Philosophical Foundations of International Criminal Law: Legally-Protected Interests

Morten Bergsmo, Emiliano J. Buis and SONG Tianying (editors)

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Front cover: *View of internal courtyard of the orphanage Ospedale degli Innocenti in Florence. Established in 1419 by the local silk workers guild, it is an early example of secular resolve to elevate concern for the survival and security of vulnerable children, a value shared with the authorities of Florence and religious institutions. Facing serious environmental threats six centuries later, this anthology argues that the equally-fundamental values of humankind's survival and unity should be given elevated recognition also by international criminal law.*

Back cover: *Binding ancient steps on the flight of stairs leading up to the enclosed landing of the fifteenth century Convent of St. Francis in Fiesole outside Florence. By metaphor, this book discusses how we can bind a fractured humankind also with the hands of international criminal justice. All volumes in this Publication Series display a picture of publicly accessible ground on the back cover.*

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ἐκ τῶν διαφερόντων καλλίστην ἁρμονίαν.
"from what is different emerges the most beautiful harmony"
Heraclitus, frag. 22 B8 DK (Aristotle, EN VII,1 1155b4).

PREFACE BY THE EDITORS

It was with pleasure and modesty that we submitted this volume to the Torkel Opsahl Academic EPublisher ('TOAEP') for publication. It concerns a difficult topic: what the main interests or values protected by international criminal law are and how they should be supplemented. The discourse should not be constrained to recognition of ecocide or other contenders as the next core international crime. Nor should the discussion be dominated by a small group of gatekeepers who may have participated in the making of the provisions in the Statute of the International Criminal Court on subject-matter jurisdiction. An inclusive, broad discourse is called for. It should not be limited to interests or values that could alone constitute the centre of a new international crime as such. And we should turn every stone to ensure that participants from outside the Western European and Other States Group ('WEOG') can play a prominent role. We firmly believe that new international criminal law-making should be genuinely representative of humankind.

It has been a pleasure for us to work on an anthology with a total of thirteen authors from diverse backgrounds, including China, India, Latin America, the Middle East, Nigeria and WEOG countries. With nine chapters, this first edition is not a comprehensive anthology, but it is the third volume in the series *Philosophical Foundations of International Criminal Law*. The three volumes together contribute 37 chapters by 45 authors (selected through a public call for papers), organized in three thematic clusters and volumes: *Correlating Thinkers* (2018), [1] *Foundational Concepts* (2019),[2] and now *Legally-Protected Interests* (2022). A form of history of ideas of international criminal law, *Correlating Thinkers* seeks to broaden the spectrum of sources we draw from to fertilise new ideas and perspectives. The second volume, *Foundational Concepts*, focuses on select doctrinal categories on which the discipline of international criminal law is

[1] Morten Bergsmo and Emiliano J. Buis (eds.), *Philosophical Foundations of International Criminal Law: Correlating Thinkers*, TOAEP, Brussels, 2018, 804 pp. (the book is freely available at http://www.toaep.org/ps-pdf/34-bergsmo-buis).

[2] Morten Bergsmo and Emiliano J. Buis (eds.), *Philosophical Foundations of International Criminal Law: Foundational Concepts*, TOAEP, Brussels, 2019, 333 pp. (the book is freely available at http://www.toaep.org/ps-pdf/35-bergsmo-buis).

based. Both should be expanded in subsequent editions that we hope to release. The present *Legally-Protected Interests* turns to the values that we aspire to protect through the core international crimes or international criminal law instruments, documents, mechanisms or related arenas of value affirmation. First describing central existing values in Chapters 2 and 3, authors proceed in subsequent chapters to zoom in on values or interests that should receive a greater measure of recognition by international criminal law, such as 'reconciliation', 'solidarity' and 'unity of humankind'.

Lawyers and diplomats may well feel that these are 'big questions', somewhat distant from their day-to-day work. They are nevertheless important as questions that go beyond the growing polarisation between rival 'great powers' – questions that can unite actors in a common, forward-looking endeavour. It was in this spirit that the project-conference that has produced the three volumes was held at the Indian Law Institute in New Delhi, with funding from the Norwegian Ministry of Foreign Affairs and the International Nuremberg Principles Academy. The project has been academically led by the Centre for International Law Research and Policy (CILRAP), in co-operation with several partner institutions, including the 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 at the University of Cologne.

We thank these partners and supporters, as well as the patient authors who have contributed their precious time and energy. We also thank Antonio Angotti and Rohit Gupta of the TOAEP Editorial Team, and CILRAP Fellows Devasheesh Bais and Medha Damojipurapu for their contributions to the copy-editing and production of the book.

Morten Bergsmo
Emiliano J. Buis
SONG Tianying
Co-Editors

TABLE OF CONTENTS

Preface by the Editors i

1. Protected Interests in International Criminal Law 1
By Morten Bergsmo, Emiliano J. Buis and SONG Tianying

1.1. Scope of Inquiry 1
1.2. Community Interests and International Law 5
1.3. The Concept of Legal Interests as an Analytical Tool in International Criminal Law 11
1.4. What Are (Should Be) the Legal Interests Protected Under International Criminal Law? 13
1.4.1. International Peace and Security 17
1.4.2. Humanity and Collectivity 21
1.4.3. Solidarity, Unity and Harmony 27
1.5. Community Interests as Aims and Purposes of International Criminal Law: Status and Prospects 40

2. The Legal Interests Protected by War Crimes 57
By SONG Tianying

2.1. Introduction 57
2.2. Between Internationally Prescribed Rules of Municipal Law and Crimes under International Law 58
2.2.1. Normalisation of Penal Sanctions as a Means of Protecting Interests in Humanitarian Treaties 59
2.2.2. *Ad Hoc* Accountability Processes and the International Criminal Court 67
2.3. Criminalisation Criteria and Legal Interests 75
2.3.1. The Ordinary Domestic Crime Analogy 76
2.3.2. Dichotomy of War and Peace: Protection of Legal Interests in Armed Conflict 79
2.3.3. Additional Interests Violated by War Crimes of Policy or Large Scale 82
2.4. Conclusion 83

3. The Legal Good of 'Humanity' Protected by Crimes Against Humanity 85
By Susan R. Lamb

3.1. Introduction 85
3.2. The Notion of 'Humanity' 87
3.3. In What Sense Is 'Humanity' a Fundamental Interest upon Which Crimes Against Humanity Are Based? 88
3.3.1. 'Humanity' as a Means of Differentiating Crimes Against Humanity from Other International Crimes 90
3.3.2. 'Humanity' as a Jurisdictional Trigger 90
3.3.3. Crimes Against Humanity Create Externalities Beyond Borders 91
3.3.4. Conduct That Is Inhumane 91
3.3.5. Crimes Against Humanity as Particularly Grave Crimes 92
3.3.6. Crimes Against Humanity as Crimes That Harm All Humankind 93
3.3.7. 'Humanity' as a Normative Constraint and Guide to Future Conduct 96
3.3.8. Crimes Against Humanity as Collective Crimes That Have Individuals at Their Core 96
3.3.9. Crimes Against Humanity as a Corruption of Politics or Abuse of Sovereignty 97
3.4. How Are These Notions of 'Humanity' Reflected in the Development of Crimes Against Humanity in Positive Law? 98
3.4.1. Nuremberg, Tokyo and Their Precursors 98
3.4.2. The *Ad Hoc* International Criminal Tribunals 103
3.4.3. The International Criminal Court 109
3.4.4. Hybrid or Internationalized Courts and Tribunals 111
3.4.5. Enumerated Offences 112
3.5. Conclusion 114

4. Legal Goods in International Criminal Law 117
By Ioanna N. Anastasopoulou

4.1. The Protection of Legal Goods in Criminal Law 117
4.1.1. *Rechtsgut*: The Dominant Theory in Germanic Systems 117
4.1.2. Harm and Endangerment of a Legal Good 119
4.1.3. Individual and Collective Legal Goods 121
4.1.4. Abstract or Real Legal Goods? 123
4.1.5. The Analytic Power of the *Rechtsgut* Concept 125

4.2. The Importance of the Concept of Legal Goods in International Criminal Law 127
4.2.1. The Collective Reach of the International Criminal Law 127
4.2.2. The Violation of Internationally Recognized Personal Goods 131
4.2.3. The International Nature of ICC Crimes 132
4.2.4. The Theory of Legal Goods under International Criminal Law 134
4.2.5. Global Solidarity as a Collective Legal Good Protected by International Criminal Law 136

5. 'Reconciliation' as a Philosophical Foundational Concept in International Criminal Law 139
By David Baragwanath

5.1. Introduction 139
5.2. Contention 143
5.3. Approach 149
5.4. Concepts of Reconciliation: Some Context 150
5.5. Why Has Reconciliation Not Been Recognised as the Basis of International Criminal Law? 159
5.5.1. Some Examples 160
5.5.2. Other Opinions 162
5.6. Reconciliation and War 168
5.7. Reconciliation as a Legal Term of Art 176
5.8. Reconciliation and Judicial Process 178
5.8.1. Transitional Justice 178
5.8.2. Reconciliation in International Criminal Law 185
5.9. Some Reflections on how the Discipline of International Criminal Law Might Evolve 206
5.9.1. Terrorism 206
5.9.2. The Environment 209
5.9.3. Research and the International Court of Justice 209
5.9.4. Ultimate 211
5.10. Conclusion as to Reconciliation and International Criminal Law 211

6. On 'Unity' as an Emerging Legal Interest in International Criminal Law 225
By Salim A. Nakhjavani and Melody Mirzaagha

6.1. Why Legal Interests Matter 225

6.2. Identifying Emerging Legal Interests Should Be about Reading Reality, Not Magic 226
6.3. Explicit References to 'Unity' in Texts Related to International Criminal Law Offer a Spectrum of Conceptions of the Term 227
6.4. 'Unity' in Which Society? 235
6.5. 'Unity' and Social Evolution Are Interdependent Processes: Both Depend on a Species-Consciousness 237
6.6. 'Unity' as a Foundational Value in Sentencing and Reparations Decisions 239
6.7. 'Unity' as a Foundational Value in Threshold Decisions on Aggression? 243
6.8. What Are Some Implications of Recognising an Emerging Legal Interest of 'Unity' in International Criminal Law? 245

7. Forging a Modern African Perspective on 'Unity' as a Collective Legal Interest in International Criminal Law 247
By Kafayat Motilewa Quadri, Vahyala Kwaga and Tosin Osasona

7.1. Introduction 247
7.1.1. Theoretical Framework 251
7.1.2. What Are Legal Goods or Interests? 258
7.1.3. Individual and Collective Legal Goods in International Criminal Law 260
7.2. 'Unity' and Collectiveness in Communitarianism 262
7.2.1. Menkiti and Mbiti on Personhood and Community 264
7.2.2. Individualism: The Movement from Personhood to Community 268
7.2.3. Singaporean Communitarianism: The Personhood/Community Stance That Makes No Movement at All 271
7.2.4. The Western and African Divide 273
7.3. Neo-Communitarianism 274
7.4. 'Unity' as a Collective Legal Good for International Criminal Law 276
7.5. Conclusion 281

8. Humanity and Unity: Indian Thought and Legal Interests Protected by International Criminal Law 283
By Surabhi Sharma

8.1. Fundamental Legal Interests 286

8.1.1. Traces of the Concept of Legally-Protected Interests in International Criminal Law 287
8.2. 'Humanity' as a Legally-Protected Interest 288
8.3. 'Humanity' in Indian Philosophy 290
8.4. 'Unity' as a Value Protected by Indian Philosophy 294
8.4.1. '*Aham Brahman Asmi*' – I Am Brahman 295
8.4.2. The Hymn of Creation 297
8.4.3. The Operation of '*Māyā*' 298
8.4.4. The Universe and All Its Inhabitants as a Manifestation of Brahman 299
8.4.5. Correlating with the Legal Interest Test 303
8.5. Some Tentative Remarks on Advantages of Elevating 'Unity' to a Legally-Protected Interest from an Indian Perspective 304
8.6. Within the Reparative Justice Framework 306
8.6.1. Victims and the Reunification of Affected Communities 306
8.6.2. The Van Boven and Bassiouni Principles 308
8.6.3. Repairing Societies 309
8.7. The Significance of International Criminal Law Recognizing Foundational Indian Notions 311

9. Unity and Disunity in International Criminal Justice 313
By Rod Rastan

9.1. Introduction 313
9.2. Foundational Concepts and Fundamental Values 316
9.3. 'Unity' as Rationale for the Creation of the International Criminal Court 323
9.4. 'Unity' as a Rationale for the Jurisdiction *Ratione Materiae* of the ICC and Its Role in Restoring and Maintaining Social Order 338
9.5. 'Unity' as an Organising Principle for Enforcement 347
9.6. Disunity 354

Index 369
TOAEP Team 379
Other Volumes in the Publication Series 381

1

Protected Interests in International Criminal Law

Morten Bergsmo, Emiliano J. Buis and SONG Tianying*

quod omnes similiter tangit ab omnibus comprobetur
"What concerns all equally, must be approved by all"
JUSTINIAN, Codex 5, 59, 5

1.1. Scope of Inquiry

As a general framework, law is intended to provide institutional protection of important interests in most societies. In many ways, law reflects the value system of a society, since interests or values inform the creation, interpretation, application and evaluation of legal norms. This is why, when examining legal rules and standards, it is important to explore the relationship between those norms and their aggregated moral or value content. With this idea in mind, our effort to reconstruct central interests or values embodied in international criminal law[1] is both analytical and normative. It is analytical because it must be rooted in positive criminal law as a "particular kind of human practice";[2] it is normative because it seeks to discern coherent values and ends that criminal law pursues or should pursue. A 'turn to values' therefore links rational theorizing of the law to moral and political phi-

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1 We will sometimes use the abbreviation 'ICL' for international criminal law in this chapter.

2 R.A. Duff and Stuart Green, "Introduction: Searching for Foundations", in R.A. Duff and Stuart Green (eds.), *Philosophical Foundations of Criminal Law*, Oxford University Press, 2011, p. 5.

losophy, in a pursuit to comprehend the basis on which legal efforts are (and should be) built.[3]

Embedded in a moral landscape which defines its purposes, international criminal law is largely a self-contained regime of international law created to increase compliance with its proscriptions, primarily by implying reduced impunity for violations through the imposition of punishment. Its international enforcement comes into play when national jurisdictions are generally unable or unwilling to prosecute individuals who are accused of having committed the most serious and heinous crimes. As a result of its reactive history as a legal discipline emerging in response to the excesses of World War II, and the diplomatic nature of the negotiations leading to the statute for the creation of a first permanent international criminal tribunal, focus has been placed on the identification of the *conduct* that can amount to crimes. During almost 80 years of international criminal law-making, there has been considerable awareness of the potential harm of excessively violent conduct during armed conflict, attacks directed against civilian populations or similar situations of mass-use of force. However, it is fair to say that less attention has been paid to the specific *values* or *interests* that the proscriptions of the harmful conduct – the core international crimes: war crimes, crimes against humanity, genocide and aggression – seek to protect.

We have reached a stage in the evolution of international criminal law that seems to be characterised by (a) will to consolidate the normative and institutional gains made, (b) attempts by a growing variety of actors to apply international criminal law standards in different conflict situations, (c) polarisation of positions on some frontline issues (such as the use of universal jurisdiction and the crime of aggression), (d) a rich critical discourse that increasingly challenges complacency regarding risks of selective justice and inadequate respect for integrity and quality-control within international criminal justice institutions, and (e) signs of growing interest in further development of international criminal law to protect our planet's natural environment and atmosphere. Problems such as man-made degradation of the environment may be convenient catalysts to international criminal law-making. The threat to our common atmosphere and seas is obvious for all to see, and the 'global North' (China included) cause the greatest harm (so criminalization initiatives may not easily be rebuffed as post-colonial).

[3] *Ibid.,* p. 7.

In the past, we have faced situations where the main perpetrator group has inadvertently set the agenda for international criminalization efforts insofar as the latter have been reactive, responding to the blameworthy conduct. For example, the ways the Nazis used force with horrendous excess largely determined the subject-matter jurisdiction of the International Military Tribunal at Nuremberg. Ideally, common sense, not war criminals, should guide efforts to refine international criminal law.

Obviously, forward-looking international law-making is also susceptible to the risk of instrumentalisation by powerful states and transgovernmental networks, but perhaps less so than by victorious allies in the immediate aftermath of a war. Proactive deliberation both poses risks and offers opportunities. It should encourage more careful reflection and analysis, and also facilitate broader participation in law-making, in particular from populous non-Western countries such as China, India, Indonesia and Nigeria. Their influence on international law-making may not yet be commensurate with the size of their populations. This is ultimately a question of democratic representation that can hardly be sacrificed on the altar of 'great-power' rivalry – it will tend to come back until it is recognized and addressed. International criminal law should evolve further in response to real and contemporary common problems. This recognition provides an opportunity to draw genuinely on representative concerns and aspirations, and thus to depolarise. Normally, a deliberative, prospective approach offers more time and opportunity to raise systemic questions that may sometimes benefit from theoretical reflection.

As a matter of fact, the present anthology is the third in a series produced by the research project 'Philosophical Foundations of International Criminal Law'.[4] The first volume – *Philosophical Foundations of Interna-*

[4] See the online symposium 'Philosophical Foundations of International Criminal Law' (https://www.cilrap.org/philosophical-foundations/) for detailed information on the project and its work products. The project has been led by the Centre for International Law Research and Policy (CILRAP), 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, with funding from the Norwegian Ministry of Foreign Affairs and the International Nuremberg Principles Academy.

tional Criminal Law: Correlating Thinkers (2018)[5] – invites us to revisit some well-recognized political and other thinkers, exploring and correlating their main thoughts with the foundations of contemporary international criminal law. More than a mere history of ideas, such cross-fertilisation holds the promise of broadening the discourse and may offer fresh perspectives in an emerging sub-discipline of philosophy of international criminal law. The second volume – *Philosophical Foundations of International Criminal Law: Foundational Concepts* (2019)[6] – identifies and discusses some doctrinal building blocks that may be considered as foundational to the discipline of international criminal law. Not nearly exhaustive, we would like to expand both volumes with more thinkers and concepts, respectively, in future editions. The present, third volume in the series supplements the earlier correlational and doctrinal analyses with discussions of fundamental interests or values protected by international criminal law, inseparable from its specific aims.

One of our motivations in pursuing such a multi-year project has been our belief that theoretical approaches can sometimes create constructive common ground where actors from different, increasingly polarised, backgrounds can unite in a common concern to strengthen and develop further international criminal law, transcending rivalries and contestation between governments. Accordingly, among the contributors to the present volume you find experts from the Anglosphere and Europe as well as China, India and Nigeria, and the regions of Latin America and the Middle East. We could probably have done better, but readers will note that this anthology only has nine chapters by thirteen authors selected pursuant to a public call for papers and through the proceedings of a project-conference in New Delhi (25-26 August 2017).

This Chapter 1 will, in Section 1.2., focus on the importance of 'community interests' in international law, in order to explain to what extent the existence of shared interests can contribute to the efficacy of international justice. Section 1.3. discusses the notion of 'legally-protected interests' or goods and related domestic terms such as '*Rechtsgut*' or '*retts-*

[5] Morten Bergsmo and Emiliano J. Buis (eds.), *Philosophical Foundations of International Criminal Law: Correlating Thinkers*, Torkel Opsahl Academic EPublisher ('TOAEP'), Brussels, 2018, 804 pp. (http://www.toaep.org/ps-pdf/34-bergsmo-buis).

[6] Morten Bergsmo and Emiliano J. Buis (eds.), *Philosophical Foundations of International Criminal Law: Foundational Concepts*, TOAEP, Brussels, 2019, 333 pp. (http://www.toaep.org/ps-pdf/35-bergsmo-buis).

gode' as an analytical tool for principled criminalization. In light of the importance of collective values, Section 1.4. identifies community interests that are (and should be) underlying contemporary international criminal law. These interests include 'international peace and security' (1.4.1.), 'humanity' (1.4.2.), and other values and interests that are mentioned in this volume, such as 'solidarity', 'unity' or 'harmony' (1.4.3.). This allows us to think further about the need to identify universally shared values and ideals that could contribute to a stronger foundation of international justice (1.5.).

1.2. Community Interests and International Law

The concept of 'legally-protected interests' is used in international law generally.[7] There have been extensive efforts to map community interests in positive international law.[8] Terms such as 'community interests',[9] 'common interests',[10] 'collective interests'[11] and 'interests of humanity'[12]

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7 See, for example, International Court of Justice ('ICJ'), *"Barcelona Traction, Light and Power Company, Limited" (Belgium v. Spain)*, Judgment, 5 February 1970, ICJ Reports 3, para. 33 (https://www.legal-tools.org/doc/75e8c5/).

8 See, for example, Bruno Simma, *From Bilateralism to Community Interest in International Law*, Collected Courses of the Hague Academy of International Law, vol. 250, Martinus Nijhoff, The Hague, 1994; Giorgio Gaja, *The Protection of General Interests in the International Community*, Collected Courses of the Hague Academy of International Law, vol. 364, Brill, The Hague, 2011; Ulrich Fastenrath, Daniel-Erasmus Khan, Sabine von Schorlemer and Andreas Paulus (eds.), *From Bilateralism to Community Interest: Essays in Honour of Bruno Simma*, Oxford University Press, 2011; Cedric Ryngaert, *Unilateral Jurisdiction and Global Values*, Eleven International Publishing, The Hague, 2015; Wolfgang Benedek, Koen De Feyter, Matthias C. Kettemann and Christina Voigt (eds.), *The Common Interest in International Law*, Intersentia, Antwerp, 2014; Eyal Benvenisti and Georg Nolte (eds.), *Community Interests Across International Law*, Oxford University Press, 2018; Vera Gowland-Debbas, "Judicial Insights into Fundamental Values and Interests of the International Community", in A.S. Muller, David Raič and J.M. Thuránszky (eds.), *The International Court of Justice: Its Future Role After Fifty Years*, Martinus Nijhoff, The Hague, 1997, pp. 327-366; Pierre-Marie Dupuy, "Some Reflections on Contemporary International Law and the Appeal to Universal Values: A Response to Martti Koskenniemi", in *European Journal of International Law*, 2005, vol. 16, no. 1, pp. 131-137; Erika de Wet, "The Emergence of International and Regional Value Systems as a Manifestation of the Emerging International Constitutional Order", in *Leiden Journal of International Law*, 2006, vol. 19, no. 3, pp. 611-632; Santiago Villalpando, "The Legal Dimension of the International Community: How Community Interests Are Protected in International Law", in *European Journal of International Law*, 2010, vol. 21, no. 2, pp. 387-419.

9 Isabel Feichtner, "Community Interest", in Rüdiger Wolfrum (ed.), *Max Planck Encyclopedia of International Law*, Oxford University Press, 2008, p. 2.

10 Benedek, De Feyter, Kettemann and Voigt (eds.), 2014, see *supra* note 8.

11 Feichtner, 2008, see *supra* note 9.

have been used. Community interests are important for both the identification and understanding of international legal norms. They are intrinsic to concepts such as *jus cogens*, general principles, and obligations *erga omnes*.[13] At the same time, we see that community interests are also invoked in discussions on aims and purposes of particular rules.[14] Notions of community interests can be used to both describe positive law and assess the legitimacy of law.

The idea that some common interests exist can be helpful to rethink international law beyond its traditional state-centrism, which has tried to place at the centre of international order the idea of 'sovereignty' as the key characteristic regulating normativity among nations. The idea that there are interests that go well beyond the realm of a modern state's particular domain is relevant and has been infused by the emergence of human rights law, contributing to states no longer being seen as the exclusive subjects of a global normative system.

As we have seen, 'community interests' are frequently invoked, but not precisely defined. This would seem to be deliberate, as the concept has not been created out of "scientific abstraction", but emerges in the "recognition of concrete problems".[15] Conceptions of 'community interests' are derived from observations of positive international law and practice as well as from discussions of widely-recognized problems that we face, more so

[12] ICJ, *"Gabčíkovo-Nagymaros Project" (Hungary v. Slovakia)*, Judgment, 25 September 1997, ICJ Reports 7, p. 118 (separate opinion of Vice-President Weeramantry) (https://www.legal-tools.org/doc/e45b69/).

[13] See, for example, Gaja, 2011, see *supra* note 8, in his Chapter III ("Identifying the protection of general interests through principles and rules of general international law"); Samantha Besson, "Community Interests in the Identification of International Law: With a Special Emphasis on Treaty Interpretation and Customary Law Identification", in Benvenisti and Nolte (eds.), 2018, see *supra* note 8, pp. 36-49; James Crawford, "Responsibility for Breaches of Communitarian Norms: An Appraisal of Article 48 of the ILC Articles on the Responsibility of States for Internationally Wrongful Acts", in Fastenrath, Khan, von Schorlemer and Paulus (eds.), 2011, see *supra* note 8, pp. 224-240.

[14] Samantha Besson, "Community Interests in International Law: Whose Interests Are They and How Should We Best Identify Them?", in Benvenisti and Nolte (eds.), 2018, see *supra* note 8, pp. 50-69.

[15] See Simma, 1994, see *supra* note 8, p. 235. See also Jean-François Marchi, "Bien commun et droit international", in *Les Cahiers Portalis*, 2017/1, no. 4, pp. 53-67, on pp. 57-62. Sarah Thin examines approaches to concepts of community interest and international community in legal practice in "In Search of Community: Towards a Definition of Community Interest", in Gentian Zyberi (ed.), *Protecting Community Interests Through International Law*, Intersentia, Antwerp, 2021.

than from *a priori* principles. Relatedly, the term 'international community' holds "an ideological function"[16] in international law and practice. It can be used to connote different subjects.[17] It is commonly appropriated by state actors to mean the community of states. It is frequently used to denote states, non-state actors and individuals combined, especially by civil society actors. But 'international community' could in principle also mean the wider collective of 'mankind' or 'humankind'. Most authors, however, would not limit 'community interests' to interests held by the international community of states.[18] Habermas, for example, proposes a world community of states and citizens, where the former remain the prominent actors in the global legal order, while individuals are "actual bearers of the status of world citizen".[19]

Opinions are divided as to whether the scope of 'community interests' in international law should be limited to universal interests. Bruno Simma, for example, has expressed the view that 'community interests' should be reduced to fundamental values which concern all states.[20] To him, 'community interests' express and support "universally held moral beliefs" ,[21] and "correspond to the needs, hopes and fears of all human beings, and attempt to cope with problems the solution of which may be decisive for the survival of entire humankind".[22] Isabel Feichtner, on the other hand, includes non-universal interests which transcend national interests, in

16 Simma, 1994, see *supra* note 8, p. 248.

17 See, for example, Andreas Paulus, "International community", in *Max Planck Encyclopedia of International Law,* online, 2013; William E. Conklin, "The Peremptory Norms of the International Community", in *European Journal of International Law*, vol. 23, no. 3, pp. 837-861; Simma, 1994, see *supra* note 8, pp. 243-248; de Wet, 2006, see *supra* note 8. Steven Roach reviews international lawyers' approaches to this concept in Steven R. Ratner, "Conceptual Groundwork for a Standard of Global Justice", in Steven R. Ratner (ed.), *The Thin Justice of International Law; A Moral Reckoning of the Law of Nations*, Oxford University Press, 2015, pp. 42-63.

18 Simma, 1994, see *supra* note 8, p. 233; Feichtner, 2008, *idem* n. 5; Wolfgang Benedek, Wolfgang Benedek, Koen De Feyter, Matthias C. Kettemann and Christina Voigt, "Conclusions: The Common Interest in International Law – Perspectives for an Undervalued Concept", in Benedek, De Feyter, Kettemann and Voigt (eds.), 2014, see *supra* note 8, pp. 219-226, on p. 219; Gaja, 2011, see *supra* note 8, pp. 20–22.

19 Jürgen Habermas, *The Divided West*, Polity Press, London, 2006, p. 135.

20 Simma, 1994, see *supra* note 8, p. 233.

21 *Ibid*., p. 249.

22 *Ibid*., p. 244.

which case 'community' only comprises those concerned.[23] While Simma and Feichtner rely on different scopes of 'community interests', their illustrations of the category overlap significantly.[24] Feichtner divides community interests into four types: those in (a) the protection and creation of common goods;[25] (b) the protection of common values;[26] (c) the internationalisation of common spaces; and (d) redistributive and inter-generational justice. Her examples of 'community interests', as noticeable from the categories that have been suggested, are universal in their nature. The table below summarises examples given by her for each category:[27]

[23] Feichtner, 2008, see *supra* note 9; Besson, 2018, see *supra* note 13, pp. 39-40.

[24] Simma, 1994, see *supra* note 8, pp. 236-244.

[25] On common goods, see also Fabrizio Cafaggio and David D. Caron, "Global Public Goods amidst a Plurality of Legal Orders: A Symposium", in *European Journal of International Law*, 2012, vol. 23, no. 3, pp. 643-649.

[26] See also, Daniel Bodansky, "What's in a Concept? Global Public Goods, International Law, and Legitimacy", in *European Journal of International Law*, 2012, vol. 23, no. 3, pp. 651-668, on p. 653: "human rights norms provide a private benefit to the individuals concerned, but they also provide public benefits to the international community"; Gregory Shaffer, "International Law and Global Public Goods in a Legal Pluralist World", in *European Journal of International Law*, 2012, vol. 23, no. 3, pp. 669–693, on p. 682: "The right to life and human dignity can be viewed as yet another affected public good to the extent that it affects our moral sensibilities".

[27] Feichtner, 2008, see *supra* note 9.

Type of community interests:	**Protection and creation of common goods**	**Protection of common values**	**Internationalisation of common spaces**	**Redistributive and inter-generational justice**
Examples:	International peace and security.	Protection of nature and living resources: biological diversity (common concern of humankind).	The moon and other celestial bodies (common heritage of mankind).	Redistributive justice in relations between developed and developing countries (international solidarity): the principle of *common but differentiated responsibility* or provisions on *financial assistance*, *economic assistance*, *technical assistance* and *technology transfer.*
	Protection of environment: the protection of the ozone layer; climate change ("common concern of humankind").	Conservation of national or indigenous culture: protection of world cultural and natural heritage (world heritage of mankind).	Deep seabed and its resources; Antarctica and the high seas.	Intergenerational justice: *sustainable development.*
	A functioning legal system which creates security and predictability in international trade relations.	Human rights: Genocide Convention.		
		International criminal law: ICC Statute (concern to the international community as a whole).		

Table 1: Feichtner's four categories of 'community interests'.

Feichtner's examples of universal 'community interests' cover very different areas, such as the protection of the environment, common spaces, human rights, and equity among states. Each interest has its own normative structure, which justifies its importance beyond state borders. The approach to community interests is inductive and descriptive. There is no overarching normative framework to which a particular branch of 'community interests' could refer.[28] Nor are there comparative studies of the diverse 'community interests', of their commonalities, differences or connections to each other. This reflects a lack of common action or structure for different 'community interests' protected under separate regimes. Nevertheless, we contend that the emergence and advocacy of 'community interests' in a variety of areas support the common-sense idea that there are some challenges that cannot meaningfully be freely disposed of by individual states.

The 'community interests' discourse provides an important background for this anthology's approach to international criminal law, for several reasons. First, we can see that only a fraction of the 'community interests' are protected by contemporary international criminal law. Obviously, the classification of certain values as 'community interests' does not necessarily entail that they should be protected by international criminal law. Sensible criminalization should not only distinguish between national (or ordinary crimes) and core international crimes, but also between 'community interests' that need criminal law protection and those that do not. Second and relatedly, future criminalization may consider 'community interests' that are not currently protected by international criminal law. Third, analysis of protected interests in this area of law should take into account the indeterminacy and plurality[29] of 'community interests'. They conflict with each other and with other types of interests. There should therefore be no assumption of automatic prioritisation of certain 'community interests' over other such interests, or of 'community interests' over other interests.[30] Finally, the development of ICL-protected interests enriches the communi-

[28] See, for example, Benedek, De Feyter, Kettemann and Voigt (eds.), 2014, see *supra* note 8, pp. 219-221.

[29] Besson, 2018, see *supra* note 13, p. 37.

[30] *Ibid*.

ty-interest discourse by providing new courses of action within the regime of criminal law.[31]

1.3. The Concept of Legal Interests as an Analytical Tool in International Criminal Law

Besides 'community interests', the discourse on 'legally-protected interests'[32] in international criminal law may also be informed by domestic criminal law concepts such as '*Rechtsgut*' or '*rettsgode*'. The so-called '*Rechtsgutstheorie*' is an influential criminalization theory in several continental law countries.[33] The notion of '*Rechtsgut*' was probably coined by Johann Birnbaum in 1834, and it was soon incorporated by German authors who argued that, in order to be criminal, conduct needs to violate a protected legal good.[34] Although there has to some extent been heated discussion on whether the notion of '*Rechtsgut*' is useful in order to legitimise criminalization,[35] it has been argued that it serves a "heuristic" function:[36] it

[31] More on mechanisms to protect community interests, see Zyberi (ed.), 2021, see *supra* note 15.

[32] In this chapter we use protected 'interests' and 'values' interchangeably. Besson, 2018, see *supra* note 13, p. 38, argues that 'interests' and 'values' are closely connected terms. These two terms can mean different things in other contexts, as 'interests' can mean self-interest in a realist sense, while 'values' may represent moral goods. See also Jean D'Aspremont, "The Foundations of the International Legal Order", in *Finnish Yearbook of International Law*, 2007, vol. 18, pp. 219–255, who argues for an international legal order based on individual and common interests rather than global values.

[33] Carl Constantin Lauterwein, *The Limits of Criminal Law: A Comparative Analysis of Approaches to Legal Theorizing*, Ashgate, Surrey, 2010, p. 5, who reviews the German *Rechtsgutstheorie*. It is stated that '*Rechtsgutstheorie*' is similar to other continental European theories, such as '*valeur légale*' in France and '*valore legale*' in Italy. Its common law counterpart is the principle of 'harm', where the objects harmed are legally-protected interests (Albin Eser, "The Principle of 'Harm' in the Concept of Crime: A Comparative Analysis of the Criminally Protected Legal Interests", in *Duquesne University Law Review*, 1965, vol. 4, pp. 345-417). On '*Rechtsgutstheorie*' generally, see Markus Dubber, "Theories of Crime and Punishment in German Criminal Law", in *American Journal of Comparative Law*, 2006, vol. 53, pp. 679-707; Claus Roxin, "Crime Policy and the Criminal Law System", in Institute for Scientific Co-operation (ed.), *Law and State, A Biannual Collection of Recent German Contributions to the Fields*, vol. 6, 1972, pp. 32-59. Nina Peršak, *Criminalising Harmful Conduct: The Harm Principle, its Limits and Continental Counterparts,* Springer, New York, 2007, pp. 35-93, focuses on the harm principle, born in Anglo-American philosophy of criminal law, and its possible transplant to the continental legal debate on criminalization.

[34] Iwona Seredyńska, *Insider Dealing and Criminal Law: Dangerous Liaisons*, Springer, New York, 2011, pp. 192-195.

[35] The chapters in the anthology by Roland Hefendehl, Andrew von Hirsch and Wolfgang Wohlers (eds.), *Die Rechtsgutstheorie: Legitimationsbasis des Strafrechts oder dogmatisch-*

helps to answer the question "what kind of conduct should be declared criminal"[37] by identifying the legally-protected interests violated by the conduct. The identification of a legal good is a necessary – though not sufficient – condition for criminalization.[38] It has to be further established that criminalization serves the protection of the respective legal good.[39]

It is certainly not the intention of this chapter to promote transposition of a domestic '*Rechtsgut*'-debate onto international criminal law. The ordinary crime analogy is in many ways problematic for international criminal law.[40] Domestic criminal law theories may offer methodological and analytical assistance, so much is clear. But they should not be applied to international criminal law without imagination or pursuant to perceived rivalry between common and civil law actors. For example, in the domestic context collective legal goods usually protect the state and its institutions;[41] while for international criminal law, collective legal goods must be conceived of in a completely different way, for which the community-interest discourse becomes an important point of reference.

Several chapters in this anthology use the term 'legal interest' (a) to analyse criminalization criteria of existing core international crimes, or (b) to articulate additional interests, particularly 'community interests', that should in their view be recognized by international criminal law.

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es Glasperlenspiel?, Nomos, Baden-Baden, 2003, offer several views on the advantages and difficulties inherent in the need to identify proper 'legal goods' to build an efficient criminal legal system.

36 Tatjana Hörnle, "Theories of Criminalization", in Markus D. Dubber and Tatjana Hörnle (eds.), *The Oxford Handbook of Criminal Law*, Oxford University Press, 2014, pp. 679-701, on p. 686.

37 *Ibid*.

38 Mayeul Hiéramente, "The Myth of 'International Crimes': Dialectics and International Criminal Law", in *Goettingen Journal of International Law*, 2011, vol. 3, no. 2, pp. 551-588, on p. 563.

39 *Ibid*.

40 Miriam Aukerman, "Extraordinary Evil, Ordinary Crime: A Framework for Understanding Transitional Justice", in *Harvard Human Rights Journal*, 2002, vol. 15, pp. 39-98; Mark Osiel, "Why prosecute? Critics of punishment for mass atrocity", in *Human Rights Quarterly*, 2000, vol. 22, no. 1, pp. 118-141; M. Cherif Bassiouni, "The Normative Framework of International Humanitarian Law: Overlaps, Gaps and Ambiguities", in *Transnational Law and Contemporary Problems*, 1998, vol. 8, pp. 199-276.

41 See Ioanna Anastasopoulou, "Legal Goods in International Criminal Law", Chapter 4 below in this anthology.

If our concern is criminalization criteria, the history of international criminal law suggests that its creation and development are driven by contingent events.[42] Criminalization criteria can help to clarify justifications and limitations of the discipline. An analysis based on 'legal interests' distinguishes between crimes by tracing back to the interests or values they serve to protect.[43] To conceptually distinguish among international crimes, transnational and municipal crimes, international crimes are perceived to either (a) protect special legal interests which make them *international*; or (b) have special circumstances of violation of fundamental legal interests (for example, when the state cannot guarantee the protection of certain legal interests, the international community should intervene).[44]

1.4. What Are (Should Be) the Legal Interests Protected Under International Criminal Law?

The 'legal-interest approach' invites two questions. What are the distinct legal interests protected by the core international crimes? Why are they worthy of the protection granted by international criminal law? Several avenues could be followed in order to interpret and identify possible candidates of legal interests that either are or deserve to be considered for protection under international criminal law. From the very beginning of modern experiences of international trials, justifications have been contemplat-

42 See, for example, Morten Bergsmo, CHEAH Wui Ling and YI Ping (eds.), *Historical Origins of International Criminal Law: Volume 1*, TOAEP, Brussels, 2014 (http://www.toaep.org/ps-pdf/20-bergsmo-cheah-yi/); Morten Bergsmo, CHEAH Wui Ling and YI Ping (eds.), *Historical Origins of International Criminal Law: Volume 2*, TOAEP, Brussels, 2014 (http://www.toaep.org/ps-pdf/21-bergsmo-cheah-yi/); Morten Bergsmo, CHEAH Wui Ling, SONG Tianying and YI Ping (eds.): *Historical Origins of International Criminal Law: Volume 3*, TOAEP, Brussels, 2015 (http://www.toaep.org/ps-pdf/22-bergsmo-cheah-song-yi/); and Morten Bergsmo, CHEAH Wui Ling, SONG Tianying and YI Ping (eds.), *Historical Origins of International Criminal Law: Volume 4*, TOAEP, Brussels, 2015 (http://www.toaep.org/ps-pdf/23-bergsmo-cheah-song-yi/). See also Surabhi Sharma, "Humanity and Unity: Indian Thought and Legal Interests Protected by International Criminal Law", Chapter 8 in this anthology; Salim A. Nakhjavani and Melody Mirzaagha, "On 'Unity' as an Emerging Legal Interest in International Criminal Law", Chapter 6 below; and Ioanna Anastasopoulou, "Legal Goods in International Criminal Law", Chapter 4 below.

43 See Lauterwein, 2010, see *supra* note 33, p. 30.

44 Hiéramente, 2011, see *supra* note 38, p. 563, identifies similar types of legal good justifications. For a discussion on an integrative approach to core international crimes and transnational crimes, see Harmen van der Wilt and Christophe Paulussen (eds.), *Legal Responses to Transnational and International Crimes: Towards an Integrative Approach*, Edward Elgar Publishing, Cheltenham, 2017.

ed to support their extraordinary nature. These crimes were thought of as grave and serious enough to motivate external intervention by norm or jurisdiction, therefore responding to an illegal act committed against essential shared interests.

Thus, when Peter von Hagenbach was prosecuted in 1474 in what has been called the first international war crimes trial in history, the atrocities committed left no room for impunity.[45] Von Hagenbach was accused of several outrageous acts which he had performed while serving the Duke of Burgundy, in clear violation of imperial laws: murder without any prior judgment, perjury in relation to his previous oath to uphold the laws of Breisach, conspiracy to commit murder in relation to the supposed plot to expel and exterminate the local citizens, and rape.[46] The gravity of these crimes was immediately acknowledged, and a reference was made at the tribunal to the fact that (as indicated by the opening speech of the prosecutor Iselin), the defendant had "trampled under foot the laws of God and man".[47] Hagenbach's deeds had outraged all recognized notions of humanity and justice.

The attempted trial of Kaiser Wilhelm II at the end of World War I is also significant to understanding the underlying historical values involved in international penal prosecutions.[48] Despite the fact that the trial itself could not take place because the Kaiser was granted asylum in the Netherlands, the importance of this attempt as a first concrete step in the development of international criminal law should not be underestimated.[49] When

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45 Gregory S. Gordon, "The Trial of Peter von Hagenbach: Reconciling History, Historiography and International Criminal Law", in Kevin J. Heller and Gerry Simpson (eds.), *The Hidden Histories of War Crimes Trials*, Oxford University Press, 2013, pp. 13-49.

46 *Ibid*., p. 33.

47 Amable Guillaume Prosper Brugière de Barante, *Histoire des ducs de Bourgogne de la maison de Valois: 1364–1477*, Libraries Le Normant, Paris, 1854, vol. 9, p. 15; John Foster Kirk, *History of Charles the Bold, Duke of Burgundy*, J.P. Lippincott, Philadelphia, 1864, p. 435. See also Georg Schwarzenberger, *The Law of Armed Conflict,* Stevens and Sons, London, 1968, pp. 462–466, on p. 465. For an opposing view, see Hermann Heimpel, "Mittelalter und Nürnberger Prozeß", in *Festschrift Edmund E. Stengel: Zum 70. Geburtstag am 24. Dezember 1949 dargebracht von Freunden Fachgenossen und Schülern,* Böhlau, Münster, p. 450, n. 1, for whom such a statement was never pronounced by the prosecutor.

48 On this political and legal effort to try to take the Kaiser to justice, see the in-depth study by William A. Schabas, *The Trial of the Kaiser*, Oxford University Press, 2018.

49 Kirsten Sellars, "Trying the Kaiser: The Origins of International Criminal Law", in Bergsmo, CHEAH and YI (eds.), *Historical Origins of International Criminal Law: Volume 1*, 2014, see *supra* note 42, pp. 195-211. It should be noted that these efforts were part of a larger

the charges were discussed and decided among the victorious states, the United States President Woodrow Wilson, who had initially been against such a tribunal, agreed to include that the Kaiser would be taken to justice for the commission of a "supreme offense against international morality". This clause would then become the text of Article 227 of the Treaty of Versailles, which generated strong opposition by the Germans at the time. In its content, it seemed natural to include a reference to the common interest that had been affected by the actions of the German leader: "international morality" and the "sanctity of treaties". Once again, these first experiences of international criminal justice are heavily installed over a layer of extra-legal values which require protection when disturbed by particular actions. These values correspond both to the realm of ethics and to the order of religion, which inspire normative conduct even if well-recognized positive laws or statutes are absent.

The whole building of contemporary international law, as established after World War II, is organized pursuant to key concepts that provide the conceptual basis for its institutionalisation. The United Nations ('UN') Charter includes a number of collective values in the text of its Preamble and in the Purposes defined in Article 1. In the Preamble, for example, it seems clear that the main subject of rights are no longer the states, but the "Peoples of the United Nations": worried about the sorrowful effects of war on mankind, these "Peoples" are jointly determined to, among other ends, "reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small", and to "promote social progress and better standards of life in larger freedom". In order to achieve these objectives, reference is made to common values: tolerance, unity, international peace and security, and the promotion of advancement for everyone.

The Purposes, enshrined in Article 1, complement the general framework by acknowledging these same values that should endorse the activities of the UN:

chain of events that preceded the signing of the Treaty of Versailles; see Ziv Bohrer, "The (Failed) Attempt to Try the Kaiser and the Long (Forgotten) History of International Criminal Law: Thoughts Following the Trial of the Kaiser by William A Schabas", in *Israel Law Review*, 2020, vol. 53, no. 1, pp. 159-186.

> Article 1
>
> 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, and for the suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace;
> 2. To develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace;
> 3. To achieve international co-operation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion; and
> 4. To be a centre for harmonizing the actions of nations in the attainment of these common ends.

The insistence on the notions of "collective", "common" and "harmonizing" measures or ends reflects the reality that the international society needs some shared values in order to promote necessary dialogue with the aim of avoiding future war. The idea that the UN will only be able to consolidate a better world, safer and fairer, is governed by the recognition and identification of some fundamental interests, shared by all peoples, which need to be protected from every threat.

When the International Criminal Court ('ICC') Statute was adopted in 1998, a similar strategy was deployed. Its Preamble draws attention to existing values that are at the core of international justice: the unity of peoples by common bonds, the conscience of humanity, and the values of peace, security and well-being of the world are explicitly mentioned in the first paragraphs of the Statute. Although here the subject of the Preamble is described as the "States Parties" (not the "Peoples"), it is evident that the intention of creating a permanent International Criminal Court was to tackle the most serious crimes that are "of concern to the international community as a whole". Peace, security and the well-being of the world have been

identified as fundamental values of the international community.[50] There is a focus on the description of joint values that need to be ensured when the international society – not just sovereign states – assumes the challenge of administering worldwide justice in accordance with universal parameters.

1.4.1. International Peace and Security

As just described when quoting from the Preamble of the UN Charter and its Purposes statement in Article 1, 'international peace and security' are frequently invoked as fundamental community interests protected by the United Nations Organization and international law, including by core international crimes.[51] In the original architecture of the UN Charter, it is "the only common interest of the international community that could be guaranteed through the use of force".[52] This comes as no surprise as it is not the primary objective of the UN Charter alone: the Preamble of the 1919 Covenant of the League of Nations had listed achieving "international peace and security" as the Covenant's first objective of the high contracting parties.[53] The need to protect the value of 'international peace and security' may well be the primary reason why both the League of Nations and the United Nations Organization were created.

However, the law regulating use of armed force between states was not the same in 1919 and 1945. The International Court of Justice has referred

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50 Florian Jeßberger and Gerhard Werle, *Principles of International Criminal Law,* Oxford University Press, 2020, p. 38.

51 Kai Ambos, "The Overall Function of International Criminal Law: Striking the Right Balance Between the Rechtsgut and the Harm Principles: A Second Contribution Towards a Consistent Theory of ICL", in *Criminal Law and Philosophy*, 2015, vol. 9, no. 2, pp. 301-329, on p. 324. See Kai Ambos, Morten Bergsmo and Otto Triffterer, "Preamble", in Kai Ambos (ed.), *Rome Statute of the International Criminal Court: Article-by-Article Commentary*, 4th ed., Beck/Hart/Nomos, Munich, 2022, para. 11; Enzo Cannizzaro, "Common Interests of Humankind and the International Regulation of the Use of Force", in Benvenisti and Nolte (eds.), 2018, see *supra* note 8, pp. 419-422. The Draft Code of Crimes against the Peace and Security of Mankind, for example, only includes crimes which amount to a threat to international peace and security, see Report of the International Law Commission on the Work of its Forty-Eighth Session, UN Doc. A/51/10, 26 July 1996, p. 20 (https://www.legal-tools.org/doc/f6ff65/).

52 Cannizzaro, 2018, see *supra* note 51, p. 420, continuing: "Every other legally protected interest, of an individual or collective nature, remained deprived of this special form of protection" (*ibid.*); "international peace and security are overarching collective values that prevail over other conflicting interests" (p. 421).

53 Preamble, The Covenant of the League of Nations, 28 June 1919 (https://www.legal-tools.org/doc/106a5f/).

to the prohibition against the use of force as "a cornerstone of the United Nations Charter",[54] but the "decisive step toward a *ius contra bellum* was made only in 1928 with the Briand-Kellogg Pact", as explained by Claus Kreß: "This treaty-based prohibition of war quickly grew into customary international law because of its almost immediate more or less worldwide acceptance".[55] During World War II, it became clear that the value of 'international peace and security' – its restoration and maintenance – would need to be crystallised in the main regulating document of the emerging UN. In 1945, we got the prohibition on the use of force in Article 2(4) of the UN Charter, the fundamentally-important principle of non-use of force in international relations which "is anchored in customary international law".[56] Interestingly, this principle gives effect to several preambular paragraphs of the Charter, including the determination of UN Member States to "ensure, by the acceptance of principles and the institution of methods, that armed force shall not be used, *save in the common interest*".[57] Against this background, it should not be problematic to identify 'peace' as a key value which is shared by members of the international community.[58]

An argument sometimes presented is that the nature and gravity of core international crimes harm peace and security in the international community. The problem with such a general consequentialist argument, however, is that the causal relationship cannot easily be established. For example, some war crimes of small scale may not have such an effect while still satisfying the definition of war crimes. In turn, crimes against humanity can have quite a limited geographical scope but grave impact on the lo-

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54 ICJ, *Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, Judgment, 19 December 2005, ICJ Reports 2005, pp. 168, 223 (para. 148) (https://www.legal-tools.org/doc/8f7fa3/).

55 Claus Kreß, "The Ukraine War and the Prohibition of the Use of Force in International Law", Occasional Paper Series No. 13 (2022), TOAEP, Brussels, 2022, p. 2 (https://www.toaep.org/ops-pdf/13-kress/). He cites, *inter alia*, the Judgment of the International Military Tribunal at Nuremberg.

56 *Ibid*., p. 3.

57 Preamble, Charter of the United Nations, 26 June 1945, seventh preambular paragraph (italics added) (https://www.legal-tools.org/doc/6b3cd5/). It is in other words "in relation to the [value of] maintenance of international peace and security [that] the term 'common interest' has entered the Charter of the United Nations" (and become a Charter-term), see Christina Voigt, "Delineating the Common Interest in International Law", in Benedek, De Feyter, Kettemann and Voigt (eds.), 2014, see *supra* note 8, p. 16.

58 Cecilia M. Bailliet, "Peace is the Fundamental Value that International Law Exists to Serve", *Proceedings of the ASIL Annual Meeting,* 2017, vol. 111, pp. 308-312.

cal population. Where peace and security are not only international, but also include peace within a state, the threshold is lower.[59] If one follows this line of reasoning, it is not entirely clear how international peace is a value to be attributed to core international crimes in general, especially taking into account that criminalization and prosecution of such crimes do not always serve peace and can sometimes even destabilise the situation.[60]

We should therefore consider 'international peace and security' as interests protected by the crime of aggression specifically.[61] It may be the primary legal good protected by this core international crime, alongside the state interests of "territorial integrity or political independence of another State" as provided by Article 8*bis*(2) of the ICC Statute.[62] More so than these two interests, 'international peace and security', are arguably values held by the international community as a whole, not just the states.[63] Perhaps they are more than anything values of humankind and should come to

[59] See Ambos, 2015, see *supra* note 51, p. 324, on this "peaceful cohabitation of people".

[60] Hiéramente, 2011, see *supra* note 38, pp. 569-573.

[61] Mégret observes that "the overwhelming emphasis at Nuremberg was […] on the world order shattering potential of aggression. Peace is evidently a collective good and therefore fits well within the sense of aggression being criminalised largely as a result of *international community* values. Wars do not simply breach the peace between the states that participate in them as has already been suggested, they breach the peace of the world", see Frédéric Mégret, "What is the Specific Evil of Aggression?", in Claus Kreß and Stefan Barriga (eds.), *The Crime of Aggression: A Commentary*, Volume 2, Cambridge University Press, 2017, p. 1414.

[62] UNGA resolution 3314 (XXIX) also refers to "the sovereignty, territorial integrity or political independence of another State", see United Nations General Assembly, Resolution 3314 (XXIX), Annex: Definition of Aggression, Article 1, 14 December 1974 (https://www.legal-tools.org/doc/90261a/). Koskenniemi reminds us that "Law is a means to fulfil objectives. States joined the United Nations to fulfil objectives, among them the protection and preservation of their territorial integrity and political independence", see Martti Koskenniemi, "'A Trap for the Innocent …'", in Kreß and Barriga (eds.), 2017, see *supra* note 61, p. 1368; see also p. 1366. Mégret criticizes the notion that "aggression's evil can be computed primarily as a function of how it affects the state": "the currency of aggression as an international crime must be appraised in a context of systemic devaluation of sovereignty and the rise of human rights sensitivity in international relations", see Frédéric Mégret, "What is the Specific Evil of Aggression?", in *ibid*., pp. 1404-1405.

[63] Peace "takes as its cue to evaluate the gravity of aggression an implicit community of reference that might be described [as] *international society or the international community*", see Mégret, *ibid*., p. 1402 (italics added).

be viewed as such, rather than as a domain of national governments directly or through the 'international community'.[64]

The crime of aggression is directly linked to the prohibition against unlawful use of force in Article 2(4) of the UN Charter. The definition in Article 8*bis*(1) of the ICC Statute requires "an act of aggression which, by its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations", thus tying the elements of the crime to the Charter principle on non-use of force in international relations. This is a good illustration of the relationship between legally-protected interests (here 'international peace and security'), Charter-based principles of general public international law, and prohibitions in international criminal law.

But rather than becoming enamoured by such conceptual convergence of value, interest, principle and crime, we should remind ourselves that the actual practice of the UN Security Council has not always brought clarity and predictability to the understanding of the expression 'international peace and security'. The political turmoil or paralysis within the Council has left us with a deficit of consistent deterrence.[65] It nevertheless seems radically true that the struggle against violence can only be meaningful if peace and security are key elements to be respected. That is why, when assessing whether there are threats to or breaches of international peace and security, the UN Security Council is constantly asked to act in defence of the essential values of the international society.[66]

64 Mégret develops "a fully-fledged critique of aggression based on human rights", using as the community of reference "the global community of mankind", see *ibid*., pp. 1429, 1402.

65 Rasool Soltani and Maryam Moradi, "The Evolution of the Concept of International Peace and Security in light of UN Security Council Practice (End of the Cold War-Until Now)", in *Open Journal of Political Science*, 2017, vol. 7, pp. 133-144.

66 Jure Vidmar, "Norm Conflicts and Hierarchy in International Law: Towards a Vertical International Legal System?", in Erika De Wet and Jure Vidmar (eds.), *Hierarchy in International Law: The Place of Human Rights*, Oxford University Press, 2012, pp. 13-41, on p. 17. According to Vidmar, the UN Charter shows "a strong sense of an international community with shared values and interests", even over (and sometimes against) the desires of individual states (p. 22).

1.4.2. Humanity and Collectivity

Homo sum: humani nihil a me alienum puto
"I am a human being; I think that nothing human is strange to me"
TERENCE, Heauton Timoroumenos, v. 77.

Another type of interests protected by international criminal law can be described as 'human interests'. The argument is either that special human interests are violated by core international crimes or that fundamental human rights are threatened in a particular manner. It can also be a combination of both. The collective nature of both the perpetration (involving state or state-like entities) and victims figures prominently in the reconstruction of relevant criminalization rationales. For the arguments related to special protected interests, the key terms are 'humanity' and 'human dignity'.

It is not uncommon to go back to Pico della Mirandola's 1486 essay *On the Dignity of Man* to anchor the foundational term 'human dignity' in international law.[67] It is indeed a relevant text, but even before that the notion of 'humanity' as a legal interest finds important roots in ancient times. The concept of '*humanitas*' appeared already in the context of the Roman Republic to reflect "the quality of civilized and cultural behaviour that is inculcated in people by education and training".[68] It cannot be denied that the notion had a political scope. In fact, the idea of '*humanitas*', as such, was at the core of the identity of the Romans; when related to '*Romanitas*', it involved the values of the Roman élite which tried to identify some shared goals and values which others (non-Romans) had to abide by in order to be accepted by the civic community.[69] However, it is also the case that '*humanitas*' became a traditional Roman value based on the grounds of what the Greeks had previously called '*philantropía*' ('φιλανθρωπία'), a concept which contained a heavy moral sense related to the need to promote and encourage correct social conduct.

Therefore, at least since Cicero's time, '*humanitas*' meant for the Romans the identification of all those characteristics that defined human beings and that individuals shared in common.[70] In this sense, as part of

[67] Pico della Mirandola, *On the Dignity of Man*, translated by Charles Glenn Wallis, Hackett Publishing Company, Cambridge, 1965 (1486).

[68] Richard A. Bauman, *Human Rights in Ancient Rome,* Routledge, London, 2000, p. 2.

[69] Susanna Morton Braund, "Roman Assimilations of the Other: 'Humanitas' at Rome", in *Acta Classica,* 1997, vol. 40, pp. 15-32.

[70] François Prost, "Humanitas *: originalité d'un concept cicéronien*", in *L'art du comprendre*, 2016, vol. 15, 2e série, pp. 31-46.

what had to be educated, '*humanitas*' was an artificial term that reflected not on the nature of mankind, but on the concrete identification, in specific circumstances, of social agreements and understandings.[71] Together with '*philantropía*', the ancients coined an expression that could refer to societal processes based upon the education in the development of people's attitudes towards one another. As such, since classical times, it constitutes an element that was used to develop a consciousness of society as a result of spiritual and moral motivations.[72] This historical dimension related to the notion of '*humanitas*' can prove to be useful to identify a common set of values which mirror the universality of our condition. But to what extent can this concept be considered a legally-protected interest in contemporary international justice?

Although in current times, 'humanity' and 'human dignity' are general terms with wide application, they are interpreted to have very specific meaning, reflecting the existing structure and rules of international criminal law. David J. Luban, for example, takes state-involvement in crimes against their citizens as violating a special interest of 'humanity'. He argues that 'humanity' should be understood as our nature as 'political animals' as far as crimes against humanity are concerned.

Politics is an indispensable means to organise the society and advance interests of its individual members, since as individuals we have "no alternative to living in politically organized communities".[73] The health of politics is crucial to human survival, yet vulnerable to cancerous perversion.[74] Crimes against humanity are therefore "*political* crimes".[75] The health of politics as such would constitute a unique interest that the law of crimes against humanity seeks to protect: it is distinctly different from "the traditional taxonomy of legally protected values" such as property, persons or public order.[76]

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71 Pierre Vesperini, "Le sens d'humanitas à Rome", in *Mélanges de l'École française de Rome,* 2015, vol. 127-1.

72 See Leszek Aftyka, "Philanthropy in Ancient Times: Social and Educational Aspects", in *Journal of Vasyl Stefanyk Precarpathian National University*, 2019, vol. 6, no. 1, pp. 149-154.

73 David J. Luban, "A Theory of Crimes against Humanity", in *Yale Journal of International Law*, 2004, vol. 29, no. 1, pp. 85-167, on p. 138.

74 *Ibid*., p. 117.

75 *Ibid*.

76 *Ibid*., p. 87.

For Luban, it is not the gravity of the crimes, but the fact that they are "committed by governments and government-like organizations towards civilian groups under their jurisdiction and control" that distinguishes crimes against humanity from ordinary municipal crimes.[77] And because of the inescapability of politics, healthy politics is an interest important to all human beings.[78] Luban therefore considers that political entities' violations of human rights not only harm interests of direct victims, but also an additional interest of political health. His theory reveals a core feature of crimes against humanity as political crimes, thus excluding organised crimes committed, for example, for economic purposes. Yet, this protected interest does not exclude human rights violations committed by the state in general.[79]

On the other hand, Kai Ambos identifies the special protected interests of 'humanity' and 'human dignity' in the collective nature of the victims. He argues that certain collective goods – in that they are concrete manifestations of 'humanity' – are distinct for international crimes. The existence of certain "pre-characterised" groups for crimes of genocide, the existence of the people in their "contingent and contextual categorisation as 'enemy group'" for war crimes, and the idea of civilian population as the potential target of crimes against humanity, point to the existence and acknowledgment of common values. But Ambos does not clarify what the concrete collective interest is, except that there is a collective dimension of the attack directed against persons for group-related reasons.[80] These group interests are 'interests of humanity' because, according to Ambos, "[w]here a group is conceived as less-than-human in its nature […], its interests become, by this fact, instances of the interests of humanity".[81] In other words, 'humanity' has a certain independent value which is different from mere aggregation of individual interests.[82]

Similarly, SONG Tianying[83] and Susan R. Lamb[84] – in Chapters 2 and 3 of this volume focusing on war crimes and crimes against humanity,

77 *Ibid*., p. 120.

78 *Ibid*., p. 139.

79 See Hiéramente, 2011, see *supra* note 38, pp. 564-565, 575.

80 Ambos, 2015, see *supra* note 51, p. 321.

81 *Ibid*., p. 322.

