in their following-up on the advices.

The analogy could even be extended to the codification of international criminal law in the Rome Statute. It is hard to imagine that Bentham would have been anything but positive towards such an endeavour

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<sup>35</sup> An overview of Bentham's reflections on the obstacles to reform is provided in Steintrager, 2004, chap. 2, see *supra* note 4.

that in his terms would clarify the law and serve as a model for domestic legislation.

Equally striking, however, is Bentham's attack on predecessors of the modern human rights movement, namely, thinkers that referred to the natural rights of all human beings in political declarations. For any contemporary reading, his denouncing of the 1789 French *Declaration of the Rights of the Man and of the Citizen* seems overblown. A comment by Hart may enlighten an important point:

It seems to me that Bentham really was afraid not merely of intemperate invocations of the doctrine of Natural Rights in opposition to established laws, but sensed that the idea of rights would always excite a peculiarly strong suspicion that the doctrine of utility was not an adequate expression of men's moral ideas and political ideals. There is, I think, something strident or even feverish in Bentham's treatment of rights which betrays this nervousness.<sup>36</sup>

Bentham's view on fictional entities – such as legal rights – was that they needed to be translated and established on firmer foundations. Legal rights, however, had an important place in legislation and political life, and should not be disposed of.

Natural rights, however, were not fictional but *fabulous* entities and 'contradictions in terms'. Legal rights could be analysed in terms of the corresponding duties and the threat made by law of sanctions against those who did not fulfil their duties. This was not possible for natural rights since they were not part of any law at all. They were more akin to poetry, than to legal language. Unfortunately, the language of law had been infested with such entities.

The purpose of the legislator requires that both the composer and the reader be as much as possible in their sober senses that they may be able (the one for the purpose of determining what he shall command, the other for that of knowing what he is to obey) to distinguish every object as perfectly as possible from all other with which it is in danger of being confounded. No kind of enthusiasm ought either the Legislator

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<sup>36</sup> Hart, 1971, p. 33, see *supra* note 20.

or the Judge to have about them, not even the enthusiasm of humanity.<sup>37</sup>

Bentham invented a whole range of expressions to describe that natural rights are non-existing, such as calling them 'counterfeit rights', 'nonsense on stilts' and so on. More constructive, however, is his suggestions that the reference to natural rights is a way of arguing or stating a strong wish about which *legal* rights there ought to be. He would then add that this must be done with care in order not to create expectations and enthusiasm that could lead to anarchical consequences.

Supposing that natural rights exist is wrong for another reason as well, because it indicates that these rights would be the same for all time. According to Bentham, only those systems of rights that produce utility should be upheld. Over time, different conditions may mean that we must restate rights or change them altogether. It is therefore a mistake to think that any rights are unalterable.

In the utilitarian view on rights, they are reduced to tools to promote the principle of utility. In this author's view, important features of rights are then lost, such as their defence of the dignity, autonomy, privacy and personal freedom; in particular of persons belonging to vulnerable groups of society.<sup>38</sup>

According to Hart, Bentham failed to see that 'rights' have a different time direction than the principle of utility, which always points to the future consequences of actions to assess whether they are acceptable. Reasons for ascription of moral rights "must refer to the present properties or past actions of the individuals who are said to have moral rights as in themselves sufficient grounds for treating them in a certain way independently of the beneficial consequences to society of doing so".<sup>39</sup>

The point is that rights do not depend on an analysis of future consequences, but on whether a person has done something that make her or

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<sup>37</sup> Steintrager, 2004, p. 9, see *supra* note 4. The quotation is from University College London, Bentham Manuscript, Box 27, p. 123.

<sup>38</sup> Cf. Hugo Adam Bedau, "'Anarchical Fallacies': Bentham's Attack on Human Rights", in *Human Rights Quarterly*, 2000, vol. 22, no. 1, pp. 261–79. Bedau argues that Bentham's restrictive utilitarian view misses the key points of human rights, and that they should instead be derived from "recognition of our common nature as rational, autonomous, moral agents for whom liberty, privacy and other goods are paramount, rather than from any collective or aggregative fact about net social welfare or the general happiness". (p. 278).

<sup>39</sup> Hart, 1971, pp. 38 ff., see *supra* note 20.

him *deserve* certain treatment. The claim of natural and human rights is that if only a person is born as human being she or he qualifies to certain basic rights. Even if treating someone according to human rights has neutral or negative consequences for the overall well-being of affected persons, the rights should be respected.

In many cases, there would not be a conflict between the results of applying the principle of utility and applying human rights. However, it is easy to find examples where there are. For instance, should the law permit applying torture if you by torturing a person could obtain information that could save innocent civilians from a terrorist attack? Utilitarian and human rights consideration would provide opposite answers. In human rights, the prohibition of torture is an absolute one, resulting in a certain inflexibility that Bentham would oppose.<sup>40</sup>

#### 12.2.4. Punishment and Criminal Responsibility

The philosophical foundation of any criminal law – which imposes forms of punishment on those who are found guilty of breaching the law – must entail a theoretical justification for punishment as such. Traditionally, such justifications have been either ‘consequentialist’ or ‘deontological’.

In general, the practice of punishment could be justified by reference either to ‘forward-looking’ or to ‘backward-looking’ considerations. If the former prevails, then the theory is likely to be ‘consequentialist’ and likely some version of utilitarianism. According to this view, the point of the practice of punishment is to increase overall net social welfare by reducing or ideally, preventing crime.

If the latter prevail, the theory is ‘deontological’. In this approach, punishment is seen either as a good in itself or as a practice required by justice. A ‘deontological’ justification of punishment is likely to be a ‘retributive’ justification.

There is also a third alternative, providing justifications in hybrid combinations of these two independent alternatives.<sup>41</sup>

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<sup>40</sup> For the sake of the argument, I disregard considerations about the effectiveness of torture in getting reliable information. Much modern research indicates that coercive interrogation methods are not to be relied on. See for example Norwegian researcher Asbjørn Rachlew, “From interrogating to interviewing suspects of terror: Towards a new mindset”, in *Penal Reform International*, 14 March 2017.

<sup>41</sup> Hugo Adam Bedau and Erin Kelly, “Punishment”, in *Stanford Encyclopaedia of Philosophy*, 31 July 2015.

The consequentialist views punishment as justified to the extent that its practice achieves (or is believed to achieve) an end-state such as “happiness for the greatest number”, general welfare or another specified common good. Most philosophers today would modify this view by introducing various constraints on punishment, such as those following from human rights or other humanistic considerations. Whether these constraints can in turn be justified by their consequences is not a necessary condition. An important part of the theory of punishment is thus a careful articulation of the norms that provide these constraints on the practice and their rationale.

As we have seen, the assessing of the future consequences of individual actions, application of legal norms and implementation of government decrees is at the centre of Bentham's normative approach. His justification of punishment follows the same logic.

The proper aim and justification for punishment is to produce pleasure and prevent or reduce pain. However, punishment is painful. The only viable justification of it is therefore to prove that the pain inflicted on the person who is punished, is outbalanced by the reduction in pain or increase of pleasure it causes for all affected persons.

If the threat of punishment is deterring people from doing things which would produce more pain – such as rape, theft, murder or committing international crimes – then punishment is justified. A consequence of the theory is also that the amount of pain which is inflicted must be less than the reduction of pain or the happiness it produces. In other words, there must be a valuation of the likely pains produced by future offences, which can be averted by setting out a meted punishment.

This way of reasoning does not implicate that the punishment should be similar to the offence. If punishment is, however, justified as a *deliberate form of revenge*, such ideas of mimicking the offence come to the fore. For Bentham, this is an example of applying the principle of ‘sympathy and antipathy’, whereby you punish according to your feelings, “if you hate much, punish much: if you hate little, punish little: punish as you hate”.<sup>42</sup> Instead, punishment should be a tool to improve society by deterring future offences and rehabilitating criminals.

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<sup>42</sup> Bentham, 1876, p. 17, see *supra* note 6.

Currently, there may be six prevailing standard justifications of punishment. According to these views, we punish criminals because it:

1. serves justice by giving criminals the hard treatment they deserve ('retributivism');
2. deters everyone from committing crimes ('deterrence');
3. helps to morally educate both the criminal and society at large ('moral education');
4. allows society to express its moral values ('expressivism');
5. helps restore the victims along with their friends and families ('restitutivism'); and, finally
6. provides a controlled, peaceful outlet for socially disruptive emotions ('social safety valve theory').

Even though each of these justifications may carry different weight, I think they are all part of what we today would come up with if pressed to justify punishing criminals. "Each of the traditional theories helps illuminate what we stand to gain from an effective institution of punishment", in the words of Christopher H. Wellman. I also agree with him, that of the six, the second might be the most important.<sup>43</sup>

In Nordic countries, the so-called 'general' and 'individual' prevention of crimes is at the centre of the foundations of penal legislation. Such considerations also have a prominent place in many other countries and in international jurisdictions.

It is thus hard to question that Benthamite views have prevailed. However, different from his exclusionist approach of treating justifications, the utilitarian justifications have prevailed in concert with others. Depending on circumstances, as of today, many would be willing to refer to all six justifications mentioned above as valid, however, granting Bentham that deterrence and moral education should be viewed as most important.

In thinking about criminal responsibility, Bentham's view is restrictive, based on a narrow understanding of what can legitimately constitute a 'reason for action'. According to Hart, the restrictive view has its origin

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<sup>43</sup> Christopher Heath Wellman, "Piercing Sovereignty: A Rationale for International Jurisdiction Over Crimes That Do Not Cross International Borders", in R.A. Duff and Stuart Green (eds.), *Philosophical Foundations of Criminal Law*, Oxford University Press, Oxford, 2013, p. 461.

in Bentham's denial that the past actions of an individual who is said to have moral rights could serve as "sufficient ground for treating them in a certain way independently of the beneficial consequences to society of doing so".<sup>44</sup> To invoke past achievements as a reason to grant someone special treatment today is in Bentham's eyes "a form of bad faith which uses the language of reason to express personal 'antipathy or sympathy', mere irrational sentiment".<sup>45</sup>

Few of Bentham's passages are more revealing of his way of thinking than the following:

It is the principle of antipathy which leads us to speak of offences as *deserving* punishment. It is the corresponding principle of sympathy which leads us to speak of certain actions as *meriting* reward. This word *merit* can only lead to passion and error. It is *effects* good or bad which we ought alone to consider.<sup>46</sup>

In line with this restrictive line of thought about what can be a reason for rewarding or punishing someone, Bentham also has diverging views on how to justify mental conditions of criminal responsibility. In any civilised legal system, if a person was insane, a young child, under duress, or could not control himself when committing a crime, he or she should not be liable to punishment or blame.<sup>47</sup>

Even if Bentham accepts this doctrine, he turns "its face to the future away from the past. We are to observe such restrictions on the use of punishment not because there is any intrinsic objection to punishing a man who at the time of the crime lacked 'a vicious will' or lacked the 'free use of his will but because his punishment will be 'inefficacious'".<sup>48</sup>

This approach is, in my view, counter-intuitive. However, Bentham's challenging of traditional justifications of punishment and criminal responsibility – and a range of other concepts – still has some bearing. Even if we do not accept that future consequences are the *only* relevant

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<sup>44</sup> Hart, 1971, p. 38, see *supra* note 20.

<sup>45</sup> *Ibid.*

<sup>46</sup> Jeremy Bentham, *Theory of Legislation*, 2nd edition, Trübner & Co., London, 1871, p. 76.

<sup>47</sup> The doctrine of *mens rea* as a necessary condition of criminal responsibility and liability for punishment is prescribed in Articles 30 and 31 of the ICC Statute, see *supra* note 23.

<sup>48</sup> Hart, 1971, p. 40, see *supra* note 20. See also Bentham, 1876, chap. XV, *supra* note 6.

concerns when justifying punishment or determining the limits of criminal responsibility, they should be part of the consideration.

His approach also has the beneficial effect of bringing to the discussion on the foundations of punishment, questions on how to strengthen the component of rehabilitation and moral education.

### **12.2.5. Extending the Principle of Utility to International Law**

Bentham did not write extensively on international law. He did nevertheless play a crucial role by re-naming the field and providing a vision for international law's role in securing world peace and happiness for all nations. He was of the view that international law should play a similar role in the society of States as national law played in the society of individuals. It should be shaped to provide happiness for the greatest number of States.

He coined the English word 'international' in the last chapter of his book *An Introduction to the Principles of Morals and Legislation*, to replace the term 'law of nations'. The term 'law of nations' is a misnomer, according to Bentham and "were it not for the force of custom, it would seem rather to refer to internal jurisprudence" of nations.

In discussing how jurisprudence may be classified, Bentham suggests that it can be divided in terms of "the political quality of the persons whose conduct is the subject of the law". He states that persons "may [...] be considered either as members of the same state, or as members of different states; in the first case, the law may be referred to the head of *internal*, in the second case, to that of international jurisprudence".<sup>49</sup>

In putting Bentham's view on international law in context, he had a rather Eurocentric view on the globalisation taking place at his time, while also acknowledging the important role of the United States as a model of representative democracy, and arguing for de-colonisation. It was in his view primarily the European States that civilised the world, although there were many deficiencies in their legislation and political life.

Accordingly, he promoted his first book, *A Fragment on Government*, as the product of a global moment in British and human history because it was published just after James Cook's return from his second voyage around the world in 1775. In the preface, he notes that "[t]he age we live in is a busy age; in which knowledge is rapidly advancing towards

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<sup>49</sup> *Ibid.*, p. 326.

perfection. In the natural world, in particular, everything teems with discovery and with improvement. The most distant and recondite regions of the earth traversed and explored [...] are striking evidences, were all others wanting, of this pleasing truth”.<sup>50</sup>

The context of Bentham's thinking about international matters and the regulation that international law may provide thus seems to be the expanding British and European empires. This was, however, somewhat balanced by his application of the principle of utility, which defined its subjects to have equal status.

In framing the concept of international law, his starting point was his critical appraisal of Blackstone's exposition on the law of nations. *A Fragment of Government* may have been inspired by global expansion of the British Empire, but it was first and foremost a critique of Blackstone's account of municipal law. *A Comment on the Commentaries*, which Bentham drafted between 1774 and 1776, and which the *Fragment* was based on, remained incomplete and was never published by Bentham. It is in this work; however, that he explains what he thinks is wrong with Blackstone's account of the law of nations.<sup>51</sup>

Not surprisingly, among Bentham's chief concerns was that Blackstone included the law of nature in the concept of the law of nations, as well as mutual compacts, treaties, leagues and agreements, which were of doubtful legal content. It might be that Bentham did not treat Blackstone's account fairly;<sup>52</sup> however the direction of his criticism was clearly in line with his thoughts about how to improve international legislation presented thirteen years later, in *An Introduction to the Principles of Morals and Legislation*.

In an often-quoted footnote to his introduction of the term international jurisprudence,<sup>53</sup> he explains that “the word *international*, it must be acknowledged, is a new one; though, it is hoped, sufficiently analogous and intelligible. It is calculated to express, in a more significant way, the

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<sup>50</sup> Jeremy Bentham, *A Fragment on Government*, printed for T. Paine, P. Elmsly and E. Brooke, London, 1776, p. i.

<sup>51</sup> Cf. M.W. Janis, “Jeremy Bentham and the Fashioning of International Law”, in *American Journal of International Law*, April 1984, vol. 78, no. 2, pp. 405–18. *The Comment on the Commentaries* was first published in 1928. It is currently available in *The Collected Works of Jeremy Bentham*, Oxford University Press, Oxford, 2008.

<sup>52</sup> Cf. Janis, 1984, p. 408, see *supra* note 51.

<sup>53</sup> Bentham, 1871, see *supra* note 46.

branch of the law which goes commonly under the name of the *law of nations*".

It is clear from Bentham's further explanations of international law, that it deals exclusively with the rights and obligations of States between themselves and not about rights and obligations of individuals. He also assumed that foreign transactions before municipal courts were decided by internal, not international, rules. In effect, without ever mentioning that he realised to have done so, Bentham "excluded from the domain of his 'international law' all of those rules mentioned by Blackstone that concerned individual rights and obligations. [...] More or less inadvertently, Bentham changed the boundaries of the field he sought to define".<sup>54</sup>

There are several other important aspects of Bentham's view on the status and scope of international law. His disciple, John Austin is well-known for his conclusion that international law lacks lawlike qualities. He viewed it as rules established merely by general opinion, such as laws of honour or law set by fashion.<sup>55</sup> According to Austin, law-like qualities included that legal provisions should be based on a command of the sovereign and those violating it should face sanctions.

Since there was no international sovereign and because the sanctions for violating international law were only moral, Austin rejected the claim that international law really was law at all. Bentham may have expressed similar views; however, his main line of thought was quite different. In a manuscript called *Of Laws in General*,<sup>56</sup> he elaborates further on necessary qualities of laws. He contended that "concessions of sovereign are not laws" and that "a treaty made by one sovereign with another is not itself a law". He also held that the enforcement of the treaties depended only on moral and religious sanctions.

He nevertheless pointed out that national sovereigns *could* make international law, and that *real* law could be enforced only with a religious or a moral sanction. It seems then that we "have strong suggestions that Bentham, for himself, was at least sometimes satisfied that there was

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<sup>54</sup> Janis, 1984, p. 410, see *supra* note 51.

<sup>55</sup> John Austin, *The Province of Jurisprudence Determined*, Weidenfeld & Nicholson, London, 1954, p. 201.

<sup>56</sup> *Of Laws in General* was not part of the 1843 John Bowring edition of Bentham's collected works, but was only discovered in 1939. It was published in 1945 under the title *The Limits of Jurisprudence Defined*. Hart edited the manuscript and published it in 1970, under the title *Of Laws in General*.

enough to international law that was lawlike to let one call it law".<sup>57</sup> In this, he was later followed by Hart, who famously argued in the *Concept of Law* (1961) that "no other social rules are so close to municipal law as those of international law".<sup>58</sup>

More important than Bentham's discussions on the status of international law at his time, is his four essays with proposals of principles of international law.<sup>59</sup> It is the first, *Objects of International Law* and the fourth, *A Plan for a Universal and Perpetual Peace*, which identifies most clearly Bentham's aims for international law.

As to be expected, Bentham's method in the essays is to apply the principle of utility to international law, as he did to municipal law. Overall, he has an optimistic view of what international law might accomplish. The beginning of *Objects of International Law* sets the tone: "If a citizen of the world had to prepare a universal international code, what would he propose to himself as his object? It would be the common and equal utility of all nations: this would be his inclination and his duty".<sup>60</sup>

Bentham questions whether a legislator, being a citizen of one nation, could at the same time be trusted to develop laws for the whole world. He attempts to resolve the dilemma by arguing in favour of surrendering national self-interest: "But ought the sovereign of a state to sacrifice the interests of his subjects for the advantage of foreigners? Why not? – provided it be in a case, if there be such a one, in which it would have been praiseworthy in his subjects to make the sacrifice themselves".<sup>61</sup> His point of departure is clearly the principle of utility.

[...] the end that a disinterested legislator upon international law would propose to himself, would therefore be the great-

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<sup>57</sup> Janis, 1984, p. 412, see *supra* note 51.

<sup>58</sup> H.L.A. Hart, in Joseph Raz and Penelope A. Bulloch (eds.), *The Concept of Law*, 3rd edition, Oxford University Press, Oxford, 2012, p. 237.

<sup>59</sup> Bentham did not make it easy for the scholar to detect his full meaning as to the proposals. In the latter half of the 1780s, he drafted a series of proposals under the general headings of "Law Inter National 1786" and "Pacification and Emancipation". These remained incomplete and in manuscript form until they were translated from French to English, edited and published as four essays in 1843, under the title *Principles of International Law*. They appeared in the second volume of Bowring's edition of Bentham's collected works. The essays are sketchy and reflect the editor's choice as to what to include.

<sup>60</sup> Jeremy Bentham, in John Bowring (ed.), *Principles of International Law*, vol. 2, William Tait, Edinburgh, 1838–43, p. 536.

<sup>61</sup> *Ibid.*, p. 537.

est happiness of all nations taken together... he would follow the same route which he would follow with regard to internal laws. He would set himself to prevent positive international offences – to encourage the practice of positively useful actions.

He would regard as a positive crime every proceeding – every arrangement, by which the given nation should do more evil to foreign nations taken together, whose interests might be affected, than it should do good to itself. [...]

In the same manner, he would regard as a negative offence every determination, by which the given nation should refuse to render positive services to a foreign nation, when the rendering of them would produce more good to the last-mentioned nation, than it would produce evil to itself.<sup>62</sup>

Bentham views war as a type of procedure by which nations endeavours “to enforce its rights at the expense of another nation”. He named the laws of peace the “substantive laws of the international code”, while the laws of war were the “adjective laws of the same code”. He proposes several ways to prevent war:

1. Homologation [codification] of unwritten laws which are considered as established by custom;
2. New international laws to be made upon all points which remain unascertained; upon the greater number of points in which the interests of two States are capable of collision; and
3. Perfecting the style of the laws of all kinds, whether internal or international. How many wars have there been, which have had for their principal, or even their only cause, no more noble origin than the negligence or inability of a lawyer or a geometrician!<sup>63</sup>

Bentham thought that wars could be prevented by dealing more methodically with the various causes of a conflict, by elaborating new international rules where no such rules exist, and by making unwritten customs explicit. And as he believed internal peace and reduction of crime could be achieved domestically by systematic reforms based on the utility principle, he believed international peace was in sight if international law was improved in similar ways.

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<sup>62</sup> *Ibid.*, p. 539.

<sup>63</sup> *Ibid.*, p. 540.

The central theme of his *Plan for a Universal and Perpetual Peace*, the fourth of the essays on international law, is that to establish world peace nations should sacrifice national self-interest. He addresses proposals to all nations, especially to England and France, which include giving up of colonies, establishing free trade, reducing the navies to what is necessary to protect against pirates and the mutual reduction of the size of armies.

Bentham realised, however, that even if these reforms were to be adopted, there could still be conflicts between nations. He suggests therefore that to prevent disputes nations should agree to establish an international court of arbitration, “a common court of judicature for the decision of differences between the several nations, although such court were not to be armed with any coercive powers”.<sup>64</sup>

As envisioned by Bentham, the international court would work by establishing gradual responses. The first would be the mere reporting of the Court's opinion. The second would be the circulation of the opinion in each nation to stimulate a favourable public reaction. The third would be “putting the refractory state under the ban of Europe”. And the fourth, last resort, would be that participating States would contribute and deploy armed contingents to enforce the court's decisions.

In a manuscript written in the 1820s, Bentham proposed a legislative alliance among “all civilised nations”, each to be represented by an envoy at a congress with both judicial and legislative authority. He criticised Emmerich de Vattel (1714–67) for providing inadequate foundations for a new international order. He argued that only an international order “grounded on the greatest happiness principle, [...] would, if the plan and execution be more moral and intellectual than Vattel's, possess a probability of superseding it, and being referred to in preference”.<sup>65</sup> <http://www.classicsofstrategy.com/2015/08/principles-of-international-law-bentham.html> - 38

In sum, Bentham introduced the English term ‘international law’ to replace the term ‘law of nations’, which he had found and criticised in Blackstone. He however narrowed the scope somewhat, restricting international law to only those rules which concern sovereign States among or

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<sup>64</sup> *Ibid.*, p. 547.

<sup>65</sup> Quoted from Carolina Kenny, “Jeremy Bentham, Principles of International Law (1786–1789/1843)”, in *Classics of Strategy and Diplomacy*, 20 August 2015.

between themselves. That was Bentham's original meaning in crafting the term 'inter-national'.

Blackstone's 'law of nations' includes laws characterised by their sources, which are non-municipal. It includes rules provided in multistate agreements or practice or other non-municipal sources. It is more inclusive than Bentham's definition, and according to some commentators it includes much of what had been traditionally thought of as within the realm of the law of nations.<sup>66</sup>

Bentham was called during his lifetime "legislator of the world".<sup>67</sup> That was not because he succeeded in codifying international law. He did not. What he did, however, to earn such a title was to propose a term – 'international law' – that became a success even in his own time.

There was, however, more to it. Bentham was a visionary well ahead of his time, believing that a codified international law, thoroughly based on the principle of utility, could change the world for the better. In the words of Janis, "[i]t should be no surprise that Bentham brought his reformatory zeal, albeit briefly, to international, as well as to municipal, law. Realist and idealist – Bentham displayed both the scepticism and the romanticism that still invests the discipline he named".<sup>68</sup>

Bentham also included a proposal for a world institution – a world court – that could decide on contentious issues between the States. In other words, by strengthening the lawlike character of international law – by proposing an international institution that could legitimately impose sanctions on States that violated the law – he thought he could prevent war and build a peaceful world.

Finally, Bentham's central concern during the 1810s and 1820s was to promote codification of the municipal law of "nations professing liberal opinions". He argued that a code of law should be based on a rigorous logical analysis of the categories of human action, and that each enactment should be followed by the reasons which justified it. Such a comprehensive approach would signal a new era in legislation.

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<sup>66</sup> Janis, 1984, p. 41, see *supra* note 51.

<sup>67</sup> José del Valle, a Guatemalan politician, wrote in a letter to Bentham: "Your works give you the glorious title of legislator of the world". See Kenny, 2015, endnote 45, *supra* note 65.

<sup>68</sup> Janis, 1984, p. 415, see *supra* note 51.

His idea was that, once one State had adopted such a code, other States would be obliged to follow its example. He attempted to persuade legislative authorities in the United States, Russia, Spain, Portugal, Greece, South and Central America, and elsewhere, to invite him to draft a code of law for them.<sup>69</sup>

Bentham's concept of universal jurisprudence and his belief in rational model legislation, including all branches of law, is an important part of his legacy. Such international legislation as the Rome Statute of the ICC could be seen as such model legislation. The fact that States – if international core crimes take place on their territory or if their nationals are victims or offenders – must ascertain that they are willing and able to prosecute the crimes, build a strong case for them to copy the Rome Statute's definitions of the crimes. In effect, many countries have already incorporated or otherwise given the treaty's definitions effect in their national legal systems.

Bentham would, however, criticise the *ad hoc* manner in which international criminal law has been developed. He would favour a systematic approach, defining the most serious crimes that demanded a global legal response. It is an important part of his legacy not to merely accept the law as it is. One should quest for a better law, drafted by applying rational and systematic methods to achieve the set goal of global well-being.

### 12.3. Utilitarianism Refined

Bentham did not invent the 'principle of utility'. His achievement was to apply it in reform proposals to improve legislation in any State with liberal opinions. By doing so, he developed a range of distinctions of types of pains and pleasures, categorised and mapped types of offences, defined secondary ends such as subsistence, abundance, security, and equality, and developed other concepts to make utilitarianism work. He explained 14 types of pleasures, 12 types of pains, and defined four sources of them: the 'physical', the 'political', the 'moral' and the 'religious'.<sup>70</sup>

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<sup>69</sup> Bentham's correspondence with, and proposals to, authorities in these countries is published in: "Legislator of the World: Writings on Codification, Law, and Education", in Philip Schofield and Jonathan Harris (eds.), *The Collected Works of Jeremy Bentham*, Clarendon Press, Oxford, 1998.

<sup>70</sup> These themes are outlined in chapters III and V of *An Introduction to the Principles of Morals and Legislation*: see Bentham, 1876, *supra* note 6. Chapter XVI, "Division of Of-

In making his case for utilitarianism, he also developed aiding principles and proposals for mechanisms to ensure that those in charge of institutions would see it in their interest to apply the principle of utility. He had a realistic view about how the selfishness of persons in power could lead them to detract from the road to happiness for the largest number. The so-called ‘duty-and-interest-juncture-principle’ should be applied for instance in the poor house or in prisons to ensure that managers looked after those in their care. For instance, the salary of a governor should be reduced for every woman who died in childbirth. A prison director’s salary should vary with the number of juvenile inmates who survived from year to year. According to Bentham, this should be so because:

Every system of management which has disinterestedness pretended or real for its foundation is rotten at the root, susceptible of a momentary prosperity at the outset but sure to perish in the long run. That principle of action is most to be depended upon how’s influence is most powerful, most constant, most uniform, most lasting and most general among mankind. Personal interest is that principle and a system of economy built on any other foundations is built upon a quicksand.<sup>71</sup>

Another important feature of Bentham’s account of utilitarianism is that it is based on equality in two directions: (1) any individual’s pleasure and pain should count equally with the pleasure and pain of any other individual in the felicity calculus (“everybody to count for one, nobody for more than one”), which is shorthand for the utilitarian principle of justice, and (2) there is no distinction between the worth of the different forms of pleasure or pain. Intensity, duration or extent of pleasure or pain are though important factors legislators should take into consideration.

Even though Bentham can be criticised for not leaving some groups of society much chance of integrating utilitarian sentiments in their motivations, in principle he developed a refined system of evaluating actions on the individual level open for everyone to adopt.<sup>72</sup> For this author, how-

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fenses”, also includes a detailed outline of all categories of conceivable crimes and their subdivisions.

<sup>71</sup> Quoted from Hart, “Bentham”, in Bhikhu Parekh (ed.), *Jeremy Bentham: Ten Critical Essays*, Frank Cass and Company Limited, 1974, p. 76.

<sup>72</sup> For a criticism of Bentham along these lines, see Bhikhu Parekh, “Introduction”, in Bhikhu Parekh (ed.), *Jeremy Bentham: Ten Critical Essays*, Frank Cass and Company Limited, 1974.

ever, his insistence that *legislation* should adhere to the 'principle of utility' may be of even higher importance. He consequently therefore adhered to a view that while the foundation of law may be the *command of the sovereign*, it is its consequences for society that must be assessed to find out whether it should be reformed.

### 12.3.1. John Stuart Mill

Mill played a crucial role in refining and making utilitarianism as an ethical doctrine accessible to the wider public. It could also be said that the most important question he dealt with – the balance between personal freedom and State control – was an inheritance from Bentham. Based on inspiration from Bentham and Adam Smith (1723–90), Mill wrote pivotal texts for the liberal democratic tradition in Western political thinking.

The main idea of this tradition is that even a democratically elected government is no guarantee of real liberty. The ruling elite may become a class removed from the people, and a popularly elected government may still oppress minority groups of society, leading to the 'tyranny of the majority'. In a democratic society, the vital question is therefore where to put the balance between the need for social control, and the freedom of the individual to think and act as he or she wish. Humans are by nature intolerant, and therefore must be disciplined by policies and laws that protect them against each other. This leads to Mill's famous principle for ensuring freedom:

The only purpose for which power can be rightfully exercised over any member of a civilised community, against his will, is to prevent harm to others. His own good, either physical or moral, is not a sufficient warrant. He cannot rightfully be compelled to do or forbear because it will be better for him to do so because it will make him happier, because, in the opinions of others, to do so would be wise, or even right.<sup>73</sup>

Mill defined Bentham's qualities in terms of an "essentially practical mind. It was by practical abuses that his mind was first turned to speculation – by the abuses of the profession which was chosen for him, that of the law". According to Mill, Bentham was shocked to learn for the first

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<sup>73</sup> John Stuart Mill, *On Liberty*, John W. Parker and Son, West Strand, London, 1859, p. 22.

time that English lawyers demanded a client “to pay for three attendances” when only one was given.<sup>74</sup>

Unlike Bentham, Mill argued that pleasures differ in quality, and that pleasures that are rooted in one’s higher faculties should be weighted more heavily than baser pleasures. He held that people’s achievements of goals and ends, such as virtuous living, should be counted as part of their happiness. He explained that the sentiment of justice is based on utility, and that rights exist only because they are necessary for human happiness.

In his essay on utilitarianism, Mill discusses some of the criticisms of the doctrine – that it does not provide adequate protection for individual rights, that not everything can be measured by the same standard, and that happiness is more complex than reflected by the theory.<sup>75</sup> In proposing solutions he refines and develops the theory.

Like Bentham, Mill argued that the fact that a law would maximise well-being or minimise suffering is an obvious reason to adopt it. He did not, however, develop detailed assessments and proposals for reforms of laws as Bentham did. His main contribution related to the philosophy of law may have been in prescribing the limits of law, the need for legal protection of minority’s and individual rights in democratic societies, and definitions of liberty and freedom that explicitly and implicitly criticised definitions of State power and ideologies that could lead to tyranny, oppression – and international crimes.

### 12.3.2. John Austin

While Mill’s achievements included refining the ethical doctrine of utilitarianism, Austin’s *The Province of Jurisprudence Determined* (1832) is a classic in English jurisprudence, and exerted considerable influence on the development of legal philosophy. Austin also developed an ethical doctrine; however, in doing so he departed from Bentham in arguing for divine law being the basis of ethical doctrines. His ideas on divine law were similar to the so-called ‘theological Utilitarians’, including Archdeacon

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<sup>74</sup> John Stuart Mill, “Bentham (1838)”, in John Stuart Mill, *Essays on Ethics, Religion and Society*, University of Toronto Press, Toronto, Routledge and Kegan Press, London, 1985, p. 80.

<sup>75</sup> John Stuart Mill, in George Sher (ed.), *Utilitarianism*, 2nd edition, Hackett Publishing Company, Inc., Indianapolis, 2001. The essay first appeared as a series of three articles published in Fraser’s Magazine in 1861. The articles were collected and reprinted as a single book in 1863.

William Paley, a highly influential British theologian of the late eighteenth century.

Largely through Bentham's influence, Austin was appointed professor of jurisprudence at the newly founded University of London in 1826. He resigned in 1834 and did not experience notably success in his lifetime. His book on jurisprudence became influential only after his death when his wife published a second edition in 1861.

Austin's goal was like Bentham's to transform law into utilitarian science. To do this, he thought it was necessary to purge the law of all moralistic notions and to define key legal concepts in strictly empirical terms. Law, according to Austin, is a social fact and reflects relations of power and obedience. According to this view, known as legal positivism, (1) law and morality are separate, and (2) all positive laws can be traced back to human lawmakers.

Drawing heavily on the thought of Bentham (although without having access to many of Bentham's unpublished manuscripts at the time), including his criticism of natural rights and natural law, Austin was the first legal thinker to work out a completely positivistic theory of law.

Austin argues that laws are general commands issued by a sovereign to members of an independent political society. They are backed up by credible threats of punishment or other adverse consequences ('sanctions') if they are not complied with.

A command is a declared wish that something should be done or is prohibited to do. Only general commands are laws, that is, commands that refers to a course of conduct or class of actions, not specific actions. Such commands give rise to legal duties to obey. All the key concepts in this account ('law', 'sovereign', 'command', 'sanction', 'duty') are defined in terms of empirically verifiable social facts. No moral judgment, according to Austin, is ever necessary to determine what the law is – though of course morality must be consulted in determining what the law should be. As a utilitarian, Austin believed that laws should promote the greatest happiness of society.

An important part of Austin's account of law, was his discussion of sovereignty in the last chapter of his book. Every independent political society not only has, but *must have*, a sovereign. This might be either a single person, or an aggregate of persons. The criteria for identifying the sovereign is that it receives habitual obedience from the bulk of the popu-

lation, but does not habitually obey any other determinate human superior. In every society “somewhat advanced in civilization”, the identity of the sovereign is clear. It is also clear that supreme power, the sovereign, may not be limited by positive law. Such a view is a contradiction in terms, since a person cannot legislate on his own behaviour.

In federal States, such as the United States, there is an extraordinary and ulterior legislature, according to Austin. The sovereign in this case consists of the States’ governments “as forming one aggregate body”, and their ratification of the Constitution establishes its legal validity. They also have a power to amend it, by three-quarter majority.

Austin held that international law was not “law properly so called”. His map of human law was then considerable narrower than Bentham’s. He divided human laws (namely, laws set down by men for men) into positive laws or laws ‘strictly so called’ (laws laid down by a sovereign) and laws laid down by men who were not political superiors or not in pursuance of legal rights. Laws ‘improperly so called’ are firstly laws by analogy, that is, laws of fashion, constitutional, and international law. Secondly, there are also laws by metaphor, such as the law of gravity.

According to Austin, public international law cannot be deemed to be law, since no specific sovereign can be identified as the author of the rules. There are neither proper sanctions against States that disregard its requirements.

### **12.3.3. H.L.A. Hart**

When reading Bentham, Austin or Mill you soon encounter formulations and references that remind you that these thinkers lived in another time. H.L.A. Hart’s texts differ. They belong to our own post-war era. Many of his ideas and terminology is part of contemporary views of what constitutes law and legal systems. His most famous book, *The Concept of Law* (1961) is still read as an introduction to the theoretic study of law. He and Hans Kelsen (1881–1973) are probably the most influential twentieth century philosophers of law.

Hart served in British intelligence during World War II, and was well informed about crimes that had taken place, including the fact that German laws permitted many of those crimes.

There are important links between Hart, Bentham, Mill and Austin. Hart wrote about the previous thinkers, and acknowledged his intellectual debt to them. He shared their positivist approach to law, while also criti-

cising and refining their theories on several accounts. During his later years, he wrote much about Bentham and edited new versions of some of his works. In his 1963 publication *Law, Liberty, and Morality*, he wrote in the liberal tradition of Mill, applying Mill's 'harm principle' in arguing that homosexual intercourse between consenting adults should not be legally proscribed since it did not cause harm to somebody other than the participants.<sup>76</sup>

In *The Concept of Law*, Hart presents law as a social construction, an historically contingent feature of certain societies.<sup>77</sup> Law emerges as one of several systematic forms of *social control*, administered by institutions. It both rests on and supersedes custom, providing a system of 'primary rules' that direct and appraise conduct. In advanced, legal societies, law also entails 'secondary rules' about how to identify, enforce, and change the primary rules.

There is an important distinction between the 'internal' and 'external' points of view or aspects of rules. If law is constructed of social rules, rules are made up of practice. And this practice has both an external and an internal aspect. The external aspect of a rule is its forming of *behavioural uniformity*: people act in a common way. Its internal aspect involves a complex attitude Hart calls 'acceptance': a willingness to use the uniformity as a standard to guide and assess behaviour. Acceptance is though not necessarily a reflection of approval. The acceptance may also be due to a wish of pleasing others, fear or conformism.<sup>78</sup>

Among the secondary rules, the ultimate 'rule of recognition' has special importance.<sup>79</sup> It provides criteria of *legal validity* by determining which acts create law, and is based on the practice of those whose role it is to apply primary rules. It means that the foundation of a legal system is not constituted by moral justifications or logical presuppositions. Rather it is based on a customary social rule created by "a complex [...] practice of

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<sup>76</sup> H.L.A Hart, *Law, Liberty, and Morality*, Stanford University Press, Stanford, 1963.

<sup>77</sup> There are several editions of the book available. For this study, I consulted Hart, 2012, see *supra* note 58.

<sup>78</sup> *Ibid.*, pp. 56–57.

<sup>79</sup> Other secondary rules are the rule of change, that is, the rule by which existing rules might be created, altered or deleted, and the rule of adjudication, that is, the rule by which society might determine when a rule has been violated and prescribe a remedy.

the courts, officials, and private persons in identifying the law by reference to certain criteria. Its existence is a matter of fact”.<sup>80</sup>

Hart criticises Austin’s concept of law – or a simplified version of it – as commands or orders of a sovereign backed by threats. Hart agrees that there is significant conflict and disagreement about law; not merely consensus and agreement. There are many situations in which laws are not simply applied by courts to settle cases, but where judges settle arguable cases and thereby creates law. He would, however, argue that *consensus* at other points are necessary to make law function. The ‘rule of recognition’, at least, needs to rest on agreement about which activities make law.

In advanced societies, however, it may be that only *officials* accept and use “the system’s criteria of validity”. In such societies, “the acceptance of rules as common standards for the group may be split off from the relatively passive matter of the ordinary individual acquiescing in the rules by obeying them for his part alone”.<sup>81</sup> The point is that while custom and social morality are immune to deliberate change and evolve only gradually, large and complex societies need mechanisms of social control that enable customs and other norms to be publicly ascertained and to be changeable. This is made possible by the emergence of institutions with power to identify, alter, and enforce the rules.

According to Hart, the result of this division of ‘normative labour’<sup>82</sup> between the officials and ordinary people brings both benefits and costs: “The gains are those of adaptability to change, certainty, and efficiency [...] the cost is the risk that the centrally organised power may well be used for the oppression of numbers with whose support it can dispense, in a way that the simpler regime of primary rules could not”.<sup>83</sup>

So even if Austin’s view is simplified and crude, there are ample examples of legal systems which does not express the values of its community, but rather the interests of the few. There is always a risk that law becomes legalistic or morally fallible. One of the strengths of Hart’s expo-

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<sup>80</sup> Hart, 2012, p. 110, see *supra* note 58. Hart suggests that the rule of recognition in the United Kingdom is something like “whatever the Queen in Parliament enacts is law”.

<sup>81</sup> *Ibid.*, p. 117.

<sup>82</sup> I am using a term from Leslie Green’s “Introduction”, in Joseph Raz and Penelope A. Bulloch (eds.), *The Concept of Law*, 3rd edition, Oxford University Press, Oxford, 2012, p. xxix.

<sup>83</sup> H.L.A. Hart, in Joseph Raz and Penelope A. Bulloch (eds.), *The Concept of Law*, 3rd edition, Oxford University Press, Oxford, 2012, p. 202.

sure of the concept of law is that he shows that laws may fail not by accident, but because of their nature as social institutions.

So, law can be beneficial, but always at a price. It poses special risks of injustice, for instance against members of minorities, and of alienating its subjects from important norms that govern their lives. In the words of Leslie Green, Hart's view is that "[a] typical society under law depends less on broad social consensus than it does on a narrow official consensus. What the existence of law requires of the population in general is little more than acquiescence with respect to the mandatory norms of the system".<sup>84</sup>

One must therefore be cautious; law is not always a reason for celebration. A critical approach to law is also needed because it sometimes pretends to an objectivity it does not have. Judges may say different things, but in fact they wield serious power to create law.

Law and adjudication are inherently political. In understanding law, a theory of law therefore needs the help of resources from social theory and philosophic inquiry. It is thus neither the sole preserve, nor even the natural habitat, of lawyers or law professors. It is but one part of a more general political theory.

A concept of law in terms of social constructions, constituted solely of social facts, is very different from a concept of law in terms of eternal natural norms. Perhaps the classic formulation of natural law, is Cicero's summary of a Stoic doctrine: "True law is right reason in agreement with Nature; it is of universal application, unchanging and everlasting [...] [T]here will not be different laws at Rome and at Athens, or different laws now and in the future, but one eternal and unchangeable law will be valid for all nations and for all times".<sup>85</sup>

Modern proponents of natural law doctrines seldom subscribe to all elements of this classical account of the doctrine. However, after the Second World War, natural rights theories experienced a renaissance in Western jurisprudence, especially in Germany. The idea was that the Nazis had violated norms that were above and beyond the enacted laws in Germany; they had violated human rights and fundamental freedoms and could be

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<sup>84</sup> *Ibid.*, p. xxix.

<sup>85</sup> Cicero, *De Re Publica*, III.xii.33, Clinton W. Keyes trans., Harvard University Press, Loeb Classical Library, Cambridge (MA), 1943, p. 211.

prosecuted for crimes against humanity. A law that permitted such crimes was not to be considered a valid law.<sup>86</sup>

Also in the Anglo-American world, natural rights theories have strong proponents, such as John Finnis (1940–) and Ronald Dworkin (1931–2013).<sup>87</sup> Both developed their theories in response to Hart’s version of legal positivism, and their arguments became the starting points for comprehensive academic debate.

Dworkin maintained that “law includes not only norms found in treaties, customs, constitutions, statutes, and cases, but also moral principles that provide the best justification for the norms found there. While the things justified by moral principles are socially constructed, the justifications are not”.<sup>88</sup> These justifications are the same everywhere and at all times.

Hart’s concept of law denies that law includes such eternal moral principles. Law consists only of rules or principles which have been put there by humans. All rules have a pedigree, and they can all be changed. This denial does, however, not imply that Hart denies that there are *relations* between law and morality. There are several. Both law and morality are system of norms that say something about how we should live.

Another connection is related to the question of law’s purpose. Law is made for purposes such as guiding conduct, promoting the common good, for doing justice, or licensing coercion. Hart argues (in Chapter IX of *The Concept of Law*) that (1) human survival is morally good and that (2) a law which not aim at it would not be a law. Such a constitutive aim of law, does not, however, mean that it must succeed to remain law. A legal system failing to do what laws should do may remain a legal system.<sup>89</sup>

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<sup>86</sup> For classification of natural law theories and an account of the German post-war debates, see Henrich Henkel, *Einführung in die Rechtsphilosophie*, C.H. Beck Verlag, Munich, 1977.

<sup>87</sup> John Finnis, *Natural Law and Natural Rights*, 2nd edition, Oxford University Press, Oxford, 2011; Ronald Dworkin, *Taking Rights Seriously*, Harvard University Press, Cambridge (MA), 1978; Ronald Dworkin, *Law’s Empire*, Harvard University Press, Cambridge (MA), 1986.

<sup>88</sup> Green, 2012, p. xvii, see *supra* note 82.

<sup>89</sup> It remains an open question whether Hart withdrew this view, cf. *ibid.*, p. xxxv.

Moral principles may also be authorised to become part of law by a legitimate source of law. In this way, Hart interprets the constructivist doctrine in favour of what is called 'inclusive legal positivism'.

According to Hart, the value of legal theory lies not in helping advice clients or deciding cases. It rather contributes to understanding our culture and institutions and in underpinning any moral assessment of them. That assessment must be sensitive to the nature of law, and to morality, which comprises plural and conflicting values.

For this study, which aims at applying utilitarianism and legal positivism in the tradition of Bentham, Mill, Austin and Hart, on foundational issues of contemporary international criminal law, Hart's view on international law and its status as law proper is of especial relevance. Hart presents his concept of law as "a union of primary and secondary rules [...]" as a mean between juristic extremes. For legal theory has sought the key to the understanding of law sometimes in the simple idea of an order backed by threats and sometimes in the complex idea of morality".<sup>90</sup>

According to Hart, the reason why we should not "attempt to narrow the class of valid laws by the extrusion of what was morally iniquitous" is that to do this does not "advance or clarify either theoretical inquiries or moral deliberation". The broader concept of law proved, in his analysis, to be consistent with "so much usage" and "on examination to be adequate".<sup>91</sup>

#### **12.3.4. Hart's Concept of International Law**

The case of international law is "converse", according to Hart. Here the problem is not that laws are morally iniquitous, but "the absence of an international legislature, courts with compulsory jurisdiction, and centrally organised sanctions."<sup>92</sup> In Hart's view, international law lacks secondary rules – such as rules of recognition, change and adjudication – and therefore cannot be categorised as a developed legal system.

However, as Hart underlines, the union of primary and secondary rules should not be thought of as a necessary (or sufficient) condition for a system of law to be categorised as a 'legal system'. In his view, it is more

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<sup>90</sup> Hart, 2012, p. 213, see *supra* note 58.

<sup>91</sup> *Ibid.*, p. 213.

<sup>92</sup> *Ibid.*

important to ask whether “the usage that speaks of ‘international law’ is likely to obstruct any practical or theoretical aim”.<sup>93</sup>

To be sure, the issue is not about the proper use of words, Hart contends. The issue is about whether a general term should be applied to a set of international norms despite serious doubts that has been raised, such as concerning the sources of international law and concerning States as subjects.

An important part of his argument for international law to be categorised as law is to show that ‘voluntarist’ theories or theories of ‘auto-limitation’ fail. These theories attempt to “reconcile the (absolute) sovereignty of states with the existence of binding rules of international law, by treating all international obligations as self-imposed like the obligation which arises from a promise. Such theories are in fact the counterpart in international law of the social contract theories of political science.”<sup>94</sup>

Hart’s point is that States *are* bound by international law obligations, not by deciding to be so but as members of international society. The ‘voluntarist’ approach fails because it is unable to explain how it is known that States are only bound by self-imposed obligations. Hart also points to the underlying rule which must exist that a State which takes upon itself certain obligations is “bound to do whatever it undertakes by appropriate words to do”.<sup>95</sup> A State may promise to perform a specific action, however, for that promise to become an obligation there must be a rule that promises create obligations. This rule is binding independently of the choice of the party bound by it.

Hart’s third argument refers to certain facts, such as the case of a new State. According to Hart, it has never “been doubted that when a new, independent state emerges into existence, [...] it is bound by the general obligations of international law, among others, the rule that give binding force to treaties”.<sup>96</sup>

It is true, he contends, that international law resembles regimes that only contain primary rules, even though its rules are very different from rules in primitive societies. Many of its concepts, methods, and techniques are the same as those of modern municipal law.

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<sup>93</sup> *Ibid.*, p. 214.

<sup>94</sup> *Ibid.*, p. 224.

<sup>95</sup> *Ibid.*, p. 225.

<sup>96</sup> *Ibid.*, p. 226.

An argument exists that since international law does not contain secondary rules, it must be a form of 'morality'. This view is mistaken, according to Hart, and is often associated with "the old dogmatism" stemming from Austin's concept of law as "orders backed by threats". Although it is possible to construe a concept of morality in this way, as denominating all systems of rules which are not backed by threats, it would not serve any practical or theoretical purpose. It would comprise systems which are very different in form and social function, and represent an overly crude classification.

There are several reasons for not classifying international law as a form of morality, such as the fact that States in arguments against other States that they think violate rules of international law refer to "precedents, treaties, and juristic writings; often no mention is made of moral rights or wrong, good or bad".<sup>97</sup> It is true that States sometimes adhere to moral arguments in denouncing the conduct of other States, but that happens also in case of violations of municipal law. Many rules of international law are also morally indifferent; such as rules that provide for the functioning of inter-State relations.

A typical function of law, unlike morality, is to introduce detailed distinctions, formalities and procedures that serve the purpose of maximising "certainty and predictability and to facilitate the proof or assessments of claims". This 'formalism' or 'legalism' is found in international law, clearly distinguishing it from 'morality'. That does not mean that all rules of international law must be of such moral neutral, formal character. "The point is only that legal rules *can* and moral rules *cannot* be of this kind."<sup>98</sup>

The fact that there is no international legislature, which by applying certain procedures can change the rules of international law, like rules of morality cannot be changed by any legislature, is "a defect one day to be repaired", according to Hart. It is true that States may abide by rules of international law based on moral considerations. But the foundation of international law lay in wide adherence to its rules, which may be motivated rather by "calculations of long-term interest, or by the wish to continue a tradition or by disinterested concern for others", than by a sense of moral obligation.

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<sup>97</sup> *Ibid.*, p. 228.

<sup>98</sup> *Ibid.*, p. 229.

Hart's conclusion is that, because international law lacks a legislature, courts with compulsory jurisdiction and officially organised sanctions, it resembles in form though not in content "a simple regime of primary or customary law". In content, however, it resembles advanced municipal law, and this makes it possible for lawyers to freely transfer from the one to the other.

In his time, Bentham concluded that international law was "sufficiently analogous" to municipal law to be called 'law'. Hart refines this conclusion by stating that "the analogy is one of content not of form; secondly, that, in this analogy of content, no other social rules are so close to municipal law as those of international law".<sup>99</sup>

I hold this conclusion as still valid. However, for contemporary discussions his observations on how international law could become a developed system of law, may be of even greater importance. True to his descriptive approach, he does not argue that international law *should* become a developed system of law. But he states how that could happen, and an unspoken wish in that direction may perhaps be sensed.

It is true, he contends, that important relations between States are regulated by multilateral treaties, and sometimes arguments are made that these treaties also may be binding on other States that are not parties:

If this were generally recognized, such treaties would in fact be legislative enactments and international law would have distinct criteria of validity for its rules. A basic rule of recognition could then be formulated which would represent an actual feature of the system and would be more than an empty restatement of the fact that a set of rules are in fact observed by states. Perhaps international law is at present in a stage of transition towards acceptance of this and other forms which would bring it nearer in structure to a municipal system.<sup>100</sup>

It should be noted that, since Hart wrote these words in the early 1960s, international law has indeed developed in directions which could further the transition. International courts have been established with binding jurisdiction over a subset of States, such as the European Court of Human Rights, the *ad hoc* tribunals for Rwanda and the former Yugosla-

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<sup>99</sup> *Ibid.*, p. 237.

<sup>100</sup> *Ibid.*, p. 236.

via, and the ICC. Some of these jurisdictions have been imposed on a group of States by decisions of the United Nations Security Council, while others exist based on States' self-imposition. The ICC is in this respect a hybrid, since it can exercise jurisdiction over citizens of non-States Parties which commit ICC crimes within its jurisdiction on the territory of States Parties.

The existence of such courts leads to judicial decisions ascertaining which rules, based on treaty or customary law, could be binding upon all States, irrespective of treaty obligations. However, it seems a way to go for States to reach consensus on so-called *jus cogens* norms.<sup>101</sup>

According to legal literature, the following international crimes may be characterised as *jus cogens*: aggression, genocide, crimes against humanity, war crimes, piracy, slavery, slave-related practices, and torture. The legal basis for this claim consists of:

1. international pronouncements recognising that these crimes are part of general customary law;
2. language in preambles or other provisions of treaties indicating that these crimes have a higher status in international law;
3. the large number of States which have ratified treaties related to these crimes; and
4. international investigations and prosecutions of perpetrators of these crimes.<sup>102</sup>

Further arguments for including specific crimes in the *jus cogens* category are that they "affect the interests of the world community as a whole because they threaten the peace and security of humankind and because they shock the conscience of humanity".<sup>103</sup>

In 1996 Professor M. Cherif Bassiouni stated that:

It is still uncertain in ICL whether the inclusion of a crime in the category of *jus cogens* creates rights or, as stated above, non-derogable duties *erga omnes*. The establishment of a

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<sup>101</sup> The term '*jus cogens*' means 'the compelling law' and, as such, a *jus cogens* norm holds the highest hierarchical position among all other norms and principles. Because of that standing, *jus cogens* norms are deemed to be 'peremptory' and non-derogable, cf. M. Cherif Bassiouni, "International crimes: *jus cogens* and obligation *erga omnes*", in *Law and Contemporary Problems*, Autumn 1996, vol. 59, no. 4, p. 67.

<sup>102</sup> *Ibid.*, p. 68.

<sup>103</sup> *Ibid.*, p. 69.

permanent international criminal court having inherent jurisdiction over these crimes would be a convincing argument for the proposition that crimes such as genocide, crimes against humanity, and war crimes are part of *jus cogens* and that obligations *erga omnes* to prosecute or extradite flow from them.<sup>104</sup>

The problem remains, however, that the Rome Statute of the ICC as it was adopted in 1998 does not provide for the ICC to have ‘inherent jurisdiction’, which is a doctrine of the English common law that a superior court has the jurisdiction to hear any matter that comes before it, unless a statute or rule limits that authority or grants exclusive jurisdiction to some other court or tribunal. Even so – the ICC only having limited temporary and territorial jurisdiction – it could be argued that it represents a further step in the direction of establishing rules binding upon all States.

States disobeying such rules, by committing international crimes, weakens the system, but does not destroy it. Municipal law is frequently violated without its status as law being questioned. However, it may be true that international law, and especially international criminal law, is more vulnerable.

The four points mentioned above constituting a legal basis for the claims of *jus cogens*-crimes may be a rule of recognition in the making. However, it is not functioning as such yet. Obviously, it is also a rather complicated rule.

#### **12.4. Benthamite Perspectives on International Law**

Bentham’s formative years took place in the context of the eighteenth-century Enlightenment. He engaged in a battle against both tradition and authoritarianism, as well as against anarchical fallacies and revolutions. He devoted a lifetime of developing a third way, namely, gradual reforms in legislation and policies based on the principle of utility. The end goal was for governments and legislators to ensure happiness for the greatest number of people. These were radical ideas at his time, but over time they became influential.

In 1871, 29 years after Bentham’s death, one of his translators, R. Hildreth concluded that “whatever may be thought of the principle of util-

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<sup>104</sup> *Ibid.*, p. 74.

ity, when considered as the foundation of morals, no one now-a-days will undertake to deny that it is the only safe rule of legislation".<sup>105</sup>

It was mainly due to Bentham and a small group of followers that the principle achieved such a status. Bentham's science of applying the principle has had a lasting effect on jurisprudence, legal theorising and in informing legislators up to the present. It is therefore pertinent to ask what can be learnt from him in discussing the foundations of international criminal law.

There can be no doubt that the 'principle of utility' is providing foundation for a branch of law that deals with heinous crimes, such as genocide, crimes against humanity and war crimes, which inflict unbearable pain and unhappiness on large numbers of human beings. These are crimes that in their very nature attack the well-being and even the existence of collectives of people. The crimes also have the potential of leading to further pain and unhappiness for the world community, leading to escalation of conflicts, wider security risks, humanitarian crisis, and so on.

Based on utilitarian premises, there is therefore wide space for inflicting pain in the form of prosecution and punishment of those bearing the responsibility for or performing such crimes. The main motivation would be to prevent such crimes from being committed again in the future; the end goal being ultimately to eliminate such crimes completely.

Challenged whether law is effective in preventing or eliminating such crimes to occur, Bentham offers a wide range of arguments and viewpoints. He presents convincing ideas about the civilising functions of law, including criminal law. However, he cautions that there are a set of necessary conditions law must meet to fulfil such functions. Legislation must be designed well and be based on sound principles to maximise overall happiness, and institutions must be redesigned bearing these concerns in mind, not the least taking into consideration that mechanisms must be in place to counter corruption and other negative practices to take root. Investigations and trials must be conducted effectively to avoid delays and high expenses.

Reforming and improving legislation and practice is an ongoing process. Reform efforts often lead to interest-based resistance by narrow groups who have something to lose from them, as Bentham experienced

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<sup>105</sup> R. Hildreth, "Preface", in Jeremy Bentham, *Theory of Legislation*, 2nd edition, Trübner & Co., London, 1871, p. iii, see *supra* note 46.

himself. Strategic thinking about how to create conditions conducive of reforms and improvements of legislation is therefore of primary importance.

Bentham would insist to give priority to arguments that demonstrate how criminal law may benefit the overall well-being and positive development of society. As mentioned, this may have led him to embrace the complementarity principle of the Rome Statute. He would point to local trials having greater beneficial effects than more distant international trials or to the importance of international trials taking place in the proximity of crime affected societies whenever feasible.

The prospect of the ICC exerting jurisdiction if national jurisdictions were unable to do so, could lead to national legal reform. States prefer to be able to prosecute crimes themselves and avoid interference by the ICC, and in this way, the Rome Statute could serve as a model for national legislation and over time build capacity at the national level to prosecute core international crimes.

The consequentialist challenge stemming from Bentham's approach also have other aspects. International courts are often criticised by civil society organisations for conducting poor outreach or for creating expectations in affected communities, which they are unable to fulfil. Thinking justice in consequentialist terms would lead to international courts stepping up efforts to explain how justice works not only to those involved in trials but to the wider society.

The ICC might represent some progress in this regard from previous international criminal courts. There may, however, be more to be done. In pointing to the future beneficial consequences of prosecutions as their main *raison d'être* (deterrence of similar crimes), Bentham would ask for well-thought-out and well-resourced strategies of outreach being part of any international legal intervention into situations where core international crimes had taken place.

Bentham's justification for punishment was based on its overall tendency to produce more happiness than pain for affected persons. Only a well-organised State with rational and accessible laws, where legislators were elected by the people to apply the principle of utility in their legislative work, could succeed in achieving that. He had in mind that successful States in this regard, could serve as models for other States. He, however, also realised that even democratic and peaceful States could end up in

conflicts that would need international intervention to avoid violent wars to break out.

Consequently, he argued for international law to be reformed so it could become an effective tool in preventing wars and improving inter-State relations. His idea of codifying an international legal code also led him to see the need for establishing an international court able to decide on disputes between States. He did not develop foundations for international criminal law as such, but he clearly depicted needs for sanctioning violations of international norms by representatives and even heads of States. This means that some conditionality was inherent in Bentham's thinking about the sovereignty of States. I think he would have supported international criminal law as a way of ensuring utility-based punishment of the most serious crimes in cases where national States were unable or unwilling to do so.

He would, however, have wanted to introduce a systematic approach to reforming and developing further international criminal law. His method would be to ask which crimes are most detrimental to overall happiness among the greatest number of people. He would not erase the already existing crimes from the law book – aggression, crimes against humanity, genocide, and war crimes – but he would question whether other serious pain-inflicting crimes should be included, as discussed in the third volume in this series, *Philosophical Foundations of International Criminal Law: Legally Protected Interests*. Central to reform of international criminal law would be to ensure that the gravest crimes – with the largest negative consequences for specific societies, and ultimately to humankind – were included, and that they were expressed in language that could be understood by legal experts, governments as well as by ordinary people.

Were he alive today, Bentham would of course come up with his own reform proposals. But he would also have liked to see experts and representatives from as many countries as possible being involved in discussions about the proper scope of international criminal law. His vision was an alliance of States with liberal opinions perfecting legislation.

He would also have noticed the existence of a branch of international law named human rights law. He would have been worried by the fact that the declarations of human rights he criticised so vehemently had been followed up by the enactment by a large majority of States of the

Universal Declaration of Human Rights and a range of international legal documents protecting human rights, giving them status as legal rights.

Maybe he in the end would accept that as Newton's law on gravity later was shown by Albert Einstein to be incorrect and only valid in certain circumstances, his principle of utility also was valid only as a special case of a more all-encompassing theory. He would have to see that States with liberal opinions, fully respecting individual and minority human rights, are the only States in which the principle of utility could be applied without modifications. In other States, human rights concerns should in some cases override utilitarian conclusions to protect minorities' and individuals' rights from being sacrificed for the greater good of the majority.

### **12.5. Philosophical Foundations of International Criminal Law**

Philosophical foundations of international criminal law may take diverse forms. Its inherent values, norms, rules, and concepts may be supported by reference to existing religious or philosophical principles and views. International criminal law – being both in theory and in practice, “a marriage between criminal justice and human rights activism”<sup>106</sup> – may be especially attractive for adherents of religious or philosophical schools that want to strengthen protection of core human values.

For the international human rights movement, however, international criminal law is not merely about seeing wrongdoers punished and thereby having some basic values confirmed. Its most important function may be to help end a global climate of impunity and lack of accountability in which grave abuses of human rights so regularly occur.

Bentham and the way of thinking he inspired come with a similar approach. He would see the most important function of international criminal law not in the fact that it gives legal effect to protection of natural rights (which do not exist, according to him), or protection of human dignity or any other preconceived highest value. Its most important function would be to promote the largest happiness of the greatest number by educating people and deterring crimes. He believed that the law could civilise and improve human societies even at moments when civilisation has broken down.

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<sup>106</sup> Cf. Wellman, 2013, p. 477, see *supra* note 43

This approach also puts a test in front of international criminal law jurisdictions: do they contribute effectively to achieving these aims? If not: which reforms are needed to improve them?

In other words, the foundation given is conditional upon success. Bentham would, however, address failure not by revolutionary measures but by reforms.



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## **Reconciliation v. Retribution, and Co-operation v. Substitution: Hegel's Suggestions for a Philosophy of International Criminal Law**

**Sergio Dellavalle\***

### **13.1. Hegel and International Criminal Law: A Field with Unexpected and Inspiring Discoveries**

Attempting to discover the contribution that Hegel's philosophy could make to the further development of international criminal law is not an easy task. Rather, it is like starting an expedition into an arid region where hardly anything exciting is expected to be found. Indeed, Hegel paid little attention, in general, to international law, and his understanding of the international arena is dominated by largely self-reliant individual States, often struggling with each other to defend their own selfish interests. Moreover, criminal law seems to be exclusively related to the inner sphere of the individual State. Nonetheless, if we have the intellectual courage to go beyond first impressions and, venturing into what appears to be unpromising terrain to explore, to have a closer look not so much at Hegel's concrete proposals, but rather at some of the underlying concepts of his social, political and legal conception, we can find interesting, if not even ground-breaking suggestions.

To this end, it is useful to distinguish between two separate questions on which we should concentrate. The first is Hegel's general understanding of crime and punishment, and therefore of criminal law. The second is the way in which this understanding could be expanded to possibly include the dimension of a criminal law beyond the individual State.

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This second question surely goes further than Hegel's explicit intentions, but can be reasonably inferred on the basis of his vision of international law and relations which connects in an unprecedented way institutions, history and destiny of the individual State with the universal order of reason.

The first question – which is addressed in the next section – is focused on Hegel's view of criminal law. This emerges, with all its originality, if we place it against the backdrop of the interpretation that characterised the paradigms of order that dominated the Modern Ages until Hegel's time and against which he had to establish his innovative position. More specifically, we must keep in mind that the modern philosophy of criminal law – with Kant as its most exemplary exponent – had an almost undisputed individualistic basis. In other words, it was largely, if not exclusively, focused on the individual as a free and fully responsible moral agent. Based on this foundation, society is an artefact which has been built by individuals for their purposes and can only survive if the balance between its components – precisely the individuals themselves along with their self-referential interests – is strictly maintained or restored as soon as possible if disrupted. In fact, a criminal act is a serious disruption of the balance insofar as an individual is acting for his own benefit and to the unjustified detriment of the other(s). Thus, punishment should be retribution imposed on the individual who, on the basis of a free and conscious act of will, acted to the disadvantage of the other(s), in order to re-establish the balance, whereas the retribution must be comparable to the criminal act.

Hegel's social philosophy, on the contrary, is not centred around individuals, but on the community, which is assumed to possess an added value compared to the sum of its individual components. Coherently, his theory of crime and punishment interprets the former rather as an offence to the homeostasis of the community – that is, to its capacity to guarantee peaceful and co-operative interactions – so that the punishment actually aims at reconciling the society trapped in an unresolved conflict. Consequently, the form and severity of the punishment can differ greatly from the form and severity of the crime, provided that it can achieve its main goal. From this perspective, Hegel's philosophy seems to create an idea of justice – and of transitional justice in particular – that departs from its traditional conception, as exercised at the international level in the Nu-

remberg and Tokyo trials, giving some significant conceptual support to the kind of approach that has been established by truth commissions.

The second aspect of Hegel's philosophy that is interesting in the context of this analysis – as addressed in the third section – is his idea of the relation between individual States and the world order. Once again, the target of Hegel's criticism was Enlightenment political philosophy. This philosophy relied, in fact, on just two elements: the individuals with their rights, reason and interests, on the one hand, and the *societas civilis* as the political structure created by the individuals themselves in order to safeguard their entitlements and to make the social interactions well-ordered on the other. Insofar as social order was assumed to be – at least potentially – cosmopolitan, also the *societas civilis* was supposed to take the form of a worldwide *civitas maxima*. Although we can detect in Kant's works a seminal reference to a multi-layered system of public law, he never developed this ground-breaking intuition into a coherent concept. Actually, the fundamental assumption of the individualistic paradigm of social order was, therefore, that individuals are the foundation of order as well as its goal. Moreover, insofar as their interactions unfold worldwide, also the political and legal structure which makes these interactions peaceful and predictable cannot but be a *Weltrepublik*. This understanding of social order – in particular, the focus on the individuals and the centralisation of order into a unitary supra-State organisation – is also relevant for the theory of criminal law since it paves the way for two decisive developments: first, the introduction of the principle of individual responsibility in public international law, and, secondly, the creation of criminal courts at the international level. This approach found its most radical theoretical expression – one and a half centuries after the end of the golden age of Enlightenment – in Hans Kelsen's work (discussed in Chapter 16 below), and was transferred into legal praxis, even later, through the establishment of the International Criminal Court ('ICC').

At first glance, it seems that we have little to learn from Hegel on this point, due to his restriction of criminal law just within the borders of the single State, as well as to the rather marginal normative quality that he attributed to international law. However, this is not the whole truth. In fact, he recognised a higher level of rationality than that embedded in the single State, namely the rationality of world history. In other words, he developed an idea of rationality that is realisable in the world of politics and history, which includes two layers: the single State, on the one hand, and

the world order on the other. Applying this perspective to the question of criminal justice and of its possible extension into the international realm, we could argue that the main context of criminal justice has still to be essentially the nation-State, and that the more inclusive level comes into play only when the basic instance fails to achieve its goal. More concretely, the ICC should not be seen as an institution of the *civitas maxima*, which substitutes the national judicial authority, but rather as an integration of, and a support to, the latter. Surely, such a suggestion goes a couple of steps further than the explicit contents of Hegel's philosophy. In particular, the fact that, in his conception, world reason is independent of individual awareness, and thus non-reflexive, is highly problematic. Nevertheless, if we manage to re-interpret world reason in intersubjective terms, then Hegel's view could become an illuminating conceptual platform to elaborate a new balance between national and international criminal justice.

Therefore, anticipating the main conclusions of the inquiry, on which the final section is focused, it is possible to assert, first, that Hegel introduced a significant transition from the understanding of criminal law as essentially aiming at retribution to an idea of it as primarily contributing to reconciliation. Secondly, he suggested the overcoming of the contraposition between an absolutely self-reliant State and a cosmopolitanism which turned out to be largely forgetful of the specificity of the national identity. In his multi-layered philosophical, political and legal construct, both national identity and the world order of reason have a role to play, although the latter does so in a way which may be rather unconvincing. Nevertheless, the first stone for a highly innovative view of a multilevel world order was laid, so that, if we apply his general vision to the question of criminal law, we can deduce, then, that its international dimension should co-operate with – and not substitute – national institutions, always with the goal of restoring national and international peace and order.

### **13.2. Crime, Punishment and Reconciliation in Hegel's Philosophy**

To better understand the novelty and originality of Hegel's approach to criminal law, we must set it against the background of the well-established conceptions which had been developed before his time. To this end, it is useful to connect these conceptions to what I propose to define as the

'paradigms of social order'.<sup>1</sup> By the notion of paradigm of social order, I refer to the most essential set of concepts which lie at the basis of the use of the theoretical and practical reason, with reference to a specific field of human knowledge and action within a certain historical context. Put differently, in order to understand the world – or at least a part of it – and to act properly, we always rely on some basic concepts which make up what we can identify as the preconditions of knowledge and action. On this set of most fundamental concepts, then, we build the theories that, at a less general level, allow us to describe the world – sometimes also to try to explain it – and justify our actions. Given these premises, if we connect the most fundamental theories on criminal law to the paradigms of social order, we will have as many fundamental ideas of criminal law as we have paradigms of social order. In fact, this cannot be surprising insofar as the ideas about crime and punishment are generally considered essential for a certain understanding of how a well-ordered society should be organised. Therefore, depending on which fundamental paradigm of order we adopt, we also assume, as a consequence, a quite specific conception of what a crime is and of how we should deal with it in order to restore social order.

If the connection between the ideas of criminal law and the paradigms of order is the first step, the second consists in specifying the contents of the paradigms of order that also determine the conceptions of criminal law. Paradigms of social order comprise concepts which make claims as regards three inescapable aspects of a well-ordered society: first, the extension of a well-ordered society, that is, whether this is necessarily limited in space and population, or can be presumed to be universal, including all human beings; secondly, the ontological basis of a well-ordered society; thirdly, the question whether a well-ordered society must be structured in a hierarchical and unitary form, or can also positively display plurality and diversity, so that the conflict of norms is not seen as a pathology, but as a difference that should be resolved by means of dialogue. Leaving the influence that the first and third aspects of the contents of the paradigms of order may have on the understanding of criminal law to the next section, I concentrate here on the second aspect, namely, on which ontological basis a well-ordered society is assumed to be built.

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<sup>1</sup> Armin von Bogdandy and Sergio Dellavalle, "Universalism Renewed. Habermas' Theory of International Order in Light of Competing Paradigms", in *German Law Journal*, 2009, vol. 10, no. 1, p. 5; Sergio Dellavalle, *Dalla comunità particolare all'ordine universale. Vol. I: I paradigmi storici*, Edizioni Scientifiche Italiane, Naples, 2011.

Before Hegel, two opposite conceptions had been developed with reference to the ontological fundament of a well-ordered society. On the one hand, we have the *holistic* understanding of society, according to which the whole – or *holon* – of the community, with its social bond, is not only genetically but also axiologically superior to the sum of its members. In other words, the social community is presumed to have more value than all associates taken together, as well as than each one of them taken singularly. On the other hand, the opposite idea arose that society is nothing more than a construct created by individuals in order to better protect their rights and interests, with the result that it has no inherent value which might supersede the value of the individuals.

In accordance with the holistic paradigm, since the highest worth is assigned to the well-being of the community as a whole – or, more specifically, to its homeostasis – crime is seen primarily as an offence against the *holon*, and only secondarily against one or more of its members individually. Furthermore, the social whole is regarded as an organic unity, so that the reaction to the crime – that is, the punishment – has essentially the task of recreating the homeostasis and the unity of the society, and not so much of compensating the individual damage. The consequence is that similar crimes might result in quite different kinds of punishment, if this disparity is deemed beneficial for the restoration of social order.

A perfect example of this approach is delivered by Thomas Aquinas. His starting point is the acknowledgement that crime – or, in Thomas' words, 'sin' – is a breach of the unitary principle of social order. As a result, "whoever sins, commits an offence against an order: wherefore he is put down [...] by that same order, which repression is punishment".<sup>2</sup> However, given that "the proper act of justice is nothing else than to render to each one his own",<sup>3</sup> Thomas specifies that a two-fold order of justice must be taken into account: on the one hand 'commutative justice', which "is concerned about the mutual dealings between two persons"; on the other 'distributive justice', which represents "the order of what belongs to the community in relation to each single person" and "distributes the goods proportionately".<sup>4</sup> When it comes to the definition of how a

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<sup>2</sup> Thomas Aquinas, *Summa Theologica*, R.C.L. Benziger, Cincinnati, 1947 (1265–73), part II, sect. I, question 87, art. 1, 1304 ff.

<sup>3</sup> *Ibid.*, sect. II, question 58, art. 11, 1921.

<sup>4</sup> *Ibid.*, question 61, art. 1, 1935.

“just proportion” in the distribution of goods of common interests should be understood, Thomas leaves no room for ambiguity:

[I]n distributive justice something is given to a private individual, in so far as what belongs to the whole is due to the part, and in a quantity that is proportionate to the importance of the position of that part in respect of the whole. Consequently in distributive justice a person receives all the more of the common goods, according as he holds a more prominent position in the community.<sup>5</sup>

Therefore, we can conclude that, since criminal justice is intended, if not to distribute, then surely to defend common goods, it must be ruled by distributive justice, with the consequence that punishment must aim primarily at re-establishing the hierarchical order of society.

Albeit in a less radical way than Thomas Aquinas, Jean Bodin – to cite a second example from a nearer historical and ideological context – also seems to share largely the same view. Indeed, Bodin criticises the commonwealth in which, according to a strict understanding of distributive justice, “all is left to the discretion of the magistrates to distribute pains and penalties according to the importance and status of each individual”.<sup>6</sup> Such a political community, Bodin argues, would be “neither stable nor durable” since “no bond of union” could be possible “between the great and the humble, and therefore no harmony between them”.<sup>7</sup> As a result, distributive justice should be mitigated by some elements of commutative justice, in order to make the distribution of benefits and penalties more predictable for all members of the *République*. Bodin gives to this mixed regime the name of ‘harmonic justice’. However, even if social rank is partially – and rather marginally – balanced by considerations of equal treatment, the rationale behind Bodin’s conception does not consist in the principle that every individual should get what she or he deserves as a consequence of her or his actions and on an equal footing with all other individuals, but, again, in the idea that the highest goal of social life is the stability of the community, and not the guarantee of individual rights and interests. Yet, in Bodin’s perspective stability can be best achieved

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<sup>5</sup> *Ibid.*, question 61, art. 2, 1936.

<sup>6</sup> Jean Bodin, *Six livres de la république*, Imprimerie de Jean de Tournes, Lyon, 1579 (1st edition 1576), translated to English in Jean Bodin, *Six Books of the Commonwealth*, M.J. Tooley ed. and trans., 1955, book VI, chap. VI, p. 711.

<sup>7</sup> *Ibid.*

through harmonic justice as a synthesis of distributive and commutative justice, and not through an uncompromising and lastly short-sighted defence of social hierarchy.

The shift came with the paradigmatic revolution from the holistic towards the *individualistic* understanding of society, which was triggered by the political philosophy of Thomas Hobbes (discussed in Chapters 8 and 9 above, and in the chapter by Christopher B. Mahony in *Philosophical Foundations of International Criminal Law: Foundational Concepts*).<sup>8</sup> In his works, Hobbes put, for the first time, individuals with their inherent endowment of rights, interests and reason at the centre of society. As a corollary, the *societas civilis* is nothing but a construction of human will, with the purpose of safeguarding the fundamental entitlements of the individuals by means of a contract. In fact, Hobbes's *pactum unionis* was assumed to necessarily re-establish social hierarchy, but this was regarded as the outcome of a free decision taken by those individuals who had chosen to become members of a political community. In other words, while according to Bodin, social hierarchy is a positive matter of fact, which deserves to be preserved, in Hobbes's view it is created by an agreement between free and equal individuals.

As far as criminal law is concerned, the individualistic paradigms of order led sometimes to opposite outcomes – at least in such an important issue as the death penalty. In particular, Cesare Beccaria condemned capital punishment resorting to the contractualist argument that no one would agree on giving to others the right to take her or his life. Nor would the State have such an entitlement, since it derives its competences exclusively from the transfer of rights by the citizens.<sup>9</sup> On the contrary, Jean-Jacques Rousseau started from the same contractualist premises to achieve the reverse conclusion, namely that the death penalty is justifiable precisely because everyone has the right to risk her or his life in order to preserve it. Thus, if we admit that the threat of capital punishment can

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<sup>8</sup> Thomas Hobbes, *De Cive*, Royston, London, 1651 (1642); Thomas Hobbes, *Leviathan, or the Matter, Form, and Power of a Commonwealth Ecclesiastical and Civil*, Croke, London, 1651.

<sup>9</sup> Cesare Beccaria, *Dei delitti e delle pene*, Ugo Mursia Editore, Milan, 1973 (1764), chap. 28.

deter crime, every citizen would subscribe to an agreement which allows its implementation because this would enhance her or his safety.<sup>10</sup>

Despite these differences, the individualistic understanding of criminal law is generally characterised by a significant internal coherence and conceptual soundness – a coherence and soundness that has been interpreted in the most paradigmatic way by Kant. In his work, we can perfectly detect the two outstanding features of the individualistic conception of criminal law: the idea of the moral freedom and autonomy of the individual, on the one hand; and the constructivist – we could almost say: mechanistic – view of the State on the other. Kant's centrality of the individual is most famously expressed in the second formulation of his categorical imperative, according to which a person should never be treated "as a means to an end", but "always [...] as an end".<sup>11</sup> When applied to criminal law, this principle implies that a punishment should not be inflicted on a person in order to deter someone else from committing a crime, and even not to prevent the convicted from doing further harm to the society. As a result, criminal law should not be seen as a cure against the pathologies of society, or as an instrument to recreate social cohesion and harmony, and punishment has the only goal of re-establishing the moral integrity of the subject. Therefore, according to the individualistic paradigm of order – and contrary to the holistic one – the purpose of criminal law is not the preservation of the organic homeostasis of the social community, but the defence of the most essential elements of the individual capacity to act. In Hobbes's philosophy, this was best guaranteed by the safeguard of life and safety of the individuals;<sup>12</sup> for Locke by the prevention of self-defence;<sup>13</sup> for Rousseau by the consolidation of the *volonté générale*<sup>14</sup> – and for Kant,

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<sup>10</sup> Jean-Jacques Rousseau, *Du contract social, ou principes du droit politique*, Garnier-Flammarion, Paris, 1966 (1762), book II, chap. V, p. 71, translated to English in Jean-Jacques Rousseau, *The Social Contract*, Maurice Cranston trans., Penguin Books, London, 1968.

<sup>11</sup> Immanuel Kant, "Grundlegung zur Metaphysik der Sitten", in Immanuel Kant, *Werkausgabe*, Wilhelm Weischedel ed., Suhrkamp Verlag, Frankfurt am Main, 1977 (1785), vol. VII, pp. 9–102, at p. 49 (for the 1956-edition, see [www.legal-tools.org/doc/cb8e1e/](http://www.legal-tools.org/doc/cb8e1e/)).