82 *Ibid*., p. 320.

83 In Chapter 2, SONG Tianying identifies legal interests protected by war crimes. Although war crimes have long been regarded as 'classic' international crimes, their nature and scope

respectively – identify the protected interest of recognising basic human rights regardless of group identity, which they call "common humanity".[85] 'Common humanity' between communities or groups is a more concrete kind of 'humanity' than 'humanity' within a global community. This concretization of 'humanity' has both normative and practical implications, which are explored in-depth in both contributions. For instance, this 'inter-group humanity' can be particularly difficult to recognize and protect during inter-group conflicts.

The *collective* dimension of the perpetration and victimisation can also justify international criminalization. Regarding the element of state or organisational involvement, jurisdictionally the function of international criminal law is to protect fundamental rights of individuals when the state is unwilling or unable to do so.[86] International and domestic criminal law

are not clearly established. SONG approaches criminalization of war crimes through their ordinary and unique protected interests. The ordinary interests are similar to those protected by domestic criminal law. SONG identifies two unique interests protected by war crimes: the interests of common humanity, that is, recognition of human rights independent of an individual's national, social affiliation; the collective interests of the parties to the conflict. She also attaches normative signification to the aggravated threat to the protected interests of war crimes: the destructive potential of armed conflict and vulnerability of victims both. With these interests and circumstances, SONG seeks to establish war crimes as a unique category of international crimes. The characterisation of war crimes as international crimes does not always require policy or magnitude, as is the case in other international crimes.

84 Susan R. Lamb's Chapter 3 focuses on the notion of 'humanity' as a core value protected by crimes against humanity. Her review of interpretations of 'humanity' in theory and the practice of international criminal law shows that the concept is multifaceted, contested and incoherent. Nevertheless, Lamb concludes from existing conceptions that 'humanity' reflects universal concerns and seeks to exert a humanising impact. According to Lamb, what distinguish crimes against humanity from ordinary crimes are: the interests of common humanity, understood as recognition of fundamental human rights regardless of one's identity; the collective interests of all persons; the extensive threat posed by the destructive potential of widespread or systematic criminality; and our collective vulnerability to these crimes. Lamb thinks crimes against humanity should not be restricted to crimes committed pursuant to state policy. Through her analysis, she points to the tension between crimes against humanity as being, on the one hand, crimes of a collective nature, and on the other having a central focus on the individual.

85 Relatedly, Larry May argues that harm to 'humanity' or the international community requires either that the victims are harmed based on "non-individualized characteristics" or that the perpetrator has state or other collective traits. See Larry May, *Crime Against Humanity: A Normative Account*, Cambridge University Press, 2005, p. 83.

86 Ambos, 2015, see *supra* note 51, p. 323; Steven R. Ratner, "The Schizophrenias of International Criminal Law", in *Texas International Law Journal*, 1998, vol. 33, pp. 237-256, on p. 256; Andrew Altman and Christopher Heath Wellman, "A Defense of International Criminal

both protect fundamental human rights, the difference being, in terms of elements, that core international crimes require a certain socio-political context (most frequently state involvement), while 'ordinary' or domestic crimes lack the contextual element (but are normally committed by private persons not acting on behalf of a state). Ratner argues that all violations of fundamental rights by the State – regardless of their scale or organisation – should be deemed international crimes.[87] Accordingly, his critique of positive law is the selective international criminalization of conduct in wartime and peacetime, in both international and non-international armed conflicts, and finally in peacetime among crimes of similar gravity.[88]

Others think that both a collective perpetrator (a state or an organisation) and collective victims are necessary for international crimes to be grave enough. International criminalization, then, should only be reserved for serious violations of basic rights.[89] Altman argues that there should be a fine balance between self-determination and protection of human rights.[90] But this is not the unanimous opinion. Several others rather believe that, in case of serious violations of basic rights, either the collective nature of the perpetration or of the victimisation would in itself justify the use of international criminal law.[91]

Apart from the collective characteristics of core international crimes, additional factors have been considered with regard to specific categories of crimes. In the case of war crimes, for example, SONG Tianying argues that the destructive potential of armed conflict and vulnerability of victims

Law", in *Ethics*, 2004, vol. 115, pp. 35-67. See also, Andrew Altman, "The persistent fiction of harm to humanity", in *Ethics and International Affairs*, 2006, vol. 20, pp. 367-372.

87 Ratner, 1998, see *supra* note 86, p. 252.

88 *Ibid*., pp. 238, 249, 253.

89 See Susan R. Lamb, "The Legal Good of 'Humanity' Protected by Crimes Against Humanity", Chapter 3 in this volume. Altman and Wellman, 2004, see *supra* note 86; Altman, 2006, see *supra* note 86.

90 Altman and Wellman, 2004, see *supra* note 86; Altman, 2006, see *supra* note 86.

91 May, 2005, see *supra* note 85, p. 83; Kirsten Fisher proposes a combined "severity" and "associative" threshold which has to be reached to justify the application of ICL. The former requires that the most basic human rights protecting the physical security of human beings, being a prerequisite for the enjoyment of other rights, are jeopardised by the respective conduct, that is, the gravity of the harm caused to physical security. The associative threshold represents the group or organisational element in international crimes in two ways: the political organisation or group as the aggressor or the victims as part of the group. See Kirsten J. Fisher, *Moral Accountability and International Criminal law*, 2012, Routledge, London, pp. 17–26, 30–31, 186.

constitute elevated threats to the protected interests, which make international criminalization of war crimes not always dependent on the multiplicity of victims.[92] For crimes against humanity, in turn, Susan R. Lamb invokes the extensive threat posed by the destructive potential of widespread or systematic criminality, and our collective vulnerability to these crimes.[93]

Table 2 summarizes the theoretical approaches presented in this section, with horizontal and vertical categorizations.

	Special protected interests ('humanity')	**Nature and extent of threat to protected interests**
Collectivity in perpetration (state or organisational involvement)	Health of politics (Luban for CAH)	State-sponsorship justifies intervention of ICL (Ratner, Ambos)
Collectivity in victimisation	The existence of certain 'pre-characterised' groups (Ambos for genocide)	Extensive threat and destructive potential (Lamb for CAH)
	The existence of the people in their "contingent and contextual categorisation as 'enemy group'" (Ambos for war crimes)	Widespread or systematic violations transcend right to self-determination vested in sovereignty (Altman and Wellman)
	Certain groups (Ambos for CAH)	
	Recognition of fundamental human rights regardless of collective identity (Lamb for CAH; SONG for war crimes)	
	Collective interests of all persons as part of humanity (Lamb for CAH)	

Table 2: Normative significance of collectivity in perpetration and victimisation.[94]

[92] See SONG Tianying, "The Legal Interests Protected by War Crimes", Chapter 2 in this volume.

[93] See Susan R. Lamb, "The Legal Good of 'Humanity' Protected by Crimes Against Humanity", Chapter 3 in this volume.

[94] Table 2 was elaborated by the authors of this chapter.

The theoretical approaches studied above attach different normative significance to factors such as state involvement and gravity or scale of the crime. When conceiving justifications, authors have different scenarios and crimes in mind. What is fitting for a prototype may not suit other crimes or scenarios.

Focusing on legally-protected interests, it becomes clear that special interests identified by the experts have both normative and functional limitations. As explained, state involvement can create a distinct legally-protected interest (Luban) or constitute a source of threat which justifies international concern (Ratner). Multiplicity of victims also contributes to explanatory clarity. Hiéramente and Ratner argue that neither state involvement nor gravity alone can justify the current scope of criminalization. In this sense, Ambos' understanding of collective interests seems to function better, although it does not quite distinguish state or state-like actors from private actors pursuing economic interests. Besides, although Ambos articulated the very useful structure of individual and collective interests, he does not elaborate on the three collective interests. This justifies a thorough examination of these interests in order to contribute towards a solid basis for the development of international criminal law and, by the same token, a clear understand of its limitations.

1.4.3. Solidarity, Unity and Harmony

The '*Rechtsgutstheorie*' has not really produced a list of legally-protected interests or goods that we may wish to rely upon for the purposes of this anthology. In the context of international criminal justice, it is important to discuss what other protected goods – apart from values such as 'international peace and security' and 'humanity' addressed above – are at stake when core international crimes are committed. We should be able to identify those common values which, as a result of their universal importance, justify international criminalization of conduct that violates them.

Several contributions to this book reflect on which interests *should* receive a greater measure of recognition as common and distinct to international criminal law. Such recognition can be general – for example, through a preambular paragraph or through the practice of international judges – or it can be in the form of articulation of the specific reach of subject-matter jurisdiction.

Ioanna Anastasopoulou's Chapter 4 below, for instance, proposes 'solidarity' as a collective interest common to all core international crimes.

Similarly, the concept of 'unity' is discussed extensively in other chapters as another common interest. The concepts of *solidarity* and *unity* import "society-oriented" [95] or "communitarian" [96] perspectives into our understanding of international criminal law. MacDonald rightly noted that the precondition of 'solidarity' is a "sense of community or commonality".[97] The two concepts are closely related to each other.[98] 'Solidarity' has been used extensively in the context of economic equity between the global North and South.[99] It is established to the extent that Benvenisti and Nolte refer to "the notion of human solidarity that is grounded in global fraternity".[100] It has a long political and ideological history.[101] Social scientists have made significant contributions towards our understanding of the con-

[95] See Surabhi Sharma "Humanity and Unity: Indian Thought and Legal Interests Protected by International Criminal Law", Chapter 8 in this volume.

[96] See Kafayat Motilewa Quadri, Vahyala Kwaga and Tosin Osasona, "Forging a Modern African Perspective on 'Unity' as a Collective Legal Interest in International Criminal Law", Chapter 7 below. See also Crawford, 2011, see *supra* note 13.

[97] Ronald St. John MacDonald, "Solidarity in the Practice and Discourse of Public International Law", in *Pace International Law Review*, 1996, vol. 8, no. 2, pp. 259-302.

[98] See, for example, Karel Wellens, "Solidarity as a Constitutional Principle: Its Expanding Role and Inherent Limitations", in Ronald MacDonald and Douglas Johnston (eds.), *Towards World Constitutionalism: Issues in the Legal Ordering of the World Community*, Martinus Nijhoff, The Hague, 2005; Danio Campanelli, "Principle of Solidarity", in Wolfrum (ed.), 2008, see *supra* note 9, p. 2; Laurence Boisson de Chazournes, "Responsibility to Protect: Reflecting Solidarity?", in Rüdiger Wolfrum and Chie Kojima (eds.), *Solidarity: A Structural Principle of International Law*, Springer, New York, 2010, pp. 93-122. MacDonald, 1996, see *supra* note 97.

[99] Simma, 1994, see *supra* note 8, p. 237, uses solidarity between developed and developing countries as an illustration of community interests. See also MacDonald, 1996, see *supra* note 97.

[100] Eyal Benvenisti and Georg Nolte, "Introduction", in Benvenisti and Nolte (eds.), 2018, see *supra* note 8, p. 3. They observe that, in "more recent times, and particularly in the post-Cold-War era, political realities, technological changes, and the sense of growing interdependence have generated efforts to articulate what human solidarity means for international law as a framework to secure a sustainable future for all" (p. 4).

[101] The solidarity tradition has deep political anchoring in the movement for labour rights and its relations with socialist and social-democratic political parties. "As an ideological superstructure over a civilian sense of community, the labour movement and later the welfare state secured an hegemony, an exclusive right to associate solidarity with *their* policies", writes Håkon Lorentzen in his interesting monograph *Fellesskapets fundament: Sivilsamfunnet og individualismen* ([The Foundation of the Community: The Civil Society and Individualism], Pax Forlag, Oslo, 2004, p. 77). He explains how "the monopolization of solidarity" had lasting effects in the Nordic countries (p. 84).

cept of 'solidarity'.[102] There are different views on the preconditions for collective solidarity beyond nation states, extending to the imaginary 'other'. The emotional dimension of empathy is easily affected by long distance to 'the other', making 'collective solidarity', for Habermas, interest-based and dependent on reason and agreement on objectives and means; for Vetlesen, empathy based in emotions can be extended from the near to the remote, provided it can draw nourishment and experience from the near.[103] Stjernø's comprehensive study on the history of the idea of 'solidarity' emphasizes, however, the importance of the economic or material aspect of 'solidarity'.[104]

We will focus more on the term 'unity' in this and the next sections. 'Unity' is a relational value that has in our view not yet been fully appreciated in international law. 'Unity' can be seen as a social and psychological value which concerns inter-communal relationships.[105] While human interests discussed in Section 1.2. above represent efforts to interpret 'humanity' or human nature in the international criminal law context, the interest of

[102] We mention here the work of Stjernø, which covers social and political theory, Protestant and Catholic social ethics, the evolution of the notion of solidarity in eight European countries, comparing the treatment of 'solidarity' by a variety of political parties (see Steinar Stjernø, *Solidarity in Europe: The History of an Idea*, Cambridge University Press, 2004).

[103] See Lorentzen, *op. cit.*, pp. 73-75, and the detailed discussion in Chapter 6 ("Empathy and Solidarity in Habermas' Discourse Ethics") of Arne Johan Vetlesen, *Perception, Empathy and Judgment: An Inquiry into the Preconditions of Moral Performance*, The Pennsylvania State University Press, University Park, 1994, pp. 283-339. For Stjernø, to be effective, the "globalisation of solidarity presupposes the globalisation of law and must include the full development of the individual's rights and obligations in the context of global citizenship", see Stjernø, 2004, see *supra* note 102, p. 349.

[104] Stjernø concludes that "solidarity can most fruitfully be defined as the preparedness to share resources with others by personal contribution to those in struggle or in need and through taxation and redistribution organised by the state", *ibid*., p. 2. Such emphasis on the role of the state in economic redistribution exposes the idea of 'solidarity' to the extreme polarisation of the political debate on the role of the state, in particular in the United States, where authors such as Nisbet warns against "a sense of the absolute identity of State and society – nothing outside the State, everything in the State", a state in which "the basic needs for education, recreation, welfare, economic production, distribution, and consumption, health, spiritual and physical, and all other services of society are made aspects of the administrative structure of political government", contrasted with "a sense of cultural membership in the significant and meaningful relationships of kinship, religion, occupation, profession, and locality", see Robert Nisbet, *The Quest for Community*, ISI Books, Wilmington, 2010 (1953), pp. 261-262.

[105] By 'unity', we are not in this volume thinking of doctrinal coherence and unity – as opposed to fragmentation – of international law, cf. Mario Prost, *The Concept of Unity in Public International Law*, Hart Publishing, Oxford, 2012.

human 'unity' does not address simply persons or groups, but their social relations. 'Unity' is nevertheless a human interest albeit of a different kind than 'humanity'. Just as the interest of 'international peace and security' concerns relations between nation-states, this book considers 'unity' largely in the context of how to make the principles in the UN Charter on the maintenance and restoration of international peace and security more effective, but not at the expense of normal competition between states and their respective comparative advantages. Concern for the 'unity' of nation-states should temper short-sighted collective irrationality and help to bring global risks more under control. It ultimately concerns the survival of humankind, also long-term, and thus "qualifies as the common interest that public international law needs to protect".[106]

Unity of humankind is embodied in 'unity' among diverse communities.[107] 'Unity' has its sociological basis in the common human identity and radical interdependence of all human beings.[108] In its appreciation and consolidation of human fellowship, it is necessary for human survival and prosperity.

To better understand the modern notion of 'unity' as a legally-protected good, it should be recalled that the concept of '*unitas*' has a long tradition in human culture. As opposed to disunity, the idea of unity has always included a will to assess collectively shared elements into a group, in order to foster proximity and reciprocity.[109] As a political notion, 'unity'

[106] Benedek, De Feyter, Kettemann and Voigt, 2014, see *supra* note 18, p. 221. Voigt refers to "*the primary* common interest of collective survival", see Voigt, 2014, see *supra* note 57, p. 17.

[107] See Wim van Binsbergen, "Notes on the Fundamental Unity of Humankind", in *Culture and Dialogue,* 2020, vol. 8, no. 1, pp. 23-42.

[108] See, for example, Bhikhu Parekh, "Non-ethnocentric Universalism", in Tim Dunne and Nicholas Wheeler (eds.), *Human Rights in Global Politics*, Cambridge University Press, 1999.

[109] These elements are important to us when we use the notion of 'unity of humankind'. We are therefore not thinking about an idea of unity as developed by, for instance, Plotinus, according to whom 'the One' (or, equivalently, 'the Good', *Ennead* 1.6.9), is the absolutely simple first principle of all. In his metaphysics, clearly rooted in pre-Socratic and Platonic thought, Plotinus' mystical idea of 'the One' ('*τὸ Ἕν*') is one of the three fundamental principles, together with the Intellect and the Soul. 'The One', as a supreme notion, knows no distinction, multiplicity or division, and cannot be reduced to anything. It is therefore indescribable, so it is impossible to consider it as a principle of oneness or goodness, for these are intelligible attributes to which '*τὸ Ἕν*' cannot be reduced. Plotinus' concept has been widely celebrated in Christianity in general (and in the Neo-Platonic tradition in particular) as a way to conceive the inscrutability of God. However, in our reading of 'unity' as a legal good, we are

became in antiquity an efficient tool to draw societies together, expelling threats that could compromise the social pact, and thus can be examined today under the rhetoric of amalgamation and merger which are typical to modern social paradigms.[110]

The element of unity is historically significant as a way of promoting a *background for identity consolidation*. The appeal to, for example, a mythical past or to common ancestors was a frequent strategy to endorse autochthony and national belonging.[111] The creation of a sense of unity was, of course, a means to avoid the permanent risk of fragmentation, an aspect which was very present in ancient society.[112] In ancient Greek thought, for instance, we find numerous references to the idea that there was *one* mankind and, therefore, that all humans shared identical grounds.[113]

This idea, which was depicted in interpersonal relations, was also expanded into the international arena, since the establishment of imperial endeavours heavily relied upon the ideal of a world unity. This has been the object of interesting approaches by historians who tried to investigate the origins of this idea of 'unity of mankind'. It seems that there is strong evidence suggesting that it was not until the Hellenistic era that the idea of

concerned with the social dimension of 'oneness' – more related to the origins of the human rights discourse – one that is born out of the conscious attitude of feeling part of a human community. On Plotinus' Henosis and its complexities, see Pao-Shen Ho, *Plotinus' Mystical Teaching of Henosis: An Interpretation in the Light of the Metaphysics of the One*, Ph.D. dissertation, Leopold-Franzens-Universität Innsbruck, Innsbruck, 2014. See also the traditional studies by John Bussanich, *The One and its Relation to Intellect in Plotinus*, Brill, Leiden, 1988, and Gary M. Gurtler, *Plotinus: The Experience of Unity*, Peter Lang, New York, 1988.

110 See Andreas N. Michalopoulos, Andreas Serafim, Alessandro Vatri and Flaminia Beneventano della Corte, "Unity and Division in Ancient Literature: Current Perspectives and Further Research", in Andreas N. Michalopoulos, Andreas Serafim, Flaminia Beneventano della Corte and Alessandro Vatri (eds.), *The Rhetoric of Unity and Division in Ancient Literature* (Trends in Classics – Supplementary Volumes, 108), De Gruyter, Berlin, 2021, pp. 1-18.

111 Andrew Erskine, "Unity and Identity: Shaping the Past in the Greek Mediterranean", in Erich S. Gruen (ed.), *Cultural Borrowings and Ethnic Appropriations in Antiquity*, Franz Steiner Verlag, Stuttgart, 2005, pp. 121-136.

112 See the recent contribution by Greg Stanton, *Unity and Disunity in Greek and Christian Thought under the Roman Peace*, Mohr Siebeck, Tübingen, 2021.

113 On this aspect, see most notably H.C. Baldry, *The Unity of Mankind in Greek Thought*, Cambridge University Press, 1965.

such a 'unity' was fully developed as an ideological umbrella.[114] It appears that under Alexander the Great, a notion related to the brotherhood of all men was born.[115] The problem, of course, was that to some extent this unity was the result of a political and cultural manipulation, aimed at centralising control and imposing an internal coherence at the cost of annihilating differences.

The emergence of the idea of 'unity of mankind' has, in other words, always faced the challenge of its manipulation. When we discuss the idea of 'unity' as a legally-protected interest, it is therefore necessary to clarify that we refer to the recognition of a universal human nature and not to an argument for oppression or tool of conformity, as frequently used in nation states. Simply put, national governments invoke 'unity' for domestic purposes within their state, while this book is concerned with the relationship between states when it discusses 'unity'. 'Unity' responds to the acknowledgment of large collectivities as a way of overcoming war and confrontation through the perception of others as equals. It is an idea that may help to give greater effect to the fundamental UN Charter value of 'international peace and security' which we discussed above.

The ancient Greek and Roman philosophers were well aware of the idea of commonality. When they discussed the idea of '*kosmos*' ('κόσμος') or '*orbis*' or '*mundus*', respectively, they pointed to the common nature involving all those who share the same living world. The Greeks, for example, coined the idea of the '*oikoumene*' ('οἰκουμένη', literally, a past participle related to a verb linked to the idea of the house, '*oikos*', 'that which is inhabited') to refer to the whole habitable space. The idea of 'unity' and '*kosmos*' gave rise to the consciousness of belonging to a community well beyond the limits of a specific city-state. Contrary to the famous Aristotelian idea that a man is a '*zoon politikon*' – 'ζῶον πολιτικόν', an animal that is social by nature and whose identity can only be found in the civic dimension of a '*polis*' – the Stoics developed the idea of cosmopoli-

[114] Rolf Strootman, "Hellenistic Imperialism and the Ideal of World Unity", in Claudia Rapp and H.A. Drake (eds.), *The City in the Classical and Post-Classical World. Changing Contexts of Power and Identity*, Cambridge University Press, 2014, pp. 38-61, on p. 54.

[115] This was the main thesis of the famous speech by William Woodthorpe Tarn, *Alexander the Great and the Unity of Mankind* (The Raleigh Lecture on History, British Academy, 1933), Humphrey Milford, London, 1933. His idea that Alexander was the father of the concept of the unity of all human beings was mainstream in ancient history until the harsh criticism launched against his argument by Ernst Badian, "Alexander the Great and the Unity of Mankind", in *Historia,* 1958, vol. 7, pp. 425-444.

tanism (literally, the fact of being a citizen of the '*kosmos*', of the world) in order to promote the identification of close connections between all people.[116]

In Hellenistic Greece and the Roman empire, the appearance of the cosmopolitan ideal was clearly reflected in a historical context in which growing connections among peoples paved the way to some visions of the world as a complex network, already identified by some others as a primitive globalization.[117] An interesting element of the cosmopolitan character of Hellenistic times is that it did not dissolve the presence of the individual or the importance of personal experiences. This is relevant to those who consider that cosmopolitanism tends to erase the particular features of singular involvements. Quite on the contrary, even in ancient times there were constant tensions between the private and the public, or between the local and the global, which was part of a larger identity crisis in times of radical structural changes in society.[118] If we follow the figure of Diogenes, the founding father of the Cynic school, a person can choose to be a citizen not only of his '*polis*', but at the same time of the whole world.[119] Ratzinger writes that this provided early Christianity "with some decisive points of departure".[120] Roman Stoics, such as Marcus Aurelius, shared the idea –

[116] Malcolm Schofield, *The Stoic Idea of the City*, Cambridge University Press, 1991; Eric Brown, "Hellenistic Cosmopolitanism", in Marie Louise Gill and Pierre Pellegrin (eds.), *A Companion to Ancient Philosophy*, Blackwell, Oxford, 2006, pp. 549–558; Katja Maria Vogt, *Law, Reason, and the Cosmic City: Political Philosophy in the Early Stoa*, Oxford University Press, 2008. A basic understanding of cosmopolitanism, reflecting the concept's ancient Greek etymology, is provided by Derek Benjamin Heater, *World Citizenship and Government*, Macmillan, London, 1996.

[117] On this debate, see David Inglis and Roland Robertson, "The Global *Animus*", in *Globalizations*, 2004, vol. 1, no. 1, pp. 38-49.

[118] Sheila Ager and Riemer Faber, "Introduction: Belonging and Isolation in the Hellenistic World: Themes and Questions", in Sheila Ager and Riemer Faber (eds.), *Belonging and Isolation in the Hellenistic World*, University of Toronto Press, 2016, pp. 3-16, on p. 3.

[119] Diogenes declared himself an '*a-polis*' (without a city), an '*a-oikos*' (homeless) and a '*kosmopolites*' (a citizen of the universe); see Diogenes Laertius VI.2.63. See Marie-Odile Goulet-Cazé, *A Guide to Greek Thought*, Belknap, Cambridge 2000, p. 329, and John L. Moles, "Cynic Cosmopolitanism", in R. Bracht Branham and Marie-Odile Goulet-Cazé (eds.), *The Cynics: The Cynic Movement in Antiquity and its Legacy*, University of California Press, Berkeley, 1996, pp. 105-120.

[120] Ratzinger describes how "Stoicism had discovered the unity of the being 'man,' the unvarying humanity of man, which exists throughout all times and places. It had discovered that the entire *cosmos* was nothing other than Zeus's immense body and that all of humankind was a single body. But the consequences that were drawn from this were actually quite different. Antisthenes and his disciple Diogenes saw in this the apolitical-individualistic ideal

justified in the context of a multi-cultural and multi-ethnic political entity – that all individuals should be deemed fellow-citizens, since the entire world is like a single city.[121]

Even though in every case the Greek and Roman idea was to treat all persons as quasi-siblings,[122] there are, of course, different traditions that dwell on the philosophical concept of cosmopolitanism.[123] However, in general terms the ancient concept has made its way to contemporary debates in liberal democracies, thanks in part to the work of Martha Nussbaum.[124] According to her, there is a universal humanism which can be

of the world-citizen, who puts himself above the laws of the state or in any event shows them little respect, because what he wants more than anything else is simply to be a 'man.' This stance of inner freedom vis-à-vis the state aimed not at a political but at an ethical revolution, at changing man rather than changing his relationships. There is no doubt that this provided the Christian opposition with some decisive points of departure and helped pave the way for that inner freedom which allowed Christian martyrs to set their faith-filled conviction over against the authority of the state, the internal strength of truth over against the external force of earthly powers", see Joseph Ratzinger (Pope Benedict XVI), *The Unity of the Nations: Vision of the Church Fathers*, translated by Boniface Ramsey, The Catholic University of America Press, Washington, DC, 2015 (1970), pp. 4-5 (footnotes omitted). Ratzinger discusses Origen Adamantius' interpretation of the story of the Tower of Babel (Genesis, 11:1-9), and uses terms such as the "Babylonian division of humanity", "fallen into the prison of national identity", the "falling away of the peoples from the spiritual unity of humankind", and "submitted himself to a national identity and, instead of thinking and living along human lines, thought and lived within the confines of national identity" (pp. 37-50, 67).

121 *Med*. 6.43. See Louise Revell, *Roman Imperialism and Local Identities,* Cambridge University Press, 2009.

122 Anthony A. Long "The Concept of the Cosmopolitan in Greek and Roman Thought", in *Daedalus*, 2008, vol. 137, no. 3, pp. 50-58, on p. 51.

123 David Inglis, "Cosmopolitanism: Roots and Diversities", in Gerard Delanty and Stephen P. Turner (eds*.)*, *Routledge International Handbook of Contemporary Social and Political Theory*, 2nd ed., Routledge, London, 2021, pp. 326-336. Even in Greek philosophy, differences were very noticeable: Stoics, for example, were openly supportive of a quietist cosmopolitanism, whereas Cynical cosmopolitanism seemed to be much more engaged in active social criticism; see Gilbert Leung, "A Critical History of Cosmopolitanism", in *Law, Culture, and the Humanities*, 2009, vol. 5, pp. 370-390. See also David Konstan, "Cosmopolitan Traditions", in Ryan K. Balot (ed.), *A Companion to Greek and Roman Political Thought*, Wiley-Blackwell, Chichester, 2009, pp. 473-484.

124 See, for instance, Martha Craven Nussbaum, "Kant and Stoic Cosmopolitanism", in *Journal of Political Philosophy*, 1997, vol. 5, n. 1, pp. 1-25; and "Patriotism and Cosmopolitanism", in Joshua Cohen (ed.), *For Love of Country? Debating the Limits of Patriotism*, Boston, Beacon Books, 2002, pp. 2–17. More recently, she wrote a monograph on her readings of the topic: Martha Craven Nussbaum, *The Cosmopolitan Tradition: A Noble but Flawed Ideal*, Harvard University Press, Cambridge, 2019.

translated as a positive orientation towards humankind. This is explained by the fact that every person lives and feels some sort of affiliation (that may be political, moral, ethical or of some other kind) with everyone else in the world, regardless of his or her specific membership in a particular group. In other words, cosmopolitanism is founded on the perception that all humans are of equal moral worth. Thus, in other words, a cosmopolitan action can be defined as an ethically-informed agency which is rooted in that idea, on the basis of the existence of universally-acknowledged human rights.[125]

The ancient sources teach us that, far from being a mere abstract notion, cosmopolitanism is translated into a real mode of being and of behaving.[126] Under these considerations, it is not surprising that Stoic cosmopolitanism became influential during the early Christian period, when a new emphasis was placed on the idea of 'unity' in order to justify the teachings of Jesus related to the understanding of human nature through a shared belief.[127] But this idea of world unity is not exclusive to Western thought. In ancient Chinese sources, for example, we find similar thoughts related to a broad concept, '*dàtóng*' (大同), according to which the world is a place in which everyone and everything are united in peace.[128] Similarly, the idea of

[125] See the two essays published in Seyla Benhabib, *Another Cosmopolitanism*, Oxford University Press, 2006, whose ideas are embedded in the perspectives of both Immanuel Kant and Jürgen Habermas. In classical antiquity, the sources of cosmopolitanism were rather related to the principles of natural justice, as discussed by Eric Brown, "The Emergence of Natural Law and the Cosmopolis", in Stephen Salkever (ed.), *The Cambridge Companion to Ancient Greek Political Thought*, Cambridge University Press, 2009, pp. 331-363.

[126] Ulf Hannerz, "Cosmopolitans and Locals in World Culture", in *Theory, Culture and Society*, 1990, vol. 7, no. 2-3, pp. 237-251.

[127] Klaus Göbbels, *Christliche Einheit aus der Sicht des Neuen Testamentes: Ein Beitrag zum ökumenischen Gespräch*, Lebendiges Wort, Augsburg, 1964; Robert Nelson (ed.), *No Man is Alien: Essays on the Unity of Mankind*, Brill, Leiden, 1971; Annemarie C. Mayer, *Sprache der Einheit im Epheserbrief und in der Ökumene* (Wissenschaftliche Untersuchungen zum Neuen Testament: 2. Reihe, Band 150), Mohr Siebeck, Tübingen, 2002. On the Biblical doctrine of 'unity', see also Benjamin Breckinridge Warfield, "On the Antiquity and the Unity of the Human Race", in *The Princeton Theological Review*, 1911, vol. 9, no. 1, pp. 1-25.

[128] On the classical sources for this idea, see Anastasia Blazhkina, "Concept of Great Unity (*datong*) in the Confucian Treatise 'Kong-zi jiayu'", in *Problemy Dalnego Vostoka*, 2021, vol. 4, pp. 177-189. See also Albert H.Y. Chen, *The Concept of 'Datong' in Chinese Philosophy as an Expression of the Idea of the Common Good*, University of Hong Kong Faculty of Law Research Paper No. 2011/020, 2011. In his biography on the Chinese utopian K'ang Yu-Wei, Kung-chuan Hsiao writes that the "fact appears to be that *Ta-t'ung* was a sufficiently appealing concept to attract persons of widely divergent persuasions – and with sufficient ambiguity and flexibility to allow diverse interpretations. Hence it had been used with equal

one world shared by all people finds fruitful expressions in Arab thought.[129]

Once again, the problem arising from the endorsement of cosmopolitanism as the basis for identifying legally-protected interest is that the term has been abused on many occasions. One could think of several instances when various political regimes made use of a 'global order' to endorse expansionism or colonialism. The Macedonian expansion under Alexander[130] or the frequent hypocritical references to unity and equality to strengthen positions of power during the Roman empire[131] may be quoted as examples of such real risks.[132] These challenges, nevertheless, do not necessarily put the notions of cosmopolitanism or 'unity of mankind' at stake. Rather, at-

facility in the T'ai-p'ing rebellion, the Chinese anarchist movement, the revolution led by Sun Yat-sen, and in K'ang's utopian thought, to convey vastly different social ideals". "K'ang's 'one-world' idea" reminds one of "such ancient Chinese conceptions as 'all-under-heaven for all alike' (*t'ien-hsia wei kung*) and 'all-under-heaven as one family' (*t'ien-hsia yu i-chia*), conceptions familiar to K'ang", see Kung-chuan Hsiao, *A Modern China and a New World: K'ang Yu-Wei*, *Reformer and Utopian, 1858-1927*, University of Washington Press, Seattle, 1975, pp. 501, 505, 457 (footnotes omitted). The Chinese philosopher Tingyang Zhao has proposed a theory for the contemporary application of the concept of 'Tianxia' based, *inter alia*, on an ontology of co-existence, relational rationality, and rational risk aversion, see Tingyang Zhao, *Redefining A Philosophy for World Governance*, Palgrave Macmillan, Singapore, 2019, pp. 58-65. Hu Shih, a contemporary of K'ang's, sought to introduce "Ibsenism" to China, giving "special notice to Ibsen's cosmopolitan outlook, quoting from a letter written in 1888, to the effect that intelligent men invariably felt dissatisfied with the 'old conception of the state' and that such conception would surely be replaced by the 'conception of humanity'", see Kung-chuan Hsiao, *op. cit.*, p. 484.

129 Josh Hayes, "Cosmopolitanism in the Medieval Arabic and Islamic World", in Andrew LaZella and Richard A. Lee Jr. (eds.), *The Edinburgh Critical History of Middle Ages and Renaissance Philosophy*, Edinburgh University Press, 2022, pp. 217-233.

130 C.A. Robinson Jr., "Alexander the Great and the Oecumene", in *Hesperia Supplements*, 1949, vol. 8, no. 2, pp. 299-304; Hugh Liebert, "Alexander the Great and the History of Globalization", in *The Review of Politics,* 2011, vol. 73, no. 4, pp. 533-560.

131 Nussbaum, 2019, see *supra* note 124.

132 On these appropriations of the vocabulary of cosmopolitanism for national interests, see Tamara T. Chin, "What Is Imperial Cosmopolitanism? Revisiting *Kosmopolitēs* and *Mundanus*", in Myles Lavan, Richard E. Payne and John Weisweiler (eds.), *Cosmopolitanism and Empire: Universal Rulers, Local Elites, and Cultural Integration in the Ancient Near East and Mediterranean,* Oxford University Press, 2016, pp. 129-152. It should be reminded that the appeal to cosmopolitanism has paid a considerable role in allowing imperial elites to mesh within states defined by internal heterogeneity: these interactions facilitated imperial cohesion through assimilation or subordination; see Myles Lavan, Richard E. Payne and John Weisweiler, "Cosmopolitan Politics: The Assimilation and Subordination of Elite Cultures", in Lavan, Payne and Weisweiler (eds.), 2016, *ibid*., pp. 1-28.

tention should be paid to the motivations behind its mention as well as anticipated advantages of reinforcing a sense of 'unity' between peoples of different states.

This historical and philosophical excursus on aspects of the background of the notion of 'unity' has pointed to the controversial nature of its past use. The question now remains: why, then, should the value or interest of 'unity' be more expressly recognized by international criminal law or international law generally? As we have seen, the reference to 'unity' can be employed as an instrument of imposition, as an efficient tool to guarantee the power of authorities through the deletion of heterogeneity. As a community interest or socio-political condition, 'unity' between nations is easy to break, difficult to recover, and yet essential to human survival. The Preamble of the ICC Statute puts it beautifully: while "all peoples are united by common bonds […] this delicate mosaic may be shattered at any time". Considering this 'unity' between nations may reinforce efforts to give effect to core values in the ICC Statute and the UN Charter, including 'international peace and security'.

Realistically, 'unity' is not just an abstract cosmopolitan or other aspiration, but a sober precondition for the continued existence and prosperity of humankind. Mistrust, hatred and animosity feed disunity, the opposite of 'unity'. Violent communal clashes – be it at local or inter-state levels – poison human rationality and morality. The poisonous effect of identity-based violence is dangerous and long-lasting. A peace agreement may restore peace, but not necessarily 'unity'. Domestic crimes represent exceptional conduct that is suppressed and punished, but it usually does not put into question human or national unity. Core international crimes tend to be committed in a conformist manner along group lines, so they threaten unity between diverse communities. Deliberately creating communal violence, thus harming the hard-achieved and perennially fragile unity across communities, deserves criminal sanction at the international level. 'Unity' should be clearly recognized as a vital – even existential – interest that needs to be protected by existing core international crimes, and carefully considered when new international crimes are developed.

Beyond the Western importance of individual will and consent in liberal societies, there are patterns of communal interaction and cultural pluralist connections that require other mechanisms in order to resolve conflicts. 'Harmony', as a Chinese concept (*he,* 和) that has also some Platonic echoes in the West and which can be related to Roman '*concordia*' (as op-

posed to the hegemonic construction of '*pax*'),[133] becomes a threat to hegemonic governance because it fosters an inclusive, diverse, and caring society.[134]

Here again, a broader approach to these notions may prove to be useful in order to portray their characteristics as potential protected goods. The idea of 'harmony' was enshrined in classical antiquity as a key value to social order. In the Greek world, the concept was known as '*homonoia*' ('ὁμόνοια') and involved not only the avoidance of the evils of civil strife ('stasis', 'στάσις'), but at the same time the safeguarding of national solidarity in the face of any external menace.[135] The idea of '*homonoia*' is etymologically related to the idea of 'like-mindedness',[136] since it is grounded on the notion of union and equality ('*homoios*', 'ὁμοῖος') and rationality ('*nous*', 'νοῦς'). In that sense, it has been appropriately translated into Latin with the word '*concordia*', which similarly refers to the quality of having one heart, '*cors*' ('togetherness of heart'). Both in Greece and Rome the concept would become divinized in a goddess which would become the personification of reconciliation and harmony. In this sense, the notions of '*homonoia*' and '*concordia'* became deeply rooted in religious considerations and sacred principles.[137]

It is not surprising to see that the political interest in '*homonoia*' can be traced back to Hellenistic times as well, especially during the Macedo-

[133] Karl A. Kumpfmüller, "*Concordia* versus *pax*. The impact of Eastern governance for harmony on Western peace concepts", in Julia Tao, Anthony B.L. Cheung, Martin Painter and Chengyang Li (eds.), *Governance for Harmony in Asia and Beyond,* Routledge, London, 2010, pp. 329-347.

[134] Julia Tao, Anthony B.L. Cheung, Martin Painter and Chengyang Li, "Why governance for harmony?", in Tao, Cheung, Painter and Li (eds.), 2010, see *supra* note 133, pp. 3-11. On the ancient Chinese notion of harmony, see also Chenyang Li, "The Confucian Ideal of Harmony", in *Philosophy East and West, 2006, vol. 56, no. 4, pp.* 583-603.

[135] A.R.R. Sheppard, "'Homonoia' in the Greek Cities of The Roman Empire", in *Ancient Society*, 1984-1986, vols. 15/17, pp. 229-252, on p. 229.

[136] In literal terms, "being of one mind together", see Henry M. de Mauriac, "Alexander the Great and the Politics of 'Homonoia'", in *Journal of the History of Ideas*, 1949, vol. 10, no. 1, pp. 104–114, on p. 106.

[137] For this religious background in Roman antiquity, see Emmanuele Curti, "From Concordia to the Quirinal: notes on religion and politics in mid-republican/hellenistic Rome", in Edward Bispham and Christopher Smith (eds.), *Religion in Archaic and Republican Rome and Italy: Evidence and Experience*, Edinburgh University Press, 2000, pp. 77-91.

nian expansion under Alexander the Great,[138] although the nationalist implications of communal concord can already be seen in the sources related to the consolidation of a Greek identity against the domination of the Persians.[139] In Rome, the concept of '*concordia*' appears in the context of civil wars during the early Republic in order to show the need to overcome, through the implementation of solidarity, the consequences of factional dissention.[140] The idea of Concordia, then, would be politically efficient to fight against tyranny, oppression and imposition.[141] Together with '*pax*', '*concordia*' became a key instrument of stabilisation in situations of social turmoil or chaos.[142] This is why, for example, '*concordia*' was also considered a founding principle of Republican Rome,[143] as frequently stated by the orator Cicero.[144]

The idea of human 'harmony' is closely related, in classical sources, to the promotion of social and civic 'friendship'. Already Aristotle, in his *Nicomachean Ethics*, would consider that '*homonoia*' and '*philia*' ('φιλία') had the common purpose of removing the hostility of discord from the city, just as it did eradicate the pain from the soul of each person.[145] According to the philosopher, '*homonoia*' was a political 'friendship' ('*philia politike*', 'φιλία πολιτική'), therefore constituting a crucial value for the integrity of the entire '*polis*'.[146] Under the Stoics as well, '*homonoia*' would be consid-

[138] Sheppard, 1984-1986, see *supra* note 135, p. 230. See also Elias Thermos, "Alexander the Great and the concept of *homonoia*", in *The Greek Review of Social Search*, 1975, vol. 24, pp. 217-227.

[139] Sheppard, 1984-1986, see *supra* note 135, p. 238. For an examination of the uses of the word during the fifth and forth centuries B.C., see Hans Kramer, *Quid valeat Homonoia in litteris Graecis*, Ph.D. dissertation, University of Göttingen, 1915, pp. 14-45; Jacqueline de Romilly, "Vocabulaire et propagande ou les premiers emplois du mot ὁμόνοια", in *Mélanges de linguistique et de philologie grecques offerts á Pierre Chantraine*, Klincksieck, Paris, 1972, pp. 199-2009; Athanasios Moulakis, *Homonoia. Eintracht und Entwicklung eines politischen Bewußtseins*, P. List, Munich, 1973.

[140] John Alexander Lobur, *Consensus, Concordia, and the Formation of Roman Imperial Ideology*, Routledge, London, 2008, p. 40.

[141] *Ibid*., p. 13.

[142] Carlos F. Noreña, *Imperial Ideals in the Roman West: Representation, Circulation, Power*, Cambridge University Press, 2011, p. 132.

[143] Philippe Akar, *Concordia. Un idéal de la classe dirigeante romaine à la fin de la République*, Publications de la Sorbonne, Paris, 2013.

[144] See Mark A. Temelini, *Cicero's Concordia. The Promotion of a Political Concept in the Late Roman Republic*, Ph.D. dissertation in Classics, McGill University, Montreal, 2002.

[145] Arist. *EN* 1166b.

[146] Arist. *EN* 1167b.

ered to share the same basis as 'friendship', in the sense that both notions show a strong commitment to socialisation and civic understanding.[147]

It is visible, thus, that 'concord' and 'harmony', associated with civic 'friendship', were highly estimated in ancient times. These ideas have been recovered by modern authors, who have attempted to make solid relations between 'togetherness' and 'solidarity'.[148] They are accepted interests that have the same end: to foster, by legal and moral means, the collective 'harmony' of a shared citizenship.[149] Promoting global 'unity' through political 'friendship' can endorse the preservation of the integrity of the state, as Aristotle has also noted.[150] It is in the sense that 'harmony', 'friendship' and 'solidarity' could form together a set of complementary values of universal implications, that would allow for the consideration of a collective good that needs to be guaranteed and preserved.

1.5. Community Interests as Aims and Purposes of International Criminal Law: Status and Prospects

As we have seen in the previous sections, the concept of legal interests or goods is not self-substantiating. Rather, it expresses a structure of analysis into which value judgements are filled through the law-making process broadly speaking (including interpretation during application of the law).[151]

On the basis of what has been expressed so far in this chapter, when discussing different candidates for recognition as collective interest by international (criminal) law, an abstract debate on the nature or content of potential legally-protected interests of core international crimes would reveal ambiguity and disagreements. It is not easy to agree and decide on which fundamental values and principles should guide the *de novo* formation and interpretation of such legal interests.

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147 Barbara Caine, *Friendship: A History*, Routledge, London, 2014, pp. 34-35.

148 See, for instance, Hauke Brunkhorst, *Solidarität: Von der Bürgerfreundschaft zur globalen Rechtsgenossenschaft*, Suhrkamp Verlag, Frankfurt am Main, 2002.

149 The link between '*homonoia*' and 'solidarity' could already be identified in Aristotle, see Misung Jang, "Aristotle's Political Friendship (*politike philia*) as Solidarity", in Liesbeth Huppes-Cluysenaer and Nuno M.M.S. Coelho (eds.), *Aristotle on Emotions in Law and Politics* (Law and Philosophy Library, vol. 121), Springer, 2018, pp. 417-433.

150 Arist. *Pol*. 1262b7–8. On the projection of Aristotle's considerations on political 'friendship' to modern liberal democracies, see Murray Faure, "The lure of political friendship: aspects of Aristotle's *philia politike* in the search for a civic *vinculum*", in *Acta Academica*, 2010, vol. 42, n. 4, pp. 1-41, on p. 36.

151 See, for example, Ambos, 2015, see *supra* note 51, p. 306.

While in the domestic context, the guiding principles usually aim to constrain criminalization in order to protect individual freedom or protect society, it is more complex in the international community. For international criminal law, the balancing needs to take into account factors such as community and other interests, mechanisms of enforcement, individual accountability and structural bias.[152] Guidance on the formation of legal interests for protection by international criminal law is also relevant to justifications of international criminal law as an enforcement mechanism. That is to say, such guidance concerns both criminalization and punishment theories.[153]

This anthology dwells in particular on 'reconciliation', 'solidarity' and 'unity' as fundamental values that should find a greater measure of recognition in international criminal law. Justice David Baragwanath argues in Chapter 5 that 'reconciliation' should be a foundational principle that guides the criminalization and application of international criminal law.[154] It is intimately related to the interest of 'solidarity', as elaborated by Ioanna Anastasopoulou in Chapter 4.[155] Baragwanath explains that 'recon-

[152] See, for example, Antony Anghie and B.S. Chimni, "Third World Approaches to International Law and Individual Responsibility in Internal Conflict", in *Chinese Journal of International Law*, 2003, vol. 2, no. 1, p. 91: "a legal approach that addresses the conditions under which these broad societal conflicts take place may prove more effective in quelling violence against civilians over the long term than a regime of individual accountability alone enforced through national and international courts". In particular, both Anghie and Chimni link ethnic conflicts to the North-South socio-economic divide.

[153] More on punishment theory, see, for example, Aukerman, 2002; Osiel, 2000, both in *supra* note 40.

[154] According to Baragwanath, the application of the principle of 'Reconciliation' has "four distinct yet closely related themes: stating a general principle; giving guidance in its application in particular cases; applying the principle; and evaluating the practice against the principle". A policy of 'Reconciliation' is a principled and practical way to guide the development of international criminal law.

[155] Ioanna Anastasopoulou combines legal goods analysis of international criminal law with the particular German theory of *Rechtsgüter*. She maps the main issues in the debate on the theory of *Rechtsgüter* and responds to criticisms. She thinks it is the collective legal goods protected by international crimes that distinguish them from ordinary crimes. For international crimes, there is a collective element both in the perpetrators and victims in that they represent a collective political and cultural confrontation. This makes it difficult for the party involved, which is often the state, to punish the crimes. As such, it breaches what Anastasopoulou calls the collective legal good of 'global solidarity'. 'Global solidarity' is used instead of 'humanity', 'mankind', or 'human dignity' because it expresses real and concrete human, group and state relations, not merely abstract virtues. This means the breach of accepted minimal standards in a certain manner incurs the interest of 'global solidarity', and

ciliation' is often-times marginalised or even viewed as being in tension with prosecution of international crimes. To integrate the notion of 'reconciliation' more fully in international criminal justice would require a certain evolution of mindset.

'Unity' is discussed from a variety of diverse perspectives in Chapters 6 through 9 below.[156] 'Unity' is proposed not only as an interest to be

consequently the intervention of international criminal law. She calls for further elaboration of the collective good of 'global solidarity' which acknowledges our multiple interdependencies and the awareness of our common destiny.

156 In Chapter 6, Salim A. Nakhjavani and Melody Mirzaagha explore the concept of 'unity' as a legally protected interest and as a foundational value. They examine scholarship and legal practice which support the recognition of 'unity' as a foundational value in international criminal law. They define 'unity' as "the capacity to pursue common goals in a purposeful and co-ordinated manner within a common framework". 'Unity' according to the authors is a relational or societal qualitative value, that is linked to the quality of the relationship between communities, thus completing 'humanity' which characterises individual conduct. The authors propose 'unity' as an interest protected by the crime of aggression. They also argue that the concept of 'unity' could shape the development of future law – such as a potential Convention on Crimes against Humanity.

In Chapter 7, Kafayat Motilewa Quadri, Vahyala Kwaga and Tosin Osasona from Nigeria introduce neo-communitarian thinking to the concept of 'unity'. They discuss communitarian thoughts of African philosophers such as Menkiti and Mbiti, who believe that the community is more important than the life of an individual. The authors seek to modify traditional communitarian theories by embracing differences among members, forming a new concept which they call "neo-communitarianism". Neo-communitarianism means that the community should be an embodiment of all persons, not to exclude certain groups. It seeks to resolve the African-Asian and Western divide on individualism and communitarianism. Rooted in neo-communitarianism, 'unity' means peaceful, harmonious relations among persons and communities. As mass atrocities not only harm individuals but also peaceful relations within and between communities, it is important to recognize the collective legal interest of 'unity'.

Surabhi Sharma's Chapter 8 explores the concept of 'unity' from the perspective of Indian Hindu thought. Sharma argues that like 'humanity', 'unity' should be recognized as a foundational legal interest in international criminal law. Sharma finds passages from the Upanishads and the Bhagavad Gita which hold 'humanity' and 'unity' as central values. These two values are different in that 'humanity' concerns a person's conduct towards others, while 'unity' emphasises the close relation among people. This points to the communal dimension in the concept of 'unity'. This collective perspective prompts Sharma to highlight the value of reuniting a society from within and promoting 'unity' among nation States. Sharma also makes suggestions for the role of 'unity' in legal practice and policy.

In the final Chapter 9, Rod Rastan discusses 'unity' as a fundamental value underpinning the project of international criminal justice. According to Rastan, notions of 'unity' can serve as rationales for the creation and operation of the International Criminal Court. Such notions of 'unity' include oneness of humanity, global social order, and consistent application of the law. Rastan emphasises the "at once explanatory, aspirational and transformative" powers of

accorded a greater measure of attention, but also as a foundational value that should, among others, guide the future development of international criminal law. The project of international criminal law should aim to promote 'unity of humankind' longer-term, and not to polarise collectives, especially when they are embedded in conflict. The authors think that the movement of international criminal law, in its focus on inter-communal conflicts, should look beyond individuals and also consider communal relations in its operation. If those acting on the basis of international criminal law ignore a basic feature or root cause of the conflict, its introduction can even be counter-productive in the short term or lose its relevancy over time.

International (criminal) lawyers cannot be blind to the value of 'unity of humankind'. It is not a value without recognition by international law. As explained above, it is contained in the first paragraph of the Preamble of the Statute of the International Criminal Court, which makes clear that States Parties are "[c]onscious 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".[157] In their commentary on the Preamble, Ambos, Bergsmo and Triffterer observe that the "references to 'common bonds' and 'shared heritage' – which resonate in different cultures around the world – recognise that humankind is essentially one", despite various divides and considerations, and that the "enforcement of ICL through an international jurisdiction has the potential to contribute to the further unification of humankind by bringing peace through justice".[158] The preamble to a treaty "does not and should not have direct operative force", but "has effect as indicating the general purposes and spirit of the treaty, in the light of which the interpretation to be given to particular provisions may be considered"[159] – so "a preamble does have legal force and effect

social norms over social reality. Problems of international criminal justice reflect different conceptions of the international society and the values it seeks to uphold. The fundamental value of 'unity' should be consciously upheld by individuals and institutions practicing international criminal justice.

157 Preamble, Statute of the International Criminal Court, 17 July 1998 (https://www.legal-tools.org/doc/7b9af9/).

158 Ambos, Bergsmo and Triffterer, 2022, see *supra* note 51, p. 7.

159 Gerald Fitzmaurice, *The Law and Procedure of the International Court of Justice*, Volume 1, Grotius Publications Ltd., Cambridge, 1986, p. 51 (based on a text published in *British Yearbook of International Law*, 1951, vol. 28, pp. 1-28). See also Leena Grover, *Interpreting Crimes in the Rome Statute of the International Criminal Court*, Cambridge University Press, 2014, p. 53.

from the *interpretative* standpoint".[160] Indeed, one element of the general rule of treaty interpretation provides that the ordinary meaning of a term is determined in light of the object and purpose of the treaty,[161] so judges in international courts often include "a reference to the purpose of the treaty".[162] "Especially with a treaty of a constitutional character", Oppenheim's observes, "it will often be appropriate to lay particular emphasis on the object and purpose of the treaty when interpreting its provisions".[163] The doctrine of effectiveness is also "relative to the object and purpose of the treaty".[164]

This level of recognition of 'unity of humankind' by international criminal law – as an overarching preambular value – may be adequate for some readers. As it stands, judges in international jurisdictions,[165] members of the UN International Law Commission,[166] international civil servants,[167]

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[160] *Ibid*., p. 66, where Fitzmaurice also refers to the Asylum case (ICJ, *'Asylum Case' (Colombia v. Peru)*, Judgment, 20 November 1950, ICJ Reports 1950 p. 282 (https://www.legal-tools.org/doc/cb94fc/)).

[161] Article 31(1), Vienna Convention on the Law of Treaties, 23 May 1969 (https://www.legal-tools.org/doc/6bfcd4/).

[162] Besson, 2018, see *supra* note 13, p. 63 (mentioning examples of relevant separate opinions of ICJ judges).

[163] Robert Jennings and Arthur Watts (eds.), *Oppenheim's International Law*, Volume I: Peace, Parts 2 to 4, 9th ed., Longman, Harlow, 1992, p. 1273. The text continues on the same page: "Such a teleological interpretation of a treaty may tend to by-pass any inquiry into the particular intentions of the parties when adopting a particular provision, by attributing to them simply the more general intention to secure the object and purpose of the treaty as effectively as possible in the light of circumstances as they develop over time".

[164] *Ibid*., p. 1281.

[165] Benvenisti has a positive view of the role of international judges in affirming community interests: "if properly insulated from partisan pressures or biases, and amply informed, international adjudicators are institutionally inclined and relatively well positioned to promote community interests, and therefore to act as trustees of humanity", see Eyal Benvenisti, "Community Interests in International Adjudication", in Benvenisti and Nolte (eds.), 2018, see *supra* note 8, p. 71 (observing further: "Being in such a privileged position to develop and stabilize global expectations imposes a heavy moral responsibility upon international adjudicators" (*ibid*.); "international courts are inherently attuned to take community interests into account and promote community interests where states fail" (p. 72)). Voigt discusses the "craftsmanship of concerned and serious judges" and how "[j]udges and arbitrators can – under certain circumstances – better defend long-term, common and global interests against the short-sighted sovereign interests often pursued by states in treaty negotiations", see Voigt, 2014, see *supra* note 57, p. 25.

[166] While Nolte recognizes that the Commission, "[s]ince its inception, […] has articulated community interests and formulated corresponding primary community obligations", it is "doing so in a way which reassures states that the traditional inter-state paradigm remains

diplomats, authors and civil society actors can already refer to the value as recognized by the Preamble to the ICC Statute. It can and should by this time be included as a relevant factor in the "decision-making processes"[168] of ICC States Parties, also when they are acting in the context of, for example, the UN Security Council. It is indeed among the interests that should 'influence' States Parties,[169] for whom the concern for 'unity' becomes integral to their sovereignty and state consent when accepting the ICC Statute.[170] Chapters in this book may gently encourage such a practice of affirmation to emerge in criminal justice for core international crimes and more widely.

Other readers may prefer to see further, reinforced expressions of the value of 'unity of humankind' in future declarations or treaties, insofar as it is perceived as "an infant concept [that] needs to be fostered and devel-

untouched", see Georg Nolte, "The International Law Commission and Community Interests", in Benvenisti and Nolte (eds.), 2018, see *supra* note 8, pp. 110, 116. By examining the Commission's failure to use the term "common concern of humankind" in its work on 'Protection of the Atmosphere' – only to be included "a few months later in the Paris Agreement on Climate Change to normatively articulate the most important collective interest at stake" – Nolte maintains that the Commission "is not necessarily 'ahead of' states, leading the way toward the recognition of more community interests and obligations" (footnote omitted) (pp. 113-115). He notes that the concepts 'common heritage' and 'common concern of humankind' used elsewhere have inspired "the international legal community, including the academic community" (p. 114). Quite apart from what the Commission does or fails to do, the present authors underline the importance of the language used by individual members in their Commission capacity.

167 Although Klabbers suggests that "it is no longer plausible to consider international organizations as embodying the community interest", he points out that they help "to shape the perception that something is, or is not, a community interest" as they "benefit from the circumstance that they are the *agorae* of the global community: The UN General Assembly in particular is the 'town meeting' of the world in a relevant, nonpejorative sense"; they "can contribute to the community interest in that they help to formulate how the community interest should be understood", see Jan Klabbers, "What Role for International Organizations in the Promotion of Community Interests? Reflections on the Ideology of Functionalism", in Benvenisti and Nolte (eds.), 2018, see *supra* note 8, pp. 89, 92, 93, 94. High officials of international organizations are often influential in legal discourse, sometimes recognized publicists.

168 Benvenisti and Nolte, 2018, see *supra* note 100, p. 7.

169 Wolfrum refers to how community interests can 'govern' or 'influence' the management of particular issues, see Rüdiger Wolfrum, "Identifying Community Interests in International Law", in Benvenisti and Nolte (eds.), 2018, see *supra* note 8, p. 19.

170 We are in other words not dealing with a situation of "top-down identification" of a new community interest without basis in existing treaty law, with its associated "risks of inequality, parochialism, and hegemony" which Besson mentions, see Besson, 2018, see *supra* note 14, p. 48.

oped".[171] Several authors in subsequent chapters mention the preamble of the draft convention on crimes against humanity in this connection. Yet more ambitious readers may wish to explore how the value of 'unity of humankind' relates to existing or future international crimes – how it may be constructed as a legally-protected interest in the narrower sense of international proscriptions.

Broadening the range of interests or values that are recognized by international criminal law is not just a task of governments, but all stakeholders in international law-making, including civil society and individuals. "A community interest is not something which exists objectively", writes Judge Nolte, "but needs to be socially established (constructed, recognized)".[172] As we have seen, such broadening is not only about introducing new international criminal *prohibitions*, however important such initiatives may be. It is also about highlighting dormant recognition of interests in existing treaties, preambles and declarations, and about proposals to add to such indirect acknowledgment of fundamental interests and values, including in language used in judgments and by eminent publicists.[173] Such language can express global common concerns, stabilise normative expectations, and "be used as effective advocacy tools by both state and non-state actors".[174] "[C]ommon interests are those that are backed by a communal legal spirit – the opinio iuris communis."[175]

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[171] To borrow Weeramantry's words about sustainable development, see C.G. Weeramantry and M.C. Cordonier Segger (eds.), *Sustainable Justice: Reconciling Economic, Social and Environmental Law*, Martinus Nijhoff, Leiden, 2005, p. 445.

[172] Nolte, 2018, see *supra* note 166, p. 103 ("The establishment of a community interest in international law usually begins with a claim by a certain actor which then becomes politically more widely accepted, by persuasion or by different forms of pressure. The process by which a community interest is established is usually fed by many informal (political or other) impulses whose legal relevance is determined by secondary rules of international law.").

[173] Nolte highlights the potential role of experts as catalysts: "Epistemic and expert communities may be able to successfully articulate and promote a community interest (as well as defend realms for the pursuit of self-interest), in particular under the benign acquiescence of formal institutions, but their competence may ultimately not go far beyond that of a catalyst", see Nolte, 2018, see *supra* note 166, p. 117.

[174] Benedek, De Feyter, Kettemann and Voigt, 2014, see *supra* note 18, pp. 223-224.

[175] *Ibid*., p. 220. Zyberi elaborates: the "formulation of international law itself constitutes a much wider process than the formulation and acknowledgment of its 'formal sources', seeking the legitimacy of international norms through the expression of the *opinio juris communis* (going well beyond the subjective element of custom), as well as the fulfilment of the public interest and the realization of the common good of the international community as a whole", see Gentian Zyberi, "The Protection of Community Interests in International Law:

Baragwanath describes in his Chapter 5 below how the making of international criminal law has traditionally been reactive.[176] It should probably become more proactive. We favour increased awareness of the potential dynamics of what we may call a '*Völkerstrafrechtspolitik*' broadly understood, with its promise of stimulating higher quality of initiatives (made possible by active reflection over years, sometimes decades) and broadening participation in international law-making beyond foreign ministries (to include other areas of domestic governance and professional expertise) and Western states that have tended to dominate international law-making, as discussed above. This is not about a naïve "ideology of legal cosmopolitanism",[177] but rather about the overdue need to hear what younger actors from populous countries such as China, India, Indonesia and Nigeria think the next generation of international criminal law-making should consider. Neither does it reflect a naïveté concerning the privileged role of *states* in the making and interpretation of international law. It is about the fact that humankind can do considerably better in serving the interests of the collective,[178] and that it can do so while being ever vigilant that actor-driven initiatives actually serve the global interest.[179] Governments – whether democratically elected or not – can ill afford to be seen as standing in the way of humankind's most basic aspirations to eat, drink water, breathe clean air

Some Reflections on Potential Research Agendas", in Zyberi (ed.), 2021, see *supra* note 15, p. 310.

176 David Baragwanath, "'Reconciliation' as a Philosophical Foundational Concept in International Criminal Law", Chapter 5 below.

177 Koskenniemi describes "the ideology of legal cosmopolitanism": "Throughout the twentieth century, international lawyers have put forward reform plans the central idea of which has been to bring institutions and practices familiar from domestic Western societies to the international level. The more recent pull towards an international 'rule of law' captures some of this idea", see Koskenniemi, 2017, see *supra* note 62, p. 1372.

178 Nolte discusses the movement of international lawyers for whom "classical international organizations and other traditional forms of international lawmaking are too slow, too inflexible, and they do not reach the necessary degree of orientation and substantive problem-solving capacity", see Nolte, 2018, see *supra* note 166, p. 106.

179 See the warning of Wolfgang Benedek, Koen De Feyter, Matthias C. Kettemann and Christina Voigt, "Introduction", in Benedek, De Feyter, Kettemann and Voigt (eds.), 2014, see *supra* note 8, p. 7. They acknowledge, however, that the "increasing participation of non-state actors in this process corresponds to the development from a community of states to a proper international community, which increasingly pursues common aims as a matter of common interest", see their concluding chapter in the same anthology, "Conclusions: The Common Interest in International Law – Perspectives for an Undervalued Concept", see *supra* note 18, p. 226.

and not suffer unintelligent wars,[180] unless they wish to see further mass-disenchantment and growing indifference. The list of aggravated harms people suffer on the watch of nation-state governments has grown precariously long and is probably yet to be called out by persuasive, less beholden voices.

Actors who seek to engage in prospective analysis should endeavour to understand existing legally-protected interests in international criminal law as well as closely related interests in domestic criminal jurisdictions. A functioning '*Völkerstrafrechtspolitik*' would be nourished by a strong commitment to justice and open minds capable of exploring and assessing how societies advance. This may become one of the significant challenges ahead for new generations of international criminal lawyers: to think out of the realm of existing positive legal instruments, and dive into more substantial consideration of the reasons behind the architecture of global justice. Younger specialists willing to serve the field should be able to perceive the dynamics of social interests, as universal interests are not static. Eyes should be open to see how values are enlarged, deepened and questioned, including how power is wielded in such processes. Recent exchanges on international criminalization of environmental harm represent an important aspect of this evolving landscape, including proposals on the notion of ecocide.[181] Given how arduous and long the process to raise spe-

[180] Ryngaert illustrates the impatience that may be building up. With reference to environmental challenges such as those alluded to, he proposes "a paradigm shift" whereby states can "act unilaterally to protect global values", arguing that such "authorization is needed for the proper enforcement of international law, as well as to tackle pressing global governance challenges"; a "state's sovereignty is relative: it comes with cosmopolitan responsibilities and objectives. When these objectives are not properly fulfilled, other states or actors may assume their own responsibility by exercising unilateral jurisdiction in the global interest", see Ryngaert, 2018, see *supra* note 8, pp. 145-146. Nolte describes a growing vision of international law whereby "informal channels" become more important, and "other actors (nongovernmental organizations (NGOs), transnational corporations, epistemic communities) would play an increased role and emancipate themselves (somewhat) from states, in particular by convening informally and solving their problems informally", see Nolte, 2018, see *supra* note 166, p. 105.

[181] For an overview of the discussion on ecocide, including numerous challenges, see Daryl Robinson, "Ecocide – Puzzles and Possibilities", in *Journal of International Criminal Justice*, 2022, vol. 20, pp. 313–347. Voigt, a significant contributor on international environment law the past two decades who participated in drafting one of the ecocide proposals discussed by Robinson, emphasizes the gravity of the environmental threats and says that sustainable development is "*the* common interest in the 21st century and beyond". She observed back in 2014: "The climate, the ozone layer, the oceans, biodiversity, indeed the entire physical world form an interdependent ecological system, much of which can only be

cific proposals is, practicing baptism by fire may not be required to ensure quality-control.

The authors of this volume have chosen to focus on the foundational values of 'unity' and 'reconciliation', suggesting that it is overdue to give them greater importance also in the international criminal law project. We are not pretending to be exhaustive, but rather hope that the present chapters – as well as the growing emphasis on harm to the 'environment' – will inspire younger generations of international criminal lawyers to conduct analyses on other goods that may be relevant candidates for protection by the international criminal law of tomorrow. They may be guided by the same recognition of the importance of addressing the historical, philosophical and theoretical dimensions of the abstract standards, ideas and beliefs which concern fundamental values to be recognized by international criminal law. They may also take into account two additional considerations that have informed our work with this volume.

Firstly, values discussed for prospective protection of international criminal law should be conceived as being part of more general perceptions of universal goods that all people cherish, and which are interdependent. As Richard Bauman has pointed out when discussing the Latin concept of '*humanitas*', the most important values that structure societies operate together. Among the Romans, for example, over the ideas of 'humanity', 'harmony', 'solidarity', 'peace', 'friendship' and other related positive concepts, we gauge an umbrella under which several moral, religious and legal considerations are grouped, including '*clementia*', '*aequitas*', '*lenitas*', '*mansuetudo*', '*moderatio*, '*indulgentia*', '*iustitia*', '*fides*' and '*pietas*', to mention some central examples mentioned by Bauman.[182] Values to be protected by international criminal law do not walk alone.

Secondly, our research has shown that only through a perspective committed to an inclusive understanding of humankind and its common interests is it possible to overcome the state-centric dimension of international justice, especially the claim that international criminal law can only be understood provided we accept – in realist terms – that states are concerned only with their own national interests.[183] A study of common values

protected at the global level, making it a common concern of all humanity", see Voigt, 2014, see *supra* note 57, pp. 27, 19.

182 Bauman, 2000, see *supra* note 68, p. 6.

183 Ryngaert, 2015, see *supra* note 8, pp. 9-18.

can shed light on this view when examining jurisdictional claims: the political notions of legitimacy, democracy and public participation, based upon well-grounded positive interests that are globally shared and accepted, can justify going beyond the unilateral limits of state borders and endorsing a non-territorial, community-based concept of jurisdiction.[184] International criminal law is therefore not limited to being a way of shadowing the national authority of states, but rather an efficient instrument to translate, in valid terms, genuine expectations of the global civil community. Far from the vertical imposition of the administration of justice, we have been able to pinpoint the great importance of acknowledging that international criminal law should be built upon an inter-subjectively shared normativity,[185] but not as a community of hypocrisy.[186] As we go forward, the interests of humankind as a whole – not just the international community or the community of nations or states – should be kept in focus when we consider values to be recognized by international criminal law.

The way we talk about these things is important. Do we describe degradation of the atmosphere or oceans or spread of serious viral disease as 'shared challenges', 'cross-border challenges' or 'transnational challenges'? Each of these terms preserves the nation-state as the yardstick, while the challenges or threats cannot be resolved by any one national government or state. They are perhaps better referred to as 'global challenges' or 'shared global challenges', but the word 'global' often comes with associations of economic globalization and transfer of manufacturing jobs to locations with lower labour costs. These types of challenges may therefore more accurately be understood as 'common challenges of humankind', for reasons captured by Anne-Marie Slaughter: "Successfully addressing shared global challenges requires a planetary perspective, one focused on all human beings, regardless of the countries they live in, and their rela-

[184] *Ibid*., pp. 20, 77.

[185] *Ibid*., p. 146.

[186] Koskenniemi warns that "even a wonderful-sounding principle such as 'there shall be no more war' fails as a symbolic or community-affirming declaration; it can be accepted only with a mental reservation. And that reservation (hypocrisy) destroys its symbolic value. Instead of bringing the community together in a mutual ethos of non-violence, the community is joined by its shared acceptance that its words need not correspond to its deeds. Each member agrees to an ethics of peace while holding a dagger behind one's back. There are, of course, many such communities", see Koskenniemi, 2017, see *supra* note 62, p. 1364.

tionships to one another and to the planet".[187] Climate change and the Covid-19 pandemic represent threats to all humankind, not just to nation-states.[188] Recognizing *humankind* as the primary bearer of certain risks or harms[189] – far from a radical proposition[190] – adds sheer realism to the discourse. It may also encourage new perspectives and voices, even on the further evolution of principles of interpretation.[191] Indeed, Vattel – whose

[187] Anne-Marie Slaughter, "America must be serious about cross-border challenges", in *Financial Times*, 20 October 2022. She commends the 2022 United States National Security Strategy for "insist[ing] issues like climate change are as important as geopolitical threats", but argues that "a shift in money, *mindset* and metrics must follow suit" (italics added), see National Security Strategy, The White House, United States of America, October 2022 (https://www.legal-tools.org/doc/ujmc6y/).

[188] Slaughter criticizes national governments for not speaking about common challenges of humankind in adequate terms: "It is hard to avoid the conclusion that the administration's focus on shared transnational challenges is less about meeting and defeating them than about *leading the global response to them*", Slaughter, 20 October 2022, see *supra* note 187 (italics added).

[189] Simma points to "the evolution of international law from the State-centred system […] towards one that is more focused on, and accounts better for, the interests of peoples or humanity as a whole", see Bruno Simma, "Preface", in Zyberi (ed.), 2018, see *supra* note 15, p. l.

[190] Nolte even feels a need to point out that "community interests have never only been those of humanity as a whole", see Nolte, 2018, see *supra* note 166, p. 101 ("The protection against pirates on the high seas, or the protection against deleterious effects of climate change, lies in the self-interest of every single state, as well as in the self-interest of all individuals.").

[191] Oppenheim's considerable list of supplementary means of interpretation – which we approach cognizant of Schwarzenberg's warning that "[e]ach of the various techniques of interpretation is a valuable servant, but a dangerous master" (Georg Schwarzenberger, *International Law*, Volume 1, 3rd ed., Stevens & Sons Ltd., London, 1957, p. 532) – even includes a principle that had *not* made it into the Vienna Convention on the Law of Treaties: *in dubio mitius*, "in deference to the sovereignty of states", whereby that meaning is to be preferred "which is less onerous to the party assuming an obligation, or which interferes less with the territorial and personal supremacy of a party, or involves less general restrictions upon the parties" (Jennings and Watts (eds.), 1992, see *supra* note 163, p. 1278). Whereas an author such as Schwarzenberg expresses doubt whether it amounts to a general principle of law, and argues that it would automatically reinforce "the presumption against limitations of the independence of States" (*op. cit.*, p. 492) – and Brownlie says it is "question-begging" as a general principle of interpretation (Ian Brownlie, *Principles of Public International Law*, 7th ed., Oxford University Press, 2008, p. 635) – the Appellate Body of the World Trade Organization ('WTO') nevertheless invoked the principle in the *Hormones* case (WTO, *European Communities – Measures Concerning Meat and Meat Products – Report of the Appellate Body*, 16 January 1998, WT/DS26/AB/R, para. 165 (https://www.legal-tools.org/doc/zoy8jp/)). Support subsequently lent to this approach (Johannes Hendrik Fahner, "*In Dubio Mitius*: Advancing Clarity and Modesty in Treaty Interpretation", in *European Journal of International Law*, 2021, vol. 32, no. 3, pp. 835–861) illustrates that there may now be room for some further thinking on approaches to interpretation. Cognizant of Lauterpacht's cau-

writings on treaty interpretation Lauterpacht found "the most detailed discussion of the subject by any author of a general treatise"[192] – argued that we should be "giving the utmost extent to obligations that tend to the *common advantage of mankind*".[193] Jessup referred to "the general world interest" and "the interests of the world community";[194] Benvenisti and Nolte, to "the human community";[195] Wolfrum, to "the interest of the world community", "the interests of humankind", and to "mankind as a whole";[196]

tion that rules of interpretation "are not the determining cause of judicial decision, but the form in which the judge cloaks a result arrived at by other means" (Hersch Lauterpacht, "Restrictive Interpretation and the Principle of Effectiveness in the Interpretation of Treaties", in *British Year Book of International Law*, 1949, vol. 26, p. 53), perhaps the time has come to re-examine the basis of a principle of *in dubio humanitas*, as concerns for threats to the survival of mankind grow?

192 Hersch H. Lauterpacht, *ibid.*, p. 48. He observed: "It is doubtful whether any party to a dispute involving the interpretation of a treaty can fail to derive some advantage from the rich choice of weapons in Vattel's armoury of rules of interpretation" (*ibid*.).

193 Emer de Vattel, *The Law of Nations*, Liberty Fund, Indianapolis, 2008 (1758), Book II, Chapter XVII: Of the Interpretation of Treaties, §302, p. 435 (italics added). In contrast, he equates harm with that which "is, in its own nature, rather injurious than useful to mankind" (*ibid*.). Elsewhere he asks provocatively, as were he a contemporary: "Is it in the power of men, on dividing themselves into different political bodies, to break the ties of that universal society which nature has established amongst them?" (*ibid*., §12, p. 267). Voigt distinguishes between "human societies" and "human-made collectives, one of them being collectives of states" (see Voigt, 2014, see *supra* note 57, p. 12). For a stimulating discussion on the use of the term 'mankind' in the 1700s when Vattel wrote *The Law of Nations*, see, Jens Bartelson, *Visions of World Community*, Cambridge University Press, 2009, pp. 117 ff. Vattel's influence in the United States was considerable already in the late 1700s (see Cornelius F. Murphy, Jr., *The Search for World Order*, Martinus Nijhoff Publishers, Dordrecht, 1985, pp. 55 ff.). More than a century earlier, Suárez had written: "Mankind, though divided into numerous nations and states, constitutes a political and moral unity bound up by charity and compassion; wherefore, though every republic or monarchy seems to be autonomous and self-sufficing, yet none of them is, but each of them needs the support and brotherhood of others, both in a material and a moral sense. Therefore they also need some common law organizing their conduct in this kind of society.", see Francisco Suárez, *Tractatus de legibus, ac Deo legislatore*, 1612, Book II, Chapter 19, § 5. If it were to be true that "whoever invokes humanity, wants to cheat", as the frequently-quoted Nazi lawyer Schmitt asserted (Carl Schmitt, *The Concept of the Political*, University of Chicago Press, 2007, p. 54), it would seem to be a very old pastime indeed.

194 Philip C. Jessup, *A Modern Law of Nations*, 1968, pp. 105-106.

195 Benvenisti and Nolte, 2018, see *supra* note 100, p. 3.

196 Wolfrum, 2018, see *supra* note 169, pp. 20, 26, 28 ("the common heritage principle introduces a revolutionary new positive element into the law of the sea by indicating that the control and management of the deep seabed is vested in mankind as a whole"; "[…] states parties are meant to act as a kind of trustee on behalf of mankind as a whole."; and "The term

Voigt, to "obligations owed to an international community of states – and ultimately of all humankind".[197] Vattel's "obligations that tend to the common advantage of mankind" resonate in late Judge Cançado Trindade's work to recognize humankind as a subject of international law.[198]

New generations should be able to endorse the fundamental values on which international criminal prohibitions are based. These legally-protected values or interests define the nature of the international criminal law order – they reflect what Cannizzaro and others call the "legal conscience of the international community".[199] Through goodwill and accord, civil society can engage with various viewpoints and agendas in order to promote a reconnection of institutions that would benefit international criminal law and its unique features.

This is essentially an exercise of imagination that, in a recent volume, Gerry Simpson promotes among younger specialists in international law: in order to realise our aspirations and to channel our ever-existing longing for a decent international legal order, we should be ready to engage in original ways.[200] Only by means of innovative thinking, by recovering the human nature behind the very idea of international law, can we expect to materialise our expectations for peace, justice and human survival. Anderson has inspired discourses on 'imagined communities' for several decades;[201] Al-

'mankind' combined with the word 'heritage' indicates that the interests of future generations have to be respected in making use of the international commons." (p. 29)).

197 Voigt, 2014, see *supra* note 57, p. 16.

198 "*[H]umankind* has in my view also emerged as a subject of International Law": "We are here still in the first steps, and there remains of course a long way to go in order to attain a more perfected and improved system of legal representation of humankind in International Law, so that the rights recognized to it thus far can be properly vindicated on a widespread basis", see Antônio Cançado Trindade, *International Law for Humankind. Towards a New* Jus Gentium, 3rd revised ed. (The Hague Academy of International Law Monographs, vol. 10), Nijhoff, Leiden, 2020, pp. 281, 287. The idea that 'unity of humankind' should be properly recognized by international criminal law does not depend on the construct of humankind as a subject of international law.

199 Cannizzaro, 2018, see *supra* note 51, p. 420.

200 Gerry Simpson, *The Sentimental Life of International Law: Literature, Language, and Longing in World Politics*, Oxford University Press, 2021.

201 Communities are "*imagined* because the members of even the smallest nation will never know most of their fellow-members, meet them, or even hear of them, yet in the minds of each lives the image of their communion", see Benedict R.O. Anderson, *Imagined Communities: Reflections on the Origin and Spread of Nationalism*, Verso, London, 2016 (1983), p. 6. Others have made important contributions on ethnic and religious 'visions of community':

lott acknowledges that the "human imagination plays a big part in forming our values, in the way that we *imagine* ourselves and our societies".[202] This resonates with us. At the same time, we remain cognizant that the concept of community interests is "often awarded too lightly by international lawyers to their favorite regime" and should thus be used cautiously.[203]

In sum, the chapters in this third and last volume on the *Philosophical Foundations of International Criminal Law* represent diverse examples of the work that can and should be done on the identification of relevant legal interests, thus feeding our comprehension of international penal justice and contributing to the progressive development of international criminal law.[204] Taken as a whole, these essays suggest that opening inquiries into legally-protected interests and foundational goods may add value, and motivate further research on aspects which this limited volume could not fully consider. May these reflections inspire future work on how values inform – or should inform – a coherent and productive development of international criminal law, so that it can play its role in protecting fundamental common interests of humankind. An international criminal law that is not "able to respond to common needs" risks becoming less relevant.[205] On

by seeking to understand "the complex mechanisms in which their identities were formed, we may be able to contribute to a better understanding of the delicate balances that have nourished their respective 'visions of community'" (Walter Pohl, "Ethnicity, Religion and Empire", in Walter Pohl, Clemens Gantner and Richard Payne (eds.), *Visions of Community in the Post-Roman World: The West, Byzantium and the Islamic World, 300-1100*, Routledge, Abingdon, 2016 (2012), pp. 22-23). The substantial contributions by political scientists and historians to our understanding of identity, belonging and othering should inspire international lawyers when they turn their minds to imagining harm to 'humankind' or that fundamental interests of 'humankind' should be afforded more express recognition by international law.

202 Philip Allott, *Eutopia: New Philosophy and New Law for a Troubled World*, Edward Elgar, Cheltenham, 2016, p. 221.

203 See Jochen von Bernstorff, "'Community Interests' and the Role of International Law in the Creation of a Global Market for Agricultural Land", in Benvenisti and Nolte (eds.), 2018, see *supra* note 8, p. 295.

204 "[T]he identification and protection of the common interest is by itself an important task in the progressive development of international law", see Benedek, De Feyter, Kettemann and Voigt, 2014, see *supra* note 18, p. 226.

205 *Ibid*. Benvenisti and Nolte soberly refer to "the capacity of international law to accommodate community interests in a system that contains strong structural elements for the protection of self-interest", see Benvenisti and Nolte, 2018, see *supra* note 100, p. 8. Føllesdal observes that "neither international law in general nor ICs [international courts] in particular are a universal panacea for the challenges of international cooperation: international bodies without adjudicatory authority may often be better placed to act", see Andreas Føllesdal,

the contrary, an international criminal law that properly recognizes the importance of values such as the 'unity of humankind' can contribute immensely towards the well-being of mankind, its peace and security.

"How International Courts Can Help Secure Global Public Goods Worth Having: Pure Public Goods and Beyond", in Zyberi (ed.), 2021, see *supra* note 15, p. 64.

2

The Legal Interests Protected by War Crimes

SONG Tianying*

2.1. Introduction

'War crimes' is a generic term. It is loosely known as (serious) violations of the laws and customs of war that incur individual criminal responsibility. This definition, as presented here, is circular and not self-contained. On the other hand, one can find very clear examples of war crimes in international humanitarian law treaties and statutes of international courts. The definitions or enumerations of war crimes in these international legal instruments vary significantly. The criminalisation of violations in humanitarian treaties and statutes of international tribunals appears to emphasise different legal interests that they seek to protect at the time.

A study of legal interests protected by war crimes prescribed in different contexts links positive rules to their underlying value-orientation and opens door to moral-philosophical and legal-policy discussions. Legal interests protected by individual war crimes and war crimes as a category reflect the nature and scope of war crimes and normative justifications for their criminalisation. We may therefore ask the following questions through the study of legal interests: What are the criteria of criminalisation? Can war crimes form a coherent, unique category of crimes based on the legal interests they protect? What are the normative justifications for war crimes to be 'core international crimes'? Even if it is merely a contingent product of historical events that war crimes are seen as international crimes, the justification of legal interests is essential.

Section 2.2. of this chapter will review the development of positive war crimes law through treaties and statutes of international tribunals. I take note of the mutual-legitimation and cross-fertilisation between regular treaty-making and *ad hoc* international trials. The idea of imposing criminal responsibility on violations of the law of war started to be accepted in

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international treaties in the late nineteenth century. Although for long there had been no explicit distinction between any violation of laws of war and those constituting war crimes, more and more enumerations of war crimes emerged alongside the codification and expansion of the law of war. Such development has reached a high point under the Rome Statute of the International Criminal Court, which adopted war crimes from previous treaties and *ad hoc* international tribunals.

Section 2.3. identifies criminalisation criteria. It examines ordinary and special legal interests protected by the war crimes law, and circumstances which requires enhanced protection of those interests. Additional interests of international peace and security may incur in case of war crimes of policy or large scale. Section 2.3. also explores the relationship between war crimes and international crimes in light of these legal interests.

2.2. Between Internationally Prescribed Rules of Municipal Law and Crimes under International Law

In this section, I trace the law of war crimes from two types of sources: international humanitarian law treaties and international trials (considering that jurisprudence or case law and academic teachings are subsidiary or auxiliary sources of international law in accordance with Article 38(1) of the Statute of the International Court of Justice). Treaties and judicial decisions, of course, played different roles in the emergence of the concept of war crimes and its rise to the 'status' of core international crimes. However, together they have contributed to the changing understanding of legal interests protected by war crimes. On the one hand, the Hague Conventions, Geneva Conventions and the like detailed rules of warfare and eventually included domestic penal sanctions as a means of enforcement. Such provisions focus exclusively on domestic enforcement and never declare the violations 'international crimes' or even use the term 'war crimes'. If we only consider these treaties, war crimes seem similar to transnational crimes such as drug trafficking or organised crimes.

Post-war accountability processes, on the other hand, have pushed the punishment of war crimes to the international level. As all violations of laws of war and those constituting war crimes had not been positively distinguished, the treaties provided a pool of 'eligible' legal interests to be protected by war crimes, whether they were covered by the penal-sanction provisions or not. The post-World War I Commission on Responsibility, the Statutes of the Nuremberg, and the Tokyo Far East Military Tribunals, or

more recently those of the *ad hoc* Tribunals for the former Yugoslavia and Rwanda did not invent new rules of warfare, but criminalised certain violations of existing law of war treaties. The Statute of the permanent International Criminal Court covered war crimes to the most comprehensive extent possible, but did not produce a principled definition, nor criminalisation criteria. Through tribunal jurisprudence and academic writing, war crimes took on the mantle of 'core international crimes' which did not come with humanitarian law treaties themselves. Such characterisation cannot be abstracted from the mass atrocity situations the tribunals faced. Two questions arise from the observations in this section: (i) Can individual war crimes qualify as international crimes; if yes, which interests give rise to international concern? (ii) Do war crimes of a certain gravity – compared to those committed in isolation – implicate additional legal interests?

2.2.1. Normalisation of Penal Sanctions as a Means of Protecting Interests in Humanitarian Treaties

Humanitarian law treaties have a logic of their own. They often focus on specific areas such as protected persons or means and methods of warfare. In these treaties, war crimes were typically seen as municipal crimes whose criminalisation and punishment depended on State implementation.[1] In his 1950 article "The problem of an international criminal law", Georg Schwarzenberger concluded that the international law of war crimes simply prescribed or authorised an "extraordinary" jurisdiction to prosecute war criminals under municipal law.[2]

In the beginning, penal sanctions did not receive much attention as a means of enforcement. Where provisions on penal sanctions were included, States had a lot of discretion in their implementation. Since the 1949 Geneva Conventions, the obligation to carry out domestic criminal sanctions became more precise. Provisions of penal sanctions in international agreements were important in the sense that they formalised criminal enforcement at the domestic level. They laid the foundation for individual criminal responsibility to attach internationally.

1 George Manner, "The Legal Nature and Punishment of Criminal Acts of Violence Contrary to the Laws of War", in *American Journal of International Law*, 1943, vol. 37, no. 3, p. 433.

2 Georg Schwarzenberger, "The problem of an international criminal law", in *Current Legal Problems*, 1950, vol. 3, no. 1.

2.2.1.1. Introducing Criminal Enforcement into International Humanitarian Law Treaties: From Zero to Criminal Sanctions against All Violations

The nineteenth century witnessed the start of codification of the laws of war against the backdrop of legal positivism. The issue of serious guarantees for the compliance of codified rules of war also started to emerge. As the rhetoric of 'humanity' and 'civilisation' began to materialise, the traditional and natural guarantee in the battlefield – reprisal – was causing discomfort as a form of collective punishment. At the time, the punishment of violations of the laws of war was completely left to States – sanctions can be found, for example, in the Instructions for the Government of Armies of the United States in the Field ('Lieber Code'). Many European States also had some sort of military codes, not all of them were up to date.[3]

Initial discussions surrounding international regulation of this issue was related to the earliest modern law of war treaty – the 1864 Convention for the Amelioration of the Condition of the Wounded in Armies in the Field adopted in Geneva. In 1870, Gustave Moynier, one of the five founders of the Geneva Committee – precursor of the International Committee of the Red Cross ('ICRC') – already pointed out that the lack of provisions regarding violations was a "very serious" lacuna of the 1864 Convention.[4] The ensuing Franco-Prussian war made Moynier realise that "a purely moral sanction" was insufficient "to check the unbridled passions" in war, and that the drafters of the Geneva Convention should not have left penal sanctions for violations completely to government discretion.[5] He proposed to establish an international arbitral tribunal to decide on personal and di-

[3] Gustave Moynier, "Rapport présenté à l'Institut de droit international sur la réglementation des lois et coutumes de la guerre", in *Annuaire de l'Institut de Droit International 1879-1880*, vol. 1, Librairie C. Muquardt, Brussels, 1880, p. 314.

[4] Gustave Moynier, *Étude sur la Convention de Genève pour l'amélioration du sort des militaires blessés dans les armées en campagne (1864 et 1868)*, Librairie de Joël Cherbuliez, Paris, 1870.

[5] Gustave Moynier, "Note sur la Création d'une Institution Judiciaire Internationale propre à prévenir et à réprimer les Infractions à la Convention de Genève", in *Bulletin International des Sociétés de Secours aux Militaires Blessés*, 1872, vol. 3, no. 11, pp. 122–23. See also Daniel Marc Segesser, "'Unlawful Warfare is Uncivilised': The International Debate on the Punishment of War Crimes, 1872–1918", in *European Review of History*, 2007, vol. 14, no. 2, p. 216; Christopher Keith Hall, "The first proposal for a permanent international criminal court", in *International Review of the Red Cross*, 1998, no. 322.

rect criminal sanctions of violations of the 1864 Geneva Convention. This is known as the first proposal for an international criminal court.[6]

Another initiative was subsequently advanced by the French representative, General Eugène Arnaudeau, during the 1874 Brussels Conference. Arnaudeau observed that, at the international level, there was no repression for the violations of the laws of war other than public reprobation. He lamented that as criminal justice for violations was completely left to States, the same act might receive different penalties under different military codes. Arnaudeau wanted concordance of the modes of repression in military codes of the States, and, as a further step, an agreement "unifying the penalties applicable to crimes, offenses and contraventions in violation of international law".[7] He called on States to include in their military codes similar penalties for the following cases: looting by group or individuals; stealing from the inhabitants; violence towards a wounded person; violation of parole by a prisoner of war; espionage; prolongation of hostilities beyond the agreed time; armed robbery; and conducting hostilities in neutral or allied territory.[8] Arnaudeau's proposal was supported by most delegates at the conference.[9] Criminal repression was not mentioned in the Brussels Declaration, but Arnaudeau's suggestion put a foot in the door for later discussion.

In the meantime, Gustave Moynier channelled his effort to introduce international regulation of sanctions of violations of the laws of war through the Institut de droit international (Institute of International Law, IIL), which he had co-founded with Gustave Rolin-Jaequemyns, Jean-Gaspard Bluntschli and other distinguished jurists in 1873.[10] The Institution followed up with Arnaudeau's proposal at the Brussels Conference and "further progress of the international regulation" of the laws and customs

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6 Moynier, 1872, pp. 123, 130, proposed articles for the arbitral tribunal: Articles 5, 7, see *supra* note 5.

7 "Protocole No. 4 (Séance plénière du 26 août.)", in *Actes de la Conférence de Bruxelles de 1874 sur le projet d'une convention internationale concernant la guerre*, Librairie des publications législatives, Paris, 1874, p. 52.

8 *Ibid*.

9 *Ibid*. Fifteen European States participated in the conference.

10 "Statuts votés par la Conférence Juridique Internationale de Gand, le 10 Septembre 1873", in *Annuaire de Institut de Droit International 1877*, Institut de Droit International, Ghent, 1877, p. 1, Article 1.

of war.[11] A manual on the laws of war on land was adopted by the Institute in 1880 at Oxford ('Oxford Manual'). The Manual included a final part, "Penal Sanction", whose Article 84 provided: "Offenders against the laws of war are liable to the punishments specified in the penal law". This part did not specify which acts were punishable by criminal law and left the decision to States. Reprisal was allowed where the offender could not be apprehended.

The updated Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field adopted in 1906 was the first international treaty to mention enforcement under domestic criminal law. Its Article 28 requested States Parties to endeavour to include in their military penal law repression of two types of violations: robbery and ill-treatment of wounded and sick soldiers; abuse of the Red Cross flag and armlet.[12] Among the 1899 and 1907 Hague Conventions for maritime and land warfare, only the 1907 Hague Convention (X) for the Adaptation to Maritime Warfare of the Principles of the Geneva Convention included a provision on penal repression. Article 21 required States to enact penal sanctions against pillage and ill-treatment of the wounded and sick in the fleet, and misuse of distinctive marks for protection.[13] The 1907 Hague Convention remained in force during the two World Wars, until it was replaced by Geneva Convention II in 1949.

In 1929, two Geneva Conventions were adopted: the Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field was to revise and replace its 1906 predecessor; while the Convention relative to the Treatment of Prisoners of War was new. Article 29 of the 1929 Convention on land warfare extended penal sanction to *all* violations

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11 "Note sur les travaux des commissions en séances des 26 et 27 Août 1875", in *Annuaire de Institut de Droit International 1877*, Institut de Droit International, Ghent, 1877, p. 47; Gustave Rolin-Jaequemyns, "Rapport de Rolin-Jaequemyns", in *Revue de Droit International et de Législation Comparée*, 1875, vol. 7, p. 510; Institut de Droit International, *Examen de la Déclaration de Bruxelles de 1874 (Rapporteur: M. Gustave Rolin-Jaequemyns)*, p. 3; Moynier, 1880, p. 312, see *supra* note 3.

12 International Committee of the Red Cross ('ICRC'), Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field, 6 July 1906, Article 28 (http://www.legal-tools.org/doc/90dd83/).

13 Regarding the 1899 and 1907 Hague Conventions on land warfare, the issue of penal sanctions was simply not discussed during the conferences. See Louis Renault, "De l'application du droit pénal aux faits de guerre", in *Revue générale de droit international public*, 1918, vol. 5, p. 15.

of its provisions in time of war, as a result of the ICRC and the US proposals.[14] It is believed that the post-World War I Commission on Responsibility's list of war crimes, which covered the most serious breaches of the 1906 Convention, influenced the authors of the 1929 Convention when they drew up Article 29 on penal sanctions.[15] The new Convention on prisoners of war, however, did not include any provision on penal sanctions.

Table on penal sanctions in laws of war instruments 1864-1929:

Legal text	Criminal sanctions
1864 Geneva Convention for the Amelioration of the Condition of the Wounded in Armies in the Field	None.
1880 Oxford Manual	Article 84 Offenders against the laws of war are liable to the punishments specified in the penal law.
1899 Hague Convention respecting the Laws and Customs of War on Land and its annexed Regulations	None.
1906 Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field	Article 28 requested States Parties to impose criminal responsibility on robbery and ill-treatment of wounded and sick soldiers; abuse of the Red Cross flag and armlet.
1907 Hague Convention for the Adaptation to Maritime Warfare of the Principles of the Geneva Convention	Article 21 required States to enact penal sanctions against pillage and ill-treatment of the wounded and sick in the fleet, and misuse of distinctive marks for protection.
1907 Hague Convention respecting the Laws and Customs of War on Land and its annexed Regulations	None.
1929 Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field	Article 29 extended penal sanction to *all* violations of its provisions in time of war.
1929 Geneva Convention relative to the Treatment of Prisoners of War	None.

From 1864 to 1929, the criminal sanctions provisions in the Geneva and Hague Conventions emerged among other measures of enforcement,

[14] "Penal sanctions", in Jean S. Pictet (ed.), *Commentary of Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, ICRC, Geneva, 1952, chap. IX ('Commentary to GCI').

[15] *Ibid*.

their prominence prompted by the post-World War I accountability process. Instead of leaving it entirely to States, the issue of criminal punishment started to be discussed and formalised at the international level. As the table above illustrates, at this stage, conventional obligations to impose penal sanctions against violations of the laws of war were fragmented and ambivalent. It is safe to say that consistent attention to penal sanctions in the treaty-making was lacking. Its utility was balanced with monetary compensation, reprisals, and so on. Unlike in the domestic context, criminal punishment is not necessarily the *most severe means* – or *means of last resort* – of protecting important interests among States.

2.2.1.2. More Precise Criminalisation: 'Grave Breaches' in the 1949 Geneva Conventions and the 1977 Additional Protocol I

The 1949 Geneva Conventions I–III updated and replaced the previous Geneva Conventions on the protection of the wounded and sick on land and at sea, and prisoners of war. Geneva Convention IV covered a new subject: the protection of civilians in wartime. Compared to their predecessors, the 1949 Geneva Conventions established a more forceful and specific enforcement regime of penal sanctions for "grave breaches" of their provisions. The term 'war crimes', however, was not used.[16]

Grave breaches cover violations committed against persons and property respectively protected by the four Geneva conventions: wilful killing, torture or inhuman treatment including biological experiments, wilfully causing great suffering or serious injury to body or health, extensive destruction and appropriation of property not justified by military necessity and carried out unlawfully and wantonly, compelling a prisoner of war or a civilian to serve in the forces of the hostile Power, wilfully depriving a prisoner of war or a civilian of the rights of fair and regular trial, unlawful deportation or transfer or unlawful confinement of a civilian, and taking of hostages.[17]

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[16] According to the 1952 Commentary to Geneva Convention I, Article 50 Grave breaches, "the reason why the Conference preferred the words 'grave breaches' was that it felt that, though such acts were described as crimes in the penal laws of almost all countries, it was nevertheless true that the word 'crimes' had different legal meanings in different countries".

[17] ICRC, Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 12 August 1949, Article 50 ('GCI') (http://www.legal-tools.org/doc/baf8e7/); ICRC, Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, 12 August 1949, Article 51 ('GCII') (http://www.legal-tools.org/doc/0d0216/); ICRC, Convention (III) relative to the

The 1977 Additional Protocol I ('API') expanded the scope of protected persons and hence the scope of grave breaches related to such persons. API also designated certain violations of the rules of conduct of hostilities as grave breaches: attacking protected persons or objects including cultural objects and places of worship, or the effects of which exceed their legitimate objectives, and also the perfidious use of protective signs and signals.[18] These grave breaches concerning the conduct of hostilities are based on Parts III and IV of the Protocol, which fall into the body of law traditionally known as 'Hague law'.

API did clarify that grave breaches of the Geneva Conventions and the Protocol are war crimes.[19] The grave breaches of the Geneva Conventions and API form part of war crimes, covering the examples of war crimes enumerated in the Nuremberg Charter. Grave breaches do not exhaust all acts that constitute war crimes. Violations of other treaties or of the Geneva Conventions and API other than grave breaches could also be treated as war crimes. Although Additional Protocol II ('APII') regulating non-international armed conflicts did not prescribe penal sanctions, it was later used as a basis for war crimes committed in non-international armed conflicts. Therefore, the regime of grave breaches illustrates classic war crimes, but is not able to produce a clear concept of war crimes.

The 'grave breaches regime' confirms criminal sanctions as the indispensable means to protect important interests during armed conflict. Compared to penal-sanction provisions in previous treaties, the 'grave breaches" are more precise and comprehensive in prescribing the legal interests protected. They cover four specific categories of persons, objects as well as means and methods of warfare. They remain the key reference point for later statutes of international tribunals in formulating their versions of war crimes.

Treatment of Prisoners of War, 12 August 1949, Article 130 ('GCIII') (http://www.legal-tools.org/doc/365095/); ICRC, Convention (IV) relative to the Protection of Civilian Persons in Time of War, 12 August 1949, Article 147 ('GCIV') (http://www.legal-tools.org/doc/d5e260/).

18 ICRC, API, 8 June 1977, Article 85 (http://www.legal-tools.org/doc/d9328a/).

19 *Ibid*., Article 85(5).

2.2.1.3. Criminal Enforcement in Specialised Treaties Concerning Persons, Objects or Means and Methods of Warfare

Humanitarian law treaties focusing on certain categories of persons, objects, or means and methods of warfare sometimes include a provision on domestic criminalisation of their breaches. Together with general international humanitarian law treaties such as the Hague Convention and the Geneva Conventions, these specialised treaties lend basis to subsequent efforts to create lists of war crimes for international criminal tribunals. Such specialised treaties with penal sanctions provisions include the 1954 Convention on the Protection of Cultural Property and its 1999 Second Protocol,[20] the 1993 Convention on Chemical Weapons, the 1996 Mines Protocol to Convention on Certain Conventional Weapons, the 1997 Convention on Anti-Personnel Mines, and the 2008 Convention on Cluster Munitions.[21] Other specialised treaties do not specify States Parties' obligation to impose criminal sanctions, but may still provide basis for future criminalisation of their violations.[22]

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[20] United Nations Educational, Scientific and Cultural Organization ('UNESCO'), Convention for the Protection of Cultural Property in the Event of Armed Conflict, 14 May 1954, Article 28 (http://www.legal-tools.org/doc/6d6697/); UNESCO, Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict, 26 March 1999, Article 15 (http://www.legal-tools.org/doc/7d8622/).

[21] Organisation for the Prohibition of Chemical Weapons ('OPCW'), Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction, 13 January 1993, Article 7(1) (http://www.legal-tools.org/doc/fc1928/); UN, Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices as amended on 3 May 1996 (Protocol II to the 1980 Convention as amended on 3 May 1996), 3 May 1996, Article 14 (http://www.legal-tools.org/doc/b0f78d/); UN, Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction, 18 September 1997, Article 9 (http://www.legal-tools.org/doc/79f43b/); and UN, Convention on Cluster Munitions, 30 May 2008. Article 9 (http://www.legal-tools.org/doc/7600a8/).

[22] On special categories of protected persons: UN, Convention on the Rights of the Child, 20 November 1989 (http://www.legal-tools.org/doc/f48f9e/); UN, Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict, 25 May 2000 (http://www.legal-tools.org/doc/669fb1/). On means and methods of warfare: League of Nations, Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare, 17 June 1925 (http://www.legal-tools.org/doc/a68438/); UN, Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction, 10 April 1972 (http://www.legal-tools.org/doc/16b36b/); UN, Convention on the prohibition of military or any hostile use of environmental modification techniques, 10 December 1976 (http://www.legal-tools.org/doc/151f0b/); UN, Convention on Prohibitions or

2.2.2. *Ad Hoc* Accountability Processes and the International Criminal Court

Violations of humanitarian treaties were criminalised selectively in different contexts. Atrocity-driven international trials gave momentum to the repression of war crimes. Empirically, it can be said that war crimes became core international crimes as such, not because of the treaties, but because of those international trials. The scope of war crimes remains contingent on the statute of a certain tribunal or the need to punish certain acts. The *ad hoc* judicial bodies did not use the term 'war crimes' in their statutes, but rather specified which violations of specific treaties were criminalised. Even the definition in the ICC Statute, which is regarded as the most comprehensive list of war crimes so far, does not seem to follow principled guidance of criminalisation.

Overall, 'war crimes' end up as an ambitious and ambiguous concept that cannot be fully rationalised by its history or current state. In particular, the link between war crimes' status as international crimes and their protected legal interests has not been explored.

2.2.2.1. Post-World War I Accountability for Violations of Laws and Customs of War: Illustrative List of Crimes

Atrocities committed during World War I gave rise to renewed interest in penal sanctions for violations of laws of war, especially of those rules laid down in the existing Hague Conventions and the Geneva Convention. In January 1919, the Preliminary Peace Conference set up a commission consisting of 15 members to inquire and report on the question of responsibility for the outbreak of war, the facts as to breaches of the laws and customs of war, the degree of responsibility of individuals for those offences, and

Restrictions on the Use of Certain Conventional Weapons which may be deemed to be Excessively Injurious or to have Indiscriminate Effects ('CCW'), 10 October 1980 (http://www.legal-tools.org/doc/22c3ef/); UN, Protocol on Non-Detectable Fragments (Protocol I to CCW), 10 October 1980 (http://www.legal-tools.org/doc/082789/); UN, Protocol on Prohibitions or Restrictions on the Use of Incendiary Weapons (Protocol III to CCW), 10 October 1980 (http://www.legal-tools.org/doc/fd72d3/); UN, Protocol on Blinding Laser Weapons (Protocol IV to CCW), 13 October 1995 (http://www.legal-tools.org/doc/a42aa3/); and UN, Protocol on Explosive Remnants of War (Protocol V to CCW), 28 November 2003 (http://www.legal-tools.org/doc/d86d32/).

the appropriate manner for the trial of those accused.[23] Based on the facts of the violations of the laws of war committed by the Central Powers, the Commission on Responsibility put forward a list of 32 crimes to facilitate prosecution:[24]

- Murders and massacres; systematic terrorism.
- Putting hostages to death.
- Torture of civilians.
- Deliberate starvation of civilians.
- Rape.
- Abduction of girls and women for the purpose of enforced prostitution.
- Deportation of civilians.
- Internment of civilians under inhuman conditions.
- Forced labour of civilians in connection with the military operations of the enemy.
- Usurpation of sovereignty during military occupation.
- Compulsory enlistment of soldiers among the inhabitants of occupied territory.
- Attempts to denationalize the inhabitants of occupied territory.
- Pillage.
- Confiscation of property.
- Exaction of illegitimate or of exorbitant contributions and requisitions.
- Debasement of the currency, and issue of spurious currency.
- Imposition of collective penalties.
- Wanton devastation and destruction of property.
- Deliberate bombardment of undefended places.
- Wanton destruction of religious, charitable, educational, and historic buildings and monuments.
- Destruction of merchant ships and passenger vessels without warning and without provision for the safety of passengers or crew.

[23] "Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties: Report presented to the preliminary peace conference (March 29, 1919)", in *The American Journal of International Law*, 1920, vol. 14, nos. 1–2, p. 95.

[24] *Ibid*., pp. 113–15.

- Destruction of fishing boats and of relief ships.
- Deliberate bombardment of hospitals.
- Attack on and destruction of hospital ships.
- Breach of other rules relating to the Red Cross.
- Use of deleterious and asphyxiating gases.
- Use of explosive or expanding bullets, and other inhuman appliances.
- Directions to give no quarter.
- Ill-treatment of wounded and prisoners of war.
- Employment of prisoners of war on unauthorized works.
- Misuse of flags of truce.
- Poisoning of wells.

The Commission dealt with war crimes with the specific purpose of punishing German violations already known to them. The Commission's list of war crimes was deliberately left open-ended in anticipation of violations that had not been previously considered. This mode of definition reflects the common belief at the time that all violations of laws and customs of war were liable to criminal sanctions – an approach shared by subsequent *ad hoc* tribunal statutes. The term 'war crimes' was neither used for the name of the Commission, nor to describe the violations. Although not explicitly stated, the listed violations had their basis in existing treaties at the time, namely the 1906 Geneva Convention and the 1907 Hague Convention on land warfare. The subsequent Treaty of Versailles stated the right of the Allied States to try persons accused of having committed violations of laws of war in their military courts and the obligation of surrendering such persons to the Allies.[25] Suspects whose victims were nationals of multiple countries shall be brought before military tribunals composed of members of concerned countries.[26]

Pursuant to Article 228, second paragraph of the Treaty of Versailles, the Allies demanded handover of 896 German personnel, including military and naval officers of high rank. This demand aroused strong public opposition in Germany and threatened the political stability in post-war Germa-

[25] Treaty of Versailles, 28 June 1919, Article 228 (http://www.legal-tools.org/doc/a64206/).

[26] *Ibid*., Article 229.

ny.[27] The Allies eventually accepted the German proposal to try the accused persons before the Supreme Court of the Empire in Leipzig. The Leipzig trials turned out to be an utter failure. Most of the accused were acquitted, and the 13 convicted were only given short sentences which they did not actually serve.[28] The design of an 'international' tribunal for cases involving victims from multiple countries under Article 229 of the Versailles Treaty never materialised.

Despite the failure to implement the criminal sanctions in the Peace Treaty, the work of the Commission on Responsibility and the Treaty set the tone for resolving questions such as the criminal nature of violations of the laws of war, jurisdiction over foreign soldiers, and post-war jurisdiction. As we will see below, such seemingly *ad hoc* solutions have been driving the development of the general concept of war crimes – and one can naturally question whether all specific responses are generalisable. The list of war crimes influenced the drafting of the penal sanctions provision of the 1929 Geneva Convention on land warfare and served as a working basis for the UN War Crimes Commission in 1943.[29]

2.2.2.2. The Nuremberg and Tokyo Charters: War Crimes under International Law

As World War II drew close to the end, the Allies established the United Nations War Crimes Commission in 1943.[30] The Commission started from a very general definition of war crimes as violations of the laws and cus-

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27 *Völkerrecht im Weltkrieg*, vol. III (1), 1927, p. 57, cited in Hersch Lauterpacht, "The Law of Nations and the Punishment of War Crimes", in *British Year Book of International Law*, Vol. 21, 1944, p. 61.

28 United Nations War Crimes Commission ('UNWCC'), "Developments of the Laws of War during WWI", in *History of the United Nations War Crimes Commission and the Development of the Laws of War*, 1948, chap. III, pp. 46–52 (http://www.legal-tools.org/doc/cac045/). See Matthias Neuner, "When Justice Is Left to the Losers: The Leipzig War Crimes Trials", in Morten Bergsmo, CHEAH Wui Ling and YI Ping (eds.), *Historical Origins of International Criminal Law: Volume 1*, Torkel Opsahl Academic EPublisher, Brussels, 2014 (http://www.toaep.org/ps-pdf/20-bergsmo-cheah-yi), pp. 333-377; and Wolfgang Form, "Law as Farce: On the Miscarriage of Justice at the German Leipzig Trials: The Llandovery Castle Case", in *ibid*., pp. 299-331.

29 UNWCC, "Committee I – The Examination of Cases and the Listing of War Criminals", *History of the United Nations War Crimes Commission and the Development of the Laws of War*, chap. XV, p. 477.

30 UNWCC, "The Establishment and Organisation of the United Nations War Crimes Commission", *History of the United Nations War Crimes Commission and the Development of the Laws of War*, chap. VI.

toms of war, and cited *exempli causa* a number of typical offences. The list of the 1919 Commission on Responsibility was adopted as a non-binding working reference that could be expanded to accommodate new types of crimes committed by the enemies. Eventually, Article 6(b) of the 1945 Charter of the International Military Tribunal (Nuremberg Charter) adopted an open-ended definition of war crimes:

> namely, violations of the laws or customs of war. Such violations shall include, but not be limited to, murder or ill-treatment of prisoners of war or persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns or villages, or devastation not justified by military necessity.

The Nuremberg Charter list was much shorter than the 1919 one. The Tribunal's judgment confirmed that such crimes were violations of rules laid out in the Regulations annexed to the 1907 Hague Convention on land warfare and the 1929 Geneva Convention on the Treatment of Prisoners of War, and that a finding of individual criminal responsibility was not barred by the absence of criminal sanctions in these treaties.[31] The Tribunal stated confidently that "violation of these provisions constituted crimes for which the guilty individuals were punishable is too well settled to admit of argument",[32] and that war crimes as "crimes against international law"[33] incur individual criminal responsibility under international law.

General MacArthur's 1946 proclamation establishing the International Military Tribunal for the Far East only stated that the tribunal had jurisdiction over "conventional war crimes: namely, violations of the laws or customs of war".[34] No enumeration of specific crimes was given in the Tokyo Charter.

In concluding the London Agreement to which the Nuremberg Charter was annexed, the Allies already declared they were "acting in the interests of all the United Nations". The rhetoric has been consistent that the

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31 International Military Tribunal ('IMT'), *The Trial of Major War Criminals: Proceedings of the International Military Tribunal Sitting at Nuremberg, Germany*, 1950, part 22, at pp. 445, 467 (http://www.legal-tools.org/doc/45f18e/).

32 *Ibid*., p. 468.

33 The Tribunal famously declared that "[c]rimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced"; *ibid*., p. 447.

34 Charter of the International Military Tribunal for the Far East, 19 January 1946, Article 5(b) (http://www.legal-tools.org/doc/a3c41c/).

legal interests protected by the crimes in the Charter were not relative to parties to World War II, but concerned all States. After the conclusion of the Nuremberg trial in 1946, the UN General Assembly affirmed the principles of international law recognised by the Nuremberg Charter and the judgment of the IMT. It entrusted the International Law Commission ('ILC') to formulate such principles and prepare a draft code of offences against the peace and security of mankind.[35] The ILC included in the Nuremberg Principles verbatim the definition of war crimes under Article 6(b) of the Nuremberg Charter.[36] The precedential value of the Nuremberg and Tokyo trials rose beyond the special circumstances of their occurrence and gained general relevance. They lent force to subsequent international war crimes trials and the characterisation of war crimes as international crimes.

2.2.2.3. The ICTY and the ICTR: War Crimes in Non-International Armed Conflicts and the Protection of Human Rights

The two United Nations *ad hoc* criminal tribunals – the International Criminal Tribunals for the Former Yugoslavia ('ICTY') and Rwanda ('ICTR') – were established by the Security Council to deal with specific situations. The Statutes of these two tribunals did not use the term 'war crimes', nor did they aim to provide a comprehensive list of war crimes or a precise definition. Article 2 of the ICTY Statute (1993) set out jurisdiction over a clear list of "grave breaches of the Geneva Conventions of 1949"; Article 3 ("violations of the laws or customs of war") consisted of violations of certain prohibitions in the 1907 Hague Convention IV and its annexed Regulations. The list in Article 3 was not exhaustive.[37] The ICTY's most significant decision concerning war crimes was to extend criminal responsibility to serious violations of laws of war in non-international armed conflicts, which

[35] Affirmation of the Principles of International Law Recognized by the Charter of the Nürnberg Tribunal, UN Doc. A/RES/95(I), 11 December 1946 (http://www.legal-tools.org/doc/bb7761/); Formulation of the Principles Recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal, UN Doc. A/RES/177(II), 21 November 1947 (http://www.legal-tools.org/doc/57a28a/).

[36] ILC, "Principles of International Law recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal", in *Yearbook of the International Law Commission*, 1950, vol. II, para. 97 (http://www.legal-tools.org/doc/ad76e5/).

[37] Statute of the International Criminal Tribunal for the former Yugoslavia, adopted 25 May 1993, amended 7 July 2009, Article 2 Grave breaches of the Geneva Conventions of 1949, Article 3 Violations of the laws or customs of war ('ICTY Statute') (http://www.legal-tools.org/doc/b4f63b/).

was not sanctioned by its Statute.[38] The Appeals Chamber made the following statement when imposing criminal liability for serious violations of Common Article 3 of the Geneva Conventions and other applicable rules:[39]

> [I]n the area of armed conflict the distinction between inter-state 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.

The ICTR Statute (1994) conferred jurisdiction on violations of rules regulating non-international armed conflicts – Common Article 3 of the Geneva Conventions and Article 4 of APII. Again, the list of violations was not exhaustive.[40]

The establishment and operation of the ICTY and the ICTR not only revived the idea of 'international crimes' from the Nuremberg and Tokyo trials, but also signalled the shift of the focus of protected interests underlying war crimes from States to human beings.

2.2.2.4. ICC Statute: Jurisdictional Threshold of Policy or Magnitude

The Rome Statute adopted in 1998 provides the most comprehensive list of war crimes to date. The Statute also imposes a jurisdictional caveat: the Court may exercise jurisdiction over war crimes, "in particular when committed as part of a plan or policy or as part of a large-scale commission of such crimes". This seems to confirm international courts' focus on atrocity

[38] ICTY, *Prosecutor v. Tadić*, Appeals Chamber, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, IT-94-1, para. 134.

[39] *Ibid*., para. 97.

[40] Statute of the International Criminal Tribunal for Rwanda, 8 November 1994, Article 4 Violations of Article 3 Common to the Geneva Conventions and of Additional Protocol II ('ICTR Statute') (http://www.legal-tools.org/doc/8732d6/).

crimes, which may implicate wider interests that are "of concern to the international community as a whole".[41]

Article 8 includes two categories of war crimes committed in international armed conflicts ((2)(a) and (b)) and two in non-international armed conflicts ((2)(c) and (e)), further confirming the ICTY jurisprudence on the application of international criminal law to non-international armed conflicts. Sub-paragraph (2)(a) is comprised of grave breaches of the 1949 Geneva Conventions, and (2)(b) of some grave breaches and other violations of API and of the Regulations annexed to the 1907 Hague Convention IV. Sub-paragraph (2)(c) is comprised of violations of Article 3 common to the 1949 Geneva Conventions, and (2)(e) of APII of 1977. Additionally, both sub-paragraphs (2)(b) and (2)(e) include violations of certain specialised treaties: the 1899 Hague Declaration, the 1925 Geneva Protocol, the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict and its protocols, the 1989 Convention on the Rights of the Child, the 1994 Convention on the Safety of United Nations and Associated Personnel, as well as some provisions from Article 3 of the ICTY Statute.[42]

Article 8 is organised according to the sources of war crimes in various general and specialised international humanitarian law treaties, not legal interests protected by those individual crimes.[43] Some of the provisions overlap substantially and are not placed next to each other, examples including (2)(a)(iii) and (2)(b)(x) on violations of the person, (2)(a)(viii) and (2)(b)(vi) on taking hostages, (2)(b)(vi) and (2)(b)(xii) on killing surrendered combatants, and so on. Similar examples can be found in war crimes committed in non-international armed conflicts under sub-paragraphs (2)(c) and (2)(e).

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41 Rome Statute of the International Criminal Court, 17 July 1998, Preamble ('ICC Statute') (http://www.legal-tools.org/doc/7b9af9/).

42 For more details, see ICRC Advisory Service on International Humanitarian Law, *War Crimes under the Rome Statute of the International Criminal Court and their sources in International Humanitarian Law: Comparative Table*, October 2012, available on ICRC's web site.

43 This has been recognised by many as problematic, see for example Claus Kreß, "Crimes de guerre", in *Dictionnaire encyclopédique de la justice pénale internationale*, Berger-Levrault, 2017; Gerhard Werle, *Principles of international criminal law*, T.M.C. Asser Press, 2005, p. 286.

2.2.2.5. Other *Ad Hoc* Judicial Bodies

The subsequent Statute of the Special Court for Sierra Leone of 2002 included in Article 3 the same list of violations of Common Article 3 and of APII as that of the ICTR Statute. Article 4 included three specific violations: (1) Intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities; (2) intentionally directing attacks against personnel, installations, material, units or vehicles involved in a humanitarian assistance or peacekeeping mission in accordance with the Charter of the United Nations, as long as they are entitled to the protection given to civilians or civilian objects under the international law of armed conflict; and (3) conscripting or enlisting children under the age of 15 years into armed forces or groups or using them to participate actively in hostilities. The criminalisation of violations against special categories of protected persons – children and UN personnel – draws on Article 8(2)(e)(iii) and (vii) in the ICC Statute, which is based on the 2000 Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict and the 1994 Convention on the Safety of United Nations and Associated Personnel.

The 2004 Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia created jurisdiction over the destruction of cultural property during armed conflict pursuant to the 1954 Hague Convention for Protection of Cultural Property in the Event of Armed Conflict, in addition to grave breaches of the 1949 Geneva Conventions.[44] These offences against special categories of protected persons and properties were created to deal with corresponding conducts in the Sierra Leone and Cambodia situations. Again, the term 'war crimes' was not used in either statute.

2.3. Criminalisation Criteria and Legal Interests

It is not clear what have been the criteria for criminalisation, judging from the trajectory of war crimes law laid out in previous Section 2.2. The criminalisation process is somehow mystified by treaties of laws of war and contingent international trials. The ICTY in its first case did give general guidance on criminalisation of violations of the laws of war: "the violation must be 'serious', that is to say, it must constitute a breach of a rule protecting important values, and the breach must involve grave consequences for

[44] Geneva Conventions, 12 August 1949, Articles 6, 7, see *supra* note 17.

the victim".[45] These criteria point to the severity of the violations – the legal interests protected must be important enough. The Appeals Chamber made the point that a combatant simply appropriating a loaf of bread in an occupied village would not meet the threshold.[46] The ICTY's importance or seriousness requirement is not self-explanatory. This section considers criminalisation criteria from the perspective of ordinary and unique protected interests of war crimes, and special circumstances surrounding their protection.

2.3.1. The Ordinary Domestic Crime Analogy

> Military necessity does not admit of cruelty – that is, the infliction of suffering for the sake of suffering or for revenge, nor of maiming or wounding except in fight, nor of torture to extort confessions.
>
> Article 16, Lieber Code (1863)

Although publicists and practitioners seldom used the term 'war crimes' before and during World War I, most of them agreed that crimes committed during the war could and had to be punished.[47] In his 1906 book *International Law: A Treatise. War and Neutrality*, Lassa Oppenheim first defined war crimes as "such hostile acts of soldiers or other individuals as may be punished by the enemy on capture of the offenders", including violations of the recognised rules of war committed by members of the armed forces, all hostilities committed by individuals who were not members of the armed forces, espionage and war treason, and all marauding acts in general.[48] In 1916, the British lawyer Hugh Bellot also used the term 'war crimes' to describe "those acts of the armed forces of a belligerent against the person or property of the enemy, combatant or non-combatant, which are deemed

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45 ICTY, *Prosecutor v. Tadić*, Appeals Chamber, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, IT-94-1, para. 94, see *supra* note 38.

46 *Ibid*.

47 Timothy L.H. McCormack, "From Sun Tzu to the Sixth Committee: The Evolution of an International Criminal Law Regime", in Timothy L.H. McCormack and Gerry J. Simpson (eds.), *The Law of War Crimes: National and International Approaches*, Kluwer Law International, 1997.

48 Lassa Oppenheim, *International Law: A Treatise: Vol. 2: War and Neutrality*, Longmans, 1906, pp. 263–70. See also Daniel Marc Segesser, "The Punishment of War Crimes Committed against Prisoners of War, Deportees and Refugees during and after the First World War", in *Immigrants & Minorities: Historical Studies in Ethnicity, Migration and Diaspora*, 2008, vol. 26, nos. 1–2, p. 137.

contrary to the established usages of war".[49] Unlike Oppenheim, Bellot did not include espionage, wartime treason and all hostilities by individuals who were not members of the armed forces as 'war crimes', which were designed to protect interests of quite a different nature.[50] Bellot's definition is closer to the contemporary scope of war crimes. Two French lawyers, Fernand Larnaude and Albert de Lapradelle, in their memorandum on violations of international law for the French Prime Minister Georges Clemenceau, also used the term '*crimes de guerre*' (war crimes) to describe crimes committed by the armed forces not only during military operations, but also during occupation.[51] In 1924, Alfred Verdross, an influential Austrian international lawyer, published a seminal article "*Kriegsverbrechen und Kriegsverbrecher*" ("War Crimes and War Criminals"), where he followed to a large extent the definitions given by Hugh Bellot.[52]

These initial conceptualisations of war crimes did not openly engage the question of criminalisation. What constituted war crimes seemed random and at the same time common-sensical. Indeed, it seemed axiomatic for both the authors and their readers. For example, Article 47 of the Lieber Code stated:

> Crimes punishable by all penal codes, such as arson, murder, maiming, assaults, highway robbery, theft, burglary, fraud, forgery, and rape, if committed by an American soldier in a hostile country against its inhabitants, are [...] punishable as at home.