<sup>12</sup> Hobbes, *Leviathan*, chap. XVII, see *supra* note 8; Hobbes, *De Cive*, book II, chaps. XIII, II ff., see *supra* note 8.

<sup>13</sup> John Locke, *Two Treatises of Government*, Awnsham-Churchill, London, 1698 (1690), book II, chap. 7, sect. 90; *ibid.*, chap. 11, sect. 134; *ibid.*, chap. 12, sect. 143; *ibid.*, chap. 13, sect. 150.

<sup>14</sup> Rousseau, 1966, see *supra* note 10, book I, chap. 6, p. 51.

in probably the most radical way, by the protection of the moral integrity of every single person.

Furthermore, the individualistic paradigm of order generally assumes that individuals are capable of acting on the basis of free, self-conscious and reasonable decisions. In other words, while in accordance with the holistic understanding of order what the single person does is always, to some extent, depending on her or his role within society, the supporters of the individualistic paradigm assert that individual action is nothing but the result of free choice. Rousseau and Kant went so far as to claim that autonomy is the most fundamental goal which a correct use of practical reason should envisage. With a difference, however: while for Rousseau the autonomy of the individual derives from the autonomy of the political community,<sup>15</sup> for Kant individual autonomy has clear priority.<sup>16</sup> Thus, for Rousseau, crime is primarily an offence against the autonomy of the *volonté générale* insofar as someone has tried to impose her or his selfish – and therefore, from the perspective of the political community, heteronomic – advantage on the shared interests. Instead, according to Kant – and more specifically, to the first and the third formulations of his categorical imperative<sup>17</sup> – crime is an attack against the capacity of the individual to act in accordance with the universal commands of reason, which is the only guarantee that she or he is not at the mercy of the heteronomy of egoistical driving forces. From this point of view, if we have to preserve the dignity of the individual as an autonomous decision-maker, then we must also assume that every action is the consequence of a free decision. This approach rules out any possibility to concede to the offender some kind of mitigating circumstances due to her or his unfavourable social situation.

Once given that, within the conceptual horizon of the individualistic paradigm of order, criminal law does not aim at restoring the organic uni-

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<sup>15</sup> *Ibid.*, chap. 8, pp. 55 ff.

<sup>16</sup> Kant, “Grundlegung zur Metaphysik der Sitten”, 1977, p. 65, see *supra* note 11; Immanuel Kant, “Zum ewigen Frieden: Ein philosophischer Entwurf”, in Immanuel Kant, *Werkausgabe*, Wilhelm Weischedel ed., Suhrkamp Verlag, Frankfurt am Main, 1977 (1795), vol. XI, pp. 191–251, at p. 204 (for an English translation, see [www.legal-tools.org/doc/dc079a/](http://www.legal-tools.org/doc/dc079a/)); and Immanuel Kant, “Der Streit der Fakultäten”, in Immanuel Kant, *Werkausgabe*, Wilhelm Weischedel ed., Suhrkamp Verlag, Frankfurt am Main, 1977 (1798), vol. XI, sect. II, chap. 8, pp. 263–393, at p. 364.

<sup>17</sup> Kant, “Grundlegung zur Metaphysik der Sitten”, 1977, p. 67, see *supra* note 11.

ty of society, but at reinstating the moral capacity of the subject to act in a just way – and not in a functional one – both as an individual and as a member of a political community based on a contract between free and equal, then the question arises on what the just measure of punishment should be. It was Kant, once again, who gave the most unequivocal answer.<sup>18</sup> Since the consideration that should matter is exclusively the damage that the culprit has inflicted on the society – not her or his social status, difficulties that she or he might have had in life, or social pathologies in general – the just punishment cannot be anything but the imposition by the society of the same amount of harm on the convicted criminal. Otherwise, Kant argues, the punishment would be a matter of individual arbitrariness by the judge, therefore a breach of the principle of legal certainty, as one of the most central tenets of justice.<sup>19</sup>

Leaving aside Kant's chilling defence of the death penalty, which is justified by resorting to the same strict concept of retribution,<sup>20</sup> the question of the just measure of punishment brings the second most remarkable element of the individualistic understanding of criminal law to the fore, along with the freedom and autonomy of the individual: that is, the constructivist, if not mechanistic, idea of justice. To understand this aspect, it is necessary to return to the epistemological revolution which came with the transition from the holistic to the individualistic paradigm of order.

According to the holistic understanding, society can be regarded as superior to the sum of its members because it is conceived as an organic body, as a *corpus*, each component of which has its proper *raison d'être* only within the whole, while being largely useless outside of it. Therefore, the action undertaken by the public power against one limb of the body – also in the form of criminal punishment – is essentially depending, in its scale, on the functional interaction of the components. On the contrary, the individualistic paradigm conceives of society as made of elements – the individuals themselves – which have inherent value of their own. As a result, the political community is visualised as a *machine* that puts together those elements for the purpose of obtaining a general benefit. On the other hand, since the components have a social meaning regardless of

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<sup>18</sup> Immanuel Kant, “Die Metaphysik der Sitten”, in Immanuel Kant, *Werkausgabe*, Wilhelm Weischedel ed., Suhrkamp Verlag, Frankfurt am Main, 1977 (1797), vol. VIII, pp. 303–634, at pp. 452 ff.

<sup>19</sup> *Ibid.*, p. 454.

<sup>20</sup> *Ibid.*, p. 455.

their belonging to the assembled machine, they must be preserved in their original, pre-social endowments, while the mechanism of social interaction must aim at maintaining perfect balance between equally essential and potentially independent constituents. Within the horizon of an understanding of politics that consider physics – and in particular mechanics – as its leading science,<sup>21</sup> to each action a contrary reaction must follow, which must have the same intensity in order to uphold the mechanism and its capacity to function. Thus, to a criminal action that threatens to jeopardise the stability of the construction, an equivalent counteraction must follow in form of a punishment according to the most severe principles of *retributive justice*.<sup>22</sup>

When Hegel began to address the question of the consequences of crime for the destabilisation of the social and political community, as well as of the significance and measure of punishment as the instrument to re-establish order, he had to develop his own position against a paradigmatic background characterised by a dichotomy. On the one hand, there was the idea that criminal law should reinstate social cohesion and hierarchy; on the other, the individualistic view according to which the punishment should aim at recreating the moral integrity of the person on the basis of an inflexible system of retribution. In fact, Hegel started to show interest in the matter quite early, and no doubt can be raised that the target of his criticism was – at least at first sight – the criminal law conception of modern individualism in general, and of Kant in particular. We find the first references to the meaning of crime and punishment in the fragmentary writings – going back to his time in Frankfurt (1796–1800) and never published during his lifetime – which are generally known under the title *Der Geist des Christentums und sein Schicksal* (*The Spirit of Christianity and Its Fate* – 1797–1800).<sup>23</sup> Given that crime is interpreted by Hegel, as

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<sup>21</sup> Norberto Bobbio, “Il modello giusnaturalistico”, in Norberto Bobbio and Michelangelo Bovero, *Società e stato nella filosofia politica moderna*, Il Saggiatore, Milan, 1979, pp. 15–109, at pp. 17 ff.

<sup>22</sup> Kant speaks explicitly of the “balance of justice”. See Kant, “Die Metaphysik der Sitten”, 1977, p. 453, see *supra* note 18.

<sup>23</sup> Georg Wilhelm Friedrich Hegel, “Der Geist des Christentums und sein Schicksal”, in Georg Wilhelm Friedrich Hegel, *Werke in zwanzig Bänden*, Eva Moldenhauer and Karl Markus Michel eds., Suhrkamp Verlag, Frankfurt am Main, 1971, vol. 1: *Frühe Schriften*, pp. 274–418, translated to English in Georg Wilhelm Friedrich Hegel, *On Christianity: Early Theological Writings*, T.M. Knox trans., Harper & Brothers, New York, 1961, pp. 182–301.

usual, as a severe breach of the rules of social order, his originality already emerges clearly when he shifts his attention to the task that should be assigned to punishment and, thus, to criminal law. His criticism is most explicitly directed against the rigid Old Testamentary law of retaliation (*lex talionis*),<sup>24</sup> but, in fact, his closest and most significant target is Kant's theory of morals and law.<sup>25</sup>

According to Hegel's analysis, in both Old Testamentary conception and Kant's vision, criminal law is a power which arises from outside, against the will of the wrongdoer.<sup>26</sup> It can submit the culprit, but it cannot reconcile her or him with the community. Against this conceptual background, no room for mercy is given.<sup>27</sup> The wrongdoer is punished and subdued, and she or he might also be led back to her or his moral autonomy insofar as her or his criminal attitude is made inoffensive. Nonetheless, the law remains an external force that can compel, but is still unable to really overcome the conflict by transforming it into a stable condition of peace based on a largely shared interpretation of the facts as well as of the best way to rise above them.

Instead, to heal the wound that has been inflicted to society through the criminal act, it is necessary that the culprit recognises that she or he has done wrong and that she or he must make peace with the community so as to have a dignified social life again. In order to explain the difference between the positive law that only punishes and the interior, more deep-going process that can reconcile, Hegel introduced the concept of 'fate' (*Schicksal*). While the force of the law externally constrains the freedom of the convicted persons, their 'fate' – that is, what happens to them after the crime, and their moral and psychological reaction to these events – makes them aware of the fact that the offence against the rules of the community has alienated them from the social group which is essential to build up the most fundamental nucleus of their identity.<sup>28</sup> Therefore, in a kind of brilliant anticipation of the moral and social dilemma masterfully expressed by Dostoyevsky in *Crime and Punishment*,<sup>29</sup> in Hegel's

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<sup>24</sup> Hegel, 1971, p. 331, see *supra* note 23; Knox, 1961, p. 218, see *supra* note 23.

<sup>25</sup> Hegel, 1971, pp. 324 ff., see *supra* note 23; Knox, 1961, p. 213, see *supra* note 23.

<sup>26</sup> Hegel, 1971, p. 306, see *supra* note 23.

<sup>27</sup> *Ibid.*, pp. 338 ff.; Knox, 1961, pp. 225 ff., see *supra* note 23.

<sup>28</sup> Hegel, 1971, p. 343, see *supra* note 23; Knox, 1961, pp. 228 ff., see *supra* note 23.

<sup>29</sup> Fyodor Dostoyevsky, *Crime and Punishment*, Constance Garnett trans., Dover Publications, Mineola (NY), 2001 (1866).

early work, it is the culprit her- or himself who acknowledges – like Dostoyevsky’s Raskolnikov – the necessity to submit her- or himself to the social order. The true meaning of justice should not consist in the application of abstract rules, but in aiming at a ‘reconciliation through love’ (*Versöhnung durch die Liebe*). In fact – Hegel claims – “punishment betters nothing, for it is only suffering, a feeling of impotence in face of a lord with whom the criminal has and wants nothing in common”.<sup>30</sup> On the contrary, “it is in the fact that even the enemy is felt as life that there lies the possibility of reconciling fate”.<sup>31</sup> Therefore, “this sensing of life, a sensing which finds itself again, is love, and in love fate is reconciled”.<sup>32</sup>

Nonetheless, the purpose of reconciliation does not remove the necessity of inflicting punishment as a reaction to the crime.<sup>33</sup> Yet, the task that is accomplished by inflicting punishment does not consist in counterbalancing the harm done to the society and to the moral autonomy of the subject, which is based on the categorical imperative, but in supporting the solution of social conflicts.<sup>34</sup>

Since already in Hegel’s early works the reaction to the crime should lead primarily – if not exclusively – to the reconciliation of the political community, it could seem that we are confronted, here, with a backwards-oriented plea for a return to the holistic understanding of criminal law. In fact, this is partially true insofar as Hegel openly turned his back on the conception of criminal law of the enlightenment and, in general, of the individualistic paradigm of order. As a result, he envisaged the reconstruction of a harmonic social community, and not the regaining of moral autonomy by the single subject.<sup>35</sup>

However, claiming that Hegel just wanted a kind of restoration of the old idea of order is too reductive, and ultimately incorrect. Indeed, it is also undisputable that the goal of justice should not consist, in his view, in restoring traditional and old-fashioned hierarchies, but in reconstructing

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<sup>30</sup> Hegel, 1971, p. 345, see *supra* note 23; Knox, 1961, p. 231, see *supra* note 23. In the English version edited by T.M. Knox, the German “*Verbrecher*” is rendered by “trespasser”; I prefer to translate it as “criminal” since the German word is the same which is also used in the language of criminal law.

<sup>31</sup> Hegel, 1971, p. 345, see *supra* note 23; Knox, 1961, p. 232, see *supra* note 23.

<sup>32</sup> Hegel, 1971, p. 346, see *supra* note 23; Knox, 1961, p. 232, see *supra* note 23.

<sup>33</sup> Hegel, 1971, p. 306, see *supra* note 23.

<sup>34</sup> Hegel, 1971, p. 353, see *supra* note 23; Knox, 1961, pp. 238 ff., see *supra* note 23.

<sup>35</sup> Hegel, 1971, p. 376, see *supra* note 23; Knox, 1961, p. 260, see *supra* note 23.

and consolidating an ethical life with a predominant look to the future. In fact, criminal law can only succeed in its most fundamental task if it contributes to the 'interiorization' of shared social values, whereas these values must imply what Hegel called, in his later works, a *Gesinnung* ('conviction'), namely, a profound and assertive identification with the goals of the social and political community by every single individual.<sup>36</sup>

This is the very point where the second essential novelty of Hegel's conception of criminal law comes into play. Indeed, at least in some of his texts, the criminal act is not an offence against a legal order which – in a static vision of society – is deemed to sustain the best possible or, at least, the best achievable form of social life. Rather, according to a dynamic understanding of social evolution, the crime is an inevitable revolt against an abstract system of norms which rises in front of the individuals as an alien power. Surely, this interpretation is not meant to justify the violation of norms. In fact, no doubts can be raised on the fact that Hegel always condemned the criminal act as a dangerous attack on the essential rules of a peaceful social life, and that he was utterly convinced that it had to be punished. Nonetheless, it was also seen as a response to some kind of social pathology, which punishment – and, thus, criminal law – has the task, if correctly understood, of healing and overcoming. In this sense, the criminal act is granted a positive meaning as a necessary step on the way to a better society. Indeed, if we consider that international criminal law has to deal with such abhorrent crimes as, for instance, genocide, it might be quite disturbing to think of them as bearing some kind of constructive function. Nonetheless, leaving aside Hegel's optimistic teleology, it is also true that crimes – even the most horrifying – may be indicators of a deep-going sickness in which a society is trapped and from which it should be released. In making society healthy again, however, the intervention should always concentrate first on the support for the victims, and only in a second step on the social rehabilitation of the perpetrators.<sup>37</sup>

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<sup>36</sup> Georg Wilhelm Friedrich Hegel, *Grundlinien der Philosophie des Rechts*, in Georg Wilhelm Friedrich Hegel, *Werke in zwanzig Bänden*, Eva Moldenhauer and Karl Markus Michel eds., Suhrkamp Verlag, Frankfurt am Main, 1971, vol. 7, § 268, p. 413 ([www.legal-tools.org/doc/ceb813/](http://www.legal-tools.org/doc/ceb813/)); translated to English in Georg Wilhelm Friedrich Hegel, *Philosophy of Right*, S.W. Dyde trans., George Bell, London, 1896.

<sup>37</sup> Giada Girelli, *Understanding Transitional Justice*, Palgrave Macmillan, Basingstoke/New York, 2017, pp. 9 ff.

The idea that crimes are the result of social pathologies – in particular of a too formal understanding of rules – was already implicit in the Frankfurt writings on *The Spirit of Christianity*. A couple of years later – namely in the first lecture on the *Philosophy of Spirit* held by Hegel in 1803–04,<sup>38</sup> thus in the middle of his time in Jena (1800–07) – the breach of rules was directly related to social conflicts and to the role played by them in paving the way to higher and more stable forms of social organisation.<sup>39</sup> No direct reference is made, here, to criminal law. Nonetheless, the reason for the breach is given, here too, by the presence of regulations which are too far from the individual sensibility; yet, they concern, in this text, not religious worship, but the safeguard of property. The outcome, then, is similar as well: far beyond the mere punishment of the trespasser, the true solution of the conflict cannot but be a pacified society grounded on mutual recognition.<sup>40</sup> In the last lecture on the *Philosophy of Spirit* of the Jena period (1805–06), the strands of thinking that Hegel developed in his earlier works came to an accomplished synthesis.<sup>41</sup> The reference to criminal law reappeared again, even more explicitly than in the Frankfurt writings, but was now inserted – following the pattern of the *Philosophy of Spirit* – into an ambitious interpretation of social evolution, that was assumed to move on through the emergence of conflicts and their solution. Building a stage on its own, criminal law was located – like the ‘struggle for recognition’ in the lectures of 1803–04, but in the context of a more complex systematic structure and on the basis of a more sophisticated argumentation – between the system of property grounded in contract, and the constitution built on shared values.<sup>42</sup> Hegel did not reject the principle of retribution, but left no doubts, nonetheless, about his conviction that this had to be only a preparatory and largely instrumental step on the way

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<sup>38</sup> Georg Wilhelm Friedrich Hegel, *Jenaer Systementwürfe I: Das System der spekulativen Philosophie*, Klaus Düsing and Heinz Kimmerle eds., Felix Meiner Verlag, Hamburg, 1986, p. 217, translated to English in Georg Wilhelm Friedrich Hegel, *System of Ethical Life and First Philosophy of Spirit*, H.S. Harris and T.M. Knox eds. and trans., State University of New York Press, Albany, 1979.

<sup>39</sup> *Ibid.*, pp. 217 ff.

<sup>40</sup> *Ibid.*, pp. 223 ff.

<sup>41</sup> Georg Wilhelm Friedrich Hegel, *Jenaer Systementwürfe III: Naturphilosophie und Philosophie des Geistes*, Rolf-Peter Horstmann ed., Felix Meiner Verlag, Hamburg, 1987, p. 250, translated to English in Georg Wilhelm Friedrich Hegel, *Hegel and the Human Spirit*, Leo Rauch trans., Wayne State University Press, Detroit, 1983.

<sup>42</sup> *Ibid.*, pp. 212 ff.

to a higher goal, namely the foundation of a society in which the interests of the individuals could be identical with the common good.<sup>43</sup>

Hegel did not regard crime as the result of social tensions and pathologies in all texts in which he addressed the question of criminal law. The difference depends largely on how he respectively interpreted and described the distinct forms of the 'spirit' (*Geist*) – namely, the expressions of the self-realisation of the individual in relation to its conscience, to other individuals, as well as to the social world – and their relations to each other. In some works – in particular, those from the early stages of his philosophy – he did it with an almost evolutionary approach. In other words, the shapes taken by the *Geist* are dynamically presented as the result of social conflicts, or – as Hegel preferred to say – of “struggles for recognition”.<sup>44</sup> This applies in particular to all works referred to above; to be more precise, it applies at least partially to *The Spirit of Christianity*,<sup>45</sup> and fully to the later *Philosophies of Spirit* of 1803–1804<sup>46</sup> and 1805–1806.<sup>47</sup> In these writings, crime and punishment are conceived of as painful, but inevitable stages on the way to a properly integrated society. In other works, on the contrary, Hegel fixed the forms of the 'spirit' within a rather static system, in which each one of its manifestations contributes to the organic whole, and the transition from the lower expression of the *Geist* to the higher one is determined – according to what we assume to be the typical idealistic method – by the conceptual insufficiency of the former, rather than by social processes. This approach was anticipated – at least as regards the static understanding of the social order, far less with reference to the concept of *Geist*, which Hegel had not properly developed yet – in the *System of Ethical Life* (*System der Sittlichkeit*) of 1802–03,<sup>48</sup>

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<sup>43</sup> *Ibid.*, pp. 215 ff.

<sup>44</sup> Axel Honneth, *Kampf um Anerkennung*, Suhrkamp Verlag, Frankfurt am Main, 1994, translated to English in Axel Honneth, *The Struggle for Recognition*, Joel Anderson trans., The MIT Press, Cambridge (MA), 1995; Sergio Dellavalle, *Freiheit und Intersubjektivität: Zur historischen Entwicklung von Hegels geschichtsphilosophischen und politischen Auffassungen*, Akademie Verlag, Berlin, 1998.

<sup>45</sup> Hegel, 1971, see *supra* note 23; Knox, 1961, see *supra* note 23.

<sup>46</sup> Hegel, 1986, see *supra* note 38; Harris and Knox, 1979, see *supra* note 38.

<sup>47</sup> Hegel, 1987, see *supra* note 41; Rauch, 1983, see *supra* note 41.

<sup>48</sup> Georg Wilhelm Friedrich Hegel, “System der Sittlichkeit”, in Georg Wilhelm Friedrich Hegel, *Schriften zur Politik und Rechtsphilosophie*, Georg Lasson ed., 2nd edition, Felix Meiner Verlag, Leipzig, 1923, pp. 413–99, at p. 460, translated to English in Harris and Knox, 1979, see *supra* note 38.

and was brought to completion, then, in the works of his Berlin period (1818–31). Here, the criminal act loses its former function as a detector of social pathologies and conflicts to be healed through social processes of reconciliation, but criminal law in general, and punishment in particular, maintain their role as instruments in the service of the construction of an ethical life based on shared values. More specifically, in the *System of Ethical Life*, punishment is presented as a preliminary stage of the ‘Free Government’ (*freie Regierung*) insofar as it has the task of overcoming the challenge against the very idea of a society grounded on the common good.<sup>49</sup>

The most complete presentation of criminal law in Hegel’s work, however, is to be found in the *Elements of the Philosophy of Right* (*Grundlinien der Philosophie des Rechts*) – officially printed in 1821, but released in 1820.<sup>50</sup> Yet, completeness does not correspond necessarily with innovativeness. In fact, in the *Philosophy of Right* of his Berlin period, Hegel was primarily interested in construing a coherent system of political and legal philosophy in which every element of the two disciplines could find its proper place as part of a holistic understanding of truth and knowledge. Hegel was convinced that this could happen on the basis of the subjectivistic categories of his *Logics*, which he had developed during his Nuremberg period.<sup>51</sup> The subjectivistic logics allowed, according to Hegel’s intention, a sufficient dialectic between the categories of law and politics, but within a framework which was determined from the outset. In other words, each element was regarded, now, as a component of the self-development of the holistic subject, and not – as in the earlier texts – as a step in the context of a social evolution with open-ended results. The outcome was that intersubjective interaction turned into monological subjectivism, and that the elements of law and politics were frozen into a rather rigid structure. Therefore, we can find in the Berlin *Rechtsphilosophie* only a vestige of the most ground-breaking innovations that Hegel brought into the debate for the first time in the earlier texts.

The presentation of criminal law in the *Rechtsphilosophie* of 1821 is divided into two parts: the first one is inserted into the section on the

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<sup>49</sup> *Ibid.*, p. 497.

<sup>50</sup> Hegel, 1971, vol. 7: *Grundlinien der Philosophie des Rechts*, see *supra* note 36.

<sup>51</sup> Georg Wilhelm Friedrich Hegel, *Werke in zwanzig Bänden*, Eva Moldenhauer and Karl Markus Michel eds., Suhrkamp Verlag, Frankfurt am Main, 1971, vol. 5: *Wissenschaft der Logik I* and vol. 6: *Wissenschaft der Logik II*.

‘Abstract Right’ (*Abstraktes Recht*) and contains the analysis of the formal concepts of criminal law;<sup>52</sup> the second belongs to the section on the ‘Administration of Justice’ (*Rechtspflege*), in which, in general, the abstract system of the legal categories acquires living concreteness through statutes and adjudication.<sup>53</sup> Although marginalised if compared with the earlier texts, at least two of the innovative elements of Hegel’s former interpretation of criminal law are still present in the *Rechtsphilosophie* of 1821. In particular, each of the parts into which the analysis is divided contains one of them. First, the ‘Abstract Right’ is concluded with the paragraphs on criminal law since – according to Hegel – the laws on crime and punishment are, of all components of the legal system with the only exception of constitutional law, those that best express the superiority of the common good over the individual interests. Moreover, the fact that the reinstated conscience of the criminal finds its completion, beyond criminal law, in the realm of morality, is a further proof of Hegel’s conviction that reconciliation – and not retaliation – must be the aim.<sup>54</sup> Secondly, in the section on the ‘Administration of Justice’ Hegel took up his former idea that the measure of the punishment must depend on general social interests, so that, if society is sufficiently “strong and sure of itself”, this might justify a “mitigation of [...] punishment”.<sup>55</sup>

Having reconstructed Hegel’s understanding of criminal law, it is now possible to address the question on which suggestions it could give to the contemporary efforts to construe a system of international criminal law. Before doing that, let us recollect briefly the most important components of his conception. First, contrary to the theory of retribution which characterised the understanding of criminal law according to the individualistic paradigm of order, Hegel expressed throughout his whole philosophical work the conviction that punishment should be primarily – if not exclusively – applied with the purpose to restore social cohesion. Secondly, however – against the organic vision of social order of the holistic paradigm – social cohesion did not coincide, in his vision, with the reinstatement of traditional hierarchies, but rather meant the construction of a peaceful and healthy social life, which had to be based not on passive

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<sup>52</sup> Hegel, 1971, vol. 7: *Grundlinien der Philosophie des Rechts*, §§ 90 ff., pp. 178 ff., see *supra* note 36.

<sup>53</sup> *Ibid.*, §§ 209 ff., pp. 360 ff.

<sup>54</sup> *Ibid.*, § 104, p. 198.

<sup>55</sup> *Ibid.*, § 218, p. 372.

obedience, but on shared values. Thirdly, and lastly, in some of his early works Hegel explicitly asserted that crime might be the consequence of social pathologies. Put differently, we could also say that Hegel's theory of criminal law, by and large, does not aim at retribution, but at reconciliation through the overcoming of the social conflicts that led to the criminal action. If we transpose this theory, now, into the present discussion, we can surprisingly detect that it shows significant similarities with some of the most innovative approaches of transitional justice.

By the concept of transitional justice, we understand the extraordinary measures – which include criminal law, but are not limited to this – that a society emerging from a period of conflict and repression takes in order to address the large-scale violation of human rights that occurred during that time and cannot be dealt with by the procedures of ordinary justice. In its early stage, which is to be located at the end of World War II, transitional justice was characterised by the tendency to sort out some of the most prominent exponents of the regime which perpetrated the violations of human rights, in order to put them to trial, while victims were granted little involvement – or none at all – in the procedure, and a blank guarantee of innocence was given to the rest of the populace. In the most optimistic interpretation, “society as a whole was given the chance to atone for its sins by witnessing the cathartic act of blaming its representatives”.<sup>56</sup> This was the model that was strictly applied in the Nuremberg and Tokyo trials – namely, in the first experiments of transitional justice – and later, to a large extent, also as regards the *ad hoc* international tribunals for Rwanda and the former Yugoslavia. Having recognized the deficits that affected these experiences, a different pattern has emerged which, going through the intermediary step of the hybrid courts of Sierra Leone, was implemented in particular by the truth commissions of South Africa.

Three elements typify the South African truth commissions if compared to the former models of transitional justice. First, reconciliation is given priority over retribution. Secondly, more attention is focused on the victims and their destiny. Thirdly, society as a whole is involved, whereby not only the most active perpetrators of human rights violations have to stand trial, but also their backstage supporters must acknowledge their breach of the most essential rules of societal life in front of the victims in order to be reintegrated into the community. Mercy is central, thus, but

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<sup>56</sup> Girelli, 2017, p. 393, see *supra* note 37.

under the condition of a credible recognition of one's own guilt. Therefore, according to an innovative understanding of transitional justice, criminal law is not only about the rehabilitation of the culprit – which has become, in the meantime, a well-established principle of criminal justice – but also, and above all, about the healing process of a “wounded society”.<sup>57</sup> With some understandable adjustments, this is, quite precisely, what Hegel suggested more than two hundred years ago, in particular in his early writings. Surely, it would be a huge stretch to claim that Hegel had the newest developments of transitional justice in mind, but it is not an exaggeration to assert that the most forward-looking understanding of criminal law can find in his work an intriguing and thought-inspiring – although quite unexpected – philosophical support.

### **13.3. A Hegelian Understanding of International Criminal Law**

Inevitably, the conception of transitional justice has a relevant impact on the international implementation of criminal law. In fact, international criminal law comes into play when a nation proves to be unable to guarantee the implementation of justice. This happens, almost always, under circumstances in which a national society has gone through devastating historical experiences such as dictatorships with large and severe violations of fundamental human rights, or genocide. At this point, international criminal law overlaps with transitional justice, since it must step in where the structures of the national administration of justice cannot adequately perform their task. This is the reason why international criminal law should always pay the highest attention to the theoretical and practical developments of transitional justice.

However, to develop appropriately, international criminal law does not need only a sound concept of justice – which might be suitably influenced by the most innovative understanding of transitional justice – but must also conceive of justice as something which can, and should, be implemented at the international level no less than within the borders of the State. The presupposition for justice to be conceived this way, yet, is that we are provided with a universalistic conception of order. This brings us back to those conceptual patterns that have been defined, at the beginning of the former section, as the paradigms of social order, in particular to their second essential characteristic – beside the claim regarding the onto-

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<sup>57</sup> *Ibid.*, pp. 195 ff.

logical basis of the well-ordered society – namely the assertion concerning the possible extension of order.

At the time Hegel began to address the question of the possible extension of order, a dichotomy of two opposing paradigms had dominated the scene of the theories on international law and relations for a long time.<sup>58</sup> On the one hand, we have the idea that order can only be achieved within a limited and homogeneous community. This *particularistic* assumption rules out from the outset the possibility that criminal law could be implemented beyond the legal boundaries of the State. On the other hand, a conception was developed according to which order can include, in principle, the whole humankind. The consequences were, first, that the perspective of a world constitutionalism became palpable,<sup>59</sup> and, second, that criminal courts can also be established at the international level. To reach these conclusions, however, a long time in the history of ideas was needed.

Indeed, the most ancient ideas that gave expression to *universalism* – the Buddhist *dharma* in Eastern thinking and Stoic philosophy in the West – despite their role as ground-breakers, had little impact, if any, on law and politics (maybe with the only exceptions of Ashoka in the East and Mark Aurel in the West). An important step forwards was made when the universalistic approach of the Stoic philosophy was taken up by Christianity which later became the leading force of the Western world, not only in spiritual but also political and legal matters. Yet, due to the still missing institutional structure which could guarantee the realisation of the universal order, the Western political and legal philosophy of the early Modern Ages had to ground its universalistic conception of order on the abstract commands of natural law and reason. In other words, all authors

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<sup>58</sup> Armin von Bogdandy and Sergio Dellavalle, “Parochialism, Cosmopolitanism, and the Paradigms of International Law”, in Mortimer N.S. Sellers (ed.), *Parochialism, Cosmopolitanism, and the Foundations of International Law*, Cambridge University Press, Cambridge, 2012, pp. 40–117; Armin von Bogdandy and Sergio Dellavalle, “Universalism and Particularism: A Dichotomy to Read Theories on International Order”, in Stefan Kadelbach, Thomas Kleinlein and David Roth-Isigkeit (eds.), *System, Order, and International Law*, Oxford University Press, Oxford, 2017, pp. 482–504.

<sup>59</sup> Sergio Dellavalle, “World Constitutionalism”, in Mortimer N.S. Sellers and Stephan Kirste (eds.), *Encyclopedia of the Philosophy of Law and Social Philosophy*, Springer, Heidelberg, 2019 (forthcoming).

who shaped the modern understanding of *jus gentium*, from Vitoria<sup>60</sup> to Suárez,<sup>61</sup> and from Grotius<sup>62</sup> to Pufendorf<sup>63</sup> – all of them deeply influenced by the Christian concept of natural reason, the former two in its Catholic version, the latter two in its Protestant setting – supported the idea that a universal order of reason is possible. Nonetheless, this order was not intended to be based on anything else than on what natural reason demands from every rational being, with the result that it was actually devoid of whatsoever form of supra-State legal framework.

The author who paved the way to a new stage of the development of the universalistic idea was, again, Immanuel Kant. In his vision, cosmopolitanism was not only a command of reason but also, as *jus cosmopoliticum*, a part of his tripartite system of public law, beside constitutional law (*jus civitatis*) and international law (*jus gentium*).<sup>64</sup> Therefore, Kant's framework for universalism had – for the first time in the history of ideas – an explicitly *legal* character. Although his intuition marked a fundamental milestone on the way to the philosophical foundation of international adjudication, and thus also of international criminal law, the final goal was nonetheless far from achieved. In fact, the contents of the *jus cosmopoliticum* in Kant's perspective were rather slim, making no reference to criminal law. Moreover, he failed to present a coherent proposal on how the cosmopolitan order could be supported by adequate institutional structures.<sup>65</sup> These shortcomings were removed – largely in Kant's spirit, but with a more radical approach – by Hans Kelsen roughly one and a half century later.

Essentially, Kelsen introduced two major clarifications, and two novelties. The first clarification focussed on the synthesis between individualism and universalism. Indeed, it was Kant who first conceived a

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<sup>60</sup> Francisco de Vitoria, *De Indis et De Jure Belli Relectiones*, Oceana, New York/London, 1964.

<sup>61</sup> Francisco Suarez, “De legibus, ac Deo legislatore”, in *Selections from three Works*, Clarendon Press, Oxford, 1944 (1612), pp. 1–646.

<sup>62</sup> Hugo Grotius, *De Jure Belli ac Pacis*, William S. Hein & Co., Buffalo, 1995 (1646).

<sup>63</sup> Samuel Pufendorf, *De jure naturae et gentium libri octo*, William S. Hein & Co., Buffalo, 1995 (1672).

<sup>64</sup> Kant, “Zum ewigen Frieden: Ein philosophischer Entwurf”, 1977, p. 203, see *supra* note 16.

<sup>65</sup> *Ibid.*, p. 212; Kant, “Die Metaphysik der Sitten”, 1977, § 54, p. 467, see *supra* note 18; *ibid.*, § 61, p. 474.

paradigm of order that we can call *universalistic individualism*, according to which the individuals are at the centre of the order of theoretical and practical reason, while this order is cosmopolitan. Yet, it was Kelsen who made this idea more concrete by transposing the centrality of the individuals from the philosophical to the legal level,<sup>66</sup> and by locating international law – charged with the unequivocal task of safeguarding individual rights – at the apex of the legal system.<sup>67</sup> A further clarification brings the third – and last – feature of the paradigms of order to the fore. Indeed, beside the claims on extension and ontological basis of order, a third element characterises every paradigm of order, namely an assumption as regards the unitary – or non-unitary – character of order. In the case of the unitary conceptions, order can only exist if it is structured in the form of a coherent hierarchy of institutions and norms, in which vertical relations prevail, whereas horizontal ones are largely ignored or avoided. From this standpoint, it is ruled out that two or more institutions – as well as two or more norms – can claim to possess the same degree of authority and normativity, while belonging nonetheless to different, yet commensurable institutional and legal systems. On the contrary, non-unitary or post-unitary conceptions of order admit the possibility of conflicts between institutions and norms which cannot be addressed by resorting to hierarchy, so that dialogical forms of conflict solving must take place. Undoubtedly, the explicit assertion of the existence of legal pluralism as a possible enrichment of society – and not as a pathology – dates back to just a few decades ago.<sup>68</sup> Nevertheless, while Kant left the door open to some kind of balance between constitutional and international law, without imposing a clear-cut hierarchy between the two regimes, Kelsen's construction is unequivocally pyramidal, with international law at the top<sup>69</sup> and State law as nothing more than the enforcer, within a specific territory, of what international law requires or allows.<sup>70</sup>

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<sup>66</sup> Hans Kelsen, *Law and Peace in International Relations*, William S. Hein & Co., Buffalo (NY), 1997 (1942), p. 83; Hans Kelsen, *General Theory of Law and State*, Harvard University Press, Cambridge (MA), 1949 (1945), pp. 343 ff.

<sup>67</sup> Hans Kelsen, *Peace through Law*, University of North Carolina Press, Chapel Hill (NC), 1944, p. 35.

<sup>68</sup> Sergio Dellavalle, "Addressing Diversity in Post-unitary Theories of Order", in *Global-Trust Working Paper*, 2015, vol. 5.

<sup>69</sup> Hans Kelsen, *Reine Rechtslehre: Einleitung in die rechtswissenschaftliche Problematik*, Deuticke, Leipzig/Vienna, 1934, pp. 149 ff.

<sup>70</sup> Kelsen, 1949, pp. 351 ff., see *supra* note 66.

Kelsen's first novelty, then, if compared to Kant, has been the claim that universalistic order has to be conceived not only as having, beside the political components, also a legal character, but as being *essentially a legal system*.<sup>71</sup> In other words, legal norms are more than only one pillar to support the construction of universal order: they are rather, if not the only one, at least and by far its most fundamental feature. The second novelty, finally, affects directly criminal law, in particular in its international implementation. Being Kelsen's cosmopolitan system of the *civitas maxima* centred on the individuals, law-based, unitary and hierarchical, the consequence cannot but be that international criminal law is destined to play a central role. In fact, the supremacy of the legal dimension – more specifically, of public law – ensures that criminal law is granted a prominent position in guaranteeing social stability. Furthermore, being the individuals at the core of social order, international criminal law should target primarily individual responsibility<sup>72</sup> while addressing State responsibility only insofar as the system is underdeveloped and no better alternative is available.<sup>73</sup> It is important to keep in mind, at this point, that the same centrality of the individuals, which characterised Kelsen's approach, also informed deeply the spirit that led to the establishment of the ICC roughly sixty years after the first formulation of the individualistic principle in international criminal law.<sup>74</sup> Lastly, since Kelsen's legal system is conceived as necessarily unitary and hierarchical, criminal justice at the international level can claim undisputed priority – or even exclusivity – over its national counterpart.

Having outlined the dichotomy of paradigms that had shaped the panorama of the theories of international law and relations for many centuries – and not least at the juncture of the eighteenth and nineteenth centuries – it is possible, now, to turn to Hegel again, addressing the question on which of the two dichotomous paradigms found support in his work. And, if his conception of international law and relations did not belong properly to any of them, we have then to verify whether it is correct to assert that he laid down some relevant anticipations for a new paradigm of

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<sup>71</sup> Kelsen, 1944, see *supra* note 67.

<sup>72</sup> *Ibid.*, pp. 71 ff.

<sup>73</sup> Kelsen, 1949, p. 96, see *supra* note 66.

<sup>74</sup> Rome Statute of the International Criminal Court, 17 July 1998, in force 1 July 2002, Article 25 and Article 27 ('ICC Statute') ([www.legal-tools.org/doc/7b9af9/](http://www.legal-tools.org/doc/7b9af9/)).

order.<sup>75</sup> In fact, answering these questions is far from easy for at least two reasons. First, Hegel paid little attention, in general, to the topic, inserting it in his writings only late and, in all likelihood, more because of his wish not to leave any significant aspect of human knowledge and action out of his system, than as a result of a profound and true interest. Secondly, even in the works of his Heidelberg (1816-1818) and Berlin periods, which contain a systematic outline of Hegel's understanding of international law and relations, the room dedicated to the subject is comparatively small, comprising – in its most detailed presentation in the *Rechtsphilosophie* of 1821 – only twenty, rather short paragraphs, from § 321 to § 340 included. Despite these limitations, however, we are provided with enough elements to determine Hegel's position as regards both previous paradigms. In particular, while his rejection of natural-law-based universalism essentially relies on indirect remarks,<sup>76</sup> his criticism of Kant's cosmopolitanism could hardly be more explicit.<sup>77</sup>

Hegel's refusal of universalism seems to suggest the conclusion that he endorsed the opposing paradigm. Such a deduction, however, would be hasty and, on the basis of a more accurate analysis, quite incorrect. In fact, Hegel's theory of international law and relations is characterised by some relevant features which could hardly be tracked down in the work of a

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<sup>75</sup> On Hegel's conception of international law and relations, see Sergio Dellavalle, "The Plurality of States and the World Order of Reason: On Hegel's Understanding of International Law and Relations", in Stefan Kadelbach, Thomas Kleinlein and David Roth-Isigkeit (eds.), *System, Order, and International Law*, Oxford University Press, Oxford, 2017, pp. 352–78.

<sup>76</sup> Georg Wilhelm Friedrich Hegel, *Vorlesungen über Naturrecht und Staatswissenschaft*, in Georg Wilhelm Friedrich Hegel, *Vorlesungen: Ausgewählte Nachschriften und Manuskripte*, Claudia Becker et al. eds., Felix Meiner Verlag, Hamburg, 1983, vol. 1, § 162, p. 253; translated to English in Georg Wilhelm Friedrich Hegel, *Lectures on Natural Right and Political Science*, J. Michael Steward and Peter C. Hodgson trans., University of California Press, Berkeley, 1995; Hegel, 1971, vol. 7: *Grundlinien der Philosophie des Rechts*, § 194, p. 350, see *supra* note 50; Georg Wilhelm Friedrich Hegel, *Philosophie des Rechts*, in Georg Wilhelm Friedrich Hegel, *Vorlesungen über Rechtsphilosophie 1818–1831*, Karl-Heinz Ilting ed., Frommann-Holzboog Verlag, Stuttgart-Bad Cannstatt, 1973, vol. 3, p. 33; Georg Wilhelm Friedrich Hegel, *Vorlesungen über die Geschichte der Philosophie III*, in Georg Wilhelm Friedrich Hegel, *Werke in zwanzig Bänden*, Eva Moldenhauer and Karl Ludwig Michel eds., Suhrkamp Verlag, Frankfurt am Main, 1971 (1833/36), vol. 20, p. 224; translated to English in Georg Wilhelm Friedrich Hegel, *Lectures on the History of Philosophy*, E.S. Haldane and Frances H. Simson trans., vol. 3, Nebraska University Press, Lincoln (NE), 1995.

<sup>77</sup> Hegel, 1971, vol. 7: *Grundlinien der Philosophie des Rechts*, § 333, p. 500, see *supra* note 50.

true exponent of particularism. For instance, his concept of the 'people' (*Volk*) is free from any nationalist subtext,<sup>78</sup> and his defence of war rather aimed at justifying social and political dynamism than at defending any kind of ruthless self-affirmation of the nation.<sup>79</sup> Yet, the most important element that distinguishes Hegel's understanding of international law and relations from the particularistic view is his concept of reason. Indeed, according to the particularistic paradigm of order, rationality is the idiosyncratic product of an individual community, with its specific cultural tradition. Many rationalities exist, therefore, each of them incommensurable with any other, whereas the perspective of a universalistic reason would be nothing more than a chimaera.

Yet, this is surely not Hegel's vision. In his philosophy, in fact, the identity of the individual social and political community is unmistakably recognised, which is grounded on its unique idea of common values, namely on its distinctive use of practical reason. Nonetheless, a higher form of reason is situated above all these particularistic rationalities, overcoming their limited range and contents. The higher sort of rationality, which is in essence *universalistic*, is implemented through the course of world history<sup>80</sup> and, even more so, through the realisations of the 'absolute spirit' (*absoluter Geist*), that is, through art, religion and philosophy.<sup>81</sup> Surely, in Hegel's conception, universalistic rationality has nothing to do with legal or political institutions, and even less with any kind of conscientious involvement by the individuals. Rather, it is a "cunning of reason",

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<sup>78</sup> Georg Wilhelm Friedrich Hegel, *Enzyklopädie der philosophischen Wissenschaften III*, in Georg Wilhelm Friedrich Hegel, *Werke in zwanzig Bänden*, Eva Moldenhauer and Karl Markus Michel eds., Suhrkamp Verlag, Frankfurt am Main, 1971, vol. 10, § 549, p. 350; translated to English in Georg Wilhelm Friedrich Hegel, *Philosophy of Mind: Part Three of the Encyclopaedia of the Philosophical Sciences*, William Wallace trans., Oxford University Press, Oxford, 2007 (1st edition 1970).

<sup>79</sup> Georg Wilhelm Friedrich Hegel, "Über die wissenschaftlichen Behandlungsarten des Naturrechts, seine Stelle in der praktischen Philosophie und sein Verhältnis zu den positiven Rechtswissenschaften", in Georg Wilhelm Friedrich Hegel, *Werke in zwanzig Bänden*, Eva Moldenhauer and Karl Markus Michel eds., Suhrkamp Verlag, Frankfurt am Main, 1971, vol. 2: *Jenaer Schriften 1801-1807*, pp. 434–530, at p. 482; translated to English in Georg Wilhelm Friedrich Hegel, *Natural Law*, T.M. Knox trans., University of Pennsylvania Press, Philadelphia (PA), 1975; Hegel, 1971, vol. 7: *Grundlinien der Philosophie des Rechts*, § 324, p. 493, see *supra* note 50.

<sup>80</sup> *Ibid.*, § 340, p. 503.

<sup>81</sup> Hegel, 1971, vol. 10: *Enzyklopädie der philosophischen Wissenschaften III*, § 553 ff., pp. 366 ff., see *supra* note 78.

that happens beyond our awareness and in many cases against our will.<sup>82</sup> Nevertheless, the mere fact of the postulation of its existence rebuts one of the most fundamental tenets of particularism.

As a result, we can maintain that, if Hegel was no exponent of universalism, he was surely not a supporter of particularism either. We could even go so far as to claim, with good reasons and without exaggeration, that he was paving the way for a new paradigm of order. Indeed, the two paradigms of particularism and universalism are trapped in a dichotomy which has the effect of constraining both into a one-sided conceptual framework. More concretely, on the one hand particularism highlights the indispensable role played by the identity of the individual social and political community, with its distinctive culture and legitimacy – based, in the most favourable cases, on democratic and inclusive procedures – but at the cost of rejecting even the mere possibility of a feasible world order. On the other hand, universalism focusses on the chances for a stable order for the whole humanity, but downgrades the single community to nothing more than an agency of the international community.

Hegel was the first author who tried to overcome the dichotomy by developing a multi-layered and flexible system – as a germinal and quite partial anticipation of contemporary pluralism – in which both elements, namely world order and the identity of the individual social and political community, are included. This could happen because he took a significant distance, for the first time, from the traditional understanding of order as a unitary structure. His system, in fact, does not have the shape of a simple pyramid; rather, it comprises many layers and contexts, the interactions of which cannot be reduced to hierarchy. As a result, the realm of the single social and political community may be superior to world order in terms of participative legitimacy, but inferior as regards inclusiveness.

Hegel's innovative conception has been a huge step forward in the history of political ideas. Moreover, as regards the topic of this contribution, it can be a great inspiration for international criminal law, in particular for its most advanced approaches. In fact, international criminal law was initially conceived of as an institution of the international community

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<sup>82</sup> Georg Wilhelm Friedrich Hegel, *Vorlesungen über die Philosophie der Weltgeschichte. Band I: Die Vernunft in der Geschichte*, Johannes Hoffmeister ed., Meiner, Hamburg, 1994, p. 105; translated to English in Georg Wilhelm Friedrich Hegel, *Lectures on the Philosophy of World History: Introduction, Reason in History*, H.B. Nisbet trans., Cambridge University Press, Cambridge, 1980.

and, therefore, of world order, aiming at safeguarding the most essential fundaments of a worldwide interaction between fellow humans. On that basis, those individuals had to be put to trial before an international court, who, as members of the worldwide community of humankind, had severely offended the essential rights of other members of that same community. Little attention was paid, instead, to the reinstatement of a healthy civil life within the societies in which the crimes had been perpetrated. This was the idea that informed the experiences of the Nuremberg and Tokyo Tribunals as well as, to a large extent, also those of the *ad hoc* tribunals for Rwanda and the former Yugoslavia. Later, it was recognised that international criminal law, to be effective, must do more than just impose the right punishment on the perpetrators of crimes against the most fundamental values of humankind. Three factors, in particular, should be adequately taken into account: the location of the tribunal, which should preferably be in the country in which the crimes have been committed; the condition of the victims, to which more attention should be paid; and the involvement in the trial also of those who supported the perpetrators without committing the crimes first-hand. All these elements are meant to contribute to the reconstruction of a healthy social life within the wounded community.

We have in the debate, therefore, two contrasting approaches: the one considers international criminal law as a component of a cosmopolitan idea of order; the other focuses, instead, on the rebuilding of peaceful interactions within the parochial horizon of the individual community. The first is based on the fundamental assumptions of the universalistic paradigm of order, whereas the second rather relies on its particularistic counterpart. The tension between the two approaches has been interpreted as the contradiction of justice versus peace.<sup>83</sup> However, as justice need not necessarily be in contrast with peace, international criminal law similarly need not have inevitably to disregard parochial peace and the specific identity of the nation. In other words, international criminal law should preferably *co-operate* with national institutions in order to support domestic criminal law procedures in the perspective of stabilising peace-building processes aiming at restoring healthy social interactions in affected countries. In contrast, home institutions and procedures should be

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<sup>83</sup> See, also for a cursory bibliography: Bartłomiej Krzan, "International Criminal Court Facing the Peace vs. Justice Dilemma", in *International Comparative Jurisprudence*, 2016, vol. 2, no. 2, p. 81.

*substituted* by international criminal law only when they prove unable or unwilling to carry out their tasks. The shift from substitution to cooperation surely needs a corresponding interpretation of the existent legal instruments as well as, possibly, the establishment of institutions and procedures in line with this purpose.

Yet, institutional and procedural arrangements cannot do all the work alone: a sound conceptual framework is no less decisive. So long as universalism and particularism are regarded as a dichotomy, though, no sound conceptual solution can be found. To properly address the theoretical dimension of the question, a framework is required which integrates the universalistic aspiration of a worldwide rational order that includes the whole humankind, with the particularistic attention to the conditions for the preservation – or for the reinstatement – of the fragile identity of the individual social and political community. In the last decades some interesting and quite innovative attempts have been made in this direction.<sup>84</sup> However, if we look back at the history of ideas to search for the inspiration – generally hidden and mostly unknown – of these attempts, we will discover, maybe surprisingly, that no other philosopher is better suited to the task than Hegel.

### **13.4. Towards a Multi-Layered Idea of International Criminal Law**

International criminal law was established to reaffirm the personal responsibility of those who had committed severe crimes against the most fundamental tenets of a civilised and peaceful interaction between fellow humans. If led back to the conceptual framework of the theory of the paradigms of order, international criminal law was – at least at its begin-

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<sup>84</sup> Jürgen Habermas, *Der gespaltene Westen*, Suhrkamp Verlag, Frankfurt am Main, 2001 (translated to English in Ciaran Cronin (trans.), *The Divided West*, Polity, Cambridge, 2006); Jürgen Habermas, “Eine politische Verfassung für die pluralistische Weltgesellschaft?”, in *Kritische Justiz*, 2005, vol. 38, no. 3, p. 222; Jürgen Habermas, “Democracy in Europe: Why the Development of the EU into a Transnational Democracy Is Necessary and How It Is Possible”, in *European Law Journal*, 2015, vol. 21, no. 4, p. 546; Mattias Kumm, “The Cosmopolitan Turn in Constitutionalism: On the Relationship between Constitutionalism in and beyond the State”, in Jeffrey L. Dunoff and Joel P. Trachtman (eds.), *Ruling the World?*, Cambridge University Press, Cambridge, 2009, pp. 258–324; Anne Peters, “Dual Democracy”, in Jan Klabbers, Anne Peters and Geir Ulfstein (eds.), *The Constitutionalization of International Law*, Oxford University Press, Oxford, 2009, pp. 263–341; Sergio Dellavalle, “On Sovereignty, Legitimacy, and Solidarity: Or: How Can a Solidaristic Idea of Legitimate Sovereignty Be Justified?”, in *Theoretical Inquiries in Law*, 2015, vol. 16, no. 2, p. 367.

ning – individualistic, universalistic and unitary. It was *individualistic* because it took on and strengthened the newly established principle of individual responsibility at the international level. Moreover, as a consequence of the unconditioned recognition of personal responsibility, punishment was conceived essentially as a retribution aiming at reinstating moral autonomy, while, on the contrary, little or no emphasis was given to the rehabilitation of the convicted wrongdoer or to the peace-building processes of the affected society. International criminal law was *universalistic*, then, because it was understood as an institution of the cosmopolitan community, rather intended to replace the intervention by the involved nation States than to co-operate with them. Finally, it was *unitary* insofar as no complementarity with the criminal law institutions and procedures of the individual States was envisaged.

After criticism was raised against the shortcomings of the first iterations of international criminal law, the awareness arose that two major corrections had to be made: the first concerning the relationship between international and national criminal justice; the second with reference to the goal that should be pursued by criminal law, in general, and by punishment in particular. As regards the first point, the idea that international justice should supplant its national counterpart made progressively room for the conviction that complementarity would better suit the task. The ICC Statute partially reflects this change of mind by expressly “[e]mphasizing” that the ICC “shall be complementary to national criminal jurisdictions”.<sup>85</sup> More concretely, the ICC shall have no jurisdiction, firstly, when “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”,<sup>86</sup> or, secondly, when “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”.<sup>87</sup> Surely, the recognition of complementarity is only the first step to full-fledged co-operation. For this purpose, in particular, a well-functioning praxis of institutional and jurisdictional dialogue be-

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<sup>85</sup> ICC Statute, “Preamble”, 1998, see *supra* note 74.

<sup>86</sup> *Ibid.*, Article 17(1)(a).

<sup>87</sup> *Ibid.*, Article 17(1)(b).

tween the international and the national levels should be established, beside and beyond the wording of the Rome Statute.

With reference to the second point, namely to the reinterpretation of the function of punishment, international criminal law – and the ICC in the first place – has progressively increased its responsiveness to demands of contribution to peace-building processes emerging from the involved communities.<sup>88</sup>

Institutions and policies, as well as legal instruments and their interpretations, must be grounded on a robust conceptual and epistemological fundament, if we want them to be convincing, coherent, sound and long-lasting. Otherwise, they run the risk of being nothing more than forms of short-term expediency. In particular, as regards the two recent corrections of international criminal law – namely the better connection between the international and the national level, and an understanding of criminal law as a contribution to restore peace in the affected communities – three most relevant theoretical innovations have to be introduced if compared with the conceptual pattern that deeply influenced for long time the way how the function of criminal law was interpreted, including the first experiences of international criminal law.

First, the strict individualistic approach of criminal law should be abandoned in favour of a position in which the reinstatement of the moral autonomy of the individual and their possible rehabilitation is associated and co-ordinated with the restoration of peaceful social interactions. Otherwise, this process should not simply lead to a return to the old-fashioned holistic view of the defence of the status quo. As a result, a new paradigm of order has to be envisaged in which social order and individual autonomy are on the same footing. Secondly, the dichotomy between universalism and particularism must be overcome, with a view to establishing a better balance between the cosmopolitan and the parochial dimension, so that both national identity and the common values of humankind can receive appropriate recognition. Thirdly, social and legal order should be acknowledged in its essential plurality, and no attempt should be made to bring diversity back to the restrictive corset of a forced unity.

Summing up, the conceptual underground of a forward-looking international criminal law must be a paradigm of social order which over-

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<sup>88</sup> Janine Natalya Clark, “Peace, Justice and the International Criminal Court”, in *Journal of International Criminal Justice*, 2011, vol. 9, no. 3, p. 521.

comes the traditional features (and dichotomies) of the old paradigms. As regards its ontological foundation, it should not be individualistic *or* holistic any longer, but, at the same time, individualistic *and* holistic. Similarly, with reference to the extension of order, it should dismiss the dichotomy between universalism and parochialism by being at once *universalistic and parochial*. Finally, it should leave behind the usual identification of order with unity and hierarchy, and explicitly claim a *post-unitary* understanding of the well-ordered society. Hegel laid down the cornerstone for such a ground-breaking change of perspective. Therefore, re-discovering his work from this unusual standpoint can be a source of inspiration for all those who are committed to improving the theoretical background as well as the impact of international criminal law.



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## Understanding the International *Ius Puniendi* under Durkheim's Collective Conscience: An Anachronism or a Viable Path?

**Carlos Augusto Canedo Gonçalves da Silva  
and Aléxia Alvim Machado Faria\***

### 14.1. Introduction

The States Parties to this Statute,

Conscious that all peoples are united by common bonds,  
their cultures pieced together in a shared heritage, and concerned  
that this delicate mosaic may be shattered at any time,

Mindful that during this century millions of children,  
women and men have been victims of unimaginable atrocities  
that deeply shock the conscience of humanity,

Recognizing that such grave crimes threaten the peace,  
security and well-being of the world,

[...]

Determined to put an end to impunity for the perpetrators  
of these crimes and thus to contribute to the deterrence  
of such 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, [...]

Resolved to guarantee lasting respect for and the enforcement  
of international justice [...]<sup>1</sup>

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The Preamble to the Rome Statute of the International Criminal Court provides fertile ground for understanding the basis, purpose and functions of international criminal law. The “delicate mosaic” of juridical cultures, united to fight the impunity of “unimaginable atrocities that deeply shock the conscience of humanity”, focuses on crimes of special gravity, the censure of which is supposedly a common shared value among national sovereignties.<sup>2</sup>

However, while the quest for the legitimacy of international punishment may seem relatively clear from these excerpts, the hypotheses elaborated upon in the scholarship face hurdles in at least two respects. To begin with, the foundation for punishment is commonly not distinguished from its purpose and function, possibly because the first outlines the legitimate boundaries for the latter two. Hence, theories of punishment that originally seek to describe valid functions or purposes are sometimes analysed as the very basis and grounds for the validity of punishment itself. Consequently, the discussion on the foundation and legitimacy of criminal sanctions becomes a debate over effectiveness of punishment – in repaying evil, preventing new crimes, maintaining social cohesion and so on. This may be caused by confusion among the theoretical, political and empirical methods of analysis and critique, as observed by Garland while studying Durkheim’s theory of punishment.<sup>3</sup> It is therefore convenient to highlight that this research works only with the theoretical analysis of the international *ius puniendi* and of the Durkheimian collective conscience itself, leaving political and empirical methods for further studies.

Moreover, the scholarship on *ius puniendi* and the functions and purposes of international criminal law is so diverse that one chapter would not be sufficient to describe and analyse all of them. Assuming that it is necessary to narrow the scope of study, this chapter focuses on the con-

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<sup>1</sup> From the Preamble of the Statute of the International Criminal Court ([www.legal-tools.org/doc/7b9af9/](http://www.legal-tools.org/doc/7b9af9/)). The text has been incorporated into Brazilian law, see Decreto n. 4,388, de 25 de setembro de 2002, Promulga o Estatuto de Roma do Tribunal Penal Internacional [Decree number 4,388, of 25 September 2002, Enacting the Rome Statute of the International Criminal Court].

<sup>2</sup> Kai Ambos, “Punishment without a Sovereign? The *Ius Puniendi* Issue of International Criminal Law: A First Contribution towards a Consistent Theory of International Criminal Law”, in *Oxford Journal of Legal Studies*, 2013, vol. 33, no. 2, p. 313.

<sup>3</sup> David Garland, “Durkheim’s Theory of Punishment: A Critique”, in David Garland and Peter Young (eds.), *The Power to Punish: Contemporary Penalty and Social Analysis*, Heinemann Educational Books, 1983, p. 39.

cerns most frequently mentioned in international criminal legislation and jurisprudence, such as deterrence, retribution and protection of fundamental human rights. It concludes that only the last one can be considered a legitimate foundation or justification for international punishment, while the others remain as a fruitful ground for functions and purposes. This chapter further outlines the main shortcomings of this justification, such as the asymmetrical historical development of the idea of human rights, compared to the prerogative of the international community to punish (States, and later individuals), and the use of a necessarily universalising concept that encompasses elements far beyond the so-called core crimes.

We therefore introduce the Durkheimian 'collective conscience' notion as an alternative to the theories of international *ius puniendi*. It admits the legitimacy of punishment from the choice of certain practices that are especially burdensome for the international community, understood in its intercultural aspect, and is able to share a lowest common denominator of values to be protected. The chapter analyses the Durkheimian concept of crime and punishment as part of the process of collective morality, animated by universally shared feelings, in which crimes are violations of feelings intensively inserted into the collective consciousness. Thus, punishment, considered as an expression of these violations, is applied to maintain cohesion and reinforce collective beliefs and social solidarity.

However, the Durkheimian theory has its own shortcomings, partially due to the somewhat inconsistent descriptions of the different levels of societal development,<sup>4</sup> partially because the use of the theory requires a cultural translation – after all, Durkheim never wrote about international criminal justice itself. The collective consciousness, defined by Durkheim as the totality of the beliefs and feelings common to the average membership of a society,<sup>5</sup> was conceived based on specific societies, and not for such an open and multicultural collectivity as the international one. Hence, although the idea of a common collectivity has been developed in international criminal justice since the beginning of modern international law, the use of the Durkheimian concept does not dismiss a careful contextual analysis, in order to determine to what extent it can be applied without structural anachronism.

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<sup>4</sup> Bruce DiCristina, "Durkheim's Theory of Homicide and the Confusion of the Empirical Literature", in *Theoretical Criminology*, 2004, vol. 8, no. 1, p. 64.

<sup>5</sup> Émile Durkheim, *Da divisão do trabalho social* (The Division of Labor in Society), Eduardo Brandão trans., Martins Fontes Press, 1995, p. 40.

The main purpose of this chapter is not to speculate on Durkheim's possible understandings of international punishment. He lived in a period of intense development of international law and humanitarian law but nevertheless refrained from positioning himself on the Treaty of Versailles, the League of Nations or any other element connected with the creation of international criminal law.<sup>6</sup> But one can apply his thoughts about punishment to the context of international criminal law to see if the collective conscience can offer a better starting point for the international *ius puniendi* than more common theories that frequently transit between purpose, function and foundation, or are based on the broad concept of human rights.

#### **14.2. Philosophy of Punishment Between Justification, Purpose and Function**

Philosophy in criminal law concerns four main questions: why, for what, when and how to punish. Answering them homogeneously would entail intermingling the concepts of foundation, purpose, convenience and form of punishment – what would be reckless to do, even though the answers of each one of these questions intimately influence the others.

However, this is usually the case with the study of traditional theories. The insufficiency of the dichotomous classification of the purposes of the penalty between absolute theories – namely retribution – and the relative theories – in short, general and special deterrence – has long been recognised by the scholarship concerning national criminal law.

The first problem of theories for punishment is therefore also common in national criminal law: not all of them lend themselves to answering the same question. From the perspective of sociological functionalism, the concept of purpose refers to actions, while that of function, to a system of actions, communications or other elements. The purpose of the norm is derived from the acting purposes of the legislator – when they define what is prohibited and what is permitted – and of the applicator of

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<sup>6</sup> This is not to say, however, that Durkheim did not study international conflicts. On the contrary, in 1915 he published two essays on the First World War. In “‘L’Allemagne au-dessus de tout’: la mentalité allemande et la guerre”, he comes to the point of analysing the States’ sovereignty towards international treaties – that would not be binding, since “any superiority [to the national sovereignty] is intolerable”. See Émile Durkheim, “‘L’Allemagne au-dessus de tout’: la mentalité allemande et la guerre”, Armand Collins Press, Paris, 1991 (1915), pp. 19–21.

the norm – when they justify their decision with the norm, reinforcing, reinterpreting or rejecting the legislator's intends.

In the case of a function, on the other hand, the opposite occurs. A given social function can only be attributed to an action, either because this action is part of a social context of action or because it updates the structure in which the action itself is thought, leading to a specific function for this context of action.<sup>7</sup>

The categories 'purpose' and 'function' of punishment have something in common, namely they are descriptive rather than normative. The question of whether a purpose or function is legitimate and adequate must be distinguished from the question whether a purpose is sought. The *ius puniendi*, in turn, is intrinsically embedded in theories of legitimacy, not in empirically verifiable descriptive theories.

That is why one cannot place the grounds of the power of punishment on, for example, retribution. Retribution "asserts that the perpetrator should be punished for guilty acts",<sup>8</sup> and is "the expression of social disapproval attached to a criminal act and its perpetrator, and demands punishment of the latter for what he did".<sup>9</sup> Retribution is widely mentioned in the scholarship<sup>10</sup> and in international criminal tribunals: a survey of the decisions of the International Criminal Tribunal for the former Yugoslavia ('ICTY'), the International Criminal Tribunal for Rwanda ('ICTR') and the Special Court for Sierra Leone ('SCSL') identified the mention of retribution in most sentences (82.4 percent in the ICTY, 72.1 percent in the ICTR and 88.9 percent in the SCSL, averaging 78.9 percent), with more than half (53.5 percent) concerning retribution being the most important or one of the main principles of sentencing.<sup>11</sup> In Kupreškić's sen-

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<sup>7</sup> Stephan Ast, "Überlegungen zum Verhältnis von Zweck und Funktion im Strafrecht", in *ZIS – Zeitschrift für Internationale Strafrechtsdogmatik*, 2018, vol. 4, p. 116.

<sup>8</sup> Marcelo Almeida Ruivo, "O fundamento da pena criminal: Para além da classificação dicotômica das finalidades", in *Diritto Penale Contemporaneo*, 2014, vol. 1, p. 180.

<sup>9</sup> International Criminal Tribunal for Rwanda, *The Prosecutor v. Vincent Rutaganira*, Trial Chamber III, Judgement and Sentence, ICTR-95-1C-T, 14 March 2005, para. 108 ([www.legal-tools.org/doc/cd2a8f/](http://www.legal-tools.org/doc/cd2a8f/)).

<sup>10</sup> Gerhard Werle, *Principles of International Criminal Law*, 2nd ed., T.M.C. Asser Press, 2009, p. 34.

<sup>11</sup> Other sentencing principles are the restoration and maintenance of peace. See Shoshana Levy, "Retribution as a Sentencing Goal in International Criminal Justice", in *Research Project – When Justice Is Done: Life After Conviction*, Centre for International Criminal Justice, Vrije Universiteit of Amsterdam, April 2014, pp. 9–10.

tence, the importance of retribution was raised because of the special gravity of the crimes.<sup>12</sup>

This does not mean, however, that the international community should punish the criminal agent solely because they committed an illegal act. Retribution is one of the social functions of the sentence and may also appear as a ground since it is based on an idea of realisation of a universally shared justice. But it cannot be the basis for the legitimacy of punishment for it derives only in part from a thought that analyses why the community has the power to punish certain behaviours.

A somewhat different situation occurs with general and special deterrence theories, because they do not come to operate in the plane of the purpose. In other words, deterrence theories do not reaffirm what was desired by the legislator, but instead update the structures in which the action is thought, from the perspective of the law enforcer. The so-called relative doctrines understand punishment as a “political-criminal instrument intended to act (psychically) on the generality of community members, away from the practice of crimes through criminal threat”.<sup>13</sup> As Marcelo Ruivo rightly points out, “the basis and purpose of the penalty are synthetically confused in the interest of avoiding the dangerous consequences of crime for the community”.<sup>14</sup>

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<sup>12</sup> International Criminal Tribunal for the former Yugoslavia, *Prosecutor v. Vlatko Kupreškić*, Trial Chamber, Judgement, IT-95-16-T, 14 January 2000, paras. 848 ff. ([www.legal-tools.org/doc/5c6a53/](http://www.legal-tools.org/doc/5c6a53/)): “The Trial Chamber is of the view that, in general, retribution and deterrence are the main purposes to be considered when imposing sentences in cases before the International Tribunal. As regards the former, despite the primitive ring that is sometimes associated with retribution, punishment for having violated international humanitarian law is, in light of the serious nature of the crimes committed, a relevant and important consideration. As to the latter, the purpose is to deter the specific accused as well as others, which means not only the citizens of Bosnia and Herzegovina but persons worldwide from committing crimes in similar circumstances against international humanitarian law. The Trial Chamber is further of the view that another relevant sentencing purpose is to show the people of not only the former Yugoslavia, but of the world in general, that there is no impunity for these types of crimes. This should be done in order to strengthen the resolve of all involved not to allow crimes against international humanitarian law to be committed as well as to create trust in and respect for the developing system of international criminal justice. [...] The Trial Chamber also supports the purpose of rehabilitation for persons convicted in the hope that in future, if faced with similar circumstances, they will uphold the rule of law”.

<sup>13</sup> Ruivo, 2014, p. 181, see *supra* note 8.

<sup>14</sup> *Ibid.*, p. 183.

General and special deterrence oscillates between the “why” and the “for what” questions – in the scholarship, there is an understanding that there is a duty on the State (or the international community) to change deviant behaviour – either by educating individuals, neutralising those who committed crimes, using punishment as a reinforcement of social cohesion or threatening, with exemplary punishment, effective repression of future crimes. This perspective is incompatible with the democratic State of law because it instrumentalises the criminal agent for the sake of improving social coexistence, and is even more fragile in the conception of an international community, whose prerogative to interfere in the lives of individuals and their freedoms is more limited.

In general terms, however, deterrence is also mentioned in international criminal law. The very Preamble to the Rome Statute quoted at the beginning of this chapter highlights the intention to “contribute to crime deterrence” by combating impunity. The reference to punishment deterrence is also present in international criminal scholarship both in order to prevent new crimes from occurring and to focus on the idea of creating and strengthening the ability of international criminal law to contribute to stabilising international norms.<sup>15</sup>

Notwithstanding the frequent allusion in international sentences, deterrence does not become a purpose in the international context. Under the spectre of re-socialisation, for example, to assume it as part of the purpose of international criminal law would imply giving the international community the duty to change the standard of conscience and action of an individual, bringing a paternalistic character that does not fit the very precepts of international law. And, even more, it would imply obliging the criminal agent to be re-socialised, violating the integrity of his psyche.<sup>16</sup> Negative special deterrence also seems unacceptable as the purpose of punishment in international criminal law, for the same reasons that make it inappropriate for national criminal law: it is not a proportionate response to move the expensive punitive apparatus with the sole aim of neutralising the convicted person and preventing them from committing crimes temporarily while serving the imprisonment penalties imposed upon them.

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<sup>15</sup> Werle, 2009, p. 35, see *supra* note 10.

<sup>16</sup> Ruivo, 2014, p. 184, see *supra* note 8.

Denying its role as a purpose, however, does not exclude the deterrence theory's capability of explaining nuances of the function of punishment reinforced in international criminal sentences. The issue seems to be, again, the constraints on the connection between social function, purpose, and foundation. Given that social functions are primarily descriptive elements that do not necessarily become legally relevant purposes (nor do they serve as grounds for legitimacy), the analysis of the effectiveness of these functions is also limited to this spectrum of social function. For positive special deterrence, the absence of re-socialisation cannot be a problem as long as this function of the penalty is not understood as the purpose of the rule – that is, the reason why the penalty was imposed in that way. As the function of deterrence is a part of the structure of action, not of the action itself – whose purpose has in its essence the protection of people against the crimes chosen in the Rome Statute – the bridge of this relative theory to the foundation of the penalty is impaired.

Therefore, although the analysis of the effectiveness of criminal deterrence in the context of international criminal law is important to point out their practical differences from national contexts, it does not interfere with the basis of punishment. This is the case with Deirdre Golash's argument that some characteristics of international crimes and the social context in which they are committed – such as those perpetrated for more irrational rather than strategic reasons<sup>17</sup> – suggest that punishment must be less effective at achieving deterrence in the international forum than in the national.<sup>18</sup> The discrepancy between theory and practice of deterrence, already recognised by scholarship,<sup>19</sup> would then become even more evident in international law.

And if the precautions do not even reach the 'why' of the international criminal legislator awarding penalties for core crimes, neither can they be seen as the element that gives legitimacy to punishment.

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<sup>17</sup> Deirdre Golash, "The Justification of Punishment in the International Context", in Larry May and Zachary Hoskins (eds.), *International Criminal Law and Philosophy*, Cambridge University Press, Cambridge, 2009, pp. 204, 206.

<sup>18</sup> *Ibid.*, pp. 202, 211.

<sup>19</sup> Kai Ambos, "Sobre los fines de la pena al nivel nacional y supranacional", in *Revista de derecho penal y criminología*, 2003, vol. 2, no. 12, p. 202.

### 14.3. The *Ius Puniendi* in International Law

The point that gives legitimacy to international punishment is approached by scholars in distinct ways. Werle uses the classic Kantian justification that international law crimes substantially violate freedom in interpersonal relations, for which the validity of the general world law (*Weltrecht*) is denied. Consequently, international criminal law is legitimate because (and to the extent that) punishment compensates both the violation of freedom in interpersonal relationships and the denial of the general world law.<sup>20</sup>

For Ambos, the purpose of international criminal law is to protect the fundamental legal rights of the individual and the international community, which is why only what is called “fundamental crimes” is criminalised.<sup>21</sup> The author understands that the international community is where the nation-State was at the beginning of its existence: in the formation and consolidation of the monopoly of force, on which a *ius puniendi* is founded.<sup>22</sup> This right to punish would also be based on a universally shared notion of what would be just or right. Further, despite the difficulty in analysing the purposes of punishment at the international level, national and international criminal law would have similarities in relation to their focus on the peaceful coexistence of persons – whether within a State, as in national criminal law, or across borders, in situations of serious human rights violations. According to Ambos, while national criminal law aims to have the same effect, for the individual and for society, international criminal law serves the purpose of creating a universal legal consciousness, towards a general positive and integrative deterrence that calls for reconciliation with the recognition that one does not give up the hope of achieving a negative general deterrence.<sup>23</sup>

The protection of human rights is also recognised by Werle and Neubacher, the latter of whom regards the construction of human rights, from the 1940s, as the foundation for the existence of the International Criminal Court.<sup>24</sup> For Werle, international criminal law responds to mas-

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<sup>20</sup> Werle, 2009, p. 33, see *supra* note 10.

<sup>21</sup> Ambos, 2003, p. 195, see *supra* note 19.

<sup>22</sup> *Ibid.*, pp. 197–98.

<sup>23</sup> *Ibid.*, p. 211.

<sup>24</sup> Frank Neubacher, “Kriminologische Grundlagen einer internationalen Strafgerichtsbarkeit”, in *Menschenrechte als Fundament einer internationalen Strafrechtsordnung*, Mohr Sibeck Verlag, 2005, p. 43.

sive violations of fundamental human rights and to the failure of traditional mechanisms. In fact, the protection of human rights is clear, especially in crimes against humanity, which held responsible individuals for systematic acts against fundamental human rights, such as the right to life and physical integrity, freedom of movement and dignity. But this does not mean that any violation of human rights, or even any serious violation of them, will be directly punishable by international criminal law. Only a small sample of human rights have guaranteed protection under international criminal law. Protection of human rights would then legitimise international criminal law while limiting its application.<sup>25</sup>

Golash, on the other hand, sees the justification for the punishment of international crimes, above all in the seriousness of the crimes and their power to directly affect more individuals.<sup>26</sup> International punishment would then be important to show the condemned that the whole world (and not just their local enemies) condemns their criminal attitudes and recognises the grave damage caused by the crime. Judgments are essential to the narrative of these crimes.<sup>27</sup>

This point of view has non-judicial aspects that may be compared with other justifications commonly associated with international criminal law, such as promoting social reconciliation, giving response to the victims, and establishing historical records, in order to avoid denialism in the future. Analysing these type of arguments, Luban comes to the interesting conclusion that they are recurring in international criminal law discussions mainly because the international courts are focused more in the judgements themselves than in the punishment. But since they tend to insert the political character of the international judgements into the purpose of punishment itself, they would not be adequate. Because of that, Luban offers the alternative of justifying the international punishment from the norm projection. The international criminal judgements would be, then, expressive acts to spread the news that mass atrocities are not only political conflicts, but mainly hideous crimes. In other words, only judgements would be able to express that the political violence committed

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<sup>25</sup> Werle, 2009, pp. 45–46, see *supra* note 10.

<sup>26</sup> Golash, 2009, pp. 201–23, see *supra* note 17.

<sup>27</sup> *Ibid.*, pp. 218–19.

against innocents is essentially criminal, even when one side hates the innocent as its enemy.<sup>28</sup>

What all these theories have in common is the assumption that the international community has universally shared values, irrespective of culture, whose grave violations may be guarded beyond the sovereignty of each country. “[P]articularly serious crimes affecting the international community as a whole”, as referred to in the Preamble and Article 5 of the Rome Statute, constitute the key element that reflects not only on the legitimacy of punishment by the international community, but also on its justification from the perspective of the legislator; that is, how to choose core crimes that will have universal validity required by the norms of international law.<sup>29</sup> It is in this respect that Durkheim's idea of collective consciousness may help the understanding of legitimation without as many caveats as the justification that surrounds the concept of human rights.

#### **14.4. Émile Durkheim and Functionalist Criminology**

For this part of the analysis, let us begin by recalling some basic points of functionalism: society can be perceived as a system whose parts cannot be examined in isolation, but in an interrelated way and from the contribution of each person to the society in general. In this way, human relationships, beliefs and convictions, production institutions and the family can only be understood from how they relate to each other – since the change in one of them will certainly have reflexes in others – and what they mean for the functioning of the whole society. The methodologies chosen by leading functionalist authors (Durkheim, Talcott Parsons, Malinowski, and so on) have often been far apart and the same can be said of the central theoretical problems of each one of them. But all tended to regard society as a ‘whole’.

Durkheim's work emerges in the context of nineteenth century French society, and must be understood in this perspective. This means that the French sociologist sought answers to the disturbing effects of the collapse of France in the Franco-Prussian War of 1870–1871, as well as the vertiginous industrialisation process experienced by his country at that

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<sup>28</sup> David Luban, “Fairness to Rightness: Jurisdiction, Legality, and the Legitimacy of International Criminal Law”, in Samantha Besson and John Tasioulas (eds.), *The Philosophy of International Law*, Oxford University Press, Oxford, 2010, pp. 575–77.

<sup>29</sup> Werle, 2009, p. 30, see *supra* note 10.

time. It was a question of examining the possible elements of social cohesion from this framework of rapid and profound social changes.

His thinking incorporates significant elements bequeathed by the great Revolution of 1789, which would prepare ground for some problems that would be faced by France in the following century.<sup>30</sup>

Within this new structural framework imposed by the process of industrialisation, followed by profound social changes, Durkheim sought to identify the paths to be travelled towards a functionally integrated society. He aimed also at understanding the origins of solidarity in modern society, seemingly devoid of shared categories, due to increasing individualism, the specialisation of functions and the gradual loss of religion as a moral reference.<sup>31</sup>

The question of authority within the framework of the modern industrial State would become the principal focus of analysis of all of his social theory. Durkheim confronted this question by taking into account that, in France, the problem of authority postulated its study in the perspective of the revolutionary legacy that enshrined “individualism” as an unconquerable and permanent conquest, but still faced with the moral traditions of autocratic, catholic and petrifying conservatism.

These concerns are very much present in his *The Social Division of Labor*, in which the concept of anomia would make its appearance.<sup>32</sup> Identifying the processes of social change in the light of the various historical forms of social organisation and division of labour, Durkheim pointed to two forms of society: that which generates a kind of mechanical solidarity, characterised by its self-sufficiency, uniformity and monolithism, located in the most primitive stages of social organisation; and that which gives rise to the type of organic solidarity that will manifest itself in modern society, characterised by its dynamism, high complexity and with a high division of labour.<sup>33</sup>

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<sup>30</sup> Anthony Giddens, *Política, sociología e teoria social. Encontros com o pensamento social clássico e contemporâneo* [Politics, Sociology and Social Theory: Encounters with Classical and Contemporary Social Thought], Edusp, 1997, pp. 105 ff.

<sup>31</sup> David Garland, *Castigo y sociedad moderna, Siglo Veintiuno Editores*, 1999, pp. 41 ff.

<sup>32</sup> Durkheim, 1995, see *supra* note 5.

<sup>33</sup> Bernard Snipes Vold, *Theoretical Criminology*, Oxford University Press, Oxford/New York, 1998, p. 125: “Durkheim’s analysis of the processes social change involved in industrialization is presented in his first major work, *De la division du travail social*, written as his doctoral thesis and published in 1893. In it he describes these processes as part of the

Criminality, in this perspective, plays an important role in maintaining social solidarity and as a normal manifestation of diversity, being part of a healthy society rather than a pathological manifestation of it, changing due to the transformations of society itself.<sup>34</sup>

Every society must co-exist with a certain amount of crime, as a necessary and indispensable condition for its progress and even social change, since criminality itself can constitute forms of actions capable of anticipating a certain moral that later would be countersign by the society itself.<sup>35</sup> In this context, the criminal, far from being a parasitic agent or a foreign body to society, becomes a regular agent of social life, and crime, in this way, appears as a normal phenomenon or social fact and with a tendency to grow in a differentiated and increasingly individualistic socie-

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development from the more primitive mechanical form of society into the more advanced organic form. In the mechanical form each social group in society is relatively isolated from all other social groups and is basically self-sufficient. Within these social groups individuals live largely under identical circumstances, do identical work, and hold identical values. There is little division of labor, with only a few persons in the clan or village having specialized functions. Thus, there is little need for individual talents and the solidarity of the society is based on the uniformity of its members. Contrasted with this is the organic society, in which the different segments of society depend on each other in a highly organized division of labor. Social solidarity is no longer based on the uniformity of the individuals, but on the diversity of the functions of the parts of the society”.