The French judge Jacques Dumas considered it not very controversial to impose penal sanctions against violations of the 1907 Hague Regulations that also constituted crimes in peacetime, such as pillage.[53]

How can we explain this 'common-sense' in naming war crimes? Louis Renault stated in his 1918 article "De l'application du droit pénal

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49 Hugh H.L. Bellot, "War Crimes: Their Prevention and Punishment", in *Transactions of the Grotius Society*, 1916, vol. 2; see also Hugh H.L. Bellot, "War Crimes and War Criminals (I)", in *Canadian Law Times*, 1916, vol. 36, no. 10, p. 754.

50 *Ibid*.

51 Fernand Larnaude and Albert Geouffre de Lapradelle, "Examen de la Responsabilité Pénale de l'Empereur Guillaume d'Allemagne", in *Journal du Droit International*, 1919, vol. 46, pp. 132–36. Segesser, 2008, p. 138, see *supra* note 48.

52 *Ibid*., pp. 138–39.

53 Jacques Dumas, "Les sanctions du droit international d'après les conventions de la Haye de 1899 et de 1907", in *Revue Générale de Droit International Public*, 1908, vol. 15, pp. 573–75.

aux faits de guerre": many acts of violence in war contained all the elements of ordinary crimes such as murder, arson, destruction of property and theft, and what relieved those violent acts of their criminality was their conformity with international law.[54] Once the violence exceeds the limits set by international law – for example by the Hague Regulations – they may be subjected to criminal sanctions. This is, according to Renault, where international law and domestic criminal law cross path.[55]

The American professor James Garner explained that these violations of laws of war were at the same time "offences against the general criminal law" or "crimes under the common law of nations".[56] He emphasised that soldiers must not be protected by their uniform from criminal sanctions.[57] Similarly, Hersch Lauterpacht in his 1944 article "The Law of Nations and the Punishment of War Crimes" defined war crimes as

> such offences against the law of war as are criminal in the ordinary and accepted sense of fundamental rules of warfare and of general principles of criminal law by reason of their heinousness, their brutality, their ruthless disregard of the sanctity of human life and personality, or their wanton interference with rights of property unrelated to reasonably conceived requirements of military necessity.[58]

The ordinary-crime approach seems to be a reasonable criterion for criminalisation. In this sense, the legal interests protected by war crimes are no different from those protected by ordinary domestic crimes. What is special about war crimes is that the extent of protection of these legal interests concerning persons and properties are regulated by the law of war.

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54 Louis Renault, "De l'application du droit pénal aux faits de guerre", in *Revue Générale de Droit International Public*, 1918, vol. 25, p. 12. See also, Louis Renault, "Dans quelle mesure le droit pénal peut-il s'appliquer à des faits de guerre contraires au droit des gens?", in *Revue pénitentiaire et de droit pénal*, 1915, vol. 39, pp. 406–29.

55 *Ibid*., p. 15. Renault's characterisation of violations of laws of war as ordinary crimes – and therefore liable to criminal sanction – represents the reasoning in a chain of writings by fellow French jurists as well as British and American jurists of the era. See Daniel Marc Segesser, *Recht statt Rache oder Rache durch Recht? Die Ahndung von Kriegsverbrechen in der internationalen fachwissenschaftlichen Debatte 1872-1945*, Ferdinand Schöningh, 2010, pp. 196–98.

56 James W. Garner, "Punishment of offenders against the laws and customs of war", in *American Journal of International Law*, 1920, vol. 14, nos. 1–2, pp. 71, 81.

57 *Ibid*., p. 73.

58 Hersch Lauterpacht, "The Law of Nations and the Punishment of War Crimes", in *British Yearbook of International Law*, 1944, vol. 21, p. 79.

Apart from this, the context of armed conflict may justify additional protected interests relevant to war crimes' label of international crimes.

2.3.2. Dichotomy of War and Peace: Protection of Legal Interests in Armed Conflict

2.3.2.1. Common Humanity and Interests of Individuals and Groups of the Adverse Party

The ordinary crime analogy makes clear that ordinary crimes and war crimes harm the same legal interests at the individual or group level. This is true in terms of abstract rights. What is not explicit in such understanding is that war crimes are typically committed against persons and properties of the adversary. Unlike ordinary crimes, which are punished to protect interests within a somewhat value-monolithic community, war crimes are punished in recognition of interests outside such a classic moral community, in particular, interests of those from an adverse community.

Contrary to the belief that there is absolutely no limit or order in war – sometimes known as *inter arma silent leges* (among arms, laws are silent) – war crimes recognise that certain acts committed against the enemy are nevertheless crimes. In this sense, it entails a leap of faith to invoke universal human rights[59] in the context of armed conflict as it recognises interests of people outside the traditional community, however limited they are. This goes beyond mere reciprocity between the parties. It appeals to the common humanity across borders. Such shared interests of humanity can even rise to interests *of* or *concerning* the international community in general.[60] 'Interests of humanity', for example, had inspired the 1899 Hague Convention; the famous Martens Clause in the Convention confirmed the protection of laws of humanity and the dictates of the public conscience. Both the post-World War I Commission on Responsibility and

[59] 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. Allan Buchanan promotes "a conception of international law grounded in the ideal of protecting the basic rights of all persons", in *Justice, legitimacy and, self-determination: Moral foundations for international law*, Oxford University Press, 2004, p. 290. Kirsten J. Fisher, *Moral accountability and international criminal law*, Routledge, 2012, pp. 17–26, 30–31, 186.

[60] Anthony Duff refers to a community of humanity that concerns itself with international crimes. R.A. 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.

Nuremberg Judgment mentioned breaches of "dictates of humanity" in relation to violations of the laws and customs of war.[61] Louis Renault gave a moral, psychological explanation of what this common humanity entails. According to Renault, while one feels the misery of life when witnessing loss of thousands of lives during a battle, it is simply a sense of painful reality. On the contrary, the manifestly unjust treatment of a single person – say, pillage or killing of an incapacitated enemy soldier – creates a real indignation that such violence is against the law of humanity.[62] Hersch Lauterpacht emphasised that the nature of such offences must be such that it was "condemned by the common conscience of mankind".[63]

Normatively, such belief in shared humanity connects war crimes to the concept of international crimes. International crimes, as they are understood, either harm the interests of the international community or concern the international community as a whole.[64] These interests of common humanity make a strong case for most war crimes to be regarded as international crimes, regardless of their scale and impact. It simultaneously recognises a higher community of human beings and boundaries between warring communities. It involves the higher community because local communities are distinct yet have something in common.

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61 Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties, *Report Presented to the Preliminary Peace Conference*, 1919, p. 113 (http://www.legal-tools.org/doc/63159c/). IMT, 1950, p. 450, see *supra* note 31.

62 Renault, 1918, pp. 6–7, see *supra* note 53.

63 Lauterpacht, 1944, p. 79, see *supra* note 58.

64 For example, Werle contends that an "attack on the fundamental values of the international community lends a crime an international dimension and turns it into a crime under international law", see Werle, 2005, p. 28, see *supra* note 43. For Duff, there is a distinction between the criminal wrong to be punished and its victim: "crimes are 'public' wrongs in the sense not that they harm 'the public', but that they properly concern 'the public'". See Duff, 2010, p. 600, see *supra* note 60. According to Kreß, the "ultimate purpose of international criminal law *stricto sensu* is to strengthen and to protect certain international rules of conduct the importance of which [...] transcend their national interests. Crimes under international law therefore concern the international community as a whole", see ICC, Situation in Darfur, Sudan, *Prosecutor v. Omar Hassan Ahmad Al Bashir*, Appeals Chamber, Written observations of Professor Claus Kreß as amicus curiae, with the assistance of Ms Erin Pobjie, on the merits of the legal questions presented in 'The Hashemite Kingdom of Jordan's appeal against the "Decision under article 87(7) of the Rome Statute on the non-compliance by Jordan with the request by the Court for the arrest and surrender [of] Omar Al-Bashir"' of 12 March 2018 (ICC-02/05-01/09-326), 18 June 2018, ICC-02/05-01/09-359, p. 6 (http://www.legal-tools.org/doc/85f44c/).

2.3.2.2. Collective Interests of Parties to the Conflict and Non-Escalation

For classical war crimes committed against persons and property of another State, they violate not only the interests of individuals but also that of the State. For example, in the case of mistreatment of prisoners of war, it is not only the right of individual soldiers that is violated, but also that of the State that the soldiers fight for. As the traditional protector of its citizens – whether military or civilian – the victim's State has a special interest in having the perpetrators punished. In fact, interests of the State vested in their personnel and property – as part of the sovereign right – have been the strongest drive in the pursuit of individual responsibility of perpetrators of war crimes. Punishing individuals for violations of the law of war also serves as an alternative to a more radical response – belligerent reprisal, which as a form of collective punishment had been regularly used to enforce the laws of war.[65] It is in the parties' interests to employ the most effective means to enforce minimum order and contain the calamity of war. Redressing the victim State's grievances through individual criminal responsibility can reduce the risk of retaliation and escalation.

In non-international armed conflicts, the collective interests of an organised armed group have less legitimacy than those of States from both positive and normative points of view. To certain extent this explains why war crimes law and international humanitarian law applicable to non-international armed conflict are less forthcoming. On the other hand, certain types of war crimes can be committed against one's own population, including recruitment and use of child soldiers, use of civilians as human shield, etc. For such crimes, the claim of collective interests of parties to the conflict does not apply. The prevalence of non-international armed conflicts and the increasing emphasis on individual rights have been challenging the historically overriding justification of collective interests of parties.

2.3.2.3. Increased Destructive Potential and Vulnerability of Victims

Common law crimes are committed where the use of violence is the exception, and war crimes are committed where the use of violence is the norm. When crimes are committed amid accepted use of organised violence, there

[65] See Patryk I. Labuda, "The Lieber Code, Retaliation and the Origins of International Criminal Law", 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 (http://www.toaep.org/ps-pdf/22-bergsmo-cheah-song-yi).

are two consequences. The first is the potential to cause graver consequences. A soldier or commander supported with military resources has more destructive potential than an individual criminal – even more than criminal organisations or law-enforcement agencies – in peacetime. Where certain weapons – such as weapons of mass destruction – are used, the result is particularly disastrous and inhumane. Second, war crimes committed against defenceless individuals or population is an abuse of collective violence. The unequal access to resources and the authoritative position held by the perpetrator deepens the injustice of such crimes. Overall, the context of confrontation of organised violence makes the protection of interests more urgent and demanding.

2.3.3. Additional Interests Violated by War Crimes of Policy or Large Scale

The 'ordinary' and 'unique' legal interests protected by war crimes are often shadowed by discussion of gravity in the context of atrocity trials. The gravity element is important both for normative and empirical analysis. The moral case for labelling certain war crimes international crimes strengthens as the number of victims increases. If these interests are violated as a matter of policy or on large scale, would additional interests be violated? The normative presumption is that war crimes committed with policy or on large scale has a destabilising effect which may justify invocation of the international community. In this sense, war crimes are not different from atrocity crimes, such as genocide and crimes against humanity. It can be said that with such gravity, war crimes violate additional interests of international order, peace and security.

In practice, war crimes are more likely to be characterised as international crimes when they reach a certain threshold of gravity. The ICC Statute included war crimes as the "most serious crimes of concern to the international community as a whole". It corresponds to the Court's jurisdictional threshold of war crimes "committed as part of a plan or policy or as part of a large-scale commission of such crimes". The Preamble of the Statute also specifies that it is "atrocities", not isolated crimes, that "shock the conscience of humanity", and that "such grave crimes threaten the peace, security and well-being of the world". Similarly, the International Law Commission's draft Code of Offences against the Peace and Security of Mankind set out a list of war crimes, which must be committed "in a systematic manner or on a large scale". The Commission had adopted the

view that "crimes against the peace and security of mankind are the most serious on the scale of international offences"; in order for a war crime to be regarded as such, it "must meet certain additional criteria which raise its level of seriousness".[66]

The additional interests incurred by war crimes of certain gravity is strong justification for treating war crimes as international crimes, but not the only justification. In most cases, the unique legal interests protected by war crimes are sufficient to justify invocation of the international community, regardless of policy or scale. This aspect of war crimes is often neglected in discussions of international war crimes trials.

2.4. Conclusion

War crimes are more than tribunal crimes. Their evolution is deeply rooted in modern laws of war. This chapter has examined criminalisation criteria of war crimes through their protected interests: those analogous to ordinary domestic crimes and those unique to war crimes. I identify two types of special protected interests of war crimes and circumstances which require enhanced protection of such interests. These interests are: the interests of common humanity, that is, the recognition of human rights independent of an individual's national or social affiliation; the collective interests of the parties to the conflict, and the special circumstances being the destructive potential of armed conflict and vulnerability of victims which aggravate threat to interests. A study of these unique interests shows a shift of focus from the State to individuals and groups. War crimes becomes therefore a fluid concept whose nature and scope are controlled by the ordinary and special protected interests, and circumstances surrounding their protection.

The relationship between war crimes and international crimes is a complicated one. Through international trials, war crimes are recognised as international crimes. This path has its limitations. Interests of international order, peace and security may be common to core international crimes, but they are not the only criteria. Focusing on large numbers of victims in international trials makes it easy to label war crimes as international crimes, but neglects unique features which make war crimes an independent category. It cannot be said that isolated war crimes with limited impact violate interests of the international community or concern the international com-

[66] ILC, "Articles of the draft Code of Crimes against the Peace and Security of Mankind", in *Yearbook of the International Law Commission*, 1996, vol. II, part 2, pp. 53–54 (http://www.legal-tools.org/doc/bb5adc/).

munity as a whole. Yet, considering the unique legal interests identified above, many war crimes should be regarded as international crimes even when committed without policy or magnitude.

3

The Legal Good of 'Humanity' Protected by Crimes Against Humanity

Susan R. Lamb*

3.1. Introduction

Crimes against humanity, which first found expression in positive international law within Article 6(c) of the Charter of the International Military Tribunal at Nuremberg ('IMT Charter'), crystallized over the following decades in the ongoing work of the International Law Commission ('ILC'), and through their incorporation in the statutes of all modern international criminal tribunals.[1] Their evolution is not universally considered to be complete. In mid-2014, the ILC commenced the formulation of a draft Convention aimed at addressing the absence of a comprehensive global

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1 Charter of the International Military Tribunal, 8 August 1945, Article 6(c) ('IMT Charter') (http://www.legal-tools.org/doc/64ffdd/); International Military Tribunal, *Prosecutor v. Hermann Wilhelm Göring et al.*, Judgment, 1 October 1946 ('Nuremberg Judgement') (http://www.legal-tools.org/doc/f41e8b/); Statute of the International Criminal Tribunal for the Former Yugoslavia, 25 May 1993 ('ICTY Statute') (http://www.legal-tools.org/doc/b4f63b/); Statute of the International Criminal Tribunal for Rwanda, 8 November 1994, Article 3 ('ICTR Statute') (http://www.legal-tools.org/doc/8732d6/); Statute of the Special Court for Sierra Leone, 14 August 2000, Article 2 ('SCSL Statute') (http://www.legal-tools.org/doc/aa0e20/); and Statute of the International Criminal Court, 17 July 1998, Article 5(b) ('ICC Statute') (http://www.legal-tools.org/doc/7b9af9/).

treaty on crimes against humanity, a process which is still ongoing at the time of publication of this anthology.[2]

The phrase 'crimes against humanity' was drawn from, amongst other sources, a 1915 declaration by the Governments of Great Britain, France and Russia that condemned Turkish massacres of Armenians as "crimes against humanity and civilization".[3] The inclusion of crimes against humanity in the Nuremberg Charter was hard-won and their original conceptualization – due largely to the efforts of the eminent British international lawyer Hersch Lauterpacht – envisaged the protection of individuals singled out for victimization, thereby creating "radical inroads" into the sphere of the domestic jurisdiction of sovereign States.[4] Lauterpacht's efforts proceeded in parallel to those of another international lawyer of renown, Raphael Lemkin, whose concern for group rights instead culminated in the crime of genocide.[5] Incorporating crimes against humanity within the IMT Charter left its framers vulnerable to allegations of *ex post-facto* justice, requiring considerable effort to disguise or at least downplay the novelty of this category of crimes.[6]

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2 See, for example, Leila Nadya Sadat and Douglas Pivnichny, "Towards a New Global Treaty on Crimes Against Humanity", in *EJIL: Talk!*, 5 August 2014; and, generally, Morten Bergsmo and SONG Tianying (eds.), *On the Proposed Crimes Against Humanity Convention*, Torkel Opsahl Academic EPublisher, Brussels, 2014 (http://www.toaep.org/ps-pdf/18-bergsmo-song).

3 Gregory S. Gordon, "International Criminal Law's 'Oriental Pre-Birth': The 1894–1900 Trials of the Siamese, Ottomans and Chinese", 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, p. 148 (http://www.legal-tools.org/doc/3370fc/).

4 Egon Schwelb, "Crimes against humanity", in *British Yearbook of International Law*, 1946, vol. 23, p. 179 ('Schwelb').

5 See, generally, Philippe Sands, *East West Street*, Weidenfeld & Nicholson, London, 2016; see also Ana 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. 4, pp. 1163–94. While absent from the catalogue of crimes prosecuted at Nuremberg, mention of genocide was made in the indictment at Nuremberg and the crime found expression shortly afterwards in the Convention on the Prevention and Punishment of the Crime of Genocide, 12 January 1951 ('Genocide Convention') (http://www.legal-tools.org/doc/498c38/).

6 See, for example, District Court of Jerusalem, *Attorney-General of Israel v. Eichmann*, Judgment, 12 December 1961, Criminal Case No. 40/61, para. 7 (http://www.legal-tools.org/doc/7519c3/). See also Hans Kelsen, "Will the Judgement in the Nuremberg Trial Constitute a Precedent in International Law?", in *International Law Quarterly*, 1947, vol. 1, no. 2, pp. 153–71 (noting the retroactivity of the IMT Charter in providing individual punishment for

Despite the contested circumstances of their birth, heterogeneous origins, and ongoing discussion as to their definition, relatively little scholarly attention has been paid to the values, fundamental interests or concepts upon which crimes against humanity are based. This chapter explores what is meant by the notion of 'humanity', and in what sense it may be said to be a fundamental value protected by crimes against humanity. It then briefly identifies areas of convergence and divergence between the various conceptions of 'humanity' identified within the positive law in which crimes against humanity are embodied.

3.2. The Notion of 'Humanity'

It bears emphasising that while 'humanity' is a useful starting point when seeking to particularize the core values and interests underscoring crimes against humanity, it is by no means the only potential candidate.[7] Nor is the notion of 'humanity' self-explanatory or entirely free from ambiguity.

Reflecting its plain English meaning,[8] scholars unpacking this notion in relation to crimes against humanity refer to several variants of 'humani-

acts that were not punishable when they were committed, although finding the rule regarding retroactivity to not be unqualified, particularly in relation to "those who had committed acts" that were "morally most objectionable"); and Hans Ehard, "The Nuremberg Trial Against the Major War Criminals and International Law", in *American Journal of International Law*, 1949, vol. 43, no. 2, pp. 223–45.

7 Other authors have identified possible alternatives such as 'human dignity', and 'international peace' (see, for example, David J. Luban, "A Theory of Crimes Against Humanity", in *Yale Journal of International Law*, 2004, vol. 29, no. 1, pp. 85–167 ('Luban'). See also Norman Geras, *Crimes Against Humanity: Birth of a Concept*, Manchester University Press, 2011, p. 39 (referring to "threatening the peace and security" of humankind) ('Geras').

8 While beyond the scope of this chapter, linguistic variations of the term 'humanity' in other languages may add further nuances. See, for example, the difference between the Belgian (Dutch) and Dutch translations of 'humanity' in Article 7 of the ICC Statute: Belgium (Dutch) – *mensheid* (humankind) and The Netherlands – *menselijkheid* (humanness), see *supra* note 1. Hannah Arendt also observed, in relation to the German translation of Article 6(c) of the Nuremberg Charter, the rendering of 'humanity' as *Menschlichkeit* (the moral sentiment or ensemble of values) rather than *Menschheit* ('humankind') (noted without further attribution in Geras, p. 40, see *supra* note 7). The French text of the Kellogg-Briand Pact (UK Secretary of State for Foreign Affairs, *Treaty Series No. 29 (1929): International Treaty for the Renunciation of War as an Instrument of National Policy*, His Majesty's Stationery Office, London, 1929, Cmd. 3410) uses the term *l'humanité* as meaning the human race as a whole. In its preamble, the signatories declare themselves as "ayant le sentiment profond du devoir solennel qui leur incombe de développer *le bien-être de l'humanité*" ("Deeply sensitive to their solemn duty to promote *the welfare of mankind*" (Article 3)) (http://www.legal-tools.org/doc/998ff6/).

ty': in terms of our humanness as an abstract quality, as a collective noun (that is, all human beings together), or to the behavioural quality of being humane.[9] The present chapter considers the concept of 'humanity' in one or more of these senses.[10] Other conceptions of 'humanity' are, however, possible.[11] Other chapters in this present volume expand this concept, for example to speak of the notion of humanity as an inter-connected body and the quality of unity of all peoples.[12]

3.3. In What Sense Is 'Humanity' a Fundamental Interest upon Which Crimes Against Humanity Are Based?

Kai Ambos argues that identifying 'humanity' as a fundamental legal good protected by crimes against humanity has much to recommend it – particularly when situating crimes against humanity in relation to other grave international crimes.[13] In what sense can 'humanity' be said to be a core val-

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9 See "humanity", in *Oxford English Dictionary*: (1) human beings collectively; (2) the state of being human; and (3) the quality of being humane; benevolence.

10 Legal commentators also tend to use one or other of these variants. See, for example, Schwelb, p. 195 (noting that the word 'humanity' has at least two different meanings, one connoting the human race or mankind as a whole, and the other, humaneness, that is, a certain quality of behaviour), see *supra* note 4; and Luban, p. 86: "the phrase 'crimes against humanity' suggests offenses that aggrieve not only the victims and their own communities, but all human beings, regardless of their community. Second, the phrase suggests that these offenses cut deep, violating the core humanity that we all share and that distinguishes us from other natural beings", see *supra* note 7; see also Fourth Report on the Draft Code of Offences Against the Peace and Security of Mankind by Mr. Doudou Thiam, Special Rapporteur, UN Doc. A/CN.4/398, 11 March 1986, para. 15, in *Yearbook of the International Law Commission*, 1986, vol. II, part 1 ("in the term 'crimes against humanity', the word 'humanity' means the human race as a whole and in its various individual and collective manifestations") (http://www.legal-tools.org/doc/ccd6cc/).

11 See, for example, Surabhi Sharma, "Humanity and Unity: Indian Thought and Legal Interests Protected by International Criminal Law", Chapter 8 in this volume (describing conceptions of humanity in Indian philosophical sources such as the Bhagavad Gita as including purity of heart, tranquillity and aversion to slander; compassion and freedom from covetousness and malice; gentleness; modesty; forgiveness and fortitude).

12 See, for example, Rod Rastan, "Unity and Disunity in International Criminal Justice", Chapter 9 in this volume (noting, in relation to the Preamble to the ICC Statute ("*Mindful* that […] millions […] have been victims of unimaginable atrocities that deeply shock the conscience of humanity") a universalizing tendency, insofar as it is linked in the paragraph that follows to not only the "children, women and men" who "have been victims of unimaginable atrocities", but to all humanity, whose "conscience is deeply shocked").

13 Kai Ambos, "The overall function of international criminal law: Striking the right balance between the Rechtsgut and the Harm Principle" , in *Criminal Law and Philosophy*, 2015, vol. 9, no. 2, p. 320 (noting that 'collectivist notions' such as 'mankind', 'humanity' or "the

ue protected by crimes against humanity? What does it mean to say that 'humanity' itself is harmed by these crimes?

Political philosophers and legal scholars alike have identified a number of ways in which 'humanity' can be said to be a fundamental interest underpinning crimes against humanity. They have also addressed the notion that, in harming their immediate and indirect victims, certain types of offences represent an injury as well to 'humanity', although these two lines of inquiry are sometimes difficult to distinguish.

Authors who have addressed these questions have adopted different but overlapping taxonomies. Using a typology of humanity as either (a) the human race or mankind as a whole or (b) a certain quality ('humaneness'), Norman Geras identifies several senses in which 'humanity' can be said to be a core value protected by crimes against humanity.[14] Richard Vernon, another political theorist, reviews several related conceptions of 'humanity', before alighting on the central idea that a crime against humanity is best thought of as "a moral inversion, or travesty, of the state; it is an event that can occur only when […] essential resources of the state are put to malign use".[15] David J. Luban, a scholar of both law and philosophy, similarly argues that crimes against humanity are "universally odious because they injure something fundamental to being human in a way that municipal legal systems fail to address".[16] He identifies as a shared feature of our common humanity our nature as political beings. As this compels us to live within political organizations, we are thus uniquely vulnerable to the risk that these indispensable institutions of political life will instead turn on us and

human race, carry […] independent moral force […] while [also] being relevant for individuals") ('Ambos').

14 These are, in relation to (a): diminishing the human race, threatening the peace and security of mankind, breaching the sovereign authority of humankind, shocking the conscience of humankind, threatening the existence of humankind, and the idea that all humankind are the victims. In relation to (b) (humanity as a quality of behaviour), Geras identifies inhumane, grave or 'inhuman' acts; acts against the human status or condition; and genocidal acts (see Norman Geras, *Crimes Against Humanity: Birth of a Concept*, Manchester University Press, 2011). Many of these formulations appear distinct from the notion of 'humanity' in a strict sense and as such are beyond the scope of the present chapter, although related ideas are reflected in other contributions within this volume.

15 Richard Vernon, "What is Crime Against Humanity?", in *The Journal of Political Philosophy*, 2002, vol. 10, no. 3, p. 233 ('Vernon').

16 Luban, p. 90, see *supra* note 7.

destroy us. It is for this reason that crimes against humanity pose a universal threat that all humankind shares an interest in repressing.[17]

3.3.1. 'Humanity' as a Means of Differentiating Crimes Against Humanity from Other International Crimes

The first and most obvious relevance of 'humanity' is as a means of differentiating crimes against humanity from other categories of grave international crimes. According to Ambos, reference to 'humanity' to a large extent gives crimes against humanity their distinctiveness *vis-à-vis* war crimes and genocide. Ambos characterizes the legal interest protected by crimes against humanity as arguably less concrete than for the other core crimes – in the sense that individuals protected by crimes against humanity are protected by virtue of their membership of humanity; that is, by virtue of being part of a collectivity of persons singled out for attack on the basis of their group characteristics.[18]

Even if accepting this criterion as specific to crimes against humanity, it is still necessary to determine *how* or in what sense 'humanity' can be said to be a legal interest protected by crimes against humanity.

3.3.2. 'Humanity' as a Jurisdictional Trigger

Appeals to 'humanity' have also been used in response to a jurisdictional vacuum. The notion of a crime 'against humanity' provides a justification for the exercise of jurisdiction over "manifestly evil acts which are beyond the reach of domestic law", thus creating a means to punish those who are guilty of them.[19] Indeed, a rationale for including crimes against humanity within the IMT Charter in the first place was because it was feared that un-

[17] *Ibid*., pp. 90–91.

[18] Ambos, p. 321, see *supra* note 13 (identifying the legal good of the crime of genocide as comprising by contrast the existence of national, ethnical, racial, or religious groups. In relation to war crimes, the legal good is instead the existence of individuals in their contingent and contextual categorisation as an 'enemy group'. Ambos however characterises both values as "a concretisation of the value of mankind"). See also, in relation to war crimes, SONG, 2019, see *supra* note 14 (observing a changing understanding of the protected legal interests as no longer only relating to parties to conflict, but as also giving rise to universal concerns).

[19] Vernon, p. 234, see *supra* note 15 (citing Geoffrey Robertson, who viewed crimes against humanity as above all "the key to unlock the closed door of state sovereignty, and to hold political leaders responsible for the great evils they visit upon humankind").

der the traditional formulation of war crimes, many of the defining acts of the Nazis would otherwise have gone unpunished.[20]

3.3.3. Crimes Against Humanity Create Externalities Beyond Borders

Other scholars introduce consequentialist considerations, arguing that crimes against humanity become the concern of the international community where they have repercussions reaching across international frontiers. Humanity as a whole has an interest in preventing mass persecutions because of their tendency to lead to international upheaval; the removal of rights from German Jews was, after all, the prelude to an onslaught across the whole of Europe.[21]

Arguments of this kind are, however, too selective and conditional in their effect: not every crime against humanity is a prelude to disorder, and this formulation inadvertently privileges victims with a higher degree of influence or disruptive capacity. The punishment of crimes against humanity surely rests on a more principled foundation.[22]

3.3.4. Conduct That Is Inhumane

'Humanity' – or rather its converse, *inhumanity* – is also used to depict conduct which is cruel. Terms used to describe crimes against humanity include 'unconditional wrongness', 'severity' or 'odiousness'. As a criterion, however, 'inhumanity' suffers from both vagueness and a lack of distinctiveness, as, in a sense, *all* criminal conduct can be said to be inhumane. It is also doubtful whether this conception was envisaged when including crimes against humanity in the IMT Charter. Depicting the Nazis as being merely inhumane is, as Hannah Arendt noted, "certainly the understatement of the century".[23] Insofar as it suggests merely that the Nazis were lacking in human kindness, 'humanity' is thus too weak and undiscriminating to serve as the underpinning of crimes against humanity in isolation. Nor is

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20 Schwelb, p. 183, see *supra* note 4 (inclusion of Article 6(c) reflected the Allies' desire not to be restricted "to bringing to justice those who had committed war crimes in the narrower sense […], but that also such atrocities should be investigated, tried, and punished as have been committed on Axis territory against persons of other than Allied nationality").

21 Vernon, p. 239, see *supra* note 15.

22 *Ibid*.

23 Hannah Arendt, *Eichmann in Jerusalem: A Report on the Banality of Evil*, The Viking Press, New York, 1963, p. 275.

this criterion unique to crimes against humanity. The supposed inhumanity of the perpetrator is scarcely a better criterion, as the correlation "between subjective intention and objective result may be very weak".[24]

3.3.5. Crimes Against Humanity as Particularly Grave Crimes

If cruelty or inhumanity is too minimalistic and imprecise, could this deficiency be solved by a quantitative criterion? Might crimes against humanity connote instead a notion of scale or degree of inhumanity? Crimes against humanity are referred to as particularly grave crimes: inhumane acts that by their extent and gravity go beyond the limits of what is tolerable.[25] Although still imprecise[26] and while comparisons of this type are inevitably repugnant,[27] notions of a high degree of inhumane conduct or extreme absence of the quality of humaneness are understandably persistent. As Vernon notes, "[n]o view of crime against humanity that fails to take account of the violent presence of inhumanity can be morally persuasive".[28]

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[24] Vernon, p. 238, see *supra* note 15 (noting that the most inhumane results, however measured, may not necessarily reflect the most subjectively measured inhumanity. The inhumanity of the perpetrator will instead depend on several other considerations, including "the costs of non-compliance, the jointness of responsibility, the certainty of the foreknowledge of consequences, and the personal involvement of the actor in the outcome").

[25] Schwelb, p. 195, see *supra* note 4 (crimes against humanity are offences under certain general principles of law which become the concern of the international community if they pass "in magnitude or savagery any limits of what is tolerable by modern civilisations").

[26] All international crimes are extremely grave, and the notion of a hierarchy of international crimes is a contested one. See, for example, Micaela Frulli, "Are Crimes against Humanity more serious than War Crimes?", in *European Journal of International Law*, 2001, vol. 12, no. 2, pp. 329–50.

[27] Vernon, p. 7, notes the offensively reductionist quality of any such calculus: The "scale of evil occupies a notoriously difficult place in moral evaluation. […]. [T]here are two considerations that tell against relying on any kind of quantitative criterion. The first is that quantification is simply implausible. Should we set out to compare the evil done by the Holocaust, by African slavery, and by the (near-) extermination of aboriginals in North America? If we employ a body count, then African slavery killed more people than the other two did. If we are looking at the proportion of the target group killed, then the aboriginal case is the worst. If we are looking at rates of killing per day, one might interject, the Rwanda genocide outclasses all three. […] [This is a] matter resistant to considerations of quantity. We need to think about kinds of evil, not about amounts of it", see *supra* note 15.

[28] *Ibid*., p. 236 (citing Schwelb, p. 195, who exhorts us to think of the term 'humanity', in the expression 'crimes against humanity', not as a collective noun but as a synonym for 'humaneness', see *supra* note 4).

3.3.6. Crimes Against Humanity as Crimes That Harm All Humankind

Another conception of 'humanity' focuses instead on who or what are the victims of crimes against humanity. In this regard, it is arguably not humaneness, as a moral quality, which is lost or denied; it is the fact that damage is done to humanity imagined as an entity of some kind.[29]

For those agreeing with this conception, crimes against humanity are universally odious because they injure something fundamental to being human.[30] They describe crimes against humanity as crimes which "strike at all mankind"; that is, crimes against humanity are crimes committed not only against their immediate victims, but also 'against humanity'.[31] Crimes against humanity express the idea that the international community's interests are different to those of the immediate victims, and that it is the former which is in some way harmed.[32]

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29 See, for example, Vernon, p. 239, see *supra* note 15.

30 However, not all scholars agree. Some find the notion of harm to 'humanity' troubling, inasmuch as the concept of harm is more usually applied to natural persons rather than to abstract concepts. See, for example, Ambos, who notes, at pp. 320–21, that "[a]ccordingly, international criminal prosecutions are legitimate if the crimes in question are not only directed against individuals but are also "group-based either in terms of the nature of the victim's harm or the character of the perpetrator of the harm", that is, if humanity, as such, is harmed. The shortcoming of this account is that it is hard to see how the concept of harm can account for any alleged 'harm to humanity'. 'Humanity' can hardly be harmed. The victim, and only the victim, is harmed, and this harm has two implications in terms of value: one for the victim as an individual, and another one for humanity as a collectivist concept. This latter implication is more abstract and general than the first one, and only partly overlaps with it", see *supra* note 13.

31 See, for example, Ronald C. Slye*,* "Apartheid as a Crime Against Humanity*:* A Submission to the South African Truth and Reconciliation Commission", in *Michigan Journal of International Law*, 1999, vol. 20, no. 2, p. 270.

32 Luban, p. 88, see *supra* note 7. See also ICC, Situation in Darfur, Sudan, *Prosecutor v. Omar Hassan Ahmad Al Bashir*, Appeals Chamber, Written observations of Professor Claus Kreß as amicus curiae, with the assistance of Ms Erin Pobjie, on the merits of the legal questions presented in 'The Hashemite Kingdom of Jordan's appeal against the "Decision under article 87(7) of the Rome Statute on the non-compliance by Jordan with the request by the Court for the arrest and surrender [of] Omar Al-Bashir"' of 12 March 2018 (ICC-02/05-01/09-326), 18 June 2018, ICC-02/05-01/09-359, p. 6 ("The ultimate purpose of international criminal law *stricto sensu* is to strengthen and to protect certain international rules of conduct the importance of which [...] transcend their national interests. Crimes under international law thus concern the international community as a whole") (http://www.legal-tools.org/doc/85f44c/).

Under this conception, the defining feature of these offences is the *value* they injure.[33] The essential value injured by crimes against humanity is our humanness – crimes against humanity attack 'humanness' (as opposed to, say, property or public order).[34] Crimes against humanity offend against our humanness in the way that crimes against peace offend against peace. 'Humanity' thus denotes the value that the crimes violate, just as 'peace' denotes the value that wars of aggression assault. But what is this damage? Why do crimes against humanity violate humanness and how do they offend against all humankind? Is humanity as a whole the victim of these crimes, and what is meant by this claim?

3.3.6.1. Crimes Against Humanity as Crimes That 'Diminish the Human Race'

Geoffrey Robertson views 'crimes against humanity' as being 'against humanity' because "the very fact that a fellow human being could conceive and commit them diminishes every member of the human race", or "diminish[es] whatever value there is in being human".[35] These formulations are not self-explanatory, and could be criticised as unacceptably *de minimis*.[36]

3.3.6.2. Crimes Against Humanity as Crimes That 'Shock the Conscience' of Humankind

Others refer to the idea of crimes against humanity as expressing a sense of moral outrage which predates crimes against humanity becoming an international offence.[37] As Vernon notes, both before and after the crime's incorporation into international law, invoking 'humanity' has been one of the standard means of expressing horror and revulsion at acts of great evil.

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33 Luban, p. 86, see *supra* note 7: "Here, the idea is to supplement the traditional taxonomy of legally protected values – property, persons, public order, morals – by adding that some offenses are crimes against humanness as such".

34 *Ibid*., citing Hannah Arendt in the 'Epilogue' to *Eichmann in Jerusalem*, where she describes the Holocaust as a "new crime, the crime against humanity – in the sense of a crime 'against the human status', or against the very nature of mankind" (Arendt, 1963, see *supra* note 23).

35 Geoffrey Robertson, *Crimes against Humanity*, 4th edition, New Press, New York, 2013, pp. 220, 374, 239.

36 Vernon, p. 237, see *supra* note 15: "to say that crime against humanity 'diminishes every member of the human race' […] seems to carry no sense of limits at all: cruelties falling well short of grave international crimes come within its scope" […]; [for example] "the broadcasting of dreadful music […] [has a] diminishing effect […], for some of us at least".

37 Vernon, p. 232, see *supra* note 15: "it [a crime against humanity] was wrong before a law could be contrived to condemn it".

Since Nuremberg, it has remained a way of expressing outraged revulsion that owes nothing to international law at all. Instead, 'crime against humanity' signifies "a level of callousness that embodies the very essence of evil itself".[38]

In what sense, or in what way, are all human beings the victims of crimes against humanity? All humankind may be viewed as the victim of these crimes because humanity in the sense of the *human status* of the direct victims "comes under attack and is negated".[39] Eve Garrard explains how everyone is harmed by crimes against humanity perpetrated against others as follows: "What harms them [the direct victims] harms us all […] because we are in some way, due to our common human nature, implicated in their suffering".[40] But she does not say precisely what this harm is, nor how we are all "implicated" in it; a notion which appears at odds with the objective of international justice of individualising and particularising responsibility for grave international crimes. Others contest this notion. As Geras notes, we are *not* all shamed and diminished by these crimes.[41] Nor is being 'shamed' or 'diminished' by acts, even if shown, sufficient to criminalize them.

Another sense in which crimes against humanity may victimize us all is that they terrorize us.[42] They instil fear not only in those directly attacked, or those closely threatened by or in the vicinity of an attack, but human beings in general. A notion akin to this is expressed in the Preamble to the ICC Statute, which refers to "grave crimes [that] threaten the […] well-being of the world". According to Geoffrey Robertson, "this is true, in the sense that our psychological well-being suffers from the sight of atrocities by fellow human beings".[43] While the vast majority of persons undoubtedly find it difficult to witness the suffering of others, significant individual variation exists. Scientific studies even show that human beings are highly

[38] *Ibid*. (citing Laurence Thomas, "Forgiving the Unforgivable?", in Eve Garrard and Geoffrey Scarre (eds.), *Moral Philosophy and the Holocaust*, Ashgate Publishing, Aldershot, 2003).

[39] Geras, p. 58, see *supra* note 7.

[40] Eve Garrard, "Forgiveness and the Holocaust", in *Ethical Theory and Moral Practice*, 2002, vol. 5, no. 2, p. 159.

[41] Geras, pp. 58–59, see *supra* note 7.

[42] *Ibid*., p. 59.

[43] Robertson, 2013, pp. 331, 492, see *supra* note 35. See also Arendt, 1963, p. 273, see *supra* note 23 (noting that after the crimes of the Nazis, "no people on earth […] can feel reasonably sure of its continued existence without the help and the protection of international law").

susceptible to having natural inhibitions overcome by appeals to factors such as authority and danger.[44] There are, further, doubtless instances in which we are also curiously insensitive to human suffering, particularly of those persons ascribed the character of 'otherness', and the limits of human empathy in this area are well-known.[45]

3.3.7. 'Humanity' as a Normative Constraint and Guide to Future Conduct

As a counter to the above, 'humanity' may also be seen as a constraint and guide to future conduct. Notions of 'humanity' in this regard provide certain 'moral resources' – such as respect and sympathy – which generally constrain us in our relations with others. While various circumstances and emotions can blunt them and lead us to commit or be complicit in terrible acts, conversely, these resources of humanity can sometimes "pull us back from committing evil".[46]

3.3.8. Crimes Against Humanity as Collective Crimes That Have Individuals at Their Core

While a key focus of crimes against humanity is on human collectivities – a feature which helps differentiate crimes against humanity from ordinary criminality – a distinctive feature of crimes against humanity is that they manifest an intense concern for the *individual* as opposed to groups as such. The drafting history of Article 6(c) of the IMT Charter shows that the central intellectual concern of its principal architect, Hersch Lauterpacht, was the development of rules that place limits on the supposedly "eternal and inalienable" powers of the State.[47] The early emphasis of the United Nations War Crimes Commission on the protection of individuals rather than group rights reflected Lauterpacht's primary hope for the newly-emerging

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44 See, for example, Stanley Milgram, "Behavioural Study of Obedience", in *Journal of Abnormal and Social Psychology*, 1963, vol. 67, no. 4, p. 376.

45 See, for example, Alessio Avenanti, Angela Sirigu and Salvatore M. Aglioti, "Racial Bias Reduces Empathic Sensorimotor Resonance with Other-Race Pain", in *Current Biology*, 2010, vol. 20, no. 11, pp. 1018–22.

46 Vernon, pp. 236–37, see *supra* note 15; citing Jonathon Glover, *Humanity: A Moral History of the Twentieth Century*, Pimlico, London, 2001.

47 Sands, p. 82, see *supra* note 5; citing Matthew Lippman, "Crimes against Humanity", in *Boston College Third World Law Journal*, 1997, vol. 17, no. 2, p. 171 (noting that prior to Nuremberg, international law allowed states to discriminate and adopt measures such as the Nuremberg decrees).

international legal order – namely ending the omnipotence of the State and ensuring that atrocities such as those witnessed during the Holocaust would no longer be matters governed exclusively by national law.[48] However, Lauterpacht's approach diverged from that of Raphael Lemkin who, in his book entitled *Axis Rule in Occupied Europe,* aimed at protecting groups, for which he invented a word for a new crime, 'genocide' (the destruction of groups). Lauterpacht was lukewarm regarding the notion of genocide, being concerned that elevating the role of groups may undermine the protection of individuals.

3.3.9. Crimes Against Humanity as a Corruption of Politics or Abuse of Sovereignty

Other scholars instead emphasize human beings as political beings, viewing crimes against humanity as a moral inversion, or travesty of the State. Crimes against humanity occur when essential resources of the State are put to malign use. They comprise an assault against human beings in their inevitable subjection to territorial and organizational authority. The conclusion that crimes against humanity are committed by States against civilians within their borders in turn provides the justification for overriding State sovereignty and subjecting these crimes to international criminalization. Further, the risk that indispensable institutions of organized political life may instead become malevolent and destroy us is a universal threat that all humans share and have an interest in suppressing.[49]

According to this view, it is arguably the abuse of sovereignty which makes crimes against humanity a concern to the entire world. This also provides a rationale for the expansion of international criminal law at the

[48] *Ibid*., pp. 82, 85–87, 101–02, 106–08. Lauterpacht considered the well-being of the individual to be the "ultimate objective of all law" and sought to use generally applicable principles of national law ("general principles of law recognized by civilized nations") to address lacunae in international rules protecting individuals. His focus on the limits of international law to protect individuals was inspired by the inability of treaties regarding the rights of minorities adopted after the First World War to achieve their aims. In the post-World War II period, this vision began to bear fruit, and the United Nations War Crimes Commission worked alongside "burgeoning new international law designed to protect fundamental human rights". Lauterpacht viewed the concept of genocide as impractical and a distraction; a 'recession' from the treatment of individual human rights. Genocide was excluded from the enumeration of crimes in the IMT Charter, although this term was used in the indictment at Nuremberg.

[49] The main exponent of this idea is David J. Luban, who describes crimes against humanity as "politics gone cancerous" (Luban, p. 116, see *supra* note 7).

expense of the interests of States in maintaining authority within their territory. International jurisdiction is needed to address crimes committed by or at the instigation of governments, and sovereignty must yield to the need to prevent crimes against peace and security of mankind and against the dictates of the human conscience.

This statist focus has much internal logic and rhetorical force. As Luban states, "our propensity to enter into society should not be a suicide pact".[50] However, this conception of crimes against humanity as being principally committed by States against their own citizens within national borders – that is, as inevitably reflecting an emanation of national policy – has been challenged by more recent examples of these crimes. Increasingly, crimes against humanity have served as a means of punishing certain categories of serious violations and not merely as a response to abuses perpetrated by State actors. Crimes against humanity consist of the most severe acts of violence and persecution – their organized character, scale and added dimensions of cruelty and barbarism being arguably the most fundamental criteria for making international crimes of these deeds.

3.4. How Are These Notions of 'Humanity' Reflected in the Development of Crimes Against Humanity in Positive Law?

These various conceptions of humanity are reflected, to a greater or lesser extent, in the substantive law of crimes against humanity. They find expression in both the antecedents to, and statutory instruments and case law defining, crimes against humanity, although not always coherently or consistently. The interplay, ascendency and regression of certain of these values – as the scope of crimes against humanity has come to be determined and refined over time – reveal important tensions at the heart of the concept of crimes against humanity, particularly concerning the limits to the protective scope of these crimes.

3.4.1. Nuremberg, Tokyo and Their Precursors

The formulation of crimes against humanity in Article 6(c) of the Charter of the IMT[51] drew on many antecedents in which notions of 'humanity' had

[50] *Ibid*., p. 113.

[51] Article 6(c) of the IMT Charter defined crimes against humanity as "murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war; or persecutions on political, racial, or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or

been expressed. In these older international documents, however, expressions such as 'humanity', 'dictates of humanity', and 'laws of humanity' were used in a non-technical sense and arguably not in a manner intended to create a new category of offences distinct from war crimes.[52] The evolution from moral condemnation to positive law took nearly a century.[53]

Consensus among the IMT Charter framers as to which crimes to include in the Charter, and how to formulate them, was initially lacking. Hersch Lauterpacht proposed the introduction of a new term into international law – crimes against humanity – to address atrocities against civilians, a matter on which the Russians and Americans were divided.[54] One formulation that had been used in international discourse when the British and the Americans decried the Turkish mass murder of Armenians in the summer of 1915 was condemnation of this conduct as "a crime against humanity and civilization". Originally, the term used was "crimes against Christians".[55] For the Russians, they were "crimes against Christianity and civilization", a phrase that the French used but changed to a "crime against humanity and civilization", concerned about Muslim sensitivities.[56]

not in violation of the domestic law of the country where perpetrated". Article 5(c) of the Charter for the Tokyo Tribunal was substantially the same as Article 6(c) of the IMT Charter, although it omitted reference to persecutions on 'religious grounds' and did not require the enumerated acts to be "committed against any civilian population". See Charter of the International Military Tribunal for the Far East, 19 January 1946, Article 5(c) (http://www.legal-tools.org/doc/a3c41c/).

52 Schwelb, p. 180, see *supra* note 4.

53 Leila N. Sadat, "Crimes Against Humanity in the Modern Age", in *American Journal of International Law*, 2013, vol. 107, no. 2, p. 337, fn. 16 (the term 'crimes against humanity' or offenses against the 'laws of humanity' emerged in the nineteenth century to describe the evils of slavery and the slave trade).

54 Sands, pp. 110–11, 143, see *supra* note 5. See also Kerstin von Lingen, "Defining Crimes Against Humanity: The Contribution of the United Nations War Crimes Commission to International Criminal Law, 1944–1947", in Morten Bergsmo, CHEAH Wui Ling and YI Ping (eds.), *Historical Origins of International Criminal Law: Volume 1*, Torkel Opsahl Academic EPublisher, Brussels, 2014 (http://www.toaep.org/ps-pdf/20-bergsmo-cheah-yi).

55 Sands, p. 143, see *supra* note 5 (the American ambassador to the Ottoman Empire Henry Morgenthau described the Armenian massacres as "the greatest crime of all ages", noting that "more than 1.2 million Armenians were killed […] for no other reason than they were Christians"). See also Raphael Lemkin, in Donna-Lee Frieze (ed.), *Totally Unofficial: The Autobiography of Raphael Lemkin*, Yale University Press, 2003, p. xi; and Vahakn N. Dadrian, *The History of the Armenian Genocide: Ethnic Conflict from the Balkans to Anatolia to the Caucasus*, Berghahn Books, 2003, p. 421.

56 Sands, pp. 143–44, see *supra* note 5 (noting that "[n]o longer would a state be free to treat its people entirely as it wished"). Robert Jackson endorsed Lauterpacht's formulation in a

A further early source expressing this term was paragraph 2 of the Preamble to the Fourth Hague Convention of 1907 concerning the Laws and Customs of War on Land, known as the Martens Clause.[57] It declared the Contracting Parties to be "animated by the desire to serve", even in the case of war, "the interests of humanity and the ever-progressive needs of civilization".[58] While the Martens Clause was too imprecise to provide a clear basis for either State responsibility or criminal liability, it did articulate the notion that international law encompassed transcendental humanitarian principles that existed beyond conventional law, conceiving of the "interests of humanity" as "the purpose which the laws and customs of war serve, and the 'laws of humanity'" as one of the sources of the law of nations.[59]

In the aftermath of World War I, the Preliminary Peace Conference in January 1919 created a Commission of Fifteen Members for the purpose of inquiring into responsibilities relating to the war. The report of the Commission of 29 March 1919 stated that "in spite of the explicit regulations, of established customs, and of the clear 'dictates of humanity', Germany and her allies have piled outrage upon outrage".[60] The majority of the

revised draft of the Statute and it was eventually agreed, extending the protections of international law and bringing into the trial Germany's actions against its own nationals – Jews and others – before the war began. See also US Department of State, "Notes on Proposed Definition of 'Crimes', Submitted by American Delegation, July 31, 1945" and "Revision of Definition of 'Crimes', Submitted by American Delegation, July 31, 1945", *Report of Robert H. Jackson, United States Representative to the International Conference on Military Trials*, 1949, pp. 394–95.

57 Martens clause, Convention (II) with Respect to the Laws and Customs of War on Land, 29 July 1899, Preamble ('Hague Convention II') (http://www.legal-tools.org/doc/7879ac/). It states that "[u]ntil a more complete code of the laws of war is issued, the High Contracting Parties […] 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".

58 Schwelb, p. 180, see *supra* note 4.

59 See Antonio Cassese, "The Martens Clause: Half a Loaf or Simply Pie in the Sky?", in *European Journal of International Law*, 2000, vol. 11, no. 1, pp. 187–216. See also Beth Van Schaack, "The Definition of Crimes Against Humanity: Resolving the Incoherence", in *Columbia Journal of Transnational Law*, 1999, vol. 37, no. 787, pp. 795–96.

60 Schwelb, pp. 180–81, see *supra* note 4; citing Carnegie Endowment for International Peace, Division of International Law, *Violation of the Laws and Customs of War: Report of Majority and Dissenting Reports of American and Japanese Members of the Commission on Responsibilities, Conference of Paris, 1919*, Pamphlet No. 32, 1919, chap. II ('Report of the

Commission concluded that World War I "was carried on by the Central Empires together with their allies, Turkey and Bulgaria, by barbarous or illegitimate methods in violation of the established laws and customs of war and the elementary laws of humanity", and that "all persons belonging to enemy countries […] who have been guilty of offenses against the laws and customs of war or the *laws of humanity*, are liable to criminal prosecution".[61]

Reference to the notion of 'humanity' was taken up in the work of the United Nations War Crimes Commission, established in 1943. It recommended to the Allied governments that the retributive action of the United Nations should not be limited to war crimes in a strict sense, as "the unprecedented record of crimes committed by the Nazi regime and the other Axis Powers, not only against Allied combatants but also against the civilian populations of the occupied countries and of the Axis countries themselves, made it necessary to provide that these crimes also should not go unpunished". The text of Article 6(c) as ultimately agreed, while contentious, allowed crimes against humanity to become part of international law. It aimed at the protection of individuals, extending the protections of international law and bringing into the trial Germany's actions against its own nationals – Jews and others – before the war began.[62]

Commission to the Paris Peace Conference, 1919') (https://www.legal-tools.org/doc/4plw5h/).

61 In a dissenting memorandum to the Report of the Commission to the Paris Peace Conference 1919, two American members of the Commission, Robert Lansing and James Brown Scott, entered a reservation concerning the report's appeal to 'laws and principles of humanity', on grounds that "the laws and principle of humanity are not certain, varying with time, place, and circumstance, and according, it may be, to the conscience of the individual judge. There is no fixed and universal standard of humanity" (*ibid*., pp. 133–34, 144).

62 Sands, pp. 111–12, see *supra* note 5. See also Schwelb, pp. 184–85, 188–89, see *supra* note 4:

> From the words 'against *any* civilian population', it follows that a crime against humanity can be committed both against the civilian population of territory which is under belligerent occupation and against the civilian population of other territories, irrespective of whether they are under some other type of occupation or whether they are under no occupation at all. The civilian population protected by the provision may therefore also include the civilian population of a country which was occupied without resort to war, e.g. Austria and parts of Czechoslovakia in 1938–9. It may be the civilian population of territories where armed forces of one belligerent were stationed without effecting an occupation, which was the case […] with German forces in Italy at some stages of the Second World War. The civilian population protected by the provision may also be the civilian population of countries neighbouring […] Germany, without German armed forces

The War Crimes Commission declared that an ordinary crime, punishable under municipal law, is transformed into a crime against humanity, and thus a concern of international law in relation "only [to] crimes which either by their magnitude and savagery or by their large number or by the fact that a similar pattern was applied at different times and places, endangered the international community or shocked the conscience of mankind, warranted intervention by States other than that on whose territory the crimes had been committed, or whose subjects had become their victims".[63] Reference to 'any civilian population' indicated that a larger body of victims is envisaged and that single or isolated acts committed against individuals are outside its scope.[64] As a rule, systematic mass action, particularly if it was officially sanctioned, was necessary to transform a common crime, punishable only under municipal law, into a crime against humanity.[65] Crimes against humanity thus conceived were viewed as "clearly an innovation", but it was an "enlightened innovation" – one that affirmed that international law was not only law 'between States' but also 'the law of mankind'.[66] Those who transgressed it would have no immunity, even if they were leaders, which reflected the "outraged conscience of the world".[67]

On 20 December 1945, the Control Council for Germany, generally known as 'Control Council Law No. 10', was passed. It was designed to establish a uniform legal basis in Germany for the prosecution, including for crimes against humanity, of war criminals and other similar offenders other than those dealt with by the International Military Tribunal.[68] The prohibition of crimes against humanity was also subsequently affirmed by the General Assembly and by the Principles of International Law Recog-

being permanently stationed there. The population protected may finally be the civilian population of the respective belligerent itself, e.g. the German civilian population […], or the Italian population […] which may have become the victim of outrages by Italian military and fascist formations.

63 United Nations War Crimes Commission ('UNWCC'), *History of the United Nations War Crimes Commission and the Development of the Laws of War*, 1948, p. 179 (http://www.legal-tools.org/doc/cac045/).

64 Schwelb, p. 191, see *supra* note 4.

65 UNWCC, 1948, p. 179, see *supra* note 63.

66 *Ibid*.

67 Sands, p. 113, see *supra* note 5; citing Elihu Lauterpacht, *The Life of Hersch Lauterpacht*, Cambridge University Press, Cambridge, 2010, p. 275.

68 Schwelb, p. 216, see *supra* note 4.

nized in the Charter of the Nuremberg Tribunal and in the Judgement of the Tribunal ('Nuremberg Principles'), adopted by the International Law Commission in 1950, both of which further refined the notion of crimes against humanity reflected in the IMT Charter.[69]

These first positive expressions of crimes against humanity contained features which have proved durable, and others that have not withstood the test of time. The original conception of these crimes gave expression to the enduring notion of offences whose objects are civilian collectivities: important universalizing concepts which have found expression and refinement in the positive law of all international criminal tribunals. Other features of these early definitions of crimes against humanity have disappeared or re-emerged only intermittently. In particular, crimes against humanity in the post-war years became unshackled from armed conflict – an important distinction to war crimes[70] – and the notion of a required nexus between these and other international crimes also atrophied as the independent character of crimes against humanity and the legitimacy of their criminalization gained increasing acceptance.

3.4.2. The *Ad Hoc* International Criminal Tribunals

The *ad hoc* international criminal tribunals for the former Yugoslavia ('ICTY') and for Rwanda ('ICTR') embodied crimes against humanity in Article 5 of the ICTY Statute (referring to "crimes […] committed in armed conflict […] and directed against any civilian population") and, in non-identical fashion, in Article 3 of the ICTR Statute ("when committed as part of a widespread or systematic attack against any civilian population on national, political, ethnic, racial or religious grounds").[71] The work of the ILC, which in the aftermath of Nuremberg decoupled crimes against humanity from armed conflict, led to a downplaying of the stubbornly recrudescent war nexus in Article 5 of ICTY Statute, demonstrating that the le-

69 For areas in which the Control Council Law No. 10 formulation of crimes against humanity modified the IMT formulation of these crimes, see generally Schwelb, pp. 217–19, see *supra* note 4.

70 SONG, 2019, see *supra* note 14.

71 See, however, ICTR, *Prosecutor v. Bagosora et al.*, Trial Chamber, Judgment and Sentence, 18 December 2008, ICTR-98-41-T, paras. 2166, 2208 (noting that the additional *chapeau* requirement that crimes against humanity have to be committed "on national, political, ethnic, racial or religious grounds" does not mean that a discriminatory intent must be established for all crimes against humanity, as this would remove the distinctiveness of the enumerated crime of persecution) (http://www.legal-tools.org/doc/6d9b0a/).

gal interests protected by crimes against humanity are broader than those which connect the belligerent parties to a situation of armed conflict.[72]

The express limitation of these crimes to civilians (that is, all persons who are not members of the armed forces) further delineates the fundamental legal interests encapsulated by crimes against humanity: combatants are in the domain of war crimes. This reference to "any" civilian population has important universalising tendencies, in that the individuals targeted need not comprise an identifiable or specifically protected group.[73] Notably, crimes against humanity include a State's attack on its own population, and unlike genocide, they do not exclude any particular human group.[74]

The core requirements of a widespread or systematic attack impart notions of scale and gravity. The adjectives "widespread or systematic" qualify the underlying attack and not the acts of the perpetrator.[75] While the acts of the accused must comprise part of a pattern of widespread or sys-

[72] The United Nations Secretary-General's report to the Security Council establishing the ICTY acknowledged that crimes against humanity "are aimed at any civilian population and are prohibited regardless of whether they are committed in an armed conflict, international or internal in character" (Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993), UN Doc. S/25704, 3 May 1993, para. 47 (http://www.legal-tools.org/doc/c2640a/)). The ICTY jurisprudence, while acknowledging the armed conflict requirement in the Statute, described the armed conflict requirement as "a jurisdictional element, not a substantive element of the *mens rea* of crimes against humanity". See, for example, ICTY, *Prosecutor v. Duško Tadić*, Appeals Chamber, Judgment, 15 July 1999, IT-94-1-A, para. 251 ('*Tadić* Appeal Judgement') (http://www.legal-tools.org/doc/8efc3a/); see also ICTY, *Prosecutor v. Kunarac et al.*, Trial Chamber, Judgment, 22 February 2001, IT-96-23-T&IT-96-23/1-T, para. 413 ('*Kunarac* Trial Judgement') (http://www.legal-tools.org/doc/fd881d/).

[73] *Ibid*., paras. 423–24 (there is no need to show that a particular victim was a member of a specifically targeted group such as a particular ethnic or religious group, or that the victims were linked – politically, ethnically, or otherwise – to any particular side of the conflict. The victim need only be a civilian who was targeted as part of an attack against a civilian population). Civilian status is interpreted liberally: the intermingling of civilians and combatants does not deprive the group of its civilian character provided that it is "predominantly civilian". Insofar as the status of an individual is in doubt, he or she is presumed to be a civilian.

[74] The fact that the perpetrator is part of the targeted population, or even has himself been targeted, does not preclude a conviction for crimes against humanity. See District Court of Tel Aviv, *Attorney-General of the State of Israel v. Enigster*, 4 January 1952 (finding a Jewish individual, who was imprisoned by the Nazis, guilty of crimes against humanity for his acts against other Jewish inmates).