<sup>34</sup> Durkheim employs the word ‘function’ to designate the system of vital movements, abstracting itself from its consequences and, in a different way, as an expression of the correspondence that exists between these movements and some needs of the body. Thus, one can speak in terms of digestion, breathing, and so on. In this line of reasoning, according to Durkheim, punishment has little use as a means of correcting the guilty or of general intimidation. Its function is to keep intact the social cohesion and validity of the common consciousness. In this sense, it acts in the sphere of collective feelings, reaffirming them and showing their vitality (see Durkheim, 1995, p. 13, see *supra* note 5). Needless to say, the influence of this view in the contemporary functionalist debate on the function of punishment is clear from reading the work of Günther Jakobs, although there are important differences between Durkheim’s thought and that of Jakobs, which incorporates Luhmann’s theory of systems. For an analysis of the integrative-preventive conception of the penalty, see Alessandro Baratta, “Viejas y nuevas estrategias em la legitimación del Derecho Penal”, in *Poder y Control*, PPU, Barcelona, 1986, pp. 77–92, where the author points to the Durkheimian resonances of Jakobs’s proposal, although reworked in the light of N. Luhmann’s systems theory.

<sup>35</sup> The classic example would be political crime, whose author, appointed and condemned as a social and subversive reprobate of the constituted order, will often be the same person who will later occupy a prominent place or leadership within the new order. Nélsón Mandela, becoming Head of State in South Africa, represents one of the most emblematic examples of this.

ty. Thus, one of the conclusions to be drawn from a reading of *The Social Division of Labor* is that criminal law and punishment reinforce the so-called collective conscience<sup>36</sup> – demeaned by the practice of crime – and play a fundamental role in the process of cohesion in societies organised on the basis of mechanical solidarity, losing some of this predominant role but still maintaining its importance, in those founded on organic solidarity (modern societies).<sup>37</sup>

Although there are:

crimes of different species, there is, in all these species, something in common. What proves it is that the reaction that they determine on the part of society, namely, the penalty, is, apart from differences of degrees, always and everywhere the same. The unity of effect reveals the unity of the cause. Not only among all the crimes foreseen by the legislation of one and the same society, but among all those who have been or are recognized and punished in the different social types, there are surely essential similarities. [...] Because, everywhere, they affect in the same way the moral conscience of the nations and produce the same consequence.<sup>38</sup>

In this way, this social solidarity, coming from common states of consciousness, represents and embodies the process of general integration of society, to a greater or lesser extent depending on the different relationships in which it is felt. If these relationships are in greater numbers, they will create more bonds between the individual and the group and reinforce, increasing the degree of social cohesion. The number of these relations

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<sup>36</sup> Durkheim, 1995, pp. 50–52, see *supra* note 5.

<sup>37</sup> *Ibid.*, pp. 81–83: “The penalty does not serve, or only serves very secondary, to correct the guilty or intimidate their possible imitators; from this dual point of view, its efficacy is fairly dubious and, in any case, mediocre. Its true function is to keep social cohesion intact, maintaining all the vitality of the common consciousness. Denied in such a categorical way, it would necessarily lose part of its energy if an emotional reaction from the community did not compensate for that loss, and this would result in a relaxation of social solidarity. [...] In a word, in order to have an exact idea of the penalty, it is necessary to reconcile the two opposing theories that were offered to it: the one that sees in it an atonement and that makes of it a weapon of social defense. Indeed, it is true that the purpose of the sentence is to protect society, but this is because it is atonement; and, on the other hand, if it is to be expiatory, it is not because, in convergence of I do not know what mystical virtue, pain redeems the lack, but because the penalty can only produce its socially useful effect under this necessary condition”

<sup>38</sup> *Ibid.*, pp. 39–40.

will be proportional to that of the repressive rules, so that by determining which fraction of the repressive legal apparatus represents criminal law, we can know the extent and importance of this solidarity.<sup>39</sup>

As Garland points out, for Durkheim, though the pen possesses some content of instrumental control and rationality, its essence will be – and this holds true for mechanical as well as organic societies<sup>40</sup> (although much more for the first) – that of an unthinking and irrational emotion. Emotion presides, rather than anything else, over the punitive moment directed at the profanatory action of the sacred, that is, crime.

And while the institutional routines modify these rage accesses and strive to use them productively, the dynamic and motivational force of punishment, and its general direction arise from sentimental roots, from the psychological reactions commonly felt by individuals when the sacred collective values are violated. For this reason, although the modern state has practically the monopoly of criminal violence and the control and administration of punishment, a much larger population feels involved in the process and provides the context of support and social assessment within which the State execute the punishment.<sup>41</sup>

In Durkheim's subsequent work *Suicide*, the concept of anomie appears more explicitly,<sup>42</sup> although it is recognised that he never developed it in detail.

If, in *The Social Division of Labor*, the notion of anomie is related to the failures of the system of social division of labour that characterise modern societies, in Durkheim's *Suicide*, he uses the selfishness-altruism typology to support the argument that the complexification of social sys-

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<sup>39</sup> *Ibid.*, p. 83.

<sup>40</sup> Durkheim argues that retributive justice measures lose strength as 'mechanical societies' give way to 'organic societies'. The recent growth of restorative justice models may well support Durkheim's thesis.

<sup>41</sup> Garland, 1999, p. 49, see *supra* note 29. Durkheim states that these instinctive and irresistible feelings even reach the innocent (relatives of the guilty, for example). Accompanying the work of a court provides, according to him, a vision of these passions insofar as the lawyer seeks to arouse sympathy for the accused and the prosecutor to arouse the social feelings that the criminal act offended. Thus, he concludes, "the nature of the pen has not essentially changed. All that can be said is that the need for revenge is better addressed today than it was yesterday". See Durkheim, 1995, p. 61, *supra* note 5.

<sup>42</sup> Émile Durkheim, *O suicidio [The Suicide]*, Martins Fontes Press, 2000.

tems is responsible for the growing process of individualisation of society.<sup>43</sup>

In this work, Durkheim notes that suicide rates increase significantly both during peak periods and moments of economic depression, both characterised as periods of collective disorganisation, marked by the absence of regulatory mechanisms (anomic suicide). Relating suicide to some variables such as levels of education or family nucleus, he concludes that there will be a higher incidence of attacks on one's own life when it comes to individuals belonging to societies that profess predominantly Protestant religions, where the levels of education are higher and the ties of family assertion fainter. The result of such a situation of maladjustment may be, in addition to crime, suicide, individual response to the social structure maladjusted (selfish suicide). Thus, in more markedly individualistic societies, the possibility of suicidal responses would be greater. It is important to note here that, for Durkheim, the situation of anomie refers to social and cultural structures and their own characteristics rather than to a psychological state of reaction of the individual when confronted with them.<sup>44</sup>

Crisis is often the result of this anomie, which impedes the efficient functioning of the regulatory mechanisms for the good functioning of society. The crime carried out under anomalous conditions, that is, outside reasonable control parameters, will be the product of the non-functioning or dysfunctional institutional instruments capable of providing satisfactory degrees of social cohesion.

As well noted by Hassemer and Muñoz Conde:

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<sup>43</sup> The more objective concept of anomie in Ralf Dahrendorf seems to approach that of Durkheim, see Ralf Dahrendorf, *A Lei e a ordem [Law and Order]*, Tamara D. Barile trans., Instituto Liberal Press, 1997, p. 28: "a social condition where the norms regulating people's behavior have lost their validity. A guarantee of this validity is the present and clear force of sanctions. Where impunity prevails, the effectiveness of standards is in jeopardy. In this sense, anomie describes a state of affairs where violations of norms are not punished. This is a state of extreme uncertainty, in which no one knows what behavior to expect from the other in certain situations [...] Anomie would then be a condition in which both social effectiveness and the cultural morality of norms tends to zero".

<sup>44</sup> However, it is undeniable that the concept of anomie can be understood from the perspective of a psychological reaction of the individual before the social and cultural structures. See, for example, David Riesman, Reuel Denny and Nathan Glazer, *The Lonely Crowd*, Yale University Press, New Haven, 1950, pp. 287 ff.

[N]aturally, neither Durkheim nor his followers attribute all the causes of suicide, nor all the problems that lead to deviant behavior or criminality to anomie, but, of course, there is no doubt that an explanation in these terms of criminality is suggestive, at least worthy of being taken into account, especially if it is observed that it no longer locates its origin in the deficient individual or in the deficient socialization, but in the social structure itself that conditions this type of attitude. The theory of anomie is also attractive because it does not refer, as was characteristic of other sociological theories, to social groups of marginal young people or adults, members of subcultures that in some way predetermined their criminal careers, but to the average man, even of good cultural level, that accepts, in principle, the social and legal norms and wants to make his life within them.<sup>45</sup>

Durkheim's more detailed analysis of punishment is found in a perhaps less well-known work, *Moral Education*. In this book, Durkheim emphasises that we should think of punishment less as a utilitarian instrument and more as an expression of moral action. Its role is to enhance the reality of moral commandments. After all, Durkheim regards the State as a kind of public awareness of society. Or, in the words of Melossi, the moral leader who must educate and guide citizens.<sup>46</sup> Both in the classroom and in the courts, punishment will be the testimony that the violated law maintains its authority and its validity. It is less a question of dissuading other members of society from committing actions similar to those of the punished than of encouraging consciences to persevere in their faith in the 'system', or, to use a more adequate expression in Durkheim, the functioning of society.<sup>47</sup> Punishment is a demonstration of the inviolability of the rule infringed by the offender. As a moral phenomenon, the penalty must communicate to the transgressor – but, above all, and especially, to society – that content, through ways that can sensitise a specific social audience. This explains, for example, why our modern societies repudiate corporal punishments such as scourges or amputations – penalties that, if

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<sup>45</sup> Winfried Hassemer and Francisco Muñoz Conde, *Introducción a la criminología*, Tirant Lo Blanch, 2001, p. 109.

<sup>46</sup> Mario Melossi, *El Estado del control social*, Siglo Veintiuno editores, 1992, p. 80.

<sup>47</sup> Durkheim *apud*: Garland, 1999, p. 63, see *supra* note 29: "Punishment is only the palpable symbol through which an inner state is represented; it is an observation, a language through which the social conscience or that of the teacher expresses the feeling inspired by the disapproved behavior".

applied, would weaken their trust and moral message, weakening their character of communication – unlike ancient societies.

In conclusion, Durkheim, despite leaving aside other important dimensions of punishment and criminal law, knew how to exploit like no one else this symbolic resonance as an instrument for understanding the moral life of society.<sup>48</sup>

#### **14.5. A Potential Cultural Translation**

Analysing the philosophical grounds of international criminal law from Durkheim's perspective is not a new idea. Marina Aksenova, for example, uses criminological functionalism to understand the choice of crimes that are considered international, especially crimes against humanity. Like Tallgren, Aksenova considers the work of the sociologist as important in building the legal basis on which international criminal law is based. And disregarding deterrence as the basis of the right to punish in international criminal law, she finds the legitimation of the international response to crimes against humanity in the symbolic recognition of suffering and outrage caused by collective criminality.<sup>49</sup>

The main Durkheimian argument used is the moral legitimacy of feelings shared collectively – in this case, beyond the boundaries of State sovereignty. To explain why the Durkheimian theory should be used in this matter, Aksenova argues that there is fluidity and adaptability in his ideas to explain the “moral glue” that binds all communities. If one analyses this statement from Durkheim's relationship with his position on the collective consciousness as a platform for shared feelings, one will see that his last works indicate some fluidity. While in *The Elementary Forms of Religious Life*, he identified the scope of the collective consciousness as a platform for shared feelings that becomes smaller as society progresses and differentiates, Durkheim later recognised the role of that consciousness even in advanced societies, claiming that morality transcends time and social organisation.<sup>50</sup>

However, although Durkheim lived in a period of intense development of international and humanitarian law and his own personal life was

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<sup>48</sup> *Ibid.*, p. 65.

<sup>49</sup> Marina Aksenova, “Solidarity as a Moral and Legal Basis for Crimes against Humanity: A Durkheimian Perspective”, in *iCourts Working Paper Series*, 2016, no. 52.

<sup>50</sup> *Ibid.*, pp. 5–6.

especially affected by the First World War, his texts do not address international criminal law. Crime, punishment and anomie were all thought of in a context that presupposes State sovereignty.

But this does not prevent the analysis of his ideas – provided in a contextualised manner – in the study of the philosophy of international punishment. Tallgren argues that Durkheim's texts did not have this original function but were used in the very elaboration of what is now understood as international criminal law – not only in relation to the International Criminal Court, but also in the *ad hoc* and hybrid courts that preceded.<sup>51</sup>

Durkheim rejected the common conception that the criminal repression of certain acts could be validly explained from the mere reference to their danger to society. For him, some acts that pose no danger to society are repressed, such as violations of etiquette or religious practices. In a provocative way, he argues that “even if the injury occurs, there is no proportionality between the injury caused by the criminal act and the repression that it entails”.<sup>52</sup> An economic crisis may therefore disrupt society more than an isolated homicide, and yet the latter is considered the most severe of crimes.

The rapprochement of these observations to the context of international criminal law would lead to questions about whether the crimes described there are in fact more serious than other problems in the international community, such as hunger and destruction of the environment by their exploitation. These questions may seem absurd, for criminality is not an inherent quality of a particular class of actions, but rather the result of a process of social definition. In this regard, the protection of society is dismissed as an argument to legitimise criminalisation – also because both crime and its punishment are considered important for social integration – which shifts the very reaction of society to the central point. The function of the sentence, then, would be to maintain inviolable social cohesion, to reinforce collective beliefs and feelings and, consequently, social solidarity.

If the repressive law is a partial reflection of the collective consciousness of a particular society, the choice of criminalisation does not

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<sup>51</sup> Immi Tallgren, “The Durkheimian Spell of International Criminal Law?”, in *Revue interdisciplinaire d'études juridiques*, 2013/2, vol. 71, pp. 137–69.

<sup>52</sup> *Ibid.*, pp. 144–45.

necessarily represent the fruit of a categorical analysis of the most dangerous behaviours, but rather what the feelings of society indicate as more important.

The problem, however, is to see to what extent the use of the Durkheimian idea of collective consciousness for the international community leads to distortions of the theory. As Tallgren notes, the notion of an international common sense or consciousness has been present since the beginning of modern studies on this branch of law and extends throughout its development in the twentieth century, although the idea of “legal consciousness of the civilized world” have been widely questioned since the 1960s<sup>53</sup> as inappropriate or insignificant.

On the other hand, Durkheim’s sociological approach to law analysed it not only at a specific time and place, but also from factual historical developments. International criminal law deals with a much more abstract collectivity, what implies the union of heterogeneous and totally diverse collectivities in terms of cultural development.

The claim to universality of international criminal law is one of the greatest obstacles to the identification of a foundation for international punishment through approaches to Durkheim’s collective conscience. For Durkheim, crime is what disturbs the feelings that will be found in any healthy person of any society.<sup>54</sup>

The way Durkheim views criminal law is the direct expression of an unambiguous collective consciousness, which gives no room for conflict of values.<sup>55</sup> International criminal law continues its relentless effort to distinguish itself from political affairs.<sup>56</sup> Moreover, Durkheim’s thinking about punishment was not a monolithic part of his work, but continued to develop during his career. First, in the *Division of Labor*, he regarded punishment as essential to maintaining the cohesion of society inviolable in upholding common consciousness in all its vigour; in *Moral Education*, Durkheim comes to understand punishment as performative and demonstrative; and in his last great work, *Elementary Forms*, arbitrary religious codes emerge as the centre of primitive taboos, to the detriment of the

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<sup>53</sup> Martti Koskenniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870–1960*, Cambridge University Press, Cambridge, 2001, pp. 11–97.

<sup>54</sup> Durkheim, 1995, p. 34, see *supra* note 5.

<sup>55</sup> Tallgren, 2013, p. 152, see *supra* note 51.

<sup>56</sup> *Ibid.*, p. 153.

social need for solidarity.<sup>57</sup> What does not change is that, for Durkheim, punishment was never an instrument to rationally control deviant conduct – it would never serve, therefore, for special deterrence. It is, instead, the result of emotional reactions caused by the offence to the feelings shared by all of society.

Durkheim insists that even in modern times, punishment remains a passionate and vengeful reaction motivated by irrational and moral feelings. International criminal law is also a diverse collectivity of nationals insofar as it refers to a world in which destruction, injury and suffering far exceed the routine of national criminal law. In this sense, although it is difficult to define an international 'collective conscience' due to the social plurality that it covers, international criminal law works only with crimes whose moral feelings of aversion are more easily identified than those of various crimes national authorities. In Tallgren's words, moral feelings are more likely to be touched by genocide than by evasion.<sup>58</sup>

#### **14.6. Conclusion**

With the difference between the foundation, purpose and social functions of punishment, from the perspective of sociological functionalism, some elements of international criminal punishment become clearer. First, perhaps also found in national criminal law can be overcome by identifying that retribution can be understood as one of the 'whys' of punishment insofar as it is founded on the realisation of justice and, thus, legitimises the choice of the legislator; that there is a difference between the purpose of the norm and its social function; and that theories of general and special deterrence through punishment are limited to the confirmation of the structure in which the action is committed. Thus, although they may even be considered as legislative purposes – as in the preamble to the Rome Statute – they suffice to justify the choice of core crimes (that is, the purpose of punishing such crimes specifically) or the punitive prerogative of the international community. In this sense, the recognised difficulty of transposing national theories on the purpose of punishment, or of creating totally new elements for international criminal law,<sup>59</sup> does not interfere with the legitimacy of the right to punish that already surrounds it.

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<sup>57</sup> *Ibid.*, p. 156.

<sup>58</sup> *Ibid.*, p. 159.

<sup>59</sup> Ambos, 2003, p. 210, see *supra* note 19.

In addition, *ius puniendi* is understood in a less restrictive way when collective consciousness is used to explain why the international community can break through the borders of State sovereignty and punish, when this is not enough, violations of values that unite the international community as a whole, despite its inter-culturality. This seems to be an alternative adequate to the specificities of the philosophy of punishment in international criminal law since it is not as comprehensive or universalising as human rights, not so localised in a specific criminal legal culture as the idea of protection of particularly serious legal assets.

However, to assume the applicability of Durkheim's thinking in the philosophy of international criminal justice also implies recognising the limitations that the author's contextualisation and his own work do not allow us to transpose. One might argue, for example, that Durkheim does not explore the processes by which some rule-breakers rather than others are considered criminals. This issue, as a touchstone of international criminal law, remains challenging to the legitimation of a punitive system that is unable to investigate and hold responsible everyone involved in an international crime – nor does it intend to do so.

This chapter does not purport to address this limitation. After all, considering that sample punishment is more an effect of the eminently political character of international criminal tribunals than a philosophical assumption to legitimise punishment, its theorising is much closer to questioning of 'when' and 'how' to punish than 'why'. And for these questions, it may be necessary to admit the inapplicability of Durkheimian thought.

The limits of contextualisation and content that encompasses the scope of this chapter are mainly those already discussed concerning the sovereignty and cultural translation of a text that was not thought to deal with an international society that is not only complex or advanced in the sense meant by Durkheim but involves legal cultures with totally different forms and levels of criminalisation.

Furthermore, understanding the *ius puniendi* of international criminal law by utilising the Durkheimian collective conscience leads to different conclusions about the basis and purpose of the sentence, but does not summarily reject all other theories. If in national criminal law it is possible to recognise, for example, the importance of retributive thinking for the development of ideas about guilt and proportionality of punishment, even if one insists on conceiving some of the forms of deterrence as its

most adequate foundation, to incorporate what the relative and absolute theories of punishment have to say about the limits and circumstances of the right to punish seems the natural way also to international criminal law.



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## Gandhism and International Criminal Law

Abraham Joseph\*

*Ahimsa* (non-violence) is the highest ideal. It is meant for the brave, never for the cowardly. To benefit by others; killing, and delude oneself into the belief that one is being very religious and non-violent is sheer self-deception.<sup>1</sup>

### 15.1. Introduction

International criminal law has been the response of the international community to acts of impunity. Holding individuals accountable for war crimes, crimes against humanity and genocide is the most effective way to ensure justice for the victims of the worst violations of human rights. Reading the mandate and philosophy of international criminal justice in the works of leading thinkers requires a deep understanding of both the subject and the works of the thinker concerned. Reading Gandhism and its influence in international criminal law is no exception.

Gandhi is widely regarded as the moral initiator of the global peace and justice movement. Many movements that seek to uphold these virtues imbibe the spirit of Gandhism in them. It is therefore natural that formal criminal codes of a country, theories of criminology and all measures in the field of criminal justice will benefit from an evaluation on the touchstone of Gandhism if their real philosophical breadth is to be measured. However, Gandhi never directly addressed the subject of international law,

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<sup>1</sup> Mohandas Karamchand Gandhi, in *The Harijan*, 9 June 1946, para. 172. (Gandhi's work have been documented by a variety of credible Indian sources over the years. While it is believed that the *Collected Works of Mahatma Gandhi* ('*Collected Works*') comprise the most authentic record of his writings, other records of his writings exist. In this chapter, the authentic online version of *Collected Works* is cited. Note that citations on actual dates may vary given that they pertain to voluminous matters compiled over a 40-year period where no systematic technological tools to document material existed. It is also possible that multiple variants of *Collected Works* exist which may not be entirely consistent on certain aspects.)

much less international criminal law. International law during Gandhi's time was a rudimentary system with First World moorings. Its emphasis was on a limited range of concerns and its failure to clearly address the causes of the two World Wars has left it considerably weakened. In any case, there is hardly any evidence of an impact of international law on Gandhi during his lifetime, except perhaps on limited dimensions of aggression in the context of imperialism.

While it is often assumed that Gandhi's sole or at least primary concern was the fight for India's independence from British rule, his emphasis on specific values of individual propriety, including the quest for *Satyagraha* and truth, among other values, helps us link his philosophy with any other normative system that is open for evaluation. It is in this context that there exists the possibility of comparing the values of international criminal law with Gandhism, despite the absence of direct relevance.

Gandhi's concept of peace and non-violence, I argue, remains the intellectual and practical basis for the functioning of the International Criminal Court ('ICC') and the broader field of international criminal law. Both the ICC and international criminal law function as 'philosophical *satyagrahis*' (truth seekers) that seek to eliminate impunity through the use of judicial and prosecutorial means to fight impunity. International criminal tribunals as 'non-violent' actors have come to play a significant role in making the world a safer place through their jurisprudence. As tribunals of justice striving for accountability through the judicial route, these courts have come to highlight the global efforts in striving for a world order that is rooted in Gandhi's notion of truth, peace and non-violence. The ICC best represents these judicial institutions. Using judgments and legal reasoning, the Court is contributing to transitional justice by advancing the Gandhian values of peace, justice and non-violence by resorting to the moral conscience of the parties involved. By emphasizing 'truth' through either conviction or acquittal, the Court ensures a process of closure through the Gandhian mode of personal introspection, employing personal morality and private conscience. Thus, Gandhi and his ideas continue to resonate through the discipline of international criminal law.<sup>2</sup>

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<sup>2</sup> Mohandas Karamchand Gandhi, in *Young India*, 10 October 1928, para. 342:

I know only one way-the way of *ahimsa*. The way of *himsa* goes against my grain. I do not want to cultivate the power to cultivate *hamsa* [...] The faith sustains me that He is the help of the helpless, that He comes to one's succor only when one throws himself

Despite the close philosophical link between Gandhism and international criminal law there has been no serious attempt to link Gandhian philosophy with the subject. This is surprising given that peace making and transitional justice through the judicial route are the primary objectives of the discipline and Gandhi has remained the principal moral, intellectual and practical proponent of these values, albeit in highly different context. Whereas existing works have focused on the apparent contradictions between the Court's judicial mandate in prosecuting individuals and its resultant impact on the peace process from the perspective of public policy, this work is an attempt in fulfilling this void in literature. It is an attempt in bringing Gandhi alive in one of the most significant debates facing the global community. The challenges facing international criminal law are in many ways, the challenges facing the *satyagrahis*.<sup>3</sup> The critical attacks directed against the ICC by its opponents are to be viewed as threats faced by an institutional *satyagrahi* who is on the eternal quest for truth and non-violence. In this sense, critical attacks against the philosophy of international justice in general and the international criminal court in particular should not be surprising given the premise that the quest for peace and non-violence is fraught with opposition. The ICC thus is reflective of a 'Gandhism in action' when it holds individuals accountable for mass crimes.

Gunnar Myrdal, a Swedish economist, famously remarked that states seek to maintain their monopoly on the process of peacekeeping, thereby implying that non-state actors and institutions are normally kept at bay during such initiative. If this statement is true, all peacekeeping initiatives can operate only at the behest of states with non-state actors getting eclipsed in the process. However, that is not true. This 'statist' mindset is sought to be challenged in this chapter, whose fundamental premise is 'judicialism' with its peacemaking potential. While Gandhism was co-opted in South Africa and the United States of America by Nelson Mandela and Rev. Martin Luther King to fight against apartheid and seg-

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on His Mercy. It is because of that faith that I cherish the hope that God will one day show me a path which I may confidently commend to the people.

<sup>3</sup> Mohandas Karamchand Gandhi, in *Young India*, 20 February 1930, para. 61:

I have been a 'gambler' all my life. In my passion for finding truth and in relentlessly following out my faith in non-violence, I have counted no stake too great. In doing so I have erred, if at all, in the company of the most distinguished scientist of any age and any clime.

regation respectively, it leads to an impression that Gandhism can only be employed directly in the face of objective and identifiable injustice alone. Here again the thrust was on the creation of a ‘non-violent force’ that resists (passively) the onslaught of violence. This chapter seeks to advance the thesis that the international criminal tribunals, despite their judicial character, embody an international peacekeeping mission advancing the concept of *Satyagraha* as propounded by Mahatma Gandhi. This is a constructive understanding of *Satyagraha*. Peacekeeping as conventionally understood needs to be given a re-look with a thorough examination of judicial bodies that engage in this function. The chapter seeks to re-orient the narrative surrounding international criminal institutions not merely as institutions engaged in holding individuals accountable for ‘core crimes’, namely genocide, crimes against humanity and war crimes, but as institutional actors actively engaged in the process of promoting and advancing the values of peace and non-violence in the moral spirit of Gandhism. Convicting individuals for genocide, war crimes and crimes against humanity is merely a means to achieve the broader goal of peace and non-violence. These attempts ultimately lead to ‘truth’, the final destination of Gandhi’s spiritual quest.

However, this is not to suggest that international criminal law is perfect. The shortcomings in the normative framework of the discipline can only be addressed by a deeper embrace of the subject. In short, international criminal law is the intellectual and applied realization of Gandhian truth and non-violence at the global level, a moral exercise far more significant than the mere holding of individuals accountable for mass crimes. It is a moral mission to be strengthened and bolstered by a deeper embrace of the apostle of peace and non-violence. As Martin Luther King mentioned, if humanity is to develop and progress, Gandhi is inescapable. He lived, thought and acted, inspired and motivated by the vision of a humanity evolving towards a world of peace, justice, non-violence and harmony. One may ignore or discard him only at his own risk. This rings true in the case of international criminal law as well, as in most other dimensions of human relations.

## **15.2. Mahatma Gandhi: The Man and his Ideas**

### **15.2.1. Formative Years**

Born in 1869, in the town of Porbandar, located in the State of Gujarat, scholars tend to view Gandhi’s initial upbringing as anything but uncon-

ventional. He belonged to the traditional business caste and his family, like most others of the time, was steeped in social conservatism. Growing up under the watchful eyes of his deeply religious mother and disciplinarian father, Gandhi was strongly ensconced in the virtues of moral and ethical behaviour. Notions of right and wrong, ethical and unethical were a defining feature of Gandhi's formative learning and educative mores. His autobiography, *My Experiments with Truth*, contains numerous illustrations, where he was placed in difficult moral conundrums during his childhood years, requiring him to take decisions based on competing moral and ethical dilemmas. The instructions of a teacher to cheat in an exam, curbing the biological needs of the body for other necessities, among other instances, are replete in the autobiography.

### **15.2.2. Gandhi during the Boer War: Gandhi's Tryst with Humanitarian Law**

The Boer War, by all accounts, seems to have had a defining influence on the life of Gandhi. The bloodshed, killing and merciless warmongering that followed had a deep impact on the young Gandhi. Gandhi, who was a lawyer working for Muslim Indian traders in Natal, formed a volunteer Ambulance Corps for the British Army.<sup>4</sup> The Natal Indian Ambulance Corps, led by Gandhi, comprised of 300 free and 800 indentured labourers working for their employers. Its task was to take the wounded from the battlefield and carry them to safety. The task of this force was fundamentally humanitarian in nature. The importance of caring and providing for the sick during conflict was a salutary effort by the early Gandhi in the applied philosophy of peacekeeping.<sup>5</sup>

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<sup>4</sup> He was a Warrant Officer since Indians could not be commissioned unless they were Rajas or Maharajas.

<sup>5</sup> Mohandas Karamchand Gandhi, in *Young India*, 5 November 1925, para. 379, as quoted in Nirmal Kumar Bose, *Selections from Gandhi*, Navajivan Publishing House, 2nd ed., 1957, p. 212: "By enlisting men for ambulance work in South Africa and in England, and recruits for field service in India, I helped not the cause of war, but I helped the institution called the British Empire in whose ultimate beneficial character I then believed. My repugnance to war was as strong then as it is today; and I could not then have and would not have shouldered a rifle. But one's life is not a single line; it is a bundle of duties very often conflicting. And one is called upon continually to make one's between one duty and another. As a citizen not then, and not even now, are former leading an agitation against the institution of war, I had to advise and lead men who believed in war but who from cowardice or from base motives, or from anger against the British Government refrained from enlisting.

### 15.2.3. Gandhi on Law

Mahatma Gandhi is widely acknowledged as the leading political and spiritual figure of the Indian freedom movement. Known as ‘Mahatma’ (Great Soul), Gandhi’s spiritual aura, without prejudice to other strands of ideological thought, was the defining point of Indian nationalism in the struggle against colonial exploitation. While his principal political objective was the liberation of India from the clutches of British imperial rule, his practice and ideas had an appeal that extended much beyond that objective. In his numerous writings penned over a lifetime, Gandhi discussed a diverse range of subjects that covered numerous dimensions of human existence. Given the range and breadth of this scholarship, any attempt to analyse his concepts must be delicately undertaken, giving primacy to his fundamental ideas, on which there appears to be little, if any, controversy. As such, this chapter proceeds with the hypothesis that international criminal law is an ideological embrace of Gandhism and shortcomings in its functioning, if any, can be addressed by a deeper embrace of Gandhism.

This may sound surprising to those who regard Gandhi as a bitter critique of law, judicial institutions and lawyers. His most seminal text, the *Hind Swaraj*, published in 1909, may be considered a vitriolic attack on law and lawyers. In addition, it denounces, in most trenchant terms, the evils posed by modernism. However, I argue that Gandhi’s critique of law should not be interpreted as a criticism of the values represented by global

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I did not hesitate to advise them that so long as they believed in war and professed loyalty to the British constitution they were in duty bound to support it by enlistment. Though I do not believe in the use of arms, and though it is contrary to the religion of ahimsa which I profess, I should not hesitate to join an agitation for a repeal of the debasing Arms Act which I have considered amongst the blackest crimes of the British Government against India. I do not believe in retaliation, but I did not hesitate to tell the villagers near Bettie four years ago that they who knew nothing of ahimsa were guilty of cowardice in failing to defend the honour of their womenfolk and their property by force of arms. And I have not hesitated, as the correspondent should know, only recently to tell the Hindus that if they do not believe in out-and-out ahimsa and cannot practiced it they will be guilty of a crime against their religion and humanity if they failed to defend by force of arms the honour of their women against any kidnapper who chooses to take away their women. And all this advice and my previous practice I hold to be not only consistent with my profession of the religion of ahimsa out-and-out, but a direct result of it. To state that noble doctrine is simple enough; to know it and to practise it in the midst of a world full of strife, turmoil and passions is a task whose difficulty I realize more and more day by day. And yet the conviction too that without it life is not worth living is growing daily deeper”.

justice. His aversion towards the legal profession, its goals, motives and objectives, of which he himself was an integral part, is not to be interpreted as a standing denouncement of institutional judicial endeavours of peace-making, more so at the international level.

Gandhi saw the British legal system as a colonial tool to morally corrupt the Indian people. The devices and tools of the common law legal system, given their origins in private law, did not have necessary roots in *dharmic* moral justice. Settlement of private disputes was the principal objective of common law. The lawyer was merely a hired agent to argue that case on behalf of the parties. While the common law exalts the role of the lawyer and the judge, especially as independent arbiters who champion the cause of justice, Gandhi disagrees. The quest for truth should be ultimate objective of legal proceedings, in Gandhi's understanding of the aims and ends of law. Common law, it is said, is not keen on truth. Truth through the common law courts is not necessarily the quest for justice. It is, some may say, merely a showmanship of power and wealth. The victim may win and secure the delivery of justice, but it is not usually the principal objective of the British legal system, which seeks to preserve the values of truth, solely through the judicial route. The edifice of justice must be willing to evolve and if required give way to other alternatives if truth is the casualty. This may be unimaginable in the British legal system, which, to take a simplistic view, is more concerned with the ends than the means. For Gandhi, the means adopted to pursue a stated goal are more important than the end in itself, which meant that the latter could never be justified by the former.<sup>6</sup>

## **15.2.4. Gandhi's Key Concepts**

### **15.2.4.1. Non-Violence**

Of all the ideas of Gandhi, the concept of non-violence is the most significant. In fact, it can be said with certainty that there is no other concept of Gandhi which has received as much attention as his concept of *ahimsa* or

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<sup>6</sup> Mohandas Karamchand Gandhi, as quoted in Krishna Kripalani (ed.), *All Men Are Brothers: Life and Thoughts of Mahatma Gandhi as Told in His Own Words*, 2nd edition, UNESCO, 1969, p. 81: "They say 'means are after all means'. I would say 'means are after all everything'. As the means so the end. There is no wall of separation between means and end. Indeed the Creator has given us control (and that too very limited) over means, none over the end. Realization of the goal is in exact proportion to that of the means. This is a proposition that admits of no exception".

non-violence.<sup>7</sup> While Gandhi acknowledges the progressive decline in the belief in non-violence, according to him, this is the cause of human misery and intolerance.<sup>8</sup> Non-violence should never be confused with being meek or submissive.<sup>9</sup> It is the highest spiritual power which a person can

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<sup>7</sup> Mohandas Karamchand Gandhi, in *The Harijan*, 5 September 1936, para. 236, as quoted in Bose, 1957, pp. 186–87, see *supra* note 7: “Non-violence is the law of the human race and is infinitely greater than and superior to brute force. In the last resort it does not avail to those who do not possess a living faith in the God of Love. Non-violence affords the fullest protection to one’s self-respect and sense of honour, but not always to possession of land or movable property, though its habitual practice does prove a better bulwark than the possession of armed men to defend them. Non-violence, in the very nature of things, is of no assistance in the defence of ill-gotten gains and immoral acts. Individuals or nations who would practice non-violence must be prepared to sacrifice (nations to last man) their all except honour. It is, therefore, inconsistent with the possession of other people’s countries, i.e., modern imperialism, which is frankly based on force for its defence. Non-violence is a power which can be wielded equally by all-children, young men and women or grown-up people, provided they have a living faith in the God of Love and have therefore equal love for all mankind. When non-violence is accepted as the law of life, it must pervade the whole being and not be applied to isolated acts. It is a profound error to suppose that, whilst the law is good enough for individuals, it is not for masses of mankind”.

<sup>8</sup> Mohandas Karamchand Gandhi, in *The Harijan*, 30 March 1947, para. 86: “The lesson of non-violence is present in every religion, but I fondly believe that, perhaps, it is here in India that its practice has been reduced to a science. Innumerable saints have laid down their lives in *tapashcharya* until poets had felt that the Himalayas became purified in their snowy whiteness by means of their sacrifice. But all this practice of non-violence is nearly dead today. It is necessary to revive the eternal law of answering anger by love and of violence by non-violence; and where can this be more readily done than in this land of Kind Janaka and Ramachandra?”.

<sup>9</sup> Rabindranath Tagore, in *Young India*, 11 August 1920, para. 713, as quoted in Bose, 1957, see *supra* note 7: “Non-violence in its dynamic condition means conscious suffering. It does not mean meek submission to the will of the evil-doer, but it means the putting of one’s whole soul against the will of the tyrant. Working under this law of our beings, it is possible for a single individual to defy the whole might of an unjust empire to save his honour, his religion, his soul and lay the foundation for that empire’s fall or its regeneration”. Cf. para. 516. See also Mohandas Karamchand Gandhi, in *The Harijan*, 30 March 1947, paras. 85–86: “[T]he true meaning of non-resistance has often been misunderstood or even distorted. It never implied that a nonviolent man should bend before the violence of an aggressor. While not returning the latter’s violence by violence, he should refuse to submit to the latter’s illegitimate demand even to the point of death. That is the true meaning of non-resistance. [...] He is not to return violence by violence, but neutralize it by withholding one’s hand and, at the same time, refusing to submit to the demand. This is the only civilized way of going on in the world. Any other course can only lead to a race for armaments interspersed by periods of peace which is by necessity and brought about by exhaustion, when preparations would be going on for violence of a superior order. Peace through superior violence inevitably leads to the atom bomb and all that it stands for. It is

possess on the road to truth which should have the capacity to conquer the heart of the opponent.<sup>10</sup>

#### 15.2.4.2. Satyagraha

*Satyagraha* or soul-force is the road or the path adopted to arrive at truth.<sup>11</sup> A *satyagrahi* is an individual who is on the quest of this journey, experimenting with methods and tactics which help him arrive at the truth. Soul-force remains one of Gandhi's most powerful ideas and can be termed as the 'philosophical equator' of Gandhian philosophy.<sup>12</sup>

#### 15.2.4.3. The Relationship between *Ahimsa* and Truth

*Ahimsa* and truth represent two sides of the same coin. One cannot exist without the other. A proper understanding of these two concepts is funda-

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the completes negation of nonviolence and of democracy which is not possible without the former”.

- <sup>10</sup> Mohandas Karamchand Gandhi, in *Young India*, 2 April 1931, para. 58, as quoted in Bose, 1957, p. 195, see *supra* note 7: “The mysterious effect of non-violence is not to be measured by its visible effect. But we dare not rest content so long as the poison of hatred is allowed to permeate society. This struggle is a stupendous effort at conversion. We aim at nothing less than the conversion of the English. It can never be done by harbouring ill-will and still pretending to follow nonviolence. Let those therefore who want to follow the path of nonviolence and yet Harbour ill-will retrace their steps and repent of the wrong they have done to themselves and the country”.
- <sup>11</sup> Mohandas Karamchand Gandhi, in *The Harijan*, 15 October 1938, paras. 290–91: “I present [...] a weapon not of the weak but of the brave. There is no bravery greater than a resolute refusal to bend the knee to an earthly power, no matter how great, and that without bitterness of spirit and in the fullness of faith that the spirit alone lives, nothing else does”.
- <sup>12</sup> Mohandas Karamchand Gandhi, *Hind Swaraj*, International Printing Press, Phoenix, 1910, as quoted in Bose, 1957, p. 43, see *supra* note 7: “Passive resistance is a method of securing rights by personal suffering; it is the reverse of resistance by arms. When I refuse to do a thing that is repugnant to my conscience, I use soul-force. For instance, the Government of the day has passed a law, which is applicable to me. I do not like it. If by using violence I force the Government to repeal the law, I am employing what may be termed body-force. If I do not obey the law and accept the penalty for its breach, I use soul-force. It involves sacrifice of self. Everybody admits that sacrifice self is infinitely superior to sacrifice of other. Moreover, if this kind of force is used in a cause that is just, only the person using it suffers. He does not make others suffers for his mistakes. Men have before now done many things which were subsequently found to have been wrong. No man can claim that he is absolutely in the right or that a particular thing is wrong because he thinks so, but it is wrong for him so long as that is his deliberate judgment. It is therefore meet that he should not do that which he knows to be wrong, and suffer the consequence whatever it may be. This is the key to the use of soul-force”.

mental to understanding Gandhism.<sup>13</sup> While it is not easy to achieve *ahimsa*, one should constantly try to strive for the same. Even a person who is weak and unable to achieve the goal of *ahimsa* should not stop trying.<sup>14</sup>

#### 15.2.4.4. *Advaita* (Non-Dualism)

Gandhi passionately advocated the concept of *advaita* or non-dualism. Essentially, this principle denotes the inherent harmony and unity between all forces existing in nature. One man's gain is everyone's gain, whereas his loss is everyone's loss. One cannot derive happiness at the cost of another person's sorrow and thus his success lies with the overall development and well-being of the human race.<sup>15</sup>

#### 15.2.4.5. Gandhi's Ultimate Objective

Gandhi's ultimate objective was the attainment of *moksha*. The closest English translation of the word is liberation from the cycle of birth and re-birth, the ultimate realisation in Hindu spiritual quest.<sup>16</sup>

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<sup>13</sup> Mohandas Karamchand Gandhi, as quoted in Kripalani (ed.), 1969, p. 81, see *supra* note 8: “*Ahimsa* and Truth are so intertwined that it is practically impossible to disentangle and separate them. They are like the two sides of a coin, or rather a smooth unstamped metallic disc. Who can say, which is the obverse, and which the reverse? Nevertheless, *ahimsa* is the means; Truth is the end. Means to be means must always be within our reach, and so *ahimsa* is our supreme duty. If we take care of the means, we are bound to reach the end sooner or later. When once we have grasped this point final victory is beyond question. Whatever difficulties we encounter, whatever apparent reverses we sustain, we may not give up the quest for Truth which alone is, being God Himself”.

<sup>14</sup> Mohandas Karamchand Gandhi, as quoted *Ibid.*, p. 94, see *supra* note 8: “When two nations are fighting, the duty of a votary of *ahimsa* is to stop the war. He who is not equal to that duty, he who has no power of resisting war, he who is not qualified to resist war, may take part in war and yet whole-heartedly try to free himself, his nation and the world from war”.

<sup>15</sup> Mohandas Karamchand Gandhi, in *Young India*, 4 December 1924, para. 398, as quoted in Bose, 1957, p. 33, see *supra* note 7: “I do not believe that an individual may gain spiritually and those who surround him suffer. I believe in *advaita*, I believe in the essential unity of man and, for that matter, of all that lives. Therefore, I believe that if one man gains spiritually, the whole world gains with him and, if one man falls, the whole world falls to that extent”.

<sup>16</sup> Mohandas Karamchand Gandhi, *An Autobiography or the Story of My Experiments with Truth*, Navajivan Publishing House, Ahmedabad, 1948, pp. 4–5: “What I want to achieve – what I have been striving and pining to achieve these thirty years— is self-realization, to see God face to face, to attain *Moksha*. I live and move and have my being in pursuit of this goal. All that I do by way of speaking and writing, and all my ventures in the political

## 15.2.5. Gandhi's Ideas in Relation to International Criminal Justice

### 15.2.5.1. International Criminal Justice as 'Peace Trusteeship'

One of the most celebrated of Gandhi's concepts is the idea of 'trusteeship'. Trusteeship refers to the socio-economic framework under which resources are held in 'trust' by an individual most capable of holding them for the benefit and welfare of society.<sup>17</sup> A trustee is not the perpetual owner of the resource in question but merely a holder of the resource. Since his proprietary interests in the property are limited, the elements of selfishness, avarice and greed all socially harmful traits can be best contained. While the idea of trusteeship has its roots in the desire to eliminate economic inequality by bringing about a change in the ownership and control of the means of production, the idea can application in diverse settings. Gandhi proceeded with the logic that expropriation and taxation to eliminate disparities in wealth and resources had their limitations. Since no one could be better off by harming or hurting another, Gandhi considered that all attempts to deprive the wealthy of their holdings are based in violence. Just as no one can become legitimately rich by robbing others of resources, the best moral path to secure equality was to permit the industrious to hold the resources for the good of the less fortunate man in society. In this process, we do not harm the rich or strike violence against them, but convince them of the moral necessity of egalitarianism.

This idea of refraining from 'violence against the other' can have application in international criminal justice. While focusing on holding individuals accountable for war crimes, crimes against humanity and genocide, the focus must not be on stigmatising individuals. Even the most deplorable war criminal or *genocidaire* must be treated with a sense of compassion and mercy. The abolition of the death sentence in international criminal law is a salutary adoption of 'peace trusteeship'.<sup>18</sup> Even long-

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field, are directed to this same end. But as I have all along believed that what is possible for one is possible for all, my experiments have not been conducted in the closet, but in the open; and I do not think that this fact detracts from their spiritual value. There are some things which are known only to oneself and one's Maker. These are clearly incommunicable. The experiments I am about to relate are not such. But they are spiritual, or rather moral; for the essence of religion is morality".

<sup>17</sup> Mohandas Karamchand Gandhi, in *The Harijan*, 1 June 1947, para. 174: "To answer brutality with brutality is to admit one's moral and intellectual bankruptcy and it can only start a vicious circle".

<sup>18</sup> Mohandas Karamchand Gandhi, in *Young India*, 26 March 1947, para. 49, as quoted in Bose, 1957, p. 111, see *supra* note 7: "[N]o human being is so bad as to be beyond re-

term imprisonment can have disastrous consequences on the health and well-being of a convict. In this context, it is argued that the sentences provided by the Rome Statute are excessive and amount to a form of ‘violence’ against the convict.<sup>19</sup> Regardless of how immoral a criminal may be, international criminal justice should be a step ahead of him. It should treat criminals with compassion in the Gandhian sense of the term, embracing mercy and empathy as its guiding philosophy. The focus of punishments should be making the convict realise the gravity of his offence and bringing him on the path to reform.<sup>20</sup> This idea of punishment is the defining feature of Gandhian philosophy and essential for the ultimate realisation of truth. No form of punishment or punitive theory will be successful if it does not create a sense of moral guilt in the offender. This cannot be

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demption, no human being is so perfect as to warrant his destroying him whom he wrongly considers to be wholly evil”.

<sup>19</sup> Statute of the International Criminal Court, 17 July 1998, in force 1 July 2002, Article 77 ([www.legal-tools.org/doc/7b9af9/](http://www.legal-tools.org/doc/7b9af9/)):

Applicable penalties

1. Subject to article 110, the Court may impose one of the following penalties on a person convicted of a crime under article 5 of this Statute:
  - (a) Imprisonment for a specified number of years, which may not exceed a maximum of 30 years; or
  - (b) A term of life imprisonment when justified by the extreme gravity of the crime and the individual circumstances of the convicted person.
2. In addition to imprisonment, the Court may order:
  - (a) A fine under the criteria provided for in the Rules of Procedure and Evidence;
  - (b) A forfeiture of proceeds, property and assets derived directly or indirectly from that crime, without prejudice to the rights of bona fide third parties.

<sup>20</sup> Gandhi, in *The Harijan*, 30 March 1947, paras. 85–86, see *supra* note 11: “The true meaning of non-resistance has often been misunderstood or even distorted. It never implies that a nonviolent man should bend before the violence of an aggressor. While not returning the latter’s violence by violence, he should refuse to submit to the latter’s illegitimate demand even to the point of death. That is the true meaning of non-resistance. [...] He is not to return violence by violence, but neutralize it by withholding one’s hand and, at the same time, refusing to submit to the demand. This is the only civilized way of going on in the world. Any other course can only lead to a race for armaments interspersed by periods of peace, which is by necessity, and brought about by exhaustion, when preparations would be going on for violence of a superior order. Peace through superior violence inevitably leads to the atom bomb and all that it stands for. It is the complete negation of nonviolence and of democracy which is not possible without the former”.

achieved by violence and can be addressed only by morally prevailing over the offender.<sup>21</sup>

### 15.2.5.2. The Crime of Aggression: A Gandhian Perspective

Aggression, as a crime and solutions to deal with the issue, has troubled the international community for long. With December 2017 witnessing a historic moment of its activation, the aggression debate has taken centre stage. The ICC now has jurisdiction over this crime, along with the other three core crimes. While the move is commendable, it appears it may take several years for the ICC to officially prosecute anyone for the crime of aggression, if at all. Nonetheless, the global justice community should leave no stone unturned in ensuring the progressive development of the crime of aggression. Interestingly, of all of Gandhi's views, the one bearing the closest connection to the discipline of international criminal law is his official position on the question of aggression. Since Gandhi viewed colonialism as an extension of aggression, his views on the subject naturally reflect a premise based on the realities of colonialism. Gandhi used the term 'gangsterism' to refer to the phenomena of aggression which he condemned.<sup>22</sup> Exploitation of nations also lies at the root of aggression.<sup>23</sup>

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<sup>21</sup> Mohandas Karamchand Gandhi, in *Young India*, 8 October 1925, para. 346: "The non-violence of my conception is a more active and more real fighting against wickedness than retaliation whose very nature is to increase wickedness. I contemplate a mental and, therefore, a moral opposition to immoralities. I seek entirely to blunt the edge of the tyrant's sword, not by putting up against it a sharper-edged weapon, but by disappointing his expectation that I would be offering physical resistance. The resistance of the should that I should offer instead would elude him. It would at first dazzle him, and at last compel recognition from him, which recognition would not humiliate him but would uplift him. It may be urged that this again is an ideal state. And so it is. The propositions from which I have drawn my arguments are as true as Euclid's definitions, which are none the less true because in practice we are unable to even draw Euclid's line on a blackboard. But even a geometrician finds it impossible to get on without bearing in mind Euclid's definitions. Nor may we dispense with the fundamental propositions on which the doctrine of Satyagraha is based".

<sup>22</sup> Mohandas Karamchand Gandhi, in *The Harijan*, 10 December 1938, para. 372: "What to do with 'gangster' nations, if I may the expression frequently used? There was individual gangsterism in America. It has been put down by strong police measures both local and national. Could not we do something similar for gangsterism between nations, as instanced in Manchuria-the nefarious use of the opium poison, in Abyssinia, in Spain, in the sudden seizure of Austria, and then, the case of Czechoslovakia? If the best minds of the world have not imbibed the spirit of non-violence, they would have to meet gangsterism in the orthodox way. But that would only show that we have not got far beyond the law of the jungle, that we have not yet learnt to appreciate the heritage that God has given us, that, in

### 15.2.5.3. Gandhi on the Use of Force

Did Gandhi ever justify the use of force for any purpose? As the apostle of peace and non-violence, it is widely believed that Gandhi rejected the use of force under all circumstances. However, on a closer reading, it becomes clear that he did support and perhaps even justify the use of force on certain occasions. When a comparative analysis is made on defending aggression and the use of force, it is clear that a weaker State or party may resort to the use of force only to the extent of protecting their interests. Morally, the weaker party deserves the support in such situations.<sup>24</sup> Also, all uses of force are not equally bad. According to Gandhi, there is a need to distinguish between an aggressor and a defender. While a defender may be compelled to use force, his employment of force may not always be a cause of concern, where it is undertaken for the right cause.<sup>25</sup> In all cases,

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spite of the teaching of Christianity which is 1900 years old and of Hinduism and Buddhism which are older, and even of Islam (if I have read it aright), we have not made much headway as human beings. But, whilst I would understand the use of force by those who have not the spirit of non-violence to throw their whole weight in demonstrating that even gangsterism has to be met by non-violence. For, ultimately, force, however justifiably used, will lead us into the same morass as the force of Hitler and Mussolini. There will be just a difference of degree. You and I who believe in non-violence must use it at the critical moment. We may not despair of touching the hearts even of gangsters, even if, for the moment, we may seem to be striking our heads against a blind wall”.

- <sup>23</sup> R.K. Prabhu and U.R. Rao (eds.), *The Mind of Mahatma Gandhi*, 3rd edition, Greenleaf Books, 1968, p. 63, as quoted in Kripalani (ed.), 1969, p. 123, see *supra* note 8: “If there were no greed, there would be no occasion for armaments. The principle of non-violence necessitates complete abstention from exploitation in any form. [...] Immediately the spirit of exploitation is gone, armaments will be felt as a positive unbearable burden. Real disarmament cannot come unless the nations of the world cease to exploit one another”.
- <sup>24</sup> Mohandas Karamchand Gandhi, in *The Harijan*, 18 August 1940, para. 250, as quoted in Bose, 1957, p. 215, see *supra* note 7: “If war is itself a wrong act, how can it be worthy of moral support or blessings? I believe all war to be wholly wrong. But, if we scrutinize the motives of two warring parties, we may find one to be in the right and the other in the wrong. For instance, if A wishes to seize B’s country, B is obviously the wronged one. Both fight with arms. I do not believe in violent warfare, but all the same, B, whose cause is just, deserves my moral help and blessings”.
- <sup>25</sup> Mohandas Karamchand Gandhi, in *The Harijan*, 21 October 1939, para. 309, as quoted in Bose, 1957, pp. 215–16, see *supra* note 7: “Whilst all violence is bad and must be condemned in the abstract, it is permissible for, it is even the duty of, a believer in ahimsa to distinguish between the aggressor and the defender. Having done so, he will side with the defender in a non-violent manner, i.e., give his life in saving him. His intervention is likely to bring a speedier end to the duel, and may even result in bringing about peace between the combatants”.

an endeavour should be made to use the weapon of non-violence alone.<sup>26</sup> Saving one's honour, which is tantamount to protecting one's soul, is the ultimate victory in the moral battle man faces.<sup>27</sup>

#### 15.2.5.4. The Duty to Resist Aggression

According to Gandhi, those who believe in non-violence have a duty to resist aggression. This resistance should be guided by the inner voice of the person undertaking the resistance and may be imperative where one's nation is being attacked or invaded. This is also, ultimately, a great service to humanity.<sup>28</sup> However, wherever possible, recourse should be taken of pacifism.<sup>29</sup> This pacifism should not be confused with cowardice, which is to be avoided at all costs and is even subordinate to violence.

#### 15.2.5.5. Gandhi on Permanent Peace

Despite understanding the difficulty of following the path of non-violence in the ultimate quest for truth, Gandhi optimistically believed that permanent peace between nations and the international community is possible.<sup>30</sup>

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<sup>26</sup> Mohandas Karamchand Gandhi, in *The Harijan*, 1 June 1947, para. 174: "No power on earth can subjugate you when you are armed with the sword of Ahimsa. It ennobles both the victor and vanquished. [...] To answer brutality with brutality is to admit one's moral and intellectual bankruptcy and it can only start a vicious circle".

<sup>27</sup> Mohandas Karamchand Gandhi, in *The Harijan*, 15 October 1938, para. 290: "I must live. I would not be a vassal to any nation or body. I must have absolute independence or perish. To seek to win in a clash of arms would be pure bravado. Not so if, in defying the might of one who would deprive me of my independence, I refuse to obey his will and perish unarmed in the attempt. In so doing, though I lose the body, I save my soul, i.e., my honor".

<sup>28</sup> Mohandas Karamchand Gandhi, in *The Harijan*, 15 April 1939, para. 90: "The true democrat is he who with purely non-violent means defends his liberty and therefore, his country's and ultimately, that of the whole of mankind [...] But the duty of resistance accrues only to those who believe in non-violence as a creed-not to those who will calculate and will examine the merits of each case and decide whether to approve of or oppose a particular war. It follows that such resistance is a matter for each person to decide for himself and under the guidance of the inner voice, if he recognizes its existence".

<sup>29</sup> *Ibid.*: "A true pacifist is a true *satyagrahi*. The latter acts by faith and, therefore, is not concerned about the result, for he knows that it is assured when the action is true. [...] Pacifists have to prove their faith by resolutely refusing to do anything with war, whether of defense or offence".

<sup>30</sup> Prabhu and Rao (eds.), 1968, pp. 59–60, as quoted in Kripalani (ed.), 1969, pp. 122–23, see *supra* note 25: "Not to believe in the possibility of permanent peace is to disbelieve in the godliness of human nature. Methods hitherto adopted have failed because rock-bottom sincerity on the part of those who have striven has been lacking. Not that they have realized this lack. Peace is unattained by part performance of conditions, even as a chemical

This optimism has remained the guiding light of the philosophy and the promises success on the road to truth ahead.

#### **15.2.5.6. Gandhi and International Organisations**

Those arguing that Gandhi should be seen as a critic of modern international law and its organisations tend to overlook the fact that Gandhi was supportive of the functioning of the United Nations Educational, Scientific and Cultural Organization. While the *Hind Swaraj* was an attack against the institution of law, lawyers and the edifice surrounding the legal profession, Gandhi's views cannot be imported to imply a position against global peacekeeping and development agendas.<sup>31</sup> Thus, Gandhi would have supported the mandate of international criminal law and its most prominent institution, the ICC.

### **15.3. International Criminal Law: Dealing with Criticism the Gandhian Way**

International criminal law has been a much-criticised discipline. From African States alleging institutional bias against the ICC, to allegations of Eurocentrism, international criminal law has faced constant attacks from diverse sources. With 124 States Parties to the Rome Statute, the ICC is going strong. With the court taking over jurisdiction for the crime of aggression, international criminal law is, much to the relief of the global community, getting stronger. Criticisms against the ICC must be countered using the route of *ahimsa*.<sup>32</sup> In addition, love towards the opponent,

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combination is impossible without complete fulfillment of the conditions of attainment thereof. If the recognized leaders of mankind who have control over the engines of destructions were wholly to renounce their use, with full knowledge of its implications, permanent peace can be obtained. This is clearly impossible without the Great Powers of the earth renouncing their imperialistic design. This again seems impossible without great nations ceasing to believe in soul-destroying competition and to desire to multiply wants and, therefore, increase their material possessions”.

<sup>31</sup> Mohandas Karamchand Gandhi, in *The Harijan*, 16 November 1947, paras. 412–13: “I am deeply interested in the efforts of the United Nations Economic, Social and Cultural Organization to secure peace through educational and cultural activities. I fully appreciate that real security and lasting peace cannot be secured so long as extreme inequalities in education and culture exist as they do among the nations of the world. Light must be carried even to the remotest homes in the less fortunate countries which are in comparative darkness and I think that, in this cause, the nations which are economically and educationally advanced have a special responsibility”.

<sup>32</sup> Mohandas Karamchand Gandhi, in *The Harijan*, 17 November 1946, para. 404: “Assume that a fellow-passenger threatens my son with assault and I reason with the would-be-

understanding and empathising with its perspective should also inform the approach to international criminal justice.<sup>33</sup> A war criminal before an international criminal court should be viewed as an individual with a diseased soul and treated accordingly.<sup>34</sup> It is imperative for international criminal justice to factor in nationalistic considerations in the course of developing the normative framework on the subject. A Gandhian approach to the problem would essentially require factoring in nationalistic motivations of State actors in their relationship with international law organisations.<sup>35</sup> An attempt at self-purification must be made whenever in doubt as to the exact role that international criminal law need take in contemporary times.<sup>36</sup> Thus, the critical attacks launched against the ICC by its oppo-

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assailant who then turns upon me. If then I take his blow with grace and dignity, without harbouring any ill-will against him, I exhibit the ahimsa of the brave. Such instances are of every day occurrence and can be easily multiplied. If I succeed in curbing my temper every time and, though able to give blow for blow, I refrain, I shall develop the ahimsa of the brave which will never fail me and which will compel recognition from the most confirmed adversaries". See also Mohandas Karamchand Gandhi, in *Young India*, 25 February 1921, para. 164, as quoted in Bose, 1957, p. 265, see *supra* note 7: "Whilst we may attack measures and systems. We may not, must not, attack men. Imperfect ourselves, we must be tender towards others and be slow to impute motives".

<sup>33</sup> Mohandas Karamchand Gandhi, in *The Bombay Chronicle*, 9 September 1942: "I have no weapon but love to wield authority over anyone".

<sup>34</sup> D. G. Tendulkar, *Mahatma: Life of Mohandas Karamchand Gandhi*, vol. 2, 2nd ed., Publications Division, 1960, p. 20: "Terrorism and deception are weapons not of the strong but of the weak".

<sup>35</sup> Prabhu and Rao (eds.), 1968, p. 134, as quoted in Kripalani (ed.), 1969, p. 119, see *supra* note 25: "It is impossible for one to be an internationalist without being a nationalist. Internationalism is possible only when nationalism becomes a fact, i.e., when peoples belonging to different countries have organized themselves and are able to act as one man. It is not nationalism that is evil, it is the narrowness, selfishness, exclusiveness which is the bane of modern nations which is evil. Each wants to profit at the expense of, and rise on the ruin of, the other". See also Mahadev H. Desai, *The Diary of Mahadev Desai*, Navajivan Publishing House, Ahmedabad, 1953, p. 287: "Duties to self, to the family, to the country and to the world are not independent of one another. One cannot do good to the country by injuring himself or his family. Similarly, one cannot serve the country injuring the world at large. In the final analysis we must die that the family may live, the family must die that the country may live and the country must die that the world may live. But only pure things can be offered in sacrifice. Therefore, self-purification is the first step. When the heart is pure, we at once realize what is our duty at every moment".

<sup>36</sup> Mohandas Karamchand Gandhi, in *Young India*, 39 April 1925, para. 153, as quoted in Bose, 1957, p. 201, see *supra* note 7: "The spiritual weapon of self-purification, intangible as it seems, is the most potent means of revolutionizing one's environment and loosening external shackles. It works subtly and invisibly; it is an intense process though it might often seem a weary and long-drawn process, it is the straightest way to liberation, the surest

nents should be viewed as threats faced by an institutional *satyagrahi* who is on an eternal quest for the ultimate values of truth and non-violence.

#### 15.4. Conclusion

Gandhi's moral prescription was the defining moment of international conscience in the twentieth century. His ideas remain the philosophical touchstone to examine any global movement even close to 70 years after his death. This assumes significance given the fact that Gandhi never addressed the subject of international law directly, much less international criminal law (which never existed as a formal discipline when he lived). The prescription of *ahimsa*, which is fundamental to Gandhian philosophy as analysed in this chapter, finds application in the judicial attempts of international criminal tribunals to hold individuals accountable for mass crimes. Without resorting to violence or revenge, perpetrators are tried and punished. However, it is argued that there is a need to further embrace Gandhism by eliminating the concept of life imprisonment in international criminal law *in toto*. A person facing trial before an international criminal tribunal should be viewed as a 'moral patient' who needs a Gandhian judicial prescription. Love, compassion, mercy and empathy must flow from the judicial pens of international criminal judicial officers engaged in the noteworthy task of promoting global peace and justice. There is no doubt that Gandhi would have wholeheartedly supported the justice initiatives of international criminal law and launched a global *satyagraha* for the strengthening of this remarkable branch of international law.

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and quickest and no effort can be too great for it. What it requires is faith – an unshakable mountain-like faith that flinches from nothing”.

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## Hans Kelsen and the Move to Compulsory Criminal Jurisdiction in International Law

Jochen von Bernstorff\*

Kelsen was a Viennese law professor in between the two World Wars, who is seen by many, particularly those on the continent, as one of the most – if not *the* most – outstanding jurist of the twentieth century. He was not only an international lawyer, but also a legal theorist and eminent scholar of constitutional law. His extremely successful academic career, in the period before, between, and after the two World Wars, took him from Vienna, Cologne, and Geneva, to Harvard and Berkeley. However, nearly all moves and emigration were involuntary and came in response to life-threatening perils, persecution, or political defamation, all of which had an anti-Semitic basis. Kelsen was a radical modernist thinker, social democrat and liberal cosmopolitan. His writings on constitutional law, democracy theory and international law were hotly debated in Germany during the Weimar Republic. Among Kelsen's students were outstanding international lawyers, namely Alfred Verdross, Josef L. Kunz, Hans Morgenthau and also Hersch Lauterpacht. His writings on international law include numerous articles, a monograph on the problem of sovereignty, a general text-book, Hague Lectures and a United Nations ('UN') Charter Commentary. His vigorous defence of democracy and a cosmopolitan international legal order made him subject to harsh criticism of mainstream German scholars, most of whom were contemptuous of Weimar democracy and the League of Nations.

What is perhaps less well known is that Hans Kelsen also was one of the first scholarly promoters of introducing compulsory criminal jurisdiction in international law. This quest formed part of his general support

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for introducing a strong world court after World War II. Somewhat unexpectedly, however, Kelsen at the same time belonged to the small group of cosmopolitan scholars who were very critical of the Nuremberg Trials, which are commonly hailed as a historical breakthrough for international criminal law. Yet, as I will attempt to explain in this chapter, Kelsen's stance on Nuremberg was a direct and logical consequence of his general approach to international adjudication.

This chapter will first explore, in greater detail, Kelsen's belief in the international judiciary in the context of the liberal pacifist quest for compulsory arbitration and adjudication in international relations in the first three decades of the twentieth century. Next, it will consider Kelsen's 1940s blueprint of a court establishing compulsory criminal jurisdiction. Lastly, the chapter will deal with Kelsen's critical stance regarding the move to criminalising aggressive war in Nuremberg, in which he had an unexpected ally in Hans Morgenthau.

### 16.1. Kelsen and the International Judiciary

From the middle of the 1930s to the end of World War II, Kelsen devoted most of his scholarly attention to the question of a political reform of the international legal community's institutional structure. Before the outbreak of World War II, his publications dealt with discussions about the reform of the League of Nations that had been ongoing since the mid-1930s.<sup>1</sup> Later, Kelsen's work on this topic made a contribution to the debate over a new, peace-securing world organisation that got under way during the war.<sup>2</sup> At the centre of these publications stood the *de lege ferenda* call for the establishment of an international court charged with compulsory adjudication. Kelsen's blueprint of a constitutive document

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<sup>1</sup> Hans Kelsen, *The Legal Process and International Order*, The New Commonwealth Research Bureau Publications, London, 1934; Hans Kelsen, "Les résolutions de la S.D.N. concernant la séparation du Pacte et des Traités de Paix", in *Revue de Droit International et de Législation Comparée (RDILC)*, 1939, vol. 1, pp. 101 ff. For a critical revision of the various provisions of the Charter, see Hans Kelsen, "Revision des Völkerbundstatus", in *Legal Technique in International Law: A Textual Critique of the League Covenant*, Geneva Research Center, 1939; Hans Kelsen, "Sanktionen sind Sache des Gerichts", in *Geneva Press Service*, 10 July 1936, pp. 1–3.

<sup>2</sup> Hans Kelsen, "The Old and the New League: The Covenant and the Dumbarton Oaks Proposals", in *American Journal of International Law*, 1945, vol. 39; Hans Kelsen, "The Strategy for Peace", in *The American Journal of Sociology*, 1944, XLIX, pp. 381 ff.; Hans Kelsen, "International Peace by Court or by Government?", in *The American Journal of Sociology*, 1941, XLVI, pp. 571 ff.

for the new world organisation made the court the central organ, whose decisions would have to be enforced by a Council of the great powers. The creation of such a court rendering binding decisions was the institutional core of Kelsen's cosmopolitan project.

Having witnessed two World Wars, Kelsen saw in the rule of law in international relations, secured by courts rendering binding decisions, the only way to a more peaceful world order. For Kelsen, the state of peace pursued by compulsory jurisdiction<sup>3</sup> did not mean the complete absence of violence, but merely a state of relative peace.<sup>4</sup> In that sense Kelsen set himself apart from a 'utopian pacifism', which he regarded as a serious threat to international politics.<sup>5</sup> In the future, the decision to use force would no longer remain within the competency of individual legal subjects, but would be transferred to central organs of the community for the purpose of sanctioning violations of the law. The final, binding decision about the existence of a violation of the law subject to sanction, referred to by Kelsen as a 'delict', would be made by a central court organ *ex officio* or at the request of the contending parties. The central place that Kelsen accorded compulsory jurisdiction within the legal system had already manifested itself clearly in the 1920s with respect to national law in his scholarly analysis of the dispute over the reach of constitutional jurisdiction in the Weimar Republic.<sup>6</sup> Kelsen's approach to both issues seems to be marked by Kelsen's general faith in the peace-creating function of constitutional adjudication, which he helped to develop and introduce in Austria after World War I.

The real originality in Kelsen's works on international law from this period lies in the direct combination of concrete *de lege ferenda* proposals and his own socio-historical studies that buttressed his policy proposals. As a constructive justifying strategy, Kelsen developed his own theory of the evolution of legal systems, which, applied to international law, made

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<sup>3</sup> See the programmatic title of his book *Peace through Law*, The University of North Carolina Press, Chapel Hill, 1944.

<sup>4</sup> Hans Kelsen, "The Law as a Specific Social Technique", in *University of Chicago Law Review*, 1941, vol. 9, no. 81.

<sup>5</sup> Hans Kelsen, 1944, chap. VIII, see *supra* note 3.

<sup>6</sup> Hans Kelsen, "Wesen und Entwicklung der Staatsgerichtsbarkeit: Überprüfung von Verwaltungsakten durch die öffentlichen Gerichte", in Heinrich Triepel, Hans Kelsen and Max Lauer (eds.), in: *Veröffentlichungen der Vereinigung der Deutschen Staatsrechtslehrer, Heft 5, Tagung vom 23. und 24. April 1928 in Wien*, W. de Gruyter, Berlin, 1929, pp. 30–88.

the establishment of compulsory international jurisdiction seem like the next step in a progressive development of the international legal order. According to this theory, decentralised primitive” legal orders historically started to centralise their legal functions by introducing compulsory jurisdiction on a centralised level. A centralised legislature and executive branch could then follow as a second step.<sup>7</sup> To further underpin his legal-political convictions, Kelsen trained his critical eye on the traditional international legal doctrine concerning the function of international courts in international relations, such as the doctrine of the non-justiciability of political disputes. For him, every political dispute could conceptually be turned into a legal one. Kelsen thus solicited support for the establishment of compulsory jurisdiction as the central element of his cosmopolitan project on three different levels: first, through the constructive articulation of a draft charter for the new world organisation; second, through the equally constructive development of his own general theory of the evolution of legal systems; and third, by deconstructing those doctrinal elements in international legal scholarship that could be marshalled against his *de lege ferenda* proposal.

In 1944, Kelsen published a draft charter for a ‘Permanent League for the Maintenance of Peace’ as the successor organisation to the League of Nations.<sup>8</sup> Kelsen’s new world organisation had four main organs: Assembly, Court, Council, and Secretariat.<sup>9</sup> The charter consisted of clear procedural rules governing the working relationships between the four organs. The only substantive regulation was a comprehensive prohibition of the use of force on the part of members of the new organisation.<sup>10</sup> If a State wanted to enforce international legal rules through war or forcible reprisals against another member State, it was up to the Court, at the request of the affected State or the Council, to decide whether the charter had been violated. Only after the Court had determined that the law had been broken could the Council impose the necessary military and economic sanctions on the responsible member States. In Kelsen’s draft charter, the Council could take action on the matter of a sanction only on the basis of, and in conformity with, the Court’s finding that the State conduct

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<sup>7</sup> Jochen von Bernstorff, *The Public International Law Theory of Hans Kelsen: Believing in Universal Law*, Cambridge University Press, Cambridge, 2010, chap. 6A.

<sup>8</sup> Hans Kelsen, 1944, Annex I, pp. 127–40, see *supra* note 3.

<sup>9</sup> *Ibid.*, art. 2, p. 127.

<sup>10</sup> *Ibid.*, art. 34, p. 134.

in question had been illegal. The Court became the central organ whose actions bound the Council. The eruption of violence in international relations was hereby to be rationalised in a judicially dominated and fully institutionalised procedure.

With this, Kelsen was reviving the Hague Movement's strategy of 'juridifying' international relations through obligatory arbitration.<sup>11</sup> The international pacifist movement had already made the development of the international judiciary one of its central demands in the first two decades of the century. The decisions rendered by international tribunals over legal disputes, in the view of these authors, should be implemented by an international organisation by way of collective enforcement measures.<sup>12</sup> These demands, put forth in German scholarship even before and during World War I by Nippold, Schücking and other authors,<sup>13</sup> could not prevail during the political negotiations over the Covenant of the League of Nations.<sup>14</sup> The call for compulsory jurisdiction<sup>15</sup> fell on deaf ears in Paris and Gene-

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<sup>11</sup> Much to the chagrin of the pacifist movement, the Second Hague Conference in 1907, because of the alleged obstructionist attitude of the Reich government, was able to agree only on a voluntary form of arbitration by the Court of Arbitration in The Hague. If the pacifists had their way, the Third Hague Conference would finally remedy this shortcoming. On this, see, from the perspective of someone involved in the pacifist movement, Otfried Nippold, *Die Gestaltung des Völkerrechts nach dem Kriege*, O. Füssli, Zurich, 1917, pp. 12–27.

<sup>12</sup> On the blueprints of the "League to Enforce Peace", see *ibid.*; Otfried Nippold, *Der Völkerbundsvertrag und die Frage des Beitritts der Schweiz*, K.J. Wyss Erben, Bern, 1919, pp. 5–6.

<sup>13</sup> Walther A. Schücking, *Der Staatenverband der Haager Konferenzen*, Duncker & Humblot, Munich, 1912. Alongside the Court of Arbitration in The Hague, an international agency was to be created that would be staffed with independent international lawyers and able to function as an obligatory and non-partisan arbitration authority, see *Der Weltfriedensbund und die Wiedergeburt des Völkerrechts*, Verlag Naturwissenschaften, Leipzig, 1917.

<sup>14</sup> David Kennedy, "The Move to Institutions", in *Cardozo Law Review*, 1987, vol. 8, no. 5, p. 888.

<sup>15</sup> At the time of the Paris negotiations, the pacifist conception became the basis of the official German proposals for the League of Nations. The so-called 'Gelehrtenentwurf' [Experts' Blueprint] (on this see Philipp Zorn, *Der Völkerbund*, Engelmann, Berlin, 1919) was introduced into the Paris negotiations by the Reich government in slightly modified form, though it failed to have any influence on the Covenant of the League of Nations that was finally agreed upon. See "Entwurf der Reichsregierung als Note an die Pariser Friedenskonferenz vom 9. Mai 1919", Berlin in Alma Luckau, *The German Delegation at the Peace Conference*, Columbia University Press, New York, 1941, pp. 225–33.

va after World War I.<sup>16</sup> The influential British draft by General Smuts, on which Wilson had based the revision of his own first draft that he brought to Paris, opted instead for a strong Council of the great powers, which was to come up with and implement political solutions to disputed issues. A neutral mediation authority was seen as an unnatural superstructure that was not in accord with the reality of the co-existence of sovereign States:

The new institution must not be something additional, something external, superimposed on the existing structure. It must be an organic change; it must be woven into the very texture of our political system. The new motive of peace must in future operate internally, constantly, inevitably, from the very heart of our political organization, and must, so to speak, flow from the nature of things political.<sup>17</sup>

The Covenant of the League of Nations subsequently institutionally enshrined the primacy of politics over international law with the powerful organ of the Council.<sup>18</sup> Agreement could be reached only on the formula in Article 14 of the Covenant, which charged the Council with drafting a plan for the establishment of a permanent court of international justice.<sup>19</sup> In effect, then, the new institutional arrangement failed to institutionalise the encompassing and compulsory judicial controls of political decisions taken in and outside of the new institution, as demanded by internationalists.<sup>20</sup> To be sure, the Covenant itself, in Article 12, provided for a process

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<sup>16</sup> In the response (written by Robert Cecil) of 22 May 1919, the conference rejected the German proposals for obligatory arbitration and a permanent international court as being impractical at that time. See the response in David H. Miller, *The Drafting of the Covenant*, Vols. I–II, G. P. Putnam’s Sons, New York, 1928, pp. 539–41.

<sup>17</sup> Smuts’s Plan, printed in *ibid.*, p. 46.

<sup>18</sup> The institutional structure of the Paris blueprint of the League of Nations envisioned three main organs: the Assembly of all members states, the Council of the five great powers, and the Secretariat. In other words, there were two political organs and one administrative organ.

<sup>19</sup> On the history of the creation of the Permanent Court of International Justice (‘PCIJ’), see Walther A. Schücking and Hans Wehberg, *Die Satzung des Völkerbundes*, 2nd rev. ed., Vahlen, Berlin, 1924, pp. 556–68.

<sup>20</sup> The statute for the PCIJ was adopted only by a decision of the General Assembly on 13 December 1920. However, through Article 13 of the Covenant, the jurisdiction of the court was linked to the voluntary declaration by the state in question to abide by the decision. The attempt, especially by South American states, to enshrine obligatory arbitration in the statute proposed by the Council did not find enough support in the first session of the General Assembly. The majority of the states joined the opinion of the Council that the time for such a provision was not yet ripe: on this, see *ibid.*, p. 563. On the compatibility of an ob-

of dispute settlement, which obligated the members of the League, in case of a dispute, to submit the matter to “either arbitration or judicial settlement or to enquiry by the Council”. Further, the contending parties could not resort to war until three months after the announcement of the decision.<sup>21</sup> Still, in this case again, given the fact that States could choose between political settlement by the Council and judicial proceedings or arbitration, the contending parties were not obligated to subject themselves to a binding legal decision.<sup>22</sup> A later attempt to introduce compulsory jurisdiction by amending the Covenant, in the form of the so-called ‘Geneva Protocol’, failed in 1924 when Britain ultimately did not ratify the document.<sup>23</sup> Moreover, while the arbitration treaty of 1928 that supplemented the Covenant of the League of Nations, the so-called ‘General Act’, introduced compulsory jurisdiction in a differentiated procedure,<sup>24</sup> it limited such jurisdiction through the possibility of making reservations as allowed under Article 39 of the Charter.<sup>25</sup>

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ligatory jurisdiction with the Covenant of the League of Nations, see P.J. Baker, “The obligatory jurisdiction of the Permanent Court of International Justice”, in *Baltic Yearbook of International Law*, 1925, vol. IV, pp. 68–102.

<sup>21</sup> On Article 12, see Schücking and Wehberg, 1924, pp. 501–14, *supra* note 19.

<sup>22</sup> Hans Wehberg, “Der Weltschiedsvertrag der Generalakte”, in *Völkerbund: Monatsschrift der Dt. Liga für Völkerbund*, 1929, vol. 2, p. 39.

<sup>23</sup> Even with this ambitious project, the preparatory commission, in the unanimously adopted report to the General Assembly of the League of Nations, maintained that conflicts involving territorial issues and the revision of treaties should remain excluded from the system of arbitration. See the report by N. Politis to the Assembly on 1 October 1924, printed in *Niemeyers Zeitschrift für Internationales Recht*, 1924–5, vol. 33, pp. 172–201 [185–6].

<sup>24</sup> Following the failure of non-judicial dispute settlement, a party to the treaty could no longer avoid judicial proceedings: see Articles 17 and 21 of the General Act, printed in Wilhelm G. Grewe (ed.), *Fontes Historiae Iuris Gentium. Quellen zur Geschichte des Völkerrechts*, vol. 3/2, W. de Gruyter, Berlin, 1992 [1815–1945], pp. 1067–78.

<sup>25</sup> “The General Act is the first instrument which aims at institutionalizing obligatory arbitration in the case of failure of previous conciliation as a means of settling non-legal disputes”, quoted from Karin Oellers-Frahm and Norbert Wühler, *Dispute Settlement in Public International Law*, Springer, New York, 1984, p. 61, with additional references. On this see James L. Brierly, “The General Act of Geneva 1928”, in *Baltic Yearbook of International Law*, 1930, vol. XI, pp. 119 ff.; Hans Wehberg, “Der Weltschiedsvertrag der Generalakte”, in: *Völkerbund. Monatsschrift der Deutschen Liga für Völkerbund*, 1929, vol. 2, p. 40; E.H. Carr, *The Twenty Years' Crisis 1919–1939*, Perennial, New York, 2001 [1939], p. 185.

## 16.2. Compulsory Criminal Jurisdiction

Kelsen's own draft charter in 1944 was based on the conviction that the absence of a global court rendering compulsory decisions on any dispute brought before it by States or organs of the League had permanently weakened the international legal order in the inter-war period. In his blueprint, the jurisdiction of the court extended to all disputes that arose between members. As laid out above, that also included the matter of the legality of the use of force in international relations. In Kelsen's conception, war and reprisal were possible only as legally authorised sanctions against a State that was violating the charter. Imposing the sanction presupposed a court's decision that the member had in fact broken the rules. To that extent, not only did the monopoly of force lie with the world organisation, but the use of force was possible only to enforce international law on the basis of a court decision. Within his vision of universal law, war and reprisals became acts of law enforcement of the international legal community. As such, this legal community was in need of a central organ that determined the illegality of the behaviour being remedied and reviewed the legality of the applied sanction. In Kelsen's eyes, only a judicial organ was able to exercise that function.

The substantively unlimited competence of the court also reflected Kelsen's conception of universal law. The political sphere to be regulated by international law was not restricted by a pre-legal concept of sovereignty. A rigid conception of the '*domaine réservé*' or 'domestic jurisdiction', in the sense of an untouchable core area of State sovereignty, was incompatible with the objective construction of international law by the Vienna School.<sup>26</sup> According to the doctrine of the primacy of international law, it could claim jurisdiction over, and regulate, any matter previously regulated by national law. If the judicial organ was to decide all disputes between members brought before it, its jurisdiction could not be subject to any *a priori* substantive limitations. In another annex to his draft statute, Kelsen added procedural rules on how to punish those individuals who, as organs of their States, were responsible for the violation of the charter.<sup>27</sup> The jurisdiction of the court over criminal matters included the possibility,

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<sup>26</sup> On this see Jochen von Bernstorff, 2010, chap. 3 C IV, *supra* note 7.

<sup>27</sup> Hans Kelsen, 1944, annex II, art. 35a, p. 144, see *supra* note 3; excluded from this, according to Article 35c of the draft, were representatives of states belonging to the Council of the organization (see p. 145).

upon the request by a member State or the Council, to prosecute and try war crimes committed or ordered by governments.<sup>28</sup> Members of governments were to be punished by the international court as they would have been according to their own State law if they had acted as organs of the State.<sup>29</sup> Member States were obligated to hand over individuals prosecuted by the court.

Kelsen, in light of the widespread violations of international humanitarian law and the indescribable horrors of the Holocaust committed during World War II, did not believe that the doctrine of the functional immunity of State organs was in any way legally sacrosanct. He argued that the immunity of heads of States could be completely revoked by the new charter as a treaty under international law. Direct jurisdiction over individuals, as well as individualised prosecution, indictment and conviction through international courts, was perfectly in line with the concept of international law as articulated by the Vienna School through the concept of a monist global legal order according international law primacy over national law.<sup>30</sup> The court envisioned by Kelsen was composed of five criminal lawyers and twelve international lawyers, thus it not only had the power to decide any dispute brought before it by the organs or individual member States, but it also functioned as a two-tiered criminal court for individual representatives of governments who could be charged with violations of international law.

The proposed powers of the new international court were a political reaction by Kelsen to the ‘failure’ of the League of Nations and the impending legal processing of war crimes and the Holocaust.

For Kelsen, the problem of international jurisdiction before and during World War II revolved above all around the future institutional development of international relations; that development could be achieved only by way of an international treaty and thus via international law. With the theoretical insight of the legal scholar into the specific inherent rationality of highly evolved legal systems, the Vienna School in international law favoured, to this end, the creation of a court that rendered binding decisions. The transfer of their system-oriented approach to the law to

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<sup>28</sup> *Ibid.*, annex I, art. 35b, section 1, p. 144.

<sup>29</sup> *Ibid.*

<sup>30</sup> On the individual within Kelsen’s doctrine of international law, see Jochen von Bernstorff, 2010, chap. 4 B, *supra* note 7.

international law was beyond question for them. If international law had the quality of law, it had to be conceptualised as a complete system of norms. In this respect, the relatively small number of general international legal norms was no obstacle to the creation of a compulsory jurisdiction. Had not the League of Nations given excessive consideration to the power-logic of politics in the structure of its organs? As they saw it, the existing international legal framework was in dire need of better judicial support. Irrational power politics had brought war, now a unified international legal system was to bring peace. International legal validity, which came with the criticised notion of formal equality, had an irreplaceable function and value for taming and civilising the irrational forces of nationalism and unrestrained pursuit of alleged national interests. The last sentence of the lectures on “Law and Peace in International Relations”, delivered by Kelsen at Harvard in 1942, remained programmatic for this thinking during World War II: “The idea of law, in spite of everything, seems still to be stronger than any other ideology of power”.<sup>31</sup>

### 16.3. Kelsen on the Nuremberg Trials

In 1945, Kelsen must have been strongly disappointed by the position and competencies the founders of the UN accorded to the International Court of Justice (‘ICJ’). As in 1918, strong judicial controls were not the central concern of the Allies when erecting the edifice of the new world organization in the last three years of World War II. Regarding the jurisdiction of the new Court, the drafters of the UN Charter and the ICJ Statute relied heavily on the jurisdictional rules of its predecessor from the inter-war period, the Permanent Court of International Justice. Hence, jurisdiction of the Court was only foreseen on the basis of voluntary acceptance of the respective States Parties, and only confined to ‘legal’ disputes as opposed to ‘political’ ones. In addition, individuals had no standing before the court, neither as applicants nor as defendants. Thus, unlike in Kelsen’s wartime blueprint, the new Court could not render judgment on cases of individual criminal responsibility for war crimes. Instead, the Allies opted for a special *ad hoc* tribunal outside the UN framework based on a separate agreement concluded amongst them (the London Agreement). This agreement foresaw jurisdiction of the temporarily erected International Military Tribunal for individual crimes against peace, war crimes and

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<sup>31</sup> Hans Kelsen, *Law and Peace in International Relations*, William S. Hein & Co., Buffalo, 1997, p. 170.

crimes against humanity. It was the establishment and application of the first notion, the crimes against peace, which gave rise to Kelsen's and Morgenthau's harsh critique of the Nuremberg Trials.

### 16.3.1. Waging Aggressive War as an Individualised Crime

'Crimes against peace' are defined in the Charter of the Tribunal, which was annexed to the London Agreement, as "planning, preparation, initiation, or waging a war of aggression, or a war in violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing". In the first trial against 24 of the highest-ranking German war criminals, which began on 20 November 1945 and continued until October 1946, twelve defendants were found guilty of, *inter alia*, waging 'aggressive war' or conspiracy thereof. The majority of this group was sentenced to hang, all of them in combination with additional charges (Frick, Göring, Jodl, Keitel, Ribbentrop, Rosenberg, and Seyss-Inquart) or given life sentences (Hess, Räder and Funk).<sup>32</sup> In the judgment, the Tribunal attempted to argue that individual responsibility for crimes against peace existed before the London Agreement gave the Tribunal jurisdiction over these crimes. Otherwise, it would have had to apply Article 6 of the Nuremberg Charter retroactively. In order to avoid the *nullum crimen* problem, the Tribunal thus needed to find a norm which had stipulated international criminal responsibility of State officials for waging war before the Nazis began their international acts of aggression in 1938.

Until World War I, the right to wage war had not been seriously questioned by international lawyers as a sovereign prerogative of States in international relations.<sup>33</sup> The first international treaty which substantively attempted to outlaw war as a matter of national policy was the Briand-Kellogg Pact of 1928. Article 1 of the Pact states that the "High Contracting Parties solemnly declare in the names of their respective peoples that they condemn recourse to war for the solution of international controversies and renounce it, as an instrument of national policy in their relations with one another". No explicit references to collective or individual criminal responsibility were to be found in the Briand-Kellogg Pact, but it was

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<sup>32</sup> Two defendants found guilty of 'crimes against peace' successfully pleaded mitigating circumstances: Neurath was sentenced to 15 years and Dönitz to 10 years' imprisonment.

<sup>33</sup> Bernhard Roscher, *Der Briand Kellogg-Pakt von 1928*, Nomos Verlagsgesellschaft, Baden-Baden, 2004, chap. II.

the only international treaty that could serve as an applicable pre-war rule restricting *ius ad bellum* that the Tribunal sought.

But how could the Nuremberg Tribunal deduce criminal responsibility of individuals from the Pact, which had merely declared war waged by States under specific circumstances to be illegal under international law? The Tribunal at the outset conceded that the Briand-Kellogg Pact had not explicitly foreseen individual criminal responsibility but nonetheless attempted to develop individual responsibility by interpretation. The main argument for individual criminal responsibility under the Pact was a constructed analogy with existing national practices of criminal prosecution of individuals violating rules of the Hague Conventions on international humanitarian law. Legal developments in the criminalisation of *ius in bello* (as in the Hague Conventions) in the early twentieth century were thus argumentatively transferred by the Tribunal to the *ius ad bellum* area (as in the Briand-Kellogg Pact):

[...] it is argued that the Pact does not expressly enact that such wars are crimes, or set up courts to try those who make such wars. To that extent the same is true with regard to the laws of war contained in the Hague Convention. The Hague convention of 1907 prohibited resort to certain methods of waging war. These included the inhumane treatment of prisoners, the employment of poisoned weapons, the improper use of flags of truce, and similar matters. Many of these prohibitions had been enforced long before the date of the Convention; but since 1907 they have certainly been crimes, punishable as offences against the laws of war; yet the Hague Convention nowhere designates such practices as criminal, nor in any sentence prescribed, nor is any mention made of a court to try and punish offenders. For many years past, however, military tribunals have tried and punished individuals guilty of violating the rules of land warfare laid down by this Convention.<sup>34</sup>

Upon likening national developments in the criminalisation and prosecution of violations of *ius in bello* with the current legal situation under *ius ad bellum* following the Briand-Kellogg Pact, the analogy in the judgment is then based upon a moral *a fortiori* reasoning:

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<sup>34</sup> International Military Tribunal, Trial of the Major War Criminals before the International Criminal Tribunal, Nuremberg, Vol. 1, Judgment of 30 September – 1 October 1946, p. 220 ([www.legal-tools.org/doc/388b07/](http://www.legal-tools.org/doc/388b07/)).

In the opinion of the tribunal, those who wage aggressive war are doing that which is equally illegal, and of much greater moment than a breach of one of the rules of the Hague Convention.<sup>35</sup>

Because waging war in the first place (*ius ad bellum*) has more dramatic political and moral effects than violating specific rules of conduct in war (*ius in bello*), it should also be criminalised. In a later part of the judgment, this essentially moral *a fortiori* reasoning is argued in universalist terms:

The charges in the indictment that the defendants planned and waged aggressive wars are charges of the utmost gravity. War is essentially an evil thing. Its consequences are not confined to the belligerent states alone, but affect the whole world. To initiate a war of aggression, therefore, is not only an international crime; it is the supreme international crime differing only from other war crimes in that it contains within itself the accumulated evil of the whole.<sup>36</sup>

With this justification, which was used to overcome the *nullum crimen* problem faced by the Tribunal, the ‘crime of aggression’ was for the first time in history tried by international judges.

### **16.3.2. Kelsen’s Reading of the Nuremberg Trials: A Missed Opportunity for the Advancement of International Law**

It needs to be mentioned at the outset that both Kelsen and Morgenthau did not oppose the conviction of Nazi Officials in general. Both defended the need to try high ranking Nazi-officials for the crimes committed within and outside of Germany since 1933. Both also did not see the at least partly retroactive character of the judgment as a legally insurmountable problem of the trial. Kelsen expressed two main grievances with regard to the judgment: first, its flawed attempt, in his view, to deduce international criminal responsibility from the Briand-Kellogg Pact; and second, the insufficient legal foundation of the trial with the absence of the consent of the vanquished States and the related lost opportunity for the international community to generally establish individual criminal responsibility in international law via a universal multilateral instrument.

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<sup>35</sup> *Ibid.*, p. 220.

<sup>36</sup> *Ibid.*, p. 186.

As to the ‘crimes against peace’, Kelsen clearly rejected the argument developed by the Tribunal to justify the assumption that criminal responsibility could be inferred from the Briand-Kellogg Pact by way of analogy with the Hague Conventions:

The differences between the Hague Convention on the rules of warfare and the Briand-Kellogg Pact is that the former can be violated by acts of state as well as by acts of private persons, whereas the latter can be violated only by acts of states. The Briand-Kellogg Pact does not – as does the Hague Convention – forbid acts of private persons.<sup>37</sup>

Given that the Briand-Kellogg Pact, unlike the Hague Conventions, did not oblige or authorise States Parties to punish under their own laws the individuals who acted in their capacity as organs of a State-waged war in contravention of the Pact, Kelsen was of the view that Article 6 of the Nuremberg Charter had created genuinely new law and not merely applied the Briand-Kellogg Pact.

According to his interpretation of the events in Nuremberg, the application of the newly established ‘crimes against peace’ to acts of aggression which were committed during the ‘Third Reich’ through the Nuremberg judgment was clearly a form of retroactive legislation and punishment. However, the prohibition of retroactive legislation was no recognised rule of international law and in most domestic legal systems was only valid with important exceptions. Since it was not an established rule of international law, the Allies in 1945 did not violate international legal rules by authorising the application of these newly-established crimes to acts committed during the war.<sup>38</sup> There were simply no applicable rules which prohibited the new rules established by the London Agreement. Kelsen, at this juncture, did not explicitly refer to the *Lotus* Principle or the Kantian negative rule according to which – in the absence of a specific prohibition – restrictions upon the freedom of the Allies to establish retroactive legislation through the London Agreement could not have been presumed.<sup>39</sup> However, in the absence of a legal prohibition, the matter for Kelsen could indeed be assessed on moral grounds or ‘general principles

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<sup>37</sup> Hans Kelsen, “Will the Judgement in the Nuremberg Trial constitute a Precedent in International Law?”, in *International Law Quarterly*, 1947, pp. 153–71, at p. 161.

<sup>38</sup> *Ibid.*, p. 164.

<sup>39</sup> Permanent Court of International Justice, *The Case of the S.S. “Lotus” (France v. Turkey)*, Judgment, 7 September 1927, *Series A, no. 10*.

of justice'. For him, there were good "moral" reasons to allow retroactive punishment of those persons "who are morally responsible for the international crime of the second World War".<sup>40</sup> The fact that there was no clear rule against retroactive legislation in international law and that there was a demand of moral justice to punish the perpetrators led Kelsen to endorse retroactive punishment in Nuremberg.

Much more worrying for Kelsen seems to have been his second main point of critique, namely the limited relevance of the trial for the advancement of international law. Very much in the late nineteenth century German international law tradition, Kelsen had always judged international law against the background of a highly developed and formalised Western national legal system. Hence his labelling of international law as a "primitive" law, which still had to rely on custom and decentralised legislation, enforcement and adjudication.<sup>41</sup> The move from collective to individual responsibility was a decisive evolutionary step in turning a primitive legal order into a developed one; analogous to the development of the modern State, international law was supposed to move from the phase of privately declared vendettas or blood-feuds to the stage of judicially controlled individual criminal responsibility.

The problem with Nuremberg was that the Allies had failed to advance general international law to that desired stage of development. They had failed to do so due to various shortcomings in the legal architecture of the Nuremberg Trials. There was first the missing consent to the London Agreement of those States that had lost the war and whose nationals were being tried. The Allies, exercising the sovereign rights for Germany as a whole in a condominium through the Allied Control Council, had not made the effort to formally declare Germany's consent to the trial. For Kelsen, the absence of the consent of the European Axis powers was problematic:

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<sup>40</sup> Kelsen, 1947, p. 165, see *supra* note 37.

<sup>41</sup> Kelsen agrees with the argument put forth by the Tribunal itself: "In the first place, it is to be observed that the maxim *nullum crimen sine lege* is not a limitation of sovereignty, but is in general a principle of justice. To assert that it is unjust to punish those who in defiance of treaties and assurances have attacked neighboring states without warning is obviously untrue, for in such circumstances the attacker must know that he is doing wrong, and so far from it being unjust to punish him, it would be unjust if his wrong were allowed to go unpunished", see International Military Tribunal, Judgment of 30 September – 1 October 1946, p. 219, see *supra* note 34.

If, however, a tribunal is instituted to make individuals criminally responsible for their State's violation of a treaty, it is not exactly an improvement of general international law to establish that tribunal without the consent of the State accused of the treaty violation.<sup>42</sup>

While admitting that this was more a formal rather than a substantive charge against the judgment, Kelsen moves on to the main point of his critique. What really impaired the authority of the judgment was that the rules established by the London Agreement had not been established as general principles of international law, but as rules applicable only to vanquished States by the victors.<sup>43</sup> Through its asymmetrical establishment and application, the London Agreement had the character of a '*privilegium odiosum*'. This impression was aggravated by the fact that the Tribunal was exclusively composed of representatives of victorious States directly affected by the crimes over which the Tribunal had jurisdiction. Representatives of neutral States were excluded from the bench. The Allies became judges in their own cause.<sup>44</sup>

The Nuremberg Trials in their basic architecture had not lived up to the principle of formal equality before the law, which for Kelsen was the very essence and unique property of law as a specific social technique that was distinguishable from every other form to exercise power over human beings.<sup>45</sup> All in all, Kelsen in 1947 saw Nuremberg as a lost opportunity to move from collective responsibility to individual responsibility in general international law. Not only had the Allies failed to enshrine this principle in a legal document of general application, such as the UN Charter, they also had missed the opportunity to provide a historical example for the neutral application of this principle in line with the ideal of formal equality.

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<sup>42</sup> Kelsen, 1947, p. 168, see *supra* note 40.

<sup>43</sup> *Ibid.*, p. 170.

<sup>44</sup> It needs to be mentioned here that the Tribunal in several cases reacted to this problem by dropping prosecutions once the defendant could prove that military forces or officials from the United States or United Kingdom acted in a similar manner during the war. See "International Military Tribunal (Nuremberg) Judgement and Sentences", in *American Journal of International Law*, 1946, vol. 41, no. 1, p. 172; *International Law Reports*, 1946, vol. 13, p. 203.

<sup>45</sup> Hans Kelsen, "The Essential Conditions of International Justice", in *Proceedings of the Thirty-fifth Annual Meeting of the American Society of International Law*, 24–26 April 1941, vol. 35, pp. 70 ff.

### 16.3.3. 'Crimes Against Peace' as Allied Moral Hypocrisy

As early as December 1948, Hans Morgenthau published a brief comment on the Nuremberg Trials in a non-scientific journal.<sup>46</sup> He interestingly concurred with Kelsen as to the fundamental problem of the trials. In his view, the eighteen men convicted at Nuremberg “were guilty of many crimes, and they were justly condemned and punished”. Like Kelsen, Morgenthau also took issue with the establishment and application of ‘crimes against peace’ in Nuremberg:

If the leaders of Nazi Germany are guilty of conspiring to wage, and of planning and waging, a war of aggression and a war in violation of international law, so are the leaders of France, Great Britain, and Russia. [...] German aggression and lawlessness were not morally obnoxious to France and Great Britain as long as they were directed against Russia. If one can believe Ribbentrop’s last plea, Stalin wired congratulations to Hitler upon the starting point of the Second World War, which became morally reprehensible in Russian eyes only on June 22, 1941.

For Kelsen and Morgenthau, the Allies in Nuremberg were judging in their own cause. By comparing the Nuremberg trial to a ‘punitive trial’ in the scholastic tradition, Morgenthau reminded the Allies that the scholastic just war tradition had limited and qualified the right of the princes to pass judgment on the justice of the enemy’s cause in war.<sup>47</sup> Morgenthau polemically observes a “flood of moralizing legend” and criticises the Allies for mistaking “the voice of the victor for the voice of Divine Justice”. A crime of aggression adjudicated by the victors in a punitive trial was inherently problematic in its inclination to hypocritical condemnation of the enemy by those who win the war. A modern and thus secular revitalisation of a just war concept in international relations was a dangerous undertaking. The reason was that the foundational circumstances of the scholastic concept had long vanished; namely the moral unity of Christendom and the originally rather strict doctrinal limitations of punitive wars.<sup>48</sup> Without these preconditions, a modern punitive war was problematic in its inherent tendency to demonise the opponent and to absolve one-

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<sup>46</sup> Hans J. Morgenthau, “America”, 7 December 1948, reprinted in Hans J. Morgenthau, *The Decline of Democratic Politics*, University of Chicago Press, 1962, pp. 377–79.

<sup>47</sup> *Ibid.*, p. 378.

<sup>48</sup> *Ibid.*

self from any wrongdoings by moralising one's own cause for, and conduct in, war. This Nietzschean critical sensibility with regard to the moralisation of politics and law was shared by both of Morgenthau's main intellectual reference points, namely Carl Schmitt's concept of the political and Kelsen's pure theory of law.

In his seminal *Politics among Nations* of 1948, Morgenthau only devotes a few lines to the Nuremberg Trials. According to his reading of the legal debate on Nuremberg, there was "no way of stating with any degree of authority whether any country which went to war after 1929 in pursuance of its national policies has violated a rule of international law and is liable before international law for its violation; or whether only those individuals responsible for preparing and declaring the Second World War are liable in this way; or whether all countries and individuals which will prepare for, and wage aggressive war in the future will thus be liable".<sup>49</sup>

The Nuremberg uncertainties about a question so fundamental as the legality of collective acts of violence in Morgenthau's view demonstrated the weakness of international law as a legal order. For him, both the uncertainty reigning in the *ius ad bellum* area as well as the consistent violation of previously less uncertain rules of the *ius in bello* raised serious doubts as to the validity of international legal rules in these areas. Uncertainty and lack of adherence thus could have repercussions for legal validity itself. In contrast to Kelsen's strict methodological dualism, the effectiveness of the norm (its '*Sein*') does affect its '*Sollen*'. In line with Morgenthau's realist approach, international law in his eyes is valid and generally adhered to in all areas where it regulates the delineation of jurisdictions and technical co-operation between States in times of peace,<sup>50</sup> its validity will however be at stake when vital political interests are involved and once war looms under the surface of inter-State diplomacy.

After Nuremberg, it took more than sixty years before a shaky consensus could be forged in a multilateral setting on how international law could define and prescribe individual criminal responsibility for waging aggressive war. What is being called the 2010 'Kampala compromise' includes a definition of the crime of aggression, which was intended to amend the Rome Statute of the International Criminal Court and was acti-

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<sup>49</sup> *Ibid.*, p. 218.

<sup>50</sup> *Ibid.*, pp. 210–11.

vated by the Assembly of States Parties as of 17 July 2018.<sup>51</sup> Even though international criminal law has advanced enormously over the last twenty years, the problem of the ‘*privilegium odiosum*’ through the asymmetrical application of existing rules remains a fundamental one. The definition of the crime of aggression has deliberately been made malleable in order not to impose an obligation to prosecute all acts violating the prohibition of the use of force. Only “manifest” violations of the prohibition of the use of force can be tried under the new definition.<sup>52</sup> This highly flexible substantive standard comes with the institutional privilege of the UN Security Council, dominated by Great Powers, to block investigations into alleged violations of the crime of aggression. The permanent members of the UN Security Council have thus been granted a convenient legal justification for preventing potential prosecution in cases of violations of the *ius ad bellum* in the future.<sup>53</sup> As long as it appears politically unimaginable, or even often technically impossible, for the International Criminal Court to indict leaders of the most powerful nations for waging illegal aggression, the promise of peace and global justice through international criminal law will remain a distant dream at best and another moralising legend at worst.<sup>54</sup>

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<sup>51</sup> ICC Assembly of States Parties, Resolution proposed by the Vice-Presidents of the Assembly Activation of the Jurisdiction of the Court over the crime of aggression, UN Doc. ICC-ASP/16/L.10, 14 December 2017 ([www.legal-tools.org/doc/d7cb22/](http://www.legal-tools.org/doc/d7cb22/)).

<sup>52</sup> Also critical of the qualification of the breach of the *ius ad bellum* is Andreas Paulus, “Second Thoughts on the Crime of Aggression”, in *European Journal of International Law*, 2010, pp. 117–1128, at p. 1121; less critical is Claus Kreß and Leonie von Holtendorff, “The Kampala Compromise on the Crime of Aggression”, in *Journal of International Criminal Justice*, vol. 8 (5), 2010, pp. 1179–217.

<sup>53</sup> In general, the “determination of an act of aggression by an organ outside the Court shall be without prejudice to the Court’s own findings under this Statute”, see ICC Assembly of States Parties, Review Conference Resolution, The Crime of Aggression, UN Doc. RC/Res.6, 11 June 2010, Annex I, Article 15bis(9) ([www.legal-tools.org/doc/de6c31/](http://www.legal-tools.org/doc/de6c31/)). Hence, the Court is not bound by the assessment of the UN Security Council. However, the UN Security Council can always block the investigation, per Article 15bis(8).

<sup>54</sup> The jurisdiction of the Court over the crime of aggression is further limited by the two following provisions of the ‘Kampala compromise’ (*ibid.*), namely Article 15bis(4): “The Court may, in accordance with article 12, exercise jurisdiction over a crime of aggression, arising from an act of aggression committed by a State Party, unless that State Party has previously declared that it does not accept such jurisdiction by lodging a declaration with the Registrar. The withdrawal of such a declaration may be effected at any time and shall be considered by the State Party within three years”; and 15bis(5): “In respect of a State

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that is not a party to this Statute, the Court shall not exercise its jurisdiction over the crime of aggression when committed by that State's nationals or on its territory".

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## ***Mens Rea*, Intentionality and Wittgenstein's Philosophy of Psychology**

**Jaroslav Větrovský\***

Philosophy is not a body of doctrine but an activity.

Wittgenstein, *Tractatus Logico-Philosophicus*

### **17.1. Introduction**

In many legal systems, including international law, crimes consist of two elements: the *actus reus*, that is, physical behaviour, either an act or omission, which is legally prohibited or gives rise to a legally prohibited result; and the *mens rea*, regarded as the mental state or attitude that a person holds in relation to their criminally relevant behaviour.<sup>1</sup> The Rome Statute of the International Criminal Court (hereinafter, the 'Statute' or the 'Rome Statute') leaves no space for doubt in this regard. A general rule set forth in Article 30(1) of the Statute provides that a person shall be criminally responsible and liable for punishment only if a criminal act (*actus reus*) was committed with intent and knowledge (*mens rea*).

Despite its relatively clear wording, the interpretation of the provision is a rather difficult one. Both key terms determining the scope of the *mens rea* element, that is, the intent and knowledge, are profoundly indeterminate and their use often varies from one context to another. In some cases, interpretive problems are purely technical and can be resolved by means of traditional methods of legal interpretation, in accordance with the judicial policy of the International Criminal Court ('ICC').<sup>2</sup> Often,

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<sup>1</sup> Antonio Cassese, *International Criminal Law*, Oxford University Press, Oxford, 2008, p. 53; Gerben Bruinsma and David Weisburd (eds.), *Encyclopedia of Criminology and Criminal Justice*, Springer, New York, 2014, p. 4066.

<sup>2</sup> For example, a question arose as to whether the rule expressed in Article 30 of the Rome Statute encompasses all possible forms of *mens rea* pertaining to international crimes, or whether other mental categories commonly recognised in domestic legal systems, namely recklessness, may also be applicable under this provision (cf. *Prosecutor v. Thomas*

however, the character of problems transcends the confines of international criminal law or criminal law in general, which means that tools other than law become necessary to justify their solutions.

For instance, a question has arisen whether the expression “committed with intent and knowledge” embedded in Article 30(1) ought to be interpreted as encompassing two separate conditions, intent and knowledge, or whether the latter condition is in some way incorporated into the former. Some authors argue that intent and knowledge are two distinct concepts which should not be assimilated.<sup>3</sup> This is, without a doubt, a true proposition. Intent and knowledge cannot be seen as one and the same. One can be aware of what one does, however, this can be done without having the intention to do so. For example, one can perfectly know that what they are doing is shooting at a person, and that by shooting at a person they can kill that person; yet they may shoot and kill the person unintentionally, as a result of an accidental shot. In this case, the conditions of intent and knowledge are truly separate, and for a crime to be committed under the Rome Statute, they must be satisfied simultaneously.

On the other hand, a person cannot be said to act intentionally if they are not aware of *what it is* that they are intentionally doing.<sup>4</sup> For example, a person cannot intentionally commit the crime of killing or wounding a combatant who surrendered,<sup>5</sup> if they were not aware of the

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*Lubanga Dyilo*, Pre-Trial Chamber I, Decision on the confirmation of charges, Case No. ICC-01/04-01/06, 29 January 2007, paras. 350 ff. ([www.legal-tools.org/doc/b7ac4f/](http://www.legal-tools.org/doc/b7ac4f/)). In the *Bemba* case, the Pre-Trial Chamber II held that “[w]ith respect to *dolus eventualis* as the third form of *dolus*, recklessness or any lower form of culpability, the Chamber is of the view that such concepts are not captured by article 30 of the Statute”. The conclusion was based on the Chamber’s proposition that the Rome Statute, “being a multilateral treaty, is governed by the principles of treaty interpretation set out in articles 31 and 32 of the Vienna Convention on the Law of Treaties”. See *Prosecutor v. Jean-Pierre Bemba Gombo*, Pre-Trial Chamber II, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo (‘Charging Decision’), Case No. ICC-01/05-01/08, 15 June 2009, paras. 360 ff. ([www.legal-tools.org/doc/07965c/](http://www.legal-tools.org/doc/07965c/)).

<sup>3</sup> Iryna Marchuk, *The Fundamental Concept of Crime in International Criminal Law*, Springer, New York, 2014, p. 128.

<sup>4</sup> Peter M.S. Hacker, *Wittgenstein: Mind and Will, Volume 4 of An Analytical Commentary on the Philosophical Investigations, Part I: Essays*, Blackwell, Oxford, 2000, p. 240.

<sup>5</sup> Cf. Statute of the International Criminal Court (‘ICC Statute’), 17 July 1998, in force 1 July 2002, Article 8(b)(vi) ([www.legal-tools.org/doc/7b9af9/](http://www.legal-tools.org/doc/7b9af9/)).

victim's combatant status and/or that the combatant surrendered. In this regard, the intent and knowledge are conceptually interrelated. Knowledge is already included in the concept of intention and, consequently, does not create a separate criterion of one's *mens rea*. It is therefore unsurprising, as some scholars have complained, that despite the wording of Article 30(1), the case law of the ICC ignores the "semantic difference between intent and knowledge", and that the two allegedly "independent entities" have been merged "into the fully-fledged definition of intent".<sup>6</sup> To reiterate, to commit a crime intentionally always means that the person knew about all circumstances to which their intention relates.

The relationship between the concepts of intent and knowledge is, however, only the tip of the iceberg. Probably the most important question that the concept of intent has traditionally raised is how one's intent to engage in criminal conduct might be discerned and evidenced in judicial proceedings. If a person commits an act which itself is legally prohibited or gives rise to a legally prohibited result, then how can judges know, or even legitimately suppose, that the person intended to commit such an act, to cause such a result, or at least, that the person knew that such a result would occur in the ordinary course of events? In other words, is it at all logically and practically possible for an international court to genuinely determine the 'inner' intent of a crime perpetrator, given the fact that such a determination may exclusively be carried out from the court's 'outer' perspective? Is it not true that facts, which can be evidenced in court, solely consist of one's physical or verbal behaviour, but not the intentions behind this behaviour? And, consequently, that in the absence of a confession only a perpetrator of a crime can really know what their intention was when engaging in the criminally relevant behaviour?

These and related issues will be addressed and subjected to a philosophical investigation in the following sections of the present chapter. Section 17.2. outlines the concept of intention<sup>7</sup> as it has generally been depicted in international criminal law. Section 17.3. will then point to the fact that the general approach of international criminal tribunals and doctrine to the concept of intention faithfully reflects the Cartesian account of mind-body dualism, according to which human body consists of two sub-

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<sup>6</sup> Marchuk, 2014, p. 127, see *supra* note 3.

<sup>7</sup> The terms 'intention' and 'intent' are used interchangeably.

stances: the matter of which body is made up, and the mind. Sections 17.4. and 17.5. will focus on *some* characteristic methods of Wittgenstein's philosophical investigations into psychological concepts and explain how the way in which these concepts have been formulated and construed is for the most part based on a misunderstanding of our ordinary language practices.<sup>8</sup> Next, Section 17.6. will specifically deal with Wittgenstein's inquiry into the 'grammar' of the concept of intention and, in particular, into its allegedly 'private' character, according to which only a person whose intention it is, can know what this intention really is. Section 17.7. concludes this chapter.

## **17.2. The Paradigm of Intention in International Criminal Law**

The concept of intent, as traditionally regarded in criminal law, rests on the dichotomy between a criminal act (*actus reus*) and the 'guilty' mind of the perpetrator (*mens rea*). Accordingly, if committing a crime requires that certain conduct takes place (for instance, the conduct resulting in penetration in the case of a rape), then the crime was committed only if a perpetrator intended to engage in such conduct. Similarly, if committing a crime requires that a specific consequence occur (for example, the death of a person in the case of a murder), then the crime was committed only if the perpetrator intended to bring about such a consequence.<sup>9</sup> Hence, engaging in criminal conduct or causing criminal consequences is not the same as engaging in criminal conduct or causing criminal consequences *intentionally*. Intention is ordinarily considered to be something distinct from mere behaviour; it is a separate element which may or may not accompany one's behaviour, depending on the circumstances of a particular situation.

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<sup>8</sup> Wittgenstein's philosophical life is usually divided into two periods. The so-called 'early' period is dated from 1911, when Wittgenstein first came to Cambridge, to 1918 when he completed the *Tractatus Logico-Philosophicus*, the only book published during his lifetime. After completing the *Tractatus*, Wittgenstein abandoned philosophy believing that he succeeded in solving all philosophical problems. Nevertheless, in 1929, he returned to Cambridge and remained there, with short interruptions, until his death in 1951. Wittgenstein's investigations into psychological concepts fall in this second 'late' period.

<sup>9</sup> William A. Schabas, *The International Criminal Court: A Commentary on the Rome Statute*, Oxford University Press, Oxford, 2010, p. 477. For an overview of the distinction between conduct- and result-crimes, see also Mike Molan, Denis Lanser and Duncan Bloy, *Bloy and Parry's Principles of Criminal Law*, Cavendish Publishing, London, 2000, p. 27.

When terms such as *actus reus*, criminal conduct, and so on, are employed in criminal law, they refer to one's physical behaviour (act or omission) or, more broadly, to one's *physical existence*.<sup>10</sup> *Mens rea*, on the other hand, has commonly been used to denote the mental element contained in one's criminally relevant physical behaviour, one's mental state or state of mind, that is, the *mental realm* of one's life. This has been emphasised on many occasions. In the *Bemba* case, for instance, Pre-Trial Chamber II of the ICC recalled that "in order to hold a person criminally responsible for crimes against humanity and war crimes, it is not sufficient that the objective elements are met. [...] Rather, [the Statute] requires also the existence of a certain state of guilty mind [...] commonly known as the *mens rea*".<sup>11</sup>

In the same vein, Article 30(1) of the Rome Statute makes it clear that one can be said to commit a crime "only if the material elements [were] committed with intent and knowledge". To commit material elements "with intent and knowledge" means, according to the wording of Article 30(2), that a person has or had the intent to engage in the legally prohibited conduct or to cause a legally prohibited consequence.<sup>12</sup> Moreover, the wording of Article 30(1) suggests that an act or omission might be called intentional, only if the relevant intention arose before a criminal act was committed and/or in some form existed during the duration of the act that was being committed ("a person shall be criminally responsible [...] only if the material elements *are* committed with intent and knowledge").

The existence of intention is usually associated with the existence of mind. Thus, to have a certain intention amounts to a certain *state of mind*, and to act intentionally, that is, to act with a specific intention, is considered tantamount to acting "with [a specific] purpose in mind".<sup>13</sup>

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<sup>10</sup> Sometimes, the mere physical existence may, in particular circumstances, be considered as criminal conduct for which a person is responsible (the so-called 'state of affairs' cases). For example, a foreigner can be held criminally responsible for a crime of illegal entry and stay, even though they did not enter the territory voluntarily, but were forcibly returned there from another country. Cf. Molan, Lanser and Bloy, 2000, pp. 28–30, *ibid*.

<sup>11</sup> *Prosecutor v. Jean-Pierre Bemba Gombo*, Charging Decision, 15 June 2009, para. 351, see *supra* note 2.

<sup>12</sup> A person is also deemed to act intentionally if they were aware that the consequence "would occur in the ordinary course of events", see ICC Statute, Article 30(2)(b).

<sup>13</sup> *Prosecutor v. Germain Katanga*, Pre-Trial Chamber II, Judgment, Case No. ICC-01/04-01/07, 7 March 2014, Minority Opinion of Judge Christine Van den Wyngaert, para. 5 ([www.legal-tools.org/doc/9b0c61/](http://www.legal-tools.org/doc/9b0c61/)): "It may well be that among the attackers there was a

Lawyers, unlike philosophers or psychologists, do not seem bothered by the question of where the mind is located. They tacitly adhere to a commonplace opinion that our mind, and consequently our intentions are hidden in our head, most probably in the brain. Yet if a presupposition that people's intentions occur in their brain, head, or to put it simply, their *physical body*, is accepted as true, a question arises as to whether and how one can know what other's intentions are, and *a fortiori*, were. Intent, it has been argued, "is a mental factor which is difficult, even impossible, to determine".<sup>14</sup> By virtue of belonging to the mental sphere, "[a] person's state of mind is no different to any other fact concerning that person which is not usually visible or audible to others".<sup>15</sup> Hence, intent "is not usually susceptible to direct proof",<sup>16</sup> and in the absence of a confession from the accused, it must "be inferred from a certain number of presumptions of fact".<sup>17</sup> As Cassese wrote:

Intention is not capable of positive proof and, accordingly, it is inferred from overt acts. [...] [A]fter all, an individual alone honestly knows what he is thinking. The Court cannot look into the mind to see what is going on there.<sup>18</sup>

### 17.3. The Cartesian Legacy of the Mind-Body Dualism

Cassese's words not only faithfully reflect the general attitude to intentionality in international criminal law but are also strongly reminiscent of the dominant philosophical approaches to the issue. While the views of philosophers on what the human mind or soul is and how it influences

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sizeable group of persons who held a strong grudge against the Hema people and who used the opportunity of the attack to 'settle scores'. However, I do not believe the evidence shows that the attack was conceived and planned with this purpose in mind".

<sup>14</sup> International Criminal Tribunal for Rwanda ('ICTR'), *The Prosecutor v. Jean-Paul Akayesu*, Trial Chamber I, Judgement, ICTR-96-4-T, 2 September 1998, para. 523 ([www.legal-tools.org/doc/b8d7bd/](http://www.legal-tools.org/doc/b8d7bd/)).

<sup>15</sup> International Criminal Tribunal for the former Yugoslavia ('ICTY'), *Prosecutor v. Slobodan Milošević*, Appeals Chamber, Reasons for Decision on Prosecution Interlocutory Appeal from Refusal to Order Joinder ('Interlocutory Appeal Decision'), IT-99-37-AR73, IT-01-50-AR73, IT-01-51-AR73, 18 April 2002, para. 31 ([www.legal-tools.org/doc/201a8d/](http://www.legal-tools.org/doc/201a8d/)).

<sup>16</sup> ICTY, *Prosecutor v. Radovan Karadžić*, Appeals Chamber, Judgement, IT-95-5/18-AR98bis.1, 11 July 2013, para. 80 ([www.legal-tools.org/doc/84001b/](http://www.legal-tools.org/doc/84001b/)).

<sup>17</sup> ICTR, *The Prosecutor v. Jean-Paul Akayesu*, Judgement, 2 September 1998, para. 523, see *supra* note 14.

<sup>18</sup> Cassese, 2008, p. 75, see *supra* note 1.

one's behaviour have varied considerably over time, most approaches have been built on the common assumption that man is a "composite creature"<sup>19</sup> with body and mind as his two constitutive elements. Body, it has been argued, belongs to the physical world. It has size, weight, colour, shape, as well as limited temporal existence. Mind or soul, on the other hand, is *something* different from the human body. It is intelligence, intellect, or reason,<sup>20</sup> that is, an ethereal substance, which, by its very nature, transcends the spatio-temporal dimension of one's being. In other words, while the characteristic feature of the body is that it exists and acts in the physical world, the essential property of mind is that it thinks, means, intends, or otherwise acts in the mental sphere.<sup>21</sup>

The origins of the outlined dualism have typically been traced to Plato<sup>22</sup> and early Christian philosophers.<sup>23</sup> However, the most influential

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<sup>19</sup> Peter M.S. Hacker, *Wittgenstein on Human Nature*, Phoenix, 1999, p. 14.

<sup>20</sup> See René Descartes, *Meditations on First Philosophy*, John Cottingham (ed.), Cambridge University Press, Cambridge, 1996, p. 18.

<sup>21</sup> Cf. Howard Robinson, "Dualism", in Edward N. Zalta (ed.), *The Stanford Encyclopedia of Philosophy*, Stanford University, Stanford, Fall 2017.

<sup>22</sup> In Plato's account, "soul is in the very likeness of the divine", that is, immortal, intellectual, uniform, indissoluble, and unchangeable, whereas "the body is in the very likeness of the human", which means mortal, unintellectual, multiform, dissoluble, and changeable. The soul, not the body, is therefore responsible for our acquisition of knowledge, being however constantly distracted from this endeavour by the body, bodily senses, and sensations. The true existence of things, Plato claimed, is revealed to the soul in thought. Therefore, "if we would have pure knowledge of anything we must be quit of the body – the soul in herself must behold things in themselves: and then we shall attain the wisdom which we desire, and of which we say that we are lovers; not while we live, but after death; for if while in company with the body, the soul cannot have pure knowledge, one of two things follows – either knowledge is not to be attained at all, or, if at all, after death". See Plato, *Phaedo*, reprinted in Benjamin Jowett (ed.), *Dialogues of Plato, Vol. II*, Oxford University Press, Oxford, 1931, respectively pp. 223, 204, and 205–206, paras. 80a–b, 65c, 66d.

<sup>23</sup> In the fifth century AD, Augustine of Hippo (Saint Augustine), to whom the introduction of the term *mens rea* into the discourse on culpability has usually been ascribed, expressed the view that a sin can be committed even if no physical behaviour takes place, yet the mind (intention or desire) is sinful. As he explained, with respect to adultery, even "if a man finds no opportunity to lie with the wife of another but shows that he desires to do so and would do it if he got the chance, he is no less guilty than if he were caught in the act". See Augustine, *On Free Will*, reprinted in J.H.S. Burleigh (ed.), *Augustine: Earlier Writings*, Westminster John Knox Press, Louisville, 2006, p. 116, para. 8. Similarly, concerning the sin of perjury, Augustine found that it is not important whether what one says matches reality, but whether what one says matches the speaker's conviction about what reality is. Thus, the sin of perjury does not depend so much on what one utters, as on what one's intention behind the uttering was. In the *Sermon on the Words of the Apostle James*, August-

account of the mind-body relationship comes from later times and is to be associated – at least inasmuch as modern Western philosophy is concerned – with René Descartes, a French protestant philosopher of the seventeenth century. Indeed, Descartes’ so called ‘substance dualism’ gradually became a paradigmatic way of investigation into the problem of intentionality not only in philosophy, but also in psychology, law, and other scientific disciplines.

Descartes’ dualism is in principle based on the idea of there being two substances: matter, of which the body is made up, and the mind; with each substance characterised by its properties. The essential property of matter is that it is spatially extended. The essential property of the mind is that it thinks.<sup>24</sup> However, being a *substance*, the mind is not the same as a simple collection of thoughts or a “bundle” of ideas.<sup>25</sup> In the Cartesian account, the mind is *that which* thinks, that is, “an immaterial substance over and above its immaterial states”.<sup>26</sup> Accordingly, the mind is not only different from the body, in which it is located, but also from the totality of thoughts that makes it up (just like the body is not the same as the collection of organs of which it is composed).

Descartes’ essential argument underpinning his mind-body dualism was that, while it is in principle possible to doubt the existence of everything material, including the body, one can never doubt the existence of one’s own mind. In his *First Meditation*, Descartes stated:

Whatever I have up till now accepted as most true I have acquired either from the senses or through the senses. But from time to time I have found that the senses deceive, and it is

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tine explained that if someone says “it rained there” and “in fact it did rain there, but he doesn’t know it, and thinks it didn’t; he’s a perjurer”. According to Augustine, “[w]hat makes the difference is how the word comes forth from the mind”. The famous dictum then follows: “*Ream linguam non facit, nisi mens rea*”, which means: “The only thing that makes a guilty tongue is a guilty mind”. See Augustine, *Sermon 180: On the Words of the Apostle James*, reprinted in Edmund Hill and John E. Rotelle (eds.), *Sermons III/5 (148-183) on the New Testament*, New City Press, New York, 1992, p. 315, para. 2. The dictum was later turned into the legal maxim ‘*Actus non facit reum, nisi mens sit rea*’ (The act does not make evil unless the spirit is evil). Cf. “Actus Reus”, in Berry Gray (ed.), *The Philosophy of Law: An Encyclopedia*, Routledge, London, 2012, p. 18.

<sup>24</sup> Robinson, 2017, see *supra* note 21.

<sup>25</sup> David Hume, *A Treatise of Human Nature*, Book I, Part IV, Lewis A. Selby-Bigge (ed.), Clarendon Press, Oxford, 1896 [1739], p. 252.

<sup>26</sup> Robinson, 2017, see *supra* note 21.

prudent never to trust completely those who have deceived us even once.<sup>27</sup>

Similar to Plato, Descartes therefore accepts that all knowledge that we acquire from and through sensory perception is likely incorrect. Everything we sense is spurious. Perhaps, there is no shape, no extension, no movement, and also no body.<sup>28</sup> Is there, therefore, anything at all? "Am not I, at least, something?"<sup>29</sup> Here, Descartes's investigation takes a new direction. To keep on doubting one's own existence seemed *logically* impossible to him. "[I]f I conceived myself as something", he wrote, "then I certainly existed".<sup>30</sup> And even admitting that there is some "deceiver of supreme power and cunning [...] constantly deceiving me [...], in that case I too undoubtedly exist, if he is deceiving me".<sup>31</sup> Therefore, the "proposition *I am, I exist*, is necessarily true whenever it is put forward by me or conceived in my mind".<sup>32</sup> In his *Second Meditation*, Descartes explained:

Thought; this alone is inseparable from me. I am, I exist – that is certain. But for how long? For as long as I am thinking. [...] I am, then, in the strict sense only a thing that thinks; that is I am a mind, or intelligence, or reason – words whose meaning I have been ignorant until now. But for all that I am a thing which is real and which truly exists. But what kind of a thing? As I have just said – thinking thing (*res cogitans*).<sup>33</sup>

Descartes's identification of individuals with mind or reason (*res cogitans*), which is to be distinguished from their physical body (*res extensa*), has been fundamental for the majority of philosophical as well as extra-philosophical approaches interested in causes of human actions. These are usually based, alternatively or simultaneously, on three categories of duality relating to the mind-body relationship. In the first place, the outlined duality is *ontological*. It means that I, as a thinking thing, am

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<sup>27</sup> Descartes, 1996, p. 12, see *supra* note 20.

<sup>28</sup> *Ibid.*, p. 16.

<sup>29</sup> *Ibid.*

<sup>30</sup> *Ibid.*, p. 17.

<sup>31</sup> *Ibid.*

<sup>32</sup> *Ibid.*

<sup>33</sup> *Ibid.*, p. 18.

distinct from my body.<sup>34</sup> The accuracy of the distinction seems self-evident: “[E]ven an unphilosophical man soon finds it necessary to recognize an inner world distinct from the outer world, a world of [...] sensations, of feelings and moods, a world of inclinations, wishes and decisions”.<sup>35</sup>

The ontological duality goes hand in hand with a *metaphysical* one. Indeed, once we admit that there are such things as pains, moods, or wishes occupying the inner world, it seems absurd to believe that these “should go around the world without an owner independently”.<sup>36</sup> A sensation, it has been commonly argued, “is impossible without a sentient being. The inner world presupposes somebody whose inner world it is”.<sup>37</sup> Hence, whereas objects in the outer (physical) world can, but need not be owned by anybody, and yet exist, the very existence of the inner world is conditional upon there being a person whose inner world it is. Each person’s inner world, it has been emphasised, is their “metaphysically private property”.<sup>38</sup>

Lastly, if it seems appropriate to think about the inner world in terms of private property, it also seems natural to suppose that the owner of the property has some privileged access to it.<sup>39</sup> They are, so to say, better situated to apprehend what their inner world consists of than those who, as a matter of course, can regard it only from their outer perspective. The duality at stake here is therefore an *epistemological* one. Only the owner of the inner world is able to gain immediate and non-inferential knowledge of objects which are situated there, whereas anyone else’s knowledge of these objects is either mediate or tantamount to mere guessing.

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<sup>34</sup> “I [that is, my soul, by which I am what I am] am really distinct from my body, and can exist without it”. And although “my whole self” is a combination of my body and mind, which are so “closely joined and, as it were, intermingled” with each other as to form the unity, it remains that “I [...] am nothing than a thinking thing”, *ibid.*, pp. 54 and 56 (words in brackets are from the French version of *Meditations*).

<sup>35</sup> Gottlob Frege, “Thought”, reprinted in Michael Beaney (ed.), *The Frege Reader*, Blackwell, Oxford, 1997, p. 334.

<sup>36</sup> *Ibid.*

<sup>37</sup> *Ibid.*

<sup>38</sup> The term is Wittgenstein’s. See Peter M.S. Hacker, *Wittgenstein: Meaning and Mind, Volume 3 of An Analytical Commentary on the Philosophical Investigations*, Blackwell, Oxford, 1990, p. 46.

<sup>39</sup> *Ibid.*

#### 17.4. The Concept of *Mens Rea* and Wittgenstein's Philosophical Methods

The Cartesian account of mind-body dualism has been influential and in more or less subtle ways still dominates contemporary thought.<sup>40</sup> International criminal law is no exception. The fundamental ontological duality between body and mind already determines the very concept of international crime. Under the Rome Statute, a crime can be committed only if criminally relevant physical behaviour was carried out with a certain state of mind (intent and knowledge). The physical and mental are therefore seen as two separate, though interrelated, entities or elements. For a crime to be committed, they must both be satisfied.

Additionally, the idea of ontological duality between a physical act (*actus reus*) and a mental state (*mens rea*) goes hand in hand with the idea of epistemological and, in a subtler way, also metaphysical duality. A person's state of mind is considered to be part of that person's inner world. Yet the inner world, it is argued, is naturally invisible and inaudible to others.<sup>41</sup> Only an individual whose inner world it is can really know what their inner world consists of. Knowledge of other people, such as court witnesses or judges, is in this respect only mediate.<sup>42</sup> It depends on that individual's physical behaviour as well as other circumstances manifesting themselves in the public 'outer' world – circumstances that anyone can *observe* or otherwise perceive by means of senses and from which a conclusion on one's state of mind can be *inferred*.<sup>43</sup>

The outlined 'Cartesian' picture of the body-mind dualism, however, is not unproblematic. The problem is not so much as, for instance, behaviourists claimed, that the mind is a strange concept and that all psychological events can ultimately be explained in terms of behavioural criteria.<sup>44</sup> In fact, whether we accept the Cartesian idea of the mind as an independent substance, or reduce all mental events or acts to mere physical behav-

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<sup>40</sup> *Ibid.*, pp. 15–16.

<sup>41</sup> Cf. *Prosecutor v. Slobodan Milošević*, Interlocutory Appeal Decision, 18 April 2002, para. 31, see *supra* note 15.

<sup>42</sup> Cassese, 2008, p. 75, see *supra* note 1: "The Court cannot look into the mind to see what is going on there".

<sup>43</sup> *Prosecutor v. Radovan Karadžić*, Judgement, 11 July 2013, para. 80, see *supra* note 16.

<sup>44</sup> Wilfrid Sellars, *Science, Perception and Reality*, Ridgeview Publishing Company, Atascadero, 1991, p. 22.

our, the argument is still embedded in the same mind-body dialectic.<sup>45</sup> Yet, as Wittgenstein emphasised, it is the whole picture of the duality separating the inner from the outer, the mental from the physical, which is profoundly misleading.<sup>46</sup> It is therefore the mind-body dialectic itself that must be eliminated, yet not by proposing new theories substituting for previous ones deemed inconvenient, but by attaining clarity in our fundamental concepts, so that our problem disappears completely.<sup>47</sup>

Wittgenstein argued that “a disorder in our concepts” usually starts with the use of words that stand for the concepts or are otherwise employed when the concepts are applied. The nature of the problem is therefore truly “grammatical”,<sup>48</sup> that is, relating to rules (syntactic or semantic) governing the use of our language. For example, when the concept of *mens rea* is applied in criminal law, we are used to saying that “an accused *had* the intention to” commit a crime or that “*her* or *his* intention was to” commit a crime. And we automatically suppose that the auxiliary verb “to have” or possessive pronouns “her” or “his” in these cases fulfil the same function as they do when we say, for instance, “she *had* a penny in her pocket” or “a penny was in *her* pocket”.<sup>49</sup> That is, we suppose that they always refer to some form of ownership between a person and objects that this person has.<sup>50</sup> Yet the function of (these) words is not necessarily the same on every occasion of their use. What usually misleads us in this respect, Wittgenstein wrote, “is the uniform appearance of words

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<sup>45</sup> Hacker, 1990, p. 29, see *supra* note 38.

<sup>46</sup> Brian McGuinness, *Approaches to Wittgenstein*, Routledge, London, 2002, p. 4.

<sup>47</sup> Ludwig Wittgenstein, *Philosophical Investigations*, in Elisabeth M. Anscombe *et al.* (eds.), Blackwell, 2009, p. 56, para. 133. Indeed, Wittgenstein thought that philosophical problems are conceptual, not factual ones. They arise when we become aware “of a disorder in our concepts” and are solved when these concepts are properly ordered. Respectively, Ludwig Wittgenstein, *Zettel*, G.E.M. Anscombe and Georg H. von Wright (eds.), Blackwell, Oxford, 1998, p. 81, para. 458 and Ludwig Wittgenstein, *The Big Typescript*, Grant Luckhardt and Maximilian A.E. Aue (eds.), Blackwell, Oxford, 2005, p. 309, para. 421.

<sup>48</sup> Wittgenstein, 2009, p. 47, para. 90, *ibid.*

<sup>49</sup> Cf. Hacker, 1999, p. 18, see *supra* note 19.

<sup>50</sup> Gordon P. Baker and Peter M.S. Hacker, *Wittgenstein: Understanding and Meaning, Volume 1 of An Analytical Commentary on the Philosophical Investigations, Part I: Essays*, Blackwell, Oxford, 2005, p. 277.

when we hear them in speech, or see them written or in print".<sup>51</sup> In such cases, the correct use (and understanding) of words is not obvious to us.<sup>52</sup>

Hence, according to Wittgenstein, a source of the problems which preoccupy us when we try to *analyse* theoretical concepts consists of misleading features of the grammar of our language. The source of the problem determines its nature and the nature of the problem determines its solution:

Our inquiry is therefore a grammatical one. And this inquiry sheds light on our problem by clearing misunderstandings away. Misunderstandings concerning the use of words, brought about, among other things, by certain analogies between the forms of expression in different regions of our language. – Some of them can be removed by substituting one form of expression for another; this may be called 'analysing' our forms of expression, for sometimes this procedure resembles taking a thing apart.<sup>53</sup>

It must be emphasised, however, that the point of Wittgenstein's *grammatical inquiry* – in general or when applied to the concept of intentionality – is not to subject a concept to criticism for the mere fact that its content does not conform, partly or fully, to the meaning of words by means of which the concept is referred to in ordinary language. Thus, for example, the concept of the mind as a substance needs not to be rejected simply for the reason that we usually do not speak about the mind in terms of a substance. Rather, the point is to emphasise that theoretical concepts, whether philosophical or legal, are in principle not only expressed in ordinary language, but they are, so to speak, *immersed in language* from which they absorb all misconceptions that its incorrect use typically yields.<sup>54</sup> The aim of the grammatical investigation is to get rid of these misconceptions which otherwise accompany a concept in further instances of its application.

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<sup>51</sup> Wittgenstein, 2009, p. 10, para. 11, see *supra* note 47.

<sup>52</sup> *Ibid.*

<sup>53</sup> *Ibid.*, p. 47, para. 90.

<sup>54</sup> For instance, when Cassese wrote that "an individual alone honestly knows what he is thinking", he did not try to introduce a new concept of intentionality specific to international criminal law. Instead, he unwittingly accepted the concept of thought such as the one we are used to speaking about, that is, the concept of thought that we *have* and to which we also have a privileged access.

It follows that the fundamental assumption, on which Wittgenstein's methods of philosophical investigation rest, is that conceptual problems, such as the one at hand, are in large part rooted in our ordinary language.<sup>55</sup> These problems arise when our forms of language are misinterpreted, rules for the use of words misapplied, that is, when "we are, as it were, entangled in our own rules and this entanglement in our rules is precisely what we want to understand: that is, to survey".<sup>56</sup> Philosophy, Wittgenstein argued, "just puts everything before us, and neither explains nor deduces anything".<sup>57</sup> When philosophers are called upon to deal with a certain concept and with grammatical rules in which words standing for the concept are embedded, they should neither evaluate the rules, nor change them, or even stipulate new rules determining how these words ought to be used. The task of philosophers is in this respect purely descriptive. They must not, as Wittgenstein urged, "interfere in any way with the actual use of language, [...] only describe it".<sup>58</sup> They leave everything as it is.<sup>59</sup>

In sum, treating the problem of intentionality in (international) criminal law in accordance with Wittgenstein's philosophical methods means to accept that:

[O]ur considerations must not be scientific ones. [...] And we may not advance any kind of theory. There must not be anything hypothetical in our considerations. All explanation must disappear, and description alone must take its place. And this description gets its light – that is to say, its purpose – from the philosophical problems. These are, of course, not empirical problems; but they are solved through an insight into the workings of our language, and that in such a way that these workings are recognized – despite an urge to misunderstand them. The problems are solved, not by coming up with new discoveries, but by assembling what we have long been familiar with. Philosophy is a struggle

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<sup>55</sup> Wittgenstein, 2009, pp. 52–53, para. 111, see *supra* note 47.

<sup>56</sup> *Ibid.*, p. 55, para. 125.

<sup>57</sup> *Ibid.*, para. 126.

<sup>58</sup> *Ibid.*, para. 124.

<sup>59</sup> *Ibid.* See also p. 56, para. 128: "If someone were to advance *theses* in philosophy, it would never be possible to debate them, because everyone would agree to them".

against the bewitchment of our understanding by the resources of our language.<sup>60</sup>

### 17.5. Going Down to the Foundations (Problem of Inference)

Wittgenstein's philosophy is undoubtedly ground-breaking in many respects. One reason is that, unlike many philosophers or scientists before him, Wittgenstein does not primarily aim his investigation at offering "real understanding" of problems which puzzle us, but rather at removing "particular misunderstandings" which are the sources of these problems.<sup>61</sup> While the difference between the two approaches may seem subtle, the consequences of the shift are enormous. The typical attitude of philosophers or scientists to problems they try to resolve is, in normal circumstances, to compare existing theories and attitudes pertaining to the problem, accept (implicitly or explicitly) what is taken for granted and focus on what is controversial.<sup>62</sup> Wittgenstein, on the other hand, considers such an approach insufficient. In his opinion, the deepest mistakes are typically made before the relevant debate even begins. Their source lies precisely in what all debaters usually take for granted.<sup>63</sup> Consequently, in order to avoid the mistakes, Wittgenstein urged that one must "go down to the foundations".<sup>64</sup> That is, one must focus not on subjects or causes of a disagreement, but on what all sides agree upon, and challenge that.<sup>65</sup> As he noted, one must first "reveal the source of error, otherwise revealing the truth won't do any good".<sup>66</sup>

What does it mean for international criminal law and, in particular, the concept of *mens rea*? For example, there is an ongoing debate in criminal law on circumstances from which one's intention can be best inferred, and how these circumstances ought to be assessed by a judge in order to achieve a fair conclusion.<sup>67</sup> Yet, as Wittgenstein would point out, already

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<sup>60</sup> *Ibid.*, p. 52, para. 109.

<sup>61</sup> Ludwig Wittgenstein, *Philosophical Grammar*, Rush Rhees (ed.), Blackwell, Oxford, 1974, p. 115, para. 72.

<sup>62</sup> Cf. Thomas S. Kuhn, *The Structure of Scientific Revolutions*, The University of Chicago Press, Chicago, 2012, p. 10.

<sup>63</sup> Baker and Hacker, 2005, p. 288, see *supra* note 50.

<sup>64</sup> Ludwig Wittgenstein, *Culture and Value*, Georg H. von Wright (ed.), Blackwell, Oxford, 1998, p. 71.

<sup>65</sup> Baker and Hacker, 2005, p. 288, see *supra* note 50.

<sup>66</sup> *Ibid.*

<sup>67</sup> See Section 17.2. above.

at this moment “[t]he decisive movement in the conjuring trick has been made, and it was the very one that we thought quite innocent”.<sup>68</sup> That is, we focus on the process of proving intentions and we find it innocent to characterise the process as ‘inference’, leaving it until later to investigate what this process precisely consists of. But here we already were wrong, since we have a definite idea of what inference is and “that’s just what commits us to a particular [erroneous] way of looking at the matter”.<sup>69</sup> In particular, to call the process ‘inference’ already presupposes that circumstances, from which the conclusion ought to be inferred, including the perpetrator’s behaviour, are something essentially different from perpetrator’s intentions. That even if we directly observe such behaviour, we cannot be said to also observe the perpetrator’s intentions themselves. That judges have only mediate access to the content of one’s intentions (and must therefore rely on their deductive skills), whereas the perpetrator, under normal conditions, *knows* them and, consequently, can *confess* them. In sum, to say that one’s intentions can be inferred from one’s acts amounts to accepting the whole Cartesian dichotomy between the mental ‘inner’ world and the physical ‘outer’ one.

But why should we call the process of determining and proving one’s intention an ‘inference’? The point is not to deny that in *some* cases the process of determining one’s intentions indeed involves deduction and, accordingly, can be duly called an inference.<sup>70</sup> The point is to say that in most cases, the relation between behavioural expression and what it is an expression of (intention, pain, joy, anger, and so on) is not external and, thus, leaves no space for inference. As Hacker pointed out: one’s inner world is generally not “related to its outward manifestations as an unobservable entity to its causal effects. The relation is internal or grammatical”.<sup>71</sup> To know that a person has a particular intention by observing that person’s behaviour is not a derivative, defective way of finding out. It is

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<sup>68</sup> Wittgenstein, 2009, p. 109, para. 308, see *supra* note 47.

<sup>69</sup> *Ibid.*

<sup>70</sup> For example, one can be found guilty of genocide even if one killed only a single person, provided that the crime took place “in the context of a manifest pattern of similar conduct directed against that group” from which the genocidal intent may be inferred. See ICC, Elements of Crimes, 11 June 2010, Article 6(a) ([www.legal-tools.org/doc/3c0e2d/](http://www.legal-tools.org/doc/3c0e2d/)).

<sup>71</sup> Hacker, 1990, p. 243, see *supra* note 38.

what could be called 'seeing' that another has an intention or even 'knowing directly' that another has an intention and also what this intention is.<sup>72</sup>

This will become clearer if we consider the following two examples. If I see a person shooting another in the head, it would be ridiculous to say that what I do is deduce or otherwise infer from that person's behaviour that they have the intention to kill another. In such a case, I simply see one person killing another, that is, I see the person *manifesting* and *executing* their intention to kill another. I do not infer anything, unless 'knowing by the senses' would always mean 'knowing by inference'. This is however not what the words 'see', 'hear', and so on signify in ordinary or legal language. If I see someone having non-consensual sexual intercourse with another person, I do not say that I 'infer' from the totality of the perpetrator's bodily movements that what the perpetrator is actually doing is raping another person. This would be absurd. But why should it be less absurd to claim that I can *merely* infer from the perpetrator's bodily behaviour (and perhaps other circumstances) that what the perpetrator is actually intending is to rape? Is it not so that "[my] intention lie[s] *also* in what I did"?<sup>73</sup> Indeed, to say that only the perpetrator honestly knows what they are intending, whereas other people (including the victim of the rape) may only find it out by inference, would sound like a cruel joke. As Wittgenstein noted:

In addition to the so-called sadness of his facial features, do I also notice his sad state of mind? Or do I deduce it from his face? Do I say: 'His features and his behaviour were sad, so he too was probably sad'?<sup>74</sup>

### 17.6. The Grammar of Intention

Wittgenstein's remarks on intending are primarily contained in §§ 629–660 of *Philosophical Investigations*. However, considerations relating to the alleged privacy of one's inner world, including the question whether and how this world can be accessed from the outer perspective, also appear earlier in the book, namely in connection with the so-called 'private language argument' (§§ 243–315).<sup>75</sup> As usual, Wittgenstein's investigation

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<sup>72</sup> *Ibid.*

<sup>73</sup> Wittgenstein, 2009, p. 173, para. 644, see *supra* note 47.

<sup>74</sup> Ludwig Wittgenstein, *Remarks on the Philosophy of Psychology: Volume I*, Elisabeth M. Anscombe and Georg H. von Wright (eds.), Blackwell, Oxford, 1998, p. 97, para. 767.

<sup>75</sup> Hacker, 1990, p. 15, see *supra* note 38.

opens with a question: might there be a language in which a person could express his inner experiences (feelings, moods, and so on) for his own use? That is, might there be a language that “another person cannot understand”, because it refers to “what only the speaker can know – to his immediate private sensations”?<sup>76</sup> Wittgenstein, faithful to his methods, does not attempt to answer the question in a straightforward manner. Instead, he starts the inquiry by pointing to some aspects that make the question misleading. He denies, in particular, that inner experiences or activities, such as pains, moods, thinking, wishing, intending, and so on, could properly be said to be ‘private’ in the sense that *only* a person, who lived an experience or engaged in a particular mental activity, can be considered to know what these experiences or activities were:

In what sense are my sensations private? – Well, only I can know whether I am really in pain; another person can only surmise it. – In one way this is false, and in another nonsense. If we are using the word ‘know’ as it is normally used (and how else are we to use it?), then other people very often know if I’m in pain. – Yes, but all the same, not with the certainty with which I know it myself! – It can’t be said of me at all (except perhaps as a joke) that I know I’m in pain. What is it supposed to mean – except perhaps that I am in pain?

Other people cannot be said to learn of my sensations only from my behaviour – for I cannot be said to learn of them. I have them.

This much is true: it makes sense to say about other people that they doubt whether I am in pain; but not to say it about myself.<sup>77</sup>

‘Only you can know if you had that intention.’ One might tell someone this when explaining the meaning of the word ‘intention’ to him. For then it means: that is how we use it. (And here ‘know’ means that the expression of uncertainty is senseless.)<sup>78</sup>

Wittgenstein’s grammatical inquiry thus aims at the meaning of basic propositions that we regularly use when referring to our sensations

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<sup>76</sup> Wittgenstein, 2009, p. 95, para. 243, see *supra* note 47.

<sup>77</sup> *Ibid.*, pp. 95–96, para. 246.

<sup>78</sup> *Ibid.*, p. 96, para. 247.

or intentions. He argued that if we look at these propositions more closely, we realise that in one way they are false, and in another nonsense. First, they are false, because if we use the word 'know' as it is normally used, then other people very often know if I'm in pain or if I have or had a particular intention. For instance, I try to lift a dumbbell, but it is very heavy and I drop it on my foot. I think that everybody would say in this case that I am in pain. Moreover, everyone would be absolutely sure about their words. Everyone who can be said to *know* that a heavy dumbbell fell on my foot can also be said to *know* that I am or was in pain; and to know simply means that "everything speaks in favour [of such a conclusion], nothing against it".<sup>79</sup> If someone would say, for example, "Why do you feel sorry for him? You cannot really know whether he was in pain, you can only surmise it!", it would be considered nonsense or a joke, but not an expression of a legitimate opinion about the 'private' character of our sensations.

In the same vein, if I grasp the dumbbell and move it in a direction away from my foot, in this case too everyone can be said to know that my intention was, first, to move the dumbbell in a direction away from my foot and, second, to get rid of the dumbbell from my foot *by* moving it away.<sup>80</sup> Even if I do not provide any explanation for my behaviour, the maximum possible level of certainty is achieved: everything speaks in favour of such a conclusion and nothing against it. If someone would say, "Ok, I moved the dumbbell in a direction away from my foot, but I did not intend to get rid of the dumbbell from my foot", we would not believe him.

In addition, saying that only I can know whether I had a particular intention or that other people cannot know whether I had this intention "with the certainty with which I know it myself" is nonsense. As Wittgenstein pointed out, it cannot be said of me at all (except perhaps as a joke) that I know I am in pain or that I know I have such an intention. For what is it supposed to mean except that I *am* in pain or that I *have* a particular intention? Indeed, any expression of the form "I know that" keeps its sig-

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<sup>79</sup> Ludwig Wittgenstein, *On Certainty*, Elisabeth M. Anscombe and Georg H. von Wright (eds.), Harper & Row, New York, 1972, p. 2, para. 4.

<sup>80</sup> Cf. Hacker, 2000, p. 242, see *supra* note 4: "An agent *Vs* intentionally if he *Vs* knowing that he is so doing, and does so either because he wants to [...] or has a [...] reason for doing it. An agent may *V* with the intention of *Xing*. In this case the *Ving* may be unintentional or intentional".

nificance only if it is also possible not to know it. Yet can one have an intention or pain without knowing it? The answer must be negative (except, perhaps, for the specific context of psychoanalysis). Imagine, for instance, a judge justifying their verdict on genocide by saying, “Of course you had a genocidal intent, you just did not know it”. Rather, they would say, “Of course you had a genocidal intent, you just deny it”. The sentence “perhaps I have this intention, but I don’t know it” is senseless. On the other hand, it would be perfectly intelligible if a judge says, “Of course, you have or had this intention, I know it”. So contrary to our initial presupposition, what makes sense is that I can know what someone else intends, but not what I myself intend.<sup>81</sup>

Thus, according to Wittgenstein, saying that “only you can know if you had that intention” does not mean that someone else cannot know what I intend, only surmise it. The sentence “only you can know if you had that intention” is not an empirical statement informing us about certain facts. It is a grammatical statement explaining the meaning of the word ‘intention’.<sup>82</sup> Hence, saying that “only you can know if you had that intention” does not entail any information about the “nature” of our intentions (such as about their private character) or about ourselves (for example, that we each have a privileged epistemic access to our intentions); only that we use the word intention precisely in *this* way. To ‘know’ means here that it makes sense to say about other people that they doubt whether something is my intention, but not to say it about myself.<sup>83</sup> It means that as regards me and my intentions the expression of uncertainty

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<sup>81</sup> Wittgenstein, 2009, p. 233, para. 315, see *supra* note 47: “It is correct to say ‘I know what you are thinking’, and wrong to say ‘I know what I am thinking’. (A whole cloud of philosophy condenses into a drop of grammar.)”.

<sup>82</sup> In this regard, “[t]he sentence ‘Sensations are private’ is comparable to ‘One plays patience by oneself’”, see Wittgenstein, 2009, p. 96, para. 248, *supra* note 47.

<sup>83</sup> “Do not say ‘one cannot’, but say instead: ‘it doesn’t exist in this game’.”, see Wittgenstein, 1998, p. 23, para. 134, see *supra* note 47. See also Ludwig Wittgenstein, *The Blue and Brown Books*, Blackwell, Charlottesville, 1998, p. 30: “‘Surely I must know what I wish’. Now compare this answer to the one which most of us would give to the question: ‘Do you know the ABC?’ Has the emphatic assertion that you know it a sense analogous to that of the former assertion? Both assertions in a way brush aside the question. But the former doesn’t wish to say ‘Surely I know such a simple thing as this’ but rather: ‘The question which you asked me makes no sense’. [...] ‘Of course I know’ could here be replaced by ‘Of course, there is no doubt’ and this interpreted to mean ‘It makes, in this case, no sense of talk of a doubt’. In this way the answer ‘Of course I know what I wish’ can be interpreted to be a grammatical statement”.

is senseless, yet “not in the sense that one cannot be uncertain about what he intends, but in the sense that one cannot have an intention and be uncertain what it is”.<sup>84</sup> The sentence “I don't know what I intend” does not mean that I have a certain intention, but have not yet discerned it. Rather, it signifies that I have no definite intention.<sup>85</sup>

The central issue in §§ 629-660 of the *Philosophical Investigations*, dealing specifically with the concept of intention, is the theme of recollecting what one was going to do or say.<sup>86</sup> Indeed, this is a characteristic feature of humankind: after reaching a certain age, we are ordinarily able to remember not only what we did, but also what we intended to do, regardless of whether or not we actually did it.<sup>87</sup> In criminal law, for instance, an accused may confess: “I remember that my intention was to kill the victim”. Or they can say: “I remember that my intention was not to kill the victim, only to wound her”. In either case, no one would doubt that an accused *can* remember what their intention was. Of course, we can doubt one's sincerity or suspect the person of lying. Yet lying is already knowing or, at least, believing that things are thus and saying something else which one knows to be false.<sup>88</sup>

Accordingly, Wittgenstein's investigations into recollecting what one was going to do or say strike at the very heart of the problem of what intentions are. If one can remember what one's intention is, then intention is precisely what one remembers. Hence, if one would be able to describe what one's remembering consists of (and there is *prima facie* no reason to assume the contrary), then the investigation may come to its end for at this moment we would already know what one's intentions are.

It is sometimes argued, for example, that to remember my having a particular intention is tantamount to remembering an activity I was engaged in.<sup>89</sup> Seen from this perspective, the expression “I intended to”

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<sup>84</sup> Hacker, 2000, p. 258, see *supra* note 4.

<sup>85</sup> *Ibid.*

<sup>86</sup> “You were interrupted a while ago; do you still know what you were going to say?”, see Wittgenstein, 2009, p. 172, para. 633, *supra* note 47.

<sup>87</sup> Sometimes, we can also remember our intention, but not our physical or verbal acts whereby the intention was executed. See Wittgenstein, 2009, p. 174, para. 648, see *supra* note 47: “I no longer remember the words I used, but I remember my intention precisely; I wanted my words to calm him down”.

<sup>88</sup> Hacker, 1990, p. 67, see *supra* note 38.

<sup>89</sup> Cf. Hacker, 2000, p. 251, see *supra* note 4.

would be, as a matter of fact, akin to the expression “I planned to”, and “having the intention” to do something could be likened to “having a plan”. This is, however, misleading. As Wittgenstein explains, to say “‘I intend’ does not mean ‘What I am at, is intending’, or ‘I am engaged in intending’ (as one says, I am engaged in reading the newspaper)”.<sup>90</sup> While it makes perfect sense to say, for instance, “I am engaged in reading (the newspaper)”, “I am engaged in planning (a journey, an assault)”, or “I am engaged in thinking (of killing a person)”, the grammar of the expressions “I am engaged in” and “intend” are mutually incompatible. By the same token, we can encourage or order someone to carry out a certain (mental) activity, for example, to imagine a thing or action, to consider it, to think about it, or to plan it. On the other hand, it is grammatically impossible to order someone to intend something, just like it is impossible to order someone to mean something or believe that something is the case. “Is *this* the difference”, Wittgenstein asked, “that the first are voluntary, the second involuntary mental movements? I may rather say that the verbs of the second group *do not stand for actions*”.<sup>91</sup>

Similarly, to recollect one’s own intention is not, according to Wittgenstein, to have the memory of an experience.<sup>92</sup> When we say a sentence such as “For a moment I was going to” it seems as though we had a particular feeling, an inner experience, which was the intention, and we remember it.<sup>93</sup> But what, as a matter of fact, did this experience consist of? If one tries to remember it *quite precisely*, Wittgenstein argued, “[t]hen the ‘inner experience’ of intending seems to vanish again. Instead, one remembers [only] thoughts, feelings, movements and also connections with earlier situations”.<sup>94</sup> However, these thoughts, feelings, or connections surrounding our intentions cannot be assimilated to intentions themselves:

You remember various details. But not even all of them together show this intention. It is as if a snapshot of a scene had been taken, but only a few scattered details of it were to be seen; [...] the rest is dark. And now it is as if I knew quite

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<sup>90</sup> Wittgenstein, 1998, p. 111, para. 598, see *supra* note 74.

<sup>91</sup> Wittgenstein, 1998, p. 10, para. 51 (emphasis added), see *supra* note 47.

<sup>92</sup> “‘I had the intention of...’ does not express the memory of an experience. (Any more than ‘I was on the point of...’).”, see *ibid.*, p. 9, para. 44, *supra* note 47.

<sup>93</sup> Wittgenstein, 2009, p. 174, para. 645, see *supra* note 47.

<sup>94</sup> *Ibid.*

certainly what the whole picture represented. As if I could read the darkness.<sup>95</sup>

Lastly, philosophers, like international lawyers, tend to assimilate one's intentions with one's mental state or state of mind. To find out what intention is would therefore amount to discovering the content of one's mental state.<sup>96</sup> After all, if having an intention is not an action that I engage in, it must be a state, that is, a mental state, in which I am. In Wittgenstein's view, however, none of these options can be recognised as correct. Intention, he argued, is neither an emotion, a mood, a mental state, nor a state of consciousness. "It does not have genuine duration."<sup>97</sup> That is, we do not refer to our intentions (but also to our beliefs, understanding, and so on) in terms of time. When one has a particular intention, for instance, to unlawfully deport a group of people to another country, the intention is not interrupted by a break in consciousness or a shift in attention.<sup>98</sup> If an accused says, for example, "I had the intention of deporting those people", we would not ask him "When did you have that intention? The whole time during the deportation, or intermittently?". The questions would be senseless. One may certainly be interrupted in thinking about the deportation or the planning of the deportation,<sup>99</sup> but one would hardly say that they intended a deportation "uninterruptedly" for a certain period of time. For what would that mean? An interruption of intention, Wittgenstein suggests, is a period of lack of intention, just like an interruption of belief is a period of unbelief (not the withdrawal of attention from what one believes or intends as, for example, when one sleeps).<sup>100</sup> As Hacker noted:

One can intermittently be in a certain mental state, but to intend something intermittently is not to be interrupted in one's intending (as one's state of concentration may be interrupted

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<sup>95</sup> *Ibid.*, p. 172, para. 635.

<sup>96</sup> See Section 17.2. above.

<sup>97</sup> Wittgenstein, 1998, para. 45, p. 9, see *supra* note 47.

<sup>98</sup> Cf. Ludwig Wittgenstein, *Remarks on the Philosophy of Psychology: Volume II*, Georg H. von Wright and Heikki Nyman (eds.), Blackwell, Oxford, 1998, pp. 9–10, para. 45.

<sup>99</sup> Cf. Wittgenstein, 1998, p. 9, para. 50, see *supra* note 47.

<sup>100</sup> Wittgenstein, 1998, pp. 9–10, para. 45, see *supra* note 98.

by a series of telephone calls), but to have an intention, abandon it, resume it, etc., i.e. to vacillate.<sup>101</sup>

### 17.7. Conclusion

Wittgenstein's philosophy of psychology might appear overly negativist. As though he denies the existence of everything: of mind, feelings, mental states or activities, even of intentions. This is, however, only a cursory and misleading view of what Wittgenstein's philosophy signifies. In fact, Wittgenstein does not reject any of these concepts.<sup>102</sup> When he claims that one does not know whether one is in pain or has a particular intention, he does not mean that we are not aware of our pains or intentions. Rather, he draws attention to the fact that knowing about one's having a pain or intention is not the same as knowing about one's having a car. That in the context of referring to our intentions, the verb 'to know', as is normally used (that is, as used for physical objects), is redundant, for to say "I know that I have such an intention" means nothing else than saying "I have such an intention". Similarly, when Wittgenstein denies that we have privileged access to our intentions, because we have them, he does not attempt to remove the expression "to have intentions" from our vocabulary, nor is he willing to doubt that other people *sometimes* do not know what our intentions are. Instead, he attempts to emphasise that to have an intention is not the same as having a physical object;<sup>103</sup> that the grammatical connection between the words 'to have' and 'intentions' must not be mistaken for a metaphysical or empirical one;<sup>104</sup> and, consequently, that the fact that we talk about intentions as though we have them does not entail any metaphysical truth about intentions and/or about our relationship to them. In short, what Wittgenstein attempts to do is reject a particular grammar which, as he wrote, "tends to force itself on us",<sup>105</sup> that is, the

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<sup>101</sup> Hacker, 2000, pp. 252–3, see *supra* note 4. See also Wittgenstein, 1998, p. 9, para. 47, see *supra* note 47.