[75] *Kunarac* Trial Judgement, para. 430, see *supra* note 72.

tematic criminality, the perpetrator's individual culpability is particularized.[76]

The notion of "widespread", namely acts committed on a "large scale" and "directed at a multiplicity of victims",[77] "connotes the large-scale nature of the attack and the number of victims" and describes "massive, frequent, large scale action, carried out collectively with considerable seriousness and directed against multiple victims".[78] With no precise formula for its tabulation, whether in terms of geographical range or victimization, this criterion appears in substance to be an indicium of gravity rather than a matter of arithmetic.[79]

While it is individuals who are attacked, crimes against humanity are "crimes of a collective nature that are penalised whereby […] an individual is victimised not because of his individual attributes but rather because of his membership of a targeted civilian population".[80] A "population" in this sense is a sizeable group of people who possess some distinctive features which differentiate them as targets of the attack.[81] In this manner, crimes against humanity transcend the individual because, in the view of the *Erdemović* Trial Chamber, "when the individual is assaulted, humanity comes

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[76] *Tadić* Appeal Judgement, para. 248, see *supra* note 72. Although offences comprising crimes against humanity tend to be part of a course of conduct, a single act by a perpetrator, if linked to a widespread or systematic attack, may constitute a crime against humanity. A single act when committed in the right context could thus comprise a crime against humanity; an *isolated* one, however, cannot. See also ICTY, *Prosecutor v. Kupreškić et al.*, Trial Chamber, Judgement, 14 January 2000, IT-95-16-T, para. 550 ('*Kupreškić* Trial Judgement') (http://www.legal-tools.org/doc/5c6a53/).

[77] ICTY, *Prosecutor v. Duško Tadić*, Trial Chamber, Opinion and Judgement, 7 May 1997, IT-94-1-T, para. 648 ('*Tadić* Trial Judgement') (http://www.legal-tools.org/doc/0a90ae/).

[78] *Kunarac* Trial Judgement, para. 428, see *supra* note 72.

[79] *Ibid*., para. 424 (referring to "the geographical entity in which the attack is taking place; a state, a municipality or another circumscribed area" when discussing the notion of 'population').

[80] ICTY, *Prosecutor v. Kordić and Čerkez*, Trial Chamber, Judgement, 26 February 2001, IT-95-14/2-T, para. 178 (http://www.legal-tools.org/doc/d4fedd/).

[81] ICTY, *Prosecutor v. Kunarac et al.*, Appeals Chamber, Judgment, 12 June 2002, IT-96-23&IT-96-23/1-A, para. 90 ("it is sufficient to show that enough individuals were targeted in the course of the attack, or that they were targeted in such a way as to [show] that the attack was in fact directed against a civilian "population", rather than against a limited and randomly selected number of individuals") ('*Kunarac* Appeal Judgement') (http://www.legal-tools.org/doc/029a09/). The civilian population which is the target of the attack may nevertheless constitute the victim group of crimes against humanity even where it may comprise only a small part of the civilian population as a whole.

under attack and is negated". It is therefore "the concept of humanity as victim which essentially characterises crimes against humanity".[82]

Entirely different interests and values are implicated by the alternative of 'systematicity'. Where the organized character of the attack is in issue, the question that arises is the extent to which State-sanctioned or officially endorsed conduct is an indispensable legal ingredient of these crimes. To what extent did the *ad hoc* Tribunals advert to conventional State sovereignty concerns when determining the extent of their jurisdictional reach? This question initially lacked a consistent answer in the *ad hoc* Tribunal case law, but it was eventually determined that the underlying attack need not be supported by any form of policy or plan.[83] While the existence of such a policy or plan "may serve as evidence in establishing that an attack was directed against a civilian population and that it was […] systematic", this "does not constitute a separate and additional legal element of the crime as it is neither enshrined in the Statute of the Tribunal nor a requirement under customary law".[84] Any such policy need not be "explicitly formulated nor need it be the policy of a State".[85] In the specific context of the disintegration of the former Yugoslavia, this reflected the reality that some of worst offending committed in the course of this conflict

[82] ICTY, *Prosecutor v. Dražen Erdemović*, Trial Chamber, Sentencing Judgment, 29 November 1996, IT-96-22-T, para. 28 (http://www.legal-tools.org/doc/eb5c9d/).

[83] *Kunarac* Appeal Judgement, para. 98, see *supra* note 81.

[84] See, for example, ICTY, *Prosecutor v. Milorad Krnojelac*, Trial Chamber, Judgment, 15 March 2002, IT-97-25-T, para. 58 (http://www.legal-tools.org/doc/1a994b/). Nor is it integral even to proof of systematicity, which may be possible to establish by alternative means (*Kunarac* Appeal Judgement, para. 98, see *supra* note 81).

[85] *Kupreškić* Trial Judgement, para. 551, see *supra* note 76. Accordingly, evidence of a "policy" emanating from either a State or a non-State entity would suffice, as would a policy of acquiescence or tolerance as opposed to an overt or preconceived plan or policy of directing such attacks to be committed. It is also unnecessary to demonstrate that an accused "has taken part in the formulation of a discriminatory policy or practice by the governmental authority". ICTY, *Prosecutor v. Blaškić*, Trial Chamber, Judgment, 3 March 2000, IT-95-14-T, paras. 555 and 625 (http://www.legal-tools.org/doc/e1ae55/). See, however, Article 18 of the ILC's Draft Code of Crimes provides however that crimes against humanity must be "instigated or directed by a Government or by any organization or group" (ILC, "Articles of the draft Code of Crimes against the Peace and Security of Mankind", in *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, 5 July 1996 (http://www.legal-tools.org/doc/f6ff65/); revised by Report of the International Law Commission on the Work of Its 48th Session, 6 May-26 July 1996: Corrigendum, UN Doc. A/51/10/Corr.1, 23 October 1996 (http://www.legal-tools.org/doc/4da8d5/)). There seems to be a problem with indentation in these footnotes.

did not stem from expressly declared national policy, and was often perpetrated by paramilitaries, spontaneous groupings of individuals, or other groups with disputed or unknown status. Showing little deference to the national preoccupations that underlay the formulation of crimes against humanity at Nuremberg, the ICTY favoured maximizing the protective scope of this already expansive category of crimes.[86]

Another role discernible under the rubric of humanity concerns ethical standard-setting in relation to persons living under repressive regimes. In the *Tadić* case, for example, both the Trial and Appeals Chambers considered cases from the Nazi era in which a handful of individuals, none of whom were ideologues, nonetheless made cynical use of the repressive policies of the Nazi regime for purely personal motives. In the *Sch.* case, for example, the accused had denounced her landlord solely "out of revenge and for the purpose of rendering him harmless" after tensions in their tenancy had arisen. The denunciation led to investigations by the Gestapo which ended in the landlord's conviction and execution.[87] In these, and similar, cases, the ICTY Appeals Chamber held that merely because personal motivations can be identified in the defendant's carrying out of an act, it does not necessarily follow that the required nexus with the attack

[86] Traditionally, these concerns purported to demarcate international crimes from domestic offences. Crimes against humanity, it was reasoned, are not amenable to national adjudication, either due to the overwhelming impact of the crimes themselves, or because these crimes were themselves perpetrated by irresponsible leadership. Whilst this was arguably true for most Balkan states at the time most offences were perpetrated, considerations of this type did not heavily infuse the early case law of the ICTY. The ICTY further declared that crimes against humanity can be perpetrated by individuals "having neither official status nor acting on behalf of a governmental authority" (*Kupreškić* Trial Judgement, para. 555, see *supra* note 76).

[87] *Sch.* was convicted and sentenced to three years' imprisonment for crimes against humanity (Decision of Flensburg District Court dated 30 March 1948, in *Justiz und NS-Verbrechen*, vol. II, pp. 397–402 (https://www.legal-tools.org/doc/o0zzsd/)). See also *K. and P.*, in which the Accused, Mrs. *K. and P.*, had denounced *P.*'s Jewish wife to the Gestapo for her anti-Nazi remarks. The defendants' sole purpose was to rid themselves of Mrs. *P.*, who would not agree to a divorce, and the Accused saw no other means of so doing than by delivering Mrs. *P.* to the Gestapo. Upon her denunciation, Mrs. *P.* was arrested and brought to the Auschwitz concentration camp where she died after a few months due to malnutrition. The Court of First Instance convicted *K. and P.* of crimes against humanity. (See Decision of *Schwurgericht* Hamburg from 11 May 1948, (50). 17/48, in *Justiz und NS-Verbrechen*, vol. II, pp. 491–97 (https://www.legal-tools.org/doc/p9vkaz/) and Decision of the Supreme Court for the British Zone (Criminal Chamber) (9 November 1948), S. StS 78/48, in *Justiz und NS-Verbrechen*, vol. II, pp. 498–99 (https://www.legal-tools.org/doc/4fqmjo/)).

against a civilian population must inevitably be lacking.[88] The *Tadić* Trial Judgement also found another individual to have committed a crime against humanity because his behaviour "fitted into the plan of persecution against Jews in Germany" and "although his intent was only to harm this one individual, it was closely related to the general mass persecution of the Jews".[89] In this regard, a "perpetrator [of a crime against humanity] is […] anyone who contributes to the realisation of the elements of the offence, without at the same time wishing to promote National Socialist rule, […] but who acts perhaps out of fear, indifference, hatred for the victim or to receive some gain. [This is] because even when one acts from these motives […], the action remains linked to this violent and oppressive system […]".[90]

In short, crimes against humanity are described in the *ad hoc* Tribunal jurisprudence as "serious acts of violence which harm human beings by striking at what is most essential to them: their lives, liberty, physical welfare, health, and/or dignity. […] [I]nhumane acts that by their extent and gravity go beyond the limits tolerable to the international community".[91] Crimes against humanity "refer to inhumane acts of a very serious nature […] committed as part of a widespread or systematic attack against any civilian population".[92] Due principally to their widespread or systematic character, but also because of the standards of humanity they embody, these crimes protect vital collective interests. Crimes against humanity protect individuals in relation to their rights to dignity, life, and liberty, amongst other important values. The victims of these crimes are not, however, targeted individually. They are not attacked purely due to their individuality,

88 *Tadić* Trial Judgement, paras. 257, 262, see *supra* note 77.

89 *Ibid*., para. 658, citing OGHBZ, Decision of the District Court (Landgericht) Hamburg of 11 November 1948, STS 78/48, Justiz und NS-Verbrechen, vol. II, 1945-1966, 491, 499 (unofficial translation) (noting that crimes against humanity may be committed for purely personal motives, provided that the acts in question were knowingly committed as "part and parcel of all the mass crimes committed during the persecution of the Jews").

90 OGHBZ, Supreme Court for the British Zone (Criminal Chamber) (5 March 1949), S. StS 19/49, in *Entscheidungen des Obersten Gerichtshofes für die Britische Zone*, vol. I, 1949, p. 341.

91 ICTY, *Prosecutor v. Dražen Erdemović*, Trial Chamber, Sentencing Judgment, IT-96-22-T, 29 November 1996, para. 28, see *supra* note 82.

92 *Tadić* Trial Judgement, para. 646, see *supra* note 77.

but as members or representatives of certain groups or collectivities, which in turn "represent[s] humanity".[93]

3.4.3. The International Criminal Court

The Preamble to the ICC Statute describes the grave offences included within the purview of the Court's subject-matter jurisdiction as acts which "shock the conscience of humanity".[94] The enumerated crimes in Article 7(1) of the ICC Statute constitute crimes against humanity when "committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack". However, Article 7(2)(a) of the Statute qualifies this by indicating that an attack directed against any civilian population must be carried out "pursuant to or in furtherance of a State or organizational policy to commit such attack".[95]

Article 7(2)(a) of the ICC Statute reflects the compromise on the definition of crimes against humanity reached by the signatories at the Rome Conference in 1998.[96] Features of this qualification have created interpretative difficulties in the ICC jurisprudence – particularly the statutory requirement of an "organizational policy" within the meaning of Article 7(2)(a). Debate on the contextual elements of crimes against humanity is still ongoing before the ICC.[97]

The requirement in the Rome Statute that crimes against humanity be underpinned by State-sanctioned or organizational criminality has proved particularly contentious.[98] The majority in the *Kenya* case, which concerned post-election violence perpetrated in 2008 by political parties and interests aligned with these groups, nonetheless considered the formal na-

93 Ambos, p. 320, see *supra* note 13.

94 ICC Statute, Preamble, Clause 2, see *supra* note 1.

95 *Ibid*., Article 7(2)(a).

96 Eleni Chaitidou, "The ICC Case Law on the Contextual Elements of Crimes Against Humanity", in Morten Bergsmo and SONG Tianying (eds.), *On the Proposed Crimes Against Humanity Convention*, Torkel Opsahl Academic EPublisher, Brussels, 2014 , p. 51 and fn. 129 (noting that "[e]xplicit recognition of this policy element was essential to the compromise on crimes against humanity") ('Chaitidou') (http://www.toaep.org/ps-pdf/18-bergsmo-song).

97 See, generally, *ibid*.

98 ICC, Situation in the Republic of Kenya, Pre-Trial Chamber, Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya, 31 March 2010, ICC-01/09-19 ('*Kenya* case') (http://www.legal-tools.org/doc/338a6f/).

ture of a group and the level of its organization not to be the defining criterion, finding that a "distinction should be drawn on whether a group has the capability to perform acts which infringe on basic human values".[99] A dissenting opinion in this case, however, preferred the view that a State or organizational policy was an integral legal ingredient of the required attack, and not a mere evidentiary tool in determining the systematicity of that attack, expressing fears that absent a policy of a State or State-like entity underpinning these crimes, the concept of crimes against humanity may be diluted.[100] While agreeing that elements of statehood need not be established in order for an organization to fall within the purview of Article 7, organizations should possess some characteristics of a State in order to avoid the conflation of crimes against humanity and ordinary (albeit serious) criminality, which may instead be prosecuted at the national level. It is by contrast State-like criminality which enables mass victimization such as crimes against humanity to occur, and "it is the intolerable threat to humankind which emanates from such State policies that require international criminalization and enforcement". In the view of the minority, conflating crimes against humanity with serious violence spearheaded by criminal gangs contradicts the ultimate rationale for the formulation of crimes against humanity, dilutes their gravity and threatens to overwhelm the adjudicative capacities of the ICC.[101]

A renewed emphasis on officially-sponsored violence stemming from the statutory language in Article 7(2)(a) of the ICC Statute may, however, be at the expense of other universalizing, humanizing interests at stake in the prohibition of crimes against humanity. While the emphasis in Article

[99] *Ibid*., per Judge Trendafilova and Judge Tarfusser, paras. 83–93, 117, 121 (determining that there was a policy to commit an attack against the Kenyan civilian population following the post-election violence, as this attack comprised neither spontaneous nor isolated acts but was planned, directed or organized by various groups associated with the two leading political parties as well as the police. The organized nature of some attacks could further be inferred from the strategy and method employed in the attack. Organizations not linked to a State are capable of elaborating and carrying out a policy to commit an attack against a civilian population, and the determination of whether a specific group qualifies as an 'organization' within the meaning of Article 7(2)(a) must be made on a case-by-case basis, based on a number of criteria).

[100] *Ibid*., per Judge Kaul, paras. 25–72.

[101] *Ibid*., para. 51. This approach would have denied the Court subject-matter jurisdiction over the Kenyan post-election violence, on grounds that the identified policy underlying the attacks in question arguably emanated from the collaboration of local leaders, criminal gangs and businessmen rather than from a State or State-like entity.

7(2)(a) on the official character of the perpetrator accords with the origins of crimes against humanity, from the perspective of the victim, it matters little whether harm is perpetrated by a State-like entity, a disorganized mob, or indeed any other type of perpetrator.

3.4.4. Hybrid or Internationalized Courts and Tribunals

Crimes against humanity are proscribed in Article 2 of the Statute of the Special Court for Sierra Leone ('SCSL') Statute[102] and Article 5 of the ECCC Law.[103] Reinforcing the notion that criminalization of these offences reflects their extreme gravity, the ECCC Trial Chamber, in affirming the crystallization of these crimes into general international law by 1975, echoed the Nuremberg judgment and indicated that "the appalling nature of the offences charged pursuant to Article 5 of the ECCC Law helps to refute any claim that the Accused would have been unaware of their criminal nature".[104]

The ECCC Trial Chamber also adverted to the tension between crimes against humanity as being, on the one hand, crimes of a collective nature (excluding single or isolated acts), whilst on the other having a central focus on the individual (as opposed to the group as such). The term "population", the Trial Chamber found, does not mean that the entire population of the geographical entity in which the attack occurred must be subjected to the attack. It is instead "sufficient to show that enough individuals were targeted in the course of the attack, or that they were targeted in such a way as to satisfy the Chamber that the attack was in fact directed against

[102] SCSL Statute, Article 2 provides that the SCSL "shall have the power to prosecute persons who committed the following crimes as part of a widespread or systematic attack against any civilian population: (a) Murder; (b) Extermination; (c) Enslavement; (d) Deportation; (e) Imprisonment; (f) Torture; (g) Rape, sexual slavery, enforced prostitution, forced pregnancy and any other form of sexual violence; (h) Persecution on political, racial, ethnic or religious grounds; (i) Other inhumane acts", see *supra* note 1.

[103] Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed during the Period of Democratic Kampuchea, 27 October 2004 ('ECCC Establishment Law') (http://www.legal-tools.org/doc/9b12f0/). Like the ICTR Statute, this formulation erroneously refers in its *chapeau* to acts committed as part of a widespread or systematic attack directed against any civilian population, on national, political, ethnical, racial or religious grounds, as noted by the ECCC Trial Chamber. This error was replicated in the ECCC Statute and accorded the same treatment in the ECCC's first trial verdict (ECCC, *Prosecutor v. Kaing Guek Eav*, Trial Chamber, Judgment, 26 July 2010, 001/18-07-2007/ECCC/TC, paras. 313–14 ('*Prosecutor v. Kaing Guek Eav*') (http://www.legal-tools.org/doc/dbdb62/)).

[104] *Ibid*., para. 295.

a civilian 'population' as opposed to a limited and randomly-selected number of individuals".[105]

A particular problem confronting by the ECCC Trial Chamber – given the requirement that the "civilian population" be the object of an attack – was the reality that the victimization wrought by the Khmer Rouge regime engulfed the *entirety* of the Cambodian population, both civilian and military. The ECCC Trial Chamber thus faced the need to reconcile the fundamental legal interests regarding the regulation of hostilities with those of the overall population. The Trial Chamber first acknowledged that in considering the general requirements of crimes against humanity, the laws of armed conflict play an important role in the assessment of the legality of acts committed in the course of a conflict, and in determining whether or not the civilian population may be described as having been targeted in the first place.[106] However, where the civilian population *is* the intended target of an attack, there is no requirement that the civilian population be the *sole or exclusive* object of that attack.[107] In this manner, the Trial Chamber sought to acknowledge the overriding interests in protection of the civilian population, whilst respecting the specificity of the law of armed conflict when regulating combat.

3.4.5. Enumerated Offences

Article 6(c) of the IMT Charter criminalized "murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population […], or persecutions on political, racial or religious grounds". The major international criminal tribunals since Nuremberg have encapsulated these offences and added new crimes, reflecting the particularity of the victimization addressed before these tribunals, as well as the emergence of, or changing perceptions regarding, other equally serious forms of criminality.

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[105] *Ibid*., paras. 302–03.

[106] *Ibid*., para. 308 (citing ICTY, *Prosecutor v. Galić*, Trial Chamber, Judgement, 5 December 2003, IT-98-29-T, para. 144 (finding that in the context of an armed conflict, the determination that an attack is unlawful in light of the law of armed conflict is critical in determining whether the general requirements of crimes against humanity have been met. Otherwise, unintended civilian casualties resulting from a legitimate attack on legitimate military objectives would amount to a crime against humanity and lawful combat would, in effect, become impossible) (http://www.legal-tools.org/doc/eb6006/).

[107] *Prosecutor v. Kaing Guek Eav*, paras. 308–10, see *supra* note 103.

The enumerated crimes against humanity under both *ad hoc* Tribunal Statutes, as well as before the ECCC, are: (a) murder; (b) extermination; (c) enslavement; (d) deportation; (e) imprisonment; (f) torture; (g) rape; (h) persecutions on political, racial and religious grounds; and (i) other inhumane acts. The SCSL incorporates all these offences, whilst adding, in relation to (g), "sexual slavery, enforced prostitution, forced pregnancy and any other form of sexual violence". Article 7 of the ICC Statute also provides a more extensive list of proscribed conduct, criminalizing, in addition to all of the above, "enforced sterilization, or any other form of sexual violence of comparable gravity"[108] as well as the enforced disappearance of persons[109] and the crime of apartheid.[110]

As most of this conduct is also proscribed by other core international crimes (as well as by municipal law), the legal interests protected by these crimes are indistinguishable from equivalent war crimes or indeed, similar domestic offences. The offence of persecution is perhaps deserving of special mention, having undergone a particularly dramatic evolution from its somewhat obscure origins in the IMT Charter (where it was contrasted with the apparently graver 'murder-type' crimes against humanity) to a role of critical importance to the development in particular of the ICTY prosecution case portfolio.[111] Given its aggravated intent element, the crime of persecution has been used to describe large-scale and discriminatory offending in situations involving mass criminality which may not entail the necessary physical destruction or exterminatory *animus* required for genocide. In the particular setting of the former Yugoslavia, the crime of persecution served

[108] ICC Statute, Article 7(1)(g), see *supra* note 1.

[109] *Ibid*., Article 7(1)(i).

[110] *Ibid*., Article 7(1)(j). The formulations in Article 7 of the ICC Statute also alter or qualify the offences of deportation, imprisonment, persecution and other inhumane acts. See *ibid*., Article 7(1)(d) (Deportation or forcible transfer of population); (e) (Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law); (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); and (k) (Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health).

[111] See Schwelb, p. 190, see *supra* note 4 (referring to "crimes of the murder type on the one hand, and mere persecutions on political, racial or religious grounds on the other", noting that "[c]rimes of the murder type […] are certainly graver offences than 'persecutions on political, racial, or religious grounds'").

to neatly encapsulate the odious practice of ethnic cleansing. It comprised an aggravated category of crimes against humanity, serving as a sort of way-station between 'ordinary' crimes against humanity and genocide.[112]

Overall, it is the situation of the above crimes within the broader context of widespread and systematic offending against civilian collectivities which implicates additional legal interests stemming from humanity. It is this context, rather than the features of the above offences, which generally give crimes against humanity their particularity.

3.5. Conclusion

Core international crimes are understood either to harm the interests of the international community or to concern the international community as a whole.[113] While many protected legal interests are embodied within crimes against humanity, these offences can usefully be described as protecting the value of 'humanity'. This value, which reflects universal concerns and seeks to exert a humanizing impact, does not represent a singular, agreed or conceptually coherent concept. It instead expresses a constellation of factors around which 'humanity' has tended to be assessed and measured, and which have also come to be reflected, to a greater or lesser extent, within the evolving positive law concerning crimes against humanity.

From its inception, crimes against humanity possessed universalizing tendencies. Closely related to the growth of the human rights movement which sought to pierce the veil of national sovereignty *vis-à-vis* the treatment of individuals within a State's borders, the introduction of crimes against humanity aimed to address *lacunae* in pre-existing protections conferred by war crimes prohibitions. In seeking to protect persons falling outside the scope of war crimes, the core preoccupations of crimes against humanity transcended the immediate parties to a conflict.

Although initially focussed on individuals persecuted by their own governments or otherwise outside the protective scope of war crimes, the State-centric focus of Article 7(2)(a) of the ICC Statute may in hindsight be

[112] See, for example, *Kupreškić* Trial Judgement, paras. 632–636, see *supra* note 76 ("the *mens rea* requirement for persecution is higher than for ordinary crimes against humanity" in that the 'intent to discriminate' amounts to "attack[ing] persons on account of their ethnic, racial or religious characteristics").

[113] See, for example, Gerhard Werle, *Principles of international criminal law*, T.M.C. Asser Press, 2005, p. 28 (an "attack on the fundamental values of the international community lends a crime an international dimension and turns it into a crime under international law").

seen as a necessary political compromise at the Rome Conference rather than an inevitable, indispensable feature of crimes against humanity as such. There is room for the view that the focus of these crimes is not to safeguard the reserved domain of national competence, but instead, the fundamental rights of individuals or human collectivities. It is these interests which, after all, form the basis of international concern. What distinguishes crimes against humanity from ordinary crimes are the interests of our common humanity, that is, recognition of fundamental human rights guarantees which exist independently of an individual's national, racial or religious affiliation; the collective interests of all persons; the extensive threat posed by the destructive potential of widespread or systematic criminality, and our collective vulnerability to these crimes.

Crimes against humanity harm important interests and values and often threaten catastrophic externalities, including to international peace and security. Unshackled from the competing interests of States in preserving, to the greatest extent possible, a reserved domain of national competence over crimes committed in their territories – or the need to allocate adjudicative burdens between national and international fora – crimes against humanity protect core human values. Despite disagreement as to the manner in which humanity is implicated by these offences, crimes against humanity express what is rendered vulnerable by crimes which are directed against civilian collectivities and massive in scale or systematic in character. The notion that 'crimes against humanity' safeguard our common humanity – and that it is humanity itself which is jeopardized by these crimes – has been persistent and enduring, and will surely continue to be the case in a possible future convention on crimes against humanity.

4

Legal Goods in International Criminal Law

Ioanna N. Anastasopoulou*

4.1. The Protection of Legal Goods in Criminal Law

4.1.1. *Rechtsgut*: The Dominant Theory in Germanic Systems

The national debates regarding the scope and legitimation of criminal law have given rise to two principal theories of criminalization: the chiefly Germanic theory of *Rechtsgüter* ('legal goods') and the predominantly Anglo-American theory of 'harm principles', which respectively present the main function of the criminal law as the protection of legal goods and prevention of harm.[1]

The *Rechtsgut* theory provides an answer to the question of what the legislature can and should forbid its citizens to do under the threat of punishment. It seeks to identify criminal law as a protective right and to demarcate it from the counter-model of penalizing pure duty violations. In this context, the State is not entitled to prohibit any act it might consider immoral, indecent or anti-social; rather, criminal sanctions – penalties or measures – are legitimized as a reaction to the infringement (or even the risk of infringement) of a *Rechtsgut*. It is therefore necessary to identify important protected legal goods in order to justify the prohibition by law of conduct that infringes on them and the imposition of punishment when

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1 See, for a general discussion, Kai Ambos, "The Overall Function of International Criminal Law: Striking the Right Balance Between the Rechtsgut and the Harm Principles: A Second Contribution Towards a Consistent Theory of ICL", in *Criminal Law and Philosophy*, 2015, vol. 9, no. 2, pp. 301 ff.

such prohibitions are not adhered to. This concept of the criminal law as being intended to ensure the protection of *Rechtsgüter* was initially developed by the German criminal law scholars Franz Birnbaum,[2] Karl Binding[3] and Franz von Liszt.[4]

Some *Rechtsgut* theorists maintained that a *Rechtsgut* or legal good can be extrapolated from the criminal law norm. According to this view, a legal good has no independent, normative value; a legal protected good is simply what the law says it is.[5] In contrast, the critical *Rechtsgut* school stresses that a legal good should not be entirely descriptive and has to perform a critical function as well. In this context, different authors have assigned different definitions to the notion of '*Rechtsgut*'. Thus, while the concept itself is well-established, the details of the theory are heavily disputed.[6]

The *Rechtsgut* concept seeks to limit the ambit of criminal law to the protection of fundamental legal goods. The non-criminalization of homosexuality in societies where such conduct is or was at times considered immoral by the vast majority of the population is cited as the most characteristic effect of the concept's critical and liberal potential. Conduct that is

2 Johann Michael Franz Birnbaum, "Über das Erforderniß einer Rechtsverletzung zum Begriffe des Verbrechens, mit besonderer Rücksicht auf den Begriff der Ehrenkränkung", in *Neues Archiv des Criminalrechts*, 1834, vol. 15, pp. 149 ff.

3 Karl Binding, *Die Normen und ihre Übertretung, Band I: Normen und Strafgesetze*, 1st edition, Wilhelm Engelmann, Leipzig, 1872, pp. 189 ff.

4 Franz von Liszt, "Rechtsgut und Handlungsbegriff im Bindingschen Handbuch. Ein kritischer Beitrag zur juristischen Methodenlehre", in *Zeitschrift für die gesamte Strafrechtswissenschaft*, 1886, vol. 6, pp. 672 ff.

5 Binding, 1872, pp. 339, 344, 353 ff., see *supra* note 3; Richard Honig, *Die Einwilligung des Verletzten, Teil I: Die Geschichte des Einwilligungsproblems und die Methodenfrage*, J. Bensheimer, Mannheim, 1919, pp. 70, 94; Max Grünhut, "Methodische Grundlagen der heutigen Strafrechtswissenschaft", in Reinhard von Frank and August Hegler (eds.), *Festgabe für Reinhard von Frank zum 70. Geburtstag 16. August 1930, Band I*, Scientia Verlag, Aalen, 1969 (1930), p. 8.

6 For the history and the evolution of the *Rechtsgut* theory, see Peter Sina, *Dogmengeschichte des strafrechtlichen Begriffs „Rechtsgut"*, Helbing & Lichtenhahn, Basel, 1962, pp. 9 ff.; Knut Amelung, *Rechtsgüterschutz und Schutz der Gesellschaft*, Athenäum, Frankfurt am Main, 1972, pp. 26 ff.; Claus Roxin, "Zur neueren Entwicklung der Rechtsgutsdebatte", in Ulfrid Neumann and Felix Herzog (eds.), *Festschrift für Winfried Hassemer*, C.F. Müller, Heidelberg, 2010, pp. 573 ff.; Ioanna Anastasopoulou, *Deliktstypen zum Schutz kollektiver Rechtsgüter*, C.H. Beck, München, 2005, pp. 5 ff.

considered immoral by society can affect public emotions, but public emotions are not legal goods.[7]

An example of a modern definition of *Rechtsgut* refers to the conditions and functions needed for the individual to develop freely and for their fundamental rights to be realized. Legal goods are circumstances or purposes that are useful to the individual in his free development within the framework of an overall social system based on this objective or the functioning of the system itself. Roxin derives the content of a legal good not from some more or less explicit notion of 'law' or 'good', but from constitutional principles, given that they alone limit legislative discretion in a modern democratic State: "A concept of legal good that constrains penal policy [...] can only derive from those objectives of our law state (*Rechtsstaat*) grounded in the freedom of the individual which are articulated in the Basic Law", that is, the German constitution.[8]

Of course, while the determination of a legal good is a necessary condition for criminalization, it is insufficient. It must also be established that the criminalization serves to protect the legal good in question, which is to say that the goals underpinning the punishment are achievable. The criminal law must be the State's *ultima ratio* in its effort to protect legal goods, and the State must employ less intrusive means if viable. Since criminal law enables the harshest of all State interference in the liberty of the citizen, it may only be applied if milder means offer insufficient potential for success (the so-called subsidiarity principle of criminal law).[9]

4.1.2. Harm and Endangerment of a Legal Good

The *Rechtsgut* concept does not require actual harm to a legal good; the endangerment of a legal good may suffice to penalize the relevant act. Further, German (and Greek) criminal law distinguishes two types of offences

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7 Ambos, 2015, see *supra* note 1.

8 Claus Roxin, *Strafrecht Allgemeiner Teil, Band I: Grundlagen. Der Aufbau der Verbrechenslehre*, 4th edition, C.H. Beck, München, 2006, § 2, Rn. 7; Roxin, 2010, pp. 577 ff., see *supra* note 6.

9 Winfried Hassemer, "Grundlinien einer personalen Rechtsgutslehre", in Heinrich Scholler and Lothar Philipps (eds.), *Jenseits des Funktionalismus*, *Arthur Kaufmann zum 65. Geburtstag*, Decker & Müller, Heidelberg, 1989, pp. 87 ff.; Winfried Hassemer, "Darf es Straftaten geben, die ein strafrechtliches Rechtsgut nicht in Mitleidenschaft ziehen?", in Roland Hefendehl, Andrew von Hirsch and Wolfgang Wohlers (eds.), *Die Rechtsgutstheorie: Legitimationsbasis des Strafrechts oder dogmatisches Glasperlenspiel?*, Nomos, Baden-Baden, 2003, p. 61.

there: offences of *concrete endangerment* and offences of *abstract endangerment*. In fact, 'danger' is one of the most discussed concepts in German legal science.[10] A comparative consideration of the respective views demonstrates that the obvious possibility of damage is the first component of concrete endangerment.[11] Furthermore, irrespective of any individual disagreement in this respect, the existence of a specific risk is undisputedly a precondition for a current threat to a legal good. It is generally accepted that no concrete danger exists if the object is not yet within the given sphere of action. When the object has entered the danger zone, then a concrete risk can be said to exist if it is purely a matter of chance whether damage occurs to the legal good or not. All the viewpoints used to determine the presence of concrete danger make this element of randomness their definitive aspect.[12]

The first category (concrete endangerment offences) requires, as an element of the offence, that the danger to the legal good has actually been made manifest.[13] For the category of abstract endangerment offences, however, an actual danger is not needed – it is sufficient that the conduct underlying the offence is considered extremely hazardous in general terms. The protected legal good thus provides the motivation for criminalizing the prohibited conduct.[14] It should be noted that the number of offences based

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[10] See Eric Hilgendorf, "Die Neuen Medien und das Strafrecht", in *Zeitschrift für die gesamte Strafrechtswissenschaft*, 2001, vol. 113, p. 672.

[11] Frank Zieschang, *Die Gefährdungsdelikte*, Duncker & Humblot, Berlin, 1998, p. 44.

[12] *Ibid*., pp. 45, 49; Dietrich Kratzsch, "Prinzipien der Konkretisierung von abstrakten Gefährdungsdelikten – BGHSt 38, 309", in *Juristische Schulung*, 1994, p. 379.

[13] Ulrich Berz, *Formelle Tatbestandsverwirklichung und materialer Rechtsgüterschutz: Eine Untersuchung zu den Gefährdungs- und Unternehmensdelikten*, Beck, München, 1986, pp. 55 ff.; Urs Kindhäuser, *Gefährdung als Straftat: Rechtstheoretische Untersuchungen zur Dogmatik der abstrakten und konkreten Gefährdungsdelikte*, Vittorio Klostermann, Frankfurt am Main, 1989, p. 189; Wilfried Küper, "Gefährdung als Erfolgsqualifikation?", in *Neue Juristische Wochenschrift*, 1976, pp. 544 ff.; Zieschang, 1998, p. 15, see *supra* note 11; Heribert Ostendorf, "Grundzüge des konkreten Gefährdungsdelikts", in *Juristische Schulung*, 1982, p. 426; Helmut Satzger, "Die Anwendung des deutschen Strafrechts auf grenzüberschreitende Gefährdungsdelikte", in *Neue Zeitschrift für Strafrecht*, 1998, vol. 18, no. 3, p. 114; Klaus Geppert, "Die schwere Brandstiftung (§ 306 StGB)", in *Jura*, 1989, p. 418; Wilhelm Gallas, "Abstrakte und konkrete Gefährdung", in Hans Lüttger, Hermann Blei and Peter Hanau (eds.), *Festschrift für Ernst Heinitz zum 70. Geburtstag am 1. Januar 1972*, De Gruyter, Berlin, 1972, p. 175.

[14] Zieschang, 1998, p. 15, see *supra* note 11; Eva Graul, *Abstrakte Gefährdungsdelikte und Präsumtionen im Strafrecht*, Duncker & Humblot, Berlin, 1991, pp. 35 ff.; Lothar Kuhlen, "Der Handlungserfolg der strafbaren Gewässerverunreinigung (§ 324 StGB)", in

on abstract endangerment is currently increasing in Germanic systems and has led to intense debate and criticism of modern anti-criminal policy trends.[15]

4.1.3. Individual and Collective Legal Goods

A modern system of constitutional rights entails both rights and freedoms for the individual, which is the core value of liberal individualism. At the same time, however, collective interests and values are also gaining increasing recognition. This facilitates a distinction between the so-called individual legal good, on the one hand, and the collective or universal legal good, on the other. Classical legal goods such as life, physical integrity, personal freedom, honour, property – goods which have been recognized throughout the history of criminal justice and manifestly form the basis of virtually all criminal justice systems – can be understood without great difficulty as individual legal goods. These are values whose indispensability for a dignified individual existence can be taken as given.[16] The goods are carried by the individual without the participation of others, and the protection they offer becomes particularly clear when the individual is faced with an attacker.[17]

Legal goods that have no individual carrier and serve the interests of any number of persons (for example, the public) are referred to as collective legal goods (proper administration of justice, security of monetary transactions, uncorrupted administration, environmental goods, and so on).

Goltdammer's Archiv für Strafrecht, 1986, p. 395; Joachim Bohnert, "Die Abstraktheit der abstrakten Gefährdungsdelikte – BGH, NJW 1982, 2329", in *Juristische Schulung*, 1984, pp. 182 ff.; Eckhard Horn and Andreas Hoyer, "Rechtsprechungsübersicht zum 27. Abschnitt des StGB – „Gemeingefährliche Straftaten"", in *Juristenzeitung*, 1987, vol. 42, no. 20, p. 966; Rudolf Rengier, "Die Brandstiftungsdelikte nach dem Sechsten Gesetz zur Reform des Strafrechts", in *Juristische Schulung*, 1998, p. 399; Friedrich-Christian Schroeder, "Die Gefährdungsdelikte", in *Beiheft zur Zeitschrift für die gesamte Strafrechtswissenschaft*, 1982, p. 3; Hartmut Schneider, "Das Inbrandsetzen gemischt genutzter Gebäude, - BGH - Urt.v.20.6.1986- 1StR 270/86-", in *Jura*, 1988, p. 461; see also BGH St. 23, 308, 310.

15 See the review of the relevant discussion in Anastasopoulou, 2005, pp. 218 ff., see *supra* note 6.

16 Winfried Hassemer, *Theorie und Soziologie des Verbrechens: Ansätze zu einer praxisorientierten Rechtsgutslehre*, Athenäum, Frankfurt am Main, 1973, p. 71; Jörg Martin, *Strafbarkeit grenzüberschreitender Umweltbeeinträchtigungen*, Max Planck Institute for Foreign and International Criminal Law, Freiburg im Breisgau, 1989, p. 29.

17 Hagen Reischel, *Wirtschaftskriminalität und Rechtsgut*, Freie Universität, Berlin, 1989, p. 15.

These collective legal goods can only be realized by a multitude of individuals; they only make sense in a community context. One of their characteristics is that anyone can use them (non-exclusivity). Non-distributivity has also been proposed as a core characteristic of collective goods, whereby a good is a collective good of a class of people when it is factually or normatively impossible to divide the good and assign the shares to individuals. The theory of collective *Rechtsgüter* primarily distinguishes between those legal goods that protect the constitutive conditions of citizens' liberty, and those that protect the State and its institutions.[18]

The relationship between individual legal goods and universal legal goods is a fundamental *problematique* in the *Rechtsgut* theory. This is by no means a trivial academic dispute with no practical consequences. The question of who can legally waive the protection of a challenged legal good in a concrete situation, along with the parallel question of who is entitled to defend a legal good against its imminent violation, depend on who the bearer of the legal good is. Consent and self-defence presuppose that the legal good concerned is discretionary to the person, who either agrees or refuses, which is to say they refer to individual legal goods. But the meaning of the distinction goes much further. The role of a legal right in a criminal justice system depends directly on who the bearer of the legal good is. According to the personal perception of legal goods (*personale Rechtsgutslehre*), the constitution of a collective legal good should be directly related to the protection of specific individual interests.[19] At the core of this 'personal' *Rechtsgut* theory, which is mainly supported by the Frankfurt

[18] A very comprehensive and accurate categorization of the different types of collective *Rechtsgüter* can be found in Rohland Hefendehl, *Kollektive Rechtsgüter im Strafrecht*, Carl Heymanns, Köln/Berlin/Bonn/München, 2002, pp. 113 ff., 116 ff., 119 ff., 122 ff., 132 ff., 382 ff.

[19] On this theory, see in particular von Liszt, 1886, p. 673, see *supra* note 4; Franz von Liszt, "Der Begriff des Rechtsgutes im Strafrecht und in der Encyklopädie der Rechtswissenschaft", in *Zeitschrift für die gesamte Strafrechtswissenschaft*, 1888, vol. 8, pp. 141 ff.; Michael Marx, *Zur Definition des Begriffs „Rechtsgut"*, Carl Heymanns, Köln/Berlin/Bonn/München, 1972, pp. 24 ff., 31 ff., 40 ff., 62, 83; Olaf Hohmann, *Das Rechtsgut der Umweltdelikte, Grenzen des strafrechtlichen Umweltschutzes*, Peter Lang, Frankfurt am Main, 1991, pp. 189, 196 ff. See also Hassemer's moderate personal perception in "Grundlinien einer personalen Rechtsgutslehre", 1989, pp. 91 ff., see *supra* note 9; Hassemer, 1973, pp. 71 ff., 231, see *supra* note 16; Winfried Hassemer, "Kennzeichen und Krisen des modernen Strafrechts", in *Zeitschrift für Rechtspolitik*, 1992, vol. 25, no. 10, p. 383; Hassemer, 2003, p. 57, see *supra* note 9.

School,[20] lies a justified distrust of newcomer 'social' goods and the liberal demand for self-restraint in criminal law.

In contrast, the dualist Rechtsgut theory (dualistische Rechtsguts*lehre*) approaches collective goods as self-sufficient values.[21] In the past, this theory was accused of lacking both a comprehensive perception of legal goods and signposts linking the two poles (individual – collective good).[22] However, the dualistic theory does not neglect the contribution a properly functioning collective good makes to the promotion of individual interests. It is just that, unlike the personal theory, it does not perceive this contribution as having a direct bearing on specific individual goods. In the dualist theory, the action affecting the collective good does impact on individual goods, but it is impossible to predict in advance which individual interests will ultimately be affected.[23]

4.1.4. Abstract or Real Legal Goods?

It is also debated whether *Rechtsgüter* are merely abstract values that underlie the law or enjoy a real existence in the social sphere, perhaps even as something non-material. The realistic perception of legal goods treats the latter as true and causally variable dimensions that can be perceived by the senses.[24] The 'ideal' concept of legal goods approximates legal goods to

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[20] See the term 'Frankfurter Schule' used by Bernd Schünemann in "Kritische Anmerkungen zur geistigen Situation der deutschen Strafrechtswissenschaft", in *Goltdammer's Archiv für Strafrecht*, 1995, pp. 203 ff., which mainly describes the views held by University of Frankfurt Professors Winfried Hassemer, Felix Herzog, Cornelius Prittwitz, Peter-Alexis Albrecht and Wolfgang Naucke, as well as a large part of German theory that shares the scepticism of the above towards the developments in modern German and European criminal law.

[21] See Klaus Tiedemann, *Tatbestandsfunktionen im Nebenstrafrecht: Untersuchungen zu einem rechtsstaatlichen Tatbestandsbegriff, entwickelt am Problem des Wirtschaftsstrafrechts*, Mohr, Tübingen, 1969, pp. 6, 119 ff., 125 ff.; Hefendehl, 2002, pp. 73 ff., see *supra* note 18; Rohland Hefendehl, "Die Popularklage als Alternative zum Strafrecht bei Delikten gegen die Gemeinschaft?", in *Goltdammer's Archiv für Strafrecht*, 1997, p. 122.

[22] Hassemer, 1973, pp. 77 ff., see *supra* note 16; Hohmann, 1991, pp. 60 ff., see *supra* note 19; Gregor Stächelin, *Strafgesetzgebung im Verfassungsstaat: Normative und empirische materielle und prozedurale Aspekte der Legitimation unter Berücksichtigung neuerer Strafgesetzgebungspraxis*, Duncker & Humblot, Berlin, 1998, p. 68.

[23] See Lothar Kuhlen, "Umweltstrafrecht – auf der Suche nach einer neuen Dogmatik", in *Zeitschrift für die gesamte Strafrechtswissenschaft*, 1993, vol. 105, p. 704; Hefendehl, 2002, pp. 74 ff., see *supra* note 18.

[24] Binding, 1872, pp. 3 ff., 7, 42, 45, 54, 96 ff., 339 ff., 346 ff., 353 ff., 364 ff., see *supra* note 3; Karl Binding, *Handbuch des Strafrechts I*, Duncker & Humblot, Leipzig, 1885, p. 170; Hans Welzel, "Studien zum System des Strafrechts", in *Zeitschrift für die gesamte Strafrechtswis-*

abstract ideals, which are not subject to causal changes.[25] However, especially in recent decades, the theory has sought to materialize these values into real, even tangible, social realities.[26]

In contrast with certain individual legal goods that refer to human existence itself or have a visible material substance, collective legal goods usually refer to a level of dimensions and interactions (such as the legal good of the administration of justice mentioned above) that are significantly more complex. In cases like this, the maintenance of the real character of collective legal goods depends fundamentally on the existence of an adequate process of concretization into proximate realities that are capable of expressing what should be understood as damage. A critical concept of collective legal goods thus requires the identification of an existential social dimension. Furthermore, the protection of a collective legal good always entails the protection of individual legal goods, meaning that damage to a collective legal good always entails at least the abstract endangerment of individual legal goods. Nevertheless, it is impossible to tell (in an abstract *ex ante* prognosis) which concrete individual legal good will be in danger. For example, the issue of an erroneous court decision as a result of perjury damages the administration of justice as a collective legal good. At the same time, it causes at least the abstract endangerment of individual goods, though we cannot foresee exactly which individual legal good will (potentially) be compromised (personal freedom, honour, private property, etc.).

senschaft, 1939, vol. 58, pp. 512, fn. 30; Amelung, 1972, pp. 106, 150, 175, 199, 212, 265 ff., 344, see *supra* note 6.

25 Von Liszt, 1886, pp. 674 ff., 683, see *supra* note 4; von Liszt, 1888, pp. 151 ff., 153, see *supra* note 19; Honig, 1919, pp. 109 ff., see *supra* note 5; Eberhard Schmidhäuser, *Strafrecht, Allgemeiner Teil*, 2nd edition, Mohr, Tübingen, 1975, pp. 37 ff.; René Bloy, "Die Straftaten gegen die Umwelt im System des Rechtsgüterschutzes", in *Zeitschrift für die gesamte Strafrechtswissenschaft*, 1988, vol. 100, p. 490; Walter Sax, "„Tatbestand" und Rechtsgutsverletzung (II): Folgerungen aus der Neubestimmung von Gehalt und Funktion des „gesetzlichen Tatbestandes" und des „Unrechtstatbestandes"", in *Juristenzeitung*, 1976, vol. 31, no. 14, p. 432.

26 For criticism of the ideal theory of legal goods, see Hefendehl, 2002, pp. 28 ff., see *supra* note 18; Bernd J.A. Müssig, *Schutz abstrakter Rechtsgüter und abstrakter Rechtsgüterschutz: Zu den materiellen Konstitutionskriterien sog: Universalrechtsgüter und deren normentheoretischem Fundament – am Beispiel der Rechtsgutsbestimmung für die §§ 129, 129a und 324 StGB*, Peter Lang, Frankfurt am Main, 1994, pp. 52 ff.; Marx, 1972, pp. 68 ff., see *supra* note 19.

4.1.5. The Analytic Power of the *Rechtsgut* Concept

The *Rechtsgut* concept claims to have critical, liberal potential. It is meant to properly limit the intervention of criminal law to the protection of fundamental legal goods. Nevertheless, there is always a danger of vague and dubious collective legal goods, such as 'public confidence in the authorities' or 'public health'. Allegedly, these shortcomings substantially diminish the critical potential of the Rechtsgut concept, which, it is argued, lacks analytical power in and of itself as a result. Apart from these charges of imprecision and inconsistency levelled at it in its different variations, the *Rechtsgut* concept also allegedly fails to provide for substantive (normative) criteria for identifying which goods or interests should be protected by criminal law and which should not. Moreover, it is argued that the *Rechtsgut* concept allows for the criminalization of offences of mere endangerment, which purport to protect against a mere (abstract) danger to collective legal goods. This serves to criminalize dangerous conduct that is merely anticipated (and is thus a long way from the actual legal good), without providing any principle serving to limit the extension of this criminalization. The *Rechtsgut* concept, the Holy Grail of the German theory of criminal law, is increasingly being treated with scepticism in the light of modern legislation.[27]

[27] See the views of Wolfgang Wohlers in "Rechtsgutstheorie und Deliktsstruktur", in *Goltdammer's Archiv für Strafrecht*, 2002, pp. 15 ff.; Wolfgang Wohlers, "Die Tagung aus der Perspektive eines Rechtsgutsskeptikers", in Roland Hefendehl, Andrew von Hirsch and Wolfgang Wohlers (eds.), *Die Rechtsgutstheorie: Legitimationsbasis des Strafrechts oder dogmatisches Glasperlenspiel?*, Nomos, Baden-Baden, 2003, pp. 281 ff.; Andrew von Hirsch and Wolfgang Wohlers, "Rechtsgutstheorie und Deliktsstruktur – zu den Kriterien fairer Zurechnung", in Roland Hefendehl, Andrew von Hirsch and Wolfgang Wohlers (eds.), *Die Rechtsgutstheorie: Legitimationsbasis des Strafrechts oder dogmatisches Glasperlenspiel?*, Nomos, Baden-Baden, 2003, pp. 196 ff.; Gerhard Seher, "Prinzipiengestützte Strafnormlegitimation und der Rechtsgutsbegriff", in Roland Hefendehl, Andrew von Hirsch and Wolfgang Wohlers (eds.), *Die Rechtsgutstheorie: Legitimationsbasis des Strafrechts oder dogmatisches Glasperlenspiel?*, Nomos, Baden-Baden, 2003, pp. 39 ff.; Kurt Seelmann, "Rechtsgutskonzept, „Harm Principle" und Anerkennungsmodell als Strafwürdigkeitskriterien", in Roland Hefendehl, Andrew von Hirsch and Wolfgang Wohlers (eds.), *Die Rechtsgutstheorie: Legitimationsbasis des Strafrechts oder dogmatisches Glasperlenspiel?*, Nomos, Baden-Baden, 2003, pp. 262 ff., 267; Wolfgang Frisch, "An den Grenzen des Strafrechts", in Wilfried Küper and Jürgen Welp (eds.), *Beiträge zur Rechtswissenschaft: Festschrift für Walter Stree und Johannes Wessels zum 70. Geburtstag*, C.F. Müller, Heidelberg, 1993, pp. 71 ff., 74 ff.; Hans-Ullrich Paeffgen, "Betäubungsmittel-Strafrecht und der Bundesgerichtshof", in Claus Roxin and Gunter Widmaier (eds.), *50 Jahre Bundesgerichtshof: Festgabe aus der Wissenschaft, Band IV: Strafrecht, Strafprozeßrecht*, C.H. Beck, München, 2000, p. 702.

Further, the *Bundesverfassungsgericht* ('BVerfG') – the German constitutional court – has not yet adopted the *Rechtsgut* concept and applies the principle of proportionality (suitability, necessity, adequacy: see below) as its crucial test for determining the legitimacy of criminal laws. When the BVerfG was called upon to determine whether a criminal conviction for intercourse between siblings brought in accordance with § 173II2 StGB was constitutional, it provided an opportunity for the Court to tackle the *Rechtsgut* concept. Its subsequent 'incest ruling' of 26 February 2008[28] brushed aside the *Rechtsgut* theory as constitutionally irrelevant and insisted on applying instead the proportionality analysis, which the German constitutional court has been developed over the six decades of its existence. A criminal prohibition must be necessary (*erforderlich*), suitable (*geeignet*) and proportional in the strict sense (*verhältnismäßig im engeren Sinne*) with regard to the objective pursued. The last is the normally decisive criterion and means that the consequence of the impingement on fundamental rights must be balanced against the reasons for and objectives of this interference and must not be disproportional, unjust or inadequate.[29]

The Constitutional Court's position has been criticized on the grounds that the constitutional test is even less effective than the *Rechtsgut* concept when it comes to critical evaluation of criminal prohibitions. Despite strong criticism, the *Rechtsgut* concept has the potential to restrain the criminal law in a more efficient and meaningful way than other theories. The *Rechtsgut* concept places substantive legal requirements on criminal offences; indeed, the very existence of the concept supports the proposition that there are limits within which the modern criminal law must operate if it is to be legitimate. It also serves as a mediating concept between criminal law norms and the overly vague proportionality test. Even the criticism describing 'collective *Rechtsgüter*' as vague and diffuse is mostly based on the critical self-limiting function of the *Rechtsgut* concept itself: the legislature is entitled to adopt a penal norm only if it is absolutely necessary to safeguard fundamental individual or collective legal goods. Public 'emo-

[28] BVerfGE 120, 224, in *Neue Juristische Wochenschrift*, 2008, p. 1137.

[29] On the discussion on the BVerfG judgement 26.2.2008-2BRR 392/07, see *ibid*., pp. 1137 ff.; Wilfried Bottke, "Roma locuta causa finita? Abschied vom Gebot des Rechtsgüterschutzes?", in Winfried Hassemer, Eberhard Kempf, Sergio Moccia and Felix Dörr (eds.), *In dubio pro libertate: Festschrift für Klaus Volk zum 65. Geburtstag*, C.H. Beck, München, 2009, pp. 93 ff., 108 ff., where a new approach to the concept of legal good in the light of constitutional requirements is proposed.

tions', or the sum of many identical individual legal goods, do not constitute a collective legal good: they lack the real, complex nature and value of social institutions and interactions; they are not required to realize fundamental liberties; and they do not contribute meaningfully to the existence of the State that ensures these liberties. Thus, the protected interest guides the legislature in establishing and formulating criminal offences and plays a role in the interpretation of legal norms. An interpretation that is faithful to the purpose of the prohibition may limit its scope in comparison with the meaning of the letter of the law and at the same time the importance of the protected legal good in question is crucial for determining the appropriate severity of the sanction.[30]

4.2. The Importance of the Concept of Legal Goods in International Criminal Law

4.2.1. The Collective Reach of the International Criminal Law

When establishing the theoretical foundations of international criminal law, we need to understand which conduct can be legitimately criminalized at the international level, considering the limitations on State sovereignty which this implies. We must provide a convincing explanation of the differentiation between those crimes labelled 'international crimes' and other crimes labelled 'national crimes' or 'ordinary crimes'.

International criminal law seeks to address behaviours with the following qualitative characteristics:

1. they primarily affect the international community (international peace and security);
2. they simultaneously violate the most fundamental human values (the right to life, physical integrity, sexual freedom, property, human dignity);
3. they involve the State; and

[30] See Tatjana Hörnle and Mordechai Kremnitzer, "Human dignity as a protected interest in criminal law", in *Israel Law Review*, 2011, vol. 44, no. 1, p. 144. See also Manfred Heinrich, "Strafrecht als Rechtsgüterschutz – ein Auslaufmodell? Zur Unverbrüchlichkeit des Rechtsgutsdogmas", in Manfred Heinrich, Christian Jäger, Hans Achenbach, Knut Amelung, Wilfried Bottke, Bernhard Haffke, Bernd Schünemann and Jürgen Wolter (eds.), *Strafrecht als Scientia Universalis, Festschrift für Claus Roxin zum 80: Geburtstag am 15. Mai 2011*, De Gruyter, Berlin, 2011, pp. 145 ff., about the functionality and utility of the concept of the legal good.

4. they have a particular gravity.[31]

In this context, international criminal law has always been marked by tension between international interests – particularly the need for accountability to promote human rights norms – and sovereign interests. Cassese argues convincingly that the current flowering of international criminal justice is underpinned by various convergent factors: the spread of human rights doctrines and the growing sense that the most effective means of enforcing respect for such rights lies in prosecuting and punishing their violators; the failure of the national courts to bring to trial the alleged perpetrators of egregious breaches of human rights which amount to international crimes; and the objective merits of international judicial mechanisms compared to national courts.[32]

Although the international crimes described in the Statute of the International Criminal Court ('ICC') appear to be formal in nature, as these are acts under the jurisdiction of the Court, they constitute, however, the most serious violations of human rights. Their international character is based on the concept that they impact on the most important values of the international community: "Peace, security and [the] well-being of the world"[33] – three protected values that cannot be strictly separated from one another.[34] An attack on these values alone bestows an international dimension on a crime, turning it into a crime under international law. International criminal law is thus clearly defined as the criminal law of the international community, given that it seeks to protect the fundamental values of the latter.[35]

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31 Mordechai Kremnitzer, "The World Community as an International Legislator in Competition with National Legislators", in Albin Eser and Otto Lagodny (eds.), *Principles and Procedures for a New Transnational Law*, Max Planck Institute for Foreign and International Criminal Law, Freiburg im Breisgau, 1992, pp. 339 ff.

32 Antonio Cassese, "The Rationale for International Criminal Justice", in Antonio Cassese (ed.), *The Oxford Companion to International Criminal Justice*, Oxford University Press, 2009, pp. 123 ff.

33 Rome Statute of the International Criminal Court, 17 July 1998, Preamble, para. 3 ('ICC Statute') (http://www.legal-tools.org/doc/7b9af9/).

34 Gerhard Werle, *Principles of International Criminal Law*, T.M.C. Asser Press, The Hague, 2005, pp. 27 ff.

35 Morten Bergsmo and Otto Triffterer, "Preamble", in Otto Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article*, C.H. Beck Hart Nomos, München, 2nd edition, 2008, p. 8; M. Cherif Bassiouni, "The Philosophy and Policy of International Criminal Justice", in Lal Chand Vohrah, Fausto Pocar, Yvonne Featherstone, Olivier Fourmy, Christine Graham, John Hocking and Nicholas Rob-

It seems, therefore, that this reference to the Preamble of the Statute has left no room for further and more profound reflection on this issue. Thus, while international peace and security are presented as indisputable goods for all mankind,[36] one wonders how these goods are affected here and what else might underlie the "well-being of the world", which would seem to be distinct from peace and security.[37]

The Statute is based on a positive conception of peace that goes beyond the negative absence of wars and conflicts between States to reference a just order which, among others, respects fundamental individual human rights.[38] Peace and security are certainly collective goods, a sort of public order of the international community. As mentioned above, in classical criminal law, collective goods are distinguished into State and social goods. However, this international public order is not included among a State's legitimate goods, since it is not specific to a particular State and there is no 'world State' at the international level. International peace can be described as a transnational legitimate good, the preservation of which would be of interest to the members of the international community. In this sense, however, international peace and one State's peaceful relations with other States would have had more of a domestic State character. On the other hand, if international peace and security are considered to be social goods, they are enacted by society, since 'international society' is more a concept centred on the functioning of certain principles of human cohabitation than a politically organized and regulated society. International society is simply humanity, meaning the co-existence of all people, regardless of its institutional expression and political organization.[39]

As far as the 'well-being of the world' is concerned, the concept is extremely vague and could thus have wide-ranging dimensions. In particular, threats to global prosperity would include the challenge posed by an economic crisis caused by international credit institutions with significant implications for the prosperity of all and the economic survival of the poor

son (eds.), *Man's Inhumanity to Man: Essays on International Law in Honour of Antonio Cassese*, Martinus Nijhoff Publishers, The Hague, 2003, p. 65 ff.

36 Nikolaos Bitzilekis, "Foundation and nature of international criminal law", in *Penal Chronicles*, 2010, pp. 785 ff. (in Greek).

37 See Werle, 2005, p. 28, see *supra* note 34.

38 Frank Neubacher, *Kriminologische Grundlagen einer internationalen Strafgerichtsbarkeit*, Mohr, Tübingen, 2005, pp. 90 ff.

39 See Bitzilekis, 2010, pp. 785 ff., see *supra* note 36.

and heavily indebted, whose fate now hangs largely on international financial institutions and the financial market. The same applies to environmental disasters that threaten the ecosystem in part of our planet and, by extension, leave people with shortfalls in vital commodities such as drinking water and food. In addition, the natural environment and its fauna and flora are essential elements in humanity's survival on earth, while humanity's interests extend to the global cultural environment and our world's cultural heritage, especially those elements of it officially recognized by international organizations such as UNESCO. Finally, the security of maritime traffic, which is directly affected by international piracy, or the issue of extracting and exploiting energy resources could also be included among the assets of the international community.[40]

Of course, genocide, crimes against humanity and war crimes share their inhumane nature with other crimes that would not be labelled 'core international crimes'.[41] International criminal law is clearly focused on systematic or large-scale violations, and has a collective-individualistic reach with regard to world peace or international security and fundamental civil or human rights. This means that international criminal law protects two subjects. The first is a collective subject referring to the international community as a whole and to mankind. This focus on the collective side derives from the statutes of the *ad hoc* international criminal tribunals, in particular their recourse to the collective security system detailed in Chapter VII of the UN Charter, but it is also expressed by the group element in genocide and crimes against humanity. At the same time, core international crimes also protect individual interests insofar as these relate to the fundamental rights of mankind, or fundamental human rights, and to our underlying human dignity. International criminality may involve many actions that threaten the individual and are of a gravity that gives these individual acts the singular potential to threaten international values or interests. The last stage in the development of a rights regime is the criminalization stage. It

40 See *ibid*.

41 See Mayeul Hiéramente, "The Myth of 'International Crimes': Dialectics and International Criminal Law", in *Goettingen Journal of International Law*, 2011, vol. 3, no. 2, pp. 566, 575, in which it is argued that "[t]hrough the lens of the *Rechtsgutstheorie* the label of 'international crime' appears to be at least questionable: A persuasive value-based explanation is inexistent".

is there that the shared values contained in that particular right are further protected by penal proscriptions.[42]

Thus, the existence of international criminal law and its claim to validity are predicated on this collective-individualistic reach. International criminal law protects individuals as members of humanity or individuals as members of groups that are part of humanity. There must always be a collective or group element in international crimes in the sense that the individual victims concerned are not attacked exclusively on the basis of their individuality, but also as members or representatives of certain groups or collective entities, which in turn represent humanity. That is obvious in the case of crimes against humanity and genocide, but it also applies to war crimes in the form of attacks against the adversary's civilian population.[43]

4.2.2. The Violation of Internationally Recognized Personal Goods

Observing the international crimes within the competence of the ICC, it is clear that such crimes always cause serious violations of internationally recognized personal goods. The question is whether, given their size and character, these violations impact in a general way on co-operation between States at the international level and on peaceful co-existence as a commodity of value to the entire international community. However, although it is relatively easy to talk about interfering with international peace and security when two or more States are involved, problems arise when violations occur within a single State entity. How is the international community to legitimize the imposition of criminal sanctions on violations of humanitarian law which it considers to be, for example, war crimes, when the actions in question take place in the context of internal civil conflicts or even between organized armed groups that are non-State actors? How can an intervention in the interior of a foreign State such as that constituted by the exercise of criminal justice power be legitimized when it poses such a clear and serious challenge to the State's sovereignty? Two arguments are put forward: avoiding adverse international effects that could destabilize world

[42] Ambos, 2015, p. 319, see *supra* note 1, M. Cherif Bassiouni, "International Criminal Law and Human Rights", in *Yale Journal of World Public Order*, 1982, vol. 9, p. 193; Ilias Bantekas and Susan Nash, *International Criminal Law*, 2nd edition, Cavendish Publishing, 2003, pp. 14 ff.