<sup>102</sup> "And now it looks as if we had denied mental processes. And naturally we don't want to deny them." See Wittgenstein, 2009, p. 110, para. 308, *supra* note 47.

<sup>103</sup> For example, a beetle in a box of which only I can honestly know what kind of beetle it is, for only I can open the box and look inside. Cf. Wittgenstein, 2009, p. 106, para. 293, see *supra* note 47.

<sup>104</sup> Hacker, 1999, p. 27, see *supra* note 19.

<sup>105</sup> Wittgenstein, 2009, pp. 108–9, para. 304, see *supra* note 47.

grammar of "object and name",<sup>106</sup> according to which the function of a word is primarily to name an object.<sup>107</sup>

Our mistake, Wittgenstein argued, is "to look for an explanation where we ought to regard the facts as 'proto-phenomena'. That is, where we ought to say: *this is the language-game that is being played*".<sup>108</sup> Accordingly, we can say that intentions 'are', but this does mean that they 'exist' as things or objects, be it ethereal things or mental objects. We may say we 'have' intention, but that does not entail any form of possession over 'our' intention, nor does it mean that only a person, whose intention it is, can truly say what this intention is (as, for instance, only the owner of a strongbox can truly say what the content of their strongbox is). We can also say we 'know' what our intention is, but it only means that expressing doubts is in this regard senseless. We may say "I don't know what I intend", yet it does not mean that we have a certain intention, but have not yet discerned it. It means that we have no definite intention.

Intentions, Wittgenstein insisted, are embedded "in human customs and institutions".<sup>109</sup> These also include our (natural) language. We could not have an intention, for instance, to play chess if the technique of the game of chess did not exist.<sup>110</sup> And we could not have the 'intention' to do anything, that is, we could not use the concept of intention at all, if the technique of the use of the word 'intention', which stands for the concept, did not exist. Having said that, Wittgenstein did not mean that we could not intend to do anything *before* we mastered the relevant technique. A child obviously can intend (for example, an intention to drink from the breast), even if they cannot speak at all.<sup>111</sup> It only means that we cannot use the concept of 'intention' without having mastered the rules governing the use of the word 'intention' (or other substitutable words and expressions):

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<sup>106</sup> *Ibid.*, p. 107, para. 293.

<sup>107</sup> Cf. Hacker, 1990, pp. 254–5 see *supra* note 38.

<sup>108</sup> "The point is not to explain a language-game by means of our experiences, but to take account of a language-game.", see Wittgenstein, 2009, p. 175, paras. 654–5, see *supra* note 47.

<sup>109</sup> *Ibid.*, p. 115, para. 337.

<sup>110</sup> *Ibid.*

<sup>111</sup> Cf. *ibid.*, p. 174, para. 647: "What is the natural expression of an intention? – Look at a cat when it stalks a bird; or a beast when it wants to escape".

How [does anyone learn] to understand the order ‘Throw!’; and how, the expression of intention ‘Now I am going to throw’? Well – the grown-ups may perform before the child, may pronounce the word and straightway throw – but now the child must imitate that. [...] And how does it learn to use the expression ‘I was just about to throw’? And how does one know that it was then really in the state of mind that I call ‘being about to throw’? After such-and-such language games have been taught it, then on such-and-such occasions it uses the words that the grown-ups spoke in such cases, or it uses a more primitive form of expression, which contains the essential relations to what it has previously learnt, and the grown-ups substitute the regular form of expression for the more primitive one.<sup>112</sup>

In sum, the content of the *concept* of intention has no, so to speak, ontological independence *vis-à-vis* our language; just like the content of *our intentions*, for instance, an intention to play chess, is not independent from what it is possible to play or, more generally, to do. We learned the concept in learning language<sup>113</sup> and are able to correctly use the concept only when we have mastered the use of language in which the concept is expressed.

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<sup>112</sup> Wittgenstein, 1998, pp. 33–34, para. 163, see *supra* note 74.

<sup>113</sup> Wittgenstein, 2009, p. 125, para. 384, see *supra* note 47.

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## Genocide: The Choppy Journey to Codification

Mark A. Drumbl\*

### 18.1. Introduction

Winston Churchill exclaimed in a 1941 radio broadcast – as regards Nazi atrocities – that “we are in the presence of a crime without a name”.<sup>1</sup> Raphael (Rafael) Lemkin, a Polish-Jewish jurist, came up with a name to ease the scourge of this namelessness. He coined the word ‘genocide’ to refer to the mass destruction of groups. Lemkin did not see this kind of violence as novel. Rather, he simply invented a new word to name a recurring tragedy.

Lemkin’s Greek-Roman neologism (the Greek word *genos-* for tribe or race, the Latin word *caedere* [-*cide*] for killing) as elaborated upon in his 1944 book, *Axis Rule in Occupied Europe*, was initially rooted in the intention to annihilate a group through the destruction of its essential foundations of life.<sup>2</sup> Lemkin postulated that “genocide might be political, social, cultural, economic, biological, physical, religious, and moral”.<sup>3</sup> His

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<sup>1</sup> Anton Weiss-Wendt, *The Soviet Union and the Gutting of the UN Genocide Convention*, University of Wisconsin Press, Madison, 2017, p. 19. Churchill was specifically referring to the crimes committed by the *Einsatzgruppen* throughout Eastern Europe.

<sup>2</sup> Raphael Lemkin, “Genocide”, *Axis Rule in Occupied Europe*, Carnegie Endowment for International Peace, Washington, 1944, p. 79, describing genocide as “intended rather to signify a coordinated plan of different actions aiming at the destruction of essential foundations of the life of national groups, with the aim of annihilating the groups themselves. The objectives of such a plan would be disintegration of the political and social institutions, of culture, language, national feelings, religion, and the economic existence of national groups, and the destruction of the personal security, liberty, health, dignity, and even the lives of the individuals belonging to such groups”.

<sup>3</sup> Weiss-Wendt, 2017, p. 19, *supra* note 1.

concern lay more with the extirpation of identity than of life, of being than of doing, and hence he conceptualised genocide capaciously to encompass the destruction of “social and political institutions, culture, language, national feelings, religion, economic means, personal security, liberty, health, dignity, and finally life itself”.<sup>4</sup> Early drafts of the crime of genocide within United Nations (‘UN’) bodies reflected these broader formulations, for instance in the form of the inclusion of political groups and acknowledgement of cultural genocide.

For Lemkin, the path forward lay in *law*, specifically an international treaty. Lemkin insisted that “a treaty would take the life of nations out of the hands of politicians and give it [...] objective basis”.<sup>5</sup> Lemkin was indefatigable in his push towards codification. Lemkin indeed achieved his wish: the Genocide Convention was adopted by the UN General Assembly on 9 December 1948 and entered into force on 12 January 1951. Before the treaty, genocide was just an idea and a word. After the treaty, genocide became proscribed as an international crime. The Genocide Convention definition is as follows:

Article II: In the present Convention, genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

- (a) Killing members of the group;
- (b) Causing serious bodily or mental harm to members of the group;
- (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
- (d) Imposing measures intended to prevent births within the group;
- (e) Forcibly transferring children of the group to another group.

Article III: The following acts shall be punishable:

- (a) Genocide;
- (b) Conspiracy to commit genocide;

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<sup>4</sup> *Ibid.*

<sup>5</sup> Raphael Lemkin, *Totally Unofficial: The Autobiography of Raphael Lemkin*, Donna-Lee Frieze (ed.), Yale University Press, New Haven, 2013.

- (c) Direct and public incitement to commit genocide;
- (d) Attempt to commit genocide;
- (e) Complicity in genocide.

This chapter unpacks what happened to genocide as it travelled along this path to codification. To be clear: codification happened only because of compromise among States. Compromise was a cover for selfishness, spite, manipulation, and machination. As a result, the Convention narrowed – and even mangled – the set of protected groups, limiting it to ethnical, racial, religious, and national groups. The Convention, moreover, shrunk the means by which genocide could be committed. The case-study of genocide, I argue, serves as a more generalisable ode to the foibles of impatience (pushing for law too quickly) and the vaunted virtues of international treaty codification. This chapter thereby calls into question one of the reflexive impulses of the international lawyer, to wit, the hunger to ratify, to sign, and to rack up States Parties.

### **18.2. Lemkin: ‘Be Cool or Be Cast Out’**

Lemkin, the inventor, is inextricably intertwined with the crime of genocide. Lemkin looms large among the ‘grandfathers’ of contemporary international criminal law. He has been the subject of considerable academic and biographical literature; Lemkin, who passed away penniless and middle-aged in 1959, himself penned an autobiography that has only recently been published. In 2001, at an honorific ceremony, former UN Secretary-General Kofi Annan regaled Lemkin, noting that he “almost single-handedly drafted an international multilateral treaty declaring genocide an international crime [...] Lemkin’s success in this endeavour was a milestone in the United Nations’s history”.<sup>6</sup>

In 2016, Philippe Sands, a well-established British international lawyer, published *East West Street*. This book is a biopic of Lemkin, yet one that is deeply interactive in its cadence. Sands places Lemkin in context with both Hersch Lauterpacht, who nurtured the concept of crimes against humanity<sup>7</sup> and whose son Elihu picked up his father’s professor-

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<sup>6</sup> Quoted in Filipa Vrdoljak, “Human Rights and Genocide: The Work of Lauterpacht and Lemkin in Modern International Law”, in *European Journal of International Law*, 2009, vol. 20, no. 2, p. 1164.

<sup>7</sup> Lauterpacht, to be sure, did not invent the term ‘crimes against humanity’. Sands points out that the term had been used (albeit not in a legally binding sense) as early as 1915 to describe the conduct of the Turks against Armenians, see Philippe Sands, *East West Street*:

ship at Cambridge where he taught Sands, and Sands' own grandfather, Leon Buchholz. Each of Lemkin, Lauterpacht, and Buchholz overlapped in that they all spent time in the now Ukrainian city of Lviv, which was formerly known as Lemberg (under Austro-Hungarian rule and the Nazi occupation), Lwów (under Polish rule after World War I), and Lvov (under Soviet occupation). These three men all spent time in this one place either by birth or as students. Lemkin and Lauterpacht, in fact, both read law from the same professors at Lwów's law school which, as a result of Sands' book, now houses two portraits that honour these two alumni as catalytic figures of modern international criminal law.

What the portraits conceal, however, is the rivalries between these two figures. David Scheffer, in his review of Sands' book, unspools this competition as both energising and draining: "Lauterpacht and Lemkin never collaborated over what could have been a joint enterprise to criminalise the worst forms of human injury and destruction. Each man's arrogance, however kindly cast, created an obstacle course".<sup>8</sup> Lemkin and Lauterpacht modelled two offences, genocide and crimes against humanity, always in orbit but never in tandem.

*East West Street* has become wildly successful.<sup>9</sup> In it, Sands paints a darker picture of Lemkin that contrasts with long-standing tendencies in the literature to construct Lemkin's awkwardness as dogged tenacity rather than pugilistic self-importance.<sup>10</sup> No longer lionised, Lemkin morphs from iconoclastic juggernaut to someone who is not a 'team player' and does not 'fit in'. Sands goes to considerable lengths to point out how oth-

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*On the Origins of Genocide and Crimes Against Humanity*, Weidenfeld & Nicolson, London, 2016, p. 111. Importantly, in his review of Sands' book in the *Journal of Peace Research*, 9 July 2018, Morten Bergsmo notes: "Since 'Historical Origins of International Criminal Law: Volume 3' was published in 2015 [the year before Sands' book], we have also known that the term 'crimes against humanity' was used as early as 1861, 36 years before Lauterpacht was born and 78 years before the Nazi invasion of Poland", see Benjamin E. Brockman-Hawe: "Constructing Humanity's Justice: Accountability for 'Crimes Against Humanity' in the Wake of the Syria Crisis of 1860", in Morten Bergsmo, CHEAH Wui Ling, SONG Tianying and YI Ping (eds.): *Historical Origins of International Criminal Law: Volume 3*, Torkel Opsahl Academic EPublisher, Brussels, 2015 pp. 181-248 ([www.legal-tools.org/doc/ce092b/](http://www.legal-tools.org/doc/ce092b/)).

<sup>8</sup> David Scheffer, "Book Review, *East West Street: On the Origins of Genocide and Crimes Against Humanity*", in *American Journal of International Law*, 2017, vol. 111, no. 2, pp. 559, 564.

<sup>9</sup> Sands also narrates in a multi-media work he bases on the book.

<sup>10</sup> So, too, does Weiss-Wendt.

ers found Lemkin off-putting – so much so that, in particularly painful passages, Sands drily details how the Nuremberg social loop ostracised Lemkin and instead favoured the genteel Lauterpacht. Sands recounts how the Nuremberg team dumped Lemkin, sent him home, organised activities deliberately so he could not participate, and scooted him out before Lauterpacht arrived on site.<sup>11</sup> Even Benjamin Ferencz, then a “junior lawyer on Jackson’s team”, who seventy years later has become another lionised ‘grandfather’ of international criminal law, piles on:

[Ferencz] described Lemkin as a disheveled and disoriented figure, constantly trying to catch the attention of prosecutors. ‘We were all extremely busy,’ Ferencz recalled, not wanting to be bothered with genocide, a subject that was ‘not something we had time to think about’. The prosecution lawyers wanted to be left alone to ‘convict these guys of mass murder’.<sup>12</sup>

Sands chides Lemkin for “embellishing” a story about where Lemkin spoke and lectured and who was there and who stayed and who left.<sup>13</sup> And then the embellishment paragraph just ends, with a touch of innuendo, intimating that Lemkin was full of *braggadocio* – a confabulator not to be trusted. Absent from this discussion is the query as to *why* Lemkin’s memories were somewhat elastic and grandiose – perhaps like Ka-tzetnik, one of the most blistering among the Holocaust memorialists, Lemkin toggled between reality and fiction: such might be the mind of a true inventor and progenitor, no? Also forsaken is the chance to inquire how confabulators, riddled with agonies and demons, might advance the ball of

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<sup>11</sup> Sands, 2016, p. 185, see *supra* note 7: Jackson’s team “agreed to ‘eliminate him [Lemkin]’ from the inner circle and use him for background tasks, an ‘encyclopedia’ to be available in preparing the trial. Despite being rated as ‘top of the refugees’ and the reliance placed on his materials, he was shifted to the periphery”. See also p. 298: “Lemkin followed developments from Washington, kept far away from Nuremberg by Jackson’s team. It was frustrating to read the daily transcripts as they reached the War Crimes Office, where he worked as a consultant, to read news reports that made no mention of genocide. Maybe it was the Southern senators who got to Jackson and his team, fearful about the implications that the charge of genocide might have in local politics, with the American Indians and the blacks”.

<sup>12</sup> *Ibid.*, pp. 334–5.

<sup>13</sup> *Ibid.*, p. 175. The embellishment theme wends its way through Sands’ book. Sands, for instance, mentions how he “came to believe” that Lemkin’s memoir was “not entirely free from a touch of creative embellishment”, see p. 142. See also p. 332, reporting that Lemkin spoke with Eleanor Roosevelt and made a claim about the status of his “idea of formulating genocide as a crime” that was only partly accurate. See further p. 337.

history. In the end, thinking of Lemkin's place in *East West Street*, I wander to the angst of the Canadian rock band Rush, filtered through their classic song "Subdivisions":

Nowhere is the dreamer  
Or the misfit so alone  
Subdivisions  
In the high school halls  
In the shopping malls  
Conform or be cast out  
Subdivisions  
In the basement bars  
In the backs of cars  
Be cool or be cast out

Sands' book is a treasure trove of fascinating interviews, rich anecdotes, facts and then more facts – all delivered in lively fashion. We learn that Lemkin was born in June 1900 to a Polish-Jewish family on a farm called Ozerisko near the town of Wołkowysk several hundred miles north of Lemberg.<sup>14</sup> Lemkin was the middle child among three brothers.<sup>15</sup> Lemkin's father was able to own the farm by paying off the Russian officials who at the time controlled the area which was subject to Russian laws that prohibited Jewish land ownership. Sands notes that this ritual circumvention of law offered Lemkin his very first encounter with governmental authority and oppression.

Lemkin's childhood, moreover, was haunted by anti-Semitism and pogroms.<sup>16</sup> Lemkin was influenced by his readings of the ancient Roman ritual of feeding Christians to lions. These rituals stunned Lemkin: how could this be permissible, he wondered, and even cheered on as spectacle? Sands recounts (again, in chiding fashion) how Lemkin "imagined stomachs split apart and stuffed with pillow feathers, although it seems more likely that the impressions were drawn from a poem by Bialik, *In the City of Slaughter*, which offered a graphic account of a different atrocity a thousand miles south, with a line about 'cloven belly, feather-filled'".<sup>17</sup>

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<sup>14</sup> *Ibid.*, p. 140.

<sup>15</sup> So, too, was Lauterpacht, though he had a younger sister rather than a brother. Lauterpacht was born in August 1897 in the hamlet of Zólkiew, a few miles from Lviv (at the time Lemberg).

<sup>16</sup> Sands, 2016, p. 141, see *supra* note 7.

<sup>17</sup> *Ibid.*

Sands unearths how Lemkin's experiences – whether imagined or real – nudged him towards the seriousness and also prevalence of group destruction. According to Lemkin, “an excessive focus on individuals was naïve [... as] it ignored the reality of conflict and violence: individuals were targeted *because* they were members of a particular group, not because of their individual qualities”.<sup>18</sup>

Lemkin studied law in Lwów, where he was taught by many of the same teachers as Lauterpacht, who had passed through just before and who thereafter laboured to develop the notion of crimes against humanity. Sands casts these two legends as foils, along with their legal handiwork – such that crimes against humanity and genocide continue as rivals. Sands, to be sure, does not mask his normative preference for Lauterpacht's views nor his affection for Lauterpacht's spirit.<sup>19</sup>

Lemkin was also influenced by the violence in Armenia from 1915 to 1917, which today discursively craves (and often bears) the moniker that Lemkin himself invented, that is to say ‘genocide’, and in which Lemkin notes that “[m]ore than 1.2 million Armenians” were murdered “for no other reason than they were Christian”.<sup>20</sup> Lemkin added that “[a] nation was killed and the guilty persons set free”, and he fingered in particular the responsibility of Talaat Pasha, an Ottoman Minister. Lemkin pleaded in his autobiography to question “[w]hy is a man punished when he kills another man, yet the killing of a million is a lesser crime than the killing of an individual?”.<sup>21</sup> Lemkin also became smitten with Soghomon Tehlirian, who assassinated Pasha, and his trial which, for Lemkin, morphed into a trial not of an individual assassin but instead of “the Turkish perpetrators”.<sup>22</sup> Later in his life, Lemkin concluded that the Ukrainian

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<sup>18</sup> *Ibid.*, p. 291.

<sup>19</sup> *Ibid.*, p. 291: “I was instinctively sympathetic to Lauterpacht's view, which was motivated by a desire to reinforce the protection of each individual, irrespective of which group she or he happened to belong to, to limit the potent force of tribalism, not reinforce it. By focusing on the individual, not the group, Lauterpacht wanted to diminish the force of inter-group conflict. It was a rational, enlightened view, and also an idealistic one”.

<sup>20</sup> Cited in *ibid.*, p. 143.

<sup>21</sup> Lemkin, 2013, p. 19, see *supra* note 5.

<sup>22</sup> *Ibid.*, p. 20. Tehlirian was ultimately acquitted on the basis that he had acted under “psychological compulsion”. This is a defence that receives very little currency in contemporary atrocity trials. Lemkin's response to the assassination and to the acquittal was pointed – he felt that both underscored the need for laws against “racial or religious murder” that would be “adopted by the world”. Lemkin also expressed a similar concern regarding

*Holodomor* ('extermination by hunger') in 1932–1933 also formed part of a broader Soviet genocidal plan to destroy Ukrainian national identity. In an unpublished essay, Lemkin wrote that the "third prong of the Soviet plan" to crush Ukraine was:

aimed at the farmers, the large mass of independent peasants who are the repository of the tradition, folklore and music, the national language and literature, the national spirit, of Ukraine. The weapon used against this body is perhaps the most terrible of all – starvation. Between 1932 and 1933, 5,000,000 Ukrainians starved to death.<sup>23</sup>

It remains doubtful, however, whether the *Holodomor* would actually fit within the ambit of the Genocide Convention that subsequently entered into force.

Lemkin loved languages and the study of philology. As a result, he surely would have appreciated the power of a word as it gradually grows and spreads. Yet, Lemkin formally chose instead to study law at Lwów University from 1921 to 1926. While in school Lemkin completed a book on Russian and Soviet criminal law. After graduation, Lemkin served as a public prosecutor in Poland. He did so for six years.

As the noose of oppression tightened, Lemkin fled Poland. He ultimately journeyed to the United States, having received an offer to teach at Duke University in North Carolina along with a visa. Lemkin's travels were circuitous. He stopped for months in Stockholm. Then he departed Europe through Moscow, ten days by train to Vladivostok, then Japan (where he had a pleasant visit to Kyoto), later by boat across the Pacific to Vancouver, Canada, and then on to Seattle (all because the Atlantic route was barred by war). Lemkin subsequently crossed the United States by train. He alighted at Duke University:

Lemkin wept on arriving at the campus, the first time he permitted himself such a display of emotion. So different from a European university, without suspicion or angst, the smell of fresh-cut grass, boys wearing open white shirts,

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the acquittal of Shalom Schwarzbard (on grounds of insanity) who shot the Ukrainian Prime Minister in Paris in retaliation for a 1918 pogrom in which Schwarzbard's parents had perished.

<sup>23</sup> Roman Serbyn and Raphael Lemkin, "Lemkin on Genocide of Nations", in *Journal of International Criminal Justice*, 2009, vol. 7, no. 1, p. 128.

girls in light summer dresses, books being carried, everyone smiling. A sense of idyll prevailed.<sup>24</sup>

During his transient months in Stockholm, Lemkin dug into Nazi decrees and ordinances in order to delineate larger motives. His detailed research led him to see an overarching thread of the reduction of non-Germans to nothing, really nothing, mapping onto his identification of the scourge of group-based violence. Lemkin identified a pattern: first, denationalisation in which individuals were rendered stateless; followed by dehumanisation, in which legal rights were removed; and then the killing of the nation “in a spiritual and cultural sense”.<sup>25</sup> Lemkin thereby became among the first outside observers to capture the motion of these hideous hydraulics and invidious pneumatics well before the Wannsee Conference in January 1942 and the promulgation of the Final Solution.

Lemkin taught, wrote, and spoke increasingly single-mindedly about genocide. Although he regaled anyone who would listen, he also deliberately targeted contact with influential figures, including U.S. Supreme Court Justice Robert Jackson (who would later serve as the Chief American prosecutor at the International Military Tribunal at Nuremberg). Lemkin wound up in a consultancy at the Board of Economic Warfare in Washington, D.C. in the spring of 1942.<sup>26</sup> He wrote a memorandum to President Roosevelt urging a treaty “to make the protection of groups an aim of the war and to issue a clear warning to Hitler”.<sup>27</sup> Roosevelt’s response was tepid. At that point, then, Lemkin decided to appeal directly to the American public for support. He decided to write a book, which he titled *Axis Rule in Occupied Europe*.

### 18.3. Genocide and Crimes Against Humanity as Frenemies

It was in Chapter 9 of *Axis Rule in Occupied Europe* that Lemkin originated and introduced the neologism ‘genocide’ to identify the crime that Churchill lamented had no name. Although Lemkin had intended *Axis Rule in Occupied Europe* for a general audience, the text turned out long, heavy, technical, and wooden.<sup>28</sup> Lemkin was deeply concerned with the

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<sup>24</sup> Sands, 2016, p. 170, see *supra* note 7.

<sup>25</sup> Discussed and cited in *ibid.*, p. 166.

<sup>26</sup> *Ibid.*, p. 175.

<sup>27</sup> *Ibid.*, p. 176.

<sup>28</sup> Samantha Power, *A Problem from Hell: America and the Age of Genocide*, Basic Books, 2013, p. 38.

development of legal responses to atrocities that States committed against their own citizens, residents, or inhabitants.<sup>29</sup> He made the case for group protection but also unpacked the scourge of group violence. For Lemkin, genocide governed acts “directed against individuals, not in their individual capacity, but as members of the national group”.<sup>30</sup> He wrote of the German people, not the Nazis (only once was the term National Socialist mentioned).<sup>31</sup> Lemkin found fault with the German people for freely accepting Hitler’s conduct and for profiting therefrom.<sup>32</sup>

*Axis Rule in Occupied Europe* is an exhaustive compilation of German criminality – ordinances, laws, decrees, and policies. Lemkin was concerned centrally with Jews, but also emphasised the German policies of destroying other groups, including Poles, and the deployment by the Germans of a vast array of laws in this regard. Lemkin abhorred all forms of State-sponsored murder, but the heart of his efforts “focused on the subset of state terror that he believed caused the largest number of deaths”.<sup>33</sup>

*Axis Rule in Occupied Europe* takes root in Lemkin’s earlier publications. Although the idea of genocide was new, the interests that genocide seeks to protect and the need for those interests to be protected originate much earlier in Lemkin’s intellectual odyssey. In 1933, for example, Lemkin proposed ‘barbarism’ and ‘vandalism’ as new international crimes. Barbarism he saw as persecution of ethnic, racial, religious, or social groups. Vandalism covered the destruction of works of art and culture of those groups. Lemkin was inspired in this regard by his prescient read of *Mein Kampf* – and his insistence on international laws that could protect Jews and other minorities. In *Axis Rule in Occupied Europe*, Lemkin however discarded these terms and replaced them with genocide.<sup>34</sup>

Jackson read *Axis Rule in Occupied Europe*. Jackson even added genocide – defined as the “destruction of racial minorities and subjugated populations” – to the list of possible crimes with which to charge the Na-

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<sup>29</sup> Vrdoljak, 2009, p. 1175, fn. 75, see *supra* note 6.

<sup>30</sup> Lemkin, 1944, p. 79, see *supra* note 2.

<sup>31</sup> Sands, 2016, p. 178, see *supra* note 7. Placing responsibility on the German people led to considerable criticism after the book was published.

<sup>32</sup> *Ibid.*, p. 178.

<sup>33</sup> Power, 2013, p. 57, see *supra* note 28.

<sup>34</sup> Sands, 2016, p. 179, see *supra* note 7.

zis at Nuremberg.<sup>35</sup> Indeed, “deliberate and systematic” genocide wove its way into count 3 of the indictment (over the hesitation of the British delegation), where it was defined as “extermination of racial and religious groups, against the civilian populations of certain occupied territories in order to destroy particular races and classes of people and national, racial, or religious groups, particularly Jews, Poles, Gypsies and others”.<sup>36</sup> Lemkin felt victorious and validated. His joy, however, was fleeting and quickly dashed on the day the Nuremberg judgment was issued – the “blackest day” of his life.<sup>37</sup> The Nuremberg judgment of 1 October 1946 made no reference to genocide but did refer to crimes against humanity, Lauterpacht’s brain-child. Certainly, as Sands elaborates, Lauterpacht’s social grace gave him access to and an ease with the Nuremberg prosecution team that chronically eluded Lemkin. As early as late 1940, Jackson – at the time US Attorney-General – saw Lauterpacht as a partner: initially on the question as to how the US could become involved in the war while still neutral.<sup>38</sup> By July 1945, when they met to discuss the charges that were being formulated at the London Conference, Lauterpacht straddled an inside track. Lauterpacht also had access to British chief prosecutor Sir Hartley Shawcross and helped write Shawcross’ opening and closing speeches at the trial. Neither Shawcross nor Jackson referenced genocide in their opening statements. That said, Shawcross, entirely on his own, added references to genocide in his closing argument while still however retaining an overall focus on crimes against humanity. Another British prosecutor, Sir David Maxwell Fyfe, deployed the term ‘genocide’ when he cross-examined the German diplomat Konstantin von Neurath.<sup>39</sup> But, as mentioned earlier, this thread was not picked up by the judges in their judgment.

Lemkin, the outcast, became completely smitten with the idea of an international treaty to outlaw genocide. After all, “Lemkin, a practical idealist, believed that proper criminal laws could actually prevent atroci-

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<sup>35</sup> *Ibid.*, p. 184.

<sup>36</sup> Count 3 (war crimes), cited in *ibid.*, p. 188.

<sup>37</sup> Cited in *ibid.*, p. 377.

<sup>38</sup> Robert Jackson, “Address of Robert H. Jackson, Attorney General of the United States, Inter-American Bar Association, Havana, Cuba, March 27, 1941”, in *American Journal of International Law*, 1941, vol. 35, p. 351.

<sup>39</sup> Sands, 2016, pp. 336–7, see *supra* note 7.

ty”.<sup>40</sup> He also pushed hard for universal jurisdiction, observing that “by its very nature [genocide] is committed by the state or by powerful groups which have the backing of the state. A state would never prosecute a crime instigated or backed by itself”.<sup>41</sup> Lemkin’s vision was one in which both States and individuals could be held accountable for genocide.<sup>42</sup>

Undaunted, Lemkin continued to lobby and lobby, push and pull, prod and prompt – he was indefatigable though his efforts strained his health. Lemkin jumped into the world of politics and legislatures and diplomats and capitols. Denied in the courtroom, he persisted in the hallways. The horrific atrocities of World War II fuelled his passionate pleas.

Remarkably, on 11 December 1946, the UN General Assembly unanimously adopted Resolution 96(1), which described ‘genocide’ as “denying the rights of existence of entire human groups” and which it affirmed as a “crime under international law [...] whether it is committed on religious, racial, political or any other grounds”.<sup>43</sup> Soon thereafter, in July 1947, the Secretariat of the UN presented a draft convention that also sought “to prevent the destruction of racial, national, linguistic, religious or political groups of human beings”.<sup>44</sup> All the initial drafts of the Genocide Convention included political groups. Drafts also encompassed the concept of cultural genocide.<sup>45</sup>

Lauterpacht reviewed *Axis Rule in Occupied Europe* in the *Cambridge Law Journal*. Lauterpacht’s review was lukewarm at best.<sup>46</sup> He saw this book more as a contribution to the historical record than to law

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<sup>40</sup> *Ibid.*, p. 157. See also, p. 181: “Lemkin retained a practical perspective. The existing rules were inadequate; something new was needed. A new word was accompanied by a new idea, a global treaty to protect against the extermination of groups, to punish perpetrators before any court in the world”.

<sup>41</sup> Raphael Lemkin, “Genocide”, in *American Scholar*, 1946, pp. 227–8.

<sup>42</sup> *Ibid.*, p. 230.

<sup>43</sup> General Assembly Resolution 95 affirmed that the principles of international law recognised by the Nuremberg Tribunal, which included crimes against humanity, formed part of international law.

<sup>44</sup> Norman M. Naimark, *Stalin’s Genocides*, Princeton University Press, Princeton, 2010, p. 21.

<sup>45</sup> See, for example, Office of the United Nations High Commissioner for Human Rights, Draft Convention on the Crime of Genocide, UN Doc. E/447, 26 June 1947, Article I(II)(3)(e) ([www.legal-tools.org/doc/a2d995/](http://www.legal-tools.org/doc/a2d995/)).

<sup>46</sup> Sands, 2016, p. 107, see *supra* note 7. Elihu, Lauterpacht’s son, told Sands that his father “didn’t think much of Lemkin” and “thought him to be a compiler, not a thinker”.

and, moreover, expressed scepticism about the rationale and utility of this new neologism. Lauterpacht, according to his son, was “not keen on the concept of genocide” because of his fear that protecting groups would undermine the protection of individuals.<sup>47</sup> For Lauterpacht, the individual human being as constituting the ultimate unit of all law.<sup>48</sup> This categorisation, however, seems a touch too overdrawn. After all, how is the prosecution of crimes against humanity so shorn of group protection given the group-like aspect to many crimes against humanity, including persecution and extermination? Crimes against humanity, moreover, protect civilians as a group: must it not be shown, as an element of crimes against humanity, that the impugned conduct took place as part of a widespread or systematic attack against a civilian population? Also, in terms of nomenclature, is not ‘humanity’ the biggest group of all?

I wonder about another possible (speculative) angle of difference between the two men, namely, a difference of methodology. Lemkin, insecure and always off-balance, strikes me as a fan of codification, of treaties, and of clarity: hence, angling constantly to legally define genocide as an international crime. Lauterpacht, centred and secure, perhaps could move instead through *bricolage*, through piecemeal messiness – such that there was no hunger for a crimes against humanity convention that said it all but, rather, charges here and there, national initiatives, commas and semi-colons, something more organic.

#### **18.4. Codification: Its Externalities and Discontents**

Lemkin’s hunger for codification, while generative, was also limiting. The Cold War crept in. In an insightful new book, Anton Weiss-Wendt posits that the expansiveness of genocide as an idea was “gutted” – mostly, he argues, by the Soviet Union – in the process of codifying it in an international treaty.<sup>49</sup> The Soviets were concerned with the exercise of external

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<sup>47</sup> *Ibid.*, p. 107.

<sup>48</sup> Lauterpacht quoted in *ibid.*, p. 57. See also L. Oppenheim, in Hersch Lauterpacht (ed.), *International Law: A Treatise*, vol. I, 8th edition, London, Longman, 1955, 75 (Lauterpacht arguing that the Genocide convention is more “a registration of protest against past misdeeds of individual savagery”, than an “effective instrument of their prevention and repression”).

<sup>49</sup> Weiss-Wendt also unpacks the Soviet concept of international law which emphasised bilateral treaties instead of the development of international law through multilateral treaties and binding custom among nations. See also B.S. Chimni, “Customary International Law: A Third World Perspective”, in *American Journal of International Law*, 2018, vol.

penal jurisdiction over political arrests and executions conducted by Stalin (for example, the Great Terror), the Gulag, and expulsions of Koreans and Germans.<sup>50</sup> The Soviets insisted that “[p]olitical groups were entirely out of place in a scientific definition of genocide, and their inclusion would weaken the convention and hinder the fight against genocide”.<sup>51</sup> In the end, the USSR led a relentless and successful push to exclude political groups from protection.

Initial drafts of the Genocide Convention referenced cultural genocide. A 1948 version included a provision that mentioned “[d]estroying [...] libraries, museums, schools, historical monuments, places of worship and other cultural institutions and objects of the group with the intent to destroy the culture of that group”.<sup>52</sup> This language resonated with Lemkin’s early formulation of the crime of vandalism. The Sixth Committee, however, omitted the term ‘cultural genocide’ from the final text.<sup>53</sup> State parties to the negotiation process were sceptical. The United Kingdom (like the Canadians) feared any connection between cultural genocide and (settler) colonialism.<sup>54</sup> Denmark chided the lack of proportion and logic in including “in the same convention both mass murders in gas chambers and the closing of libraries”.<sup>55</sup>

Weiss-Wendt concludes that the US delegation to the UN “had played the key role in bringing the Genocide Convention to life”,<sup>56</sup> adding

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112, no. 1, p. 44: “The Soviet Union expressed deep skepticism about customary international law as a source of international law as it reflected the practices and *opinion juris* of the leading capitalist powers”.

<sup>50</sup> Weiss-Wendt, 2017, pp. 72–75, see *supra* note 1.

<sup>51</sup> Naimark, 2010, p. 21, see *supra* note 44. See also p. 24, noting the Soviet viewpoint that political groups were too fluid and too difficult to define).

<sup>52</sup> United Nations Economic and Social Council, Ad Hoc Committee on Genocide, Report of the Committee and Draft Convention Drawn up by the Committee, UN Doc. E/794, 24 May 1948, Article III(2) ([www.legal-tools.org/doc/d88e33/](http://www.legal-tools.org/doc/d88e33/)).

<sup>53</sup> United Nations General Assembly, Official Records, 3<sup>rd</sup> Session, 83<sup>rd</sup> Meeting, UN Doc. A/C6/SR83, 1948, p. 206 ([www.legal-tools.org/doc/75636f/](http://www.legal-tools.org/doc/75636f/)).

<sup>54</sup> Weiss-Wendt, 2017, p. 91, see *supra* note 1.

<sup>55</sup> *Ibid.*, pp. 198–9. Fifty years later, the International Law Commission (‘ILC’) rejected the notion of cultural genocide during the negotiation of the Draft Code of Crimes against the Peace and Security of Mankind, see ILC, Report of the International Law Commission on the work of its forty-eighth session, 6 May – 26 July 1996, Official Records of the General Assembly, Fifty-first session, Supplement No. 10, UN Doc. A/51/10, 26 July 1996, pp. 46–47 ([www.legal-tools.org/doc/7ec2f1/](http://www.legal-tools.org/doc/7ec2f1/)).

<sup>56</sup> Weiss-Wendt, 2017, p. 142, see *supra* note 1.

that “[t]he structure and form of the convention was unmistakably American; the text of the convention was grounded in Anglo-American legal tradition”.<sup>57</sup> When readers consider the rich details that Weiss-Wendt presents, however, it quickly becomes apparent that the US government was also complicit in the “gutting” of the treaty. US officials were preoccupied with race, specifically, the Convention’s implications for segregation in the American South, including managing some of the public’s fears regarding the domestic “campaign to indict the US government for genocide of American blacks”.<sup>58</sup> The Soviets leveraged these fears throughout the negotiation process, underscoring the connections between genocide and racism. Weiss-Wendt observes that “racial segregation in the American South was probably *the* major concern for US politicians”.<sup>59</sup> The State Department assured that the lynching of African-Americans (which it described as “sporadic outbreaks against the Negro population”) would fall outside the scope of genocide.<sup>60</sup> The Senate Foreign Relations Subcommittee on Genocide went so far as to recommend ratification of the Convention with reservations, including the explicit exclusion from the understanding of genocide of “lynching, race riots, and so forth”.<sup>61</sup> But, still, serious worries endured among US politicians and diplomats:

[O]pponents of the Genocide Convention hinted at the probability that the United States might be indicted for genocide [...] on evidence of race riots. On the other, they expressed regret that the omission of political groups from the wording of the Convention prevented similar charges from being leveled against the Soviet Union.<sup>62</sup>

This reluctance came not only from the US and the USSR, to be clear. Brazil, Iran, and South Africa all objected to the inclusion of political groups.

Ironically, the Soviets ratified the Convention on 3 May 1954, over three decades before the Americans did. The Bricker faction in the US

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<sup>57</sup> *Ibid.*

<sup>58</sup> *Ibid.*, p. 9.

<sup>59</sup> *Ibid.*, p. 228.

<sup>60</sup> *Ibid.*, p. 80. Concerns also arose regarding the status of Native Americans, see p. 117.

<sup>61</sup> *Ibid.*, p. 228.

<sup>62</sup> *Ibid.*, p. 153. See also, p. 227: “Potential indictment for crimes committed against black Americans was among the main reasons why organizations like the Daughters of the American Revolution denounced [...] the Genocide Convention”.

Senate, which “stood on guard against UN encroachments on the ‘right’ of southern states to keep black Americans in check”, prompted President Eisenhower to withdraw support for the treaty.<sup>63</sup>

Weiss-Wendt is critical of Lemkin. Rather than the “saintly figure” often venerated in public accounts, Weiss-Wendt presents Lemkin as a “rather odious character – jealous, monomaniacal, self-important, but most of all unscrupulous”.<sup>64</sup> Weiss-Wendt paints Lemkin as vain, and as complicit in the curtailment that ultimately “gutted” his own concoction. As early as 1947, Lemkin himself came to favour the exclusion of political groups in order to secure the adoption of the Convention. He enlisted the World Jewish Congress in this process.<sup>65</sup> Lemkin came to believe that the destruction of political groups should be its own crime, separate from genocide, which he called “political homicide”.<sup>66</sup> “Every revolutionary regime comes to power by destroying some of its opponents”, Lemkin wrote, and then added:

Later this regime is recognized by other nations, sometimes the whole world. Should political groups be included in the definition of genocide, recognition of a revolutionary regime would imply acceptance of genocide as legal. This would kill the Genocide Convention before it took root in world society.<sup>67</sup>

Weiss-Wendt elaborates how, when it came to excluding political groups, “even Lemkin’s closest associates expressed astonishment that he was ‘willing to throw anything and everything overboard in order to save a ship’”.<sup>68</sup> Weiss-Wendt is unstinting in his analysis, showing how Lemkin accepted the US position regarding African-Americans and the Ku Klux Klan; and even as late as the mid-1950s Lemkin continued to fret that genocide might be tied to discrimination.<sup>69</sup> Lemkin spouted an ardent anti-communism in order to secure what mattered as much to him as the entry into force of the Genocide Convention, that is, the US ratification

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<sup>63</sup> *Ibid.*, p. 273.

<sup>64</sup> *Ibid.*, p. 280.

<sup>65</sup> *Ibid.*, p. 100. See also William A. Schabas, *Genocide in International Law*, Cambridge University Press, Cambridge, 2000, p. 136.

<sup>66</sup> Lemkin, 2013, pp. 161–2., see *supra* note 5.

<sup>67</sup> *Ibid.*

<sup>68</sup> Weiss-Wendt, 2017, p. 101, *supra* note 1.

<sup>69</sup> *Ibid.*, p. 267.

thereof. Lemkin did not live long enough to witness this moment.<sup>70</sup> Weiss-Wendt ably demonstrates how Lemkin's insistence may have become annoying, if not cloying, and actually may have hindered US ratification.<sup>71</sup> Weiss-Wendt reveals, through meticulous research, how Lemkin degraded other international instruments (like the Universal Declaration of Human Rights, the draft Covenant on Social and Political Rights, the Convention Concerning the Abolition of Forced Labour, and the Draft Code of Offenses against the Peace and Security of Mankind) because he regarded them as contradicting the Genocide Convention. In this regard, as well, the relentlessly myopic focus on a curtailed Genocide Convention additionally "gutted" the number and variety of instruments that could be responsive to episodes of genocide. That said, this manoeuvring and Lemkin's obstinacy also sired a compromise that led to the Convention in the first place.

As for Lemkin: well, perhaps he was neither saintly nor odious. Perhaps he was both. Or perhaps he was just a man with missionary zeal, an activist with a cause, who laboured to get what he sought. That said, Weiss-Wendt makes an enormous contribution to the literature by demonstrating how Lemkin's thinking on genocide was far from 'static'. This means that the activists of today who invoke Lemkin's 1944 *Axis Rule in Occupied Europe* as grounds to expand the crime of genocide rely on only one – albeit perhaps the most attractive – of "many Lemkins".<sup>72</sup> In so doing, their invocation of Lemkin's contributions, while opportunistic, is also distortive. That said, this Lemkin is the original Lemkin. This is Lemkin as the progenitor of a word, a different Lemkin than the Lemkin – perhaps himself morphing through the law-making process – who became the progenitor of a Convention.

What are the fundamental values that genocide seeks to protect? Lemkin's initial thinking was that a broader scope of law was required to protect his vision, but then he became complicit in narrowing the scope of that law. Does this mean that his values changed through time? Or that some law, whatever law he could grasp, would suffice to protect those values? What is more, of course, this shard of law – its content – then

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<sup>70</sup> France had joined before Lemkin's death. The United Kingdom became a party in 1970, over a decade after Lemkin's passing.

<sup>71</sup> Weiss-Wendt, 2017, p. 149, see *supra* note 1.

<sup>72</sup> *Ibid.*, p. 281.

became customary international law – thin, assuredly, but perhaps had it been too thick it would never have hardened in this fashion, or at all. That said, the conventional definition carries its silences and omissions into the realm of the customary.

Another theme is whether private economic actors, business people, or corporate officials could be contemplated as individuals capable of committing genocide. To be sure, German industrialists were prosecuted in a number of the subsequent proceedings held at Nuremberg for their role in the aggressive war and the Holocaust. The Genocide Convention’s drafters, however, focused on the leaders or officials of States, and other political and military organisations opposing States, as potential perpetrators. No consideration was given to the possibility that private economic actors, business people, or corporate officials (or corporations as legal persons) could be liable for participating in genocide.<sup>73</sup> To be sure, the lines between private corporations and public actors are often blurred in many polities – and atrocities may involve contexts in which such blurring is particularly pronounced. Lemkin’s initial perspective on the matter inclined to the possibility that private individuals could be prosecuted for genocide. The first draft of the Genocide Convention (written by a committee made up of three experts including Lemkin) included “rulers, public officials or private individuals”.<sup>74</sup> Article IV of the final version of the Genocide Convention retains this language: “Persons committing genocide or any of the other acts enumerated in Article III shall be punished, whether they are constitutionally responsible rulers, public officials or private individuals”.

However, as Magda Karagiannakis ably demonstrates, the negotiation process of the Genocide Convention, and the commentaries made thereto, ordinarily placed potential perpetrators in an hierarchy. Private actors were on the bottom rung and additionally came to be seen as liable mainly when they acted as members of public organisations.<sup>75</sup> The Sixth

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<sup>73</sup> Magda Karagiannakis, *Business Persons and International Criminal Law: Challenges of Policy, Principle and Proof*, Ph.D. Thesis, University of Melbourne, Melbourne, 2017, p. 39.

<sup>74</sup> United Nations General Assembly, Resolution 180 (II), Draft Convention on the Crime of Genocide, UN Doc. A/RES/180 (II), 21 November 1947, Article 4 ([www.legal-tools.org/doc/d499f2/](http://www.legal-tools.org/doc/d499f2/)).

<sup>75</sup> Karagiannakis, p. 43, see *supra* note 73. See also p. 48: “[T]he drafters, while casting the net wide enough for the prosecution of any person involved in genocide, chose to consider potential perpetrators to be the leaders of officials of states and other political and military

Committee, Karagiannakis notes, “did not have any discussions regarding the possibility of business persons or corporations being liable”.<sup>76</sup> In sum, then, while the prospect of private economic actors acting in a purely private capacity may have only been meekly conceptualised by Lemkin as having the capacity to be responsible for acts of genocide, this capacity withered even further in the process of negotiating the Convention. Roughly half a century later, however, the International Criminal Tribunal for Rwanda (‘ICTR’) convicted Alfred Musema, owner of a tea factory, on charges that included genocide.<sup>77</sup> The ICTR extended command responsibility to a corporate officer for the acts of his employee subordinates. This is but one example of the interpretive push and pull that the judges of today exercise on the crime that Lemkin laboured to codify nearly three generations ago. At times this interpretive activity expands the scope of genocide, while at other times it shrinks the likelihood of securing an individual conviction.

### **18.5. Legacy: Passing the Baton to Contemporary Institutions and Judges**

Articles 4(2) and (3) of the Statute of the International Criminal Tribunal for the former Yugoslavia (‘ICTY’, 1993), Articles 2(2) and (3) of the ICTR Statute (1994), and Article 6 of the Rome Statute of the International Criminal Court (‘ICC’, 2002) each adopted the same definition as Article II of the Genocide Convention. Once negotiated, the definition of genocide remained fixed, even at the 1998 Rome Conference that established the ICC. In large part, this stasis can be traced to a reluctance to re-open negotiations, to path dependency, and also to a lack of consensus among

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organisations opposing states. This demonstrated a focus upon public officials as perpetrators of genocide rather than private economic actors such as businessmen or industrialists”.

<sup>76</sup> *Ibid.*, p. 44. What is more, Article IV covered only the punishment of natural persons for genocide – thereby excluding legal persons such as corporations. See Ben Saul, “In the Shadow of Human Rights: Human Duties, Obligations, and Responsibilities”, in *Columbia Human Rights Law Review*, 2001, vol. 32, p. 596. The ability of corporations to be held responsible for serious violations of international law remains contested. The Rome Statute, for example, only applies to natural persons. In 2018, in the *Arab Bank* litigation, the US Supreme Court held that corporations cannot be sued for damages under the Alien Tort Statute for violations of customary international law.

<sup>77</sup> ICTR, *The Prosecutor v. Alfred Musema*, Trial Chamber I, Judgement and Sentence, ICTR-96-13-A, 27 January 2000, para. 148 ([www.legal-tools.org/doc/1fc6ed/](http://www.legal-tools.org/doc/1fc6ed/)): The Chamber held that the “definition of individual criminal responsibility [...] applies not only to the military but also to persons exercising civilian authority as superiors”.

delegates regarding the merits of including cultural genocide and political groups as potential actors.<sup>78</sup>

Without the Genocide Convention as a template – however circumscribed its definition may be – contemporary institutions such as the ICTR, the ICTY, and the ICC would likely not be able to prosecute genocide under their own enabling instruments and, in the case of the first two of these institutions, actually have proceeded to convict defendants. Although each of these enabling instruments basically replicated the definition of genocide from the Convention, judges have come to play an important role as legal interpreters. Judges on the ICTR and ICTY in their application of the crime of genocide extended it to the Tutsi of Rwanda (determined to be an ethnic group) and 7,000 to 8,000 Bosnian Muslim men and boys of military age massacred in Srebrenica by Bosnian Serb forces (determined to be a substantial part of the targeted group, a qualification that the ICTY added). The ICTY convicted and sentenced some of its highest profile defendants (Radovan Karadžić and Ratko Mladić) on charges that included genocide – albeit only at Srebrenica.<sup>79</sup> The ICTR categorically identified genocide as the “crime of all crimes”, thereby knocking the crime of aggression off the pedestal upon which the Interna-

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<sup>78</sup> As to cultural genocide, ICTY judges also remained circumspect. In *Prosecutor v. Radislav Krstić*, which delivered a conviction for aiding and abetting genocide (the first such conviction at the ICTY), an ICTY Trial Chamber insisted that genocide involves only the “physical or biological destruction of all or part of the group”, thereby explicitly excluding acts aimed to destroy the cultural aspects of a particular group. See ICTY, *Prosecutor v. Radislav Krstić*, Trial Chamber, Judgement, IT-98-33-T, 2 August 2001, para. 580. ([www.legal-tools.org/doc/440d3a/](http://www.legal-tools.org/doc/440d3a/)). The Trial Chamber, however, recognised that destruction of cultural identity may proceed simultaneously with physical or biological destruction, and evidence of destruction of cultural property may be considered as evidence of the intent to physically or biologically destroy the targeted group. The Appeals Chamber in *Krstić* affirmed the Trial Chamber’s ruling on this point.

<sup>79</sup> The War Crimes Chamber of the Court in Bosnia-Herzegovina has also issued genocide convictions for the massacre at Srebrenica. The application of the crime of genocide to the Srebrenica massacre has proven controversial in academic quarters as being unduly elastic. See, for example, Menachem Z. Rosensaft, “Ratko Mladić’s Genocide Conviction, and Why it Matters”, in *The Tablet*, 22 November 2017, supporting this application but citing William A. Schabas as being “bothered by what he called a ‘micro-genocide’”. The ICTY in a series of cases nonetheless underscored that the women, children, and elderly at Srebrenica suffered ‘forcible transfer’ and ‘serious bodily and mental harm’ – each of which is proscribed as genocide by the ICTY Statute (and the Genocide Convention, of course); these judgments, beginning with *Krstić*, also explored at length what a ‘substantial’ part of the overall population constitutes and developed a series of factors to consider in the context of Srebrenica.

tional Military Tribunal at Nuremberg had placed it. The ICTR moreover elaborated at length on how to determine genocidal intent in contexts lacking direct evidence.<sup>80</sup> Prosecutors at the Extraordinary Chambers in the Courts of Cambodia (‘ECCC’) also have also pursued genocide charges. In proceedings against Khmer Rouge leaders Nuon Chea and Khieu Samphan, ECCC prosecutors allege genocide against the Vietnamese and Cham people. In a 1978 radio broadcast, which ECCC prosecutors put into evidence, Pol Pot estimated that “each Cambodian soldier was capable of killing 30 Vietnamese, and therefore Cambodia could wipe out the entire population with only 2 million soldiers”.<sup>81</sup> As for the Muslim Cham minority, prosecutors emphasised that, while many Cham were “given the opportunity to survive by abandoning their customs [this] still constitutes genocide”.<sup>82</sup>

So, indeed, while the “[t]wo superpowers worked in dialectical unison to the detriment of international criminal law” while negotiating the Genocide Convention,<sup>83</sup> the instrument that was thusly created surpassed the lifespan of one of the superpowers and ultimately helped support the creation of international courts to prosecute and punish. Weiss-Wendt may simply be too harsh, or too hasty, when he evokes Lemkin’s “metaphor of the Genocide Convention as his own child” only to add that “the child was stillborn”.<sup>84</sup> The entering into force of the Genocide Convention seeded a definition that ultimately replicated itself in the Rome Statute and the Statutes of the ICTY and ICTR. The reproduction of this ruffled definition demonstrates the path dependency of the law – once negotiated, forever knotted it seems. That said, the responsibility for

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<sup>80</sup> In terms of circumstantial evidence, the ICTR identified as probative: “The overall context in which the crime occurred, the systematic targeting of the victims on account of their membership in a protected group, the fact that the perpetrator may have targeted the same group during the commission of other criminal acts, the scale and scope of the atrocities committed, the frequency of destructive and discriminatory acts, whether the perpetrator acted on the basis of the victim’s membership in a protected group and the perpetration of acts which violate the very foundation of the group or considered as such by their perpetrators”. See ICTR, *The Prosecutor v. Siméon Nchamihigo*, Trial Chamber III, Judgement and Sentence, ICTR-01-63-T, 11 December 2008, para. 331 ([www.legal-tools.org/doc/b3c6e0/](http://www.legal-tools.org/doc/b3c6e0/)).

<sup>81</sup> Andrew Nachemson, “Case made for genocide verdict”, in *The Phnom Penh Post*, 16 June 2017.

<sup>82</sup> *Ibid.*

<sup>83</sup> Weiss-Wendt, 2017, p. 280, see *supra* note 1.

<sup>84</sup> *Ibid.*

curating that definition, for either rendering it more elastic and purposive or more restrictive and brittle, now falls to contemporary judges, whether national or international. And, although many observers rightly posit that judges have toughened the *mens rea* requirements for genocide,<sup>85</sup> the fact remains that the term has become purposively applied by judges to a number of tragedies and has been claimed by groups world-wide as a descriptor of their suffering.

In sum, then, once genocide became a legal term, *grâce à* Lemkin, its interpretation became one for international criminal courts and tribunals to make.

But not only criminal courts: the International Court of Justice ('ICJ'), moreover, would not have been able to rule in 2007 in litigation brought by Bosnia-Herzegovina against Serbia for genocidal violence or in 2015 by Croatia against Serbia (and vice-versa), insofar as jurisdiction over those disputes was solely assured by the Convention.

In its claim (the '*Bosnian Genocide* case'), Bosnia-Herzegovina asserted that Serbia and Montenegro, the State into which the Federal Republic of Yugoslavia was transformed in 2003, violated its obligations under the Genocide Convention. The Confederation of Serbia and Montenegro was dissolved in May 2006 when, following a plebiscite, Montenegro narrowly voted for independence. Serbia became the successor State to Serbia and Montenegro. On 26 February 2007, the ICJ held that, although Serbia was not directly responsible for committing genocide in Bosnia-Herzegovina, it was responsible for having failed to prevent genocide at Srebrenica in July 1995.<sup>86</sup> The ICJ affirmed that States can be held civilly responsible for breaching the Genocide Convention – thereby closing a debate that had opened at the negotiation of the Genocide Convention and settling that debate in a manner that aligned the interpretation of the Convention closer to Lemkin's initial views.

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<sup>85</sup> Scheffer, 2017, p. 565, see *supra* note 8: "Jurists have erected such a high bar for the crime defined by Lemkin that Lemkin's singular focus on such evil overshadowed the far more pragmatic approach by Lauterpacht".

<sup>86</sup> ICJ, Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*Bosnia and Herzegovina v. Serbia and Montenegro*), Judgment, 26 February 2007 (the '*Bosnian Genocide* case') ([www.legal-tools.org/doc/5fcd00/](http://www.legal-tools.org/doc/5fcd00/)). As an aside, Bosnia-Herzegovina brought its claim against Serbia in 1993; Serbia was found responsible for failure to prevent a genocide that occurred at Srebrenica in 1995, *after* the claim was brought against it.

The ICJ found that only acts committed at Srebrenica in July 1995 qualified as acts of genocide, while other atrocities complained of by Bosnia-Herzegovina in its application did not constitute genocide.<sup>87</sup> The ICJ concluded that the Srebrenica atrocities could not be attributed to Serbia directly through acts committed by its dependent organs or persons or by parties under its direction or control.<sup>88</sup> In other words, Bosnian Serb forces at Srebrenica were not acting under Serbia's direction or effective control and, thereby, Serbia could not be directly responsible for genocide. However, Serbia's responsibility was incurred in that it did not meet its obligation to prevent genocide. Failure to meet the obligation to prevent genocide can be triggered by omission and can be incurred when a State is merely aware that genocide might be committed, instead of the standard for complicity which is one of a positive act where there is knowledge that a genocide is incipient or underway. The ICJ also found Serbia responsible for its failure to prevent genocide at Srebrenica, as well as responsible for breaching the Genocide Convention because of its failure to fully co-operate with the ICTY (in particular its failure to bring notorious suspects into custody).<sup>89</sup> The ICJ did not award damages against Serbia. It ruled that the issuance of the judgment alone constituted satisfaction for Bosnia.

As a matter of jurisprudence, the ICJ ruled that State responsibility can arise from a breach of the Genocide Convention: States, in short, can be responsible for genocide. Individual culpability does not extinguish collective State responsibility. The ICJ held that “*duality of responsibility continues to be a constant feature under international law*”,<sup>90</sup> citing an

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<sup>87</sup> *Ibid.*, paras. 291–7.

<sup>88</sup> *Ibid.*, paras. 395, 412. The ICJ found that Serbia did not have effective control over the VRS (the Army of *Republika Srpska*) and that the VRS and other entities were not organs of Serbia, meaning that Serbia's responsibility for direct commission of genocide, conspiracy to commit genocide, incitement to commit genocide, or complicity in genocide could not be established. Four judges disagreed on the complicity point. See, for example, Judge Bennouna, who held that: “[L]e mens rea exigé du complice n'est pas le même que celui qui incombe à l'auteur principal, soit l'intention spécifique (*dolus specialis*) de commettre le genocide, et il ne peut pas en être autrement, car exiger cette intention reviendrait à assimiler le complice au coauteur”. The *Bosnian Genocide* case, Déclaration de M. le juge Bennouna, 26 February 2007 ([www.legal-tools.org/doc/014fb5/](http://www.legal-tools.org/doc/014fb5/)).

<sup>89</sup> The ICJ took note of evidence signifying that Serb authorities failed to take reasonable efforts to apprehend General Mladić, indicted (and convicted in 2017) by the ICTY for genocide. See the *Bosnian Genocide* case, Judgment, paras. 447–9, *supra* note 86.

<sup>90</sup> *Ibid.*, para. 178 (emphasis mine).

International Law Commission Commentary that notes a “State is not exempted from its own responsibility for internationally wrongful conduct by the prosecution and punishment of the State officials who carried it out”.<sup>91</sup>

On 3 February 2015, the ICJ separately ruled in a series of long-standing claims of genocide reciprocally brought by Croatia and Serbia against each other (the ‘*Croatia v. Serbia* litigation’).<sup>92</sup> The ICJ dismissed all claims. Invoking the jurisdictional clause of the Genocide Convention, Croatia alleged in 1999 that Serbia was responsible for several Convention violations, such as commission, conspiracy, attempt, and complicity in genocide against Croats, including failure to prevent and punish genocide, in particular from 1991-1992. Serbia counterclaimed in 2009, alleging genocide by Croatia against Serbs living in the Krajina region of Croatia in 1995 in the context of Croatia’s decisive ‘Operation Storm’. The ICJ dismissed some arguments on the basis of retroactivity (arguments that related to alleged conduct that occurred before Serbia has declared itself bound to the Convention on 27 April 1992). Croatia, however, also argued that the Genocide Convention comprehended succession as a possible mode of responsibility and, hence, that Serbia could be responsible for the acts of a predecessor State, in this case the Socialist Federal Republic of Yugoslavia (‘SFRY’), for acts committed prior to 27 April 1992. The ICJ read Article IX of the Genocide Convention as incorporating succession as a possible mode of responsibility.<sup>93</sup> The ICJ determined however that the question of responsibility could be examined only if it were established that acts amounting to genocide had been contributed and were in fact attributable to the SFRY.

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<sup>91</sup> *Ibid.*, para. 173. See ILC, Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries, 2001, Article 58 ([www.legal-tools.org/doc/10e324/](http://www.legal-tools.org/doc/10e324/)), which stipulates: “[T]hese articles are without prejudice to any question of the individual responsibility under international law of any person acting on behalf of the State”.

<sup>92</sup> ICJ, Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*Croatia v. Serbia.*), Judgment, 3 February 2015 (the ‘*Croatia v. Serbia* litigation’) ([www.legal-tools.org/doc/1f2f59/](http://www.legal-tools.org/doc/1f2f59/)).

<sup>93</sup> Article IX reads as follows: “Disputes between the Contracting Parties relating to the interpretation, application or fulfilment of the present Convention, including those relating to the responsibility of a State for genocide or for any of the other acts enumerated in article III, shall be submitted to the International Court of Justice at the request of any of the parties to the dispute”. See Convention on the Prevention and Punishment of the Crime of Genocide, 9 December 1948, in force 12 January 1951 ([www.legal-tools.org/doc/498c38/](http://www.legal-tools.org/doc/498c38/)).

As to the merits of the question, then, the ICJ ruled that although some acts cited by each party met the *actus reus* for genocide, the mental intent – the very high *dolus specialis* – was not satisfied. Here, the ICJ referred to its 2007 judgment in the *Bosnian Genocide Case*, though it added to the evolving nature of the crime of genocide by suggesting that serious mental harm (included in Genocide Convention Article II(b)) could be found in situations where the “psychological pain suffered by the relatives of individuals who have disappeared in the context of an alleged genocide [arises] as a result of the persistent refusal of the competent authorities to provide the information in their possession which could enable these relatives to establish with certainty whether and how the persons concerned died”.<sup>94</sup> The ICJ, moreover, also clarified that in the absence of a specific plan, any *dolus specialis* will be inferred only if that is the only *reasonable* inference to be drawn from the impugned pattern of conduct,<sup>95</sup> which could be seen as a departure from the suggestion in the *Bosnian Genocide Case* that genocide could be inferred if it were the only *possible* inference to be drawn. The ICJ also clarified the requisite methods of proof. In the *Croatia v. Serbia* litigation, the ICJ affirmed the general finding from the *Bosnian Genocide case* that it regarded ICTY factual findings as “highly persuasive” and deserving of due weight.<sup>96</sup>

Summarising the *Croatia v. Serbia* litigation, Surabhi Ranganathan digs into Serbia’s argument that, when it comes to discussing the ICTY as an entity, the ICJ should not accord greater weight to the findings of the ICTY Appeals Chamber than to the findings of the ICTY Trial Chamber.<sup>97</sup> Serbia emphasised that all the judges who are involved in an ICTY case ought to be given equal consideration. Serbia’s motivation in this regard, to be sure, originates with the ICTY’s judgments in the *Gotovina* litigation,<sup>98</sup> where the Trial Chamber unanimously convicted two Croatian generals of participation in a joint criminal enterprise that constituted the *ac-*

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<sup>94</sup> The *Croatia v. Serbia* litigation, Judgment, para. 356, see *supra* note 92.

<sup>95</sup> *Ibid.*, para. 148.

<sup>96</sup> *Ibid.*, para. 182, quoting the *Bosnian Genocide case*, Judgment, para 223, see *supra* note 86.

<sup>97</sup> Surabhi Ranganathan, “Current Developments, The 2015 Judicial Activity of the International Court of Justice”, in *American Journal of International Law*, 2016, vol. 110, p. 504.

<sup>98</sup> ICTY, *Prosecutor v. Ante Gotovina et al.*, Trial Chamber I, Judgement, Vol. II, IT-06-90-T, 15 April 2011; *Prosecutor v. Ante Gotovina and Mladen Markač*, Appeals Chamber, Judgement, IT-06-90-A, 16 November 2012 ([www.legal-tools.org/doc/03b685/](http://www.legal-tools.org/doc/03b685/)).

*tus reus* of genocide. The Appeals Chamber, in a controversial decision, reversed these convictions by a margin of three judges to two. Ranganathan observes that “Serbia contended that the ICJ should take into account the fact that, counting across both [ICTY] Chambers, a greater number of judges were convinced of the guilt of the Croatian generals” and then adds:

The ICJ rightly dismissed these arguments, noting that it was not for the ICJ to pronounce on the manner in which the Appeals Chamber were constituted and that the ICJ was bound to respect the hierarchy between the two chambers.<sup>99</sup>

Sands constructs Lemkin and Lauterpacht as foils, if not nemeses; and genocide, on the one hand, and crimes against humanity, on the other, as sparring partners. Indeed, as Ranganathan observes in the *Croatia v. Serbia* litigation, both disputing States, when accused of genocide, may have acknowledged the acts of violence but then insisted that these acts fell outside the frame of genocide and, instead, into the realm of crimes against humanity. Both States made these arguments in a very utilitarian sense: there is not yet an international treaty for crimes against humanity and, hence, no jurisdictional clause that can trigger ICJ review. Ranganathan morbidly notes:

[A] layperson reading the case may be struck by the parties’ ready utilization of their own terrible deeds and intentions as arguments in support of their cases. Acknowledging claims of forced displacement and ethnic cleansing, the parties argued that those acts, committed only in order to gain control over the territory, did not disclose genocidal intent. This was a sound argument in a context where the Court’s jurisdiction extended only to violations of the Genocide Convention. Nevertheless, not only laypersons, but also lawyers, must feel discomfort at the jurisdictional constraints that necessitate such fragmentary adjudications of responsibility [...].<sup>100</sup>

The Genocide Convention includes while it excludes. Such is the outcome of Lemkin’s vision in which he pursued the criminalisation of genocide above all. In the *Croatia v. Serbia* litigation, this led to the case being dismissed because the allegations failed to fit. The litigants admitted to crimes against humanity, but for the case it simply did not matter –

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<sup>99</sup> Ranganathan, p. 512, see *supra* note 97.

<sup>100</sup> *Ibid.*

it was all about genocide, all about Lemkin, because of the Convention and its jurisdictional clause.

### **18.6. Conclusion: A Counterfactual**

What if Lemkin had pursued a different strategy? What if he had advanced ‘genocide’ *outside* of the world of law and diplomacy and international conventions and, instead, within the realm of plain social discourse at the national level? What if the term had stewed and brewed at that level for a generation or two (or more), marinating a bit, before (possibly) crystallising into law? Would law have crystallised and, if so, might it have been more expansive and better aligned with Lemkin’s initial conceptualisation of genocide? Though this counterfactual knows no answer, it still ought to be presented.

Such has largely been the path of crimes against humanity: a somewhat more *ad hoc* journey of *bricolage*. Crimes against humanity may actually have played a larger role in the enforcement of international criminal law *despite* a lack of co-ordinate codification.<sup>101</sup> To be sure, crimes against humanity fall within the textual ambit of the enabling instruments of the many international criminal courts and tribunals but crimes against humanity were never jump-started by codification in a solo “owner-occupied” treaty. So perhaps the virtues of codification may be overrated and too hungrily stated. Or, perhaps, codification has nothing to do with anything: it may simply be that crimes against humanity have played a larger role because they are far easier to prove than genocide and apply to a much broader set of atrocities.

Now, many decades later, talk has arisen of a treaty devoted singularly to crimes against humanity. Pioneered by legal academics, the text of a draft treaty is currently before the ILC for development and elaboration.

As for Lemkin, it is fitting to conclude by pivoting back to his love of philology. Lemkin added a new word not only to one language but to *all* languages. He coined a term that is now broadly recognisable within and outside of law. He constructed a word that resonates and ripples widely: in my view, he invented the word that forms the very emotional heart of international criminal law. Although genocide may have lost at Nuremberg, it may have prevailed in the long game. Echoing Ranganathan and Scheffer, Sands laments:

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<sup>101</sup> Scheffer, 2017, p. 565, *supra* note 8.

In the years after the Nuremberg judgment, the word genocide gained traction in political circles and in public discussion as the ‘crime of crimes’, elevating the protection of groups above that of individuals. Perhaps it was the power of Lemkin’s word, but as Lauterpacht feared there emerged a race between victims, one in which a crime against humanity came to be seen as the lesser evil. [...] Proving the crime of genocide is difficult [...] It enhances the sense of solidarity among the members of the victim groups while reinforcing negative feelings toward the perpetrator group.<sup>102</sup>

*A contrario*, Lemkin the man quickly faded in health and comfort. The passage of time was not good to Lemkin – either physically or reputationally. Even during his youthful studies in Lwów, each “new home” in which he lived “seemed less grand than the previous one, as though Lemkin were on a downward trajectory”.<sup>103</sup> Lemkin died of a heart attack in New York. He was previously “destitute and ill”, living “on West 112<sup>th</sup> Street, a space filled with books and paper, a single room with a daybed but no telephone or water closet”.<sup>104</sup> Lemkin never married, never had children; amid all the “material” that Sands “found on Lemkin [...] none contained any hint of an intimate relationship”.<sup>105</sup> His intimacy is shared with, and felt by, a word.

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<sup>102</sup> Sands, 2016, p. 380, see *supra* note 7.

<sup>103</sup> *Ibid.*, p. 146.

<sup>104</sup> *Ibid.*, p. 139.

<sup>105</sup> *Ibid.*, p. 160.

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## Arendt on Prevention and Guarantees of Non-Recurrence

Djordje Djordjević\*

Today, prevention is once again at the forefront of collective efforts by the international community. In 2015, the Sustainable Development Goals (SDGs) explicitly recognised interdependence between violent conflict and development, and the role of development in building peace.<sup>1</sup> Subsequently, based on independent United Nations (‘UN’) reviews of the peacebuilding architecture and peace operations, in twin resolutions of the General Assembly and Security Council on sustaining peace,<sup>2</sup> Member States called for expanding the horizon of prevention, both in terms of early action to prevent outbreak of violence and sustained effort to build societal resilience to shocks and conflict risks. In 2017, the new UN Secretary-General, António Guterres, indicated that for him “prevention is not merely a priority, but *the* priority”, adding that “if we live up to our re-

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<sup>1</sup> See UNGA resolution 70/1, “Transforming our World: the 2030 Agenda for Sustainable Development”.

<sup>2</sup> See UN Security Council Resolution 2282 (2016), UN Doc. S/RES/2282, 27 April 2016 ([www.legal-tools.org/doc/6e094b/](http://www.legal-tools.org/doc/6e094b/)), and UN General Assembly Resolution, UN Doc. A/RES/70/262, 12 May 2016 ([www.legal-tools.org/doc/f34c4f/](http://www.legal-tools.org/doc/f34c4f/)), respectively.

sponsibilities, we will save lives, reduce suffering and give hope to millions”.<sup>3</sup> To support this goal, in March 2018, the UN and the World Bank released a first joint report that re-examines and updates a knowledge base for prevention,<sup>4</sup> while the UN has also undertaken to complete its new sustaining peace policy integrating contributions from peace and security, development and human rights pillars.<sup>5</sup>

The attempt by the UN to refocus on preventive action instead of relying on assistance in response to the outbreak of armed conflict is not entirely new. The Agenda for Peace of 1992 and the World Summit of 2005, for example, have both previously recommended prioritising prevention as a more effective way to minimise the risks and the effects of war, and maximise the use of resources at hand. Nevertheless, significant insights also come from further back afield, namely the post-World War II policy debate on a viable international solution for preventing the recurrence of Nazi atrocities and of war with global ramifications. It is this historical challenge that led to the creation of the United Nations and to designating prevention of violent conflict as its first and foremost task.<sup>6</sup>

This chapter argues that at that historical junction, Hannah Arendt identified a set of conditions that are critical in resisting mass participation in, and support for, what constitutes today core international crimes. These types of crimes and other serious human rights violations are known to instigate and aggravate violent conflict.<sup>7</sup> Furthermore, the pluralist outlook that informs civic action, which Arendt singled out as the

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<sup>3</sup> UN News, “At Security Council, UN chief Guterres makes case for new efforts to build and sustain peace”, 10 January 2017, available on the UN web site.

<sup>4</sup> See United Nations and World Bank, *Pathways for Peace: Inclusive Approaches for Preventing Violent Conflict*, World Bank, Washington, D.C., 2018 ([www.legal-tools.org/doc/556167/](http://www.legal-tools.org/doc/556167/)).

<sup>5</sup> See, UN Secretary General’s report on peacebuilding and sustaining peace, UN Doc. A/72/707–S/2018/43, 18 January 2018 ([www.legal-tools.org/doc/d67622/](http://www.legal-tools.org/doc/d67622/)).

<sup>6</sup> The first sentence of the UN Charter in the Article 1 reads:

The Purposes of the United Nations are:

1. To maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace [...]

([www.legal-tools.org/doc/6b3cd5/](http://www.legal-tools.org/doc/6b3cd5/)).

<sup>7</sup> See, for example, David Cingranelli *et al.*, “Human Rights Violations and Violent Internal Conflict”, Background Paper for UN-WB Flagship Study, in *ibid.*

only guarantee of non-repetition of crimes, is also instrumental in developing civic resilience to violent conflict more generally.

In 1945, the policy choice rested between a political solution, exemplified in the Morgenthau Plan,<sup>8</sup> and a legal alternative that eventually came to fruition with the establishment of the International Military Tribunal in Nuremberg. Arendt considered neither of these policy responses suitable for recognising and defining the uniqueness of totalitarian abuses. In looking for decisive preventive measures, Arendt weighed against means of deterrence of the leaders and State actors, and in favour of resistance by the citizens. The root causes of broad participation of German society in administrative mass murder, she found, lied in the corruption of civic virtue and the removal of civic space for political action. An antidote to totalitarian challenge was thus found in civic resilience, and more precisely, in developing mental predisposition of citizens that could desist mobilisation for genocidal causes. In identifying a capacity that outlines this predisposition, Arendt utilised philosophical mapping of cognitive faculties and predominantly relied on Kant's theory of cognition. Alternatively, *thinking* (as well as its principle of non-contradiction with oneself) and *judging* (as an ability to see things in the perspective of all those who happen to be present) were credited with a decisive role in situations when, to use Arendt's favourite phrase, "the chips are down". Therefore, over and above political and legal means of prevention of recurrence of Nazi

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<sup>8</sup> As late as September 1944, the Allied post-war policy towards Nazi leaders favoured summary executions over judicial action. According to the Morgenthau Plan, which was agreed upon at the meeting between Roosevelt and Churchill in Québec City, an unspecified number of Nazi leaders were to be shot without trial and Germany's industrial capacity diminished to a "pastoral" level. The plan of Henry Morgenthau Sr., who was the US Treasury Secretary at the time, was however strongly opposed by Henry Stimson, the Secretary of War in the Roosevelt Administration. Stimson, a firm believer in American respect for due process, thought trials of war criminals would set a better example for future generations in Germany and elsewhere than harsh punitive measures. The ultimate demise of the Morgenthau Plan was the American public opinion when, in a turn of events characteristic of Washington politics, the plan leaked to the front page of the *New York Times*. In fact, the undoing of the plan was the "pastoralisation" of Germany and not the method of punishment for war crimes which was not mentioned in the newspaper article. The polls at the time also showed that the majority of Americans were in favour of executions without trial. Nevertheless, swayed by this course of events and public outcry against already agreed-upon political measures, President Roosevelt turned to judicial policy. See Gary Jonathan Bass, *Stay the Hand of Vengeance*, Harvard University Press, Cambridge (MA), 1999, pp. 80–147; see also Bradley F. Smith, *The Road to Nuremberg*, Basic Books, New York, 1981, pp. 22–55.

crimes, Arendt outlined the possible normative basis for a third solution or what I will call ‘civic prevention’. Pushed further in a normative direction, prevention here depends on the exercise of different forms of civic responsibility. Looking from a policy angle, which is our primary concern, critical thinking and judging are indicative of the forms of citizenship needed to protect and preserve institutions set up to guarantee non-recurrence.<sup>9</sup>

There are significant perils in trying to present a single coherent Arendtian concept of prevention. From the initial response to the Morgenthau Plan in 1945 till her untimely death in 1975, Arendt never ceased re-examining, re-conceptualising and reformulating her insights on the topic. She would often start anew when prompted by a different topical interest without taking stock of her previous analyses and findings. In this process, both her critique of the legal response and her account of critical cognitive faculties underwent significant changes. This ongoing project can be broken down into roughly three separate, though interdependent, tasks: (i) to identify social and political conditions that led to previously unimaginable atrocities and the new face of evil in the world; (ii) to illustrate the failure of existing normative frameworks to capture the nature of wrongdoing and to inform adequately the accountability of individuals; and (iii) to identify an alternative mode of thought to rule-following, associated with a type of civic action, which can prevent recurrence of mass atrocity crimes. These issues were among the topics addressed in, respectively, (i) *The Origins of Totalitarianism*; (ii) Arendt’s essays in the immediate aftermath of the war and her reporting from the Eichmann trial; and (iii) her

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<sup>9</sup> The term ‘guarantees of non-recurrence’ is often associated with one of the four pillars of transitional justice and included in the mandate of the UN Special Rapporteur on truth, justice, reparations and guarantees of non-recurrence (see the web site of the Office of the United Nations High Commissioner for Human Rights). The pillar that is generally concerned with the preventive aspect of transitional justice processes was initially conceived as consisting of institutional reforms during transitional period. This primarily implied vetting of personnel of security and justice institutions that have previously been involved in assisting in, or failing to prevent, human rights violations. More recently, it has been indicated that in addition to a set of institutional measures (such as constitutional reform, civilian oversight of security institutions, national human rights commissions and peacebuilding architecture), prevention should include societal and cultural interventions primarily taken in the sphere of civil society (for instance, civic education, memorialisation, and so on). On this broader understanding of the concept, and other legal and conceptual issues of guarantees of non-recurrence, see UN Special Rapporteur, Report of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence, UN Doc. A/HRC/30/42, 7 September 2015 ([www.legal-tools.org/doc/d72a4a/](http://www.legal-tools.org/doc/d72a4a/)).

post-trial lectures, articles and book reviews addressing the questions of moral and political responsibility as well as her re-conceptualisation of the theory of judgment in *The Life of the Mind*.

In presenting the case for the Arendtian type of prevention, I will follow this historical trajectory of her thought. I will not attempt to reconstruct a coherent account of cognitive faculties that Arendt singled out or discuss normative implications for moral and political conduct. My intention is limited to highlighting theoretical considerations that inform policy choice of civic prevention over institutional responses, and indicate how they can assist us in shaping long-term prevention measures and perspectives.

## **19.1. The Challenge of Understanding the Unprecedented**

### **19.1.1. Nazi Crimes and Downfall of Civic Virtue**

From the very outset of the post-World War II policy debate, Arendt was among those on the margins who considered the crisis to be much more profound than a complete failure of mechanisms of accountability and deterrence put in place after World War I. The crisis, according to them, touched the very core of the Western system of values, and required more than reshaping norms of wartime conduct. At its heart, the historical precedent set by the emergence of totalitarianism was so radical that no re-imagining of the traditional axis of law, morality and politics could sustain or repair it. The outcomes of totalitarian policies “constitute a break with all traditions”, and “have clearly exploded our categories of political thought and our standards for moral judgement”.<sup>10</sup> This event, in turn, required a re-thinking of the very foundations of the modern political community. The first task, then, was to understand this novel phenomenon and indicate the extent to which this posed a challenge to existing moral, political and legal categories.

Arendt entered the debate surrounding the Morgenthau Plan soon after it leaked to the press, in January 1945.<sup>11</sup> The implementation of the

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<sup>10</sup> Hannah Arendt, “Understanding and Politics (The Difficulties of Understanding)”, in Jerome Kohn (ed.), *Essays in Understanding: 1930-1954*, Harcourt & Brace, New York, 1994, p. 310.

<sup>11</sup> Editors at the *Jewish Frontier* published this article under the title “German Guilt”. It was later reprinted as “Organized Guilt and Universal Responsibility”, in *ibid.*, pp. 121–32. See further on the context of this article: Hannah Arendt, “Letter 43”, in Lotte Kohler *et al.*

Morgenthau Plan, in her view, would constitute a serious failure on several counts: (i) by repeating policy mistakes made after the previous war and thus creating incentives for a new cycle of violence;<sup>12</sup> (ii) by sheltering the extent of individual wrongdoing of key perpetrators in creating a realm within which all Germans are perceived as equally guilty; and ultimately, (iii) by enforcing the very Nazi racist ideologies that it intends to condemn via justification of collective punishment. Nevertheless, attempts to assess individual conduct or prosecute individuals through categories borrowed from a regular criminal justice system seemed equally inadequate.

Finding a policy solution was particularly challenging because of what Arendt initially qualified as ‘organised guilt’. This was a deliberate attempt on the part of the Nazis to erase all distinctions between the Nazi elite and ordinary Germans. Ultimately, this was intentionally done to secure the survival of Nazi racial theory through the victor’s policy of collective retribution. The propaganda machine set in motion by Heinrich Himmler was specifically programmed to leave no one untainted or without complicity in crimes. As long as victory was expected, the Nazi organisation was separate from the people and the work of mass murder was reserved for the Storm Troopers and other specialised units. Hitler seemed aware that history had sometimes been forgiving to those who commit atrocities with the aim to annihilate enemies and, in 1939, classified himself in the same rank as Genghis Khan and Mehmet Talaat.<sup>13</sup> But when the

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(eds.), *Hannah Arendt/Karl Jaspers Correspondence 1926-1969*, Harcourt & Brace, New York, 1992.

<sup>12</sup> In a separate article dealing with the Morgenthau Plan from the same period, Arendt says: “The result of such ‘punishment’ would prove to be exactly the same as the Versailles Treaty, also thought as a reliable instrument for crushing Germany’s economic power but which turned out to be the very cause of the over-rationalization and amazing growth of Germany’s industrial capacity [...] Restoration thus promises nothing. If it succeeded, the process of the past thirty years might commence again, this time at a greatly accelerated tempo. For restoration must begin precisely with the restoration of the ‘German problem’! The vicious circle in which all discussion of the ‘German problem’ move shows clearly the utopian character of ‘realism’ and power-politics in their application to the real issues of our time”, see Hannah Arendt, “Approaches to the German Problem”, in Kohn (ed.), 1994, p. 120, see *supra* note 10.

<sup>13</sup> Addressing his military chiefs in August 1939, Hitler declared: “It was knowingly and lightheartedly that Genghis Khan sent thousands of women and children to their deaths. History sees in him only the founder of the state [...] The aim of war is not to reach definite lines but to annihilate the enemy physically. It is by this means that we shall obtain the

fortunes at the battlefield turned, and with it appeared the possibility of facing defeat, the strategy of assigning responsibility for the policy of extermination moved from selected murderers and elite formations to ordinary army units. Efforts were made to erase all the banners that could distinguish the deeds of the ruling party from those of the German people as a whole.

The unprecedented collectivisation of German society, however, cannot be explained solely or primarily by a theory of the State. The extent of access to absolute power by the Nazi elites through their capture of the State, elimination of other elites and implementation of extremist policies was only made possible through forging or fabricating collective consent. For Arendt, the key challenge was then to understand how these elites had managed to achieve a ‘total mobilization of the people’. What were the particular historical and social conditions that had allowed for such a high level of mobilisation and what were the characteristics of the social groups that had contributed decisively to this process?

The primary target of Nazi propaganda and coercive mechanisms was not to be found among the “fanatics, criminal types or potential sadists”, Arendt insisted, but first and foremost, in the “normality of jobholders and good family men”. It was the well-respected citizens of German society – mainly characterised by their concern for private existence, responsibility for their families and lack of any inclination towards public affairs – who turned out to be the most useful to the bureaucratic organisation. Following the secularisation of the code of conduct, they could no longer find common imaginaries to articulate their public role. Once the security of the private domain was endangered, there was little she or he would not do to protect it.<sup>14</sup> Hence, the ability to disregard more extreme aspects of ideologies based on scepticism equally directed towards all political principles alike, judged from a moralistic standpoint. Indeed, if all political action is in principle considered ethically tainted, it is that much harder to make distinctions between merely immoral actions on the one hand, and plainly criminal actions and disastrous policies on the other.

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vital living space that we need. Who today still speaks of the massacre of the Armenians?”. Cf. Samantha Power, *A Problem from Hell*, Basic Books, New York, 2002, p. 23.

<sup>14</sup> See Arendt, 1992, pp. 128–30, *supra* note 11.

Arendt identified this form of middle-class stratification as an international phenomenon, but nevertheless found it particularly prominent in German society:

It is true that the development of this modern type of man, who is the exact opposite of the ‘citoyen’ and whom for lack of a better name we have called the ‘bourgeois,’ enjoyed particularly favorite conditions in Germany. Hardly another country of Occidental culture was so little imbued with the classic virtues of civic behavior. In no other country did private life and private calculations play so great a role [...] There is [also] hardly another country where on the average there is so little patriotism as Germany; and behind the chauvinistic claims of loyalty and courage, a fatal tendency to disloyalty and betrayal for opportunistic reasons is hidden.<sup>15</sup>

Therefore, if the rally for national revival played some role in German economic and military resurgence after the first war, forms of nationalist exultation should not be understood as the primary mover behind the mobilisation for administrative mass murder. Rather, the mass mobilisation found its roots in the downfall of civic virtues and general inability to perceive oneself as an actor in the public domain.

### **19.1.2. Totalitarianism and the Closing of Civic Space**

In an essay from 1954, originally entitled “The Difficulties of Understanding”,<sup>16</sup> Arendt returned to examining the conditions that led to mass mobilisation of Germans and this time recast them in terms of *The Origins of Totalitarianism*, published three years earlier. The phenomenon of totalitarianism, here referring to both Hitler’s Germany and Stalin’s Soviet Union, had brought about an ongoing historical process of dissolution of social bonds underpinning Western political communities to an extreme conclusion. Arendt credited Montesquieu with an early warning about the potential meltdown of the traditional customary value-system, which constitutes the final defence of not only social, but also political community. While “laws govern the actions of the citizen, customs govern the actions of man”, said Montesquieu.<sup>17</sup> History offers ample examples of the decline of nations, when laws are undermined, through governments’ abuse

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<sup>15</sup> *Ibid.*, p. 130.

<sup>16</sup> See Arendt, 1994, pp. 307–27, *supra* note 10.

<sup>17</sup> *Ibid.*, p. 315.

of power and through citizens' loss of respect for the law as well as credibility of justice systems. The space for responsible political action is diminished as protection of citizens' rights ceases. In this situation, only the customs of society and traditional moral norms can retain the social bonds of the community and prevent dominance of violence and instability. Moral norms continue to shape the behaviour of private individuals, but the sustained ability of mores to guide human conduct on their own is limited, warned Montesquieu. Arendt added another historical dimension that Montesquieu could not have anticipated. Once the customs of European States came under attack through the social processes unleashed by the Industrial Revolution, she argued, a precondition was made to remove all common grounds between people.

The anticipated dangers, identified as lying in morality as the sole binding force of the polity, concern not only the loss of political freedoms, insisted Montesquieu, but much more destructively, the very understanding of human nature.<sup>18</sup> The consequences of Nazi ideology were most strongly felt in taking away the key precepts of human nature under the pretext of changing them, that is, in an attempt to make human beings superfluous. Human beings, including Nazis themselves in their individual capacity, have become expendable cogs in an unbending progression of History with a capital 'H'.

Thus, it is totalitarian domination that succeeded in accelerating the demise of customs, replacing them with an alternative set of rules and removing all vestiges of freedom, spontaneity and responsibility from political action. The combination of terror and systematic ideological indoctrination created conditions of meaninglessness and thereby destroyed the capacity of citizens for understanding and judging. In the rise of totalitarian societies, therefore, we are faced with "more than loss of capacity for political action, which is the central condition of tyranny, and more

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<sup>18</sup> *Ibid.*, Arendt cites two passages from Montesquieu: "The majority of the nations in Europe are still ruled by customs. But if through long abuse of power, if through some large conquest, despotism should establish itself at a given point, there would be neither customs nor climate to resist; and in this beautiful part of the world, human nature would suffer, at least for a time, the insults which have been inflicted on it in the three others" (*L'esprit des lois*, Book VIII, ch. 8). And, concerning the understanding of human nature: "Man, this flexible being, who bends himself in society to the thoughts and impressions of others, is equally capable of knowing his own nature when it is shown to him and of losing the very sense of it (*d'en prendre jusqu'au sentiment*) when he is being robbed of it" (*L'esprit des lois*, Preface).

than growth of meaninglessness and loss of common sense (and common sense is only that part of our mind and that portion of inherited wisdom which all men have in common in any given civilization); it is the loss of the quest for meaning and need for understanding”.<sup>19</sup> Civic freedoms are those that enable the process of understanding, a constant production of meaning in relation to political community and changing political realities, which informs political action. In a state of totalitarian domination, deliberate effort is made to undermine the common sense on which understanding rests, to quell the quest for meaning and thus to disable any free and spontaneous participation in communal life. It is, therefore, not only that, under totalitarianism, people’s traditional system of values is replaced with a new set of rules, but that the new rules are intended to stifle their freedom and space for civic action.

There is significant continuity between Arendt’s works in the mid-1940s and 1950s, although she drew from different sources and used distinctive conceptual frameworks. Nazi rule as a socio-political phenomenon, on both accounts, made a decisive break with the past and all previous forms of tyranny and authoritarian rule. Existing moral, legal and political categories were unable to fully account for the new phenomenon, find an adequate policy solution and sanction for excesses and transgressions. Mass participation of German society in Nazi crimes was due to a downfall of norms regulating conduct in the public sphere, whether of customs, by default, or of civic virtue. The decisive step, however, is the tendency to continue following the rules in those novel circumstances even when all connections to common sense have broken. Gradually, Arendt singled out reliance on the rule-following behaviour *itself* as constituting the key weakness of the modern political community in the aftermath of Nazi abuses.

It was in the context of indicating a remedy for over-reliance on rules that she offered a more optimistic outlook for a solution. Drawing from Augustine, Arendt evoked the human capacity to bring about a new beginning, no matter what history may bring our way. “Even though we have lost yardsticks by which to measure, and rules under which to subsume the particular”, this human cognitive capacity will allow us to find

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<sup>19</sup> *Ibid.*, pp. 316–7.

the means “to understand without preconceived categories and to judge without the set of customary rules which is morality”.<sup>20</sup>

## 19.2. Critique of Legalism

### 19.2.1. The Scope and Purpose of War Crimes Trials

Prior to the announcement of the *Eichmann* trial in Israel, Arendt expressed no interest in war crime trials of the Nazis. We only find several brief and categorical statements that denounce the use of criminal justice categories and penal policy as inadequate, and Nuremberg trials as a policy failure.<sup>21</sup> Almost intuitively, without analysing the trials themselves or their legal basis, she considered these categories to be in principle insufficient to apportion responsibility and establish guilt, at least in the case of the masses of lesser subordinates. No traditional notion of criminal guilt, she assumed, is equipped to deal with perpetrators for adhering to laws that themselves have become criminal, from a standpoint of international norms and standards, and for breaking customary rules that have since become superfluous, without discriminatory intent, if all opposition, space for individual intervention and voices of collective conscience are forcefully removed from the public sphere.

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<sup>20</sup> *Ibid.*, p. 321.

<sup>21</sup> For example, in the “Organized Guilt” article, Arendt points to the inability to appropriately assess the uniqueness of each individual’s criminal actions, and lack of consciousness of guilt and responsibility: “Just as there is no political solution within human capacity for the crime of administrative mass murder, so the human need for justice can find no satisfactory reply to the total mobilization of a people for that purpose. Where all are guilty, nobody in the last analysis can be judged. For that guilt is not accompanied by even the mere appearance, the mere pretence of responsibility. So long as punishment is the right of the criminal – and this paradigm has for more than two thousand years been the basis of the sense of justice and right of Occidental man – guilt implies the consciousness of guilt, and punishment evidence that the criminal is a responsible person”, see Arendt, 1992, pp. 126–7, *supra* note 11. In “Understanding and Politics”, in the most damning pronouncement against the Nuremberg Tribunal, where she singles out lack of incriminating motivation and limitation of penal policy: “The very event, the phenomenon, which we try – and must try – to understand has deprived us of our traditional tools of understanding. Nowhere was this perplexing condition more clearly revealed than in the abysmal failure of the Nuremberg Trials. The attempt to reduce the Nazi demographic policies to the criminal concepts of murder and prosecution had the result, on the one hand, that the very enormity of the crimes rendered any conceivable punishment ridiculous; and, on the other, that no punishment could ever be accepted as ‘legal’, since it presupposed, together with obedience to the command ‘Thou shalt not kill’, a possible range of motives, of qualities which cause men to become murderers and make them murderers, which quite obviously were completely absent in the accused”, see Arendt, 1994, p. 310, *supra* note 10.

The first sign of change came from correspondence with Arendt's former German professor Karl Jaspers, who was over the years her key interlocutor on the subject. "It seems to me", she said, "to be in the nature of [the *Eichmann*] case that we have no tools to hand except legal ones with which we have to judge and pass sentence on something that cannot even be represented either in legal terms or in political terms".<sup>22</sup> It is with the expectation that the *Eichmann* trial would provide a prime forum and a fitting profile of the accused for re-examining our preconceptions that Arendt took up the role of trial reporter for the *New Yorker* magazine.

One will find further reversal, and perhaps some irony, in the fact that, in her new role, she would end up defending some of the key tenants of the Nuremberg tribunal. Namely, she would praise the unique virtue of a criminal justice forum for judging individual accountability in otherwise overly collectivised contemporary societies.<sup>23</sup> The trial is thus about assessing the individual conduct of the accused, not States or organisations, and even less about condemning historical patterns, within which the individual's actions are alleged to be but a single manifestation. On the other hand, even if the new category of 'crimes against humanity' was never effectively put in practice in Nuremberg, it was, in Arendt's opinion, a much more fitting charge against Eichmann than 'crimes against Jewish people', which eventually prevailed in Israeli legislation.<sup>24</sup>

Arendt's insistence on individual accountability as the purpose of the trial has prompted criticism for a supposed overly narrow understanding of the judicial process as it pertains to war crime prosecutions and a "conservative philosophy of law". This alleged attitude rests on the prem-

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<sup>22</sup> Arendt, 1992, p. 417, see *supra* note 11.

<sup>23</sup> See Hannah Arendt, "Some Questions of Moral Philosophy", in Jerome Kohn (ed.), *Responsibility and Judgment*, Schocken Books, New York, 2003, p. 57: "It is the undeniable greatness of the judiciary that it must focus its attention on the individual person, and that even in the age of mass society where everybody is tempted to regard himself as a mere cog in some kind of machinery – be it the well-oiled machinery of huge bureaucratic enterprise, social, political, of professional, or the chaotic ill-adjusted chance pattern of circumstances under which we all somehow spend our lives. The almost automatic shifting of responsibility that habitually takes place in modern society comes to a sudden halt the moment you enter a courtroom". On centrality of courts for assessment of individual accountability, see also Hannah Arendt, "Personal Responsibility Under Dictatorship", in *The Listener*, 1964, vol. 185–87, no. 205, pp. 21–22.

<sup>24</sup> On the enactment of Israeli law in 1950, see Hanna Yablonko, *The State of Israel vs. Adolf Eichmann*, Schocken Books, New York, 2003, p. 9. On Yablonko's objections to Arendt, see pp. 242–4.

ise that legal process must take place in the vacuum of social and political dynamics, removed from any extra-legal objectives. Indeed, some of the passages from *Eichmann in Jerusalem*, taken in isolation, seem to lend themselves to such an interpretation of her position.<sup>25</sup> In contrast, Arendt's critics, Lawrence Douglas and Shoshana Felman, see the key achievement of the trial in its ability to provide a voice for the victims and a much needed narrative of the Holocaust for the State of Israel.<sup>26</sup>

There is sufficient evidence, I will argue, which shows that the perception of Arendt as holding a conservative understanding of the judicial process is, at best, oversimplified. What is at stake in conflicting perspectives on the trial is the prosecutorial strategy of Israel's Attorney-General and Chief Prosecutor Gideon Hausner. The Chief Prosecutor's strategy was centred on the need for a young State to provide a broader historical understanding of discriminatory abuse against the Jewish people over centuries and to send a message of defiance and confidence in the ability of Israel to punish the culprits who have harmed the community.<sup>27</sup>

Arendt saw this strategy as a failure on several accounts. Firstly, in its overall performance, the trial failed to recognise and define the unprec-

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<sup>25</sup> See, for example, Hannah Arendt, *Eichmann in Jerusalem: A Report on the Banality of Evil*, Viking Press, New York, 1965, p. 5: "Justice demands that the accused be prosecuted, defended, and judged, and that all other questions of seemingly greater import [...] be left in abeyance. Justice insists on importance of Adolf Eichmann [...] On trial are his deeds, not the sufferings of the Jews, not the German people or mankind, not even anti-Semitism or racism". See also, p. 157: "The purpose of a trial is to render justice, and nothing else; even the noblest of ulterior purposes – 'the making of a record of the Hitler regime which would withstand the test of history', as Robert G. Storey, executive trial counsel at Nuremberg, formulated the supposed higher aims of the Nuremberg Trials – can only detract from the law's main business: to weigh the charges brought against the accused, to render judgment, and to mete out due punishment".

<sup>26</sup> See Lawrence Douglas, *The Memory of Judgment: Making Law and History in the Trials of the Holocaust*, Yale University Press, New Haven, 2001; Shoshana Felman, "Theaters of Justice: Arendt in Jerusalem, the Eichmann Trial, and the Redefinition of Legal Meaning in the Wake of the Holocaust", in *Critical Inquiry*, 2001, vol. 27, no. 2.

<sup>27</sup> Douglas claims that the criminal trial was successfully "used as a tool of collective pedagogy and as a salve to traumatic history", see Douglas, 2001, p. 2, *ibid*. Similarly, Felman says that "the acquisition of semantic authority by victims is what the trial was all about", so that "a Jewish past that formerly had meant only a crippling disability was now being reclaimed as an empowering and proudly shared political and moral identity", see Felman, 2001, p. 233, *ibid*. Even though she spends less time in discussion with Arendt, Yablonko makes a similar argument for taking the Eichmann trial as a "historical trial" that played a state-building role in Israel as against Arendt's assessment based on legal formalism. See Yablonko, 2003, pp. 236–49, *supra* note 24.

edented nature of Nazi crimes in either legal or moral terms. “The current Jewish historical self-understanding”, she said, “is actually at the root of all the failures and shortcomings of the Jerusalem trial”. “Prosecution and judges alike” have failed to account for the discontinuity between the pogroms in Jewish history and the horrors of Auschwitz, which are “different not only in degree of seriousness but in essence”.<sup>28</sup> Secondly, focusing on the history of the persecution of the Jews, and calling witnesses that had no connection to Eichmann’s conduct, had the effect of helping his defence. It was reinforcing the idea that he was but a tiny cog in a machine propelled by historical forces that predate the Nazi regime. The image of a scapegoat that he so desperately clung to was not far behind.<sup>29</sup> Thirdly, she genuinely resented the attempt to politically instrumentalise the trial and render the prosecution of the accused secondary. The case was not helped by the fact that this course of action was also promoted by President Ben Gurion himself, who apparently announced that he did “not care what verdict is delivered against Eichmann”.<sup>30</sup> Therefore, Arendt’s attempt to narrowly define the purpose of the trial has to be viewed as a function of defending the very integrity of due process, as she saw it.

Quite contrary to the claims of a restrictive and formalistic understanding of judicial process, there is textual evidence indicating that trials can bring about a multiplicity of extra-judicial benefits, including in relation to moral inquiry, historical truth-telling and as collective means for dealing with the past. The unique role of the judicial system is to be able to extract from the broader context of collective violence and still ask pertinent questions about individual conduct. Given that legal and moral issues “have in common that they deal with persons, and not with systems or organizations”, the stage set for legal proceedings also necessarily leads to moral questioning, said Arendt. The increasing number of war crimes prosecutions at the time consequently instigated the resurfacing of the moral issue.<sup>31</sup>

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<sup>28</sup> Arendt, 1965, p. 267, see *supra* note 25.

<sup>29</sup> Arendt, 1964, pp. 29–31, see *supra* note 23.

<sup>30</sup> Cf. Arendt, 1965, p. 20, see *supra* note 25.

<sup>31</sup> *Ibid.*: “I said that moral issue lay dormant for considerable time, implying that it has come to life during the last few years [...] There was first and most importantly, the effect of the postwar trials of the so-called war criminals. What was decisive here was the simple fact of courtroom procedure that forced everybody, even political scientists, to look at these matters from a moral viewpoint”.

There are a number of remarks, made during and after the trial in Jerusalem, which indicate the importance of the truth-telling component of the trial for victims. For example, at the very beginning of the trial, and upon hearing the testimony of Zindel Grynszpan, Arendt wrote to her partner Blücher: “I told myself – even if the only result was that a simple person, who would otherwise never have such an opportunity, is given the chance to say what happened, publicly, in ten sentences and without pathos, then this whole thing will have been worth it”.<sup>32</sup> It was the particular openness and storytelling quality of Grynszpan that set him apart from numerous testimonies given at the trial.<sup>33</sup> Grynszpan’s story of expulsion from Germany and dramatic crossing into Poland was recounted in some detail in Arendt’s trial report.<sup>34</sup> We can sometimes find true understanding in rare moments when first-hand accounts have the power to bring about something new, an insight or a truth-revelation. In this sense, truth-telling can play a transformative role in understanding and articulating unprecedented events. Conversely, the failure to identify the central moral issue, namely, the role of personal responsibility, or to adequately adjust legal categories in post-war years, is attributed to an unproductive atmosphere of “speechless horror”. Only after coming face to face with the unthinkable and creating the new language needed to capture the tragedy of the Holocaust can we start to address the normative realm.<sup>35</sup>

Arendt offered further insight into the benefits of truth-telling in court proceedings in her subsequent commentary on the Auschwitz trial of 1963 in Frankfurt, conducted under the German penal code dating from 1871:

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<sup>32</sup> Arendt, 1992, p. 359, see *supra* note 11.

<sup>33</sup> Arendt, 1965, p. 230, see *supra* note 25: “No one either before or after was to equal the shining honesty Zindel Grynszpan”.

<sup>34</sup> Arendt prefaced the account of Grynszpan’s testimony by saying that “every once in a while one was glad that Judge Landau had lost his battle” to constrain the number of witnesses called by the prosecution. See *ibid.*, p. 227.

<sup>35</sup> In “Some Questions of Moral Philosophy” we find the following qualification: “What I wanted to indicate is that the same speechless horror, this refusal to think the unthinkable, has perhaps prevented a very necessary reappraisal of legal categories as it has made us forget the strictly moral, and one hopes, more manageable, lessons which are closely connected with the whole story but which look like harmless side issues if compared with the horror”. Somewhat explaining the uniqueness of Grynszpan’s testimony Arendt says, “[People] have all too frequently yielded to the obvious temptation to translate their speechlessness into whatever expressions for emotions were close at hand, all of them inadequate”. See Arendt, 2003, p. 56, *supra* note 23.

Had the judge been wise as Solomon and the court in possession of the “definitive yardstick” that could put the unprecedented crime of our century into categories and paragraphs to help achieve the little that human justice is capable of, it still would be more than doubtful that “the truth, the whole truth,” which Bernd Naumann demanded could have appeared. [...]

Instead of *the* truth, however, the reader will find *moments of truth*, and those moments are actually the only means of articulating this chaos of viciousness and evil. The moments arise unexpectedly like oases out of the desert. They are anecdotes, and they tell in utter brevity what it was all about.<sup>36</sup>

The truth then, cannot be established as an outcome of the judicial process, a form of ‘judicial truth’ delivered in a legal judgment, no matter how finely adjusted legal instruments may be. Nor is it a matter of pasting together facts from witness testimonies, and so on. Instead of a form of finality, truth for Arendt has an echo of Walter Benjamin’s fragmentary history.<sup>37</sup> In this fashion, Arendt closed the article with a number of short anecdotal tales from Auschwitz recounted at the trial. Each story carries an almost unbearable brutality and brings in something new, unheard and unpredictable, something that teaches about this ‘other’ world through a single instance or example.

It is commonplace today to see war crime trials as one of the major incentives for public recognition of deeds done in one’s name. In line with contemporary thinking, Arendt was also aware of the role that war crime trials play in a community’s effort to assimilate a traumatic past. So, for example, in spite of her negative assessment of the legal aspects of the Nuremberg trials, in her correspondence with Jaspers, Arendt emphasised its significance for post-war Germany in dealing with the “unmastered” past.<sup>38</sup> Similarly, she was concerned about the number of people who

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<sup>36</sup> Arendt, “Auschwitz on Trial”, in *ibid.*, p. 255.

<sup>37</sup> Walter Benjamin says: “To articulate the past historically does not mean to recognize it ‘the way it really was’ (Ranke). It means to seize hold of a memory as it flashes up at a moment of danger”. See Walter Benjamin, “On the Concept of History”, *Gesammelten Schriften* I:2, Suhrkamp Verlag, Frankfurt, Thesis VI.

<sup>38</sup> In a response to Jaspers’s strong endorsement of the Nuremberg trials, Arendt wrote: “I was especially taken with your view of the Nuremberg trial. I was so pleased by it, because it always seemed to me that particularly in Germany of today these things are bound to be

would be able to learn details about the *Eichmann* trial in Israel and elsewhere, while pointing out that the most far-reaching consequences of the proceedings were felt in Germany.<sup>39</sup>

Beyond meting out justice, war crime trials then have a role in engaging the whole community on the issues of the past and shaping post-conflict social and political transformations. With their high public visibility, they provide a forum for understanding the moral stakes; assist in unearthing the truth about traumatic events, which ordinarily defy conceptualisation through ready-made expressions; and enable meaningful collective reckoning and memorialisation of the past. It is worthwhile to note that these social and political functions are, as a general rule, a part and parcel of tools for developing civic resilience towards violent conflict and guarantees of non-recurrence.

### **19.2.2. Eichmann and the Perils of Rule-Following Behaviour**

Part of the interest in the trial in Jerusalem for Arendt was the profile of the accused. Adolf Eichmann was not among the Nazi leadership that made key policy decisions. He was only a note-taker at the Wannsee Conference where the decision for the “final solution” of the “Jewish question” was made, yet he had a substantive role in implementing the policy. He fell in the group of culprits that Arendt previously singled out as both decisive for their ability to execute administrative mass murder and, at the same time, beyond the pale of liability in the criminal justice system.

With the deliberate Nazi policy of imposing the idea of collective guilt on German society, Arendt considered it a key task to differentiate between various degrees of involvement in atrocities. The primary matrix for making distinctions, in her “Organized Guilt” article, was located between the concepts of guilt and responsibility, which would continue to inform Arendt’s discussion of the issues in the future. Using this formula, she identified three groups of culprits. “The number of those who are responsible *and* guilty will be relatively small”, she insisted. This first group she reserved for the chief architects and leaders of the Nazi party who “produced the whole inferno”, and who unambitiously fell in the group slated for criminal prosecutions, though facing no adequate penal

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nearly incomprehensible”. See Arendt, “Letter 43” and “Letter 54”, 1992, see *supra* note 11.

<sup>39</sup> See Arendt, 1965, p. 16, *supra* note 25.

policy. In the next group, “there are many who share responsibility without any visible proof of guilt”. Here, she identified those who supported Hitler and his party as long as it was politically viable. They voted him into power, publicly propagated or financially supported the cause, and applauded wartime victories. No direct relationship between their actions and instances of crime can be established, though the end-results of the policies they supported are apparent. Finally, “there are many more who have become guilty without being in the least responsible”.<sup>40</sup> Probably the largest group consists of “lesser subordinates”, those whose work, obedience and expandability allow for the system to run smoothly, without disruption. Apart from ‘desk murderers’ like Eichmann, Arendt also classified direct executioners into this group. The profile would generally fit those who did not have power of policy-making, whose main characteristic was obeying orders, while at the same time not being driven by any discriminatory intent towards the victims when performing murderous tasks.

The thrust of Arendt’s argument in *Eichmann in Jerusalem* lay in raising concerns regarding reliance on the rules in general and structural limitations of such behaviour, based on Nazi legislative reforms and the historical decline of moral customs. Since, in this case, rule-following behaviour concerns both moral and legal rules, which are seen as co-dependent, I will use the term ‘legalism’, coined by Judith Shklar at approximately the same time as the release of Arendt’s text, to refer to this reliance on rules.<sup>41</sup> The challenge for legalism then, comes from situations in which moral and legal codes, not so much collapse, but are *de facto* reversed, put on their head. It is the following of orders based on this substitute for legitimate rules that enabled the mobilisation of large segments of German population. One of the passages that tries to explain the “banality of evil” in the wake of Arendt’s text, also provides insight on Eichmann’s ability to substitute one set of rules with an inconsistent set without being troubled by the logical contradiction:

However monstrous the deeds were, the doer was neither monstrous nor demonic, and the only specific characteristic one could detect in his past as well as in his behavior during

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<sup>40</sup> Arendt, 1994, p. 125, see *supra* note 11.

<sup>41</sup> See Judith Shklar, *Legalism: Law, Morals and Political Trials*, Harvard University Press, Cambridge (MA), 1964. I could find no evidence that Arendt read Shklar or was influenced by her book, though this is not entirely impossible.

the trial and the preceding police examination was something entirely negative: it was not stupidity but curious, quite authentic inability to think. He functioned in the role of prominent war criminal as well as he had under the Nazi regime; he had not the slightest difficulty in accepting an entirely different set of rules.<sup>42</sup>

The inability to think, or “thoughtlessness” as Arendt otherwise stated, further strengthens reliance on rules, irrespective of their content. At the same time, it enabled two substitutions of rules, firstly common sense into the universe of Nazi rules, and then back into the common sense of the Jerusalem court. That moral codes were perceived as amounting to rules of language for Eichmann, is illustrated by his acknowledgment that his Nazi conduct was wrong from the perspective of post-war realities, but nevertheless should be considered understandable regarding the ideological setting in which he operated. According to Arendt, Eichmann’s thoughtlessness was detectable at every step during his police interrogation and testimony at the trial stand. His expressions in clichés, stock phrases, ‘Officialese’ or *Amtssprache*, using overly formal address on all occasions and the same formulation to describe an event over and over again, could form an exemplary lexicon for unreflective deniers.

In applicable legal terms, the rules become relevant when they are to be assessed against superior orders. The defence of lesser subordinates critically rests on the question of whether the orders of their Nazi superiors can be considered manifestly illegal. Namely, according to military law, not all orders should be obeyed, and there is an assumption that soldiers should be able to recognise and refuse to act upon those orders that are clearly criminal in nature. Our goal will not be to examine the merits of Arendt’s argument for manifest illegality in the *Eichmann* case, but to show how and why these considerations led to the formulation of critical thinking and political judgment.

The recognition of an illegal order becomes particularly problematic under totalitarian rule. The State system has found means of reversing the legal order altogether, of ‘legislating’ crimes on a massive scale, and arguably, and by the appearance of things, making them into something ‘ordinary’. The *Führer* principle, in particular, not only gave Hitler’s orders the force of law but, in fact, put them in the “absolute center of pre-

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<sup>42</sup> Arendt, “Thinking and Moral Considerations”, in Kohn (ed.), 2003, p. 159, see *supra* note 23.

sent legal order”, as constitutional law expert Theodor Maunz defined it at the time.<sup>43</sup> Thus, in light of the positive law of the Third Reich, Arendt duly noted, Eichmann was a law-abiding citizen. Furthermore, as Mark J. Osiel noted<sup>44</sup> and Arendt alluded to, Hitler’s words were legally binding, even if communicated privately without any formal decree. When oral performance can at any point supersede applicable law, all usefulness of judging action by a rule-following standard is lost. This is a situation that framers of criminal law never considered and were unable to predict.

In considering defence from superior orders, the Jerusalem court seized upon an example from Israeli domestic legal practice. The ruling on an incident that took place in 1956 on the *de facto* Israeli-Jordanian border, known as the Kafr Qasim massacre, established an important legal principle as to when soldiers should disobey illegal orders.<sup>45</sup> On the first day of the Suez war, the commander of the Israeli Border Police, Issachar Shadmi, decided to extend the nightly curfew and to impose a permanent curfew for twelve Arab villages under his jurisdiction without advance notice. When concern was raised about the villagers who were already in the fields or outside the village and unaware of the change in the curfew regime, he reportedly made an order through the commanding chain to make no arrests and to “shoot on sight”. All platoon commanders in charge of enforcing the curfew disobeyed the order and held their fire, except the platoon in Kafr Qasim which, under the orders of Gabriel Dahan, killed 48 civilians in nine separate incidents, many of whom were minors and children, as they were returning to their village. Shmuel Malinki, who was in the direct chain of command, and Dahan were tried in 1958 and sentenced to ten and eight years’ imprisonment respectively, while six soldiers acting under Dahan’s orders were also found guilty. However, their sentences were gradually commuted and, by November 1959, they were released from prison. In his verdict, Judge Benjamin Halevi, who was also sitting in the three-judge panel of the *Eichmann*

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<sup>43</sup> Arendt, 1965, p. 24, see *supra* note 25.

<sup>44</sup> Mark Osiel, *Obedying Orders: Atrocity, Military Discipline and the Law of War*, Transaction Publishers, New Brunswick, 1999, p. 64.

<sup>45</sup> The Kafr Qasim case ruling has since attracted the attention of legal scholars as an example of case law regarding superior orders. See, for example, M.R. Lippman, “Humanitarian Law: The Development and Scope of the Superior Orders Defense”, in *Penn State International Law Review*, Fall 2001. In the 1960s, the Israeli Defence Forces also distributed to its recruits a pamphlet that contained Judge Benjamin Halevi’s verdict, in order to inform about the nature of orders that are to be disobeyed.

trial,<sup>46</sup> stated that not all orders needed to be examined for their legality on the basis of subjective feeling, but only those that are manifestly illegal, which must be disobeyed: “The distinguishing mark of a manifestly illegal order is that above such an order should fly, like a black flag, a warning saying: ‘Prohibited!’”. Based on this case of conviction for performing acts under superior orders, and articles of German penal law predating the Third Reich, which were not repealed after 1933 and existed in parallel with the *Führer* principle, the Jerusalem court dismissed the notion that orders that amounted to participation in atrocity on a grand scale can be misrecognised as legal.

In the Kafr Qasim massacre case, however, defendants were found guilty because Shadmi’s and Malinki’s order was considered an exception to the standard rules of engagement that could be easily recognised, especially concerning civilians. The exceptionality of the order was further confirmed by the response of all other platoon commanders, who understood its illegality and disobeyed the order. But, the requirement of a striking exception to the rule, argued Arendt, was impossible to meet in “conditions in which every moral act was illegal and every legal act was a crime”.<sup>47</sup> Given the reversal of conditions, in the context of the Third Reich, it is precisely the non-criminal orders that appeared exceptional. The fact that Eichmann acted against Himmler’s orders of late 1944 to stop deportations and to dismantle the installation of camps, from a legal standpoint, should not be taken against him, says Arendt, as he, based on the same principle, recognised exceptionality to the rule.

From these considerations, Arendt came to the conclusion that rule-following behaviour alone cannot inform about the illegality of orders that Eichmann and other lesser subordinates received. Our only alternative is to assume a separate mental faculty that can distinguish right from wrong on case-by-case basis without the guidance of rules. Arendt explained it as follows:

Hence, the rather optimistic view of human nature, which speaks so clearly from the verdict not only of the judges in the Jerusalem trial but of all postwar trials, presupposes an independent human faculty, unsupported by law and public

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<sup>46</sup> On Judge Halevi, his presiding role in the related Rudolph Kastner trial of 1954, which drew public attention to Eichmann, and his removal as the president of the panel for Eichmann trial, see Yablonko, 2003, pp. 130–3, *supra* note 24.

<sup>47</sup> Arendt, 1964, p. 41, see *supra* note 23.

opinion, that judges in full spontaneity every deed and intent anew whenever the occasion arises. Perhaps, we do possess such a faculty and are lawgivers, every single one of us, whenever we act: but this was not the opinion of the judges. Despite all the rhetoric, they meant hardly more than a *feeling* for such things has been inbred in us for so many centuries that it could not suddenly have been lost.<sup>48</sup>

Instead of facing up to the challenge posed by legal standards, judges and legal experts have been seized by the magnitude of deeds, considered to be patently wrong on the basis of the unquestioned and allegedly all-pervasive quality of moral intuition.<sup>49</sup> Not sufficiently concerned with the historical precedent, they failed to consider a radically different totalitarian universe in which masses of subordinates operated, and thus to understand that one had to go by oneself in judgment. If this is what those few who refused to follow orders were guided by, then this specific mental capacity needs to be identified and qualified rather than simply assumed. It is only by identifying and characterising this “independent human faculty” that we can still find viable grounds for attributing culpability. Arendt’s strategy in the post-trial period was precisely to examine the sources and applicability of this allegedly common human capacity to judge, which we will examine in the next section.

In order to apply the defence of superior orders in the *Eichmann* case, it was also necessary to establish, due to the lack of manifest illegality, that he had no alternative personal malicious motives towards the victims in performing his orders. Over the years, Arendt’s portrayal of Eichmann according to which he neither joined the Nazi party out of conviction and subscribed to its ideological creed, nor was he particularly anti-Semitic,<sup>50</sup> has received much scrutiny. This is not a place to discuss Arendt’s depiction of Eichmann, but based on historical evidence that subsequently emerged, it seems safe to say that the case she made for his

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<sup>48</sup> *Ibid.*

<sup>49</sup> “If we look closely into the matter”, says Arendt, “we will observe without much difficulty that the judges in all these trials really passed judgment solely on the basis of the monstrous deeds. In other words, they judged freely, as it were, and did not really lean on the standards and legal precedents with which they more or less convincingly sought to justify their decision”. See Arendt, 1965, p. 294, *supra* note 25.

<sup>50</sup> See *ibid.*, pp. 30–3.

lack of racial and anti-Semitic motives is rather unconvincing.<sup>51</sup> Nevertheless, part of the argument that concerns rule-following behaviour of lesser subordinates could still be valid as subject to historical investigation.<sup>52</sup> At least hypothetically, there may have been many others who participated without holding malicious intent against their victims.

### 19.3. Thinking, Judging and Taking Action Without Rules

Once Arendt sets out to identify a capacity to judge without the help of established rules, she offers, not one, but two separate answers. Two distinct capacities will correspond to two different aspects of the challenge. Judging, derived from Kant's theory of cognition, is able to decide on individual cases, not based on subsuming under rules, but by taking into account the standpoint of all relevant actors.<sup>53</sup> In this sense, it also designates the autonomy of the political sphere of opinion in distinction to truth-centred discourse in science and ethics. Political judgement rests on recognition of the plural conditions of modern political communities, which have learnt the lessons of totalitarianism and the Holocaust.

The limitation of judging, as a consequence of Kant's political theory,<sup>54</sup> is that corresponding political action requires at least a minimum of political power, which was forcefully removed from all totalitarian subjects. If judging can then assist us in strengthening modern forms of citi-

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<sup>51</sup> For prominent criticism of Arendt on historical grounds, see Christopher Browning, *Ordinary Men: Reserve Police Battalion 101 and the Final Solution in Poland*, HarperCollins, New York, 1992; Deborah E. Lipstadt, *The Eichmann Trial*, Nextbook Press/Schocken, New York, 2011; David Cesarani, *Becoming Eichmann: Rethinking the Life, Crimes, and Trial of a "Desk Murderer"*, De Capo Press, Cambridge, 2006.

<sup>52</sup> See, for example, Christopher Browning's insistence that Eichmann was not an "ordinary Nazi" unlike Udo Klause who "felt himself to be 'decent', not 'really' a Nazi, and an apolitical civil servant who was involved in 'only administration'", in "How Ordinary Germans Did It?", in *The New York Review of Books*, 20 June 2013 issue.

<sup>53</sup> On the chronology of Arendt's identification of the concept of judging as the main problem arising from the Eichmann trial, see Ronald Beiner, "Hannah Arendt on Judging", in *Lectures on Kant's Political Philosophy*, University of Chicago Press, Chicago, 1982, pp. 97–8.

<sup>54</sup> Arendt quotes Kant on these issues: "The freedom to speak or to write can be taken away from us by the powers-that-be, but the freedom to think cannot be taken from us through them at all. However, how much and how correctly would we think if we did not think in community with others to whom we communicate our thoughts and who communicate theirs to us! Hence, we may safely state that external power which deprives man of the freedom to communicate his thoughts *publicly* also takes away the freedom to *think*, the only treasure left to us in our civic life and through which alone there may be a remedy against all evils to the present state of affairs". See *ibid.*, p. 41.

zenship and preventing the re-emergence of new totalitarianism, it cannot explain the behaviour of those who refused to obey superior orders. Recognition of powerlessness, in fact, is a precondition of understanding that we can only rely on our moral judgment and that we still have personal, if not political, choices.<sup>55</sup> Therefore, in totalitarian conditions, the only adequate decision that could leave intact one's moral integrity is personal, not to participate in public life. To explain how such a decision comes about, Arendt looked to Socratic thinking-exercises devised to strengthen Athenian citizenship. The decisive element of this form of thinking comes from the ability to maintain the consistency of one's thoughts and be able to live with ourselves and our deeds.

Arendt never made an attempt to link up these two mental capacities, thinking concerned with the self, and judging concerned with the community and the world. We therefore do not have a single coherent account of how outlined mental faculties relate to each other. In fact, it has been justly pointed out that historical sources and associated conceptual commitments, stemming from Plato and Kant respectfully, are mutually incompatible.<sup>56</sup> I will not be able to address this problem here, other than saying that I consider two separate outlines as examples of thinking that underline model civic behaviour that we want to encourage as means of prevention.

### 19.3.1. Critical Thinking and the Silent Dialogue with Oneself

In trying to identify the human mental capacity that can inform behaviour without pre-established rules, one finds a good starting point in the process of thinking itself, which is ongoing, constantly renewed and “unhinged”. In search of an illustration of thinking in practice, Arendt reached for a historical example, finding in Socrates a representative model for the examination of thinking activity. Socrates is an especially good fit for this role, as he neither aspired to be a philosopher formulating a doctrine that can be taught, nor a ruler who claimed superior knowledge

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<sup>55</sup> See Arendt, 1964, p. 45, *supra* note 24; Hannah Arendt, “Collective Responsibility”, in J. W. Bernauer, SJ (ed.), *Amor Mundi*, Martin Nijhoff, Dordrecht, 1987, pp. 43–50.

<sup>56</sup> Arendt herself states “two rather different origins” of her preoccupation with mental activities in the introduction to her *The Life of the Mind*, vols. 1–2, Harvest, San Diego, 1981, p. 3. On the incompatibility of two conceptions of judging in Arendt, that of an actor and that of a spectator, see Richard J. Bernstein, *Philosophical Profiles*, University of Pennsylvania Press, Philadelphia, 1986.

of how to improve the conditions of citizens. He operated in a sphere of opinion, as citizen among citizens, doing nothing, claiming nothing that, in his view, every citizen should do and had a right to do. The narrative about Socrates's trial and the end of his life, captured in four Platonic dialogues, has become over the centuries almost inextricably tied to Western notion of citizenship.

The Socratic method of examination, as described by Plato, is essentially aporetic: it questions commonly held beliefs about moral concepts without ever arriving at a satisfactory definition of its own. In the course of standard exchange, Socrates elicits from his interlocutor widely accepted meanings of concepts like 'justice', 'goodness', 'courage' and 'piety'. Once inspected for consistency, argumentation leads either to counter-intuitive implications or to contradictions tied within the very meaning of the concept, or yet another argument that goes in circles through the inspection of other previously unquestioned concepts. The result is invariably the same: the validity of socially accepted and unexamined norms on the basis of which we conceive morality as "a matter course" becomes radically undermined. "It is in [thought's] nature to undo, unfreeze as it were, what language, the medium of thinking, has frozen into thought", said Arendt. "The consequence of this peculiarity is that thinking inevitably has a destructive, undermining effect on all established criteria, values, measurements on good and evil, in short on those customs and rules of conduct we treat of in morals and ethics".<sup>57</sup> In ordinary circumstances, this kind of exercise could have a detrimental kind of "freezing" effect on individuals who are not prepared to deal with uncertainty concerning the value-system that makes their communal life possible. From a political standpoint, the effects of Socratic examination are confined to a marginal case, related to times of crises. When we face communal upheaval nevertheless, the price to pay for inability to think will be considerably larger than the side effects of proneness to think in normal circumstances.

By shielding people against the dangers of examination, [non-thinking] teaches them to hold fast to whatever the prescribed rules of conduct may be at a given time in given society. What people then get used to is not so much the content of the rules, a close examination of which will always lead them to perplexity, as the possession of rules under

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<sup>57</sup> Arendt, 2003, see *supra* note 42, p. 176.

which to subsume particulars. In other words, they get used to never making up their minds.<sup>58</sup>

Plato described the thinking process as a “silent dialogue between me and myself”. The conversation that goes on within the self, and indicates an inherent plurality of the self, is in this case the primary model of thinking. Extending this ability through external means of communication, of speech and writing, is considered only an epiphenomenon. What Socrates tried to do is to emulate this process through a public dialogue and establish it as a social practice.<sup>59</sup>

In accordance with Plato’s definition then, there are two main propositions attributed to Socrates that revolve around the concern for the self, rather than the system of values and beliefs in the world. In spite of the inward-looking insight, both propositions have important implications for understanding civic responsibility.<sup>60</sup> The first proposition states that it is better to suffer wrong than to do wrong.<sup>61</sup> The second proposition claims that “it is better to be at odds with multitudes than, *being one*, to be at odds with yourself, namely to contradict yourself”.<sup>62</sup> The two propositions are based on what Arendt considered to be Socrates’s main discovery. She called it “the only rule that holds sway over thinking”,<sup>63</sup> namely the rule of consistency.

In order to fully appreciate the meaning of the first proposition, we need to stress its dependence on the notion of personality and inner consistency. According to Arendt, we arrive to this world as strangers to others and to ourselves. We assert ourselves and find our place in the world, and we ‘strike roots’ through the process that Locke already identified as thinking and remembering. In the course of this process, we become someone, a person, as distinguished from a mere member of the race of

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<sup>58</sup> *Ibid.*, p. 178.

<sup>59</sup> See Arendt, 1982, p. 37, see *supra* note 54.

<sup>60</sup> Arendt insists that these propositions are not a result of a deliberate attempt to identify principles that guide moral truth. “They are insights, to be sure”, she says, “but insights of experience, and as far as the thinking process itself is concerned they are at best incidental by-products”, see Arendt, 2003, p. 182, *supra* note 42.

<sup>61</sup> This proposition appears in different versions in several texts, see Arendt, 2003, pp. 72, 109, *supra* note 23; Arendt, 2003, p. 181, *supra* note 42.

<sup>62</sup> Cf. Arendt, 1982, p. 37, see *supra* note 54. For a longer version of this proposition in a different translation, see Arendt, 2003, p. 181, *supra* note 42.

<sup>63</sup> Arendt, 1982, p. 37, *supra* note 54.

human beings. However, to the extent that we are concerned with losing the self that constitutes the person, we will have to set a limit to what we can allow ourselves to do. Namely, being constituted through thinking as a dialogue that goes on in myself, a process of being ‘two-in-one’, I will have to live with the consequences of whatever I do. Thus, if I participate in mass murder, I will have to live with a mass murderer and converse with a mass murderer for the rest of my days. It is in this sense that the concern for the self overrides the concern for the world in the claim that it is better to suffer wrong than to do wrong.

Considering the capacity of limiting and preventing ourselves from putting our personal integrity in jeopardy, Arendt said:

These limits can change considerably and uncomfortably from person to person, from country to country, from century to century; but limitless, extreme evil is possible only where these self-grown roots, which automatically limit the possibilities, are entirely absent. They are absent where men skid only over the surface of events, where they permit themselves to be carried away without ever penetrating into whatever depth they may be capable of.<sup>64</sup>

Through the notion of personality, Arendt came closest to explaining the possession of a shared thinking ability among human agents and at the same time, the possibility of large-scale corruption of this capacity. On the one hand, we can see how the ability to think critically and face the conscience through silent dialogue can be attributed as a possibility to everyone across all distinctions of class, profession, culture and age. On the other, the limits of the application of the rule of consistency and protection of personal integrity are not subject to any kind of rules or standards. They will vary from one instance to another based on different social and individual predicaments. Further, there will always be circumstances that will tempt people *en masse* to relinquish their personal identity for the sake of collective identity.

Socrates spent his life believing that his *praxis* was improving the status of citizenship in Athens in contrast to many of his fellow citizens who did not appreciate the larger implications of his instruction. The all-important lesson was not in teaching people *what* to think, but “*how* to think, how to talk to themselves”, and how to become a person. An in-

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<sup>64</sup> Arendt, 2003, p. 101, see *supra* note 23

creased reliance on the process of critical thinking and understanding of its personal and political implications, Arendt believed, could avert catastrophes. How we fare in testing circumstances will depend on how well we develop critical thinking and the notion of civic responsibility. Learning critical thinking therefore, in contrast to a more contemporary notion, rests primarily not on questioning the received knowledge, but on rigorously applying standards on our own process of thinking.<sup>65</sup>

### 19.3.2. Political Judgment and Representative Thinking

Since Plato's sharp distinction between truth and opinion, the sphere of opinion was viewed by the philosophical mainstream in low esteem, not worthy of normativity that can fully actualise human capacities. As a result, philosophy stood in uneasy tension with the political realm, continually attempting to impose epistemic norms on a sphere that is otherwise dependent on popular opinion. Arendt, however, saw virtue in the realm of opinion as a medium that brings about inclusiveness of the political community.

Truth in itself carries an element of conclusiveness that precludes public exchange of ideas and displays a tendency to coerce action. Exchange of opinion in the marketplace, on the other hand, constitutes the very essence of political life. "The shift from rational truth to opinion", Arendt said, "implies a shift from man in singular to men in plural".<sup>66</sup> We no longer inquire about the capacity of an epistemic subject, which is assumed to be the same throughout human agency, to guide our conduct in the community. Rather, in order to enhance the persuasive power of opinion, we need to consider and attempt to reconcile different standpoints of other actors in the marketplace. Not only does judging operate in conditions of plurality, but plurality is also, according to Arendt, the defining condition of political community. The strength of judgment depends on the ability to reflect on this plurality, and the degree of inclusiveness, impartiality, and capacity to forgo of our personal predilections and parochial outlook.

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<sup>65</sup> Arendt, 1982, p. 42, see *supra* note 54: "To think critically, applies not only to doctrines and concepts one receives from others, to prejudices and traditions one inherits: it is precisely by applying critical standards to one's own thought that one learns the art of critical thought".

<sup>66</sup> Arendt, *Between Past and Future: Six Exercises in Political Thought*, rev. ed., Viking Press, New York, 1968, p. 235.

In order to meaningfully capture and take into consideration the multiplicity of standpoints, we need to deploy representative thinking. Arendt defined it as follows:

Political thought is representative. I form an opinion by considering a given issue from different viewpoints, by making present to my mind the standpoints of those who are absent; that is, I represent them. This process of representation does not blindly adopt the actual views of those who stand somewhere else, and hence, look upon the world from different perspective; this is a question neither of empathy, as though I tried to be or to feel like someone else, nor of counting noses and joining a majority but of being and thinking in my own identity where actually I am not. The more people's standpoints I have present in my mind while I am pondering a given issue, and the better I can imagine how I would feel and think if I were in their place, the stronger will be my capacity for representative thinking and the more valid my final conclusions, my opinion.<sup>67</sup>

Judgment does not pertain to changing opinion and adopting somebody else's opinion without questioning it. Nor should I try in this process to emulate the feelings of what somebody else is going through in his or her own particular situation in life. Judgment is not about the idiosyncrasy of feelings but about communicability and transparency of thought directed towards the public. Most of all, judgment is not political because it proportionately reflects actual views of all those capable of judging. It is not representative of the majority view, which may as well be supporting genocidal policies. In other words, its validity does not lie in representing numbers in politics, but in representing a multiplicity of standpoints. Similar to Ronald Dworkin's rights theory,<sup>68</sup> it is precisely the minority that stands in particular need to be accounted for in representative thinking.

The material for choosing a representative example, a particular instance that "is valid for more than one case", is usually found in characters and events from historical and fictional narratives that reside in collective memory. Examples related to traumatic World War II events that left a mark on collective memory are usually captured in the names of

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<sup>67</sup> *Ibid.*, p. 241.

<sup>68</sup> See Ronald Dworkin, *Taking Rights Seriously*, Harvard University Press, Cambridge (MA), 2005.

locations in which they took place, for example: Pearl Harbour in the minds of Americans, Leningrad of Russians, Hiroshima of Japanese, and so on. The significance of exceptional events for the community is often modelled upon comparisons with ‘exemplary’ events from the past. Based on this use of an example, reactions to September 11 attacks in the US were often related to the response to the Pearl Harbour bombing. The judgment made in this way will have “exemplary validity to the extent that the example is rightly chosen”, said Arendt.<sup>69</sup> Imagination, put to effective use, is the power that enables us to represent a group of items, be they objects, events or points of view, through a single example. Impartiality of judgment is the outcome of this process of exemplification that is capable of adequately representing the diversity of standpoints of actors throughout the relevant public space.

Political judgement is of particular significance in situations of violent conflict and collective antagonism. Representative thinking, often against our strong inclinations, requires taking into consideration perspectives and grievances of others who are collectively opposed, that is, in this context perceived as enemies of our community. This is precisely when the need is most pressing, for example, to include and defend the right to life of “all those who happen to be around”, in the same sense that we would show respect for our own lives as well as those we care for or have allegiances with. In addition, civic responsibility implies the obligation to protect all those who will suffer the consequences not only of our own individual action, but also actions that will be taken in the name of our community. Our “involuntary membership”<sup>70</sup> in political communities requires that we respond to the deeds done in our name as the members of this community. In post-World War II situations when crimes against humanity and genocide were committed, in Cambodia, Bosnia or Rwanda, many accounts suggest that it took tremendous moral rectitude and courage to go against the grain in one’s own community against those who orchestrated and supported the mass killings. Nevertheless, in those cases where diplomatic and security interventions are impossible or ineffective,

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<sup>69</sup> Arendt, 1982, p. 84, see *supra* note 54.

<sup>70</sup> The membership is considered ‘involuntary’ because we cannot dissolve it in the same way that we can do with private associations. We are born in one political community and can naturalise into another, but the responsibility will follow us. On this, see Arendt, 1987, p. 149, *supra* note 55.

arguably, it is the critical mass of voices from inside the perpetrators' community that is our best bet for prevention.

In the last instance however, the process of judging requires not only removing collective biases of one's community, but also reveals the circumstantial nature of community belonging as such. Following Kant, Arendt said: "One judges always as a member of community, guided by one's community sense, one's *sensus communis*. But in the last analysis, one is the member of a world community by the sheer fact of being human; this is one's 'cosmopolitan existence'".<sup>71</sup> Therefore, the assumption of civic responsibility assumes a two-fold perspective. On the one hand, political judgment takes into account equally the standpoints of all those who happen to be affected by the course of action, irrespective of whether they are a part of my community or not. At the same time, civic responsibility requires from us to speak and act as members of our political community, engaging in political life regarding the course of action taken in the name of the community.

The Kantian cosmopolitan outlook of judgment is evident also in Arendt's stand on issues, her critique of the State in *Origins of Totalitarianism* or federal solution for a binational State of Israel, as much as her refusal to deal with Nazi crimes as solely a 'German problem', or historically related to a 'Jewish question'. However, the issues become much more complicated when credibility of preventive capacity of international institutions is concerned. This standpoint is informed by the history of failure to effectively implement the Minority Treaties set up by the League of Nations. The discord within the League of Nations and hypocrisy in the application of international treaties has led to the displacement of hundreds of thousands of people and left them 'stateless', with no protection of their rights. As a consequence, Arendt saw no possibility of enforcing human rights beyond the recognition of citizenship and exercise of State sovereignty. "The restoration of human rights", she said, "as the recent example of the State of Israel proves, has been achieved so far only through the restoration or establishment of national rights".<sup>72</sup> One could assume that her refusal to accept the Nuremberg trials as a solution for

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<sup>71</sup> Arendt, 1982, p. 75, see *supra* note 54.

<sup>72</sup> Hannah Arendt, *The Origins of Totalitarianism*, 2nd ed., Meridian Books, New York, 1958a, p. 179. Cf. Seyla Benhabib, "International law and human plurality in the shadow of totalitarianism: Hannah Arendt and Raphael Lemkin", in *Constellations*, 2009, vol. 16, no. 2, p. 338.

Nazi crimes was partly due to inadequacy of applicable legal norms, and partly to the issues related to the credibility of establishing international criminal justice institutions. It should also be noted that the example of Israel as confirming the trend of national protection, carries a stipulation of ‘so far’, indicating a possibility that international order may change in the future to allow for international institutional protection of rights. Since in Arendt’s lifetime no follow-up to the Nuremberg tribunal, such as the International Criminal Court we have today, was established, history provided no reason to revisit or reconsider conditions of possibility of international institutions. Nevertheless, there are good reasons to believe that, in contemporary conditions, she would be a strong endorser of international criminal law.<sup>73</sup> In fact, the cosmopolitan forms of solidarity among the victims and global public alike, which Arendt envisaged as instrumental for prevention, could also be the key to support further improvement, conduct oversight and protect sustainability of international criminal justice institutions.

By the time of the *Eichmann* trial, Arendt not only looked at the judicial response with a more pragmatic eye, leaving space for further improvement of legal instruments, but displayed more faith in the international law as well. At this later stage, for example, she exhibited readiness to defend the category of crimes against humanity, and embrace and strengthen the ontological force of the crime of genocide, or what she called, a ‘crime against human condition’.<sup>74</sup> The elaboration of this particular type of wrongdoing formed the crux of Arendt’s own alternative verdict addressed to Eichmann:

And just as you supported and carried out a policy of not wanting to share the world with the Jewish people and the people of a number of other nations – as though you and your superiors had any right to determine who should and who should not inhabit the world – we find that no one, that is, no member of human race, can be expected to share the earth with you. This is the reason, and the only reason, you must hang.<sup>75</sup>

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<sup>73</sup> This is an argument put forward by Seyla Benhabib, see *ibid.*

<sup>74</sup> For a detailed account of Arendt’s transition from rejection to acceptance of international law, see *ibid.*, pp. 331–350.

<sup>75</sup> Arendt, 1965, p. 279, *supra* note 25. Cf. Benhabib, 2009, p. 343, see *supra* note 72.

The transgression committed by Eichmann and other lesser subordinates, then, is an attempt to alter the essential quality of the human condition, namely plurality. The anthropological study in Arendt's *Human Condition*, highlights the sameness of humans as members of the human species, capable of speech and reasoning unlike any other. We are all, at the same time, also unique in the way of 'who' we are in physical shape and sound of our voice, and 'what' we are with our inner qualities and weaknesses.<sup>76</sup> This plurality is further reflected in our tendency to form, or be a part of, durable associations with others. Humanity thus, manifested both in the richness of human life forms and in the possibility of living together in communities, is premised on accepting the diversity of individuals and groups. An attempt to annihilate aspects of plurality violates this very premise of the human condition and constitutes a historically different type of crime altogether from those ordinarily prosecuted in national criminal justice systems up to that historical juncture.

#### **19.4. Sustaining Peace and Developing Civic Resilience for Prevention**

The imperative of finding adequate means of prevention of recurrence of Nazi crimes has guided Arendt's research over the span of three decades. The precedent set by Nazi crimes and the depth and meaning of wrongdoing revealed in the definition of crimes against humanity and the crime of genocide found a measure of redress for victims. Even if we have only a limited ability to mete out justice for these kinds of crimes that will always remain unique, if not unprecedented, court proceedings are also the prime venue for public reckoning, truth-seeking, questioning the preconceived and re-assessing the past. At the same time, neither political nor legal institutional measures alone will ever amount to a sufficient deterrent for the leaders and a guarantee of non-repetition. The mass atrocity crimes of the magnitude that occurred in Cambodia, Bosnia-Herzegovina or Rwanda are not only possible with the use of State resources, but also with the mobilisation of the large segments of society. The lesson learnt from the Nazi regime is that mobilisation for genocidal causes is possible even in environments that have strong institutional safeguards, let alone places where institutions are weak. Prevention is therefore only possible by nurturing a particular kind of citizenship which will sustain the surge

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<sup>76</sup> Hannah Arendt, *The Human Condition*, University of Chicago Press, Chicago, 1958b.

of political forces that attack the fundamentals of the rule of law, and defend political and legal institutions put in place to prevent recurrence. Civic resilience that can sustain these institutions in the situation “when the chips are down” will depend on a critical mass of citizens that possess two primary sets of qualities: 1) It will rest on active participation as a citizen through critical examination of inherited rules, readiness to make up one’s own mind, and moral (that is, personal) integrity; and 2) it will be marked by an acute awareness of recent history of mass violence in one’s community and beyond, and the ability to act against causes that promote collective violence against political plurality as such.

Having outlined Arendt’s concept of prevention, we can now look at some relevant policy implications. For the sake of argument and brevity, I will assume that prevention of mass atrocity crimes by itself has an impact on reducing risks and effects of violent conflict more broadly. There will also be ways in which we will indicate that civic forms of prevention, proposed by Arendt, address directly some of the root causes of violent conflict. The summary of Arendt’s position indicates how we can model citizenship based on specific mental predisposition and associated political action. A cursory look at entry points for sustaining peace will assist us in illustrating what kind State and civic initiatives are needed to promote and create sustainable social roots for this model of citizenship.

The sustaining peace agenda provides several vantage points for revisiting conflict prevention strategies. Firstly, conditions for re-thinking the prevention focus are set by Goal 16 of the UN’s Sustainable Development Goals. They stipulates that building peace, which can be sustained overtime, is a universal agenda and a development task of all societies. We no longer divide countries between those that need to work on developing safeguards against violent conflict, and those that can safely focus on economic development, which allegedly by itself has a preventive function.<sup>77</sup> There is a recognition that improvement is needed in long-term preventive measures even in places with stronger institutional capacity, as the recent increase of violent conflict in middle-income countries indicates.<sup>78</sup> This outlook encourages a long-term perspective on social change and provides the space to conceive of the sustainability of peace tied to

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<sup>77</sup> See the UN Sustainable Development Goals, *supra* note 1. See also United Nations and World Bank, 2018, para. 12, *supra* note 4.

<sup>78</sup> See Political Instability Task Force: Worldwide Atrocities Dataset, 2016; Uppsala Conflict Data Program, 2016.

work on slow developing social and cultural conditions that can re-enforce prevention.

Secondly, in conceiving prevention we increasingly aim beyond sole reliance on capacity-building of institutions often associated with the previous wave of State-building and peace-building initiatives. This is partly due to performance, real and perceived development outcomes, and partly due to a realisation that, beyond institutional factors, we need more emphasis on the role of actors and structural conditions to explain pathways that lead to both the onset and prevention of violent conflict.<sup>79</sup> A further need is related to looking beyond State actors, who continue to play a key role, but are now in practice accompanied increasingly by non-State actors and especially civil society.<sup>80</sup>

Civic prevention is premised on the role of agency and ability to work on some of the structural conditions. The agency, referring to both individual and group agency, which characterises actors' involvement, is conceived in an actual decision-making capacity responding to challenges along the pathways to peace and conflict. On the other hand, the point that Arendt wanted to make is that group (that is, citizens') agency potentially has a predisposition toward acting preventively, independently of institutional arrangements and safeguards. This potential can be actualised, for example through forms of civic education, and can act to defend against recurrence of mass atrocities, and by default, defend the pathways to peace. We have often heard objections that the process of actualisation is a slow moving one, as we engage in changing one of the structural conditions, namely political culture. However, the World Development Report 2011 has indicated, for example, that among those 20 countries with the fastest institutional reform in the twentieth century, it took on average 41 years to achieve "basic governance transformation" of the rule of law institutions.<sup>81</sup> With similar resources and sustained commitment of key

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<sup>79</sup> See United Nations and World Bank, 2018, chap. 3, pp. 77–108, see *supra* note 4,

<sup>80</sup> See The World Bank, *World Development Report 2017: Governance and the Law*, Washington, 2017; M. Andrews *et al.*, *Building State Capability: Evidence, Analysis, Action*, Oxford University Press, Oxford, 2017; Alexandre Marc *et al.*, *Societal Dynamics and Fragility: Engaging Societies in Responding to Fragile Situations*, The World Bank, Washington, D.C., 2013. See also United Nations and World Bank, 2018, *supra* note 4.

<sup>81</sup> See The World Bank, *World Development Report 2011: Conflict, Security, and Development*, 2011, p. 11, Table 2.1.

stakeholders, one can argue that a significant amount of civic capital for prevention can equally be accrued in this timespan.

With a view to conditions supporting guaranteeing non-recurrence,<sup>82</sup> we can therefore divide measures that fit the universal prevention agenda into two major types: those that are directed at developing institutional safeguards, and those that strengthen civic resilience towards the recurrence of mass atrocities and onset of collective violence. In the first group we find, for example, constitutional reform and the establishment of constitutional courts; legislative reform to strengthen national criminal code pertaining to situations of violent conflict, and incorporating core international crimes; civil oversight mechanisms over security institutions; development of national peacebuilding architecture, with early warning systems and mediation capacities; devolution and financial autonomy of marginalised regions and groups; development of national human rights institutions and other independent human rights monitoring bodies; and so on. In the second group we should cluster measures that are aimed at creating civic resilience, through retroactive practices, including official truth-seeking mechanisms; public information and outreach programmes of courts with jurisdiction over core international crimes; various memorialisation practices and so on, as well as forward looking practices, such as civic, peace and history education in and beyond national curricula; discussion fora on citizenship, including use of social media; art and cultural manifestation that celebrate inclusive civic outlook; youth engagement on social inclusion and against violent extremist ideologies, and so on.

Considering these two types of preventive measures, there is an inter-dependence between the impact of institutional safeguards and of civic resilience on sustainable peace. Reforming institutions and developing a coherent set of new legislative provisions and institutional capacities at the national level is a precondition for prevention of recurrence and, as indicated, it may involve an inter-generational effort. However, once put in place, there is no guarantee that these mechanisms can be effectively maintained and sustained overtime. We find a reminder of this kind of risk in countries such as Hungary, Poland or the Philippines, which made substantive progress in enhancing the respect and strengthening institutions

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<sup>82</sup> See measures listed in support of guarantees of non-recurrence in UN Special Rapporteur, 2015, *supra* note 9.

of rule of law in the last 10 to 20 years. However, more recently we witness a significant rollback regarding the protection of human rights, independence of the judiciary and overall confidence in institutions. A more robust civic capital can be gradually created to prepare for shocks and setbacks, and protect the sustainability of institutions built to promote inclusive, just and peaceful societies.

Finally, there is growing recognition that prevention, as executed by development actors in particular, has to address social, economic and political inequalities, and especially horizontal inequalities and group-on-group exclusions.<sup>83</sup> As Arendt's citizenship presupposes respect for plural and inclusive conditions of the political community, possession of this predisposition could positively inform prevention practices. This can include, for example, the conduct of civil servants in equitable distribution of social services between communities, community-based insider mediation, or prosecutorial strategies inclusive of all sides to the conflict. To the extent that horizontal inequalities enhance the risk of violent conflict, overall political culture sensitive to inclusion of all groups and able to discuss respective challenges openly, could be as effective as specific institutions set up to address inequalities.

In many contemporary democratic societies, we already see the impact of the broad engagement of citizens of a kind that Arendt envisaged. Awareness of risks, and accountability for core international crimes is a specific focus of numerous national constituencies, as well as regional and global support networks. With the recent trend of re-emerging extremist ideologies and undermining of the rule of law, such an engagement could be instrumental in defending institutions set up to both, mete out justice and sustain peace. In this respect then, Hannah Arendt's post-totalitarian and post-Holocaust conception of citizenship may yet become one of the benchmarks of the new approaches to prevention.

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<sup>83</sup> See United Nations and World Bank, 2018, chap. 4, pp. 109–40, *supra* note 4.



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## Transnational Governmentality Networking: A Neo-Foucauldian Account of International Criminal Law

Gregory S. Gordon\*

### 20.1. Introduction

Conventional accounts of the genesis of international criminal law emphasise the desire to hold individuals accountable for atrocities and grave breaches rather than let them hide behind the veil of the State. But a vein of important scholarship relying on the work of French philosopher Michel Foucault has called this conclusion into question. Far from viewing international criminal law as a crusade to end impunity for mass atrocity via individual responsibility, this body of scholarship perceives it instead as a product of more sinister and less visible forces – globalisation arising from nation-States and multinational private interests seeking maintenance of institutional order on a supranational scale. This scholarship typically offers philosophical support for its critique of international criminal law by citing Foucault’s seminal work *Discipline and Punish: The Birth of the Prison*, for the proposition that international criminal law actors create a “political economy” of punishment, bureaucratising and routinising it, and thereby normatively ingraining it into an emerging globalised social body. This strain of thinking seizes on one of the central

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tenets in Foucault's philosophy, the notion of 'disciplinary power', and reductively translates it into a naked exercise of institutional 'control' over individuals at the supranational level. Seen from this narrow perspective, international criminal law merely represents an extension of statist coercion on a collective scale.

This chapter takes issue with this Foucauldian interpretation of international criminal law. Rather than treating 'power' in the international criminal law context negatively, as a function of coercion, it turns to the later development of Foucault's thought emphasising power as 'governmentality'. Governmentality may be roughly translated as a non-disciplinary form of power arising from an amalgamation of institutions, procedures, analyses, reflections, calculations, and tactics that permit governance over a population. Although it may have certain resonances and interactions with Foucault's earlier notions of sovereignty and discipline, governmentality is more about large-scale demographic techniques that form an overall macrophysics of power concentrated on assuring security for populations.

This chapter will demonstrate that, pursuant to this interpretation of Foucault, modern international criminal law has developed not as an assiduous strategy for maintaining supranational control, but as an organic outgrowth of lower-level transnational networks that have reached critical mass through the process of governmentality. At the outset, those networks consist of low-level, and often informal, investigative, prosecutorial, and judicial trans-border personnel linkages enabled through the intercession of nongovernmental and international organisations. These networks ultimately facilitate the series of procedures, analyses and tactics that have reached critical mass in the formation of international criminal law. They are further geared toward providing security for vulnerable populations, in particular.

When seen from this alternative Foucauldian perspective, international criminal law is no longer a simple binary power-oppression mechanism operating via punishment on a cosmopolitan scale. Instead, it represents a matrix of local-global/global-local horizontal capacity building, multi-layered enforcement techniques, and convergences of rules and strategy. 'Power' in this context can thus be interpreted as a supranational normative and institutional glue that helps situate the post-World War II erosion of atomistic Westphalian sovereignty, identifies population security as its policy lodestar, and puts into perspective the notion of individual

criminal responsibility. It could represent a new and vital way of theorising the foundations of international criminal law – focusing on human security and going beyond the tired recitations of ‘the fight against impunity’.

This chapter is divided into five sections. Section 20.2. provides an overview of Michel Foucault and his philosophy, including his foundational concepts of ‘power’, ‘knowledge’, ‘discourse’, ‘archaeology’, and ‘genealogy’. With that background in mind, Section 20.3. outlines the traditional Foucauldian account of international criminal law, explaining how scholars have simply, and somewhat superficially, transposed municipal conceptions of ‘disciplinary power’ onto a transnational scale writ large. Section 20.4. examines the evolution of Foucault’s theories regarding ‘power’ into the later-stage concept of ‘governmentality’, which places an emphasis on accretions of personnel and administrative linkages coalescing into governance structures to provide security for populations. Section 20.5. traces the history of international criminal law from a grassroots perspective, showing how lower- and mid-level jurists cum State functionaries created a series of transborder international criminal law networks in the nineteenth and twentieth centuries that eventually transformed into juridical institutions now serviced by contemporary versions of these networks.

Finally, Section 20.6. explains how this growth can be explained as a kind of transnational ‘governmentality’ that takes its cues from sister initiatives focused on security for vulnerable populations, including the Responsibility to Protect and the Sustainable Development Goals. The section concludes by suggesting a governmentality-focused approach to international criminal law’s conceptual underpinnings. This would entail turning away from the stale individual criminal responsibility-focused model of international criminal law and re-conceiving it as a victim-focused institutional/procedural strategy utilised to protect at-risk masses.

## **20.2. An Overview of Michel Foucault and His Philosophy**

### **20.2.1. Background: Themes of Time, Place and Circumstance**

Paul-Michel Foucault’s 1926 birth in Poitiers (west-central France, about 200 miles southwest of Paris) to a physician father, who was himself the offspring of a line of provincial physicians (as was his mother), marked

him in many ways not immediately apparent.<sup>1</sup> First, the year of his birth meant that he would come of age during the Nazi occupation of his homeland from 1940 through 1945. The iron-fisted Nazi presence during his teenage years exerted an indirect but important influence on him.

[He] was old enough to know fear. Allied planes from time to time flew sorties over the town, targeting the railroad station. Located twenty miles inside the frontier of Vichy France, Poitiers itself was throughout the war under the control of German officials, who periodically rounded up Jewish refugees and spirited them off to concentration camps. He thus came of age in a world where the threat of death was ubiquitous yet largely invisible, more a nightmarish rumor than a tangible reality.<sup>2</sup>

Foucault himself would later say:

I have very early memories of an absolutely threatening world, which could crush us. [...] To have lived as an adolescent in a situation that had to end, that had to lead to another world, for better or worse, was to have the impression of spending one's entire childhood in the night, waiting for dawn. That prospect of another world marked the people of my generation, and we have carried with us, perhaps to excess, a dream of Apocalypse.

Nazi influence, even if only in a reactionary fashion, continued to impact that 'other world' after 1945. This was via the growth of communist thought in French academic life, initially through osmosis via the French Resistance, which then carried over to *post-bellum* France.<sup>3</sup> Foucault's early university career was forged in a fire of Marxist theoretical ferment, both checked, and, in certain respects, fuelled by contemporaneous currents of structuralism, existentialism and phenomenology (the latter two being "philosophies of the subject").<sup>4</sup> He would find his own phil-

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<sup>1</sup> David Macey, *Michel Foucault*, Reaktion Books, London, 2004, pp. 8–9.

<sup>2</sup> James Miller, *The Passion of Michel Foucault*, Harvard University Press, Cambridge (MA), 1993, p. 39

<sup>3</sup> See Alan Riding, "France's Troubled Liberation", in *The New York Times*, 24 August 2014, noting that "[t]he French Communist Party had dominated the resistance, including that of the cultural world" and "it seems clear that the left's sway over French intellectual and cultural life throughout the Cold War had its roots in the occupation".

<sup>4</sup> Bruno Gonçalves Rosi, "Main Postmodern Theorists and Their Main Concepts", in *Notes on Liberty*, 14 March 2017: "At the beginning of his career he was inserted into the post-

osophical voice by first engaging with these intellectual trends and then breaking away from them.

At the same time, his family history of medical doctors played its part.<sup>5</sup> As already noted, both his parents came from long lines of doctors and, owing to depression (and attempted suicide) over his increasing realisation and embrace of a homosexual identity, Foucault's strict physician father had him institutionalised in a psychiatric facility during his days at the prestigious *École Normale Supérieure*.<sup>6</sup> Foucault also studied, through on-site visits, the work of psychiatric clinics during his university years. And his later work would be marked by an interest in medical issues, including psychiatry, confinement and societal power over the human body.

Less overtly apparent influences on Foucault's intellectual development also bear notice. One is the German philosopher Friedrich Nietzsche. Foucault claimed to have "turned to Nietzsche to escape not only the horizon of Marxism, but also the Freudianism, structuralism, and phenomenology that were 'each flirting with Marx in turn'".<sup>7</sup> More specifically, the notion of 'genealogy' (a tracing of discourse development analysis) could be said to be Nietzsche's primary impact on Foucault. Through his *Genealogy of Morals*, Nietzsche aimed to re-conceptualise morality by eschewing "the herd's ordering of selves into its institutional arrangements" and animating "resistance against the established order" by "inventing alternative constructions of the self, which attest to personal creativity, ingenuity and artistic sensibility".<sup>8</sup> In Foucault's own work, as will be discussed below, 'genealogy' became an indispensable method for critically analysing discourse in the fields of science, medicine, psycholo-

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WWII French intellectual environment, deeply influenced by existentialists. Eventually Foucault sought to differentiate himself from these thinkers".

<sup>5</sup> *Ibid.*: "Initially identified as a medical historian (and more precisely of psychoanalysis), he sought to demonstrate how behaviors identified as pathologies by psychiatrists were simply what deviated from accepted societal standards".

<sup>6</sup> Jeff Myers and David A. Noebel, *Understanding the Times: A Survey of Competing Worldviews*, Summit Ministries, Manitou Springs, 2015, pp. 153–4.

<sup>7</sup> Justin Richards, "What Is Foucault's Interpretation of Nietzsche's Will to Power?", in *Quora*, 30 April 2016.

<sup>8</sup> Marinus Schoeman, "Generosity as a Central Virtue in Nietzsche's Ethics", in *South African Journal of Philosophy*, 2007, vol. 26, no. 1, pp. 18–19. Foucault explicitly provided his interpretation of Nietzsche's view of history in Michel Foucault, "Nietzsche, Genealogy, History", in Paul Rabinow, (ed.), *The Foucault Reader*, Pantheon, New York, 1984, pp. 76–100.

gy/psychiatry, penology and sexuality. Similarly, Nietzsche's 'will to power' was a central tenet of his philosophy.<sup>9</sup> That term captures what Nietzsche perceived as the prime motivator in human striving – the desire "to grow, spread, seize, become predominant".<sup>10</sup> Foucault picked up on this Nietzschean trope in his *History of Sexuality*, by positing the 'will to knowledge', which, in turn, has links to his conception of 'power' (also to be discussed in greater depth below). In fact, in his last interview, he avowed:

I am simply a Nietzschean, and try as far as possible, on a certain number of issues, to see with the help of Nietzsche's text – but also with anti-Nietzschean theses (which are nevertheless Nietzschean!) – what can be done in this or that domain. I attempt nothing else, but that I try to do well.<sup>11</sup>

So the spirit and ideas of Nietzsche always hover around the core principles in Foucault's oeuvre.

Another overarching factor in Foucault's work is history. In this sense, Foucault is not like most traditional philosophers, for whom philosophy, as traditionally understood, is the central inquiry, with history only factoring in collaterally (or not at all for certain types of philosophy, such as standard metaphysics, which may be shorn of historicity).<sup>12</sup> As we will see, for Foucault, the role of history is central in his philosophical critiques. His conceptual revelations spring from historical inquiry. Whether his task is examining punishment of social pariahs in pre-Revolutionary France, confinement of the insane in Europe during the Enlightenment or establishment of the medical sciences at the beginning

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<sup>9</sup> Linda L. Williams, *Nietzsche's Mirror: The World as Will to Power*, Rowman & Littlefield Publishers, Inc., Lanham, 2001, pp. 41–2.

<sup>10</sup> Friedrich Nietzsche, *Beyond Good and Evil*, W. Kaufmann trans., Vintage, New York, 1966, p. 259.