[43] Ambos, 2015, pp. 320 ff, see *supra* note 1; see also Christian Tomuschat, in Gerd Hankel and Gerhard Stuby (eds.), *Strafgerichte gegen Menschenverbrechen*, Hamburger Edition, Hamburg, 1995, pp. 270, 283. For a detailed and nuanced approach to this perspective, see SONG Tianying, "The Legal Interests Protected by War Crimes" in Chapter 2 of this volume.

peace, and ensuring criminal law protection at the national level. While protection at the international level may have a positive impact on the national level, this does not constitute sufficient justification for an international criminal procedure. Criminal offences under international criminal law are not just a mechanism for deprivation or significantly restricting the *jus puniendi* of national States when they cannot or will not exercise it effectively; it is not simply "taking over or assigning jurisdiction" due to mistrust.[44]

But even if this was acceptable, the reference to international crimes presupposes the establishment of an independent international devaluation of certain acts. Otherwise, we cannot talk about international criminal law, only about a form of international co-operation and assistance within the framework of a national criminal jurisdiction. This is alien not only to the entire logic of the ICC Statute, but also to its history and the efforts that led to the standardization of the crimes listed in the Statute and the need to establish an international criminal court. States do not delegate jurisdiction to an international criminal court simply by creating it. In fact, the State's own jurisdiction in these matters is only derivative. The ICC actually exercises original criminal competence over international crimes which, prior to its creation, were latent or dormant due to the absence of institutional organization.[45]

4.2.3. The International Nature of ICC Crimes

In cases concerning common national crimes, investigating the circumstances in which a crime has been committed is considered a sufficient condition for establishing the criminal responsibility of the accused. With core international crimes, it is a logical necessity to look at the broader context that sparked the collective violence. International criminal law protects subsidiary values and interests that, by definition, fall within the scope of national criminal law in cases where government bodies or officials commit, engage or tolerate the commission of crimes which the national legal order appears reluctant or incompetent to take to court. It is this last factor that turns what is normally a domestic matter into an issue of inter-

[44] Bitzilekis, 2010, pp. 785 ff., see *supra* note 36.

[45] See Tobias Stoll, "Responsibility, Sovereignty and Cooperation – Reflections on the 'Responsibility to Protect'", in Doris König, Peter Tobias Stoll, Volker Röben and Nele Matz-Lück (eds.), *International Law Today: New Challenges and the Need for Reform?*, Springer, Heidelberg, 2008, pp. 1 ff., 23 ff.

national interest. The turn towards criminal justice has not occurred in a vacuum and is partly a response to dissatisfaction with the other methods available for dealing with international criminals: neutralizing them extra-judicially or ignoring them.[46]

The international nature of ICC crimes is shaped by two key combined elements: the addressee of the offence and its source. The relationship between perpetrator and victim takes on a different dimension here from what we are familiar with in the field of national crimes. Actor and victim do not act as individuals but as expressers of a collective political and cultural confrontation. For the perpetrator, international crimes are expressed in the context of a collective activity as part of a power mechanism. These are 'macro-crimes', where the offense is understood not as a single act, but as part of a collective exercise of political power. However, the characteristics of this macro-crime centre on the neutralization of control mechanisms and the collective erosion of moral assessments. But from the victim's side, too, international crimes also have a collective character. The legal goods in question may be of an individual nature, as they are individual citizens' rights which are known and commonly accepted by national laws, but the manner and extent of their offence is such that they effect a transition to another dimension.[47]

So, when does this qualitative transition from national to international take place? When are one, two or more homicides or rapes or other forms of sexual violence simply of interest to the national criminal lawmaker, and when do they acquire those qualitative characteristics that directly interest the international community? The obvious answer: when the offences affect mankind itself as a society of persons. Human cohabitation does not only require natural environmental conditions or economic conditions that ensure the smooth production and distribution of goods, it also needs conditions in which the human being can function as a free, self-defining and therefore responsible person. Such a society extends to all mankind, crossing and transcending borders, States and all division or segregation based on physical or cultural characteristics.

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46 See Athanassios Chouliaras, *The emergence of the international criminal system*, Athens, Thessaloniki, 2013, p. 404 (in Greek); Robert Cryer, "The Objectives of International Criminal Law", in Robert Cryer, Håkan Friman, Darryl Robinson and Elizabeth Wilmshurst (eds.), *An Introduction to International Criminal Law*, Cambridge University Press, Cambridge, 2010, p. 23.

47 Bitzilekis, 2010, pp. 785 ff., see *supra* note 36.

4.2.4. The Theory of Legal Goods under International Criminal Law

In the context of international criminal law, the impossibility of a global moral consensus argues in favour of the need to provide criminalization criteria other than social morality. The Rechtsgut theory can help establish legal foundations in a more principled way than the current case-by-case approach by focusing on the seriousness of the different crimes.[48] It can thereby be used to evaluate 'international crime' as a label and any discrepancies between it and other criminalized human rights abuses. The label would be validated if the criminalization of genocide, crimes against humanity and war crimes served to protect distinct legal goods, or if the protected legal goods were threatened by something other than 'ordinary' human rights abuses or 'national crimes'.[49]

Köhler rightly distinguishes between legal goods that are accepted *by* the entire international community and other legal goods that are accepted as being *of* the entire international community.[50] The paradigmatic example of the latter type of international legal good is that of 'international peace'. In the words of Bergsmo and Triffterer: "The peace and security of mankind were for a long time the only expressions that summarized the basic, inherent values of the community of nations which had to be protected in the interest of all, individuals and States alike".[51]

Ambos refers both to the notion of legal goods and to the principle of harm and ultimately combines the two to determine the operation of international criminal law in relation to legal goods of a "collective or complex nature" which simultaneously protect individual and universal interests (the body of which is the international community).[52] He has developed some

48 Ambos, 2015, pp. 304 ff., 314 ff., see *supra* note 1, in which it is suggested that *Rechtsgut* and harm principles must be combined in order to rescue a liberal criminal law.

49 See Hiéramente, 2011, p. 563, see *supra* note 41.

50 Michael Köhler, "Zum Begriff des Völkerstrafrechts", in *Jahrbuch für Recht und Ethik/ Annual Review of Law and Ethics*, 2003, vol. 11, p. 440.

51 Bergsmo and Triffterer, 2008, para. 11, see *supra* note 35.

52 Kai Ambos, *Treatise on International Criminal Law, Volume I: Foundations and General Part*, Oxford University Press, Oxford, 2013, pp. 60 ff. See also Anne-Laure Vaurs Chaumette, *Les sujets du droit international pénal : Vers une nouvelle définition de la personnalité juridique internationale?*, Éditions A. Pedone, Paris, 2009, pp. 190 ff., in which it is argued that archetypal international crimes are an offense against the international collective legitimate goods of international peace and security, human dignity and humanity, which correspond to the collective interests of the international community.

concretizations of the general and abstract collectivist value of 'humanity' or 'mankind' – a value that, as he remarks, is too inclusive to be formulated as a *Rechtsgut* without further concretization. In the crime of genocide, the *Rechtsgut* is the unimpeded co-existence of cultures, meaning the national, ethnical, racial or religious group as such. The value of the existence of this pre-characterized group is a concretization of the value of mankind.[53]

According to Ambos, the *Rechtsgut* is less concrete when it comes to crimes against humanity: the people who are protected are protected simply as members of humanity. Yet, even here, the contextual element (a systematic or widespread attack against a civilian population) entails a collective dimension in an attack directed against a group of persons normally for group-related reasons. Ambos notes that crimes against humanity challenge the idea that humanity is a collective characterized by human dignity. The *Rechtsgut* concept would call for an investigation of human dignity with a view to ascertaining whether human dignity is clear enough as a concept to serve as a *Rechtsgut*.[54]

In the case of war crimes, it seems to me that the underlying humanitarian purpose of their criminalization is to contain the conflict and thus contribute to international peace. The prosecution of these acts shall also ensure the human dignity, life and physical integrity of the persons protected, even in times of armed conflict. Ambos points out that, in the case of war crimes, the *Rechtsgut* is the existence of the people in their contextual categorization as 'enemy group' and this value is also a concretization of the value of mankind.[55]

It is therefore obvious that a theoretical attempt has been made to combine the analytical power of the *Rechtsgut* concept with the overall functionality of international criminal law, especially since international criminal law must always entail a collective or group element. As mentioned above, it is argued herein that we need to develop concretizations of the general and abstract collectivist value of 'humanity', 'mankind', or 'human dignity' – all of which are too inclusive to be formulated as legal goods without further concretization.

53 Ambos, 2015, p. 321, see *supra* note 1.

54 *Ibid*.

55 *Ibid*.

4.2.5. Global Solidarity as a Collective Legal Good Protected by International Criminal Law

One key question is whether the notions of 'international peace', 'humanity', 'mankind' or 'human dignity' can serve as a theoretical basis for the concretization of collective legal goods in international criminal law? It is hard to deny that international criminal prosecutions are legitimate if the crimes in question are directed not only against individuals, but are also group-based, either in terms of the nature of the victims' harm or the character of the perpetrator of the harm. We must recognize collective legal goods in a way that entails the internationalization and concretization of the *Rechtsgut* concept. First and foremost, this would require the development of the special collectivist value aspect of the relevant crimes.

Still, in this context, it is doubtful whether 'international peace' can serve as a global *Rechtsgut* in international criminal law, both because its focus tends to be on inter-State military conflicts, and because it cannot in itself bring out the specific collective nature of war crimes. At the same time, it is also doubtful if the notion of human dignity, with its fundamental individual dimension, can effectively describe the specific collective characteristic of international crimes. The human dignity aspect, in combination with other protected interests, is helpful for fully understanding the wrongs perpetrated by a particular crime.[56] Although the protection of human dignity is a legal good for which every liberal State has to provide primary protection, it retains its fundamental personal dimension as it always and foremost refers to the individual.

Similarly, 'humanity' or 'mankind' cannot effectively serve as a theoretical basis for the concretization of *Rechtsgüter* in international criminal law. 'Humanity' means both the quality of being human (humanness) and the aggregation of all human beings (humankind).[57] Taken in the former sense, 'crimes against humanity' suggests that the defining feature of these offenses is the value they injure, namely humanness.[58] The law traditional-

[56] See Hörnle and Kremnitzer, 2011, pp. 165 ff., see *supra* note 30.

[57] See Susan R. Lamb "The Legal Good of 'Humanity' Protected by Crimes Against Humanity" in Chapter 3 above in this volume.

[58] See David J. Luban, "A Theory of Crimes against Humanity", in *The Yale Journal of International Law*, 2004, vol. 29, no. 1, pp. 86 ff., 159 ff. On the concept of humanitarian intervention and its historical background, see Hans Köchler, *Global Justice or Global Revenge? International Criminal Justice on the Crossroads*, Springer, Wien/New York, 2003, pp. 271 ff.

ly distinguishes between crimes against persons, crimes against property, crimes against public order, and so on. Here, the idea is to supplement the traditional taxonomy of legally protected values (life, health, property, public order, and so on) by adding offences that are crimes against humanness itself. Undoubtedly, 'humanity' is a virtue associated with basic ethics of altruism, which derive from the human condition. However, given this broad definition, it is doubtful whether it can serve – at least directly – as a theoretical basis for the concretization of *Rechtsgüter*.

In order to identify the specific collective element of international crimes, we have to consider that international criminality is characterized by State involvement. This makes it impossible to expect justice to be carried out by the State itself, rendering essential the exceptional measure of international law. The protected interest is here primarily an objective value that motivates the international community. International crimes assault our global conscience. These acts must be punished through criminal trials which serve as rituals that effectuate solidarity and enhance cohesion.[59] In current international law, the concept of 'solidarity' represents an emerging structural principle which often imposes negative obligations on States not to engage in certain activities as well as establishing, in an increasing number of contexts, concrete duties on States to carry out certain measures for the common good. Building on the sound foundations established by international humanitarian law, the 'solidarity principle' is clearly apparent in the growth of international criminal law. While international humanitarian law provides the first systematic example of solidarity in the positive sense (by establishing State duties) , the international criminal law mechanisms that have grown out of the basis of that law provide the most tangible and striking examples of solidarity in both its negative and positive manifestations.[60]

The specific collective element that motivates the exceptional measure of international criminal law is therefore, this chapter submits, *global solidarity*. International criminal law intervenes in cases where the infringement of individual goods that are normally protected at the national

[59] Marina Aksenova, "Solidarity as a Moral and Legal Basis for Crimes Against Humanity: A Durkheimean Perspective", in *iCourts Working Paper Series, No. 52*, 2016, pp. 4 ff., 21 ff.

[60] Abdul G. Koroma, "Solidarity: Evidence of an Emerging International Legal Principle", in Holger P. Hestermeyer, Doris König, Nele Matz-Lück, Volker Röben, Anja Seibert-Fohr, Peter-Tobias Stoll and Silja Vöneky, *Coexistence, Cooperation and Solidarity: Liber Amicorum Rüdiger Wolfrum*, Martinus Nijhoff Publishers, 2012, vol. I, pp. 102 ff., 107.

level becomes so intolerable that it triggers the reflexes of the international community. The reference to global solidarity affords prominence to real and existing human, group and State relations and interactions, not only to ethical virtues. Global human solidarity is a collective good itself; it is a *form of unity* that mediates between individuals and communities and constitutes an essential condition of social living. Our co-existence as nations and individuals is based on the common acceptance of certain minimal standards that preserve diversity in a spirit of tolerance and pluralism; minimal standards that must be followed even in times of war.

This global legal good is singular also in a further sense. Its infringement appears in two manifestations. Genocide, crimes against humanity or war crimes infringe global human solidarity, in parallel with individual legal goods. On the other hand, the failure of the international community to react to such a severe infringement causes new and additional damage to the collective entity of human solidarity. We have to diversify the relations and interactions that are grouped under the broad category of global solidarity and offended by core international crimes. The concept of solidarity can relate to both the protection of individual legal goods (life, health, personal freedom or sexual self-determination) and collective interests (such as preservation of national or cultural identity or co-existence of cultures). The question is precisely to determine when the breach of personal goods has become so unbearable that it violates global human solidarity and legitimizes the activation of international criminal law. The relevant assessment not only helps to approximate the nature of the crimes already provided for in the ICC Statute, but can also help assess the need to protect other important goods in the future (such as the environment and cultural heritage) under international criminal law. It is a challenge for the *Rechtsgut* theory to elaborate on the collective good of global solidarity, which entails the acknowledgement of our multiple interdependencies (between continents, nations and individuals) and the awareness of our common destiny.

5

‘Reconciliation’ as a Philosophical Foundational Concept in International Criminal Law

David Baragwanath[*]

‘Reconciliation’ is the philosophical foundational concept of international criminal law. Law’s currently unrealised potential, to use Reconciliation[1] as a means of restoring or improving relations and to measure and describe the result, should be recognised as law’s fundamental value. That value should be accepted as *the* philosophical foundation of international criminal law; in Kelsen’s language, its *Grundnorm*.

5.1. Introduction

> *For over forty years I’ve been speaking prose without knowing it and I’m greatly in your debt for pointing it out.*[2]

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1 In what follows ‘Reconciliation’ is capitalized when used in a sense consistent with our contention (see *infra* Section 5.2.).

2 « Par ma foi, il y a plus de quarante ans que je dis de la prose sans que j’en susse rien, et je vous suis obligé du monde de m’avoir appris cela ». Molière, *Le Bourgeois Gentilhomme*, Libraire de la Cour, 1822, Scene 6, Act 2.

Like Monsieur Jourdain's prose, 'Reconciliation' contains an insufficiently appreciated truth: as to the philosophical foundations of international criminal law. That is the thrust of this chapter.

While commonly used in the sense of restoring estranged parties to friendship, Reconciliation has yet to be clearly defined as a concept in international law.[3] So one must ask: what is the purpose of international criminal law? And what is the role of Reconciliation?

The proper task of international criminal law is to respond effectively to the gravest human-caused threats to humanity – both immediate and potential.[4] As to making that happen, my invitation is to discuss what Morten Bergsmo has termed a 'meta-legal good',[5] usually overlooked or ignored, which I believe to have immense capacity to help the law do its job. Reconciliation is not a merely theoretical abstraction, irrelevant to the protection of ordinary people and so arcane to be beyond non-specialist comprehension. Rather, it is a practical, principled and essential working concept, needed by all those charged in the most serious cases with the function of delivering justice.

During the New Delhi Conference giving rise to this anthology,[6] the loss of 38 lives in Panchkula to the north-east through rioting in response to a criminal conviction provided a tragically topical example of both the perennial need for Reconciliation and the difficulty of achieving it. That happened in a week which had seen the Supreme Court of India engage in two decisions with the Reconciliation process. The first was removal after 1,400 years of a husband's entitlement to bring a marriage to immediate end by uttering 'Talaq' three times. In the second case, nine judges unanimously reversed existing jurisprudence, holding instead that privacy is a

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3 As is accurately stated by Melody Mirzaagha, "Striving Towards a Just and Sustainable Peace: The Role of Reconciliation", FICHL Policy Brief Series No. 73 (2016), Torkel Opsahl Academic EPublisher ('TOAEP'), Brussels, 2016, p. 1 (http://www.toaep.org/pbs-pdf/73-mirzaagha). An overview is provided by Carsten Stahn in *A Critical Introduction to International Criminal Law*, Cambridge University Press, 2018, pp. 178–80, para. 3.3.1.4.

4 The United Nations ('UN') Security Council's parallel responsibility – to respond effectively to threats to international peace and security – is cited in *infra* Section 5.9.1., following *infra* note 230.

5 See *supra* Chapter 1 ("Protected Interests, Meta-Legal Universal Goods and Foundational Values in International Criminal Law").

6 The Centre for International Research and Policy ('CILRAP'), "Philosophical Foundations of International Criminal Law: Its Intellectual Roots, Related Limits and Potential", 25–26 August 2017, New Delhi (https://www.cilrap.org/events/170825-26-delhi/).

fundamental right of the people of India. The rejection in each case of settled, past authority that no longer reflects modern values and conditions, exemplified the '*prudence et audace*' which President Corstens of the Hoge Raad – the Supreme Court of the Netherlands – had described as the fundamental qualifications of a judge. It demonstrated open-mindedness coupled with hard and courageous thinking. As the decisions showed, and as Justice Madan B. Lokur of the Supreme Court of India reminded us in his address at the Delhi conference,[7] obstructions to justice must be tackled head-on.

Every day the rule of law is faced with unprecedented challenges within and across State borders. How is it to meet them? My argument is that to be fit for purpose, international criminal law must make full use of Reconciliation, respecting and promoting the equality and dignity of all people. What are the key factors?

The law, being practical, is concerned with realities – of time, place and circumstances.[8] As to time, three historic events are relevant to Reconciliation in international criminal law: the Peace of Westphalia of 1648, which recognised the autonomy of the nation State; the 1945 Charter of the UN ('UN Charter'), which, while confirming that autonomy, also limited it when the Security Council considers there is a threat to international peace and security; and – for reasons that follow – celebration in 2017 of the seventieth anniversary of the independence of India.

As to place, India exemplifies in its Constitution and the judgments just mentioned the overlapping elements of equality and liberty, alias freedom, that are essential to the human dignity, respect for which lies at the heart of Reconciliation. India's history and jurisprudence show Reconciliation as a value that can meet every form of physical and moral abuse.[9]

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7 Justice Madan B. Lokur, "Opening Remarks at Conference on Philosophical Foundations of International Criminal Law", CILRAP Film, New Delhi, 25 August 2017 (https://www.cilrap.org/cilrap-film/170825-lokur/).

8 The Judicial Committee of the Privy Council, *The Imperial Tobacco Company of India Limited v. Albert Bonnan and Bonnan and Company*, Judgment, 13 May 1924, [1924] UKPC 38; see also The Judicial Committee of the Privy Council, *Teper v. The Queen*, Judgment, 28 May 1952, [1952] UKPC 15, [1952] AC 480, 486 per Lord Normand and United Kingdom Supreme Court, *R v. Jogee*, Judgment, 18 February 2016, [2016] UKSC 8, [2017] AC 387, para. 12.

9 For the scope and complexity of reconciliation, see Birju Kotecha, "The Complexity of Reconciliation", FICHL Policy Brief Series No. 79 (2017), TOAEP, Brussels, 2017 (http://www.toaep.org/pbs-pdf/79-kotecha/), and Rachel Kerr "The 'Art' of Reconciliation",

On 15 August 1947, the *Manchester Guardian* marked Independence Day with the acknowledgement: "Events, not intention, created the British Raj";[10] principle had not entered into it. Two distinguished members of the Inner Temple in London had been struck off its roll – Shymaju Krishna Varma in 1909 and Mahatma Gandhi in 1922, in breach of what are now the Preamble to and Article 19(1)(a) of the Constitution of India establishing liberty of thought, freedom of speech and expression. That was done because of their advocacy that India be freed from colonial rule. Very much later – 1988 in Gandhi's case and not until 9 November 2015 in that of Varma – the Inner Temple, by restoring them to honoured membership, recognised the injustice done to each man by breach of the principle of fearless advocacy, for which both they and the Inns of Court now stand as exemplars to the world. The repentance of a great British institution, matched by the generosity of the Indian profession and people, completed the Reconciliation; the Justice Minister, Shailesh Vara, himself a lawyer, recording pleasure at this outcome as part of Prime Minister Modi's historic visit to Britain.

Gandhi's death in New Delhi, like his statue in Tavistock Square where London bombings took place, is a constant reminder of the obligation of international criminal law to respond not simply to the abstraction of terrorism, but to the minds of both its victims and those who carry it out.

As to circumstances, the Conference faced first the urgent need to update international criminal law according to the reality described by the Court of Appeal of England and Wales in *Belhaj v. Straw* (2014):[11]

> […] a fundamental change has occurred within public international law. The traditional view of public international law as a system of law merely regulating the conduct of states among

FICHL Policy Brief Series No. 78 (2017), TOAEP, Brussels, 2017 (http://www.toaep.org/pbs-pdf/78-kerr/).

[10] "India: The British Raj is dead – archive, August 1947", *The Guardian*, 15 August 2017.

[11] England and Wales Court of Appeal (Civil Division), *Belhaj and Another v. Straw and Others*, Judgment, 30 October 2014, [2014] EWCA Civ 1394, [2015] 2 WLR 1105 ('*Belhaj v. Straw*'). It was not controverted by the United Kingdom Supreme Court on appeal: United Kingdom Supreme Court, *Belhaj and Another v. Straw and Others*, Judgment, 17 January 2017, [2017] UKSC 3, [2017] 2 WLR 456. Rather, as noted by Andrew Sanger in his note "UK Government Cannot Hide from Complicity in Human Rights Abuses", in *The Cambridge Law Journal*, 2017, vol. 76, no. 2, p. 223, it held that state immunity and the foreign act of state doctrine did not prevent claims against the British government alleging complicity in human rights abuses and abuses of peremptory norms of international law.

> themselves on the international plain has long been discarded. In its place has emerged a system which includes the regulation of human rights by international law, a system of which individuals are rightly considered subjects. A corresponding shift in international public policy has also taken place.

There was a second reality of circumstances, described by Duff and Green in their *Philosophical Foundations of Criminal Law*. Rather like the Raj before it, international criminal law "is not the carefully crafted product of a divinely inspired creative moment, but the messy outcome of the variegated, shifting forces that determined its historical development".[12]

The project of which this volume forms part has the task of helping, as far as may be feasible, to clean up that mess. It proposes as starting point identifying and formulating the philosophical foundations of international criminal law. The key to doing so is Reconciliation.

5.2. Contention

'Reconciliation', in a broad sense, is the immediate purpose of good law and its systems, promoting their end purpose of achieving decency and human dignity in human relations.

As to criminal law, the abuse of one person by another has existed since Cain killed Abel. The role of the criminal law is to prevent and, if it occurs, to respond to abuse; that of international criminal law is to deal with the most serious crimes, including the gravest cross-border criminality. The human propensities that result in crime and the consequences of crime lead in a progression to further disharmony and often to more serious crime, which in its starkest form is known as aggressive war.

The present argument is, first, that in common with the whole of domestic and international law, Reconciliation in international criminal law should be seen and accepted as *the* foundational legal concept for minimizing and resolving inevitable human differences. Secondly, new machinery is required to give as much effect to such concept as human imperfections will allow. To create and apply it requires a fresh examination of our current systems and their modification or replacement by systems driven by such concept.

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[12] R.A. Duff and Stuart Green, *Philosophical Foundations of Criminal Law*, Oxford University Press, Oxford, 2011, p. 3. They add that some "accept […] messiness (of the right kind and in the right circumstances) is a virtue […]; a theory, and the practice that it theorizes, must be as messy as the world with which it has to deal" (*ibid.*, p. 9).

While it is the very task of the law to identify, evaluate and reconcile competing values and interests, the concept of Reconciliation is not yet commonly employed in legal parlance; save in relation to criminal sentencing, there is relatively little use made of it as a fundamental concept of law. The political scientist Daniel Philpott has concluded:

> Reconciliation […] has played little role in Western law since it emerged in the Middle Ages and is not a major theme in the Greek and Roman sources of Western laws and thought or in the natural law tradition of ethics. Only shards of reconciliation can be found in the major philosophers of the modern liberal tradition […] Reconciliation has little status in international law. Among international organisations, Western governments, international lawyers, and human rights activists, the liberal peace is far more dominant.[13]

To achieve that liberal peace, disregard of Reconciliation must be changed.

Duff and Green further recognise that "Conflict is ineliminable in our world of different, conflicting, and irreconcilable values between which only uneasy compromise rather than reconciliation is possible".[14]

Malcolm Thorburn's chapter "Criminal Law as Public Law" cites the utilitarian suggestion that rehabilitation, which may be seen as a component of Reconciliation, is among justifications for the criminal law. A footnote refers to a "widespread currency", especially in American indefinite sentencing schemes, of the "rehabilitative ideal" which, however, "has been in precipitous decline in recent years".[15] But there is no contention that a philosophy of Reconciliation overarches the whole of the law, including international criminal law.

That is, however, the present thesis. Even in the Rome Statute of the International Criminal Court ('Rome Statute'), international criminal law has never been codified by reference to fundamental philosophical criteria; hence Duff and Green's "messy outcome of the variegated, shifting forces that determined its historical development".

To be employed as a legal concept, 'Reconciliation' must be seen in the relevant context and given broad scope. While in other spheres, the term is used in a variety of senses, sometimes narrowly, I contend that in

[13] Daniel Philpott, *Just and Unjust Peace: An Ethic of Political Reconciliation*, Oxford University Press, 2015, p. 7.

[14] Duff and Green, 2011, p. 9, see *supra* note 12.

[15] *Ibid.*, p. 21, fn. 2.

the practice of international criminal law, 'Reconciliation' should not be confined, as some argue, to its most extreme definition: that of converting hostility and hatred to love. Rather, it should embrace a restoration or improvement in whole or in part of former relations, through phases that may include suspicion, apprehension, resistance, co-existence, tolerance, increasing confidence and trust; it can also describe a process undertaken to achieve any such advances. It may do so over time – even, as has been seen in Germany, generations.

The fact that, to date, the use of 'Reconciliation' in the practice of international criminal law has been quite limited may have been due to over-ambition – denial that there can be 'reconciliation' until reaching the final phase of mutual love between former adversaries, accompanied by disappointment at earlier failure to have done so. But the practice of law must be sternly practical and, for that reason, take an expansive view of human realities. The alternative is to underrate what may make a valuable contribution to improvement. In the case of international criminal law, that requires not only acknowledging the ideal of traversing the entire spectrum from hatred to love, but also recognising as reconciliatory any honest and practical effort to achieve some incremental shift across it.

Law can have many variants, often reflecting distinctive local values that warrant respect.[16] The ambition of international law has been stated by Judge Greenwood, formerly of the International Court of Justice ('ICJ'):

> International law is not just a series of fragmented specialist and self-contained bodies of law, each of which functions in isolation from the others; it is a single, unified system of law.[17]

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[16] H. Patrick Glenn, *Legal Traditions of the World*, 5th edition, Oxford University Press, 2010, p. 378 (focused on domestic laws). A further point on respect was made by Rammohun Roy (1774–1833), in his unanswerable letter to the Governor of India, Lord (William) Amherst:

> The present rulers of India, coming from a distance of many thousand miles to govern a people whose language, literature, manners, customs and ideas are almost entirely new and strange to them, cannot easily become so intimately acquainted with their real circumstances as the natives of the country are themselves.

Rammohun Roy, "Letter on Education", in Karan Singh (ed.), *A Treasury of Indian Wisdom: An Anthology of Spiritual Learning*, Penguin Books India, 2010, p. 147.

[17] ICJ, *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)*, Compensation owed by the Democratic Republic of the Congo to the Republic of Guinea, Declaration of Judge Greenwood, 19 June 2012, p. 394, para. 8, cited by Michael Wood, Special Rapporteur, *First report on formation and evidence of customary international law*, UN Doc. A/CN.4/663, 17 May 2013, para. 19 (https://www.legal-tools.org/doc/0x3xr7).

The concept is in keeping with the role of the UN, in particular, the "friendly relations among nations based on respect for the principle of equal rights" and "international cooperation" of Article 1 of the UN Charter. But in international criminal law, we have much to do to achieve it, starting with its foundations.

Good criminal law is both a formal expression of society's fundamental moral values[18] and a practical vehicle for giving them effect. International criminal law is concurrently a realistic, visionary and ambitious, albeit partially developed, post-World War II development; it may need to cross the national borders allocating sovereignty to individual States. If its immense potential for advancing international criminal law is to be realised, Reconciliation's wide range of senses need to be made specific. In the present analysis, it includes four different but related concepts:

1. *End*: the foundation and ultimate purpose of international criminal law – the end of restoring or increasing harmony among those who have suffered and created grave discord;
2. *Guide*: a guide to processes for realising that purpose;
3. *Processes*: those processes; and
4. *Measure*: a measure of whether that purpose has been achieved.

Discussion of the relationship between international criminal law and Reconciliation must consider the wide range of opinion as to what each of these four concepts means, which may legitimately differ according to discipline and personal experience. There has been much recent writing about 'reconciliation' by writers in various disciplines.[19] But because legal concepts have no useful meaning outside the particular rules under discussion,[20] in the practice of law, abstractions can be of little help if removed from their particular context and unexplained.[21] The present analysis uses

[18] For example, "criminal punishment has an essentially moral base and lesser moral fault requires recognition": Court of Appeal of New Zealand, *The Queen v. Michael Bridger*, Judgment, 12 December 2002, [2002] NZCA 298, [2003] 1 NZLR 436 (CA), para. 42.

[19] See, for example, UN Office of the High Commissioner for Human Rights ('UNHCHR'), *Transitional Justice and Economic, Social and Cultural Rights*, United Nations Publication HR/PUB/13/5, Geneva, 2014, pp. 6–8 (https://www.legal-tools.org/doc/28y0nv); and references in Vern Neufeld Redekop and Thomas Ryba (eds.), *René Girard and Creative Reconciliation*, Lexington Books, 2014, pp. 6–8.

[20] See *infra* Section 5.8.2.7. and *infra* note 127.

[21] For instance, "[t]here is in fact no such thing as the company as such, no *ding an sich*, only the applicable rules", The Judicial Committee of the Privy Council, *Meridian Global Funds*

'Reconciliation' not as requiring an absolute result, but in the modest practical sense of seeking to shift a relationship further towards an improved position. It is based on a common lawyer's exposure as counsel and judge to domestic criminal law, that of a generalist judge required to interpret and apply the developing international criminal law, and on personal perceptions of the part such notion of Reconciliation can play in improving international criminal law's performance.

International criminal courts potentially "hold great political appeal due to their moral authority as apolitical, impartial legal actors that render credible justice".[22] Beyond the practical power of reaching a verdict and acquitting, or convicting and imposing sentence, lie the judges' authority and responsibility to evaluate and pronounce definitive judgment upon whether society's standards have been infringed. Such authority depends not only on the letter of the enabling law – domestic or international – but on society's acceptance that the court has acted properly, not least in making an accurate identification and application of the relevant moral values of that law.

Both as relevant to other values and, I argue, in its own right, the concept of Reconciliation is outstanding. That is not to decry other great values, among them truth, due process, judicial candour, and expedition. My contention is rather that, individually and together, all are contributors to Reconciliation, and thus to decency and human dignity. Enhanced understanding of that concept's potential can educate citizens and thus their politicians as to how, together with non-legal means, international criminal law can help a world in urgent need of betterment.

The analysis resulting in this chapter reveals that Reconciliation as a value – embracing the foregoing four concepts of end, guide, process and measure – can be drawn upon in a variety of specific contexts both within and beyond the criminal law.[23] For instance, conduct that adds to murder a threat to society, presents an extreme challenge to Reconciliation, which

Management Asia Limited v. The Securities Commission of New Zealand, Judgment, 26 June 1995, [1995] UKPC 26, [1995] 2 AC 500 per Lord Hoffmann, para. 10.

22 Victor Reskin and Mieczyslaw P. Boduszynski, "The Rise and Fall of the ICC in Libya and the Politics of international Surrogate Enforcership", in *International Journal of Transitional Justice*, 2016, vol. 10, no. 2, pp. 272, 278. The same may be said for domestic courts.

23 See, for example, Enrique Sánchez and Syria Rognvik, *Building Just Societies: Reconciliation in Transitional Settings*, United Nations Workshop Report, Accra, Ghana, 5–6 June 2012, pp. 2–3.

derives from values of mutual concern for human safety and dignity; it is classified as terrorism; and is measured as justifying a stern sentence. By contrast, conduct, or a past record, evidencing a real attempt to reconcile may be measured as justifying mitigation or even withholding of sentence.

In law, aside from the sentencing just mentioned, the term is perhaps most familiar when linked to other values, as in 'peace and reconciliation'[24] and 'truth and reconciliation'.[25] Yet, following discord, peace entails – or is a step *en route* to – the co-existence that is an important condition, component part and example of one aspect of Reconciliation; just as truth is a contributor to both peace and the ultimate of an absolute Reconciliation entailing mutual trust, friendship and sometimes even love.

Generally, until now, in law 'Reconciliation' has been used by itself either only in particular contexts, such as sentencing, or spasmodically. Such limitation parallels that in the related field of transitional justice, where "there has been no widespread move to include root causes"[26] of breach of the universal human rights legal framework whose purpose is to protect human dignity.[27]

'Reconciliation' is often recognised as needed to advance or complete the work of other values, such as 'rule of law' and 'justice': by themselves, the former can be sterile and unjust; the latter cold and clinical. Reconciliation adds to each a vital dimension of the warmth of reciprocal human feelings.

Yet, when analysed, Reconciliation can be seen as no mere narrow term of art, or adjunct of other values, but a word of broad meaning that embraces concurrently, and across a wide spectrum, the four concepts – end, guide, processes and measure – already identified.

Although – and indeed because – there has been only limited recognition, by both judges and scholars, of Reconciliation as a basic principle of international criminal law, Reconciliation, with its four concepts, should now be recognised in its own right. It is an – and indeed the ultimate – entrée to the decency and human dignity required if international criminal law is to 'do right', as I will argue is among its major functions (Section 5.10.).

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[24] Such as the European Union Programme for Peace and Reconciliation in Northern Ireland and the Border Region of Ireland (started in 1995).

[25] See *infra* text accompanying note 139.

[26] UNHCHR, 2014, p. 1, see *supra* note 19.

[27] *Ibid.*, p. 7.

The present formulation (that there is need to identify those four distinct yet closely related themes: stating a general principle (end); showing how to give it practical effect in particular cases (guidance); provisionally applying the principle (process); and then evaluating the practice against the principle (measure)) is what any court must do in delivering justice. It must focus on – and not be daunted by – the size of a relevant principle. It must keep it constantly in mind; seek to apply its generality in the practical decisions to be made during a trial; and regularly, most importantly when considering its decision, stand back and evaluate the options against the principle.

The proposed reappraisal of Reconciliation on such fourfold basis will contribute, I contend, both to understanding the character of international criminal law and to realising its potential.

5.3. Approach

To apply Reconciliation fully requires a broad vision. In 1951, Hannah Arendt observed that the "prelude to Nazism was played out over the entire European stage".[28]

If writing today, she would have regard to the modern weapons and, importantly, the communications which extend the area of concern from that European stage to embrace the planet. She added what she called:

> [a] distinctly modern note […] struck in Zola's Letter to France of 1898. "We hear on all sides that the concept of liberty has gone bankrupt. When the Dreyfus business cropped up, this prevalent hatred of liberty found a golden opportunity […] Don't you see that the only reason why Scheurer-Kestner [vice-president of the Senate, who supported Dreyfus] has been attacked with such fury is that he belongs to a generation which believed in liberty and worked for it? Today one shrugs one's shoulders at such things […] Old greybeards,' one laughs, 'outmoded greathearts.'[29]

History makes clear the consequences of failure to believe in and work for liberty of every person. The function of international criminal law is to provide systemic resistance to the forces Zola and Arendt experienced and which confront us today. The topic of Reconciliation simultaneously

[28] Hannah Arendt, *The Origins of Totalitarianism*, Houghton Mifflin Harcourt, 1973, p. 94; Hannah Arendt, *The Origins of Totalitarianism*, Penguin Modern Classics, 2017, p. 122.

[29] *Ibid*.

offers a principle, a standard for response to such forces, a future guide to and measure of how it can be and is given effect. It is both (a) a large and virtuous foundational concept of international criminal law, offering its own fourfold contribution to the rule of law; and concurrently (b), a judicial policy that guides the formation and application of legal goods in international criminal law, as discussed in other chapters of this book (the recognised *broad* legal goods of 'humanity' (in the category of crimes against humanity), 'the continued existence of groups as such' (genocide), 'territoriality' and 'political independence' (aggression), as well as the *narrower* legal goods of 'life', 'personal integrity' and the like that contribute to human dignity).

In addition to being fundamental to the *lex lata* of current international criminal law, Reconciliation provides a compass for the *lex ferenda* – the making and development of future and better international criminal law.

The overarching reach of Reconciliation was described by the Supreme Court of India in *Dev Sharan v. State of Uttar Pradesh* (2011), a leading constitutional case about compulsory acquisition of land:

> The open-ended nature of our Constitution needs a harmonious reconciliation between various competing principles and the overhanging shadows of socio-economic reality in this country.[30]

I argue for an equally broad approach to Reconciliation in the practice of international criminal law – by both lawyers and others. To recognise and promote the decency that achieves human dignity it embraces all aspects of moving from estrangement towards achieving good relations. And it does so across time and distance.

5.4. Concepts of Reconciliation: Some Context

Reconciliation is a term familiar to, among other disciplines, theology, history, philosophy,[31] literature and social science. Its different specific concepts contain a common theme of profound importance to humanity.

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[30] India Supreme Court, *Dev Sharan and Ors. v. State of U.P. and Ors.*, Judgment, 7 March 2011, (2011) 4 SCC 769 (Bench: Justice G.S. Singhvi and Justice Asok Kumar Ganguly), where the compulsory acquisition of land for construction of district jails was quashed on the ground that there was no valid ground or justification to exclude the enquiry required by Section 5A of the Land Acquisition Act of 1894.

[31] Cf. Philpott, 2015, see *supra* note 13.

The meaning in English of 'reconciliation' depends on its context. In a general sense, it includes the "action of restoring estranged people or parties to friendship; the result of this; the fact of being reconciled".[32] I have noted that in an overlapping sense reconciliation also embraces the elements that can achieve it.

It derives from the classical Latin '*reconciliatio*' (restoration of good relations) and Anglo-Norman and Middle French '*reconsiliacion/réconciliation*' (action of restoring humanity to God's favour or restoring estranged people or parties to friendship).[33]

The concept of Reconciliation is ancient. Greek mythology has resonance for modern antagonisms and their resolution. Recounting the hostilities between the Achaeans and the Trojans following the abduction by Paris of Helen, wife of King Menelaus of Sparta, the *Iliad* describes the intervention by the goddess Athena in response to the slaughter of Achaeans by Paris's brother Hector. She assented to the proposal of the god Apollo, who favoured the Trojans, for single combat between Hector and an Achaean, which saw Ajax selected by lot. After inconclusive heavy combat, Homer reports Ajax saying to Hector:

> Heaven has vouchsafed you stature and strength and judgment […] Let us for this day cease fighting; hereafter we will fight anew till heaven decide between us, and give victory to one of to the other […] Let us […] exchange presents that it might be said among the Achaeans and the Trojans, 'They fought with might and main, but were *reconciled* and parted in friendship.'[34]

Later, when the Achaean hero Achilles sulked in his tent, furious that his king Agamemnon had taken from him the beautiful captive Briseis, the old knight Phoenix counselled Achilles:

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[32] 'Reconciliation', in *Oxford English Dictionary Online* (available on its web site). It also has theological senses: (i) Christian Church: "The action of restoring humanity to God's favour, esp. as through the sacrifice of Christ; the fact or condition of a person's or humanity's being reconciled with God"; and (ii) Roman Catholic Church: The sacrament of reconciliation is a "sacrament in which confession is made, penance is given, and absolution is granted by the priest".

[33] *Ibid.*; Josette Rey-Debove and Alain Rey, *Le Nouveau Petit Robert*, Le Robert Publishing House, 2010: « Action de rétablir l'amitié (entre des personnes brouillées) ».

[34] Homer, *The Iliad*, Dover Publications, Inc., 2012, p. 81. The translation corresponds to Samuel Butler (Jonathan Cape, London, 1925).

> I say battle with your pride and beat it; cherish not your anger for ever; the might and majesty of heaven are more than ours, but even heaven may be appeased; and if a man has sinned he prays the gods, and *reconciles* them to himself by his piteous cries and by frankincense, with drink-offerings and the savour of burnt sacrifice.[35]

And with the astute guidance of Odysseus, the advice was taken and given effect:

> [Achilles:] It has been well for Hector and the Trojans, but the Achaeans will long indeed remember our quarrel. Now, however, let it be, for it is over. If we have been angry, necessity has schooled our anger. I put it from me: I dare not nurse it for ever; therefore, bid the Achaeans arm forthwith that I may go out against the Trojans […].[36]

Thus did he speak, and the Achaeans rejoiced in that he had put away his anger.

> Odysseus said [to Achilles] "[…] let him [Agamemnon] swear an oath before the Argives that he has never gone up into the couch of Briseis, nor been with her after the manner of men and women; and do you, too, show yourself of a gracious mind; let Agamemnon entertain you in his tents with a feast of *reconciliation*, that so you may have had your dues in full […] It is no disgrace even to a kind that he should make amends if he was wrong in the first instance".[37]

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35 *Ibid.*, p. 105 (emphasis supplied).

36 *Ibid.*, p. 231.

37 *Ibid.*, p. 233. Likewise, *Herodotus*, 8.79:

> As the generals disputed, Aristides son of Lysimachus, an Athenian, crossed over from Aegina. Although he had been ostracized by the people, I, learning by inquiry of his character, have come to believe that he was the best and most just man in Athens. This man stood at the assembly and called Themistocles out, although he was no friend of his, but his bitter enemy. Because of the magnitude of the present ills, he deliberately forgot all that and called him out, wanting to talk to him. He had already heard that those from the Peloponnese were anxious to set sail for the Isthmus, so when Themistocles came out he said, "On all occasions and especially now our contention must be over which of us will do our country more good. I say that it is all the same for the Peloponnesians to speak much or little about sailing away from here, for I have seen with my own eyes that even if the Corinthians and Eurybiades himself wanted to, they would not be able to escape. We are encircled by the enemy. Go in and indicate this to them".
>
> Herodotus, *Herodotus*, book VIII, translated by A.D. Godley, Harvard University Press, Cambridge, 1920 (footnotes omitted). On the importance of Reconciliation in classical Greek sources, see Emiliano J. Buis "Between *Isonomia* and *Hegemonia*: Political Com-

Likewise, in Roman mythology, there is the reconciliation between Juno and Jupiter at the end of the *Aeneid*.[38]

Both the Old and the New Testaments use 'reconciliation'. The former[39] uses it essentially to describe a solemn religious process – as making reconciliation by way of burnt sacrifice upon an altar. The latter tends to emphasize what may be termed common parlance in the sense of restoring estranged parties to friendship: being reconciled with thy brother[40] or one's husband[41] or enemy,[42] and being reconciled to God.[43]

The *Qur'án* speaks of reconciliation among believers, of claimants under a will, between spouses, following divorce, by way of philanthropy and among mankind.[44]

Among the shards of reconciliation in Philpott's conclusion as to the paucity of its use of in Western law and among major modern liberal philosophers,[45] these may be noted in England ideas of Thomas Hobbes (1588–1679). According to Hobbes, people are dependent on the "artificial man",[46] the "Leviathan", to whom they grant absolute power. Since everyone is in fear of that 'Leviathan', he guarantees social order and inhibits the "war of all against all".[47] He stated:

plexities of Transitional Justice in Ancient Greece", in Morten Bergsmo, CHEAH Wui Lin, SONG Tianying and YI Ping (eds.), *Historical Origins of International Criminal Law: Volume 3*, TOAEP, Brussels, 2015, pp. 27-61 (http://www.legal-tools.org/doc/6474f8/).

38 Virgil, *Aeneid*, 12.781–82. For a more comprehensive study of ancient Reconciliation, see the collective volume edited by E.P. Moloney and Michael Stuart Williams (eds.), *Peace and Reconciliation in the Classical World*, Routledge, 2017.

39 *The Bible*, Leviticus 8:15, 2 Chronicles 29:34, Ezekiel 45:15 and 45:17, Daniel 9:24, and Hebrews 2:17.

40 *Ibid.*, Matthew 5:24.

41 *Ibid.*, 1 Corinthians 7:11.

42 *Ibid.*, Colossians 1:21.

43 *Ibid.*, Romans 5:10, 2 Corinthians 5:18, 5:19 and 5:20, and Ephesians 2:16.

44 *Qur'án*, 2:182, 4:128, 49:9, 2:224, 9:60 and 2:228.

45 Philpott, 2015, see *supra* note 13.

46 Thomas Hobbes, "Introduction", in *Leviathan*; reprinted in Sir William Molesworth, Bart. (ed.), *The English Works of Thomas Hobbes of Malmesbury*, John Bohn, London, 1839, vol. III, part 1; reprinted in Reink Books, 2017, p. 2.

47 *Ibid.*, part 1, chap. 14, p. 64.

> Men are apt to weep that prosecute revenge, when the revenge is suddenly stopped or frustrated by the repentance of the adversary; and such are the tears of *reconciliation*.[48]
>
> […] no man giveth but with intention of Good to himself; because Gift is voluntary; and of all Voluntary Acts, the Object is to every man his own Good; of which if men see they shall be frustrated, there will be no beginning of benevolence, or trust; nor consequently of mutual help; nor of reconciliation of one man to another; and therefore they are to remain still in the condition of *War*; which is contrary to the first and Fundamental Law of Nature, which commandeth men to *Seek Peace*. The breach of this Law is called *Ingratitude*; and hath the same relation to Grace, that Injustice hath to Obligation by Covenant.[49]

Hobbes[50] also included:

> Chapter III OF RECONCILING, OR PACIFYING ANGER
>
> *Reconciliation* is the appeasing of anger.
>
> Those to whom men are easily reconciled, are: such as have not offended out of neglect. And such as have done it against their will. And such as wish done the contrary of what they have done. And such as have done as much to themselves. And such as confess and repent. And such as are humbled […]
>
> […] *Reconcileable* are: such as are contrarily affected to those, whom we have said before to be easily angry. […] And such as have given their anger time.
>
> Men lay down their anger for these causes. Because they have gotten the victory. Because the offender has suffered more than they meant to inflict […].
>
> Whosoever therefore would *assuage* the anger of his *auditor*, must make himself appear such as men use to be *recon-*

[48] Thomas Hobbes, *The Elements of Law*, part I, chap. 9, para. 14; reprinted in Deborah Baumgold (ed.), *Three-Text Edition of Thomas Hobbes's Political Theory: The Elements of Law, De Cive and Leviathan*, Cambridge University Press, 2017, p. 55.

[49] Hobbes, 1839, vol. III, part 1, chap. 15, para. 16; reprinted in Reink Books, 2017, p. 138, see *supra* note 46.

[50] Thomas Hobbes, *The Whole Art of Rhetoric*, book II, chap. III; reprinted in Sir William Molesworth, Bart. (ed.), *The English Works of Thomas Hobbes of Malmesbury*, John Bohn, London, 1845, vol. VI.

> *ciled* unto: and beget in his *auditor* such opinions as make him *reconcileable*.[51]

In *The Introduction to Dutch Jurisprudence*,[52] Hugo de Groot (Grotius) (1583–1645) described the old Dutch law:

> International institutions
>
> Chapter XXXII
>
> Of Obligations from Crime
>
> […]
>
> Sect. VII
>
> […] reconciliation [following murder] upon the open grave, in the presence of sworn arbitrators […] between the relatives on both sides. However, in subsequent times, a remarkable alteration was made, and the punishment, as a consequence, appertained almost entirely to the Crown.[53]
>
> CHAPTER XXXXIII
>
> Of Crimes Against Life
>
> Sect. III
>
> [T]he slayer is properly bound to make compensation to the widow [and] children who were usually supported by the labour of the deceased […].
>
> [A]lthough, at the present day, the infliction of punishment for homicide, and for other crimes, properly and especially belongs to the Crown officers if the Sovereign forgives the crime, the spouse, children, or relatives of the deceased must be summoned to oppose the Writ of Pardon […] as they may think fit, or [438] otherwise to be reconciled with the criminal on reasonable terms. In this reconciliation they may […] besides the above compensation, insist upon a confession of guilt; […] and to give something to them or the poor for reconciliation-money.[54]

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51 In response to Hobbes, Montesquieu (1689–1755) authored *De l'Esprit des Lois* ("the Spirit of the Law") (G.F. Flammarion, 1979), also stressing that peace was the first natural right of man, but emphasizing the weakness of each individual alone. He concluded that peace is attainable only if the power of the state is not given to a single authority but divided to ensure a balance of power.

52 Hugo Grotius, *The Introduction to Dutch Jurisprudence*, translated by Charles Herbert, John Van Voorst, London, 1845.

53 *Ibid.*, p. 432.

54 *Ibid.*, p. 437.

> Sect. V
>
> […] in the punishment as well as the reconciliation, a great distinction is to be made between cases where homicide has been effected by assassination, that is, secretly and treacherously, or where the criminal was aware of what he was doing, and cases where the party was slain unaware; or where the homicide took place in a personal conflict […]; or where in short the homicide did not occur from passion, but from neglect.

An analogous process emerged in the South Pacific. In *Attorney General v. Matalavea* (2007),[55] on an appeal by the Attorney General of Samoa against the inadequacy of a manslaughter sentence, the Court of Appeal was required to consider whether excessive weight had been placed by the Chief Justice on the customary reconciliation practice of '*ifoga*', applied alongside the modern Criminal Procedure Act 1972. In dismissing the appeal, it stated:

> *Ifoga*
>
> 26. According to authority cited by Cluny and La'avasa MacPherson "The *Ifoga*: the Exchange Value of Social Honour in Samoa" Journal of the Polynesian Society Vol 114 Issue 2 June 2005 page 109, the word *ifoga* means a ceremonial request for forgiveness made by the offender and his *aiga* (family) to those injured. It is performed by public act of self-humiliation, accompanied by the gift of fine mats, speeches and food. Its practice, recognised by the Chief Justice in *Police v Tautunu*, is a powerful institution for reconciliation. It has been acknowledged also by the New Zealand courts in respect of serious disputes among New Zealanders of Samoan descent: *R v Talataina* (1991) 7 CRNZ 33 (CA); *R v Maposua* [2004] NZCA 212. It is a sophisticated and established method of reconciliation which includes the provision of amends now recognised in simple form by s 10 of the New Zealand Sentencing Act 2002 […].[56]
>
> 27. As an institution for restoring relations among the wider family groups the purpose of *ifoga* overlaps with but does not supersede the court-based processes of the criminal law. Care

[55] Court of Appeal of Samoa, *Attorney General v. Matalavea*, Judgment, 14 September 2007, [2007] WSCA 8.

[56] High Court of New Zealand, *Zhao v. The Police*, HCHM AP 32/03, 6 June 2003: "Court must take into account offer, agreement, response, or measure to make amends".

> must be taken by the Court to steer the narrow passage between disregarding *ifoga*'s valuable role as a contributor to reconciliation in Samoan society and, as counsel for the Attorney-General submitted, placing such weight upon it as would permit preferential treatment of those whose families can compared with those who cannot perform *ifoga*.

Indeed, the task of the judges in that case, of bringing together the ancient values and institutions of Samoa and its modern criminal legislation, is another example of reconciliation in action.

There has been a comparable evolution in South Africa, with the indigenous concept of '*ubuntu*', appearing in the epilogue to the Interim Constitution of South Africa (1993):

> 251 […] The adoption of this Constitution lays the secure foundation for the people of South Africa to transcend the divisions and strife of the past, which generated gross violations of human rights, the transgression of humanitarian principles in violent conflicts and a legacy of hatred, fear, guilt and revenge.
>
> These can now be addressed on the basis that there is a need for understanding but not for vengeance, a need for reparation but not for retaliation, a need for ubuntu but not for victimisation.

This is not the occasion to trace the use of such a broad and commonly used term as reconciliation through non-legal disciplines. It is sufficient to record one's personal assessment of an overarching message of the centrality of reconciliation to human relationships.[57]

Whether Reconciliation is to be seen as needed to modify a natural state of humanity as "solitary, poor, nasty, brutish, and short"[58] and a "warre of every man against every man",[59] or rather to seek to *restore* "a

[57] A theme at the heart of each of Christ's Sermon on the Mount (*the Bible*, Luke 6:27–6:35); of the debate as to Prospero's behaviour (see Amanda Mabillard, *Forgiveness and Reconciliation in Shakespeare's The Tempest*, Shakespeare Online, 15 December 2010, available on its web site); and of de Gaulle's enigmatic "Je vous ai compris" followed by "I, de Gaulle, open to them [the F.L.N.] the doors of reconciliation" as he sought to bring an end to the disastrous civil war in Algeria (Alistair Horne, *A Savage War of Peace: Algeria 1954-1962*, The Viking Press, New York, 1978, p. 301).

[58] Hobbes, *Leviathan*, chap. 13, 1839/2017, see *supra* note 46.

[59] *Ibid*.

prelapsarian Eden of astonishing plenitude",[60] may be left to professional philosophers and theologians. Since the present focus is on Reconciliation in international criminal law, Section 5.8.2. touches on the creation and development of international criminal law, which is at present largely bereft of the potential for systematic overall reform available within domestic legal systems.

I am arguing that, since Reconciliation in the context of criminal law concerns principle and practicality in restoring human relations following discord, it should be seen as including all steps to that end, as well as the end itself. Hence my contention that partial Reconciliation can be of value either by itself or as a step towards Reconciliation in full; it should be understood to embrace every significant act and tendency towards substituting peace and security for disharmony.[61]

Reconciliation is a mighty concept. In the ultimate, it can provide hope and even means of converting hated enemies into respected and indeed loved friends; in abstract and literal terms, translating war to peace. In 1934, Mustapha Kemal Ataturk wrote the famous words, recorded on distant war memorials, that reached out to the mothers of the Australian and New Zealand troops whom he had defeated in the attempted invasion of Gallipoli:

> Those heroes that shed their blood
> And lost their lives,
> You are now lying in the soil of a friendly country.
> Therefore rest in peace.
> There is no difference between the Johnnies
> And the Mehmets to us where they lie side by side
> Here in this country of ours,
> You, the mothers,
> Who sent their sons from far away countries
> Wipe away your tears.
> Your sons are now lying in our bosom
> And are in peace
> After having lost their lives on this land they have

[60] "Prelapsarian", in *Oxford English Dictionary Online*.

[61] See *supra* text following note 14. The law's experience expressed in the maxim *omne maior continent in se minus* – the greater includes the lesser – answers the contrary argument discussed in *infra* text before note 90. See R.H. Kersley, *Broom's Legal Maxims*, 10th edition, Sweet & Maxwell, London, 1939, p. 110.

> Become our sons as well.[62]

Since 'Reconciliation' connotes both 'end' and 'process' (as well as 'guide' and 'measure'), it is as well not to confuse the two. Certainly, in an extreme form, it can describe transformation of hatred to love. But in the present context, failure to achieve ultimate transformation does not mean that effort towards it has failed.

An Indian friend introduced me to Guru Gobind Singh, who in the seventeenth century wrote:

> Some call themselves Hindus
> Others call themselves Mussalmans […]
> And yet man is of one race all over the world.[63]

This and similar formulations, across time and space, point to a principled and practical way to serve the ultimate purpose of international criminal law: to recognise and promote the decency that achieves human dignity.

Given that Reconciliation has not so far been generally acknowledged and applied in law as being itself a fundamental value,[64] what is the problem with doing just that?

5.5. Why Has Reconciliation Not Been Recognised as the Basis of International Criminal Law?

More specifically, although commonly used in the sense of restoring estranged parties to friendship, Reconciliation has yet to be defined as a concept in international law.[65] I have sought to describe it. Judge-made international law is prepared to use similarly broad concepts to do justice and acknowledge that upon "a foundation of very general precepts of justice and good faith" exists, at least in disputes over delimitation of the continental shelf, "a rule of law which itself requires the application of equitable principles".[66] Why, then, has Reconciliation not already been expressly accepted as fundamental to international criminal law?

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62 Australian War Memorial, "Atatürk (Mustafa Kemal)" (available on its web site).

63 "Kon bhei mundai sanyasi", in Karan Singh (ed.), *A Treasury of Indian Wisdom: An Anthology of Spiritual Learning*, Penguin Books India, 2010, p. 137.

64 Philpott, 2015, see *supra* note 13.

65 As is accurately stated by Mirzaagha, 2016, see *supra* note 3.

66 ICJ, *North Sea Continental Shelf (Federal Republic of Germany/Netherlands)*, Judgment, 20 February 1969, p. 47, para. 85 (http://www.legal-tools.org/doc/ea8a54/).

There is nothing especially novel about the idea of Reconciliation. We all know what it means: "The action of restoring estranged people of parties to friendship; the result of this; the fact of being reconciled".[67] I have described the elements that can achieve this.

To perform law's task of protecting people from abuse, it must draw on the strengths of its communities. These include, or should include, those responsible for making and for applying law that is just and fair, so differences can be resolved and people reconciled.

5.5.1. Some Examples

A notable example is the Olympian decision in *Kesavananda Bharati v. State of Kerala* (1973) ('*Kesavananda*') of Justice Hans Khanna, whose vision was also seen in a prior dissent that was endorsed in the Indian privacy case. In *Kesavananda*, his reconciliation was between the Government of India, which was claiming extensive powers to make unprecedented laws and its citizens. Focusing on the future of the people of India in the light of lessons of history internationally, in a judgment of extraordinary scholarship and vision, he construed the powers of amendment of the Constitution of India in a manner that accorded adequate power to decision-makers from time to time to make amendments permitted by democratic process, but never beyond the limits of retaining the basic structure and essential features of the Constitution, which "reflects the hopes and aspirations of a people".[68] So, while acknowledging that right to property does not pertain to basic structure or framework of the Constitution,[69] he held that part of a proposed amendment "contains the seed of national disintegration and is invalid" by purporting to exclude judicial review of the legality of legislation.[70]

Other jurisdictions and jurists also display an ethos of Reconciliation helping the law to perform its task. Consider Ulpian, the third century A.D. jurist, who wrote over 40 percent of Justinian's *Digest of Roman Law*, on which the jurisprudence of four continents is founded and whom his biographer called, in a slave society, with particular emphasis on his notion of

67 'Reconciliation', in *Oxford English Dictionary Online*.

68 India Supreme Court, *Kesavananda Bharati v. State of Kerala*, Judgment, 24 April 1973, (1973) 4 SCC 255, para. 1491.

69 *Ibid.*, para. 1599(viii).