<sup>11</sup> Hans Sluga, "Foucault's Encounter with Heidegger and Nietzsche", in Gary Gutting (ed.), *The Cambridge Companion to Foucault*, 2nd ed., Cambridge University Press, Cambridge, 2005, p. 210.

<sup>12</sup> See Mark Kelly, "Michel Foucault (1926–1984)", in *Internet Encyclopedia of Philosophy*: "Ideas about reason are not merely taken to be abstract concerns, but as having very real social implications, affecting every facet of the lives of thousands upon thousands of people who were considered mad, and indeed, thereby, altering the structure of society". See also William F. Lawhead, *Voyage of Discovery: A Historical Introduction to Philosophy*, 4th ed., Cengage Learning, Boston, 2015, p. 438, noting Kierkegaard's criticism of metaphysical systems as too abstract.

of the nineteenth century, history looms large in all Foucauldian intellectual pathbreaking. As explained by Ladelle McWhorter:

[Foucault] resisted the label ‘philosopher,’ despite his training and interests. For a variety of reasons, some philosophical and some political, Foucault rejected philosophies that put the subject at the foundation of analysis and took experience as the object of description. He undertook instead projects of de-subjectivation, projects that create experiences as opposed to merely describing them, projects that pull away from established identities. Foucault’s work was not philosophy in the sense that was accepted in his time [...] he was not a builder of new theoretical structures. His intellectual enterprise was the critique of disciplines and practices that restrict the freedom to transform ourselves [...].<sup>13</sup>

Consistent with this, the Stanford Encyclopedia of Philosophy notes that “it can be difficult to think of Foucault as a philosopher. His academic formation was in psychology and its history as much as in philosophy, his books were mostly histories of medical and social sciences, his passions were literary and political”.<sup>14</sup>

### 20.2.2. Foucault’s Childhood and Academic Formation

The second of three siblings, Paul-Michel Foucault had an older sister and younger brother. His father wanted him to follow in the family tradition and become a doctor. But Paul-Michel had other career aspirations – one of the reasons he dropped the hyphenated ‘Paul’ from his name was to distance himself from his father.<sup>15</sup> Anne Foucault (née Malapert), his mother, was central to his early education. After graduating from Poitier’s Saint-Stanislas school (a strict Roman Catholic institution directed by Jesuits and selected by Anne), he matriculated to the prestigious Lycée Henri IV in Paris to prepare for the entrance exams to France’s elite higher education institution – the École Normale Supérieure (‘ENS’). At Henri

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<sup>13</sup> Ladelle McWhorter, “Review of Timothy O’Leary & Christopher Falzon, Foucault and Philosophy”, in *Notre Dame Philosophical Reviews*, 2011.

<sup>14</sup> Gary Gutting, “Michel Foucault”, in *Stanford Encyclopedia of Philosophy*, 22 May 2013. However, Gutting notes: “Nonetheless, almost all of Foucault’s works can be fruitfully read as philosophical in either or both of two ways: as a carrying out of philosophy’s traditional critical project in a new (historical) manner; and as a critical engagement with the thought of traditional philosophers”.

<sup>15</sup> Macey, 2004, pp. 20–21, see *supra* note 1.

IV, Foucault's philosophy instructor was Jean Hyppolite, whose lectures on Georg W.F. Hegel (generally positing the development of history as a dialectical progress of reason) made a strong impression on the aspiring philosopher. Eventually he took the ENS entrance exams and achieved excellent results – of all incoming ENS students in 1946, Foucault was ranked fourth. And he emerged as a gifted thinker within his *normalien* cohort. His interest in psychiatry and mental illness soon became apparent. In his first year at ENS, he was already enrolled in a course on psychopathology and, as noted above, was visiting mental hospitals. He was also being grounded in philosophy – studying existentialism and phenomenology – under Maurice Merleau-Ponty (who emphasised the philosophy of Martin Heidegger) – and was introduced to cutting-edge Marxist scholarship through Louis Althusser (who read Marx in a structuralist vein). Foucault received his license in philosophy in 1948, in psychology in 1950, and was awarded an advanced degree (or diploma) in psychopathology in 1952.

Despite his academic success, Foucault led a troubled life at ENS. He continued to suffer from bouts of depression and survived various suicide attempts.<sup>16</sup> Under the influence of Professor Althusser, he joined the Communist Party in 1950.<sup>17</sup> But by 1953 he had quit, disillusioned with its Stalinist bent and anti-Semitism and alienated by its conservative attitude toward homosexuality.<sup>18</sup> He started distancing himself from Marxist thought, as well as the then-in-vogue philosophies of structuralism and phenomenology. The theoretical fulcrum for pivoting away from such currents of thought was Nietzsche. As explained by Lawrence Kritzman:

Reading Nietzsche provided Foucault with a 'point of rupture' in his intellectual formation, enabling him to radically break with those who believed that a phenomenological and transhistorical subject could provide an accurate account of the history of reason [...] Like most intellectuals of his generation, Foucault was brought up on the promises of dialectical materialism [...] Yet Foucault engaged in a project that

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<sup>16</sup> Miller, 1993, pp. 54–55, see *supra* note 2. See also Lawrence D. Kritzman, "Michel Foucault", in Lawrence D. Kritzman and Brian J. Reilly (eds.), *The Columbia History of Twentieth-Century French Thought*, Columbia University Press, New York, 2006, p. 526.

<sup>17</sup> Kritzman, 2006, p. 526, see *ibid*.

<sup>18</sup> *Ibid*.

was to go beyond the attempt to merge Marxism with phenomenology, structuralism, or Freudianism [...] In response to Marxism, Foucault theorizes a new approach to history that challenges the one-dimensional determinism of historical materialism. The exercise of history is more than the repressive and unmediated domination of one class by another; it is rooted neither in the production of surplus value nor in political and ideological struggles. On the contrary, power for Foucault designates localized procedures of local control, an ensemble of actions that induce others and follow one another.<sup>19</sup>

### **20.2.3. Foucault's Early Career, Doctoral Thesis and Philosophical Foundations**

Foucault began his career in 1952, lecturing at the *École Normale Supérieure*. Starting in 1953, in addition to his ENS duties, he would commute to the north of France three days a week to teach psychology at the *Université de Lille*. Foucault soon tired of this teaching routine. And in 1954, he was given an out – Georges Dumézil, a French academic with ties in Sweden, learnt of Foucault through a mutual acquaintance. On verifying Foucault's credentials, he secured for him what turned out to be a four-year position as director of the *Maison de France* cultural centre, attached to the *University of Uppsala* in Sweden. In 1958, Foucault moved to *Warsaw University* after being appointed head of a new *Centre for French Civilisation* in the Polish capital. This turned out to be a short stint – conservative local officials soon discovered his homosexuality and, seeking to catch him in a sting operation, manufactured an affair with a young boy (a so-called 'honey trap'). The Poles notified the French of the indiscretion and Foucault had to find another job. A similar gig was available in Germany and so he served for the following two years as director of the *Institut Français* in Hamburg (similarly attached to the local institution of higher learning, the *University of Hamburg*).

But Foucault's years in Sweden, Poland and Germany were filled with more than programming cultural events, engaging in discreet sexual liaisons, and teaching French. At *Uppsala*, the combination of an excellent medical library and limited social life allowed him to conduct research for what would become his doctoral thesis. Coinciding with an academic ap-

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<sup>19</sup> *Ibid.*, p. 527.

pointment to the University of Clermont-Ferrand, Foucault submitted his thesis *Folie et Dérison: Histoire de la Folie À l'Âge Classique (History of Madness)*, supervised by Georges Canguilhem, one of France's most eminent philosophers of science.

*Histoire de la Folie* deals with the experience and perception of madness in Europe, from the fifteenth through the nineteenth centuries. It posits that the distinction between madness and sanity is strictly an historical construct, fabricated by the Enlightenment to cover for “controlling challenges to a conventional bourgeois morality”.<sup>20</sup>

In the process, Foucault discerned three key shifts in the treatment of madness during that period. Breaking with previous conventional wisdom, which had seen madness as a pathology to be removed, Medieval Europe viewed it as sacred and Renaissance Europe accorded it a new respect, as a kind of wisdom.<sup>21</sup> But this view shifted again in the seventeenth century, with the advent of the Enlightenment, which valorised rationality above all else. Those considered ‘mad’ went from the margins of society to complete exclusion through confinement in asylums.<sup>22</sup> This was followed by the third period, the Enlightenment, beginning at the end of the eighteenth century, when institutions were established solely to confine the mad under the supervision of doctors seeking to cure the ‘illness’ with medicine.<sup>23</sup> But, as already indicated, Foucault had a jaundiced view of these nominally more progressive institutions. He perceived them as being equally cruel and controlling as the earlier, ‘rational’ institutions had been.

#### **20.2.4. The Archaeology Books and Foucault's Rise as a Leading French Intellectual**

In May 1963, Foucault published his sequel to *Folie et Dérison* – *Naissance de la Clinique: Une Archéologie du Regard Medical (The Birth of the Clinic: An Archaeology of Medical Perception)*. Linked both thematically and historically to *Folie et Dérison*, *Naissance de la Clinique* picks up at the same point in the eighteenth century where the earlier book left

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<sup>20</sup> Gutting, 2013, see *supra* note 14.

<sup>21</sup> Michel Foucault, *Madness and Civilization: A History of Insanity in the Age of Reason*, Richard Howard trans., Vintage Books, New York, 1988, pp. 9–10.

<sup>22</sup> *Ibid.*, p. 57.

<sup>23</sup> *Ibid.*, p. 155.

off. But it deals more broadly with the history of medicine, in contrast to the previous tome's more narrow focus on the origins of psychiatry. It provides an account of the modern medical experience through an "archaeology of medical discourse" – an analysis of discourses themselves, that is, language actually used and divorced from the institutional context.<sup>24</sup> As part of this discursive digging, Foucault introduces the concept of the 'medical gaze', the act of scrutinising a patient inductively, based on observation of the individual body as an object, without adulterating the diagnosis with pre-Enlightenment cultural heuristics or identity politics.<sup>25</sup> And this has implications for State control:

Foucault concludes that hospitals are superficially places providing medical care, but are intrinsically "a sort of semi-judicial structure, an administrative entity which, along with the already constituted powers, and outside the courts, decides, judges and executes [...] Ultimately, the doctor as representative of the larger medical institution seems to embody the power, though it emanates from the institution of medical language itself".<sup>26</sup>

Foucault's developing tendency in *Naissance de la Clinique* toward discursive analysis, that is, historical research stripped of authorial context and moving toward discourse as an anonymous process, was fully realised in his next major philosophical work, *Les Mots et Les Choses: Une Archéologie des Sciences Humaines (The Order of Things: An Archaeology of Human Sciences)*. Published in 1966, *Les Mots et Les Choses* narrative-ly flows from his previous two philosophical oeuvres in that it tracks shifts in collective knowledge paradigms over time. But this work moves beyond the medical sciences and, in addition to biology, considers discursive evolution in fields of linguistics and economics.<sup>27</sup>

Foucault analysed academic development in these fields through the lens of the 'episteme'.<sup>28</sup> This then-newly-coined term refers to the orderly

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<sup>24</sup> Michel Foucault, *The Birth of the Clinic: An Archaeology of Medical Perception*, Alan Sheridan trans., Vintage Books, New York, 1994, Preface, pp. x–xi.

<sup>25</sup> *Ibid.*, pp. xi–xii.

<sup>26</sup> Daniel C. Newtown *et al.*, "Landscape, Tourism and Meaning: An Introduction", in Daniel C. Newtown *et al.* (eds.), *Landscape, Tourism and Meaning*, Ashgate Publishing Company, Burlington, p. 2.

<sup>27</sup> Michel Foucault, *The Order of Things: An Archaeology of Human Sciences*, Routledge, London, 1989, Preface, p. xxiii.

<sup>28</sup> *Ibid.*, p. xxiv.

‘unconscious’ structures underlying the production of scientific knowledge in a particular time and place.<sup>29</sup> It is the ‘epistemological field’ that creates the conditions possible for generating knowledge in a given time and place – and it charts several historical shifts of *episteme* in the disciplines covered.<sup>30</sup> This has often been compared to Thomas Kuhn’s notion of ‘paradigm’ and ‘paradigm shift’.<sup>31</sup> (Kuhn claimed in his classic 1962 work, *The Structure of Scientific Revolutions*,<sup>32</sup> that there are important alterations in the meanings of key terms – what he refers to as ‘paradigm shifts’ – as a result of ‘scientific revolutions’, such as the so-called ‘Copernican Revolution’ in reference to the scientific community’s shift from a Ptolemaic to a heliocentric view of the universe.)<sup>33</sup> Largely because many took it to be a tour de force expression of the new method of structuralism notably championed by anthropologist Claude Lévi-Strauss, *Les Mots et Les Choses* became a surprise bestseller and made Foucault a household name in France.<sup>34</sup> Still, Foucault himself never accepted the ‘structuralist’ label.

*Les Mots et Les Choses* also revealed another facet of Foucault’s Nietzschean influence. In this regard, it contained one of his most quoted passages – the idea that ‘man’ was a recent discursive formation nearing its end, and soon to be “erased, like a face drawn in the sand at the edge of the sea”.<sup>35</sup> Of course, Nietzsche had announced the death of God; Foucault was now announcing the death of man.

By the time *Les Mots et Les Choses* was published, Foucault had settled comfortably into Parisian academic life – still teaching at Clermont-Ferrand while commuting from the French capital. Also by then, he had been in a three-year relationship with Daniel Defert, his former philosophy student and junior by ten years. During the relationship, Defert had worked for stints in Tunisia and Foucault regularly visited him

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<sup>29</sup> Clare O’Farrell, “Key Concepts in Foucault’s Work”, in *Michel-Foucault.Com*.

<sup>30</sup> *Ibid.*

<sup>31</sup> *Ibid.*

<sup>32</sup> Thomas S. Kuhn, *The Structure of Scientific Revolutions*, University of Chicago Press, Chicago, 1962.

<sup>33</sup> See Alexander Bird, “Thomas Kuhn”, in *Stanford Encyclopedia of Philosophy*, 11 August 2011.

<sup>34</sup> The Foucault Society, “Biography of Michel Foucault”, *The Foucault Society*, available at the web site of the Society.

<sup>35</sup> Foucault, 1989, p. 422, see *supra* note 27.

there.<sup>36</sup> In September 1966, Foucault decided to leave France and take up a post as Professor of Philosophy at the University of Tunis, where he would remain for the next two years.<sup>37</sup> As a result, Foucault was not in Paris during the radical May 1968 student riots and factory strikes based on grievances ranging from American imperialism to capitalism/consumerism, traditional values and order.<sup>38</sup> After the riots were quelled, a series of academic reforms were instituted, including the creation of the Vincennes Experimental University Centre in the Parisian suburbs, a hotbed of radicalism that carried on the spirit of the 1968 riots with sporadic but intense outbursts of protest activity. By year's end, Foucault would become the chair of the new leftist institution's philosophy department.

This was a watershed moment in Foucault's life and academic career. On the academic side of the ledger, he would soon publish *L'Archéologie du Savoir (The Archaeology of Knowledge)* (1969), written primarily during his residence in Tunisia. This volume is almost an addendum to *Les Mots et Les Choses*, proposing pure methodological, ahistorical guidelines to conduct the kind of discursive analysis applied in the predecessor book to the specific disciplines of biology, linguistics and economics.<sup>39</sup> Also well-received critically and commercially, *L'Archéologie du Savoir* signalled the imminent manifestation of Foucault's meteoric rise in the academic ranks – his 1969 election to France's most prestigious academic institution, the Collège de France.<sup>40</sup>

### **20.2.5. Political Engagement and the Power-Knowledge Books**

At the same time, somewhat incongruously, while joining one of France's most establishment institutions, Foucault was becoming much more engaged and radical politically. Having missed the May 1968 riots in France (while supporting young radicals in Tunisia), he participated in much of the follow-on protest activity at Vincennes, joining some of the violent

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<sup>36</sup> Macey, 2004, pp. 76–77, see *supra* note 1.

<sup>37</sup> *Ibid.*

<sup>38</sup> Peter Steinfels, "Paris, May 1968: The Revolution That Never Was", in *The New York Times*, 11 May 2008.

<sup>39</sup> Michel Foucault, *The Archaeology of Knowledge*, Alan Sheridan trans., Pantheon Books, New York, 1972, p. 27: "One is led therefore to the project of a pure description of discursive events as the horizon for the search for the unities that form within it".

<sup>40</sup> Lynn Fendler, *Michel Foucault*, Bloomsbury, London, 2010, p. 120.

rioting that periodically resulted in his arrest.<sup>41</sup> Through such activity, he took an interest in the rights of prisoners. And in the early 1970s he co-founded a *Groupe d'Information sur les Prisons* (GIP) to bring to light sub-standard prison conditions and give the incarcerated a voice in French society.<sup>42</sup> Other leftist causes kept him politically engaged through the balance of the 1970s, including protests against the Franco regime in Spain; debates about sex, censorship, and rape in the United States; and support for the Iranian revolution toward the end of the decade.<sup>43</sup>

This turn toward leftist political engagement also reflected an arguably praxis-oriented shift in his major philosophical works. In particular, the historical inquiries were re-oriented from broad examinations of discourse and knowledge toward analyses more focused on institutional control over individuals via the interdependent phenomena of knowledge and power. This entailed dissecting knowledge discourses that crystallised into systems of authority and constraint while tracking the sets of intersecting but fractured identities that such systems engender. This is the theoretical-historical enterprise that gave rise to Foucault's best-known works – the 1970s–80s studies treating penal incarceration and sexuality, to which we will now turn.

### **20.2.5.1. The Turn Towards Genealogy**

In considering this new period of Foucault's work, a foundational underlying methodological issue bears explication. Foucault regarded his 1960s work as premised on an 'archaeology' of knowledge. This connotes an historiography that rested not "on the primacy of the consciousness of individual subjects; [rather] it allowed the historian of thought to operate at an unconscious level that displaced the primacy of the subject found in both phenomenology and in traditional historiography".<sup>44</sup> But this approach was not entirely satisfactory as it was restricted to the comparison of the different discursive formations of different periods.<sup>45</sup> As explained by Gary Gutting:

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<sup>41</sup> Jonathan Simons, *Foucault and the Political*, Routledge, London, 1995, p. 10.

<sup>42</sup> *Ibid.*

<sup>43</sup> *Ibid.* See also Chloë Taylor, "Foucault, Feminism, and Sex Crimes", in *Hypatia*, vol. 24, no. 4, 2009, p. 1, discussing Foucault's views on rape in the United States; Clare O'Farrell, *Michel Foucault*, Sage Publications, London, 2005, p. 124.

<sup>44</sup> Gutting, 2013, see *supra* note 14.

<sup>45</sup> *Ibid.*

Such comparisons could suggest the contingency of a given way of thinking by showing that previous ages had thought very differently (and, apparently, with as much effectiveness). But mere archaeological analysis could say nothing about the causes of the transition from one way of thinking to another and so had to ignore perhaps the most forceful case for the contingency of entrenched contemporary positions.<sup>46</sup>

## 20.2.5.2. Surveiller et Punir

### 20.2.5.2.1. An Overview

Thus, Foucault transitioned from ‘archaeology’ to ‘genealogy’. First deployed in his 1975 book *Surveiller et Punir: Naissance de la Prison (Discipline and Punish: The Birth of the Prison)*, genealogy, recalling Nietzsche’s ‘genealogy of morals’, filtered the discourse analysis that had preoccupied him through the 1960s “onto a more political terrain, asking questions now about the institutional production of discourse”.<sup>47</sup> Or, as explained by Gary Gutting: “The point of a genealogical analysis is to show that a given system of thought (itself uncovered in its essential structures by archaeology, which therefore remains part of Foucault’s historiography) was the result of contingent turns of history, not the outcome of rationally inevitable trends”.<sup>48</sup>

As applied in *Surveiller et Punir*, this yielded an account of how the modern era eschewed torture and execution, the older modes of castigation, to develop a more ‘gentle’ way of punishing criminals – that is, imprisoning them.<sup>49</sup> On a larger societal level, this represents a shift from exercise of ‘sovereign’ (or ‘juridical’) power (as famously embodied at the beginning of the book with the 1757 public spectacle torture of Damians, the regicide) to ‘disciplinary’ power embodied in the veiled treatment of prisoners within the carceral complex that is the modern prison, as em-

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<sup>46</sup> *Ibid.*

<sup>47</sup> Mark Kelly, “Michel Foucault (1926–1984)”, in *Internet Encyclopedia of Philosophy*. Interestingly, the subtitle clearly alludes to *Naissance de la Clinique (The Birth of the Clinic)*, suggesting continuity in the enterprise. And both subtitles, of course, reference Nietzsche’s *Birth of Tragedy*.

<sup>48</sup> Gutting, 2013, see *supra* note 14.

<sup>49</sup> Melissa A. Orlie, *Living Ethically, Acting Politically*, Cornell University Press, Ithaca, 1997, p. 44.

bodied in Jeremy Bentham's Panopticon or the contemporary penitentiary.<sup>50</sup>

#### **20.2.5.2.2. From Torture to Prisons**

Thus, as he did in *Folie et Dérailson* with respect to the insane, in *Surveiller et Punir* Foucault analysed institutional shifts in treatment of a nominally marginal sector of society – in this case, criminals (although Foucault sees the notion of what is termed 'criminal' expand greatly into the modern era). The book is divided into four main segments, covering key concepts as follows: (1) Torture; (2) Punishment; (3) Discipline; and (4) Prison.<sup>51</sup>

Through these sections/concepts, Foucault demonstrated the evolution of punishment from public torture and execution (and thus spectacle as a fear-based deterrence mechanism) to imprisonment (a kind of subtle, normalising control mechanism that first appears at the end of the eighteenth century – the so-called 'Classical Age' that is always, as we have seen, the crucial juncture of normative shift in his treatises). And this entails a progression from developing physical mechanisms to effect corporal/capital punishment to developing social constructs to nominally achieve 'reform' or 'conversion' of persons. In its earlier iteration, as the aforementioned spectacle, punishment sought to communicate the State's invincibility so as to cow the general population and subdue the convict.<sup>52</sup> Thus, as an attendant consequence, the torture-to-imprisonment change marks a shift from conceiving the body as a site of pain to one where the body simply loses its rights and, in effect, punishment operates on the soul.

The evolution of prisons themselves reflected this shift. They were initially conceived of as 'punitive cities' meant to remind the public of the consequences of transgression, as well as protective enclosures, holding the body of the convict for security reasons.<sup>53</sup> But with the modern transformations of punishment, prisons became more hidden from public view, a kind of sub-stratum institution, geared toward altering minds, keeping detailed records of individuals based on observation, and classifying and

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<sup>50</sup> *Ibid.*

<sup>51</sup> Michel Foucault, *Discipline and Punish: The Birth of the Prison*, Penguin Books, London, 1975.

<sup>52</sup> *Ibid.*, p. 49.

<sup>53</sup> *Ibid.*, pp. 117–23.

estimating the danger represented by the prisoner. In this way, per Foucault, “prison functions [...] as an apparatus of knowledge”.<sup>54</sup>

### 20.2.5.2.3. A Micro-Physics of Power

But the prison is not the only locus for manipulating bodies – this notion of control through knowledge – and thus, ultimately, power – extends to other sectors of society. And this is what is meant by ‘disciplinary’ power. Thus, the military, through minute regulations of dress, demeanour and bearing, conditions individuals to conduct themselves according to State needs.<sup>55</sup> Similar conditioning, based on the requirements of various techno-political tasks, also happens outside of the military context. For instance, it is seen in schools, hospitals and factories, where conditioning consists of such activities as timetabling, curriculum sequencing, and industrial divisions of labour.<sup>56</sup> According to Dave Harris’s reading of Foucault, the ensemble of such conditioning techniques is what constitutes the ‘micro-physics’ of power:

A unified technique emerged from a convergence and overlap of lots of small movements and tendencies found in schools, hospitals and the military as solutions to various developments, such as an outbreak of disease, or industrial or military innovation. The essential techniques passed from one institution to another, sometimes quickly, sometimes less quickly. Together, they made up a new “micro-physics” of power over individual bodies, which then spread throughout the social body itself, including the punishment system.<sup>57</sup>

For Foucault, this micro-physics of power represents ‘disciplinary power’ that manifests itself through hierarchical observation, normalising judgment and examination.<sup>58</sup> Much of this is captured in Jeremy Bentham’s Panopticon – a central tower surrounded by prisoners in cells, always visually accessible to an omnipresent watchman stationed in the tower.<sup>59</sup> This permits unseen scrutiny of prisoners, who must suppose that they are under perpetual observation, regardless of whether or not they

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<sup>54</sup> *Ibid.*, p. 126.

<sup>55</sup> *Ibid.*, pp. 139–40.

<sup>56</sup> *Ibid.*, pp. 149–54.

<sup>57</sup> Dave Harris, “Notes on Foucault’s Discipline and Punish”, in *Dave Harris & Colleagues*.

<sup>58</sup> Foucault, 1975, p. 170, see *supra* note 51.

<sup>59</sup> *Ibid.*, pp. 200–1.

actually are. And, again, per Foucault, this kind of ‘panopticism’ has extended to other social institutions, such as the workplace, where employees are continually watched by their supervisors.<sup>60</sup> This helps create uniform systems of behaviour, dispersed through society, that can be monitored. As explained by Foucault:

But the Panopticon must not be understood as a dream building: it is the diagram of a mechanism of power reduced to its ideal form [...] It is polyvalent in its applications; it serves to reform prisoners, but also to treat patients, to instruct schoolchildren, to confine the insane, to supervise workers, to put beggars and idlers to work. It is a type of location of bodies in space, of distribution of individuals in relation to one another, of hierarchical organization, of disposition of centres and channels of power, of definition of the instruments and modes of intervention of power, which can be implemented in hospitals, workshops, schools, prisons. Whenever one is dealing with a multiplicity of individuals on whom a task or a particular form of behaviour must be imposed, the panoptic schema may be used.

Kimberly Hutchings helps put this system of disciplinary power into its full perspective:

Juridical power belongs to and is exercised by a sovereign body to repress and control its subjects. Disciplinary power, on the other hand, belongs to nobody and is productive rather than repressive in its effects: discipline ‘makes’ individuals; it is the specific technique of a power that regards individuals both as objects and as instruments of its exercise. According to *Discipline and Punish*, the construction of the sovereign individual, which is both the premise and the accomplishment of the panopticon, is inseparable from the development of the human sciences. The discourses of human behaviour which helped inspire and account for changes in the penal system in the nineteenth century are most frequently presented as effects and channels of disciplinary power. Thus, Foucault’s argument appears to be that power produces discourses of knowledge, which in turn produce regimes of

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<sup>60</sup> *Ibid.*, pp. 203–4.

truth, criteria through which to discriminate between true and false or normal or deviant.<sup>61</sup>

It should be noted too, however, that this punishment system also finds its origins in concerns of political-economy. John Braithwaite explains:

[Foucault's] view is that the 'dying a thousand deaths' punishment of the late Middle Ages were not indicative of an attempt to control crime, but rather functioned as a means of publicly demonstrating the awesome power of the monarch. Under feudalism there was no consistently applied justice, most law breaking was tolerated and often even approved. Moreover, there was not the state apparatus to finance a systematic approach to crime control. Of necessity, therefore, punishment had to be arbitrary, cruel and cheap. Mercantilism, with the new phenomena of population mobility which separates servants from traditional masters, pilfering from employers, urban pickpockets, large urban warehouses which were targets for theft, ushered in the need for a rational crime-control policy. No longer could the ruling class turn a blind eye to most crime. Nor could they hope to enforce horrendous 16th century punishments without wiping out half the lower classes. New modalities of punishment had to be found. Rusche & Kirchheimer's theory links up with Foucault in the way it emphasises the new importance of preserving the lives of the lower classes.<sup>62</sup>

Still, regardless of the conscious trajectory of the punishment strategy, Gary Gutting warns us not to read intentionality into the development of this overall modern system of state control:

He [Foucault] further argues that the new mode of punishment becomes the model for control of an entire society, with factories, hospitals, and schools modelled on the mod-

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<sup>61</sup> Kimberly Hutchings, "Foucault and International Relations Theory", in M. Lloyd and A. Thacker (eds.), *The Impact of Michel Foucault on the Social Sciences and Humanities*, Palgrave MacMillan, Basingstoke, 1997, p. 105.

<sup>62</sup> John Braithwaite, "The Political Economy of Punishment", in E.L. Wheelwright and Ken Buckley (eds.), *Essays in the Political Economy of Australian Capitalism*, ANZ Books, Sydney, 1980, p. 193. Georg Rusche and Otto Kirchheimer's *Punishment and Social Structure* (1939) is a landmark Marxian analysis of punishment as a social institution. See Dario Melossi, "An Introduction: Fifty Years Later *Punishment and Social Structure* in Comparative Analysis", in *Contemporary Crises*, 1989, vol. 13, pp. 311–2.

ern prison. We should not, however, think that the deployment of this model was due to the explicit decisions of some central controlling agency. In typically genealogical fashion, Foucault's analysis shows how techniques and institutions, developed for different and often quite innocuous purposes, converged to create the modern system of disciplinary power.<sup>63</sup>

### 20.2.5.3. L'Histoire de la Sexualité

#### 20.2.5.3.1. An Overview

Foucault's last set of books published during his lifetime were the three volumes of *L'Histoire de la Sexualité* (*The History of Sexuality*). Foucault intended to treat sexuality as he had criminality – by showing its treatment as a discursive object through which individuals are ensnared in the knowledge-power interplay. As Gary Gutting notes: “The starting-point is [...] still Foucault's conception of modern power [...his] initial treatment of sexuality is a fairly straightforward extension of the genealogical method of *Discipline and Punish*”.<sup>64</sup>

Beginning with Volume 1, *La Volonté de Savoir* (*The Will to Knowledge*), Foucault had a list of groups he wished to show were specifically affected by this dynamic, including children, women, and ‘perverts’.<sup>65</sup> But sexuality ended up being somewhat different from imprisonment.<sup>66</sup> In particular, the genealogy did not merely involve control exercised via others' knowledge of individuals; there was also control via individuals' knowledge of themselves.<sup>67</sup> “Thus, they are controlled not only as *objects* of disciplines but also as self-scrutinizing and self-forming *subjects*.”<sup>68</sup> Central to this analysis would be the practice of confession.

But Foucault's outline of subjects did not unfold as he had originally planned. The intended second book in the sequence, *Les Aveux de la Chair* (*The Confessions of the Flesh*), which analysed the practices of

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<sup>63</sup> Gutting, 2013, see *supra* note 14.

<sup>64</sup> Gary Gutting, *Foucault: A Very Short Introduction*, Oxford University Press, Oxford, 2005, p. 92.

<sup>65</sup> Gary Gutting, *French Philosophy in the 20th Century*, Cambridge University Press, Cambridge, 2001, p. 282.

<sup>66</sup> *Ibid.*

<sup>67</sup> Gutting, 2005, see *supra* note 64.

<sup>68</sup> *Ibid.* Emphasis in the original.

Christian confession, was written but never published (it was later meant to be the fourth book in the series but Foucault died before it could be published).<sup>69</sup> The change in order came about because Foucault came to realise that the Christian confession ritual could not be properly contextualised without tracing the subject's history much further back in time, that is, understanding ancient conceptions of the ethical self.<sup>70</sup> This he undertook in his last two published books, which dealt with Greek and Roman sexuality: 1984's *L'Usage des Plaisirs (The Use of Pleasure)* and *Le Souci de Soi (The Care of the Self)*.

### **20.2.5.3.2. Volume 1: The Will to Knowledge**

#### **20.2.5.3.2.1. Parts 1-3: A Focus on Sexuality**

Volume 1, *La Volonté de Savoir (The Will to Knowledge)*, was divided into five parts: (1) We “Other Victorians”; (2) The Repressive Hypothesis; (3) *Scientia Sexualis*; (4) The Deployment of Sexuality; and (5) Right of Death and Power over Life. For the purposes of this chapter, the first three parts of the book can be described briefly as they deal in a more focused manner on sexuality itself. Part 1 disabuses the reader of the ‘repressive hypothesis’, that is, that owing to the capitalistic/bourgeois mores, social communication regarding sex was repressed during the late seventeenth through early twentieth centuries.<sup>71</sup>

This analysis bleeds into Part 2, which demonstrates that, in combating the Protestant Reformation, the Roman Catholic Church implored its adherents to ‘confess’ to sexual practices stemming from their sinful desires.<sup>72</sup> Thus, from the seventeenth century to the 1970s, there had actually been a “veritable discursive explosion” in the discussion of sex, albeit using an “authorised vocabulary” that legislated the time and place of such communications.<sup>73</sup> Among other things, this impelled discourse spurred an obsession with sexualities that did not fit within the marital relations framework.

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<sup>69</sup> Jeremy R. Carrette, *Foucault and Religion*, Routledge, London, 2000, p. 23.

<sup>70</sup> *Ibid.*

<sup>71</sup> Michel Foucault, *The History of Sexuality Volume 1: The Will to Knowledge*, Robert Hurley trans., Vintage Books, New York, 1978, pp. 3–13.

<sup>72</sup> *Ibid.*, pp. 17–49.

<sup>73</sup> *Ibid.*, pp. 17–8.

These marginal sexual practices, referred to as the “world of perversion”, included the sexuality of children, the mentally ill, the criminal and the homosexual.<sup>74</sup> In turn, this led to classifications of these perversions via social construct. Thus, where previously a man who had sexual relations with another man would be thought of as having succumbed to the sin of sodomy, pursuant to this new way of thinking, the man would now be classified as a new ‘species’, that is, a homosexual.<sup>75</sup> Part 3 of the book contrasts the Occidental approach to sex through scientific study, that is, *scientia sexualis*, which had been used to support State racism through such justifications as ‘public hygiene’, with the less rational Oriental tradition of *ars erotica*.<sup>76</sup>

#### **20.2.5.3.2.2. Disciplinary Power and Bio Power**

Parts 4 and 5 of Volume 1 have particular relevance for this chapter. Four, titled “The Deployment of Sexuality”, reprises the role of Foucauldian ‘power’ in relation to sex.<sup>77</sup> In this context, Foucault stresses that he is not referring to power as sovereignty exercised over the individual by the State. Rather, power consists of “the multiplicity of force relations immanent in the sphere in which they operate”.<sup>78</sup> Therefore, he contends, “Power is everywhere [...] because it comes from everywhere”, radiating from all communal interactions and carried out in a bottom-up, as opposed to a top-down, fashion throughout society.<sup>79</sup> This is arguably a carryover of Foucault’s micro-physics of power treated in *Surveiller et Punir*.

Part 5 of Volume 1 of *L’Histoire de la Sexualité* is central to the thesis developed in this chapter as it deals with the phenomenon of ‘bio-power’, a conceptual bridge to the notion of ‘governmentality’, which this chapter will explore in greater depth below. Gary Gutting notes that bio-power “is concerned with the ‘task of administering life’” and thus “seems to be moving beyond sexuality as such” and “embraces all the

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<sup>74</sup> *Ibid.*, pp. 36–49.

<sup>75</sup> *Ibid.*, pp. 42–3.

<sup>76</sup> *Ibid.*, pp. 53–73.

<sup>77</sup> *Ibid.*, pp. 77–131.

<sup>78</sup> *Ibid.*, p. 92.

<sup>79</sup> *Ibid.*, pp. 93–4.

forms of modern power directed toward us as living beings, that is, as subject to standards of not just sexual but biological normality”.<sup>80</sup>

Bio-power operates on two levels. As explained by Foucault himself:

In concrete terms, starting in the seventeenth century, this power over life evolved in two basic forms; these forms were not antithetical, however; they constituted rather two poles of development linked together by a whole intermediary cluster of relations. One of these poles – the first to be formed, it seems – centered on the body as a machine: its disciplining, the optimization of its capabilities, the extortion of its forces, the parallel increase of its usefulness and its docility, its integration into systems of efficient and economic controls, all of this was ensured by the procedures of power that characterized the disciplines: an anato-politics of the human body. The second, formed somewhat later, focused on the species body, the body imbued with the mechanics of life and serving as the basis of the biological processes: propagation, births and mortality, the level of health, life expectancy and longevity, with all the conditions that can cause these to vary. Their supervision was effected through an entire series of interventions and regulatory controls: a bio-politics of the population. The disciplines of the body and the regulations of the population constituted the two poles around which the organization of power over life was deployed. The setting up, in the course of the classical age, of this great bipolar technology-anatomic and biological individualizing and specifying, directed toward the performances of the body, with attention to the processes of life – characterized a power whose highest function was perhaps no longer to kill, but to invest life through and through.<sup>81</sup>

#### **20.2.5.3.3. Volumes 2 and 3: *The Uses of Pleasure and the Care of the Self***

In Volume 2 of the *L'Histoire de la Sexualité, L'Usage du Plaisir (The Uses of Pleasure)*, Foucault examined sexuality in ancient Greek society

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<sup>80</sup> Gutting, 2005, see *supra* note 64.

<sup>81</sup> Foucault, 1978, p. 139, see *supra* note 71.

as personal power politics in social relations.<sup>82</sup> In this context, ‘ethical’ sexual behaviour is a function of practicing sex within a specific social and class position.<sup>83</sup> This is in contrast to the Christian tradition where sexual pleasure smacked of sin.<sup>84</sup> In Volume 3, *Le Souci de Soi (Care of the Self)*, Foucault further investigated the ancient Greco-Roman rules of self-control through important texts, such as Artemidorus’s *Oneirocritica*, (*The Interpretation of Dreams*), which permit access to specific forms of pleasure and truth.<sup>85</sup> Again, this stands in contrast to the Christian concept of sin in relation to sexual pleasure.<sup>86</sup>

Notwithstanding the overt focus on sexuality, Foucault’s later work was still generally interpreted as continuing his critique of State power. But how does all this relate to international criminal law? To answer that question, it is helpful to consider the extant views of Foucault’s philosophy *vis-à-vis* international criminal law. The next section will be devoted to that.

### **20.3. Foucault in the International Criminal Law Literature to Date: *Discipline and Punish Super-Sized for the Supranational***

#### **20.3.1. A Dearth of Treatment**

In the specific realm of international criminal law, the literature devoted to Michel Foucault’s thought is not abundant. Sara Kendal has engaged international criminal law historical scholarship through the lens of Foucault’s *Archaeology of Knowledge*, offering that Foucault would likely object to any Whiggish account of international criminal law history “by reminding us of the nonlinear, non-teleological movement of history, with its dynamic of fits and starts, accidents and contingencies”.<sup>87</sup> In “Do International Criminal Courts Require Democratic Legitimacy?”, Marlies

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<sup>82</sup> Michel Foucault, *The History of Sexuality Volume 2: The Use of Pleasure*, Robert Hurley trans., Vintage Books, New York, 1985, pp. 219–20.

<sup>83</sup> *Ibid.*, pp. 27–9.

<sup>84</sup> *Ibid.*, pp. 14–6.

<sup>85</sup> Michel Foucault, *The History of Sexuality Volume 3: The Care of the Self*, Robert Hurley trans., Vintage Books, New York, 1986, pp. 3–36.

<sup>86</sup> *Ibid.*, pp. 39, 64.

<sup>87</sup> Sara Kendall, “The Nuremberg Military Tribunals and the Origins of International Criminal Law by Kevin Jon Heller; Beyond Victor’s Justice? The Tokyo War Crimes Trial Revisited edited by Yuki Tanaka, Tim McCormack and Gerry Simpson – Book Review”, in *Melbourne Journal of International Law*, 2012, vol. 13, no. 1, pp. 349–50.

Glasius cites John Pratt's article "Towards the 'Decivilizing' of Punishment?"<sup>88</sup> to consider a Foucauldian perspective on the "pervasive control mechanisms of the power/knowledge complex" within the international criminal law context.<sup>89</sup> In other words, she features the power-as-coercion strain of Foucault's thought.

### 20.3.2. The Fixation on Disciplinary Power in the Anglosphere

Glasius' article is of a piece with the dominant international criminal law Foucauldian discourse, sparse though it may be.<sup>90</sup> And it is informed by standard criminological scholarship. That scholarship is ably distilled in Pat O'Malley and Mariana Valverde's excellent 2014 piece "Foucault, Criminal Law, and the Governmentalization of the State".<sup>91</sup> O'Malley and Valverde contend that, in the anglophone world, the principal Foucauldian account of criminal justice has been filtered exclusively through *Discipline and Punish* and preoccupied with disciplinary institutions and practices.<sup>92</sup> This "near obsession with discipline",<sup>93</sup> as they refer to it, has resulted in a reductive and distorted perspective that channels Marxist themes of exploitation and oppression. As they describe it:

In considerable measure, habits of sociological thinking that were common to Marxists and other sociological criminologists proved difficult to abandon, or acted as a filter through which *Discipline and Punish* was read. In crude terms, for many scholars influenced by this text this new formation of 'power,' particularly the historical diagram of discipline, in effect simply replaced class and other determinants of criminal law and justice in their analytic pantheon. Discipline be-

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<sup>88</sup> John Pratt, "Towards the 'Decivilizing' of Punishment?", in *Social and Legal Studies*, 1997, vol. 7, pp. 487–515.

<sup>89</sup> Marlies Glasius, "Do International Criminal Courts Require Democratic Legitimacy?", in *European Journal of International Law*, vol. 23, no. 1, p. 62.

<sup>90</sup> A similar perspective is also seen in the international human rights law literature. See Tony Evans, "International Human Rights Law as Power/Knowledge", in *Human Rights Quarterly*, vol. 27, no. 3, 2005, pp. 1046–68, noting that international human rights law is in tension with Foucauldian 'market discipline'.

<sup>91</sup> Pat O'Malley and Mariana Valverde, "Foucault, Criminal Law, and the Governmentalization of the State", in Markus D. Dubber (ed.), *Foundational Texts in Modern Criminal Law*, Oxford University Press, Oxford, 2014, pp. 317–34.

<sup>92</sup> *Ibid.*, p. 329.

<sup>93</sup> *Ibid.*, p. 318.

came a new touchstone of the truth of modernity, in terms of which much law could be explained.<sup>94</sup>

### 20.3.3. The Impact on International Criminal Law Scholarship

#### 20.3.3.1. Transplanting Domestic Discipline

As suggested in Glasius' article, that perspective has arguably carried over to Foucauldian or Foucauldian-tinged scholarship in the domain of international criminal law. For example, in his seminal piece, *Collective Violence and Individual Punishment: The Criminality of Mass Atrocity*,<sup>95</sup> Mark Drumbl explicitly acknowledges the equivalences: "In the end, the architecture of the special field of mass violence is little more than an expropriation of domestic methodologies".<sup>96</sup> From that conceptual foundation, Drumbl goes on to quote *Discipline and Punish*, critiquing international criminal law based on its institutional 'drift' into what he describes as a Foucauldian "political economy of punishment".<sup>97</sup> Drumbl adds:

This political economy bureaucratizes and normalizes punishment, thereby inserting it deeply into the now-globalized social body. Although Foucault's discussion is limited to punishment by the state, I would apply his heuristic to the new and additional layers of bureaucratization contemplated by the emerging punitive arm of the supra-state of international organization.<sup>98</sup>

Following on this, Drumbl concludes his piece by expressing fear that, without sufficient regard for local interests:

[International] criminal law may simply speak the language of and serve self-referential globalitarian interests. Worse still, it may promote the interests of international elites over those of disenfranchised victims. The punishment inflicted by international institutions would then accomplish precisely

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<sup>94</sup> *Ibid.*, p. 317.

<sup>95</sup> Mark A. Drumbl, "Collective Violence and Individual Punishment: The Criminality of Mass Atrocity", in *Northwestern University Law Review*, 2005, vol. 99, no. 2, pp. 539–610.

<sup>96</sup> *Ibid.*, p. 545.

<sup>97</sup> *Ibid.*, p. 541.

<sup>98</sup> *Ibid.*

what Foucault most feared, namely generating power for the powerful [...].<sup>99</sup>

### 20.3.3.2. A Supranational Carceral Complex and Notions of Gramscian Cultural Hegemony

This rather monolithic Foucauldian account of international criminal law was further developed more recently in the 2015 Ph.D. dissertation of Gözde Turan at İhsan Doğramacı Bilkent University in Ankara, Turkey. Titled *A Critique of the International Criminal Court: The Making of the 'International Community' through International Criminal Prosecutions*, Turan's study titrates Foucault's philosophy even more assiduously through a power-exercised-as-oppression filter.<sup>100</sup> She begins with the perspective that the International Criminal Court ('ICC') is a more "diffuse and amorphous power" than the "the state" and thus "revitalizes the twin legacies of the state of containment and disciplinary supervision of problematic populations at the global level".<sup>101</sup> This means that "ongoing investigations and cases before the [International Criminal] Court give the impression of a developed, modern, western world judging and punishing the 'other', under-developed, and non-western ones as the latter cannot cope with the conditions of modernism".<sup>102</sup>

She arrives at this conclusion via the kind of binary, reductive Foucauldian analysis that O'Malley and Valverde describe above. That process begins by interpreting Foucault to designate 'law' as a locus of "power economies".<sup>103</sup> But to deploy its power, law needs the bludgeon of an external actor. Traditionally, she opines, this metaphorical stick was wielded by the Westphalian State. But modern realities have expanded the agency options. As Turan notes:

The Westphalian state is not an irreplaceable form of government for the operation of power in Foucauldian terms [...] The crucial thing is that there is and has to be [a] macro-level that 'brings together, arranges, and fixes within that ar-

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<sup>99</sup> *Ibid.*, p. 610.

<sup>100</sup> Gözde Turan, *A Critique of the International Criminal Court: The Making of the 'International Community' through International Criminal Prosecutions*, Ph.D. Thesis, İhsan Doğramacı Bilkent University, 2015 (available on the web site of the University).

<sup>101</sup> *Ibid.*, p. iii.

<sup>102</sup> *Ibid.*, p. 75.

<sup>103</sup> *Ibid.*, pp. 101–2.

rangement the micro-relations of power' (Dean, 1994: 157). And as long as the forms and instruments of power have historicity, the room is open for alternative forms and instruments transcending the nation-state at the international level where the state is just one of the players.<sup>104</sup>

In this way, Turan is able to direct her Foucauldian critique toward the ICC. In particular, there is an apparent allusion to disciplinary power in her observing that "Foucault's understanding of law [...] illustrates how micro techniques and strategies gradually permeate into global legal and political institutions".<sup>105</sup> In more specific terms, "just like administrative power becomes an inseparable part of the penitentiary system or medicine, international criminal law progressively encloses administrative tactics".<sup>106</sup> And thus, per Turan, a kind of supranational panopticism develops through the unwitting vehicle of complementarity:

Though the international criminal law discourse is at its very early stage of operationality, the capillary power of the discourse penetrates throughout a wide range of geography with the support of a myriad of actors and organizations [...] States become disciplined subjects that are watching over themselves, accommodating their judicial systems as well as political or economic systems to the globalized standards [...] In the global market economy, political rulers are not expected, and in fact they cannot, control each and every event taking place in the market. It is due to partly the feasibility question and partly efficiency concerns that require supportive subjects such as states and non-governmental organizations as cogs of a broader mechanism. The concomitant and closely linked network of local and global organizations, which are not confined to only judiciary mechanisms, provide the transmission of information required for surveillance and evaluation of subjects.<sup>107</sup>

This supranationally transposed Foucauldian domestic model of the ICC as part of a global 'political economy' of punishment, as Drumbl puts it, is reinforced in Turan's dissertation by her inclusion of a Gramscian analysis. Italian Marxist politician and theoretician Antonio Gramsci in-

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<sup>104</sup> *Ibid.*, pp. 125–6.

<sup>105</sup> *Ibid.*, p. 131.

<sup>106</sup> *Ibid.*, pp. 262–3.

<sup>107</sup> *Ibid.*, p. 266.

troduced the notion of ‘cultural hegemony’, which posits that the dominant ideology of society reflects the beliefs and interests of the ruling class.<sup>108</sup> Institutions – including those linked to education, media, family, religion, politics, and law, as reified in the body of the State – manage to impose on subordinate citizens the norms, values, and beliefs of the dominant social group.<sup>109</sup>

Through this, “the dominant group is able to construct a ‘common sense’ view about the way the world is (and how it cannot be changed) through a subtle blend of encouragement and intimidation”.<sup>110</sup> And, per Gramsci, a changing of the guard in terms of cultural hegemonic dominance entails a concomitant structural modification through imposition of a new “historical bloc”, that is, a new alignment of social and political forces that exercise power over subservient groups. In her dissertation, Turan seeks to “converge Foucault and Gramsci” with a “political economy perspective”.<sup>111</sup>

## 20.4. Foucault’s Turn Towards ‘Governmentality’

### 20.4.1. Overview

In the previous section, we considered Pat O’Malley and Mariana Valverde’s paper *Foucault, Criminal Law, and the Governmentalization of the State*, which explained that Anglophone scholarship on Foucault was characterised by a “near-obsession with discipline” to the exclusion of his other, later scholarship. Part of that had to do with the availability in English translation of his later works. As explained by O’Malley and Valverde:

It is a legacy of the kind of sociological misreading of *Discipline and Punish* that colored Foucaultian criminology in the Anglophone world. [Another] problem with the foundational vision of *Discipline and Punish* [...] is a result of the extraordinary delays in publishing, and to a lesser extent translating, some of his key, later works — a factor that allowed

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<sup>108</sup> Kalyan Sanyal, *Rethinking Capitalist Development: Primitive Accumulation, Governmentality and Post-Colonial Capitalism*, Routledge India, New Delhi, 2007, p. 27.

<sup>109</sup> *Ibid.*

<sup>110</sup> Giancarlo Chiro, “From Multiculturalism to Social Inclusion: The Resilience of Australian National Values since Federation”, in Fethi Mansouri and Michele Lobo (eds.), *Migration, Citizenship and Intercultural Relations: Looking Through the Lens of Social Inclusion*, Routledge, London, 2011, p. 16

<sup>111</sup> *Ibid.*, p. 132.

*Discipline and Punish* to develop and retain its mantle as foundational text for so long. The publication of *The Foucault Effect* in 1991 included [...] the first influential translation of Foucault's essay on 'Governmentality' from the late 1970s. It outlined in striking terms the rise of non-disciplinary forms of power during the eighteenth century that Foucault regarded as at least as significant as discipline. Just as important, he also provided an explicit rebuttal of attempts to establish 'an age of discipline,' a succession of sovereignty-discipline-government, and the existence of 'pure' types of power. As noted, Foucault saw sovereignty, discipline, and government(ality) as involved in a 'triangular' relationship producing hybridizations, interactions, alliances, and so on. By implication, his remarks were intended to correct in France exactly the kind of reading of *Discipline and Punish* that later arose in English. The delay of nearly a decade and a half in publishing the College de France and other important lectures and translating them into English (*three* decades if we consider the more detailed discussions in *Security, Territory, Population*) meant that much Foucault-influenced criminological scholarship was allowed to retain and develop its foundational misreadings of *Discipline and Punish* into the 1990s.

As the above passage suggests, that later neglected scholarship in the Anglophone world centred on the concept of 'governmentality'. We got a glimpse of it toward the end of Section 20.2. when discussing *The History of Sexuality*. It will be recalled that in the concluding parts of that book's first volume, Foucault introduced the concept of 'bio-power', which operates on two levels. On the micro-level, it consists of a form of individual body optimisation, and, on the macro-level, a series of population governance techniques meant to ensure a healthy and engaged citizenry. And this latter aspect of bio-power implicates one of the central concepts of this paper, namely 'governmentality'.

What are the details of 'governmentality'? In two lectures delivered during the 1977–1978 and 1978–1979 academic years, Foucault provided explanations. The first of the two lectures, *Security, Territory, Population*, given during the first months of 1978, established the foundational ten-

ets.<sup>112</sup> For the purposes of this chapter, an analysis of these lectures will sketch out the theory in sufficient detail (the 1979 lectures, collectively titled *The Birth of Biopolitics*, largely examine neoliberal politics and reprise, or do not concern, the foundational insights of the 1978 lectures – mostly focusing instead on economics).<sup>113</sup> The 1978 lectures are divided into 13 separate sessions that Foucault gave each Wednesday from 11 January through 5 April of that year. Their key points will be extracted below.

#### **20.4.2. A Review of Bio-Power and an Introduction to the Notion of Security**

Foucault kicked off the course on 11 January 1978 by briefly reviewing the notion of bio-power (consistent with what we have already examined). Then he launched into a discussion of the first part of the overall course title, that is, security, by instantiating three strata of power. He accomplished this by positing the occurrence of a theft and noting that, at a threshold level, there would be a punishment – a banishment or a beating, say.<sup>114</sup> This would represent ‘sovereign’ or ‘punishment’ power as embodied in the ‘legal’ or ‘juridical’ mechanism.

At the second level, in addition to the application of the penal law just considered, there would be incarceration, surveillance, and ‘penitentiary’ techniques: “obligatory work, moralization, correction, and so forth”.<sup>115</sup> This would correspond to the kind of ‘disciplinary’ power considered in *Discipline and Punish* and situated at the individual body level – in other words, entailing a ‘microphysics’ of power. Finally, at the third level, and once again assuming the simultaneous deployment of the sovereign and disciplinary variants, would be the power of governmentality, which developed post-eighteenth century. Impliedly, this would be a ‘macro-physics’ of power. And that power would engage authorities in finding solutions to a series of inquiries:

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<sup>112</sup> Michel Foucault, “Security, Territory, Population”, in Michel Senellart (ed.), *Lectures at the Collège de France*, Palgrave Macmillan, London, 2009.

<sup>113</sup> See Paul Patton, “Power and Biopower in Foucault”, in Vernon W. Cisney and Nicolae Morar, *Biopower: Foucault and Beyond*, University of Chicago Press, Chicago, 2016, p. 103: “Even though the 1978-79 course was entitled *The Birth of Biopolitics*, it was devoted to the analysis of liberal and then neoliberal forms of government, in particular the indirect forms of action on the actions of individuals exercised through market mechanisms”.

<sup>114</sup> Foucault, 2009, p. 19, *see supra* note 112.

<sup>115</sup> *Ibid.*

For example: What is the average rate of criminality for this [demographic]? How can we predict statistically the number of thefts at a given moment, in a given society, in a given town, in the town or in the country, in a given social stratum, and so on? Second, are there times, regions, and penal systems that will increase or reduce this average rate? Will crises, famines, or wars, severe or mild punishment, modify something in these proportions? There are other questions: Be it theft or a particular type of theft, how much does this criminality cost society, what damage does it cause, or loss of earnings, and so on? Further questions: What is the cost of repressing these thefts? Does severe and strict repression cost more than one that is more permissive? [...] The general question basically will be how to keep a type of criminality, theft for instance, within socially and economically acceptable limits and around an average that will be considered as optimal for a given social functioning.<sup>116</sup>

Foucault then commented on the significance of these inquiries: “The third form [of power] is not typical of the legal code or the disciplinary mechanism, but of the apparatus (*dispositif*) of security, that is to say, of the set of those phenomena that I now want to study”.<sup>117</sup> Notwithstanding its being different from disciplinary power, governmentality can nonetheless be linked to mechanisms juridical in nature. Per Foucault, “I could also say that if we take the mechanisms of security that some people are currently trying to develop, it is quite clear that this does not constitute any bracketing off or cancellation of juridico-legal structures or disciplinary mechanisms”.<sup>118</sup> Instead, while possessing, and operating alongside of, judicial/disciplinary techniques, and, to some extent, modifying them, a dominant mode of power emerges.

And, in the case of governmentality, the dominant power mode in modern times, the focus is security. Foucault explains further: “In reality, you have a series of complex edifices in which, of course, techniques themselves change and are perfected, or anyway become more complicated, but in which what above all changes is the dominant characteristic, or more exactly, the system of correlation between juridico-legal mecha-

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<sup>116</sup> *Ibid.*, pp. 19–20.

<sup>117</sup> *Ibid.*, p. 20.

<sup>118</sup> *Ibid.*, p. 22.

nisms, disciplinary mechanisms, and mechanisms of security”.<sup>119</sup> And this, in turn, entails “the reactivation and transformation of the juridico-legal techniques and the disciplinary techniques”.<sup>120</sup> Foucault then gave examples of security-focused campaigns, which deal with large population segments, but have legal and disciplinary implications – these would be measures to regulate the pandemics of leprosy, the plague and small-pox.<sup>121</sup> For the 18 January 1978 lecture, he also offered the example of famine (which involved systems of price control, storage, export and cultivation).<sup>122</sup>

#### **20.4.3. A Focus on Population, Its Well-Being and the Necessary ‘Techniques’**

Building on and consistent with this, in the 18 January 1978 lecture, Foucault summarised the values that underpin this notion of governmentality:

The idea of a government of men that would think first of all and fundamentally of the nature of things and no longer of man’s evil nature, the idea of an administration of things that would think before all else of men’s freedom, of what they want to do, of what they have an interest in doing, and of what they think about doing, are all correlative elements. A physics of power, or a power thought of as physical action in the element of nature, and a power thought of as regulation that can only be carried out through and by reliance on the freedom of each, is, I think, something absolutely fundamental. It is not an ideology; it is not exactly, fundamentally, or primarily an ideology. First of all and above all it is a technology of power, or at any rate can be read in this sense.<sup>123</sup>

One week later, Foucault delivered what is perhaps is the most influential lecture of the course. Michel Senellart explains why:

This lecture, which is presented as a logical extension of the previous lectures, in actual fact marks a profound turning point in the general orientation of the lectures. Foucault introduces here, in fact, the concept of ‘governmentality,’ by which he suddenly shifts the stake of his work in a sort of

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<sup>119</sup> *Ibid.*

<sup>120</sup> *Ibid.*, p. 24.

<sup>121</sup> *Ibid.*

<sup>122</sup> *Ibid.*, pp. 51–54.

<sup>123</sup> *Ibid.*, p. 71.

dramatic theoretical turn. After having separated the problem of government, as it arises in the sixteenth century, from the stratagems of the clever prince described by Machiavelli, and having shown how ‘population’ allowed the art of government to be unblocked in relation to the double, juridical and domestic model that had prevented it from finding its own dimension, Foucault [deviates from the title of the course – *Security, Territory, Population* – and orients himself toward] the concept of ‘governmentality’ [...].<sup>124</sup>

Senellart notes that, “A new field of research opens up with this concept – no longer the history of technologies of security, which provisionally recedes into the background, but the genealogy of the modern state”.<sup>125</sup> And this involves “applying to the state the ‘point of view’ he had adopted previously in the study of the disciplines, separating out relations of power from any institutionalist or functionalist approach”.<sup>126</sup> In effect, as Senellar sums it up: “The problematic of ‘governmentality’ therefore marks the entry of the question of the state into the field of analysis of micro-powers”.<sup>127</sup> Foucault himself emphasised at this point in the course what issues were at stake going forward in the lectures:

Is it possible to place the modern state in a general technology of power that would have assured its mutations, its development, and its functioning? Can we talk of something like a ‘governmentality’ that would be to the state what techniques of segregation were to psychiatry, what techniques of discipline were to the penal system, and what biopolitics was to medical institutions?<sup>128</sup>

So influential was this lecture that it was first published in English as a separate essay called “Governmentality” in the book *The Foucault Effect* (1991).<sup>129</sup> In addition to introducing and defining ‘governmentality’,

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<sup>124</sup> Michel Senellart, “Course Context”, in Michel Senellart (ed.), *Lectures at the Collège de France*, Palgrave Macmillan, London, 2009, pp. 492–3.

<sup>125</sup> *Ibid.*, p. 493.

<sup>126</sup> *Ibid.*

<sup>127</sup> *Ibid.*

<sup>128</sup> Foucault, 2009, p. 141, *see supra* note 112.

<sup>129</sup> Michel Foucault, “Governmentality”, in Graham Burchell, Colin Gordon, and Peter Miller (eds.), *The Foucault Effect: Studies in Governmentality*, University of Chicago Press, Chicago, 1991, pp. 87–104.

its importance lies in theorising how the wellbeing of the individual on a macro-level, that is, the level of the population, could be achieved:

[Population] will appear above all as the final end of government. What can the end of government be? Certainly not just to govern, but to improve the condition of the population, to increase its wealth, its longevity, and its health. And the instruments that government will use to obtain these ends are, in a way, immanent to the field of population; it will be by acting directly on the population itself through campaigns, or, indirectly, by, for example, techniques that, without people being aware of it [...].<sup>130</sup>

At the same time, there would still be juridical implications in carrying out this enterprise. Foucault problematised this new breed of government “because it was no longer a question, as in the sixteenth and seventeenth centuries, of how to deduce an art of government from theories of sovereignty [and the idea of the prince maintaining power, as dealt with by Machiavelli], but rather, given the existence and deployment of an art of government, what juridical form, what institutional form, and what legal basis could be given to the sovereignty typical of a state”.<sup>131</sup>

And here he came back to the ‘techniques’ alluded to at the beginning of this famous lecture in the block quote above. And Foucault at last provided a definition of ‘governmentality’: the “ensemble formed by institutions, procedures, analyses and reflections, calculations, and tactics that allow the exercise of this very specific, albeit very complex, power that has the population as its target [...] and apparatuses of security as its essential technical instrument”.<sup>132</sup>

#### **20.4.4. Historicising Governmentality: The Link to ‘Pastoral Power’**

In this course, Foucault also historicised, if not analogised by metaphor, the ancient origins of this kind of power by alluding to the relationship between a shepherd and his flock. Such power was exercised over “a multiplicity in movement”.<sup>133</sup> And it serves as a metaphor for the Hebrew God, who “is never more intense and visible than when his people are on the move, and when, in his people’s wanderings, in the movement that

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<sup>130</sup> Foucault, 2009, p. 165, *see supra* note 112.

<sup>131</sup> *Ibid.*, p. 142.

<sup>132</sup> *Ibid.*, p. 144.

<sup>133</sup> *Ibid.*, p. 171.

takes them from the town, the prairies, and pastures, he goes ahead and shows his people the direction they must follow”.<sup>134</sup>

Foucault referred to this as ‘pastoral power’, which he characterised as a “fundamentally beneficent power”.<sup>135</sup> And he contrasted this with other, less solicitous varieties of power, such as those exercised in ancient Greece and Rome. Such power was, he noted, “characterized as much by its omnipotence, and by the wealth and splendor of the symbols with which it clothes itself, as by its beneficence”.<sup>136</sup> He could thus define it by its orientation toward the “ability to triumph over enemies, defeat them, and reduce them to slavery” as well as “the possibility of conquest and by the territories, wealth, and so on it has accumulated”.<sup>137</sup> To underscore his point he emphasised that, regarding pastoral power:

[Its] only *raison d’être* is doing good, and in order to do good. In fact, the essential objective of pastoral power is the salvation (*salut*) of the flock. In this sense we can say that we are assuredly not very far from the objective traditionally fixed for the sovereign, that is to say the salvation of one’s country, which must be the *lex suprema* of the exercise of power.<sup>138</sup>

Moreover, pastoral power is, as Foucault describes it, “an individualizing power”. And he fleshed this out:

That is to say, it is true that the shepherd directs the whole flock, but he can only really direct it insofar as not a single sheep escapes him. The shepherd counts the sheep; he counts them in the morning when he leads them to pasture, and he counts them in the evening to see that they are all there, and he looks after each of them individually. He does everything for the totality of his flock, but he does everything also for each sheep of the flock.<sup>139</sup>

In his 22 February 1978 lecture, Foucault connected this forward in time to the ‘Christian pastorate’, which introduced pastoral power into the

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<sup>134</sup> *Ibid.*

<sup>135</sup> *Ibid.*

<sup>136</sup> *Ibid.*

<sup>137</sup> *Ibid.* But note that Foucault also indicates that power exercised in ancient Greece and Rome cannot be characterised solely as deleterious. There were, he suggests, beneficent aspects to it.

<sup>138</sup> *Ibid.*, p. 172.

<sup>139</sup> *Ibid.*, p. 173.

West and shared similar characteristics of earlier pastoral practice. But it was centred on three core objectives, one of which was the formulation of the law. As Foucault put it, “the pastor guides to salvation, prescribes the law, and teaches the truth”.<sup>140</sup> And this period serves as a bridge to the contemporary configuration of governmentality. As explained by Ben Golder and Peter Fitzpatrick in their book *Foucault’s Law*:

As Foucault’s historical narrative unfolds in *Security, Territory, Population*, we can trace a shift from the pastoral care of a flock in early Christian models of the pastorate to the governmental management of a population in modern state formations, or from the pastoral promise of spiritual salvation to the pastoral promise of material salvation within the frame of the modern administered state. ‘In a way,’ Foucault argues elsewhere, ‘we can see the state as a modern matrix of individualization, or a new form of pastoral power.’<sup>141</sup>

#### 20.4.5. The Roles of Police and Diplomacy

And, as the pastorate transformed into the rational, secular State in modern times, fulfilment of governmentality’s legal function, as well as an essential apparatus for ensuring the general weal of the flock (or in contemporary terminology, the population) was the police. As explained by Foucault in the 15 March 1978 lecture of *Security, Territory, Population*:

From the beginning of the seventeenth to the middle of the eighteenth century there is a series of transformations thanks to which and through which this notion of population, which will be a kind of central element in all political life, political reflection, and political science from the eighteenth century, is elaborated. It is elaborated through an apparatus (*appareil*) that was installed in order to make *raison d’État* function. This apparatus is police.<sup>142</sup>

Also implied in the infrastructure of governmentality was something Foucault referred to in the 22 March 1978 lecture as “the new military-diplomatic type of techniques”.<sup>143</sup> He described it as follows: “If

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<sup>140</sup> *Ibid.*, p. 224.

<sup>141</sup> Ben Golder and Peter Fitzpatrick, *Foucault’s Law*, Routledge, London, 2009, pp. 30–31, citing Michel Foucault, “The Subject and the Power”, in *Critical Inquiry*, vol. 8, no. 4, 1982, pp. 783–4.

<sup>142</sup> Foucault, 2009, p. 358, *see supra* note 112.

<sup>143</sup> *Ibid.*, p. 384.

states exist alongside each other in a competitive relationship, a system must be found that will limit the mobility, ambition, growth, and reinforcement of all the other states as much as possible, but nonetheless leaving each state enough openings for it to maximize its growth without provoking its adversaries and without, therefore, leading to its own disappearance or enfeeblement”.<sup>144</sup>

As part of this, he explained, we can situate the establishment of a permanent network of “diplomatic missions” along with “the organization of practically permanent negotiations”.<sup>145</sup> He then added, interestingly for purposes of this chapter, that this “veritable society of nations” was “correlated with” that other essential apparatus, the police.<sup>146</sup> These are agents who are concerned with securing “the development of the state’s forces” and “techniques to be employed to increase the state’s forces”.<sup>147</sup>

But there are no negative, repressive connotations here. In fact, Foucault went on to specify that the police represent the State’s means for serving “the happiness of all its citizens”.<sup>148</sup> And he provided details. He explained that the police function provides the order and support necessary to ensure the population’s proper nutrition, infrastructure (maintenance of roads, rivers, public buildings, and forests), childhood education, public health, aid for the indigent and promotion of commerce and trade.<sup>149</sup> In more general terms, this amounts to assuring continued population growth, provision of foodstuffs, health care, and circulation of goods.<sup>150</sup> Foucault then summarised:

Generally speaking, what police has to govern, its fundamental object, is all the forms of, let’s say, men’s coexistence with each other. It is the fact that they live together, reproduce, and that each of them needs a certain amount of food

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<sup>144</sup> *Ibid.*

<sup>145</sup> *Ibid.*, p. 389.

<sup>146</sup> *Ibid.*, pp. 389–90. Foucault also discusses yet another related infrastructural corollary – the military, see *ibid.*, pp. 391–2.

<sup>147</sup> *Ibid.*, p. 413. Clearly, this goes beyond the traditional definition of police limited strictly to law enforcement and connotes a wider overall administrative function. As Foucault notes himself, ‘police’ is not limited in the sense of merely being “an instrument in the hands of judicial power” (p. 441). Rather, it is more capacious in that it “consists [...] in the sovereign exercise of [power] over individuals who are subjects”.

<sup>148</sup> *Ibid.*, p. 409.

<sup>149</sup> *Ibid.*, pp. 414–9.

<sup>150</sup> *Ibid.*, pp. 417–20.

and air to live, to subsist; it is the fact that they work alongside each other at different or similar professions, and also that they exist in a space of circulation; to use a word that is anachronistic in relation to the speculations of the time, police must take responsibility for all of this kind of sociality (*socialité*).<sup>151</sup>

And police governance, to the extent it is juridical, is primarily regulatory in nature. In the words of Foucault, during his 5 April 1978 concluding lecture: “We are in a world of indefinite regulation, of permanent, continually renewed, and increasingly detailed regulation, but always regulation, always in that kind of form that, if not judicial, is nevertheless juridical: the form of the law, or at least of law as it functions in a mobile, permanent, and detailed way in the regulation”.<sup>152</sup> And the point of this regulation is to uphold ‘freedom’, which Foucault defines as “the right of individuals legitimately opposed to the power, usurpations, and abuses of the sovereign or the government”. And thus he concludes:

Henceforth, a condition of governing well is that freedom, or certain forms of freedom, are really respected. Failing to respect freedom is not only an abuse of rights with regard to the law, it is above all ignorance of how to govern properly. The integration of freedom, and the specific limits to this freedom within the field of governmental practice has now become an imperative.<sup>153</sup>

#### **20.4.6. Putting Governmentality into Perspective**

And so, springing from the regulatory implications of bio-power, a new and important theory of ‘governmentality’ is sketched out in *Security, Territory, Population*. We have seen that its antecedents can be traced to a pastoral tradition that developed from the Hebrew patriarchs to the Christian church founders. And it centred on the care of a multitude of beings, while permitting focus on individuals within the multitude. The goal of this power was security of the multitudes, and often in reference to large-scale problems, such as pandemics, famines and wars.

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<sup>151</sup> *Ibid.*, p. 420.

<sup>152</sup> *Ibid.*, p. 442.

<sup>153</sup> *Ibid.*, p. 451.

And, in the form of the modern rational State (governmentality being a portmanteau word of ‘government’ and ‘rationality’),<sup>154</sup> it consists of a series of techniques that include procedures, analyses and reflections, calculations, and tactics meant to protect the well-being of the population while never losing focus on the individual. In support of it, legal procedures, supported by police and transnational diplomatic efforts, play an integral role.

Although it is the most recent iteration of power, governmentality does not exist alone – it operates simultaneously with juridical and disciplinary power. That said, while juridical and disciplinary power might be described as coercive, governmentality is a beneficent force. More than just seeking ‘security’, it strives for freedom, which Foucault characterises as liberty from the “usurpations [...] and abuses of the sovereign”.<sup>155</sup> Golder and Fitzpatrick postulate that this includes “the constant improvement of the population, the maximization of its health, well-being, material prosperity, and so forth”.<sup>156</sup> And Johanna Oksala further contextualises it within the philosopher’s greater oeuvre:

Foucault had shifted the emphasis in his analysis of disciplinary power from repressive institutions to productive practices. He was now attempting to move from a theory focusing on the institution of the state to an analysis of modern practices of government. He criticized the tendency to demonize the state in political thought, to see it as the simple enemy and the root of all political problems. The state does not only exercise repressive, negative power over the social body, it was one historical modality of ‘government’ that reflected changes in the rationality of governmental practices.<sup>157</sup>

But how, if at all, might this epistemic breakthrough relate to the formulation and development of international criminal law? To answer that question, we must first consider international criminal law’s modern origins and recent developments. In this regard, it is helpful to consider

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<sup>154</sup> Mark G.E. Kelly, *The Political Philosophy of Michel Foucault*, Routledge, London, 2009, pp. 60–1.

<sup>155</sup> Foucault, 2009, p. 451, *see supra* note 112.

<sup>156</sup> Golder and Fitzpatrick, 2009, p. 32, *see supra* note 141.

<sup>157</sup> Johanna Oksala, *How to Read Foucault*, W.W. Norton & Company, New York, 2007, pp. 84–5.

the transnational, grassroots nature of modern international criminal law's early days, which has, in many ways, carried over to the present. With that perspective in mind, we can then return to the notion of 'governmentality' and examine whether it can help theorise international criminal law in a manner different from, and beneficial to, existing international criminal law scholarship. That will be the object of the two sections that follow.

## **20.5. International Criminal Law as an Outgrowth of Transnational Networking**

### **20.5.1. Transgovernmental Networking: An Introduction**

In the first part of the new millennium a novel theory in international law scholarship was gaining currency. First introduced in the 1970s by political scientists such as Robert Keohane and Joseph Nye, the theory of 'transgovernmental networking' posited that various actors attached to the governments of a wide range of countries generate and develop policy by interacting with each other outside formal institutional frameworks and without explicit State sanction.<sup>158</sup> In her 2004 book *A New World Order*, Anne-Marie Slaughter provided an excellent introduction to the theory, noting that terrorists, arms dealers, money launderers, drug dealers, traffickers in women and children, and the modern pirates of intellectual property all operate through global networks.<sup>159</sup> So do lower-level government officials, as she explains:

Networks of government officials – police investigators, financial regulators, even judges and legislators – increasingly exchange information and coordinate activity to combat global crime and address common problems on a global

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<sup>158</sup> See Robert O. Keohane and Joseph S. Nye, "Transgovernmental Relations and International Organizations", in *World Politics*, vol. 27, no. 1, 1974, pp. 39, 43.

<sup>159</sup> Anne-Marie Slaughter, *A New World Order*, Princeton University Press, Princeton, 2004. See also Youri Devuyt, "Transatlantic Competition Relations", in Mark A. Pollack and Gregory C. Schaffer (eds.), *Transatlantic Governance in the Global Economy*, Rowman & Littlefield Publishers, 2001, p. 127; Anu Piilola, "Assessing Theories of Global Governance: A Case Study of International Antitrust Regulation", in *Stanford Journal of International Law*, 2003, vol. 39, p. 207; Kal Raustiala, "The Architecture of International Cooperation: Transgovernmental Networks and the Future of International Law", in *Virginia Journal of International Law*, 2002, vol. 43, p. 1; Christopher A. Whytock, "A Rational Design Theory of Transgovernmentalism: The Case of E.U.-U.S. Merger Review Cooperation", in *Boston University International Law Journal*, 2005, vol. 23, p. 1; David Zaring, "Informal Procedure, Hard and Soft, in International Administration", in *Chicago Journal of International Law*, 2005, vol. 5, p. 547.

scale. These government networks [...] are underappreciated [...] [in addressing] the central problems of global governance. [Consider] the networks of financial regulators working to identify and freeze terrorist assets, of law enforcement officials sharing vital information on terrorist suspects, and of intelligence operatives working to preempt the next attack [...] Turning to the global economy, networks of finance ministers and central bankers have been critical players in responding to national and regional financial crises [...] Beyond national security and the global economy, networks of national officials are working to improve environmental policy across borders. Nor are regulators the only ones networking. National judges are exchanging decisions with one another through conferences, judicial organizations, and the Internet [...] Finally, even legislators, the most naturally parochial government officials [...] are reaching across borders [...] to adopt and publicize common positions on the death penalty, human rights, and environmental issues.<sup>160</sup>

At the same time, such networks remain connected to international organisations and courts, such as the United Nations or the International Criminal Tribunal for the former Yugoslavia, and non-governmental organisations such as the International Committee for the Red Cross.<sup>161</sup> And such organisations become hosts for the new transgovernmental networks.<sup>162</sup> In this regard, and germane to this chapter, G. John Ikenberry comments: “Particularly revealing is Slaughter’s remarkable account of the cooperation between national judicial authorities and international and regional courts, which is serving to globalize jurisprudence”.<sup>163</sup>

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<sup>160</sup> Slaughter, 2004, pp. 1–5, see *ibid.* It should be pointed out, however, that Slaughter’s theory has been the target of much criticism regarding its omission to account for systemic economic and political inequalities of the global system, as well as how it fails to appreciate the continued importance of nations and national populations. See, for example, David Singh Grewal, *Network Power: The Social Dynamics of Globalization*, Yale University Press, New Haven, 2008.

<sup>161</sup> See Jenia Iontcheva Turner, “Transnational Networks and International Criminal Justice”, in *Michigan Law Review*, 2007, vol. 105, p. 988, noting that the “cooperation could occur [...] through different kinds of international and regional associations” and be “supported by non-governmental organizations”.

<sup>162</sup> *Ibid.*, p. 6.

<sup>163</sup> G. John Ikenberry, “Review of ‘A New World Order’ by Anne-Marie Slaughter”, in *Foreign Affairs*, 1 May 2004.

In 2007, Jenia Iontcheva Turner extended the transgovernmental network concept to the specific judicial domain of international criminal law. In “Transnational Networks and International Criminal Justice”, she demonstrated how investigators, prosecutors, and judges confronted with international crimes were beginning to collaborate, both with their international colleagues and with their peers at international criminal institutions.<sup>164</sup> In her piece, Turner emphasised that these transborder international criminal law networks are a new phenomenon, noting that “until recently, [international criminal law] had not generated the kinds of informal transgovernmental networks that have emerged in other fields”.<sup>165</sup> As set out below, the history of the origins and development of international criminal law suggests otherwise.

### **20.5.2. The Historical Origins of Transgovernmental Networking**

As international criminal law’s transnational networks came into being in the twentieth century, they could trace their skeletal origins to the rise of international and non-governmental organisations during the nineteenth. The birth of the international organisation could be linked with the convening of the Congress of Vienna during 1814–1815 after the decades of war that followed the French Revolution and the conquests of Napoleon. But in addition to being regarded as “the first international organization in the modern era of nation-states”,<sup>166</sup> its creation of the ‘Concert of Europe’ was arguably as much the product of informal one-on-one confabs in cosy salon nooks as it was of formal negotiations at conference tables in august halls.<sup>167</sup> In this sense, its casual linking of government officials in more intimate settings also presaged the great transnational networks of today.

Those were also previewed in the formal creation of permanent treaty-based international governmental organisations that started sprouting up around mid-century as “the modern international system developed

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<sup>164</sup> Turner, 2007, p. 985, see *supra* note 161.

<sup>165</sup> *Ibid.*, p. 986.

<sup>166</sup> Thomas D. Zweifel, *International Organizations and Democracy: Accountability, Politics, and Power*, Lynne Rienner Publishers, Boulder, 2006, p. 39.

<sup>167</sup> Charles L. Mee, *Playing God: Seven Fateful Moments When Great Men Met to Change the World*, Simon & Schuster, New York, 1993, p. 118: “The congress did not take place in official meetings in formal settings since Talleyrand had dislodged it from such settings, forcing it into ‘informal’ sessions in Metternich’s study, and into the ballrooms and salons and boudoirs of Vienna, whispered conversations in the corners of the rooms at the duchess of Sagan’s”.

and multilateralism found its voice”.<sup>168</sup> Such bodies included the International Telegraph Union (1865) and the Universal Postal Union (1874). But a precursor to both of these was a hybrid association (part inter-governmental and part non-governmental organisation) whose creation was spurred by the worsening depredations of modern warfare. The International Committee of the Red Cross (‘ICRC’), founded in 1863, was the brainchild of a traveling 31-year-old Swiss businessman, Henri Dunant. The Genevan had happened upon the appalling aftermath of the 1859 Battle of Solferino, part of the Italian drive for independence from Austria and one of the great bloodbaths of the 1800s. Appalled by the visible suffering of wounded soldiers, prostrate and untended on the battlefield, Dunant resolved to establish an international organisation to care for future fallen combatants and protect those who ministered to them.

At his urging, and on the initiative of fellow Genevan Gustave Moynier, a local welfare group, *La Société Genevoise d’Utilité*, set up a five-member committee to realise Dunant’s proposals. That committee would eventually become the ICRC. In addition to Dunant and Moynier (a lawyer), it consisted of Dr. Louis Appia, Dr. Théodore Maunoir, and General Guillaume-Henry Dufour, who took a leading role in the project given his stature as the pre-eminent Swiss military figure of the time.<sup>169</sup> In 1863, the Committee organised an international conference that established the first municipal Red Cross societies (in Belgium and Germany), which would provide assistance to the war wounded. The ICRC then worked with the Swiss government to convene an international conference that negotiated and adopted the 1864 Geneva Convention for the Amelioration of the Condition of the Wounded in Armies in the Field. This marked the formal birth of international humanitarian law.

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<sup>168</sup> Jackson Maogoto, “Early Efforts to Establish an International Criminal Court”, in José Doria, Hans-Peter Gasser, and M. Cherif Bassiouni (eds.), *The Legal Regime of the International Criminal Court: Essays in Honour of Professor Igor Blishchenko*, Martinus Nijhoff Publishers, Leiden, 2009, p. 5.

<sup>169</sup> François Bugnion, “International Committee of the Red Cross (ICRC)”, in David P. Forsythe (ed.), *Encyclopedia of Human Rights*, vol. 1, Oxford University Press, Oxford, 2009, p. 92.

### 20.5.3. The Red Cross Movement Gives Rise to International Criminal Law Transgovernmental Networking

But how would the law be enforced? Many in the ICRC, including, at first, Moynier himself, felt that formal, judicial mechanisms were unnecessary as “an appeal to emotion by gritty descriptions of individual suffering would shock the public into humanitarian outrage and by extension pressure warring states to adhere to humanitarian norms and rules”.<sup>170</sup> But the Franco-Prussian War of 1870–1871, during which unpunished atrocities in contravention of the Geneva Convention were committed by both sides, disabused Moynier of this notion.<sup>171</sup> In 1872, he presented a proposal to the ICRC calling for the establishment of a treaty-based international tribunal to punish violations of the laws of armed conflict.<sup>172</sup>

According to the late Christopher K. Hall, “Moynier’s proposal led to a flurry of letters from some of the leading experts in international law, including Francis Lieber, Achille Morin, [Franz von] Holtzendorff, John Westlake and both Antonio Balbin de Unquera and Gregorio Robledo [...] published with a commentary by Gustave Rolin-Jaequemyns a few months later in the *Revue de droit international et de législation comparé*”.<sup>173</sup> In his book *The Birth of the New Justice: The Internationalization of Crime and Punishment, 1919-1950*, Mark Lewis supports this account and adds that Jaequemyns independently advocated for creation of a court among this circle.<sup>174</sup> And Lieber and Westlake added to the discussion by raising “critical questions”.<sup>175</sup>

Although the proposals of Moynier and Jaequemyns did not come to fruition, they arguably generated a proto-international criminal law transgovernmental network. Even if not perhaps a ‘pure’ transgovernmental network as described by Slaughter, in that certain individuals taking part in it were not government representatives, many of them were (or were involved in politics at the national level). For instance, Jaequemyns

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<sup>170</sup> Maogoto, 2009, p. 5, see *supra* note 168.

<sup>171</sup> *Ibid.*, pp. 6–7.

<sup>172</sup> *Ibid.*, p. 5.

<sup>173</sup> Christopher Keith Hall, “The First Proposal for a Permanent International Criminal Court”, in *International Review of the Red Cross*, vol. 322, 31 March 1998.

<sup>174</sup> Mark Lewis, *The Birth of the New Justice: The Internationalization of Crime and Punishment, 1919-1950*, Oxford University Press, Oxford, 2014, p. 17.

<sup>175</sup> *Ibid.*

himself was a member of the Belgian Liberal Party and served in the Belgian parliament (and ultimately became Belgian Minister of the Interior).<sup>176</sup> During this time, Lieber, who had drafted the famous “Lieber Codes” at the request of US President Abraham Lincoln, was serving in the US government “as a diplomatic negotiator between the US and Mexico”.<sup>177</sup> John Westlake was active in the UK’s Liberal Party and ultimately served in Parliament for the Romford Division of Essex.<sup>178</sup> And Antonio Balbín de Unquera was a Spanish judge in Madrid.<sup>179</sup> They were eventually joined by, among others, Italian Foreign Minister Pasquale Mancini.<sup>180</sup> Thus, they were either part of their municipal governments or intimately acquainted with them.

Many of them formed the core of the Institute of International Law, which “sought to liberalize states by abolishing servitude, establishing the right to free assembly, and reforming harsh penal laws”.<sup>181</sup> Overall, “they believed international law should progress according to changing social values [...] and saw themselves as the keepers, or the ‘conscience’ of those values [...] the protection of individual rights [...]”. And this group of individuals coalesced into what we can analogise to an embryonic transnational network because they “believed in gentlemanly conduct in international affairs”.<sup>182</sup> From these origins, a network, or networks, sprung up that would grow and develop through the post-World War I years. As contextualised by Lewis: “This was vastly at odds with the actual politics and conduct of the time, but this belief in an elite, civilized manner of conducting the business of governance and diplomacy persisted

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<sup>176</sup> Jean J.A. Salmon, “Gustave Rolin-Jaequemyns (1835-1902)”, in Joseph Barthélemy, Henry Nézard, and Louis Rolland (eds.), *Les fondateurs du droit international*, Éd. Panthéon-Assas, Paris, 1904, pp. 103–4. Apparently, Jaequemyns was not serving in the Belgian Parliament at the time of Moynier’s proposal.

<sup>177</sup> Jean-Marie Henckaerts, “Lieber Code”, in Antonio Cassese (ed.), *The Oxford Companion to International Criminal Justice*, Oxford University Press, Oxford, 2009, p. 410.

<sup>178</sup> Lassa Oppenheim, “Editor’s Note”, in Lassa Oppenheim (ed.), *The Collected Papers of John Westlake on Public International Law*, Cambridge University Press, Cambridge, 1914, p. xi. Like Jaequemyns, it would seem that Westlake was not serving in the British Parliament at the time of Moynier’s proposal.

<sup>179</sup> “Antonio Balbín de Unquera”, *Geneanet*, describing him as Magistrado, Presidente del Tribunal de Justicia de Madrid.

<sup>180</sup> Lewis, 2014, p. 21, see *supra* note 174.

<sup>181</sup> *Ibid.*, p. 21.

<sup>182</sup> *Ibid.*, p. 22.

in later jurists' ideology that systems and laws could regulate the world's problems".<sup>183</sup>

## **20.5.4. International Criminal Law Transgovernmental Networking Post-World War II**

### **20.5.4.1. From the Paris Peace Conference Through the 1920s**

Commitment to that ideology was sorely tested during the carnage of World War I and the lack of a meaningful justice response in its wake. A slew of post-bellum proposals to mount an international criminal tribunal to try war criminals were rejected. Those included the recommendation of an Entente-created Commission on Responsibilities during the Paris Peace Conference (that had to settle instead for low-level trials by the Germans themselves in Leipzig); a proposal by Belgian Baron Edouard Descamps within the League of Nations framework; and a recommendation of the Red Cross (envisioning a neutral commission, rather than a court).<sup>184</sup> But the spirit of the pre-war Moynier/Jaequemyns international criminal law group carried through to the mid-1920s as embodied in a fresh international criminal law network. This one centred around a new generation of jurists connected to two new organisations, the International Law Association ('ILA') and the *Association Internationale de Droit Pénale* ('AIDP').

#### **20.5.4.1.1. The ILA Proposal**

The ILA developed a proposal for a permanent international criminal court between 1922 and 1926. The effort was spearheaded by Hugh H.L. Bellot, a British jurist and parliamentarian, who had advised the British regarding war crimes liability during the Paris peace negotiations.<sup>185</sup> The proposal was very detailed. It envisaged a Hague-based international penal tribunal that would fall under the institutional aegis of the Permanent Court of International Justice. And many of its finer points were meant to mollify States regarding the sovereignty prerogative. According to Lewis:

[The] ILA took several steps designed to reassure states that this would not be a political or biased court. The court would

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<sup>183</sup> *Ibid.*

<sup>184</sup> *Ibid.*, pp. 27–94.

<sup>185</sup> *Ibid.*, p. 96. Bellot worked for the office of the Attorney-General of England and Wales, investigating humanitarian law violations committed during World War I. See "Hugh H.L. Bellot, D.C.L.", in *Transactions of the Grotius Society*, vol. 14, 1928, pp. xi–xiv, xiii.

be optional and states would still be free to use their own tribunals to prosecute individuals accused of violating the laws and customs of war, assuming they held them in custody. Additionally, states were given certain rights that were intended to assuage their fears of unjust prosecution or bias. If a state did not currently have a judge on the bench, it would be allowed to appoint one, whether it was on the defending side or prosecuting side. Finally, one should note that there was no independent prosecutor who had a duty to prosecute all violations of the laws and customs of war, wherever they occurred, nor could a state bring charges on behalf of victims who lived in other states. States would only be able to file charges on their own behalf and for their own subjects and citizens. This too was designed to protect state sovereignty.<sup>186</sup>

Other details, more related to the proposed court's internal workings, were also fleshed out. It called for fifteen judges, who would be seasoned magistrates or attorneys with substantial criminal courtroom experience. And they would be vetted by the League of Nations Council and Assembly, which would have had to vote on them.<sup>187</sup> According to the schema put forth, hearings would have been public, based on both written and oral evidence. And two important due process guarantees were accorded to defendants: *nullum crimen sine lege* (that is, they could not be prosecuted for crimes that were not codified in advance of the charged conduct) and a post-conviction right to request a new trial if new evidence came to light.<sup>188</sup>

Jurisdiction would have lain in respect of both individuals and States for two principal delicts: war crimes and “violations of international obligations of a penal character”. The first offence Bellot defined as violations of the laws and customs of war as contained in treaties, conventions, declarations, and customary principles “generally accepted as binding by civilised nations”.<sup>189</sup> The second offence, “violations of international obligations of a penal character”, would correspond to violations such as “white slave” trafficking, piracy, and potential crimes such as

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<sup>186</sup> Lewis, 2014, p. 100, see *supra* note 174.

<sup>187</sup> *Ibid.*

<sup>188</sup> *Ibid.*

<sup>189</sup> *Ibid.*

“cutting undersea communication cables”.<sup>190</sup> The tribunal’s subject-matter jurisdiction would not have included the crime of aggression or that of minorities-treaty violations resulting in violence.<sup>191</sup> But an alternative proposal, put before the ILA by Welsh solicitor and Liberal Member of Parliament, Frederick Llewellyn-Jones, proposed enforcing the minorities treaties with criminal penalties. The ILA, however, rejected the proposal.

#### **20.5.4.1.2. The AIDP Proposal**

The other roughly contemporaneous proposal for an international criminal court came from the AIDP. One of the group’s intellectual leaders, Romanian parliamentarian and jurist Vespasian Pella, developed the plan within the framework of a ‘transnational’ network.<sup>192</sup> That network included the Inter-Parliamentary Union, an organisation of parliamentarians from around the world dedicated to the peaceful resolution of inter-State disputes and the avoidance of war. It also included the ILA as “Pella sent a communique to the ILA” and “decided to invite Bellot to work on [the AIDP’s] own draft statute, leading Bellot, Pella, and other AIDP jurists to collaborate in 1927-28”.<sup>193</sup> Lewis points out that Bellot “had connections to the British legal establishment and said in 1926 that government officials backed his idea for an international criminal court for war crimes”.<sup>194</sup>

What the AIDP produced was, once again, very complex and detailed. Its starting point was a court with jurisdiction over individuals who committed “international military offences”, in other words, breaches of the laws and customs of war in the existing treaties.<sup>195</sup> But Pella’s plan went beyond the Hague and Geneva Conventions by extending jurisdiction over a wider range of crimes committed in occupied territories. In this way, it provided greater security for the most vulnerable segment of the population – civilians. Moreover, Pella’s proposed court would have

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<sup>190</sup> *Ibid.*, p. 97.

<sup>191</sup> *Ibid.*

<sup>192</sup> *Ibid.*, p. 102. Lewis refers to these as ‘transnational organisations’. For a detailed analysis of the role of the AIDP, see Mark Lewis: “The History of the International Association of Penal Law, 1924-1950”, in Morten Bergsmo, CHEAH Wui Ling, SONG Tianying and YI Ping (eds.): *Historical Origins of International Criminal Law: Volume 4*, Torkel Opsahl Academic EPublisher, Brussels, 2015, pp. 599-660.

<sup>193</sup> Lewis, 2014, p. 102, see *supra* note 174.

<sup>194</sup> *Ibid.*, p. 112.

<sup>195</sup> *Ibid.*, p. 107.

been able to prosecute States as well as individuals, including heads of States, for a wide range of conduct that could disrupt international peace: aggression; violations of demilitarised zones and disarmament agreements; support for armed groups that worked against the internal security of another State; financial support for political parties in a foreign State; or even counterfeiting another State's currency.<sup>196</sup>

After Pella presented his plan to the Inter-Parliamentary Union, which enthusiastically embraced it, a transnational network of parliamentarians worked with him to develop it and they convinced him to integrate the court into the League of Nations Council. Lewis describes this as “a prudent move in light of the 1922–1924 League debates about collective security, when states such as Britain did not want to be locked into automatic obligations to participate in blockades and send troops”.<sup>197</sup> Now, the proposal was gaining broader support among a wider network of government officials, including Nikolaos Sokrates Politis, who had served as Greece's Minister of Foreign affairs and was its representative at the League of Nations,<sup>198</sup> Henri Donnedieu de Vabres, a French jurist who would serve as France's judge at the International Military Tribunal at Nuremberg, and the Greek judge Megalos A. Calayonni.<sup>199</sup> Also belonging to the network were French parliamentarian Jean-André Roux and Polish Supreme Court judge Emil Stanislaw Rappaport.<sup>200</sup>

Working with this network, Pella converted the proposal into a detailed, written statute containing 70 articles.<sup>201</sup> The statute was submitted to the League of Nations by another member of the growing network, Belgium's former Prime Minister and then member of its Foreign Ministry, Henri Carton de Wiart (who would also serve as president of the League

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<sup>196</sup> *Ibid.*

<sup>197</sup> *Ibid.*

<sup>198</sup> “Nikolaos Sokrates Politis: Greek Jurist and Diplomat”, in *Encyclopedia Britannica*, chronicling Politis' service as a diplomat.

<sup>199</sup> Lewis, 2014, p. 108, see *supra* note 174.

<sup>200</sup> Daniel Marc Segesser and Myriam Gessler, “Raphael Lemkin and the International Debate on the Punishment of War Crimes (1919-1948)”, in Dominik J. Schaller and Jürgen Zimmerer (eds.), *The Origins of Genocide: Raphael Lemkin as a Historian of Mass Violence*, Routledge, London, 2009, pp. 11–12; “André Roux: 1870-1942”, in *Assemblée Nationale*, indicating Roux's service in the French Parliament; “Emil Stanislaw Rappaport”, in *World Heritage Encyclopedia*, providing details regarding Rappaport's work as a Polish judge.

<sup>201</sup> Lewis, 2014, p. 109, see *supra* note 174.

of Nations).<sup>202</sup> But the League rejected the proposal as it “preferred new legal conventions for specific problems, not grand system changes and new institutions, such as the creation of an international criminal court”.<sup>203</sup> Thus, unfortunately, by the end of the 1920s, the network’s “only successful project was the 1929 Convention for the Counterfeiting of Currency”.<sup>204</sup>

Still, the international criminal justice networks, to that point, had laid an essential groundwork. And, as Lewis stresses, that foundation rested on the desire to achieve human security:

[These] legal projects have dealt with [...] *security* [...] the concept that persons involved in international war or affected by one – wounded or sick soldiers, medical personnel, and civilians under occupation – should be secure from further unnecessary violence [...] [That] criminal prosecution could be used to secure international peace by preventing war itself.<sup>205</sup>

#### **20.5.4.2. The International Criminal Law Networks and Terrorism in the 1930s**

But the work of the transnational international criminal law networks did not terminate at the close of the Jazz Age. Undaunted, the same conglomeration of jurists/government officials, supplemented by the likes of Jules Basdevant, who worked in the French Ministry of Foreign Affairs,<sup>206</sup> and Ernest Delaquis, who served in the office of the Swiss Federal Administration of Justice,<sup>207</sup> worked on yet another proposal – this time to create an international criminal court to prosecute cases of terrorism (inspired by the 1934 assassination of King Alexander I of Yugoslavia in Marseille). Spearheaded by Pella, and working under League auspices, this group proposed a five-judge, permanent international criminal court that would be called on to try accused terrorists if domestic justice efforts stalled.

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<sup>202</sup> *Ibid.*, p. 112.

<sup>203</sup> *Ibid.*

<sup>204</sup> *Ibid.*, p. 117.

<sup>205</sup> *Ibid.*, p. 122 (emphasis added). But Lewis points out too that ‘security’ also enveloped the notion that “the authority of state governments and new international organizations had to be protected”.

<sup>206</sup> “Jules Basdevant”, in *L’Encyclopédie Biographique de l’Homo Erectus*.

<sup>207</sup> “Notes”, in *Journal of Comparative Legislation and International Law*, vol. 33, no. 3/4, 1951, pp. 97–105.

Once again, the proposal was detailed and enumerated a broad range of criminal conduct, including instigation and incitement to terrorism, which was defined as “criminal acts directed against persons or property and constituting terrorist action with a political object”.<sup>208</sup> And, in this case, support and discussion of the proposal extended beyond judges, parliamentarians and diplomats – it included police. According to Lewis, this could be attributed to the fact that:

[Police] forces became professionalized and wanted to share their techniques of investigation and identification with each other (fingerprinting, record-keeping, and communications), and police that had achieved bureaucratic autonomy were interested in forming their own international organizations to fight crime, without government oversight. Hence there was a difference between state-directed efforts to create police cooperation and those initiated by police forces themselves.<sup>209</sup>

Notwithstanding widespread buy-in from the burgeoning international criminal law transnational networks, the increasingly volatile atmosphere of the 1930s, marked by growing tension between authoritarian and democratic States, thwarted consensus among the national capitals. Thus, as the 1930s drew to a close, it became apparent that the anti-terrorism convention, with its plank for a permanent, albeit more narrowly-focused, international criminal court, would never see the light of day.

The decade’s gathering war clouds finally burst forth on the first of September 1939 with the Nazi *blitzkrieg* against Poland. World War II had begun and the transnational efforts to codify and institutionalise international criminal law had to be put on hold.

#### **20.5.4.3. World War II, Nuremberg, and the Genocide and Geneva Conventions**

As the long war stretched on, details related to the Nazi campaign to murder all of Europe’s Jews were gradually revealed to the world. In his book *The Birth of the New Justice*, Mark Lewis explains that, during the war,

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<sup>208</sup> *Bases pour la conclusion d’un accord international en vue de la répression de crimes commis dans un but de terrorisme politique*, 10 December 1934 (Geneva), C.542.M.249.1934.VIII, in Council and Member States Documents, vol. 1380 (1934.C.483.M.210 to C.583.M.274), LNA, Geneva.

<sup>209</sup> Lewis, 2014, p. 141, see *supra* note 174.

jurists with ties to the World Jewish Congress and/or the Institute of Jewish Affairs, including Sheldon Glueck, Jacob Robinson, Hersch Lauterpacht, and Raphael Lemkin, were able to keep the 1920s–1930s transnational international criminal law networks alive.

Post-war, they still relied on those networks. In the first place, they used them to persuade Allied government officials at Nuremberg to incorporate ‘victim-centred’ features into the International Military Tribunal (‘IMT’) justice process.<sup>210</sup> And, after the IMT trial, they prevailed upon their transnational network contacts “across Europe to urge their governments to make extradition requests when British occupation authorities announced in fall 1947 that Britain would release all Germans suspected of war crimes if other governments had not claimed them”.<sup>211</sup>

Still, the Nuremberg experience left these jurists dissatisfied, especially Lemkin, a Polish-Jewish lawyer, who had escaped Nazi-occupied Europe but lost nearly all of his family in the Holocaust. Chapter 18 above by Mark Drumbl contains an incisive discussion of his contribution. Lemkin was frustrated with the so-called ‘war nexus’ requirement (showing how crimes against humanity was linked to the other two crimes in the Tribunal’s subject-matter jurisdiction – war crimes and crimes against peace). This effectively exculpated all pre-1939 Nazi persecutory measures against the Jews and others. “This is one of the reasons why, after the judgment, Lemkin moved to create a Genocide Convention whose terms would not be hemmed in by a connection to war.”<sup>212</sup>

#### **20.5.4.3.1. Lemkin’s Interest in Genocide Prevention**

To understand what motivated Lemkin to launch his crusade to outlaw and criminalise genocide, a brief review of his background is helpful. Technically, at his birth in 1900, he was a Russian citizen, having been delivered on a farm near the village of Bezvodene (not far from the town

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<sup>210</sup> *Ibid.*, p. 178.

<sup>211</sup> *Ibid.*, p. 179.

<sup>212</sup> *Ibid.*, p. 177. It should be pointed out, however, that the Allies’ Control Council Law Number 10 provided that so-called zonal courts (that is, courts established in each Ally’s zone of occupation in Germany) could prosecute crimes against humanity without the ‘war nexus’. See Gregory S. Gordon, “Hate Speech and Persecution: A Contextual Approach”, in *Vanderbilt Journal of Transnational Law*, vol. 46, no. 2, 2013, pp. 309–10.

of Wołkowysk) in what was then Imperial Russia.<sup>213</sup> During his childhood and teenage years, he discovered a passion for languages, history and the law.<sup>214</sup> And always living under the spectre of the anti-Jewish pogroms then endemic to that region, he developed sympathy for minority-group rights and a burning sense of indignation regarding government complicity in the mass violence.

That sense was only heightened when, on the eve of studying linguistics at the University of Lvov, Lemkin learnt of the trial of Soghomon Tehlirian, who had assassinated Talaat Pasha, the Armenian Genocide's chief architect. During Tehlirian's trial in Germany, where the assassination took place, Lemkin found himself wondering why the Ottoman leader was not prosecuted for the killing of millions while Tehlirian was prosecuted for killing one.<sup>215</sup> The principle of sovereignty, Lemkin felt, cannot be conceived as the right to kill millions of innocent people; instead, it entails "conducting an independent foreign and internal policy, building schools, construction of roads, in brief, all types of activity directed toward the welfare of people".<sup>216</sup>

Based on Tehlirian's acquittal, as well as other contemporaneous not-guilty verdicts *vis-à-vis* ethnic-massacre-revenge assassinations across Europe, Lemkin came to conclude that "popular sentiment had finally aligned against destroying entire national groups".<sup>217</sup> In 1926, he graduated with a Polish law degree and began thinking of ways to harness that popular sentiment to effect transnational normative change. He became a prolific, and well-respected, criminal law expert. And, in 1927, on the strength of his growing reputation, was appointed secretary of the Court of Appeals in Warsaw. Two years later he was given the position of deputy public prosecutor in the District Court of Warsaw (while also teaching classes as a professor). At the same time, Lemkin secured an adjunct law

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<sup>213</sup> John Cooper, *Raphael Lemkin and the Struggle for the Genocide Convention*, Palgrave Macmillan, New York, 2008, p. 6.

<sup>214</sup> Tanya Elder, "What Do You See before Your Eyes: Documenting Raphael Lemkin's Life by Exploring His Archival Papers, 1900-1959", in Dominik J. Schaller and Jürgen Zimmerer (eds.), *The Origins of Genocide: Raphael Lemkin as a Historian of Mass Violence*, Routledge, London, 2009, p. 26.

<sup>215</sup> Douglas Irvin-Erickson, *Raphael Lemkin and the Concept of Genocide*, University of Pennsylvania Press, Philadelphia, 2016, p. 36.

<sup>216</sup> *Ibid.*, p. 37, quoting from Lemkin's previously unpublished autobiography.

<sup>217</sup> *Ibid.*, p. 38.

professor position at Tachkemoni College in Warsaw, and lectured at the Free Polish University.<sup>218</sup>

Having achieved this status, he began integrating into the transnational international criminal law networks previously described in this chapter. As chronicled by John Cooper:

Lemkin was introduced to the international law circuit, and in particular to the *Association Internationale de Droit Penal* by his mentor and colleague at the Free University of Warsaw Professor Emil Stanislaw Rappaport. At these conferences which were held under the auspices of the League of Nations, Lemkin made many useful contacts, including the Belgian statesman Count Henri Carton de Wiart, the President of the League, and Karl Schlyter, the Swedish Minister of Justice; in addition, he met the leading international lawyers, such as Professor Vespasian Pella [also a Romanian parliamentarian] and Professor Donnedieu de Vabres [...].<sup>219</sup>

#### **20.5.4.3.2. ‘Barbarism’ and ‘Vandalism’ Proposed to the International Criminal Law Transnational Network**

By 1933, Lemkin was ready to take advantage of these connections. Of contextual significance, this was the year that Adolf Hitler took power in Germany (having become Reich Chancellor on 30 January 1933). Already at the beginning of that year, waves of Jewish refugees were pouring out of the Third Reich.<sup>220</sup> Then, in August, 3,000 Assyrian Christians in the Iraqi village of Simel were slaughtered as part of an ethnic cleansing episode.<sup>221</sup>

Convinced that existing international instruments were not equal to the task of protecting national minorities, Lemkin sought to advocate for bold humanitarian law reforms at the League of Nations. In that year of Hitler’s ascension to power, he introduced a proposal that called for criminalising what he termed ‘barbarism’, that is, “acts of extermination directed against the ethnic, or social collectivities whatever the motive (po-

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<sup>218</sup> *Ibid.*, p. 39.

<sup>219</sup> Cooper, 2008, pp. 17–18, see *supra* note 213.

<sup>220</sup> *Ibid.*, p. 18.

<sup>221</sup> *Ibid.*

litical, religious, etc.)”.<sup>222</sup> He also proposed criminalising destruction of the group’s cultural life, which he referred to as “vandalism”. This he defined as “a systematic and organized destruction of the art and social heritage in which the unique genius and achievement of a collectivity are revealed in the fields of science, arts and literature”.<sup>223</sup> Lemkin sought to present his proposals at an international law conference in Madrid. But his work had drawn the ire of the anti-Semitic press in Warsaw and resistance from the Polish government, which was trying to placate Nazi Germany and the Soviet Union. According to Douglas Irvin-Erickson:

At the time, Poland was seeking non-aggression pacts with Stalin and Hitler. Wishing not to antagonize the two powers by sending a Jewish delegate to deliver such a proposal, the Polish government blocked Lemkin from leaving the country. In what appears to be a blatant case of antisemitism, Lemkin was denied travel documents and prevented from presenting his ideas. Without his presence [in Madrid], his proposal to outlaw barbarity and vandalism was tabled without debate. Within weeks, Lemkin was forced to resign from his public posts.<sup>224</sup>

Still, Samantha Power notes that Lemkin’s proposal stimulated a discussion about ‘collective security’.<sup>225</sup> She adds: “Lemkin had issued a moral challenge, and the lawyers at the conference did not reject his proposal outright [...] They [were not] prepared to admit that they would stand by and allow innocent people to die”.<sup>226</sup>

But with his proposal shelved and his job eliminated, Lemkin began a private law practice, while continuing to write academic papers (but now focused on international exchange and payment systems). And he remained active in the 1930s transnational international criminal law networks. Lewis writes that “Lemkin continued to participate in the criminal law movement, writing approvingly in 1935 about the League of Nations’ preparations for the anti-terrorism convention. In 1937, he shared Pella’s

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<sup>222</sup> L.J. van den Herik, *The Contribution of the Rwanda Tribunal to the Development of International Law*, Martinus Nijhoff Publishers, Leiden, 2005, p. 89.

<sup>223</sup> *Ibid.*, p. 39.

<sup>224</sup> Irvin-Erickson, 2014, pp. 49–50, see *supra* note 215.

<sup>225</sup> Samantha Power, *A Problem from Hell: America and the Age of Genocide*, Harper Perennial, New York, 2002, p. 22.

<sup>226</sup> *Ibid.*

long-standing point of view that international criminal law could be used to protect international peace”.<sup>227</sup>

### 20.5.4.3.3. The Birth of ‘Genocide’ as a Criminal Law Concept

Fascist State aggression soon disrupted the work of the transnational international criminal law networks, however. As the *Wehrmacht* was rolling over the Polish military, Lemkin fled, first to Lithuania and then to Sweden, where he lectured on international monetary exchange at the University of Stockholm. In 1941, he left for the United States, where he had secured a law professorship at Duke University. Having conducted extensive research on Nazi occupation policies during his time in Sweden, in 1944 Lemkin published *Axis Rule in Occupied Europe: Laws of Occupation, Analysis of Government, Proposals for Redress*. In Chapter 9 of the book, harking back to his proposals on ‘barbarity’ and ‘vandalism’ and fusing them, he coined the term ‘genocide’. It derived from the ancient Greek word *genos* (race, tribe) and the Latin *cide* (killing).<sup>228</sup> And he defined it as:

[A] coordinated plan of different actions aiming at the destruction of essential foundations of the life of national groups, with the aim of annihilating the groups themselves. The objectives of such a plan would be disintegration of the political and social institutions, of culture, language, national feelings, religion, and the economic existence of national groups, and the destruction of the personal security, liberty, health, dignity, and even the lives of the individuals belonging to such groups. Genocide is directed against the national group as an entity, and the actions involved are directed against individuals, not in their individual capacity, but as members of the national group.<sup>229</sup>

In the meantime, Lemkin had begun working for the United States government as an adviser, first to the Board of Economic Warfare and Foreign Economic Administration and then to the US chief prosecutor at

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<sup>227</sup> Lewis, 2014, p. 190, see *supra* note 174.

<sup>228</sup> Raphael Lemkin, *Axis Rule in Occupied Europe: Laws of Occupation, Analysis of Government, Proposals for Redress*, Carnegie Endowment for International Peace, Washington, D.C., 1944, p. 79.

<sup>229</sup> *Ibid.*

Nuremberg, Justice Robert Jackson.<sup>230</sup> Even though “Lemkin’s intellectual work was known to and influenced Jackson and his staff”,<sup>231</sup> the word ‘genocide’ did not appear in the Charter of the International Military Tribunal at Nuremberg.<sup>232</sup> And while the term was mentioned several times during the trial, it does not appear in the IMT’s final judgment of 1 October 1946.<sup>233</sup> Frustrated by this and the narrow scope of crimes against humanity (limited, as noted above, by the ‘war nexus’), Lemkin left Europe for the US and concentrated his efforts on drafting and then securing adoption of a Genocide Convention at the United Nations.<sup>234</sup>

#### **20.5.4.3.4. Drafting the Genocide Convention**

And, once there, Lemkin was joined in drafting the Convention by two of the core members of the 1920-30s international criminal law transnational network – Vespasian Pella and Henri Donnedieu de Vabres.<sup>235</sup> The fruit of their labours, the 1948 Convention on the Prevention and Punishment of the Crime of Genocide, was “ingenious”, as Mark Lewis describes it, for its expansive and detailed treatment of the genocide phenomenon.<sup>236</sup> And he enumerates its virtues.

First, it expanded the interwar idea of minorities protection to racial, religious, ethnic, and national groups generally, but concentrated on collective violence (which the minorities treaties did not) and included a mechanism for prosecution (which the League’s Minorities Committee did not).<sup>237</sup> Pursuant to Article I, it defined genocide not only as extermination via murder, but as a series of other acts, including infliction of bodily and mental harm against a group, the imposition of conditions of life meant to destroy the group, the forced transfer of children from one group

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<sup>230</sup> Elder, 2009, p. 27, see *supra* note 214, referring to Lemkin’s work with the U.S. Board of Economic Warfare and Foreign Economic Administration; Iavor Rangelov, *Nationalism and the Rule of Law: Lessons from the Balkans and Beyond*, Cambridge University Press, Cambridge, 2013, p. 80, noting Lemkin’s service to Justice Jackson.

<sup>231</sup> John Q. Barrett, “Raphael Lemkin and ‘Genocide’ at Nuremberg, 1945-1946”, in C. Saferling and E. Conze (eds.), *The Genocide Convention Sixty Years after its Adoption*, T.M.C. Asser Press, The Hague, 2010, p. 37.

<sup>232</sup> *Ibid.*, p. 42.

<sup>233</sup> *Ibid.*, p. 52.

<sup>234</sup> *Ibid.*

<sup>235</sup> Lewis, 2014, p. 187, see *supra* note 174.

<sup>236</sup> *Ibid.*, p. 182.

<sup>237</sup> *Ibid.*

to another, and measures designed to prevent births, including forced sterilisation.<sup>238</sup> Intent to destroy was paramount and motive was not relevant. “This was important because it eliminated the possibility that a defendant could claim that eliminating the group was necessary to protect state security” – that the group was a ‘fifth column’, a group of terrorists, or harboured insurgents.<sup>239</sup>

There were other important innovations. The crime did not have to be committed during war. And pursuant to Article III, modes of liability were extended to include conspiracy, incitement, attempt and complicity.<sup>240</sup> Article IV ensured that State officials who perpetrated genocide against their own populations could be held criminally liable. And all parties to the treaty were required to enact domestic legislation to enforce the treaty provisions, under Article V. In another significant development, via Article VII, genocide was not to be considered a political crime for purposes of extradition. Article VIII specified that parties to the Convention could call upon the United Nations (‘UN’) to enforce it and, as Lewis explains, “could file a lawsuit against [a] state [not upholding the Convention] with the International Court of Justice [...]”.<sup>241</sup> Finally, most relevant for purposes of this chapter, pursuant to Article VI, the Convention contemplated prosecution of violations under the jurisdiction of “an international penal tribunal”.<sup>242</sup>

After intense lobbying and negotiations, as well as proposed modifications that were rejected and tweaks that were made along the way, the Convention on the Prevention and Punishment of the Crime of Genocide was adopted by the UN General Assembly on 9 December 1948.<sup>243</sup> It entered into force on 12 January 1951.<sup>244</sup> Lemkin then devoted the remain-

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<sup>238</sup> Convention on the Prevention and Punishment of the Crime of Genocide, 9 December 1948, in force 12 January 1951, Article I ([www.legal-tools.org/doc/498c38/](http://www.legal-tools.org/doc/498c38/)) (‘Genocide Convention’).

<sup>239</sup> Lewis, 2014, p. 183, see *supra* note 174.

<sup>240</sup> Genocide Convention, Article III, see *supra* note 238.

<sup>241</sup> Lewis, 2014, p. 183, see *supra* note 174.

<sup>242</sup> Genocide Convention, Article VI, see *supra* note 238. Lewis also notes that the Convention had certain limitations, including failure to establish universal jurisdiction and inclusion of details regarding the process of investigation/prosecution and intervention. See Lewis, 2014, p. 183, *supra* note 174.

<sup>243</sup> Genocide Convention, see *supra* note 238.

<sup>244</sup> Benjamin N. Schiff, *Building the International Criminal Court*, Cambridge University Press, Cambridge, 2008, p. 25.

ing days of his life, before succumbing to a heart attack in 1959, to pushing for ratification among undecided nations.<sup>245</sup>

#### **20.5.4.3.5. The International Criminal Law Transnational Network and the Geneva Conventions**

In the meantime, work on updating the Geneva Conventions, including proposals for incorporating criminal suppression into them, was also under way. And once again, the transnational international criminal law networks, this time within the framework of the ICRC, played an important role. In effect, they had taken the torch from previous generations of the networks, which had fought so tenaciously for a permanent international criminal jurisdiction. According to Mark Lewis:

Dutch delegate Mouton, a military judge who had been a member of the UNWCC [United Nations War Crimes Commission], was joined by Belgian Major Paul Wibin, a medical doctor: both supported universal jurisdiction (the concept that all states have an obligation to punish certain crimes under international law) and the use of an international criminal court, which Mouton wanted to establish under the auspices of the Permanent Court of International Justice, *as various jurists such as Descamps and Bellot had before him*.<sup>246</sup>

And the unifying thread of the earlier network labours soon became apparent when the ICRC convened a working group to draft grave breaches provisions for the new Geneva Conventions. That group consisted of Mouton, Henry Phillimore, a British barrister and former IMT-Nuremberg prosecutor, Hersch Lauterpacht, who had been an adviser to the British for the Nuremberg trial and would serve as the UK's judge on the International Court of Justice, and Jean Graven, a Swiss judge and law professor, who had served as the Swiss government's representative at the Nuremberg trial.<sup>247</sup> Through Graven, Lewis explicitly notes the link be-

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<sup>245</sup> Power, 2002, p. 56, see *supra* note 225, noting that Lemkin succumbed to a heart attack in 1959.

<sup>246</sup> Lewis, 2014, p. 244, see *supra* note 174 (emphasis added).

<sup>247</sup> *Ibid.*, pp. 236, 257–8. See also Jonas Grimheden, “The International Court of Justice – Monitoring Human Rights”, in Gudmundur Alfredsson *et al.* (eds.), *International Human Rights Monitoring Mechanisms: Essays in Honour of Jakob Th. Möller*, Martinus Nijhoff Publishers, Leiden, 2005, p. 260, discussing Judge Lauterpacht's work on the International Court of Justice; “Jean Graven”, in *Mediatheque Wikivalais*, available at [www.wikivalais.ch/index.php/Jean\\_Graven](http://www.wikivalais.ch/index.php/Jean_Graven), last accessed on 1 August 2018, describing Graven's Nuremberg service.

tween this group and the previous work of the transnational international criminal law networks:

[Graven] was the Secretary of the *Association Internationale de Droit Pénal* and frequently corresponded with Pella, the Romanian catalyst for an international criminal court since the 1920s. Graven's involvement created [an] intersection between the Red Cross project and the line pursued by the criminological jurists and their pursuit of a permanent international criminal court. For Graven, the International Military Tribunal at Nuremberg represented an absolute revolution in international criminal law that proved that establishing a court was viable, as well as transformed the international legal order by proving that "might was not right" and political leaders could be held responsible for wars of aggression. Additionally, by late 1948, he had watched the development of the Genocide Convention and believed that politics, as the arch nemesis of law, had worked against making an international criminal court the primary jurisdiction in that convention.<sup>248</sup>

Consistent with this, the group's final work product was compatible with previous iterations of the transnational network drafts floated since the time of the Moynier-Jaequemyns project. As summarised by Lewis:

[The proposed] system supported universal jurisdiction. Many jurists had pursued this for a variety of crimes since the 1920s -- Descamps for "crimes against the international order," Pella for "violations of international peace and security," and Lemkin for "crimes of barbarity and vandalism". The new provisions told states they had a new duty: either prosecute the suspects or extradite them, the same concept that Pella had sought in the anti-terrorism convention and Lemkin had sought in the Genocide Convention. The Working Group's clauses stated that individuals would be held criminally liable for violations of the conventions. Jurists going back to Moynier in the nineteenth century had tried to accomplish this for the Geneva Conventions, but they had always run into obstacles. Finally, it ruled out superior orders as a defense that could exonerate a defendant. This would have taken a key idea from the Nuremberg Charter and placed it in a codified body of international law for the first

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<sup>248</sup> Lewis, 2014, p. 259, see *supra* note 174.

time: the ideas of “*raison d’état*” and “military obedience” would have been sharply curtailed.<sup>249</sup>

Although not all of these provisions survived the final draft (including, for example, international jurisdiction), most of them did and are now embodied in the grave breaches portions of the current Geneva Conventions.<sup>250</sup> But the momentum of the post-World War I through post-World War II international criminal justice project that the transnational international criminal law networks had so persistently pushed forward, was stalling. Cold War politics would soon stifle any further progress on the development of international criminal law. But by the beginning of the 1990s, after the dismantling of the Berlin Wall, a thaw in trans-global relations meant a revival of the project. And with inter-ethnic violence erupting in the former Yugoslavia and Rwanda, government officials in new transnational international criminal law networks began following in the footsteps of Moynier, Lieber, Jaequemyns, Bellot, Politis, de Wiart, Llewellyn-Jones, Pella, de Vabres, Lemkin, Lauterpacht and Graven.

### **20.5.5. International Criminal Law Transgovernmental Networking Post-Cold War**

In the explosion of international criminal law activity after the fall of the Soviet Union, international criminal law has become institutionalised and ingrained in the world order in a way that members of the pre-Cold War networks could have only dreamt about. But those pioneer networks laid the foundation that made it all possible.

The International Criminal Tribunal for the former Yugoslavia (‘ICTY’), the International Criminal Tribunal for Rwanda (‘ICTR’), the Special Court for Sierra Leone (‘SCSL’), the Extraordinary Chambers in the Courts of Cambodia and the ICC, among others, have spotlighted international criminal law’s enduring global footprint. The documents establishing these institutions, and setting out their jurisdictional prerogatives, have codified international criminal law. And the judgments issued from their courts have interpreted the key provisions and created a new and

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<sup>249</sup> *Ibid.*, p. 262.

<sup>250</sup> *Ibid.*, pp. 262–3. Lewis notes that: “One factor that dissuaded the Diplomatic Conference as a whole from making an international criminal court the primary venue for criminal repression was a lack of knowledge about international criminal law [...] Cold War cultural-legal politics also contributed to eliminating a direct reference to an international jurisdiction”. See *ibid.*, p. 267.

separate vein of jurisprudence in international law. So, given that the vision of the founding network members has been largely realised, is there still a place for transnational international criminal law networks in today's world? As explained above, Jenia Iontcheva Turner believes there is. She has broadly identified two categories: 'co-ordination and support' networks and 'joint-action' networks.

### **20.5.5.1. Co-ordination and Support Networks**

The 'co-ordination and support' networks are further divided into three subcategories: (1) investigative; (2) prosecutorial; and (3) judicial. In general, Turner notes that the co-ordination and support networks assist "states emerging from armed conflict" that often "lack the resources to develop and implement a prosecution strategy for international crimes, which usually involve mass atrocity, governmental complicity, [and] *serious security problems* [...]".<sup>251</sup>

#### **20.5.5.1.1. Investigative Networks**

With respect to the "investigative" transnational international criminal law networks, Turner provides as examples the 'Argentine Forensic Anthropology Team', which has fostered global exchanges in the investigation of human rights violations through, among other activities, training and advisory assistance and promoting national and international forensic standards.<sup>252</sup> Another organisation, the Institute for International Criminal Investigations ('IICI'), focuses primarily on training and deployment of international-crimes investigators at scenes of war crimes around the world.<sup>253</sup> And Interpol, which began setting up working group meetings to identify the needs of national police force war crimes units, has provided them with increased use of Interpol databases, the preparation of a best practice manual, and identification of points of contact in member countries.<sup>254</sup> In fact, in 2014, Interpol created a dedicated unit to focus on war crimes, genocide and crimes against humanity.<sup>255</sup>

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<sup>251</sup> Turner, 2007, pp. 1006–7, see *supra* note 161.

<sup>252</sup> *Ibid.*, p. 1008.

<sup>253</sup> *Ibid.*

<sup>254</sup> *Ibid.*, p. 1007.

<sup>255</sup> Interpol, "Project Sheet: War Crimes and Genocide Sub-Directorate", available on the Interpol web site.

### 20.5.5.1.2. Prosecutorial Networks

As for the prosecutorial networks, Turner refers to the ‘Colloquium of Prosecutors of International Tribunals’, has which brought together supranational prosecutors from the ICTY, ICTR, ICC, and the SCSL to discuss “evidence management, witness and protection management, gender crimes, operating procedures, tracking and arrests, speeding up trials” and “political strategies towards non-cooperating States”.<sup>256</sup> More recently, the International Humanitarian Law Dialogues hosted annually by the Robert H. Jackson Center in Chautauqua, New York, gather current and former international war crimes tribunal prosecutors. At this forum, they can explore current issues centred on a theme, allowing for meaningful discussions concerning contemporary international criminal law.<sup>257</sup>

### 20.5.5.1.3. Judicial Networks

Finally, regarding judicial networks, Turner notes that most transgovernmental ‘networking’ among national and supranational judges occurs in less formal ways. “Judges from the ICC, ICTY, and ICTR have become actively involved in meetings and training sessions with their counterparts from Iraq, Indonesia, the former Yugoslavia, Cambodia, and elsewhere.”<sup>258</sup> Consistent with this, Anne-Marie Slaughter has observed that we are witnessing a rise of a community of courts in which judges are increasingly referring to each other’s opinions not because these opinions are binding authority, but because of their persuasive reasoning.<sup>259</sup>

And there are networks that combine all three cohorts. Turner points to the ‘Justice Rapid Response Initiative’ that has, since publication of her article, evolved into the non-governmental organisation Justice Rapid Response (‘JRR’). JRR manages the swift deployment of criminal justice and related professionals from a stand-by roster.<sup>260</sup> These deployments can be requested by the international community to investigate, analyse and report on situations where serious human rights and international criminal violations have been reported.<sup>261</sup> JRR’s training programme has

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<sup>256</sup> Turner, 2007, pp. 1006–7, see *supra* note 161.

<sup>257</sup> The Robert H. Jackson Center, “Jackson Center Opens 11th Annual International Humanitarian Law Dialogues”, 24 August 2017, available on the web site of the Center.

<sup>258</sup> Turner, 2007, pp. 1006–7, see *supra* note 161.

<sup>259</sup> *Ibid.*, pp. 115–6; Slaughter, 2004, p. 69, see *supra* note 159.

<sup>260</sup> Justice Rapid Response, “About Us”, available on the Justice Rapid Response web site.

<sup>261</sup> *Ibid.*

been developed and carried out in collaboration with the IICI, suggesting that these networks are co-ordinating and, to a certain extent, converging with one another.<sup>262</sup>

### 20.5.5.2. Joint-Action Networks

Turner also describes what she calls ‘joint-action networks’, which also combine all three cohorts (that is, investigators, prosecutors and judges). In these, participants engage each other “daily in face-to-face joint activities – investigation, prosecution, or adjudication – for a sustained period of time”.<sup>263</sup> She describes the most prominent “joint action initiatives” as the hybrid courts established to try international crimes in Sierra Leone, Kosovo, East Timor, and more recently, Cambodia and Bosnia and Herzegovina. Hybrid courts, established in the country where the crimes took place but staffed by both local and international investigators, prosecutors, and judges, are, according to Turner, true ‘networks’:

Although hybrid courts may seem too institutionalized to fit the definition, they fulfill some of the same functions as transgovernmental networks and lack many of the trappings of permanent supranational institutions. They exist on a temporary basis, and like other networks, they initiate daily dialogue among judges and prosecutors from different countries about the application of international criminal law to domestic cases.<sup>264</sup>

And thus, the contemporary transnational international criminal law networks include jurists like the present author, who have all worked for the UN, for national governments, for international criminal tribunals and in the legal academy but, through all these various endeavours, remain engaged in advancing the international criminal law project.<sup>265</sup> The Case Matrix Network (‘CMN’) – a department of the Centre for International Law Research and Policy (‘CILRAP’), run by Ilia Utmelidze, Emilie Hunter and Olympia Bekou – was the first actor to initiate ‘positive complementarity’ or international criminal law capacity-development support activities *vis-à-vis* national criminal justice agencies, starting several years

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<sup>262</sup> *Ibid.*

<sup>263</sup> Turner, 2007, p. 1017, see *supra* note 161.

<sup>264</sup> *Ibid.*, p. 1019.

<sup>265</sup> Other actors in this vein would include Serge Brammertz, Nina Jørgensen, Juan Mendez, David Tolbert, and Alex Whiting.

before the ICC's States Parties first recognized this area at their 2010 Review Conference in Kampala, Uganda.<sup>266</sup> CILRAP's Director, Morten Bergsmo, coined the term 'positive complementarity' when he led the preparatory team of the ICC Office of the Prosecutor in 2002-03 (later serving as its Senior Legal Adviser). He also developed the original idea of a justice rapid response unit.<sup>267</sup>

## **20.6. The Transnational International Criminal Law Networks and Governmentality**

### **20.6.1. Governmentality's Conceptual Foundations**

Having now considered the concept of governmentality and the phenomenon of transnational international criminal law networks, it remains to analyse their relationship to one another. In examining the development of Foucault's thought, we have seen that modernity's transformation of large-scale societal structuring into a salutary 'macro-physics of power' gives rise to the governmentality phenomenon.

Its roots are found in the historical and metaphorical relationship between the biblical shepherd and his flock. In today's world, the beneficent biblical animal husbandry has evolved into statist population governance focused on human security. It operates to stave off mass crises, such as wars and pandemics, but it aspires never to lose sight of the individual in this process. To achieve its ends of protecting the population by means of instituting a security regime, governmentality effects an accretion of institutions, procedures, analyses and reflections, calculations, and tactics.

Governmentality is deployed alongside 'sovereign' and 'disciplinary' power. And it is perhaps conceptually permissible to suggest these latter two impliedly, and ultimately, operate in service of the security regime. Internal enforcement of that regime relies on police efforts just as

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<sup>266</sup> The CMN web site ([www.casematrixnetwork.org/](http://www.casematrixnetwork.org/)) explains its activities. During the five years leading up to the Kampala Conference, the CMN was the main co-operation partner of the ICC Legal Tools Project which at the time engaged more than 20 national jurisdictions in capacity-development, see [www.legal-tools.org/](http://www.legal-tools.org/); see also Morten Bergsmo (ed.), *Active Complementarity: Legal Information Transfer*, Torkel Opsahl Academic EPublisher, Oslo, 2011, pp. 572 (in particular 'Part I: Constructing National Ability to Investigate, Prosecute and Adjudicate Core International Crimes'). CILRAP's web page [www.cilrap.org/events/](http://www.cilrap.org/events/) details several relevant activities held between 2006 and 2011.

<sup>267</sup> See Alexander Muller, "Foreword", in Morten Bergsmo, Klaus Rackwitz and SONG Tianying (eds.), *Historical Origins of International Criminal Law: Volume 5*, Torkel Opsahl Academic EPublisher, Brussels, 2017, pp. v–viii.

external preservation of it depends on diplomacy efforts. The latter give rise to a permanent network of “diplomatic missions” along with “the organization of practically permanent negotiations”, as cited above.

We have also seen that Foucault developed this concept of governmentality in the 1970s *vis-à-vis* his usual focus on pre-twentieth century phenomena. As befits a philosophical doctrine of that vintage and nature, it is State-centric. But how would Foucault have developed this theory in light of the collapse of the Soviet Union and its satellite States? How might he have problematised the advent of a permanent international criminal court from a governmentality perspective? The doctrine’s foundational theoretic premises, as well as the international criminal law history chronicled in this paper, suggest the manner in which Foucault might have updated and expanded governmentality.

## **20.6.2. The Internationalisation of Governmentality**

### **20.6.2.1. A Focus on Population as Opposed to Territory**

And it is submitted the theory could have plausibly undergone a kind of internationalisation. There are several reasons for this. First, the focus on ‘populations’ is more broadly anthropocentric, as opposed to territorially-focused. Thus, in pointing out that contemporary versions of governmentality require “security apparatuses that minimize and/or leverage risk”, Majia Holmer Nadesan remarks:

At issue are not those of the nineteenth century seeking to protect a geographically delimited territory. Rather, security is thought of in terms of global circulation of goods, information and people. Consequently, the modern art of government is not limited to the population and territory of individual states but extends to the larger population of people and things encompassed by the entirety of the world *system*.<sup>268</sup>

### **20.6.2.2. Trans-Border Ambulatory Populations**

Moreover, in tracing the origins of governmentality to the pastoral tradition, Foucault emphasises the movement of the flock through variegated geographic spaces. In *Security, Territory, Population*, he explained:

The shepherd’s power is not exercised over a territory but, by definition, over a flock, and more exactly, over the flock

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<sup>268</sup> Majia Holmer Nadesan, *Governmentality, Biopower, and Everyday Life*, Routledge, London, 2008, p. 187.

in its movement from one place to another. The shepherd's power is essentially exercised over a multiplicity in movement [...] The Hebrew God [is the one] moving from place to place, the God who wanders. The presence of the Hebrew God is never more intense and visible than when his people are on the move, and when, in his people's wanderings, in the movement that takes them from the town, the prairies, and pastures, he goes ahead and shows his people the direction they must follow [...] The Hebrew God appears precisely when one is leaving the town, when one is leaving the city walls behind and taking the path across the prairies.<sup>269</sup>

When this "flock" is analogised to modern human populations, as implicit in Foucault's analysis, its ancient trans-border movements, under the aegis of the deistic shepherd, suggest, in modern terms, international or 'global' governance over peoples.<sup>270</sup> This analogy has resonance for the twenty-first century's continual and routine streaming across borders of large swaths of humanity. According to Alexandria Innes, Oded Lowenheim and Brent Steele:

Risk management as a technology of governmentality is seen in the context of mobile populations, who are often characterized as high risk. [This is seen in] the use of new security technologies that are seen to minimize risk in aviation security practices. [And it is seen] in the realm of things like border screening and airport security.<sup>271</sup>

This is especially true since the 1970s, when Foucault introduced the notion of governmentality. Per Michael Goodhart:

Two significant developments have sparked the recent explosion in demands for more accountable international relations. The first is the spectacular increase, since the 1970s, in global governance, along with related changes in the quantity and quality of transnational activity generally. Global governance

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<sup>269</sup> Foucault, *Security*, 2009, p. 171, *see supra* note 112.

<sup>270</sup> Global governance has been defined as "efforts to bring more orderly and reliable responses to social and political issues that go beyond capacities of states to address individually". Thomas G. Weiss and Leon Gordenker, "Pluralizing Global Governance: Analytical Approaches and Dimensions", in *Thinking about Global Governance: Why People and Ideas Matter*, Routledge, London, 2011, p. 190.

<sup>271</sup> Alexandria Jayne Innes, Oded Lowenheim, and Brent J. Steele, "Global Governance & Governmentality", in David Levi Faur (ed.), *Oxford Handbook of Governance*, Oxford University Press, Oxford, 2012, p. 720.

regimes [arise] in domains where trans-border flows of various kinds limit domestic policy and regulatory reach. The growth in global governance, in turn, both reflects and hastens the ongoing expansion and intensification of interdependence, especially economic interdependence.<sup>272</sup>

### 20.6.2.3. Global Governance, International Relations Theory, and Large-Scale Demographic Crisis Management

Not surprisingly, then, international relations scholarship has begun to link global governance concerns explicitly with governmentality. In their book *Governing the Global Polity: Practice, Mentality, Rationality*, Iver Neumann and Ole Sending offer that “the governmentality approach offers a new perspective on global governance as a set of inter-related practices with a distinct logic or rationality”.<sup>273</sup> And thus “the coming of governmentality on the global level” can perhaps be seen “as a coda of its emergence on the national level during the eighteenth century”.<sup>274</sup>

As we saw in our review of *Security, Territory, Population*, the types of problems Foucault engaged with in introducing the concept of governmentality – large-scale demographic emergencies and/or pathologies (pandemics, wars, and so on) – further justify grafting governmentality onto the contemporary international plane (and this will certainly be true for international criminal law as it confronts widespread demographic pathologies of genocide and crimes against humanity, among others). So, for instance, refugee crises that prompt humanitarian intervention are arguably by-products of establishing “a global governance regime premised on liberal ideas”.<sup>275</sup> And this specifically implicates the techniques of governmentality. In the refugee crisis context, citing Foucault’s theory, Paolo Novak notes:

By constituting refugee displacement as a problem of government, the refugee enables and defines the contours of a

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<sup>272</sup> Michael Goodhart, “Accountable International Relations”, in Mark Bovens, Robert E. Goodin, and Thomas Schillemans (eds.), *The Oxford Handbook of Public Accountability*, Oxford University Press, Oxford, p. 290.

<sup>273</sup> Iver B. Neumann and Ole Jacob Sending, *Governing the Global Polity: Practice, Mentality, Rationality*, University of Michigan Press, Ann Arbor, 2010, pp. 13–14.

<sup>274</sup> *Ibid.*, p. 15.

<sup>275</sup> Paolo Novak, “Refugees and Empire”, in Immanuel Ness and Zak Cope (eds.), *The Palgrave Encyclopedia of Imperialism and Anti-Imperialism*, vol. 1, Palgrave Macmillan, Basingstoke, p. 1363.

wide range of protection and assistance practices, an ‘ensemble formed by the institutions, procedures, analyses, and reflections, the calculations and tactics that allow the exercise of a very specific albeit complex form of power’ [detailing Foucault’s breakdown of governmentality]: a form of power that attempts to shape and direct human conduct towards specific ends.<sup>276</sup>

Of course, as we have seen, governmentality’s brief in taking on these massive demographic convulsions is the provision and maintenance of security. And this feature is also indicative of the concept’s suitability for transnational adaptation. In his book *A Foucauldian Approach to International Law*, Leonard M. Hammer observes that “human security moves one away from the state as the central character towards [...] the international system as it opens up vistas for expanding upon human rights protections”.<sup>277</sup> Security may also spur internationalisation in respect of armed conflict. According to Hammer:

The expanding vista of human security is also quite apparent for other aspects of international law that demand some form of normative relationship between systems, such as incorporating notions of human security into the context of humanitarian norms. Human security can begin to address a variety of normative gaps in the international system found in humanitarian norms where there is a great difficulty in accounting for non-state actors engaged in conflicts, as well as adapting the norms to internal conflicts, essentially the prevalent forum in most present conflict situations.<sup>278</sup>

#### **20.6.2.4. A Diplomatic Network and Permanent Inter-State Negotiations**

Governmentality is further compatible with internationalisation given its permanent network of “diplomatic missions” along with “the organization of practically permanent negotiations”.<sup>279</sup> Foucault refers to these as ‘diplomatic-military’ techniques,<sup>280</sup> which envisage a “framework of a balance

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<sup>276</sup> *Ibid.*

<sup>277</sup> Leonard M. Hammer, *A Foucauldian Approach to International Law: Descriptive Thoughts for Normative Issues*, Routledge, London, 2007, p. 103.

<sup>278</sup> *Ibid.*, p. 104.

<sup>279</sup> Foucault, 2009, p. 389, *see supra* note 112.

<sup>280</sup> *Ibid.*, p. 452.

of power between rival states competitively pursuing growth”.<sup>281</sup> This central feature of governmentality, then, also provides the structural support for conceptual transplantation within the international realm.

### **20.6.3. Governmentality and International Criminal Law**

#### **20.6.3.1. A Response to Phenomena Such as Genocide and Crimes against Humanity**

But is all of this compatible with governmentality in conceptualising the origins-story of international criminal law? Reviewing that narrative from the perspective of the international criminal law transnational networks suggests so. That account maps well onto the theoretical edifice of governmentality as sketched out in this paper. We have already touched on international criminal law as a security response to large-scale social pathologies such as genocide or crimes against humanity. This aligns perfectly with Foucault’s credo that eradicating similar phenomena – that is, pandemics, famines – calls for deployment of governmentality.

#### **20.6.3.2. An Outgrowth of a Networked Horizontal Regulatory Scheme**

But there are other, less immediately apparent, rationales for extending governmentality to international criminal law. In the first place, significantly, experts conceive of ‘global governance’ governmentality as a *horizontal*, as opposed to a vertical, regulatory structure. Per Innes, Lowenheim and Steele: “The agents of regulation [in governmentality] are not understood in a top-down hierarchical way, but comply with a *horizontal or networked* understanding of power relations”.<sup>282</sup>

And that is the nature of international criminal law’s origins as tracked in the development of the transnational networks studied in this chapter. Each stage in that chronicle evidenced groups of jurists, government officials and academics co-ordinating across State boundaries to flesh out and promote this new discipline. Consistent with Anne-Marie Slaughter’s conception of transgovernmental networks, with certain notable exceptions, these State representatives were not at the upper end of the

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<sup>281</sup> Graham Burchell, “Peculiar Interests: Civil Society and Governing ‘The System of Natural Liberty’”, in Graham Burchell, Colin Gordon, and Peter Miller (eds.), *The Foucault Effect: Studies in Governmentality*, University of Chicago Press, Chicago, 1991, p. 123.

<sup>282</sup> Innes, Lowenheim, and Steele, 2012, p. 718, see *supra* note 271 (emphasis added).

governmental food chain. And they operated within the framework of international and non-governmental organisations.

### **20.6.3.3. A Diversity of Actors**

Moreover, the identity of these actors fits within the theorised nature of governmentality on the global plane too. As explained by Innes, Lowenheim and Steele, at the international level, governmentality's players "can be understood as individuals, States, agencies, international and transnational organizations, private authorities, and so on".<sup>283</sup> Neumann and Sending explain that governmentality results in "the emergence of a more 'network like' system for governing at the global stage where states share much of their power with non-governmental organisations, corporations, and international organisations".<sup>284</sup>

### **20.6.3.4. Security for Vulnerable Populations**

In addition to the horizontal, "network-like" nature of international criminal law's foundations as examined above, it will be recalled that its objectives centred on security, another core precept of Foucault's governmentality theory. The likes of Moynier, Lieber, Jaequemyns, Bellot, Politis, Llewellyn-Jones, Pella, Lemkin, Graven and Lauterpacht promoted their various international criminal law proposals with a view to protecting civilians in the context of war or citizens targeted for extermination, mass violence, terrorism, torture, slavery, and trafficking. Others enveloped within international criminal law's proposed security net included wounded soldiers, prisoners of war, and aid workers. Lemkin's own trajectory as Holocaust survivor, as well as genocide theoriser and convention drafter, reifies international criminal law's concern for the security of at-risk groups.

One could say then that international criminal law, as conceived by these framers, was focused on a certain type of security – the security of *vulnerable* populations (consistent with Foucault's focus on large-scale societal emergencies and pathologies). And protecting such vulnerable populations from the depredations enumerated above accords them with a kind of freedom. Thus, security implicates freedom, one of governmentality's central concerns, as postulated by Foucault.

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<sup>283</sup> *Ibid.*, p. 719.

<sup>284</sup> Neumann and Sending, 2010, p. 20, see *supra* note 273.

This focus on the security of vulnerable populations is central to the argument of this paper that international criminal law's origins can be properly theorised via governmentality, which is, in turn, properly updated via international criminal law. Current UN priorities underscore this point. For instance, the UN created the Commission on Human Security in January 2001 in response to the UN Secretary-General's call at the 2000 Millennium Summit for a world "free of want" and "free of fear".<sup>285</sup> In 2015, a chief concern at the UN was assisting "vulnerable populations in emergencies".<sup>286</sup> More recently, in August 2017, the UN Secretary-General, António Guterres, repeated this commitment within the context of the emerging norm of 'Responsibility to Protect':

There is a gap between our stated commitment to the responsibility to protect and the daily reality confronted by populations exposed to the risk of genocide, war crimes, ethnic cleansing and crimes against humanity. To close this gap, we must ensure that the responsibility to protect is implemented in practice. One of the principal ways in which we can do so is by strengthening accountability for the implementation of the responsibility to protect and by ensuring rigorous and open scrutiny of practice, based on agreed principles.<sup>287</sup>

One other UN mission – that embodied in the Millennium Development Goals ('MDGs') – further demonstrates the commitment to assisting vulnerable populations. The MDGs find their origin in the "Millennium Declaration" issued at the September 2000 Millennium Summit.<sup>288</sup>

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<sup>285</sup> The United Nations Trust Fund for Human Security, "Human Security Now", available on the United Nations ('UN') web site.

<sup>286</sup> UN News Centre, "Marking World Day, UN Spotlights Plight of Vulnerable Populations in Emergencies", 10 July 2015, available on the UN web site.

<sup>287</sup> UN Secretary-General, Report, "Follow-up to the Outcome of the Millennium Summit: Implementing the Responsibility to Protect – Accountability for Prevention (Report of the Secretary-General)", UN Doc. A/71/1016, 10 August 2017 ([www.legal-tools.org/doc/c666fa](http://www.legal-tools.org/doc/c666fa)). Officials at the UN 2005 World Summit pledged to protect vulnerable populations from genocide, crimes against humanity, war crimes and ethnic cleansing via the 'Responsibility to Protect' doctrine, which sanctions military deployment pursuant to Security Council resolution to thwart commission of such offenses. See UN General Assembly, Resolution 60/1, 2005 World Summit Outcome, UN Doc. A/Res/60/1, 24 October 2005, paras. 138–40.

<sup>288</sup> Elkana Ngwenya, "An Empirical Analysis of Gendered Differences in MDG Awareness Across Sources of Information", in Harleen Kaur and TAO Xiaohui (eds.), *ICTs and the Millennium Development Goals: A United Nations Perspective*, Springer, New York, 2014, p. 42.

The MDGs obligated states to realise a new “global partnership [...] and a series of time-bound targets” to be met by 2015. Among other things, they seek to eradicate extreme poverty, hunger and disease (MDG 1), reduce child mortality (MDG 4), and combat HIV/AIDS, malaria, and other diseases (MDG 6).<sup>289</sup> Thus, they focus on security measures for the most vulnerable populations.<sup>290</sup>

In 2015, the MDGs were updated with the Sustainable Development Goals (‘SDGs’), which are meant to protect “fragile and conflict-affected societies” such that the “needs of the most vulnerable populations are brought to the fore”.<sup>291</sup> Indeed, SDG 16 incorporates peace and justice “as explicit and related development goals, emphasizing the importance of rule of law, access to justice, and inclusive institutions”.<sup>292</sup> Relatedly, The World Bank’s 2011 World Development Report entitled “Conflict, Security, and Development” linked, for the first time, transitional justice to security and development.<sup>293</sup>

#### **20.6.3.5. An Ensemble Formed by Institutions, Procedures, and Various Techniques**

Moreover, the work product of the transnational international criminal law networks, focused on the security of vulnerable populations, constitutes an “ensemble formed by institutions, procedures, analyses and reflections, calculations, and tactics”.<sup>294</sup> In particular, as we have seen, the proposals put forth by these networks always crystallised around the formation of an ‘institution’, that is, an international criminal court. To take the Bellot plan as one example, the proposed institution’s procedures were specified

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<sup>289</sup> *Ibid.*

<sup>290</sup> “Getting to Know the Sustainable Development Goals”, in *SDG Guide*, p. 3, on the SDG web site, noting that the MDGs “focus on the most vulnerable populations, and address extreme poverty, hunger, disease, gender equality, education and environmental sustainability”.

<sup>291</sup> Organisation for Economic Co-operation and Development, “The Sustainable Development Goals: An Overview of Relevant OECD Analysis, Tools and Approaches”, p. 5.

<sup>292</sup> International Nuremberg Principles Academy, “10 Years after the Nuremberg Declaration on Peace and Justice: ‘The Fight against Impunity at a Crossroad’”, Nuremberg Forum 2017, 8 September 2017.

<sup>293</sup> The World Bank, “2011 World Development Report: Conflict, Security, and Development”, available on the World Bank web site. See also, International Nuremberg Principles Academy, 2017, *supra* note 292.

<sup>294</sup> Foucault, 2009, p. 144, see *supra* note 112.

in great detail, including jurisdiction, the number and qualification of judges, the vetting procedure of judges, the nature of hearings at the court, evidentiary regulations and post-conviction protocols.

Analysis and reflections were embedded into the proposals we examined and calculations and tactics led to doctrinal success in the adoption of instruments such as the Genocide and Geneva Conventions. And those kinds of analyses, reflections, calculations and tactics ultimately gave rise to the international criminal law infrastructure we see today, complete with tribunals of an *ad hoc*, hybrid and permanent nature.

### **20.6.3.6. The Role of Police in Conjunction with Diplomacy**

Finally, the work of these networks is of a piece with Foucault's notions of police and diplomacy in connection with governmentality. Although Foucault stresses that 'police' does not refer to the narrow constabulary or judiciary function in the traditional sense, he hastens to add that the concept does have juridical implications. Upon the panorama of governmentality laid out in its full conceptual scope, the police feature represents an essential regulatory force. And given its explicit tethering to diplomacy in Foucault's work, it marries well with the idea of international law enforcement for atrocity crimes.

That point is underscored by the fact that, per its pastoral roots, governmentality never loses sight of the individual. Its chief metric may be 'population' but that is still calibrated unit by unit, such that individual criminal responsibility conceptually jibes with this paper's transnational scaling of governmentality. Just as the shepherd never loses sight of threats to any one lamb in the flock, he has to account for each lone wolf. The genocidaire in reference to the outgroup victim, as it were, is conceptually analogous.

And, to be fair, Foucauldian international criminal law scholarship has started to take notice. While this chapter has lamented the current literature's misplaced emphasis on a kind of fallacious super-sized disciplinary power, there has been an opening to governmentality within the field. In particular, Sara Kendall has advised viewing international criminal law-context power in "its more diffuse manifestations in what [Foucault] termed governmentality ('the conduct of conduct'), [and] biopower ('directed at the level of the population') [...]". She would opt, then, for "a more complex and multifaceted understanding of the workings of pow-

er” and examine where it becomes “capillary, that is, in its more regional and local forms and institutions”.<sup>295</sup>

Elsewhere, Kendall emphasises this phenomenon strictly from the perspective of bio-power:

In international criminal law, [acts of classification and categorisation] when directed at the level of the population, perform additional forms of governance. Borrowing from Michel Foucault, we can conceptualise such governance as a kind of ‘biopower’, intervening at the collective level (here, among conflict-afflicted populations) to promote life and health. Unlike other theorisations of ‘biopower’ that would regard it as a repressive form of power [...] Foucault regarded biopower as productive power, in the sense that it was oriented toward producing greater vitality in the population towards which it was directed.<sup>296</sup>

Are we seeing a shift in the international criminal law scholarly fault line? Kendall’s observations certainly suggest so. It is hoped that this paper will help move the discourse even further toward the direction of accepting governmentality as the key Foucauldian paradigm for theorising the advent, development and operation of international criminal law.

## 20.7. Conclusion

This chapter has taken a diachronic view of Foucault’s philosophy and its vital late-stage tenet, ‘governmentality’. Certainly, in his early career, the great French thinker initially devoted himself to understanding Occidental society through its treatment of marginalised groups and the attendant discourse arising from that treatment. And through the plight of these fringe actors, he detected changes in governing paradigms. During the great population swell from the fifteenth through the nineteenth centuries, ruling by fear – the mode of power he described as “sovereign” – became infeasible. Exemplary punishment could no longer serve as the needed organisational template for unwieldy and growing demos in such societies.

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<sup>295</sup> Sara Kendall, “Critical Orientations: A Critique of International Criminal Court Practice”, in Christine Schwöbel (ed.), *Critical Approaches to International Criminal Law: An Introduction*, Routledge, London, 2014, p. 62.

<sup>296</sup> Sara Kendall, “Beyond the Restorative Turn: The Limits of Legal Humanitarianism”, in Christian De Vos, Sara Kendall, and Carsten Stahn (eds.), *Contested Justice: The Politics and Practice of International Criminal Court Interventions*, Cambridge University Press, Cambridge, 2015, p. 373.

At the same time, Western thought was becoming increasingly secular and rational. In this context, Foucault was able to glean the emergence of an operational principle that reached critical mass at the institutional level. It was characterised by the dissemination and enforcement of multi-directional protocols and procedures carried out under ubiquitous surveillance in institutions such as hospitals, military barracks, schools, factories and government offices. Foucault called it “disciplinary power” and used the modern penitentiary to illustrate its operation in detail through his seminal 1975 treatise *Discipline and Punish; The Birth of the Prison*.

Among Foucault’s most widely-translated and read works by the time of his death, *Discipline and Punish* served as a touchstone for English-speaking criminology scholars. But as many of Foucault’s subsequent materials long remained unpublished in English, criminological academic work in the Anglosphere calcified. The ratio of *Discipline and Punish* was reductively distilled into an elite-over-dispossessed coercion polemic with Marxist overtones. Having been uncritically framed as such, its reception into international criminal law scholarship was seamless. That literature artificially inflated the municipal dynamic and cartoonishly stretched it to fit over the supranational landscape.

This chapter has called into question this traditional Foucauldian take on international criminal law. In developing the doctrine of ‘governmentality’, an outgrowth of his ‘bio-power’ theory, Foucault began to take a bird’s-eye view of societal co-ordination above the individual institutional level. From that perspective, he discerned a beneficent organisational power whose seat was the modern State and whose origin was biblical mass-herd husbandry. In anthropocentric terms, its mission was taking care of ‘populations’ by providing them with ‘security’, consisting not only of quotidian succour but also protection against large-scale crises, such as pandemics and famines. The State would accomplish this through the use of ‘police’ – a regulatory mechanism – yoked to a diplomatic cadre within an entrenched network of permanent negotiations amongst nations.

In reference to a theory developed in the 1970s in a far more State-centric world, it is reasonable to wonder whether governmentality would be compatible with power exercised on the international plane. This chapter has offered several reasons for why it would. Apart from its overt reliance on diplomacy and inter-State negotiation, governmentality’s concern with human populations impliedly crossing national frontiers and con-

fronting mass demographic pathologies, increasingly topical phenomena in the modern world, suggests the theory arguably had a modern transnational-orientation already embedded in its DNA.

From that conclusion, it does not strain credulity to extend transnational governmentality to one of public international law's main sub-branches, international criminal law itself. And this extension is further sanctioned via an historical review of international criminal law's transnational networks. Those formal and informal configurations of jurists and government officials advanced the international criminal law project seeking to insulate at-risk peoples confronting the spectre of mass demographic plagues such as genocide, crimes against humanity, torture, slavery, terrorism, aggression and war crimes. Per Foucault's vision of governmentality's essential ingredients, their work implicated an amalgamation of institutions (international criminal tribunals), procedures (rules of procedure and evidence), analyses (consideration of existing law and how to develop it), reflections (reliance on history and related topics, such as the law of war), calculations (the proper apportionment of judicial personnel and subject-matter jurisdiction), and tactics (international ratification and then judicial co-operation) that, in the ensemble, were geared toward providing security for vulnerable populations.

As Foucault envisaged, they would rely on the 'police' juridical-regulatory function and diplomacy in the form of State co-operation. And, as the pastoral roots of governmentality permit focus on the individual, so would international criminal law, given its stress on individual criminal responsibility. Significantly, and compatible with scholarly views of international governmentality as operating via horizontal network linkages, these (for the most part) lower-level international criminal law network functionaries worked in trans-border clusters formulating and promulgating a body of soft law that hardened after the atrocities of World War II. And new generations of transnational international criminal law networks have developed this doctrine, and helped implement it, in the post-Cold War era.

This is not to suggest that existing Foucauldian international criminal law scholarship should be shunted aside. Let us not forget that Foucault himself emphasised that governmentality operated in tandem with sovereign and disciplinary power. On the international plane, how can this be conceptually retrofitted for synchronous operation with governmentality within the international criminal law sphere? If, for example, discipli-

nary power were theorised at the level of the individual institution itself, such as the International Criminal Court, perhaps a kind of supranational panopticism could be detected. In this regard, Gözde Turan's attempted conjoining of the spirit of Foucault's carceral complex to complementarity's homogenising influence in Africa could have purchase. Does this recast the ICC's extensive activity on that continent as an exercise of disciplinary power that could be equated with neo-imperialism? It is beyond the scope of this chapter to grapple with that inquiry. But it is hoped that, with governmentality explicitly in the mix, future scholarship may take up the challenge.

In the meantime, *vis-à-vis* the larger conceptual phenomenon of international criminal law itself, governmentality occupies its own space beyond the realm of disciplinary power, even if it happens to function alongside it. As international criminal law's utility is being questioned from both resource and transitional justice perspectives, this paper's 'neo-Foucauldian' account of it could move the discourse in new and useful directions. International criminal law, as theorised through the lens of governmentality, with its emphasis on security for vulnerable populations, aligns well with the discursive project implicit in the UN SDGs and the promotion of Responsibility to Protect.

This would represent a narrative shift in international criminal law's traditionally abridged account of itself – tired recitations of the 'individual criminal responsibility' and 'fight against impunity' shibboleths. Maxim Pensky's chapter in *Philosophical Foundations of International Criminal Law: Foundational Concepts*, "Impunity: A Philosophical Analysis", points to the need for international criminal law to expand, if not reconceive, its own foundational assumptions. Sharing this concern, Immi Tallgren speculates whether, in light of vulnerable populations suffering from large-scale demographic crises, we need a new "critical reading" of international criminal law whereby we would "open up other fronts than the 'fight against impunity'".<sup>297</sup>

Assuming we move on from the "fight against impunity" to security for vulnerable populations, apart from this paper's theorised Foucauldian take on international criminal law, does the discipline's existing discourse augur a positive reception for the envisioned narrative shift? Consistent

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<sup>297</sup> Immi Tallgren, "The Durkheimian Spell of International Criminal Law?", in *Revue Interdisciplinaire d'Études Juridiques*, 2013, vol. 71, no. 2, p. 160.

with Tallgren's ponderings, there would appear to be support. The ICC's Rome Statute itself, in its Preamble, declaims that "during this century millions of children, women and men have been victims of unimaginable atrocities that deeply shock the conscience of humanity".<sup>298</sup> It then implies that one of the ICC's mandates is to remove such threats to human security ("such grave crimes threaten the peace, *security* and well-being of the world").<sup>299</sup>

Consistent with this, and much more than the other international criminal tribunals that preceded it, the ICC is quite victim-focused.<sup>300</sup> Unlike the *ad hoc* Tribunals, for example, victims actually have standing in their own right at the ICC.<sup>301</sup> According to the Rome Statute, the ICC must "permit [victims'] views and concerns to be presented and considered at stages of the proceedings determined to be appropriate by the Court".<sup>302</sup> Victims have a right to be heard, as well as to speak: the prosecutor and judges must consider victims' interests in making a range of decisions, including whether to initiate an investigation into particular allegations and whether to bring charges.<sup>303</sup> Moreover, the Rome Statute provides for a Trust Fund for Victims as a tool through which the victims of crimes before the Court can be compensated for damages suffered.<sup>304</sup>

There is also preliminary support for this victim-centric, security-focused approach in the international criminal law literature. In her paper "The International Criminal Court as a Human Security Agent", Lauren Marie Balasco proposes that the ICC "was born from the human security community" and is considered a part of the "human security agenda".<sup>305</sup> But she laments that the ICC may be reluctant in embracing "its role as a human security agent" based on its tendency to "dismiss such responsibil-

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<sup>298</sup> Statute of the International Criminal Court, 17 July 1998, in force 1 July 2001, Preamble ([www.legal-tools.org/doc/7b9af9/](http://www.legal-tools.org/doc/7b9af9/)) ('Rome Statute').

<sup>299</sup> *Ibid.* (emphasis added).

<sup>300</sup> See Gregory S. Gordon, "Toward an 'International Criminal Procedure, Due Process Aspirations and Limitations'", in *Columbia Journal of Transnational Law*, 2007, vol. 45, p. 696.

<sup>301</sup> *Ibid.*

<sup>302</sup> Rome Statute, Article 68(3), see *supra* note 298; Gordon, 2007, p. 696, see *supra* note 300.

<sup>303</sup> Rome Statute, Articles 53(1)(c) and (2)(c), see *ibid.*; Gordon, 2007, p. 696, see *ibid.*

<sup>304</sup> Rome Statute, Articles 75, 79, see *ibid.* See Peter G. Fischer, "The Victims' Trust Fund of the International Criminal Court: Formation of a Functional Reparations Scheme", in *Emory International Law Review*, 2003, vol. 17, pp. 189–90.

<sup>305</sup> Lauren Marie Balasco, "The International Criminal Court as a Human Security Agent", in *Praxis - The Fletcher Journal of Human Security*, 2013, vol. XXVIII, p. 46.

ities as outside its purview”.<sup>306</sup> For the Court to “ensure that its mission of achieving justice is done without diminishing the security of the very people it seeks to represent”, Balasco urges “scholars and policymakers [...] to take into account this [security] origin when assessing the Court’s role”.<sup>307</sup> It is hoped this chapter will make a valuable contribution in that regard.

Foucault alludes to the Treaty of Westphalia in *Security, Territory, Population*.<sup>308</sup> And he suggests that governmentality, conceptually predicated on beneficent exercise of State authority, is bound up in the notion of sovereignty reified in the epochal 1648 peace agreement.<sup>309</sup> But does the international extension of governmentality as envisaged in this chapter, plausibly germinating from the theory’s genetic code, provide perhaps another glimpse of Westphalia’s entropy in the modern world? If so, might this have troubled Foucault in any way? Perhaps one need only consider the time-machine hypothetical of ‘human security’ being proposed to the young homosexual living under the apocalyptic spectre of Nazi occupation and all its attendant criminality. One doubts the young Paul-Michel could have imagined his future philosophy being put to any better use.

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<sup>306</sup> *Ibid.*

<sup>307</sup> *Ibid.*, pp. 46-47.

<sup>308</sup> Foucault, 2009, p. 377, see *supra* note 112.

<sup>309</sup> *Ibid.*



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