70 *Ibid.*, para. 1599(xiv).

equality of slaves with free men,[71] a "Pioneer of Human Rights";[72] Lord Earl Murray (Earl of Mansfield), creator of English commercial law and well familiar with property values, who nonetheless granted habeas corpus to the slave held in chains on a ship in the Thames;[73] Chief Justices Earl Warren, who led his court to decide *Brown v. Board of Education of Topeka*,[74] and Anthony Mason, whose judgment in *Mabo v. Queensland (No. 2)*[75] as to aboriginal rights in Australia, preceded by judgments of Sir Robin (later Lord) Cooke in New Zealand,[76] is to comparable effect; Lord Tom Bingham whose judgment[77] insisting on equal treatment of foreigners who when suspected of terrorist crimes had been subjected to control orders, with British to whom such orders did not apply, was described by his successor Chief Justice Lord Nicholas Phillips[78] as the most impressive in his lifetime. While none of them would claim to have cured the systemic difficulties that caused the problems requiring their efforts, each rejected settled opinion in order to achieve justice for those to whom equal and decent treatment had been denied. Initiating a process and visualising an end of Reconciliation, they helped their fellow citizens to understand and appreciate both the principle requiring it and how in practice it might advance progress towards good relations.

As to what is required, Justice Albie Sachs, familiar personally with the opposite in apartheid South Africa, including his own imprisonment and mutilation, has expressed an over-arching theme:[79]

> Ultimately we can only have full reconciliation when conditions have been created where the full dignity of all South Africans is respected and everyone has equal life chances.

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71 He did not apply the logic of his vision to women.

72 Tony Honoré, *Ulpian: Pioneer of Human Rights*, Oxford University Press, 2002.

73 Court of King's Bench, *Somerset v. Stewart*, Judgment, 22 June 1772, (1772) 98 ER 499.

74 United States Supreme Court, *Brown v. Board of Education of Topeka*, Judgment, 17 May 1954, 347 U.S. 483.

75 High Court of Australia, *Mabo and Others v. Queensland (No. 2)*, Judgment, 3 June 1992, HCA 23, (1992) 175 CLR 1.

76 Among them, Court of Appeal of New Zealand, *New Zealand Maori Council v. Attorney-General*, Judgment, 29 June 1987, [1987] 1 NZLR 687.

77 United Kingdom, House of Lords, *A(FC) v. Secretary of State for the Home Department*, 16 December 2004, [2004] UKHL 56.

78 Nicholas Phillips, "Closed Material: Nicolas Phillips on the problems posed by the use of secret evidence", *London Review of Books*, 2014, vol. 36. no. 8, p. 29.

79 Albie Sachs, *The Strange Alchemy of Life and Law*, Oxford University Press, 2011, p. 85.

It is the task of international law, including international criminal law, to apply Sachs' vision across State borders and recognise that each life and everyone's dignity is equally precious. The fact that we are still near the beginning of the road to that destination makes it urgent to find, adopt and apply the philosophical foundations that should sustain its evolution.

Ulpian helps us formulate such philosophy. As summarised by Honoré,[80] while "it is a mistake to attribute to a lawyer a system of philosophy rather than a set of values",

> Ulpian shares with the Stoics the view that we are born free and equal […] humans form a community and relate to one another and to the gods by virtue of their power of reason. As Marcus Aurelius says, the law is […] common to all, and we are all citizens of a polity of a sort […] the universe is a kind of city, in which the whole race of men participate. From where else than from this common city is our mind, reason, and sense of law derived? Marcus is not describing the Roman constitution of his time but his universal city represents the ideal […].

This is echoed in Guru Gobind Singh's "man is of one race all over the world". That sounds like a formula of reconciliation which the law could use.

5.5.2. Other Opinions

Yet, a valuable recent research-based text *International Trials and Reconciliation: Assessing the Impact of the International Criminal Tribunal for the Former Yugoslavia*[81] challenges the relevance of reconciliation to international criminal law. Having examined the situations of which the International Criminal Tribunal for the former Yugoslavia ('ICTY') was seized and also engaged in extensive fieldwork, Dr. Janine Natalya Clark writes:

> Not only is there a fundamental dearth of empirical evidence to support claims that courts can promote reconciliation, but the very issue of whether they do in fact aid the process re-

[80] Honoré, 2002, p. 80, see *supra* note 72.

[81] Janine Natalya Clark, *International Trials and Reconciliation: Assessing the Impact of the International Criminal Tribunal for the Former Yugoslavia*, Routledge, New York, 2014. See also Jennifer Trahan, "Examining the Benchmarks by Which to Evaluate the ICTY's Legacy", in Milena Sterio and Michael P. Scharf (eds.), *The Legacy of Ad Hoc Tribunals in International Criminal Law: Assessing the ICTY's and the ICTR's Most Significant Legal Accomplishments*, Cambridge University Press, 2019, pp. 25–55.

> mains crucially under-explored. […] [T]his research seeks to establish whether the Tribunal has contributed to inter-ethnic reconciliation in the former Yugoslavia.[82]

Her conclusion is that:

> the ICTY has not contributed to inter-ethnic reconciliation in BiH, Croatia or Kosovo […].[83]
>
> If the ICTY has not contributed to reconciliation by delivering justice and establishing the truth, this does not necessarily mean that it has not done so in other ways; and thus it is important to examine everyday inter-ethnic relations in BiH, Croatia and Kosovo. These relations are largely peaceful (although less so in Kosovo), and coexistence largely exists. Rather than attributing this to the ICTY's work, however, it is argued that it is primarily domestic factors – including an overwhelming desire for peace, the exigencies of everyday life and simple pragmatism – which have made coexistence possible. Nevertheless, coexistence is distinct from reconciliation and in order to specifically measure whether the latter exists, this research uses the Reconciliation Matrix developed in Chapter 2. Assessed against the four key criteria of human security, deep contract, trust and mutual acceptance, it is submitted that there is no inter-ethnic reconciliation in BiH, Croatia or Kosovo […].
>
> This research is deeply sceptical about whether *any* international criminal court can aid reconciliation […] [T]his research asserts that reconciliation is not a realistic goal for international courts – and hence it should be neither part of their mandates nor something that we expect them to achieve. As [Kingsley Chiedu] Moghalu points out,[84] 'There is no empirical proof of any situation […] where trials in and of themselves created reconciliation'.[85]

The book's point was picked up in an introductory note by Geoffrey Robertson QC: "Judges should forget about writing history – they are not

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82 *Ibid.*, p. 2.

83 *Ibid.*, p. 6.

84 Kingsley Chiedu Moghalu, "Prosecute or Pardon? Between Truth Commissions and War Crimes Trials", in Chandra Lekha Sriram and Suren Pillay (eds.), *Peace versus Justice*? *The Dilemma of Transnational Justice in Africa*, University of KwaZulu-Natal Press, Scottsville, 2009, pp. 69–95, cited in Clark, 2014, see *supra* note 81.

85 Moghalu, 2009, see *supra* note 84, cited in Clark, 2014, p. 7, see *supra* note 81.

qualified – or producing reconciliation, which criminal justice cannot do, *other than as a precondition*" (italics added). So the book contends both that co-existence is distinct from reconciliation and that reconciliation is not a matter for the courts.

I take the author (but perhaps not Robertson QC, given his final phrase) to use 'reconciliation' as an absolute – there is no reconciliation unless and until perfect harmony has been restored. There can be no challenge to the author's entitlement to use 'reconciliation' in such a particular sense in recounting the results of her research. There is no monopoly on the use of 'reconciliation'. The transitional justice writer Pablo de Greiff describes 'reconciliation' as of "polysemic character".[86] Dr. Clark makes very clear the sense in which she uses the term.

My argument is, however, that a broader approach is more helpful for use as a legal tool in the practice of international criminal law.

Next is the fact that 'reconciliation' has been and is still used theologically, which has been suggested as a reason for reluctance to use it in the context of the social sciences;[87] that might be a reason for similar reluctance in international criminal law.

Others suggest that reconciliation is only one of several building blocks of a transitional justice policy – recognition, civic trust, reconciliation, democracy.[88] Others see it as merely one of numerous facets of an international criminal justice system, in which reconciliation can be seen as subordinate to the 'ultimate solution'.[89] Our preference is for broadening 'reconciliation' to include such solutions.

The recent popularisation of 'reconciliation' "within the secular academy and popular culture"[90] has been attributed to various causes, among them the need for a concept suited to describe a profound coming to terms with the rift caused by deep-seated conflict; the emergence of truth and reconciliation commissions in the 1990s and a burgeoning of academic literature since the turn of the millennium; the emergence of restorative

[86] Pablo de Greiff, "A Normative Concept of Transitional Justice", *Polit Orbis*, 2010, no. 50, pp. 17, 25.

[87] Redekop and Ryba, 2014, p. 5, see *supra* note 19.

[88] Pablo de Greiff, "Theorising Transitional Justice", in *Nomos: Transitional Justice*, 2012, vol. 51, pp. 66–78.

[89] See memorandum by Anda Scarlatt (on file with the author).

[90] See Redekop and Ryba, 2014, p. 5, see *supra* note 19.

justice; the many psychodynamics of victimisation; and the linking of religion and political reconciliation.[91] Each of these and other usages of the term can be both legitimate and valuable: there is no monopoly on the use of 'reconciliation' and, when made clear, each variant of its use can be informative. What matters is to identify what is meant by it in a particular context.

Another part of why Reconciliation has not been fully seized on must lie in the historical and current lack of system in the creation of international criminal law.[92] From its earliest expressions[93] – among them the criminalising of piracy[94] – to the jurisprudence of modern international criminal courts and tribunals, such treaties as the 1984 UN Convention Against Torture, Security Council resolutions under Chapter VII of the UN Charter, and the judgment of the ICJ in *Belgium v. Senegal*[95] and in *Ukraine v. Russian Federation*,[96] construing the term "any person" in the International Convention for the Suppression of the Financing of Terrorism as applying "both to persons who are acting in a private capacity as to those who are State agents" – development of international criminal law has been largely by way of *ad hoc* response to particular situations. It tends to lack the comprehensive juristic exercise, beginning with principles and applying them to the creation of particular crimes, which is the ambition of sophisticated modern domestic criminal codes. Instead, principles of international criminal law tend to be inferred, formulated and indeed created by judges in discharging their obligation to decide a case, rather than declare a *non liquet*,[97] and by scholars proposing and critiquing the law's develop-

91 *Ibid.*, p. 6.

92 Duff and Green, 2011, see *supra* note 12.

93 Judge Lokur took it back to 2000 B.C. with a prohibition of flared arrows designed to create gross injury.

94 Neil Boister, "Piracy and Maritime Safety Offences", in *id.*, *An Introduction to Transnational Criminal Law*, 2nd ed., Oxford University Press, 2018.

95 ICJ, *Questions relating to the obligation to prosecute or extradite (Belgium v. Senegal)*, Judgment, 20 July 2012 (http://www.legal-tools.org/doc/18972d/).

96 ICJ, *Application of the International Convention for the Suppression of the Financing of Terrorism and of thee International Convention on the Elimination of All Forms of Racial Discrimination (Ukraine v. Russian Federation)*, Preliminary Objections, Judgment, 8 November 2019, p. 558, para. 61 (https://www.legal-tools.org/doc/c6htxw/).

97 Julius Stone, "*Non liquet* and the Function of Law in the International Community", in *British Yearbook of International Law*, 1959, vol. 35; David Baragwanath, "The Interpretative Challenges of International Adjudication Across the Common Law/Civil Law Divide", in

ment,[98] as well as by States entering multipartite treaties, and the Security Council exercising its legislative capacity under Chapter VII of the UN Charter.

Certainly, as seen in Section 5.7. below, when one examines the decisions in international criminal law, there is no general acceptance of 'Reconciliation' as a particularly helpful concept, except in contexts such as 'truth and reconciliation' and 'truth and justice', and in the area of sentencing. To appreciate its potential, Reconciliation in law needs to be seen in its broader contexts, both of problems and of solutions.

As to problems, Prince Zeid Ra'ad Al Hussein, a former UN High Commissioner for Human Rights, warned in an address:

> A new era is unfolding before us. We find ourselves in a political earthquake zone. To many of us it appears the international system could become dangerously unstable. Fresh shocks are opening up unsuspected fault-lines, weight-bearing pillars are in danger of collapse. Our humanitarian colleagues are being asked to do the impossible, as the number and scale of raging conflicts continue to cause immense suffering and force unprecedented numbers of people to flee their homes. Violent groups of inconceivable brutality are still emerging from this furnace of wars. And countries in southern Africa are struggling with catastrophic drought. It is difficult to overstate the gravity of these and other crises, which we currently face.
>
> Yet rather than dealing with them, we seem to be turning away and looking inwards. These and other emergencies are accompanied by an intensifying breakdown in the basic consensus, embedded in key international and regional institutions, a consensus which has for decades maintained, supported and regulated the relations between states and their behaviour. That system was always flawed, but for more than 70 years it had the undeniable advantage of staving off the prospect of World War III. Now we are witnessing a sudden and massive erosion of the commitments underpinning it.[99]

Cambridge Journal of International and Comparative Law, 2014, vol. 3, no. 1, pp. 454 and 480.

98 As contemplated by Article 38(4) of the Statute of the International Court of Justice, 26 June 1945 (http://www.legaltools.org/doc/fdd2d2/).

99 Zeid Ra'ad Al Hussein, "The Impossible Diplomacy of Human Rights: Lecture by Zeid Ra'ad Al Hussein, United Nations High Commissioner for Human Rights, at Georgetown

As to solutions, the former High Commissioner continued:

> We need – all of us – to defend international law […] the very distillation and sum of human experience […] [E]clipsing all the other identities I may have, I want to feel human first […] I want you to feel this too.[100]

This expresses the ultimate purpose of international criminal law: to recognise and promote the decency that achieves human dignity.

Reconciliation is difficult because it requires an element of forgiveness of conduct that is seen as unforgivable. It is illustrated by the Parable of the Prodigal Son:[101] the demand of a graceless younger son for his share in his father's property; his squandering all he had on wild living, returning home starving and seeking treatment as a servant; the father's celebration of his return with gifts, music and dancing; the anger of the elder son returning from the work on the farm which he had always performed and seen the party; the father's response to him: "Son, thou art ever with me, and all that I have is thine. It was meet that we should make merry, and be glad: for this thy brother was dead, and is alive again; and was lost, and is found".[102]

But the alternative to the cost and effort required for Reconciliation, including on my argument the use of international criminal law, is the continuation of what is worse: enmity that can extend for generations.[103] Without Reconciliation, there is chaos.

Sir Simon Jenkins has argued:

University on the occasion of the presentation of the Trainor Award for Excellence in the Conduct of Diplomacy", *UNHCHR*, 16 February 2017 (http://www.legal-tools.org/doc/e71c87/).

100 *Ibid*.

101 *The Bible*, Luke 15:11-32.

102 The Parable expresses an archetype – what can happen between a father and son, after grave difference. A recent attempt at reconciliation was made by former President Clinton at the funeral of Martin McGuinness, Sinn Féin politician, who had been Deputy First Minister of Northern Ireland in the latest power-sharing coalition between the Catholic and the Protestant Democratic Unionists that fell apart in acrimony. President Clinton pleaded that the leaders of Northern Ireland's political parties should honour his memory by restoring the government that had shared power, see "McGuinness was a freedom fighter, not a terrorist", *BBC News*, 24 March 2017.

103 Consider William Shakespeare's *Romeo and Juliet* and Mark Twain's depiction in *Adventures of Huckleberry Finn* of the blood feud across generations between the Grangerford and Shepherdson families.

> The EU has been the framework that for half a century has held the balance between the conflicting interests of Europe's nationalities. It is that balance [...] that has traditionally underpinned the political stability of the continent and which, upset, has so often presaged disaster. […] [T]he continent clearly needs some new treaty or other conclave that embraces Britain, to replace the failed detritus of Rome, Maastricht and Lisbon […].[104]

Such a vision is required not only for Europe but globally. From a figure of 20 million just over a decade ago, the number of internal and external refugees globally has exceeded 75 million.[105] That figure is contributed to by the threat and actuality of cross-border terrorism, now fed by the communications revolution, from which no State is immune.

To achieve solutions requires, as well as diplomatic and political action, forming and accepting basic principles of the international law of which former High Commissioner Al Hussein speaks, not least in international criminal law. The need to recognise the foundational concept of reconciliation is especially the case in the greatest challenge to international criminal law, next discussed.

5.6. Reconciliation and War

> *Since wars begin in the minds of men, it is in the minds of men that defenses of peace must be constructed* […] *ignorance of each other's ways and lives has been a common cause, throughout the history of mankind, of that suspicion and mistrust between the peoples of the world through which their differences have all too often broken into war.*[106]

> *Il ne suffit pas*
> *D'avoir horreur de*
> *La guerre il faut*
> *Savoir organiser*
> *Contre elle les*
> *Eléments de défense*
> *Indispensables*

[104] Simon Jenkins, "Britain's treaty with Europe is dead. Time to strike a new one", *The Guardian*, 30 March 2017.

[105] UNHCHR, "Figures at a glance" (available on its web site).

[106] Constitution of the United Nations Educational, Scientific and Cultural Organization ('UNESCO'), 16 November 1945 (https://www.legal-tools.org/doc/lgwjml).

> […]
> *Il s'agit de fonder*
> *La paix du monde*
> *Sur un ordre*
> *Légal de faire*
> *Une réalité de*
> *Droit de cette*
> *Solidarité*
> *Internationale*
> *Qui apparait*
> *Déjà dans les*
> *Faits comme*
> *Une réalité*
> *Physique*[107]
>
> *Warfare* […] *has become* […] *a matter* […] *of violence escaping, diffusing, metastasising, becoming the business of 'non-state actors'.*[108]

Since war is the ultimate form of discord, it provides the paradigmatic test of Reconciliation. The difficulty lies not in understanding that concept, but in giving it effect. That may be impeded on one side or the other, or both, by ill-treatment which may be gross and sustained; death, injury and wounded feelings; hyper-sensitivity; psychopathy; desire for revenge, irrationality, or a mixture. Within the issues that engage not only 'international humanitarian law' (more simply the law of war), but also international criminal law, the differences may be profound and the parties reluctant to engage in processes of Reconciliation. What needs always to be recalled – despite and because of the temptation to dehumanise the enemy – is the ultimate purpose of each sphere of law: to recognise and promote the decency that achieves human dignity.

The topic of Reconciliation is not simple. For instance, a recent study has concluded that, for reasons grounded in political and evolutionary psychological theories, successful Reconciliation following violent conflicts takes different forms depending on the international or domestic nature of

[107] "It is not enough to be appalled by war; we must range against it the elements vital to defence […]. That is a matter of establishing world peace upon a legal base, using existing international capacity to achieve the rule of law", memorial to Aristide Briand, French Nobel laureate, in front of the Quai d'Orsay.

[108] T.J. Clark, "Picasso and Tragedy", *London Review of Books*, 2017, vol. 39, no. 16, pp. 33–36.

the conflict in question. Specifically, the study concluded that effective Reconciliation after international conflicts takes the form of public and politically high-cost displays, typically by leaders of the various groups, which signal an intention to reconcile following the conflict. In contrast, the study found that following domestic conflicts effective Reconciliation was achieved according to a forgiveness model consisting, *inter alia*, of judicial and other justice mechanisms.[109] But the topic must be wrestled with in all relevant decision-making.

While understandably mentioned *sotto voce*, the most vital element of the Brexit negotiations, which also underlay the economic and social aspects of the 1992 Maastricht Treaty,[110] is surely Europe's potential for the interminable militarism that five decades before gave rise to the UN Charter. The Heads of State in the Maastricht Preamble asserted they were:

> RECALLING the historic importance of the ending of the division of the European continent and the need to create firm bases for the construction of the future Europe, […]
>
> RESOLVED to implement a common foreign and security policy including the eventual framing of a common defence policy, which might in time lead to a common defence, thereby reinforcing the European identity and its independence in order to promote peace, security and progress in Europe and in the world […].

The seat of both World Wars, the Thirty and Eighty Years Wars, and many more, Europe has long experience of the absolute need for a powerful system of security against chaos. The formal letter of 29 March 2017 from the British Prime Minister to the President of the European Council contained eleven references to the topic of security. Its drafters would be

[109] William J. Long and Peter Brecke, *War and Reconciliation: Reason and Emotion in Conflict Resolution*, Massachusetts Institute of Technology, 2003, p. 3 uses two models: the 'signalling model' for international conflicts and the 'forgiveness model' for civil conflicts. They argue that in the latter case "reconciliation events restore lasting social order when they are characterized by truth telling, redefinition of the former belligerents, partial justice, and a call for a new relationship", but it "does not explain how or why international reconciliation events contribute to successful conflict resolution between, as opposed to within, nations. International society lacks the will and the ways necessary to pursue a forgiveness process. Instead, the signalling model helps us understand why the events contribute to improvement to bilateral relations. It predicts correctly that when a reconciliation event was part of a costly, novel, voluntary, and irrevocable concession in a negotiated bargain, it contributed meaningfully to a reduction in future conflict".

[110] Formally, 'Treaty of European Union'.

well conscious of the issues raised by the former UN High Commissioner for Human Rights. Yet, in the debates preceding the United Kingdom's notice to withdraw there was little emphasis of that primary security *raison d'être* of the European Union.

The theme of Reconciliation and war had been addressed by Immanuel Kant:[111]

> FIRST SUPPLEMENT
>
> CONCERNING THE GUARANTEE OF PERPETUAL PEACE
>
> This guarantee is given by no less a power than the great artist nature […] in whose mechanical course is clearly exhibited a predetermined design to make harmony spring from human discord, even against the will of man […].
>
> The provisions she [nature] has made are as follow: (1) she has taken care that men *can* live in all parts of the world; (2) she has scattered them by means of war in all directions, even into the most inhospitable regions, so that these too might be populated; (3) by this very means she has forced them to enter into relations more or less controlled by law […].
>
> [This he formulates as] "Act so that thou canst will that thy maxim should be a universal law, be the ends of thy action what it will".

Kant's extraordinary 1795 essay *On Perpetual Peace* can be seen as containing three conditions that have entered modern thinking and may be said to have contributed to the so-called 'long peace' since 1945, which has been seen to result from previously unsuspected elements of stability in the post-war international system.[112] The first was that states be democratic; because citizens are decision-makers, they are reluctant to put their own blood and money to risk and so democracies tend not to fight one another. The second, anticipating the UN idea, proposed a 'League of Nations', recognizing the homage that each State pays (as least in words) to the concept of law. The third was a "world community" based on the hope that "peaceable relations" such as communications and trade across national boundaries would mean that "a violation of rights in one place is felt throughout

[111] Immanuel Kant, *Collected Works of Immanuel Kant*, Delphi Publishing, Hastings, 2006.

[112] John Lewis Gaddis, *The Long Peace: Inquiries into the History of the Cold War*, Replica Books, 2001; Steven Pinker, *The Better Angels of Our Nature: Why Violence has Declined*, Viking Books, 2011, pp. 200–01.

the world". Each is a contributor to Reconciliation. The first is an element of equality. The second employs systemic means for communication among States. The third extends the second to the world's peoples.

In *Peacebuilding in the Aftermath of Conflict* (2014),[113] the UN Secretary-General reported on the practical needs for political leadership, institution-building including reform of rule of law institutions, sustained international support, planning and co-ordination, and mutual accountability. Practical remedies include:

- The 2030 Agenda for Sustainable Development, adopted by UN General Assembly resolution;[114]
- The Review of UN Peacebuilding Architecture, unanimously adopted by UN Security Council Resolution 2282 of 27 April 2016, which:

  > stresses that a comprehensive approach to transitional justice, including promotion of healing and reconciliation [is] critical to consolidation of peace and security […];
  >
  > recognises that effective peacebuilding must involve the entire United Nations system […].

- The report of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence of 24 October 2016.[115]

The underlying principle for all of these is identified by Professor Frans de Waal:

> War and peace are older than humanity. The principle is the same whether two apes kiss after a fight, one colleague apologizes to another, or two nations sign a peace treaty. In order to move on, we have to put such feelings behind us. Th[e] book [*War and Reconciliation: Reason and Emotion in Conflict Resolution* by William J. Long and Peter Brecke] clarifies in delightful detail the role of forgiveness in the international area.[116]

[113] Peacebuilding in the Aftermath of Conflict: Report of the Secretary General, UN Doc. A/69/399-S/2014/694, 23 September 2014 (https://www.legal-tools.org/doc/vxs561).

[114] Transforming our World: The 2030 Agenda for Sustainable Development, UN Doc. A/RES/70/1, 21 October 2015 (https://www.legal-tools.org/doc/d52143).

[115] Promotion of truth, justice, reparation and guarantees of non-recurrence, UN Doc. A/71/40827, 24 October 2016 (https://www.legal-tools.org/doc/axjshy).

[116] Long and Brecke, 2003, tribute appearing on back cover, see *supra* note 109.

The Advisory Service of the International Committee of the Red Cross in a paper called "Amnesties and International Humanitarian Law: Purpose and Scope" (July 2017) has recorded:

> In relation to a situation of armed conflict, the aim of an amnesty is to encourage reconciliation and contribute to restoring normal relations in the life of a nation affected by such a situation.[117]

The difficulty lies not in understanding the proposed concept of Reconciliation, but in giving it effect as a way to peace. What needs to be kept constantly in mind – despite and because of the temptation to dehumanise the enemy – is the ultimate purpose of each sphere of law: to recognise and promote the decency that achieves human dignity.

Reconciliation should of course be attempted before hostilities begin. As far as feasible, it should be considered throughout their process. If, however, all of these attempts at reconciliation should fail, how can reconciliation be achieved after conflict? A recent study of reconciliation following violent conflicts has concluded that successful reconciliation takes different forms depending on the international or domestic nature of the conflict in question. Effective reconciliation after international conflicts takes the form of public and politically high-cost displays, typically by leaders of the various groups, which signal an intention to reconcile following the conflict. In contrast, following domestic conflicts, effective reconciliation is achieved according to a forgiveness model, consisting *inter alia*, of judicial and other justice mechanisms.[118]

Following Carsten Stahn,[119] I respectfully offer a modified opinion from the conclusion in *International Trials and Reconciliation*[120] that courts have no part in a process of reconciliation.

Take the transition of Nazi Germany into a modern exemplar of human rights. It is unnecessary to rehearse the history of Germany.[121] The

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117 Advisory Service of the International Committee of the Red Cross, "Amnesties and International Humanitarian Law: Purpose and Scope", July 2017, p. 1.

118 *Ibid.*, p. 3.

119 Carsten Stahn, "International Criminal Justice and Reconciliation: Beyond the Retributive v. Restorative Divide", FICHL Policy Brief Series No. 36 (2015), TOAEP, Brussels, 2015 (http://www.legal-tools.org/doc/c0101d/).

120 See *supra* Section 5.5.2.; compare Honoré, 2002, p. 80, see *supra* note 72.

post-war redemption of Germany has had many contributions: the courage and determination of the Allied and Russian forces who defeated Hitler militarily, the generous inspiration of the Marshall Plan, the efforts of the German people and their post-war leaders to turn their country around. But to deny the Nuremberg Tribunal's role in Reconciliation, both practical and exemplary, would deny history.

By today's standards the absence of independent international trial of Allied war crimes would be seen as a systemic defect. But the London Agreement and accompanying Charter of the International Military Tribunal preceded the creation of both the UN Security Council, which was later able to create new international tribunals,[122] and, by nearly six decades, the International Criminal Court ('ICC').

Against the complaint of victors' justice, history has set the substitution for summary execution of a court, the procedures to achieve fair trial imposed by the presiding judges, and the formulation and application both in the Charter of the Tribunal and in its judgment of what are now famous as the Nuremberg Principles.[123] The International Military Tribunal lifted what, by the standards of the time, approximated the best procedures of domestic criminal practice across into the international arena.

Three generations later, Germany's reconciliation with other Europeans whose families had had every reason to hate and despise their countries' invaders, expressed in aspects of economic and moral leadership of Europe and beyond, can surely be seen as assisted by the Nuremberg processes. That the German authorities created the International Nuremberg Principles Academy[124] to exemplify and promote the highest standards of international criminal law, housing it in the city whose historic contribution to religion and Enlightenment had been defiled by Hitler's Race Laws and Nazi parades, and in the courtroom where the major war criminals faced

[121] Ian Kershaw, *Hitler*, Penguin, 2010; Reinhard Zimmermann and Jack Beatson, *Jurists Uprooted: German Speaking Emigré Lawyers in Twentieth-Century Britain*, Oxford University Press, 2004.

[122] See the section "The Nuremberg and Tokyo Trials and the First Flaws in the System", in Wolfgang Kaleck, *Double Standards: International Criminal Law and the West*, TOAEP, Brussels, 2015, and the argument for a proportionate assessment addressed by William Schabas at pp. 18–19 (http://www.legal-tools.org/doc/971c3c/).

[123] Principles of International Law recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal, with commentaries, 1950 (http://www.legal-tools.org/doc/038f9a/).

[124] See the International Nuremberg Principles Academy's web site.

justice, gave those attending the opening in that courtroom a real sense of the Academy's contributing to the process of Reconciliation.

I have suggested that every form of conduct that potentially contributes to Reconciliation should be recognised as Reconciliatory. It can include the use of force, as in defensive war which, by slowing or stopping the disorder of conflict, can contribute to the restoration of harmony. Reconciliatory conduct does not mean smiling benignly at those whose conduct is disruptive of others' peace. On the contrary, as Martin Luther King made so clear in his *Letter from a Birmingham Jail* (1963),[125] Reconciliation may require standing up to them: the exhibition of physical and moral courage, making hard decisions and exposure to personal risk and sacrifice. The D-Day landings in Occupied France, aimed at defeating Nazi Germany, with the effect of killing en route not only German military who resisted that purpose but innocent civilians as well, had as their overarching justification a reconciliation in terms of the restoration of peace in Europe. Their military success, together with that of the USSR, contributed notably to that end, clearing the way for ending the Nazi criminality and achieving the political, economic and social changes that followed. Both the conduct of the Allied military and the Nuremberg Tribunal are to be viewed as important parts of the greater process.

The German example evidences our contention that reconciliation is (a) a great general principle that underlies and overarches the formulation and application of international criminal law; (b) a guide to giving it practical effect; (c) a means for doing so; and (d) a practical method of evaluating it. Indeed, it is (e) a source of the hope required for the conversion of despair into confidence.

The German transition to both – exemplifying, and helping States it had abused to achieve, standards of good government and concern for refugees – is an important example of both the transitional justice process and Reconciliation. That is something to be remembered in the context of current challenges in Europe and elsewhere.[126]

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[125] Available on the Films for Action's web site.

[126] A term often used to refer to the post-Nazi period is '*Vergangenheitsbewältigung*' ('*Vergangenheit*' means 'the past'; '*bewältigen*' means 'to get on top of, master, come to terms with'). Germans have made assiduous and continuous efforts to try and understand, make up for as best they can, come to terms with, the past. 'Reconciliation' may be translated as either '*(sich) versöhnen (mit jemanden) (Verssöhnung)*' (to reconcile oneself with someone) or '*(sich) aussöhnen (mit jemanden) (Aussöhnung)*'. The latter involves some effort, suggesting

5.7. Reconciliation as a Legal Term of Art

While reconciliation has been a theme of thought throughout history and across the globe, care is needed to use it in law. I owe to central figures of modern philosophy the thesis that because "it is impossible to define a legal concept, the task of legal writers should be rather to *describe* the use of [an abstract noun] in the particular legal rules in which it occurs". This passage from Donald Harris' essay "The Concept of Possession in English Law"[127] endorsed the opinion of H.L.A. Hart[128] who relied in turn on the analysis of Jeremy Bentham. It is that, taken out of a specific legal context, words such as 'possession' and 'reconciliation' lack the precision required by the law for a term of art.[129] But contrary to certain respected opinion, their generality does not deprive such terms of legal utility. Rather, as previously argued, it requires that they be used with explanation of the particular sense of the word intended.

On the continuum from domestic discord between apes to the horrors of nuclear hostilities, international criminal law is nearer the latter end. The jurisdiction of the ICC is limited to "the most serious crimes of concern to the international community as a whole", namely, genocide, crimes against humanity, war crimes, and the crime of aggression.[130]

Likewise, while the Special Tribunal for Lebanon possesses jurisdiction in respect of certain grave crimes under the domestic law of Lebanon, it was created by the Security Council under Chapter VII of the UN Charter

a longer time and involving a more conscious and complete process than the former. Reconciliation is seen as part of the process of *Vergangenheitsbewältigung*, which is largely self-directed, whereas reconciliation involves at least two parties. I contend that both internal healing between and among Germans, and restoration of relations with those outside Germany affected by Nazism, fall squarely within the concept of reconciliation.

127 Donald Harris, "The Concept of Possession in English Law", in A.G. Guest (ed.), *Oxford Essays in Jurisprudence*, Oxford University Press, 1961, p. 68.

128 H.L.A. Hart, "Definition and Theory in Jurisprudence", in *Law Quarterly Review*, 1954, vol. 70, p. 37.

129 David Baragwanath, "Energising the Law's Response to Terrorism: The Decision of the Appeals Chamber of the Special Tribunal for Lebanon and the Need for Further Action", in Martin Böse, Michael Bohlander, André Klip and Otto Lagodny (eds.), *Justice Without Borders: Essays in Honour of Wolfgang Schomburg*, Brill, 2018, pp. 23–48, argues that the same is to be said of the term 'terrorism'.

130 Article 5 (aggression) was charged at Nuremberg; its coming into force under the Rome Statute but not in English domestic law was discussed in the High Court of Justice in England, *R (Abdulwaheed Shannan Al Rabbat) v. Blair*, Judgment, 31 July 2017, [2018] 1 WLR 2009, paras. 15–16.

in response to threats to international peace and security resulting from political assassinations; the crimes nominated include murder and terrorism.

All non-permanent international criminal tribunals, from Nuremberg to Kosovo, have been a response to extreme disharmony. Sections 5.8.2. to 5.8.2.8. examine the use of 'reconciliation' in decisions of international criminal courts, especially criminal courts. At this stage the value and importance of 'Reconciliation' are illustrated by some formulations of its use[131] in relation to international criminal law:[132]

> [T]he International Criminal Tribunals for the former Yugoslavia ('ICTY') and Rwanda ('ICTR') […] were established to bring to justice persons responsible for violations of international humanitarian law, to provide justice for victims, to deter further crimes and to aid the *reconciliation* process and restoration of peace.
>
> To support the process of *reconciliation* and the re-establishment of the rule of law in the former Yugoslavia and Rwanda, both the ICTY and ICTR have played a pioneering role in international law and paved the way for a number of other initiatives. In October 1999, Judge McDonald – the then President of the Tribunal, launched the ICTY Outreach Programme, when it was time for action to be taken to bridge the mistrust and misunderstanding between the Tribunal in The Hague and the communities it was serving.[133]
>
> […] a key purpose of the ad hoc Tribunals is to contribute to national *reconciliation* and the restoration and maintenance of peace in the regions of the former Yugoslavia and Rwanda. While healing and national reconciliation cannot be realised with the stroke of a pen, history will show that the two ad hoc Tribunals strengthened the judicial institutions of the former Yugoslavia and Rwanda, thus creating the primary conditions for peace.[134]

[131] LIU Daqun, "Contribution of the United Nations *Ad Hoc* Tribunals to the Development of International Criminal Law", in Morten Bergsmo, CHEAH Wui Ling, SONG Tianying and YI Ping (eds.), *Historical Origins of International Criminal Law: Volume 4*, TOAEP, Brussels, 2015, chap. 3 (http://www.legal-tools.org/doc/330da6/).

[132] Bergsmo, CHEAH, SONG and YI, 2015, see *supra* note 131.

[133] LIU, 2015, p. 156, see *supra* note 131.

[134] *Ibid.*, p. 159.

> […] the overarching purpose of international criminal justice is not deterrence as much as being a catalyst for *reconciliation* and rehabilitation in post-conflict situations.[135]

Until the end of the Cold War, Nuremberg stood out as a unique judicial event that mirrored universal outrage against German actions during World War II. With the creation of the UN *ad hoc* international criminal jurisdictions in 1993–1994, this perspective was altered. Instead of being the only one of their kind, Nuremberg and Tokyo are now seen as the first of their kind. In a broader sense, it appears that the establishment of the ICC has been hailed by the comity of nations by and large. The establishment of an international institution that prosecutes perpetrators of war crimes and other such acts is an imperative for reconciliation in post-conflict societies.[136]

5.8. Reconciliation and Judicial Process

5.8.1. Transitional Justice

I emphasise the developing discipline of transitional justice which is a notable contributor to Reconciliation in each of its dimensions.

In the Guidance Note of the Secretary-General,[137] transitional justice is described as meaning, for the UN:

> the full range of processes and mechanisms associated with a society's attempts to come to terms with a legacy of large-scale past abuses, in order to ensure accountability, serve justice and achieve reconciliation. Transitional justice processes and mechanisms are a critical aspect of the United Nations framework for strengthening the rule of law.

Its components comprising:

> both judicial and non-judicial processes and mechanisms, including prosecution initiatives, facilitating initiatives in respect of the right to truth, delivering reparations, institutional reform and national consultations.[138]

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[135] Rahmat Mohamad, "An Afro-Asian Perspective on the International Criminal Court", in Bergsmo, CHEAH, SONG and YI, 2015, chap. 18, see *supra* note 131 (http://www.legal-tools.org/doc/734b4e/).

[136] *Ibid.*, p. 747.

[137] Guidance Note of the Secretary-General: United Nations Approach to Transitional Justice, March 2010 (https://www.legal-tools.org/doc/jg6mfh).

[138] *Ibid.*, p. 2.

Underlying the various senses of transitional justice employed in its immense literature is the simple aspect of bringing about change from hostilities to something better – whether the ideal sought by some or the beginnings and attainment of practical improvement.

New life was injected into the term 'reconciliation' by its selection and use in the series of some thirty truth and reconciliation commissions of the 1990s. It would be difficult to undertake a meaningful discourse on reconciliation without acknowledging the experience of South Africa, which prioritised reconciliation as a primary goal in its immediate post-apartheid era.

5.8.1.1. South Africa

Following the establishment of South Africa's first democratically elected government in 1994, the nation created a Truth and Reconciliation Commission to "enable South Africans to come to terms with their past on a morally accepted basis and to advance the cause of reconciliation".[139] Its foundational document, the 1995 Promotion of National Unity and Reconciliation Act, stated that the objective of the Commission was to "promote national unity and reconciliation in a spirit of understanding which transcends the conflicts and divisions of the past"[140] by:

- establishing a complete picture of the causes, nature and extent of the gross violations of human rights which had taken place;
- facilitating the granting of amnesty to persons who made full disclosure of all relevant facts relating to acts associated with a political objective;
- establishing the fate of victims and restoring their human and civil dignity by allowing them to relate their own accounts of the violations; and
- compiling a report recounting the Commission's activities and findings, as well as recommendations to prevent the future violations of human rights.[141]

[139] Dullah Omar, "Introduction by the Minister of Justice, Mr Dullah Omar", 31 December 1995 (https://www.legal-tools.org/doc/r6t6ih).

[140] Promotion of National Unity and Reconciliation Act 34 of 1995, 1 December 1995, Section 3(1) (http://www.legal-tools.org/doc/42cdab/).

[141] *Ibid.*, Section 3.

Between 1995 and 2002, the Commission took in the testimony of approximately 22,000 victims, with more than 2,000 of them appearing at public hearings broadcast live on national television.[142] Chaired by Archbishop Desmond Tutu, the Commission offered individuals who committed politically motivated crimes amnesty from prosecution in exchange for candid, public confessions.[143] There was no blanket amnesty, however – amnesty was granted on an individual, case-by-case basis, and disclosures of crimes took place before a panel of judges, and were subject to cross-examination.[144] Those denied amnesty faced the possibility of criminal prosecution.[145] Meanwhile, victims who were determined to have suffered gross violations of human rights became eligible for modest reparations, in exchange for waiving their right to seek civil redress in South Africa's courts.[146]

In executing its mandate, the Commission first focused on creating opportunities for victims to relate their own accounts of the violations they had suffered in order to restore their human and civil dignity.[147] Then, during the second half of its mandate, the Commission shifted its focus to understanding the individual and institutional motives which gave rise to those violations, with a goal to making recommendations about the prevention of future human rights violation.[148]

The legacy of the Truth and Reconciliation Commission is, perhaps unsurprisingly, mixed. A survey conducted shortly before the Commission completed its work found that most South Africans felt that the proceedings had polarised races rather than fostered reconciliation.[149] This point was taken on directly by the Commission in its report, which noted: "It would be naïve in the extreme to imagine that people would not be appalled by

142 International Center for Transitional Justice, "20 Years On, ANC Rules but Legacy of Apartheid Still Lingers", 28 May 2014.

143 United States Institute of Peace, "Truth Commission: South Africa" (available on its web site).

144 Charles Villa-Vicencio, "Making Up Is Hard to Do", *Foreign Policy*, 17 January 2012, p. 7.

145 *Ibid*.

146 *Ibid.*; International Center for Transitional Justice, "Ignoring Cries for Justice, South Africa Fails Victims of Apartheid-era Crimes", 7 January 2013.

147 Truth and Reconciliation Commission, *Truth and Reconciliation Commission of South Africa Report*, vol. 1, 1998, p. 58 ('TRC Report, Vol. 1') (http://www.legal-tools.org/doc/773339/).

148 *Ibid.*

149 "South Africa's hurtful truth", *The Economist*, 30 July 1998.

the ghastly revelations that the Commission has brought about […] What is amazing is that the vast majority of the people of this land, those who form the bulk of the victims of the policies of the past, have said they believe reconciliation is *possible*".[150]

Whatever possibilities existed at the close of the twentieth century, some twenty years later, even those involved directly in the Commission's work could not reflect on its contributions to reconciliation without acknowledging the backdrop of violence, inequality and poverty that continues to underpin South African society.[151] According to the Commission's former chair, Archbishop Desmond Tutu, President Mandela's successors left the Commission's work "scandalously unfinished", refusing to enact the recommended reparations for victims, ignoring its proposal for a wealth tax to effect a transfer of resources, and failing to prosecute those who were declined amnesty by the Commission's judges.[152] In addition, the Commission's legacy was plagued by its inability to compel some of the apartheid era's worst offenders to come forward for testimony.[153]

More recent studies echo the claims that the mission of reconciliation is far from complete, whether through a failure to implement the Commission's recommendations or otherwise. Although it evades quantification, reconciliation was measured in a notable study conducted by South Africa's Institute of Justice and Reconciliation.[154] According to its findings, the progress of reconciliation had been gravely hindered by apartheid's economic legacies. Specifically:

> The majority feels that race relations have either stayed the same or deteriorated since the country's political transition in

[150] TRC Report, Vol. 1, p. 17, see *supra* note 147 (emphasis added).

[151] Desmond Tutu, "Tutu: 'Unfinished business' of the TRC's healing", *Mail & Guardian*, 24 April 2014.

[152] *Ibid.*; see also "Making Up Is Hard to Do", 2012, see *supra* note 144 (noting that South Africa's government "took five years to respond to the TRC recommendations for the payment of reparations to victims […] then reduced the amount of the recommended payments", and "failed to show the necessary will to prosecute alleged perpetrators who failed to obtain amnesty through the TRC").

[153] Ginger Thompson, "South African Commission Ends Its Work", *The New York Times*, 22 March 2003.

[154] Jan Hofmeyr and Rajen Govender, *National Reconciliation, Race Relations, and Social Inclusion*, South Africa Reconciliation Barometer Briefing Paper 1, Institute for Justice and Reconciliation, 2015 ('SA Reconciliation Barometer') (https://www.legal-tools.org/doc/5691d6).

> 1994 and the bulk of respondents have noted income inequality as a major source of social division.[155]
>
> Although there is a desire amongst most South Africans to have more contact with people from racial groups other than their own, they are precluded from doing so by the spatial and economic legacies of apartheid. These also serve to reinforce old prejudices.[156]
>
> South Africans generally believe that the country has made progress on the road to national reconciliation since the end of apartheid […] Most, however, believe that this objective will remain impossible for as long as those who were disadvantaged under apartheid remain poor. Inequality remains the most frequently mentioned source of social division within South Africa.[157]

Described in assessments as one of the most unequal nations on Earth,[158] it is unsurprising that any irenic value of a public forum for forgiveness would be challenged by the more tangible wounds left by South Africa's apartheid regime. Still, the Commission's legacy contains shining examples of Reconciliation under the most extraordinary of circumstances. In one widely cited example, the Commission heard the case of Amy Biehl, a native Californian who had studied international affairs at Stanford as the apartheid regime began to collapse in the early 1990s.[159] After graduation, she heard the clamouring calls for an end to apartheid and, at just 24 years old, travelled to South Africa to help register voters for the country's first free democratic election.[160] Yet, in the midst of escalating racial tensions, political instability, and social upheaval, the situation on the ground in South Africa became precarious. Driving through South Africa's townships

155 *Ibid.*, p. 1.

156 *Ibid*.

157 *Ibid*.

158 "Inequality index: where are the world's most unequal countries?", *The Guardian*, 26 April 2017. A World Bank report, updated on 14 April 2022, described it as remaining "a dual economy with one of the highest, persistent inequality rates in the world", The World Bank, "The World Bank in South Africa" (available on its web site).

159 Robert Reinhold, "Death of an Idealist", *The New York Times*, 27 August 1993.

160 Bill Keller, "How American 'Sister' Died in a Township", *The New York Times*, 27 August 1993.

one evening, Amy's car was stopped by a brick through the windshield, and Amy was stabbed to death on the streets of Guguletu.[161]

With the trials of the Truth and Reconciliation Commission underway, Amy's parents, Linda and Peter Biehl, were summoned from Newport Beach, California, to hear the confession of their daughter's killers. At the trials, the Biehls stunned the world by shaking hands with the parents of Amy's killers, and after listening to the confessions of the young men, telling the Commission that they would not oppose amnesty for the perpetrators.[162] Over the coming years, the Biehls and the young men developed a unique relationship, and when Linda Biehl established an after-school programme in South Africa to promote reconciliation for local impoverished children, two of her daughter's killers were among her volunteers.[163]

While the Biehls' case would appear extraordinary, the ability of survivors and perpetrators to coexist in the wake of the Commission's work was far from uncommon. To the extent that peaceable co-existence is a more pragmatic definition of Reconciliation,[164] the Commission may be due more credit than it has often received. The South African transition to democracy was marked by a notable lack of violence: the majority of the victims were "breathtakingly unvengeful", and "pardoned killers do not, on the whole, live in fear of their lives".[165] According to many commentators, if Mandela's government had either insisted on Nuremberg-style trials for the leaders of the apartheid-era government, or if the apartheid leaders had insisted on blanket amnesty, a bloody revolution would have been "inevitable".[166] In this way, the Commission can be credited with paving a "middle way between amnesia and justice".[167]

As one publication noted, "for all its shortcomings, [the Commission] unearthed a sizeable chunk of truth about the country's awful past, and did so on a budget barely large enough to buy every South African a Coke".[168] While the work of Reconciliation is undeniably incomplete, the Commis-

[161] *Ibid*.

[162] *Ibid*.

[163] Scott Kraft, "South African killers now work on behalf of their victim", *Los Angeles Times*, 21 October 2008.

[164] "Making Up Is Hard to Do", 2012, p. 3, see *supra* note 144.

[165] "Of memory and forgiveness", *The Economist*, 30 October 1997.

[166] "Making Up Is Hard to Do", 2012, p. 3, see *supra* note 144.

[167] "Of memory and forgiveness", 1997, see *supra* note 165.

[168] "South Africa's hurtful truth", 1998, see *supra* note 149.

sion's hearings created a unique opportunity for dialogue between victims and perpetrators. To the extent that it facilitated meaningful and truthful interactions about South Africa's most painful memories, it may have helped create a foundation for future Reconciliation among one of the world's most divided nations.

5.8.1.2. Comment on Non-Judicial Transitional Justice Mechanisms

South Africa's experience was far from the only example of a transitional justice mechanism that prioritised reconciliation as an end, and undertook creative efforts to use judicial process to bring about this end. We have noted that the 1990s witnessed some 30 truth and reconciliation commissions around the globe. Underlying the various senses of transitional justice employed in these commissions and the immense literature accompanying them is the simple aspect of bringing about change from hostilities or oppression to something better – whether the ideal sought by some or the beginnings and attainment of practical improvement.

A noteworthy contributor to the process of transitional justice, Pablo de Greiff, calls for a sense of reality. He argues, wisely, that 'Reconciliation' is not to be viewed as alien to justice.[169] I would reiterate that all elements that can lead to Reconciliation are to be seen as reconciliatory. Of these, both the military role of ending hostilities and the judicial role of adjudicating on specific allegations of infringement of law designed to protect human rights are pivotal, as clearing the way for more specific contributions to transition and optimum reconciliation.

Pablo de Greiff then challenges as impossible the notion of wiping the slate totally clean. Implicit is a sense of proportion: what is realistic in the circumstances, and in light of the atrocities that preceded them. There can be no expectation of perfection in the form of complete truth-telling, munificent reparations, and the absolute virtue of sainthood.

Notwithstanding that, he calls for a demanding understanding of Reconciliation, of which justice-related goals are to be taken seriously. He sees a place for using techniques that may help achieve co-existence and civic trust. Apology may, if honest, play a part, but it is open to the scepti-

[169] Pablo de Greiff, "The Role of Apologies in National Reconciliation Processes: On Making Trustworthy Institutions Trusted", in Mark Gibney, Rhoda E. Howard-Hassmann, Jean-Marc Coicaud and Niklaus Steiner (eds.), *The Age of Apology: Facing Up to the Past*, University of Pennsylvania Press, Philadelphia, 2008, p. 121.

cism of being seen as a cheap option more likely to inflame than to Reconcile.

My assessment is: whatever may realistically be seen by the victims as honest and substantial attempt to improve and, in the end, restore relationships and enhance the rule of law, fairly qualifies as a worthy contributor to both 'transitional justice' and Reconciliation.

5.8.2. Reconciliation in International Criminal Law

My thesis is that Reconciliation, understood as a legal concept for the purposes of international criminal law, is both a vital end in itself and also an essential means and condition of reaching that law's ultimate goal – of prevention of international criminality.

The task of all law is to avoid, manage or respond to the differences that arise from human co-existence. Wherever they do, or may, occur there is need for law and legal systems. That need underlay both the Antarctic Treaty which came into force in 1961, between the Korean War and the Cuban Crisis, at a time of heightened awareness of the risk of extension of the Cold War to uninhabited regions, and also the Outer Space Treaty[170] achieved in 1967. The Antarctic Treaty recognises "that it is in the interest of all mankind that it shall continue for ever to be used exclusively for peaceful purposes and shall not become the scene or object of international discord". It provides by its first article: "Antarctica shall be used for peaceful purposes only". Likewise, by Article IX of the Outer Space Treaty:

> In the exploration and use of outer space […] States Parties to the Treaty shall be guided by the principle of cooperation and mutual assistance and shall conduct all their activities in outer space […] with due regard to the corresponding interests of other States Parties to the Treaty.[171]

That is no less the purpose of the various Geneva Conventions, the UN Charter, and the human rights treaties that contributed to the develop-

[170] Preceded by the Declaration of Legal Principles Governing the Activities of States in the Exploration and Use of Outer Space, UN Doc. A/RES/1962(XVIII), 13 December 1963 (https://www.legal-tools.org/doc/wxwrdy).

[171] Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies, 610 U.N.T.S. 205, 10 October 1967, Article IX (https://www.legal-tools.org/doc/55930e/).

ment described by the Court of Appeal of England and Wales in *Belhaj v. Straw* (2014):[172]

> The underlying purpose of all of these is to promote and achieve Reconciliation within 'mankind' and among the 'individuals' and their institutions composing it.[173]

The civil law facilitates human relations – marital, commercial, political, and many others, and provides sanctions, as by rules of equity and of tort, to deter or compensate for misconduct in such relationships and thus reconcile the parties.

Notions of crimes at international criminal law had been evolving long before the creation of the Nuremberg and Tokyo International Military Tribunals.[174] In the days before common law courts abandoned the function of creating new criminal offences without Parliamentary sanction, they had imported the criminal offence of piracy from international law.[175] Grotius' *De jure belli ac pacis* (*On the Law of War and Peace*) was first published in 1625. The four Geneva Conventions of 1949, formulating principles of armed conflict, were preceded by Conventions of 1864, 1906 and 1929. But my discussion begins with the modern international criminal law tribunals, commencing with the Nuremberg and Tokyo International Military Tribunals.

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172 See *supra* note 11.

173 See Eric Møse, "The ICTR and Reconciliation in Rwanda", FICHL Policy Brief Series No. 30 (2015), TOAEP, Brussels, 2015 (http://www.legal-tools.org/doc/7e3bae/); Mirko Klarin, "The Elusive Reconciliation in the Former Yugoslavia: Role of the ICTY", FICHL Policy Brief Series No. 31 (2015), TOAEP, Brussels, 2015 (http://www.legal-tools.org/doc/fc6e29/); David Re, "The Special Tribunal for Lebanon and National Reconciliation", FICHL Policy Brief Series No. 32 (2015), TOAEP, Brussels, 2015 (http://www.legal-tools.org/doc/5e0e0d/); Chris Mahoney, "Sierra Leone: The Justice v. Reconciliation Archetype?", FICHL Policy Brief Series No. 33 (2015), TOAEP, Brussels, 2015 (http://www.legal-tools.org/doc/9b0eff/); Susan Lamb, "Reconciliation v. Accountability: The Extraordinary Chambers of the Courts of Cambodia", FICHL Policy Brief Series No. 34 (2015), TOAEP, Brussels, 2015 (http://www.legal-tools.org/doc/af6132/); and William H. Wiley, "Societal Reconciliation, the Rule of Law and the Iraqi High Tribunal", FICHL Policy Brief Series No. 35 (2015), TOAEP, Brussels, 2015 (http://www.legal-tools.org/doc/f55ec3/).

174 Duff and Green, 2011, see *supra* note 12.

175 Lord Mance, "International Law in the UK Supreme Court, Lord Mance gives lecture at King's College", London, 13 February 2017, para. 5b (available on the Supreme Court of the United Kingdom's web site).

Like the UN Charter, the 1945 Charter of the Nuremberg International Military Tribunal was negotiated among State representatives[176] in response to, especially, the enormities of World War II. Unsurprising, considering the alternative to trial had been summary execution of the major war criminals, the focus of the lead Prosecutor, Justice Robert Jackson, was on justice rather than reconciliation;[177] a concept that did not receive mention in the judgment of the Tribunal.

I turn to consider the foundational documents and jurisprudence of various other international tribunals to examine the extent to which they expressly refer to reconciliation as an aim of international criminal justice.

5.8.2.1. International Criminal Tribunal for the Former Yugoslavia

In the modern era of international criminal justice, reconciliation has often, but not always, been considered integral to the creation of international criminal tribunals. For example, although the UN Security Council Resolution establishing the ICTY does not refer to reconciliation,[178] both it and the UN General Assembly have later acknowledged the Tribunal's reconciliatory role in later resolutions.[179] The Tribunal's jurisprudence also recognises this role.[180] One of the Tribunal's earliest sentencing judgments considered that:

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176 France, the United Kingdom, the United States of America and the Union of Soviet Socialist Republics.

177 "That four great nations, flushed with victory and stung with injury stay the hand of vengeance and voluntarily submit their captive enemies to the judgment of the law is one of the most significant tributes that power has ever paid to reason […] [to] summon such detachment and intellectual integrity" to the task that the trial would "commend itself to posterity as fulfilling humanity's aspirations to do justice", Robert H. Jackson, "Opening Statement before the International Military Tribunal", 21 November 1945 (http://www.legal-tools.org/doc/bbc82b/).

178 Establishment of the International Tribunal for Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia Since 1991, UN Doc. S/RES/827 (1993), 25 May 1993 (http://www.legal-tools.org/doc/dc079b/).

179 The situation in Bosnia and Herzegovina, UN Doc. A/RES/51/203 (1997), 26 February 1997, preamble (N9776897) (https://www.legal-tools.org/doc/9yucdl); Necessity of Trial of Persons Indicted by the International Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda, UN Doc. S/RES/1534 (2004), 26 March 2004, preamble (also referring to the ICTR) ('Security Council Resolution 1534 (2004)') (http://www.legal-tools.org/doc/4e06ee/).

180 See ICTY, *Prosecutor v. Milošević*, Trial Chamber, Decision on Preliminary Motions, 8 November 2001, IT-99-37-PT, para. 7 (http://www.legal-tools.org/doc/f15771/); ICTY,

> The International Tribunal, in addition to its mandate to investigate, prosecute and punish serious violations of international humanitarian law, has a duty, through its judicial functions, to contribute to the settlement of the wider issues of accountability, reconciliation and establishing the truth behind the evils perpetrated in the former Yugoslavia. Discovering the truth is a cornerstone of the rule of law and a fundamental step on the way to reconciliation: for it is the truth that cleanses the ethnic and religious hatreds and begins the healing process.[181]

5.8.2.2. International Criminal Tribunal for Rwanda

Unlike the ICTY, the foundational UN Security Council resolution for the International Criminal Tribunal for Rwanda ('ICTR') directly refers to reconciliation as one of the stated aims of the Tribunal,[182] a position that has been consistently reiterated in subsequent resolutions.[183] Perhaps as a consequence of this emphasis on reconciliation, ICTR jurisprudence reveals a significant number of references to reconciliation as an aim of the tribunal as a whole.[184] The majority of judgments from the ICTR begin with a passage similar to that set out below:

Prosecutor v. Karadžić, Trial Chamber, Decision on Appointment of Counsel and Order on Further Trial Proceedings, 5 November 2009, IT-95-5/18-T, para. 20 (http://www.legal-tools.org/doc/b4a2cb/); ICTY, *Prosecutor v. Brđanin*, Trial Chamber, Decision on the Defence Objection to Intercept Evidence, 3 October 2003, IT-99-36-T, para. 7 (http://www.legal-tools.org/doc/7efabf/).

181 ICTY, *Prosecutor v. Erdemović*, Trial Chamber, Sentencing Judgement, 5 March 1998, IT-96-22-T*bis*, para. 21 (http://www.legal-tools.org/doc/72fd40/).

182 Establishment of an International Tribunal for Rwanda and Adoption of the Statute of the Tribunal, UN Doc. S/RES/955 (1994), 8 November 1994, preamble (http://www.legal-tools.org/doc/f5ef47/).

183 Increasing the Membership of the International Tribunal for the Former Yugoslavia and the International Tribunal for Rwanda, UN Doc. S/RES/1329 (2000), 30 November 2000, preamble (http://www.legal-tools.org/doc/b1b6cc/); Security Council Resolution 1534 (2004), see *supra* note 179.

184 ICTR, *Prosecutor v. Rugambarara*, Trial Chamber, Sentencing Judgement, 16 November 2007, ICTR-00-59-T, para. 11 (http://www.legal-tools.org/doc/37e659/); ICTR, *Prosecutor v. Nzabirinda*, Trial Chamber, Sentencing Judgement, 23 February 2007, ICTR-2001-77-T, para. 71 (http://www.legal-tools.org/doc/e6069d/); ICTR, *Prosecutor v. Rwamakuba*, Trial Chamber, Decision on Appropriate Remedy, 31 January 2007, ICTR-98-44C-T, para. 78 (http://www.legal-tools.org/doc/7a84f3/); ICTR, *Prosecutor v. Rwamakuba*, Trial Chamber, Judgement, 20 September 2006, ICTR-98-44C-T, para. 210 (http://www.legal-tools.org/doc/b6ffa6/); ICTR, *Prosecutor v. Serugendo*, Trial Chamber, Judgement and Sentence, 12 June 2006, ICTR-2005-84-I, para. 31 (http://www.legal-tools.org/doc/a68054/); ICTR, *Prosecutor v. Rwamakuba*, Trial Chamber, Decision on Prosecution Motion for Reconsideration or,

> The Tribunal was established to prosecute and punish the perpetrators of the atrocities in Rwanda in 1994 so as to end impunity. It was also created to contribute to the process of national reconciliation, the restoration and maintenance of peace and to ensure that the violations of international humanitarian law in Rwanda are halted and effectively redressed.[185]

Isolated challenges to the ICTR's reconciliatory role resulted in interesting commentary by the Tribunal on reconciliation in the context of judicial processes, such as Judge Dolenc's comments on the relationship between a fair trial and reconciliation below:

> I understand that the importance of a fair trial may appear pale in comparison to the gravity of the massive human rights abuses which occurred in Rwanda in 1994. However, it is only through a fair trial that we can achieve any lasting justice. Through justice this Tribunal seeks to contribute to reconcilia-

in the alternative, Certification to Appeal Chambers Decision Denying Request for Adjournment, 29 September 2005, ICTR-98-44C-T, para. 28 (http://www.legal-tools.org/doc/39e9e5/); ICTR, *Prosecutor v. Rwamakuba*, Trial Chamber, Decision on Defence Motion for Stay of Proceedings, 3 June 2005, ICTR-98-44C-PT, para. 42 (http://www.legal-tools.org/doc/b76164/); ICTR, *Prosecutor v. Ndindabahizi*, Trial Chamber, Judgement and Sentence, 15 July 2004, ICTR-2001-71-I, para. 2 (http://www.legal-tools.org/doc/272b55/); ICTR, *Prosecutor v. Ntagerura et al*., Trial Chamber, Judgement and Sentence, 25 February 2004, ICTR-99-46-T, para. 2 (http://www.legal-tools.org/doc/60036f/); ICTR, *Prosecutor v. Kamuhanda*, Trial Chamber, Judgement and Sentence, 22 January 2004, ICTR-95-54A-T, paras. 2 and 753 (http://www.legal-tools.org/doc/4ac346/); ICTR, *Prosecutor v. Nahimana et al*., Trial Chamber, Judgement and Sentence, 3 December 2003, ICTR-99-52-T, paras. 2 and 109 (http://www.legal-tools.org/doc/45b8b6/); ICTR, *Prosecutor v. Kajelijeli*, Trial Chamber, Judgment and Sentence, 1 December 2003, ICTR-98-44A-T, para. 2 (http://www.legal-tools.org/doc/afa827/); ICTR, *Prosecutor v. Semanza*, Trial Chamber, Judgement and Sentence, 15 May 2003, ICTR-97-20-T, para. 2 (http://www.legal-tools.org/doc/7e668a/); ICTR, *Prosecutor v. Elizaphan and Gérard Ntakirutimana*, Trial Chamber, Judgement and Sentence, 21 February 2003, ICTR-96-10 and ICTR-96-17-T, para. 2 (http://www.legal-tools.org/doc/9a9031/); ICTR, *Prosecutor v. Musema*, Trial Chamber, Judgement and Sentence, 27 January 2000, ICTR-96-13-T, para. 2 (http://www.legal-tools.org/doc/1fc6ed/); ICTR, *Prosecutor v. Rutaganda*, Trial Chamber, Judgement and Sentence, 6 December 1999, ICTR-96-3-T, para. 2 (http://www.legal-tools.org/doc/f0dbbb/); ICTR, *Prosecutor v. Kambanda*, Trial Chamber, Judgement and Sentence, 4 September 1998, ICTR-97-23-S, para. 59 (http://www.legal-tools.org/doc/49a299/); ICTR, *Prosecutor v. Akayesu*, Trial Chamber, Judgement, 2 September 1998, ICTR-96-4-T, para. 2 (http://www.legal-tools.org/doc/b8d7bd/); ICTR, *Prosecutor v. Kanyabashi*, Trial Chamber, Decision on the Defence Motion on Jurisdiction, 18 June 1997, ICTR-96-15-T, para. 14 (http://www.legal-tools.org/doc/a65a6c/).

185 *Prosecutor v. Rugambarara*, Sentencing Judgement, 2007, para. 11, see *supra* note 184.

> tion. As Justice Murphy of the United States Supreme Court explained nearly sixty years ago:
>
> > If we are ever to develop an orderly international community based upon a recognition of human dignity it is of the utmost importance that the necessary punishment of those guilty of atrocities be as free as possible from the ugly stigma of revenge and vindictiveness. Justice must be tempered by compassion rather than by vengeance. In this, the first case involving this momentous problem ever to reach this Court, our responsibility is both lofty and difficult. We must insist, within the confines of our proper jurisdiction, that the highest standards of justice be applied in this trial of an enemy commander conducted under the authority of the United States. Otherwise stark retribution will be free to masquerade in a cloak of false legalism. And the hatred and cynicism engendered by that retribution will supplant the great ideals to which this nation is dedicated.[186]

A submission by an accused that "the idea of the Tribunal administering justice to contribute [to reconciliation] […] runs counter to the concept of Justice as understood by States under the rule of law",[187] invited the following curt response from the ICTR Appeals Chamber:

> The Appeals Chamber is satisfied that the view expressed by the Security Council with regard to the process of national reconciliation and to the restoration and maintenance of peace is not prejudicial to the Tribunal's independence and impartiality, which the judges are required to exhibit in ruling on each case.[188]

5.8.2.3. Special Court for Sierra Leone

In relation to the Special Court for Sierra Leone ('SCSL'), the UN Security Council acknowledged the steps already taken by Sierra Leone through creating its own national truth and reconciliation process, and referred to reconciliation in requesting the UN Secretary-General to establish a Special

[186] ICTR, *Prosecutor v. Ntagerura et al*., Trial Chamber, Separate Opinion of Judge Pavel Dolenc, 25 February 2004, ICTR-99-46-T, para. 6 (http://www.legal-tools.org/doc/d7f4c1/).

[187] ICTR, *Prosecutor v. Kayishema*, Appeals Chamber, Judgment (Reasons), 1 June 2001, ICTR-95-1-A, para. 58 (http://www.legal-tools.org/doc/9ea5f4/).

[188] *Ibid*.

Court.[189] There is, however, no corresponding reference to reconciliation as a general aim in the agreement concluded between the Secretary-General and Sierra Leone or the Court's statute.[190]

However, the jurisprudence of the SCSL reveals reconciliation as a key aim of the Special Court. Justice Winter of the Appeals Chamber referred to Resolution 1315 as evidencing reconciliation as part of the SCSL's *raison d'être*:

> The necessity of credible justice for reconciliation and peace has been the *raison d'être* of this Special Court since its conception. The belief of the victims that justice in whatever form (e.g., retributive, restorative, etc.) has been done or will be done is of paramount importance to the credibility of justice. This forms the foundation for the social trust upon which reconciliation can be built.[191]

The jurisprudence of the SCSL points to some recognition of reconciliation in the context of the ongoing formal peace and reconciliation process in Sierra Leone.[192] That continuing and separate process prompted President Robertson to examine transitional justice mechanisms and the SCSL's relationship with the separate truth and reconciliation process in Sierra Leone:

> In what has been termed "transitional justice" periods, truth commissions may be the only option for weak governments. In this context they were common in South America in the 1980s – in Bolivia, Chile, El Salvador, Haiti, Argentina and so forth. They were usually accompanied by blanket amnesties and were not permitted to "name names" of those who might

189 Establishment of a Special Court for Sierra Leone, UN Doc. S/RES/1315 (2000), 14 August 2000, preamble (http://www.legal-tools.org/doc/95897f/).

190 The only reconciliation reference is to the preference for "truth and reconciliation commission" alternatives for juvenile offenders: Statute of the Special Court for Sierra Leone, 16 January 2002, Article 15(5) ('SCSL Statute') (http://www.legal-tools.org/doc/aa0e20/).

191 SCSL, *Prosecutor v. Fofana et al*., Appeals Chamber, Judgment, Partially Dissenting Opinion of Honourable Justice Renate Winter, 28 May 2008, SCSL-04-14-A, para. 94 (http://www.legal-tools.org/doc/b31512/).

192 SCSL, *Prosecutor v. Sesay et al*., Trial Chamber, Sentencing Judgement, Separate Concurring and Partially Dissenting Opinion of Hon. Justice Benjamin Mutanga Itoe, 8 April 2009, SCSL-04-15-T, para. 66 (http://www.legal-tools.org/doc/f7fbfc/); SCSL, *Prosecutor v. Norman et al*., Appeals Chamber, Decision on the Applications for a Stay of Proceedings and Denial of Right to Appeal, 4 November 2003, SCSL-2003-08-PT, SCSL-2003-07-PT, and SCSL-2003-09-PT, para. 10 (http://www.legal-tools.org/doc/fd7230/).

> be identified as perpetrators of crimes against humanity, not to avoid prejudice to trials (which were not in prospect), but to avoid political embarrassment. The reports nonetheless shed light on abuses – in some cases, as with "Nunca Más", very great light. They achieved a degree of truth, but without justice and in many cases without reconciliation – see the recent public demands in these countries to vacate the amnesties and prosecute the perpetrators. The Lome Accord of 1999 offered both a blanket amnesty and a TRC: only after that agreement was comprehensively violated did the international community deploy its muscle to insist on the prosecution of those bearing the greatest responsibility for the war.
>
> The Sierra Leone TRC may have emerged from a dishonoured agreement, but it took on a statutory form that does not preclude its co-existence with the subsequently established Special Court. It was modelled to some extent on the South African TRC although it must be understood that this body offered what were in effect plea-bargains: those who testified were only absolved from criminal liability if they testified truthfully and were prepared if need be to repeat that testimony in court against others. This plea-bargaining aspect has not been replicated in Sierra Leone's TRC statute. It has had to operate in a society where some major players in the war are indicted in the Special Court.[193]

5.8.2.4. Extraordinary Chambers in the Courts of Cambodia

As with the SCSL, the UN General Assembly referred to reconciliation when requesting that the Secretary-General conclude an agreement with Cambodia to establish the Extraordinary Chambers in the Courts of Cambodia ('ECCC').[194] This reference is recalled in the preamble of the

[193] SCSL, *Prosecutor v. Norman*, Decision on Appeal by the Truth and Reconciliation Commission for Sierra Leone ('TRC' or 'The Commission') and Chief Samuel Hinga Norman JP against the Decision of His Lordship, Mr Justice Bankole Thompson Delivered on 30 October 2003 to Deny the TRC's Request to Hold a Public Hearing with Chief Samuel Hinga Norman JP, 28 November 2003, SCSL-2003-08-PT, paras. 34–35 (http://www.legal-tools.org/doc/8b82ff/).

[194] Khmer Rouge trials, UN Doc. A/RES/57/228, 27 February 2003, preamble (http://www.legal-tools.org/doc/c9de70/).

Agreement accordingly concluded.[195] Consequently, the jurisprudence of the ECCC reveals a number of references to the reconciliatory aim, by both the Supreme Court Chamber and the Trial Chamber.[196] Relevantly, the Supreme Court Chamber has commented as follows:

> On the policy level, it should be emphasised that ECCC criminal proceedings ought to be considered as a contribution to the process of national reconciliation, possibly a starting point for the reparation scheme, and not the ultimate remedy for nation-wide consequences of the tragedies during the DK. As such, the ECCC cannot be overloaded with utopian expectations that would ultimately exceed the attainable goals of transitional justice. Therefore, while the ECCC did assume the competence to grant "collective and moral" reparations, this competence must be interpreted in view of a narrow mandate and purpose.[197]

5.8.2.5. Special Tribunal for Lebanon

UN Resolution 1757 establishing the Special Tribunal for Lebanon ('STL'), and the associated agreement between the UN and Lebanon, are silent on the issue of reconciliation. However, the former President of the Tribunal Antonio Cassese referred to the promotion of reconciliation as part of the Tribunal's purpose during the pre-trial phase of the proceedings in the

[195] ECCC, Agreement between the United Nations and the Royal Government of Cambodia Concerning the Prosecution under Cambodian Law of Crimes Committed during the Period of Democratic Kampuchea, 6 June 2003, preamble (http://www.legal-tools.org/doc/3a33d3/).

[196] For references by the Supreme Court Chamber, see ECCC, *Prosecutor v. Ieng et al*., Supreme Court Chamber, Decision on Immediate Appeal against the Trial Chamber's Order to Release the Accused IENG Thirith, 13 December 2011, 002/19-09-2007-ECCC-TC/SC(09), para. 28 (http://www.legal-tools.org/doc/ca9bf0/); ECCC, *Prosecutor v. Nuon et al*., Supreme Court Chamber, Decision on Immediate Appeals against Trial Chamber's Second Decision on Severance of Case 002, 25 November 2013, 002/19-09-2007-ECCC-TC/SC(28), para. 61 (http://www.legal-tools.org/doc/4e08f8/); ECCC, *Prosecutor v. Kaing*, Supreme Court Chamber, Decision on Guidelines for Reclassification of Documents on Case File, 26 July 2012, 001/18-07-2007-ECCC/SC, para. 5 (http://www.legal-tools.org/doc/50d29d/). For references by the Trial Chamber, see ECCC, *Prosecutor v. Nuon et al*., Trial Chamber, Final Decision on Witnesses, Experts and Civil Parties to be Heard in Case 002/01, Opinion of Judges Silvia Cartwright and Jean-Marc Lavergne, 7 August 2014, 002/19-09-2007-ECCC/TC, para. 109 (http://www.legal-tools.org/doc/31e85d/).

[197] ECCC, *Prosecutor v. Kaing*, Supreme Court Chamber, Appeal Judgement, 3 February 2012, 001/18-07-2007-ECCC/SC, para. 655 (http://www.legal-tools.org/doc/681bad/).

Prosecutor v. Ayyash et al. matter.[198] In deciding to hold trials *in absentia*, the STL's Trial Chamber also referred to this purpose.[199]

The importance of the topic of outreach needs to be acknowledged. Rule 52 of the STL's *Rules of Procedure and Evidence* requires the Registrar to set up an Outreach Programme Unit to (i) disseminate accurate and timely information to the public, particularly in Lebanon, about the general role and functioning of the Tribunal, and (ii) carry out outreach activities related to victims.

With experience of the ICTY which had pioneered outreach,[200] the STL's Head of Outreach Olga Kavran recognised that Reconciliation is a very complex and often ill-defined process. To be fully effective, it requires some form of participation of all segments of society and cannot be achieved solely by the in-court work of the judges. She initiated an inter-university programme in Beirut whereby students in the various Lebanese universities were invited to undertake a course in international criminal law presented by the STL via video facilities at the Asser Institute in The Hague. Since 2011, more than 1,000 students from eleven universities enrolled in the programme, hundreds received certificates of attendance and completion, and a considerable number were rewarded with a visit to The Hague and to the STL. It has been described by one of the participating Lebanese professors as the best effort at Reconciliation since the end of the civil war in 1990. The reason he saw it as a Reconciliatory effort is because of the collaboration that arose out of the programme among academic staff from the various universities in Lebanon and because students from all backgrounds attend lectures together in each other's universities. Prior to that initiative no such rapport had occurred. Feedback from the students in every session of the course has always included very positive references to their visits to each other's universities.

Olga Kavran has commented that, based on all these experiences, if asked whether or not international tribunals can contribute to reconciliation, she would say yes – but more through different educational efforts than through its core activity of holding trials.

198 STL, *Prosecutor v. Ayyash et al*., President of the STL, Order Pursuant to Rule 76(E), 18 August 2011, STL-11-01/I/PRES, para. 15 (http://www.legal-tools.org/doc/ab3021/).

199 STL, *Prosecutor v. Ayyash et al*., Trial Chamber, Decision to Hold Trial *In Absentia*, 1 February 2012, STL-11-01/I/TC, para. 20 (http://www.legal-tools.org/doc/19e391/).

200 LIU, 2015, p. 156, see *supra* note 131.

It is too soon to venture any personal opinion as to the latter topic. But certain points should be noted. First, to have lectured in the video course in each of the eight annual programmes, visited several universities and, on seven occasions, the Maison de l'Avocat in Beirut, enjoyed developing relationships with members of the Lebanese Bench, Bar, Academy and their students in Beirut, Paris and The Hague, and learned about Lebanese legal history from the Chief Justice of Lebanon, has been a privilege. It cannot be doubted that the development of international rapport with the current and future leaders of the legal profession of Lebanon is as valuable as the equivalent processes in Paris and London. Representing or familiar with all elements of society, their interrelationship creates a camaraderie that must contribute to mutual understanding among them. Guidance from such people of high ability and from the literature[201] of Lebanon's immense contributions to the international rule of law – among them Ulpian already mentioned;[202] Leontius, Anatolius and Dorotheus of the great Beirut Law School who helped bring together Justinian's *Digest*; [203] the education in Beirut of the representatives of Iran, Iraq, Saudi Arabia and Syria as well as Lebanon who contributed to the creation in San Francisco in 1945 of the UN; the influence of Charles Malik upon the creation of the Universal Declaration of Human Rights – must contribute to a mutual desire among the participants to see Lebanon realise its own immense potential as a leader of Reconciliation in the Middle East.

Some may see the contribution to Reconciliation of trial courts as limited to an initial deck clearing. But the role prescribed by the Statute of the Special Tribunal for Lebanon – of conduct in accordance with the highest principles of international criminal procedure by judges appointed after elaborate process, allowing both prosecution and defence arguments to be presented by competent counsel following substantial enquiry – might perhaps also be regarded as the international community engaging with Lebanon in a common effort to help that ancient and distinguished society promote Reconciliation (both at home and as exemplar to its neighbours) in accordance with Lebanon's own outstanding jurisprudential traditions.

[201] Including Amin Maalouf, *Disordered World: Setting a New Course for the Twenty-First Century*, Bloomsbury, New York, 2011, p. 184.

[202] See *supra* text accompanying note 7272.

[203] Samir Kassir, *Beirut*, University of California Press, 2010, pp. 52–53; and *ibid*., fn. 102, citing Paul Collinet, *Histoire de l'École de Droit de Beyrouth*, Sirey, Paris, 1925, p. 149.

5.8.2.6. International Criminal Court

Neither the Rome Statute nor the ICC Rules of Procedure and Evidence refer to reconciliation. However, the *travaux préparatoires* for the Rome Statute reveal that reconciliation was a concern of both States and other attendees of the plenary meetings, who variously observed:

> Mr Klich, Observer for the Moviment Nacional de Direitos Humanos: […] The Court would make a great contribution to the cause of peace and reconciliation of humanity because it would establish the truth. In order to pardon an offender, the nature of the offence had to be known, to forget the past, paradoxically it had to be remembered dispassionately, and to bring reconciliation, individual responsibility had to be established.[204]
>
> Archbishop Martino, Holy See: […] Those who had been harmed were owed the protection of the law and those responsible for the heinous crimes to be dealt with by the Court must be held accountable in accordance with universal norms. But the Court must be conceived as a means not of seeking revenge but of finding reconciliation. In handing down its sentences the Court must always bear that goal in mind, and the Holy See was convinced that the death penalty had no place in the Statute of the Court.[205]
>
> Mr. Jessen-Petersen, Observer for the Office of the United Nations High Commissioner for Refugees: […] Any permanent court could help to prevent future atrocities and also promote reconciliation in societies emerging from conflict.[206]
>
> Mr. Dorsen, Observer for the Lawyers Committee for Human Rights: […] When national courts could not provide it, the International Criminal Court could offer redress to victims and protection for women, children and witnesses of international crimes. It would strengthen peace by offering justice

[204] United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court: Official Records, Volume II: Summary records of the plenary meetings and of the meetings of the Committee of the Whole, UN Doc. A/CONF.183/13 (Vol. II), 4 December 2001, p. 71 (http://www.legal-tools.org/doc/253396/).

[205] *Ibid.*, p. 73.

[206] *Ibid.*, p. 89.

> through law and would contribute to the process of reconciliation.[207]

5.8.2.7. International Court of Justice

Although the ICJ does not often deal with the same subject-matter as international criminal tribunals, one recent exception is the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* case. The majority of the court did not discuss reconciliation at all in its judgment,[208] but Judge Cançado Trindade dedicated a section of his dissenting opinion to the concept:

> 486. In the violent conflicts which form the factual context of the present case opposing Croatia to Serbia, the numerous atrocities committed (torture and massive killings, extreme violence in concentration camps, rape and other sexual violence crimes, enforced disappearances of persons, expulsions and deportations, unbearable conditions of life and humiliations of various kinds, among others), besides victimizing thousands of persons, made hatred contaminate everyone, and decomposed the *social milieux*. The consequences, in long-term perspective, are, likewise, and not surprisingly, disastrous, given the resentment transmitted from one generation to another.
>
> 487. Hence the importance of finding the difficult path to reconciliation. In my understanding, the first step is the acknowledgment that a widespread and systematic pattern of destruction ends up dismantling everyone, the oppressed (victims) and the oppressors (victimizers). From the times of the *Iliad* of Homer until nowadays, the impact of war and destruction upon human beings has been constantly warning them as to the perennial evil surrounding humanity, and yet lessons of the past have not been learned.
>
> 488. In a penetrating essay (of 1934), Simone Weil, one of the great thinkers of last century, drew attention to the utterly unfair demands of the struggle for power, which ends up victimizing everyone. From Homer's *Iliad* to date, individuals, indoctrinated and conditioned for war and destruction, have become objects of the struggle for domination. There occurs "the

[207] *Ibid.*, p. 119.

[208] ICJ, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia)*, Judgment, Merits, 3 February 2015 (http://www.legal-tools.org/doc/1f2f59/).

substitution of the ends by the means", transforming human life into a simple means, which can be sacrificed; individuals become unable to think, and abandon themselves entirely to "a blind collectivity", struggling for power (the end).

489. The distinction between "oppressors and oppressed", — S. Weil aptly observed, — almost loses meaning, given the "impotence" of all individuals in face of the "social machine" of destruction of the spirit and fabrication of the inconscience. The consequences, as shown by the present case concerning the *Application of the Convention against Genocide*, opposing Croatia to Serbia, are disastrous, and, as I have just pointed out, generate long-lasting resentment.

490. The next step, in the difficult path to reconciliation, lies in the provision of reparations — in all its forms — to the victims. Reparations (*supra*) are, in my understanding, essential for advancing in the long and difficult path to reconciliation, after the tragedy of the wars in the former Yugoslavia in the nineties. In the framework of reparations, besides the judicial (declaratory) acknowledgment of the breaches of the Genocide Convention, there are other measures to pursue the path to reconciliation.

491. In this connection, may I single out that, in a particularly enlightened moment of the long oral proceedings in the present case concerning the Application of the Convention against Genocide (Croatia versus Serbia), in the public sitting before the Court of 10.03.2014, the Agent of Serbia took the commendable step of making the following statement:

> "In the name of the Government and the People of the Republic of Serbia, I reiterate the sincere regret for all victims of the war and of the crimes committed during the armed conflict in Croatia, whatever legal characterization of those crimes is adopted, and whatever the national and ethnic origin of the victims. Each victim deserves full respect and remembrance".

492. The path to reconciliation is certainly a difficult one, after the devastation of the wars in the Balkans. The contending parties are surely aware of it. In the same public sitting before the ICJ, of 10.03.2014, the Agent of Serbia further asserted that

> "The cases in which Serbia was a party were of an exceptional gravity: these were cases born out of the

> 1990s conflicts in the former Yugoslavia, which left tragic consequences to all Yugoslav peoples and opened important issues of State responsibility. This case is the final one in that sequence. In this instant case Serbia expects — more than in any of its previous cases — that suffering of the Serb people should also be recognized, get due attention, and a remedy.
>
> Today it is well known that the conflict in Croatia was followed by grave breaches of international humanitarian law. There is no doubt that Croats suffered a lot in that conflict. This case is an opportunity for all of us to remind ourselves of their tragedy (...). However, the Croatian war caused grave sufferings to Serbs as well (...)".
>
> 493. Croatia, for its part, contends that one of the remedies it seeks is the return of the mortal remains of the deceased to their families. It reports that at least 840 bodies are still missing as the result of the alleged genocidal acts carried out by Serb forces. Croatia claims that Serbia has not been providing the required assistance to carry on the searches for those mortal remains and their identification. The contending parties' identification and return of all the mortal remains to each other is yet another relevant step in the path towards reconciliation. I dare to nourish the hope that the present Dissenting Opinion may somehow, however modestly, serve the purpose of reconciliation.[209]

There is also important recognition of the essential part in opening a path to Reconciliation played by legitimate military force.[210]

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[209] ICJ, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia)*, Dissenting Opinion of Judge Cançado Trindade, 3 February 2015 (http://www.legal-tools.org/doc/6ff19b/).

[210] See Kofi Annan, *Interventions: A Life in War and Peace*, Penguin, 2012, pp. 70–73:

> After a series of demonstrations of the Security Council's lack of commitment to take serious actions to protect the safe area, on July 11, 1995, Bosnian Serb forces under the command of General Ratko Mladic overran Srebrenica […] within days of Srebrenica's capture, thousands of Bosniak men and boys were summarily executed by Serb forces […].
>
> Under General Smith, UNPROFOR was transformed, enabling it finally to apply credible military force […].
>
> The Security Council […] decided to take sides in the conflict, choosing war in firm rejection of peacekeeping […].

5.8.2.8. Reconciliation in International Criminal Jurisprudence: A Conceptual Approach

The jurisprudence of the international criminal tribunals reveals detailed consideration and use of concepts of reconciliation.

But Reconciliation's role in international criminal justice has been essentially restricted to the sentencing or punishment process. In particular, international courts such as the ICC, ICTY and ICTR have often referred to reconciliation when considering a sentence's intended purpose. The idea is that the sentence itself, as a general concept, has a role in the reconciliation process.[211] For example, in the *Katanga* case, the ICC's Trial Chamber II referred to reconciliation in the following way:

> When determining the sentence, the Chamber must also respond to the legitimate need for truth and justice voiced by the victims and their family members. It therefore considers that the role of the sentence is two-fold: on the one hand, punishment, or the expression of society's condemnation of the criminal act and of the person who committed it, which is also a way of acknowledging the harm and suffering caused to the victims; and, on the other hand, deterrence, the aim of which is to deflect those planning to commit similar crimes from their purpose. The punitive aspect of the sentence is therefore meant to restrain any desire to exact vengeance and it is not so much the severity of the sentence that should prevail as its inevitability. When determining the sentence, the Chamber must further ensure that, pursuant to rule 145(1)(a) of the Rules, the sentence reflects the degree of culpability while contributing to the restoration of peace and reconciliation in the communities concerned. Lastly, the extent to which the sentence reflects the culpability of the convicted person addresses the desire to ease that person's reintegration into society, although,

> The resulting deal, or Dayton Accords, brilliantly negotiated by the U.S. ambassador, Richard Holbrooke, finally ended the war in Bosnia and the brutal cruelty to civilians that accompanied it. It was an uneasy peace, with deep and recent wounds inflicted across Bosnian society and between communities that would have to now be carried forward […] – but it is a peace which has held for nearly twenty years.

[211] See, for example, ICC, Situation in the Central African Republic, *Prosecutor v. Bemba*, Trial Chamber, Decision on Sentence pursuant to Article 76 of the Statute, 21 June 2016, ICC-01/05-01-08-3399, para. 11 (http://www.legal-tools.org/doc/f4c14e/); ICC, Situation in the Republic of Mali, *Prosecutor v. Al Mahdi*, Trial Chamber, Judgment and Sentence, 27 September 2016, ICC-01/12-01/15-171, para. 67 (http://www.legal-tools.org/doc/042397/).

> in particular in the case of international criminal law, this goal cannot be considered to be primordial as the sentence on its own cannot ensure the social reintegration of the convicted person.[212]

This final comment – that a sentence cannot ensure a convicted person's social reintegration – touches on one of the potential reasons for international criminal law's reluctance to target Reconciliation in a more overt manner: that the international criminal process, as it is currently constructed, can be seen not to be designed nor equipped to participate actively in a convicted person's reintegration into society. Such conclusion, however, does not seem to be shared by the ICTY, which refers to Reconciliation in the context of rehabilitation – something that is necessarily linked to a person's reintegration into society.[213]

The ICTY has considered in a number of cases that "while national reconciliation and the restoration and maintenance of peace are important goals of sentencing, they are not the only goals", and has also considered as distinct the roles in sentencing of retribution, condemnation and deterrence.[214] On the other hand, the ICTR stated on a number of occasions that "national reconciliation" was a particular purpose of sentencing in the context of that Tribunal's mandate.[215]

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[212] ICC, Situation in the Democratic Republic of the Congo, *Prosecutor v. Katanga*, Trial Chamber, Decision on Sentence pursuant to Article 76 of the Statute, 23 May 2014, ICC-01/04-01/07-3484-tENG-Corr, para. 38 (http://www.legal-tools.org/doc/ff32a8/).

[213] ICTY, *Prosecutor v. Blagojević and Jokić*, Trial Chamber, Judgement, 17 January 2005, IT-02-60-T, para. 824 (http://www.legal-tools.org/doc/7483f2/); ICTY, *Prosecutor v. Obrenović*, Trial Chamber, Sentencing Judgement, 10 December 2003, IT-02-60/2-S, para. 53 (http://www.legal-tools.org/doc/3f6409/).

[214] ICTY, *Prosecutor v. Bralo*, Appeals Chamber, Judgement on Sentencing Appeal, 2 April 2007, IT-95-17-A, para. 82 (http://www.legal-tools.org/doc/14a169/). See also *Prosecutor v. Obrenović*, Sentencing Judgement, 2003, para. 45, see *supra* note 213; ICTY, *Prosecutor v. Tadić*, Trial Chamber, Sentencing Judgment, 11 November 1999, IT-94-1-T*bis*-R117, para. 7 (http://www.legal-tools.org/doc/b1ca4d/); ICTY, *Prosecutor v. Delalić*, Trial Chamber, Judgement, 16 November 1998, IT-96-21-T, para. 1231 (http://www.legal-tools.org/doc/6b4a33/). See also ICTR, *Kamuhanda v. Prosecutor*, Appeals Chamber, Judgement, 19 September 2005, ICTR-99-54A-A, para. 351 (http://www.legal-tools.org/doc/bd4762/).

[215] ICTR, *Prosecutor v. Seromba*, Trial Chamber, Judgement, 13 December 2006, ICTR-2001-66-I, para. 376 (http://www.legal-tools.org/doc/e0084d/); ICTR, *Prosecutor v. Muvunyi*, Trial Chamber, Judgement and Sentence, 12 September 2006, ICTR-2000-55A-T, para. 532 (http://www.legal-tools.org/doc/fa02aa/); ICTR, *Prosecutor v. Bisengimana*, Trial Chamber, Judgement and Sentence, 13 April 2006, ICTR-00-60-T, para. 106 (http://www.legal-tools.org/doc/694dd8/); ICTR, *Prosecutor v. Muhimana*, Trial Chamber, Judgement and Sentence, 28 April 2005, ICTR-95-1B-T, para. 588 (http://www.legal-tools.org/doc/87fe83/);

In a different vein, the ICTY, ICTR, SCSL and ICC have all considered efforts at or the prospect of Reconciliation as a factor influencing the severity of sentence.[216] For example, the "post-conflict conduct of the de-

Prosecutor v. Kamuhanda, Judgement and Sentence, 2004, para. 754, see *supra* note 184; *Prosecutor v. Kajelijeli*, Judgment and Sentence, 2003, paras. 944–45, see *supra* note 184; *Prosecutor v. Semanza*, Judgement and Sentence, 2003, para. 554, see *supra* note 184; ICTR, *Prosecutor v. Ruggiu*, Trial Chamber, Judgement and Sentence, 1 June 2000, ICTR-97-32-I, para. 32 (http://www.legal-tools.org/doc/486d43/); *Prosecutor v. Musema*, Judgement and Sentence, 2000, para. 985, see *supra* note 184; *Prosecutor v. Rutaganda*, Judgement and Sentence, 1999, para. 455, see *supra* note 184; ICTR, *Prosecutor v. Kayishema and Ruzindana*, Trial Chamber, Sentence, 21 May 1999, ICTR-95-1-T, para. 1 (http://www.legal-tools.org/doc/1822e5/); ICTR, *Prosecutor v. Serushago*, Trial Chamber, Sentence, 5 February 1999, ICTR-98-39-S, para. 19 (http://www.legal-tools.org/doc/e2dddb/); *Prosecutor v. Kambanda*, Judgement and Sentence, 1998, para. 26, see *supra* note 184; ICTR, *Prosecutor v. Akayesu*, Trial Chamber, Sentence, 2 October 1998, ICTR-96-4-T, para. 18 (http://www.legal-tools.org/doc/fdbe2a/).

216 See ICTY, *Prosecutor v. Perišić*, Trial Chamber, Judgement, 6 September 2011, IT-04-81-T, para. 1802 (http://www.legal-tools.org/doc/f3b23d/); ICTY, *Prosecutor v. Popović et al.*, Trial Chamber, Judgement, 10 June 2010, IT-05-88-T, para. 2140, fn. 6196 (http://www.legal-tools.org/doc/481867/); ICTY, *Prosecutor v. Zelenović*, Trial Chamber, Sentencing Judgement, 4 April 2007, IT-96-23/2-S, paras. 45, 48 (http://www.legal-tools.org/doc/2a9e0b/); ICTY, *Prosecutor v. Rajić*, Trial Chamber, Sentencing Judgement, 8 May 2006, IT-95-12-S, para. 146 (http://www.legal-tools.org/doc/b50857/); ICTY, *Prosecutor v. Bralo*, Trial Chamber, Sentencing Judgement, 7 December 2005, IT-95-17-S, paras. 71–72 (http://www.legal-tools.org/doc/e10281/); ICTY, *Prosecutor v. Babić*, Trial Chamber, Sentencing Judgement, 29 June 2004, IT-03-72-S, para. 68 (http://www.legal-tools.org/doc/1f575a/); ICTY, *Prosecutor v. Mrđa*, Trial Chamber, Sentencing Judgement, 31 March 2004, IT-02-59-S, paras. 78–79 (http://www.legal-tools.org/doc/d61b0f/); ICTY, *Prosecutor v. Jokić*, Trial Chamber, Sentencing Judgement, 18 March 2004, IT-01-42/1-S, paras. 76–77 (http://www.legal-tools.org/doc/02d838/); ICTY, *Prosecutor v. Češić*, Trial Chamber, Sentencing Judgement, 11 March 2004, IT-95-10/1-S, paras. 28, 56–60 (http://www.legal-tools.org/doc/c86c07/); ICTY, *Prosecutor v. Plavšić*, Trial Chamber, Sentencing Judgement, 27 February 2003, IT-00-39&40/1-S, paras. 75–81 (http://www.legal-tools.org/doc/f60082/); ICTY, *Prosecutor v. Todorović*, Trial Chamber, Sentencing Judgement, 31 July 2001, IT-95-9/1-S, para. 91 (http://www.legal-tools.org/doc/0cd4b3/); *Prosecutor v. Erdemović*, Sentencing Judgement, 1998, para. 21, see *supra* note 181; ICTR, *Prosecutor v. Bagaragaza*, Sentencing Judgement, 17 November 2009, ICTR-05-86-S, para. 38 (http://www.legal-tools.org/doc/3d2d48/); *Prosecutor v. Rugambarara*, Sentencing Judgement, 2007, paras. 33–35, see *supra* note 184; *Prosecutor v. Nzabirinda*, Sentencing Judgement, 2007, para. 71, see *supra* note 184; *Prosecutor v. Serugendo*, Judgement and Sentence, 2006, paras. 32, 52–59, 89, see *supra* note 184; *Prosecutor v. Bisengimana*, Judgement and Sentence, 2006, para. 126, see *supra* note 215; ICTR, *Prosecutor v. Rutaganira*, Trial Chamber, Judgement and Sentence, 14 March 2005, ICTR-95-1C-T, para. 114 (http://www.legal-tools.org/doc/cd2a8f/); ICTR, *Prosecutor v. Bizimungu et al.*, Trial Chamber, Judgement and Sentence, 30 September 2011, ICTR-99-50-T, para. 2017 (http://www.legal-tools.org/doc/7077fa/); SCSL, *Prosecutor v. Sesay et al.*, Appeals Chamber, Judgment, 26 October 2009, SCSL-04-15-A, para. 1209 (http://www.legal-tools.org/doc/133b48/); SCSL, *Prosecutor v. Fofana et al.*, Appeals

fendant which promoted peace and reconciliation in the former Yugoslavia" was identified by the ICTY Appeals Chamber as a potential mitigating factor at sentencing,[217] both after trial and in the context of a guilty plea.[218] The rationale for this position was explained by an ICTY Trial Chamber in the *Prosecutor v. Nikolić* proceedings as follows:

> Acting under Chapter VII of the Charter of the United Nations, this Tribunal is not only mandated to search for and record, as far as possible, the truth of what happened in the former Yugoslavia, but also to bring justice to both victims and their relatives and to perpetrators. Truth and justice should also foster a sense of reconciliation between different ethnic groups within the countries and between the new States on the territory of the former Yugoslavia.
>
> A guilty plea indicates that an accused is admitting the veracity of the charges contained in an indictment. This also means that the accused acknowledges responsibility for his actions. Undoubtedly this tends to further a process of reconciliation. A guilty plea protects victims from having to relive their experiences and re-open old wounds. As a side-effect, albeit not really a significant mitigating factor, it also saves the Tribunal's resources.[219]

Interestingly, the ICTR has also considered a failure to promote peace and reconciliation as an aggravating factor at sentencing.[220] In other jurisdictions that would be classified as going to absence of mitigation.

Chamber, Judgment, 28 May 2008, SCSL-04-14-A, para. 489 (http://www.legal-tools.org/doc/b31512/); *Prosecutor v. Al Mahdi*, Judgment and Sentence, 2016, see *supra* note 211; ICC, Situation in the Democratic Republic of the Congo, *Prosecutor v. Katanga*, Appeals Chamber, Decision on the Review Concerning Reduction of Sentence of Mr Germain Katanga, 13 November 2015, ICC-01/04-01/07-3615, para. 79 (http://www.legal-tools.org/doc/f36347/); ICC, Situation in the Republic of Kenya, *Prosecutor v. Kenyatta*, Trial Chamber, Decision on Defence Request for Conditional Excusal from Continuous Presence at Trial, Separate Further Opinion of Judge Eboe-Osuji, 18 October 2013, ICC-01/09-02/11-830-Anx3-Corr, paras. 42–43 (http://www.legal-tools.org/doc/7af472/).

217 ICTY, *Prosecutor v. Blagojević and Jokić*, Appeals Chamber, Judgement, 9 May 2007, IT-02-60-A, para. 330 (http://www.legal-tools.org/doc/c32768/).

218 ICTY, *Prosecutor v. Zelenović*, Appeals Chamber, Judgement on Sentencing Appeal, 31 October 2007, IT-96-23/2-A, para. 17 (http://www.legal-tools.org/doc/1e7496/).

219 ICTY, *Prosecutor v. Nikolić*, Trial Chamber, Sentencing Judgment, 18 December 2003, IT-94-2-S, paras. 120–21 (http://www.legal-tools.org/doc/f8722c/).

220 *Prosecutor v. Ndindabahizi*, Judgement and Sentence, 2004, para. 508(ii), see *supra* note 184; upheld on appeal: ICTR, *Ndindabahizi v. Prosecutor*, Appeals Chamber, Judgement, 16

Of particular note is the ICC's approach to Reconciliation in the context of a guilty plea in the *Prosecutor v. Al Mahdi* case in 2016. The Court took the opportunity to refer to the guilty plea and reconciliation, stating that Mr. Al Mahdi's admission of guilt "may also further peace and reconciliation in Northern Mali by alleviating the victims' moral suffering through acknowledgement of the significance of the destruction".[221] However, the Trial Chamber did not refer to reconciliation when considering the Accused's remorse, or his offer to make amends to the victims. The Chamber stated:

> In addition to expressing remorse, and contrary to the submission of the LRV, the Chamber does note that Mr Al Mahdi has expressed sentiments of empathy towards the victims of the crime he committed. The Chamber refers to the example of actions showing this empathy cited by the Defence, such as Mr Al Mahdi's offer to the imam of the Sidi Yahia Mosque to reimburse the cost of the door.[222]

Since in my view 'Reconciliation' is a fundamental concept in international criminal law, and Reconciliation between an offender and the victims of his or her crimes is a value that should be actively promoted, the ICC's failure to recognise Mr. Al Mahdi's offer (as well as his remorse and empathy) as an act of Reconciliation may be seen as a missed opportunity.

Finally, contribution to the Reconciliation process (or the status of the reconciliation process on the ground) has also been considered when reviewing a convicted person's detention status. At the ICC, the status of the reconciliation effort 'on the ground' has been held to be relevant to the question of interim release, particularly in assessing whether the accused is likely to commit further crimes within the jurisdiction of the Court.[223]

At the ICTY, ICTR, Mechanism for International Criminal Tribunals ('IRMCT') and the Residual Special Court for Sierra Leone ('RSCSL'), the fact that a convicted person is prepared to make efforts towards Reconcilia-

January 2007, ICTR-01-71-A, para. 134 (http://www.legal-tools.org/doc/0f3219/). See also *Prosecutor v. Muhimana*, Judgement and Sentence, 2005, para. 604, see *supra* note 215.

221 *Prosecutor v. Al Mahdi*, Judgment and Sentence, 2016, para. 100, see *supra* note 211.

222 *Ibid.*, para. 104.

223 ICC, Situation in the Republic of Côte d'Ivoire, *Prosecutor v. Gbagbo*, Pre-Trial Chamber, Fourth decision on the review of Laurent Gbagbo's detention pursuant to Article 60(3) of the Rome Statute, 11 November 2013, ICC-02/11-01/11-558, para. 51 (http://www.legal-tools.org/doc/0d1beb/).

tion is a factor that can be taken into account when considering early or provisional release.[224]

There is also limited jurisprudence regarding the role of Reconciliation in the reparations process, particularly in the context of the ICC.[225] In *Prosecutor v. Lubanga*, the accused was found guilty of the war crimes of enlisting and conscripting children under the age of 15 years and using them to participate actively in hostilities. During the reparations phase, the Trust Fund for Victims ('TFV') invited the Chamber to consider whether "symbolic interventions and programs aimed at promoting reconciliation and non-repetition" should be included in an overall reparations programme.[226] The Chamber agreed,[227] echoing the Appeals Chamber's earlier support for reconciliation measures targeting the wider community affected by the crimes.[228]

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[224] ICTY, *Prosecutor v. Krajišnik*, President of the ICTY, Decision of the President on Early Release of Momčilo Krajišnik, 2 July 2013, IT-00-39-ES, paras. 26, 28 (http://www.legal-tools.org/doc/f12f5d/); ICTY, *Prosecutor v. Haradinaj et al*., Trial Chamber, Decision on Ramush Haradinaj's Motion for Provisional Release, 6 June 2005, IT-04-84-PT, para. 34 (http://www.legal-tools.org/doc/50e888/). IRMCT, *Prosecutor v. Češić*, President of the Mechanism, Public Redacted Version of the 30 April 2014 Decision of the President on the Early Release of Ranko Češić, 28 May 2014, MICT-14-66-ES, paras. 23–25 (http://www.legal-tools.org/doc/cc45ad/). ICTR, *Prosecutor v. Rugambarara*, Office of the President, Decision on the Early Release Request of Juvénal Rugambarara, 8 February 2012, ICTR-00-59, paras. 9–10 (http://www.legal-tools.org/doc/a7cfee/). RSCSL, *Prosecutor v. Fofana*, Decision of the President on Application for Conditional Early Release, 11 August 2014, SCSL-04-14-ES-836, paras. 42–43 (http://www.legal-tools.org/doc/1027ef/).

[225] See also ECCC, *Prosecutor v. Nuon et al*., Trial Chamber, Case 002/01 Judgement, 7 August 2014, 002/19-09-2007/ECCC/TC, para. 1152 (http://www.legal-tools.org/doc/4888de/).

[226] ICC, Situation in the Democratic Republic of the Congo, *Prosecutor v. Lubanga*, Trial Chamber, Request Concerning the Feasibility of Applying Symbolic Collective Reparations, 15 July 2016, ICC-01/04-01/06-3219, para. 8 (http://www.legal-tools.org/doc/ba36b3/). See also ICC, Situation in Uganda, *Prosecutor v. Ongwen*, Pre-Trial Chamber, Public redacted version of "Report of the Registry on the outreach mission", 9 April 2015, ICC-02/04-01/15-218-Conf-Exp, 18 December 2015, ICC-02/04-01/15-218-Red, paras. 23, 25 (http://www.legal-tools.org/doc/bd5146/), where the ICC process was recognised by victims as part of the reconciliatory process: "We speak with one voice as members of the affected communities demanding for justice and accountability for what we went through, from which healing and reconciliation can take root".

[227] *Prosecutor v. Lubanga*, Request Concerning the Feasibility of Applying Symbolic Collective Reparations, 2016, paras. 11–12, see *supra* note 226.

[228] ICC, Situation in the Democratic Republic of the Congo, *Prosecutor v. Lubanga*, Appeals Chamber, Judgment on the Appeals against the "Decision Establishing the Principles and Procedures to be Applied to Reparations" of 7 August 2012, 3 March 2015, ICC-01/04-01/06-3129, para. 215 (http://www.legal-tools.org/doc/c3fc9d/).

Examination of the foundational documents of international criminal tribunals, as well as their jurisprudence, reveals that Reconciliation is often, but not always, a stated aim of international criminal justice. It has also revealed that the relationship between justice processes and Reconciliation processes emerges in a number of different areas, including jurisdiction, sentencing, provisional or early release and reparations.

5.9. Some Reflections on how the Discipline of International Criminal Law Might Evolve

I have emphasised the task of international criminal law – to protect people from abuse and, for that purpose, to draw on the strengths of its communities – and the law's currently unrealised potential to perform that task, all measured against the principle of Reconciliation. I have argued the need for the comprehensive juristic exercise, beginning with principles and applying them to the creation of particular crimes, which is the ambition of sophisticated modern domestic criminal codes. I have four proposals: two which deal with the compelling need to fill obvious gaps; the third more general; and the fourth ultimate. They concern terrorism; the environment; a combination of research and proper use of the ICJ; and a vision of what Reconciliation might contribute to an international criminal law fit for modern purpose.

5.9.1. Terrorism

Current international criminal law draws on:

- the Nuremberg crimes, adopted by the Rome Statute creating the ICC, of genocide, crimes against humanity, war crimes and the crime of aggression;
- certain international crimes, beginning with the ancient crime of piracy and recounted by Boister;[229]
- certain major domestic crimes, including murder and terrorism, as in the case of the STL where the Security Council has used Chapter VII of the UN Charter to react against threats against international peace and security by creating an *ad hoc* criminal court.

But for reasons spelt out in a series of recent addresses,[230] the eight-decade delay in creating a crime of terrorism at international law is now

[229] Boister, 2012, see *supra* note 94.

both inconsistent with Security Council policy and intolerable. The UN Charter states:

> **Functions and Powers**
>
> **Article 24**
>
> 1. In order to ensure prompt and effective action by the United Nations, its Members confer on the Security Council primary responsibility for the maintenance of international peace and security, and agree that in carrying out its duties under this responsibility the Security Council acts on their behalf.
>
> 2. In discharging these duties the Security Council shall act in accordance with the Purposes and Principles of the United Nations. The specific powers granted to the Security Council for the discharge of these duties are laid down in Chapters VI, VII, VIII, and XII.
>
> **Chapter VII: Action With Respect to Threats to the Peace, Breaches of the Peace, and Acts of Aggression**
>
> **Article 39**
>
> The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security.
>
> **Article 41**
>
> The Security Council may decide what measures not involving the use of armed force are to be employed to give effect to its decisions, and it may call upon the Members of the United Nations to apply such measures. […]
>
> **Article 42**
>
> Should the Security Council consider that measures provided for in Article 41 would be inadequate or have proved to be inadequate, it may take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security. Such action may include demonstrations, blockade, and other operations by air, sea, or land forces of Members of the United Nations.

[230] Among them, David Baragwanath, "Responding to Terrorism: Definition and Other Actions", in Chile Eboe-Osuji and Engobo Emeseh (eds.), *Nigerian Yearbook of International Law 2017*, Springer, Cham, 2018, pp. 17–49.

The UN Security Council by Resolution 2341 of 13 February 2017 has responded to potential threats against infrastructure within States:

> *Reaffirming* its primary responsibility for the maintenance of international peace and security, in accordance with the Charter of the United Nations, […]
>
> *Reaffirming* that terrorism in all forms and manifestations constitutes one of the most serious threats to international peace and security and that any acts of terrorism are criminal and unjustifiable regardless of their motivations, whenever, wherever and by whomsoever committed, and *remaining determined* to contribute further to enhancing the effectiveness of the overall effort to fight this scourge on a global level,
>
> *Reaffirming* that terrorism poses a threat to international peace and security and that countering this threat requires collective efforts on national, regional and international levels on the basis of respect for international law, including international human rights law and international humanitarian law, and the Charter of the United Nations, […].[231]

It is unnecessary to debate the more than 200 different definitions of terrorism currently on offer. Disputed issues, such as State terrorism, and Nelson Mandela's resistance to oppression, can be left to be considered under my third proposal. The international community must bring a unified approach to the terrorist crisis, which continues to operate across State borders. It is sufficient:

1. for the UN Security Council, whose legislative powers were used after 9/11, to compel every State Member of the UN to enact domestic terrorism legislation, to pick up and enact the three-fold rubric of the 1937 *International Convention for the Prevention and Punishment of Terrorism* adopted under the auspices of the League of Nations, in terms followed closely by the *Interlocutory Decision of 16 February 2011* of the Appeals Chamber of the STL: (i) a serious crime, such as murder; (ii) committed with intent to spread fear among the population (which would generally entail the creation of public danger) or directly or indirectly coerce a national or international authority to take some action, or to refrain from taking it; and (iii) involving a transnational element; and

[231] On threats to international peace and security caused by terrorist acts, UN Doc. S/RES/2341 (2017), 13 February 2017 (https://www.legal-tools.org/doc/337129/).

2. for such jurisdiction to be conferred on each State and on a small international tribunal, charged with ensuring inter-State liaison and, where necessary, itself dealing with cases that cannot be managed by States.

5.9.2. The Environment

The Paris Agreement and its aftermath have brought home to virtually all States and their representatives the need to employ all available means to respond to global warming. These include international criminal law.[232]

5.9.3. Research and the International Court of Justice

Reconciliation is fundamental to issues of causation of conflict and means of responding to it. The complexity and difficulty of these topics is beyond the scope of the present discussion; they are the subject of important recent analysis which emphasises the need for adequate research.[233]

A further, obvious, and yet sadly under-used resource is the ICJ. *The Charter of the United Nations: A Commentary*[234] acknowledges that the 'duties' of the Security Council under the UN Charter are *legal* duties susceptible of consideration by the ICJ, itself created by Chapter XIV of the same Charter. Under Article 96, the "General Assembly or the Security Council may request the International Court of Justice to give an advisory opinion on any legal question". While the opinion is advisory in law, the duties of the Security Council, stated in the UN Charter, are not. Baroness Rosalyn C. Higgins QC, former President of the ICJ, advises:

> The Court has […] emphasiz[ed] […] that a UN organ needed legal advice in order to know how to conduct its business […].[235]

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[232] David Baragwanath "Exploration of Other International Fora for Legitimacy and Enforceability", in Wendy Miles (ed.), *Dispute Resolution and Climate Change: The Paris Agreement and Beyond*, International Chamber of Commerce, Paris, 2017, chap. 17, pp. 103–10.

[233] See, for instance, Karim Bahgat *et al*., *Inequality and Armed Conflict: Evidence and Data*, Peace Research Institute Oslo (PRIO), 12 April 2017.

[234] Bruno Simma, Daniel-Erasmus Khan, Georg Nolte and Andreas Paulus (eds.), *The Charter of the United Nations: A Commentary*, 3rd edition, Oxford University Press, 2012.

[235] Rosalyn Higgins, "A Comment on the Current Health of Advisory Opinions From 50 years of the International Court of Justice: Essays in honour of Sir Robert Jennings", in Rosalyn Higgins, *Themes and Theories: Selected Essays, Speeches, and Writings in International Law*, vol. 2, Oxford University Press, 2009, pp. 1043, 1047.

> the greatest role for Advisory Opinions is where there are uncertainties about the institutional arrangements within the UN […].[236]
>
> If organs are reluctant to seek advice on the development of their own competencies, except when forced to do so by the behaviour of occasional recalcitrant states, the Court's role as the supreme 'in-house counsel' to the UN will remain limited.[237]

The Security Council issued a research report called "The Rule of Law: Can the Security Council make better use of the International Court of Justice".[238] It notes:

> The UN Charter envisioned a symbiotic relationship between the Security Council and the ICJ, the principal judicial organ of the UN. However, the Council has rarely taken advantage of this potential and, for the most part, the role of the Court has been neglected by Council members and by the Secretariat. […]
>
> Overall, the report concludes that, at a time when the demands on the Council are higher than ever in its history, strengthening the relationship between the Council and the Court could further promote international peace and security.[239]

It recognises:

> a more prominent role for the Court, within the confines set by the Council itself in this context, would likely strengthen the effectiveness and legitimacy of the Council as an institution.[240]

Recent essays have argued that a formulation of the duties of the Security Council to be declared by the ICJ would include the identification of

[236] *Ibid.*, p. 1050.

[237] *Ibid.*, p. 1052.

[238] Security Council Report, *The Rule of Law: Can the Security Council make better use of the International Court of Justice*, no. 5, 20 December 2016.

[239] *Ibid.*, p. 1.

[240] *Ibid.*, p. 9.

risks to international peace and security, resulting from both terrorism[241] and threats to the environment.[242]

It is competent for the ICJ to consider and apply the modern jurisprudence as to systemic safety and the nature of the 'duties' of the Security Council to devise, lay down and maintain safe systems for the maintenance of international peace and security – including the role international criminal law can and should play in that process.[243] While the ICJ has jurisdiction not to entertain an application under Article 96 for advisory opinion, such application may be made either by the Security Council itself or – without vulnerability to veto – the General Assembly or other UN institutions.

5.9.4. Ultimate

The proliferation of nuclear capacity has added immeasurably to the need and urgency for confronting the potential of Reconciliation and to help achieve an international criminal law fit for purpose. In the next section, I offer some concluding thoughts.

5.10. Conclusion as to Reconciliation and International Criminal Law

Methods of transitional justice other than criminal trials each have their advantages and disadvantages. My first question to Justice Richard Goldstone many years ago was: which is to be preferred? He advised that it depends on the circumstances and in particular on the choice of the affected community. Clearly, either or both may be preferred; they can be complementary. What may be overlooked is that both should focus on Reconciliation.

For the immediate protagonists – complainants and accused – the criminal process is naturally seen as very personal: the offence against me (or my family); my liberty at stake. The conduct alleged as criminal has polarised them. It is a rare complainant whose mind is focused on ultimate

241 Baragwanath, 2018, see *supra* note 230.

242 Philippe Sands, "Climate Change and the Rule of Law: Adjudicating the Future in International Law", in *Journal of Environmental Law*, 2016, vol. 28, no. 1, pp. 19–35.

243 David Baragwanath, "The Periscope of Public International Law", in *Comparative Law Journal of the Pacific*, 2017, vol. 23, no. 1, p. 18, fn. 51; citing Georges Charpak, Richard L. Garwin, and Venance Journé, *De Tchernobyl en Tchernobyls*, Éditions Odile Jacob, Paris, 2005, p. 490.

Reconciliation. Especially so in the case of the enormities that result in trial before an international court.

Yet, from early times, Reconciliation has provided the overall architecture for the judicial process. That relating to truth and reconciliation commissions is clearly focused upon it. In South Africa, the decision whether to try an accused who had acknowledged guilt was affected by whether there was apparent candour and repentance.

In international criminal trials, procedurally, the task of modern international criminal tribunals is to apply the highest standards of international criminal procedure[244] in order to meet two specific immediate criteria: the absolute requirement of a fair trial[245] and, subject only to that, the practical requirement of expedition.[246] Both these responsibilities and the substantive task of achieving justice require greater explanation, the key to which is the concept of Reconciliation. That is because, as I have argued, a policy of Reconciliation is the principled and practical way to serve the ultimate purpose of international criminal law – to recognise and promote the decency that achieves human dignity. In short, the ultimate purpose of both international law and international criminal justice is to contribute to a Reconciled international society. Good law and judging will contribute to public confidence in the rule of law, compliance with which makes for a decent society. Bad law and judging will breed lack of trust and insecurity, having the opposite effect.

Parts of the judges' task are expressed specifically in the judicial oath, administered to many common law judges and capturing the essence of the role of all judges: "[i] to do right to all manner of people [ii] after the laws and usages of the realm, [iii] without fear or favour, affection or illwill".[247] Item [ii] promises the stability it is the law's function to provide to its community; [iii] guarantees fearless independence; and [i] requires the judges to identify both those whose interests are at stake in the proceeding and how justice is to be done between and among competing interests.

I have noted that a former President of the Supreme Court of the Netherlands selected from the language of France two words to summarise

[244] As stipulated in the Statute of the Special Tribunal for Lebanon, 30 May 2007, Article 28 ('STL Statute') (http://www.legal-tools.org/doc/da0bbb/).

[245] *Ibid.*, Article 16.

[246] *Ibid.*, Article 28(2).

[247] United Kingdom, Promissory Oaths Act 1868, 31 July 1868, numbers added.

the judges' role; in doing so he echoed [i] and [iii]: "prudence et audace".[248] The Premier Président of the Cour de Cassation, Guy Canivet, had opened the French legal year with the modest aphorism as to the former quality, '*Il est vrai que nous ne rendons justice que les mains tremblantes*'.[249]

As well as the obligations so expressed, the substantive role of judges includes: (i) taking care to understand both the facts and their contexts as perceived by competing parties; (ii) demonstrating to the parties and the community the great principles of fairness in action – treating all parties and witnesses with courtesy; ensuring that each understands what is going on and has fair opportunity to be heard; giving clear and timely rulings that demonstrate a true understanding and consideration of the competing argument; and (iii) thereby contributing to enhanced public understanding and appreciation of the rule of law to the beleaguered community whose problems have required the intervention of an international court.

Certainly, judges must be free of the arrogance that would assert "trials in and of themselves create […] reconciliation".[250] Their great powers are to be exercised in performance of a service role; theirs is only one of many agencies that can contribute to transition from grave disharmony to, or towards, harmony. Looked at narrowly, the function of trial and verdict does not of itself achieve Reconciliation. But seen in total perspective, unless mismanaged it can and should contribute, whether to a limited or a greater extent, to such process and result. Indeed the *raison d'être* of the courts and their judges is in essence Reconciliatory. While judges are not historians, it is imperative (as context is all-important) that judges grapple with such of the history (viewed from each competing perspective) as is needed to understand the arguments and evaluate and express both the contentions and such conclusions as are required to decide the case. That task is a difficult one and should not be embarked upon further than is essential to performing the judicial role. But like it or not, the court is required to pronounce definitively on the issues of which it is seized. It must ensure procedurally that it is equipped by due process with the capacity to answer them and then take the trouble of ensuring a competent answer. It must

248 See *supra* text between notes 4 and 8.

249 Guy Canivet, *Audience solennelle du 6 janvier 2006: Discours de Guy Canivet, Premier président de la Cour de cassation*, Paris, 6 January 2006 (available on Cour de cassation's web site).

250 Cf. *supra* text accompanying note 85.

bear in mind the practical realities, among them the fundamental importance of reconciliation.

That can include the considerations identified by Vattel in the eighteenth century and Nish in the twenty-first:

> […] in his whole conduct, in his severity as well as in his mercy, the sovereign ought to have no other object in view than the greater advantage of society. A wise prince knows how to reconcile justice with clemency, – the care of the public safety, with that pity which is due to the unfortunate.[251]

The prince must also be persistent:

> Reconciliation is slow to develop and has to be deliberately fostered. […] even the South African Truth and Reconciliation Commission of Archbishop Desmond Tutu, which did not follow a war, was slow to ferment.[252]

Modern judges are not sovereigns. But as well as recognizing such considerations as the objective enormity and illegality of conduct, they must remove the blinkers to understanding why it was that the respective parties acted as they did. They must understand that a judicial role is not simply to apply the sword of Vattel's "strict and rigid justice",[253] but to see it as part of a total process of reconciliation.

As to sentencing, Foucault reproduces the 1789 summary by the Chancery in France of the petitions addressed to the authorities concerning tortures and executions:

> Let penalties be regulated and proportioned to the offences, let the death sentence be passed only on those convicted of murder, and let the tortures that revolt humanity be abolished.[254]

While it may be necessary ultimately to impose a stern sentence, which may be of imprisonment for life, the crucial need for proportionality requires, as he adds:[255]

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[251] Emmerich de Vattel, *The Law of Nations: Or, Principles of the Law of Nature, Applied to the Conduct and Affairs of Nations and Sovereigns*, G.G. and J. Robinson, London, 1797, p. 83.

[252] Ian Nish, "British-Japanese Dilemmas in South East Asia after 1945", in Hugo Dobson and Kosuge Nobiko (eds.), *Japan and Britain at War and Peace*, Routledge, Abingdon, 2009, p. 80.

[253] De Vattel, 1797, p. 437, see *supra* note 251.

[254] Michel Foucault, *Discipline and Punish: The Birth of the Prison*, translated by Alan Sheridan, Penguin, London, 1977, p. 73.

> 'The penalty must be made to conform as closely as possible to the nature of the offence, so that fear of punishment diverts the mind from the road along which the prospect of an advantageous crime was leading it' […] 'To derive the offence from the punishment is the best means of proportioning punishment to crime […].' In analogical punishment, the power that punishes is hidden.

Proportionality in punishment was required by the Magna Carta of 1215:[256]

> 20 A free man shall be amerced for a small point only according to the measure thereof, and for a great crime according to its magnitude […].

But it extended the control over regal power beyond punishment to due process:

> 39 No free man shall be taken, imprisoned, disseised, outlawed, banished, or in any way destroyed, nor will We proceed against or prosecute him, except by the lawful judgment of his peers and by the law of the land.
>
> 40 To no one will We sell, to none will We deny or delay, right of justice.

While slavery and capital punishment have fallen from favour in international criminal law, trial by jury plays no part in it, and attitudes to theology have changed, twenty-first century perceptions in the post-World War II human rights era have retained much of these values of the thirteenth century. They concern stability within the community and protection of citizens and their relationships with both the sovereign power and one another. They were and are in substance Reconciliatory.

The same may be seen within the standards stipulated by the UN Security Council in establishing the STL. The Tribunal's Statute spells out rights of suspects during investigation,[257] rights of the accused,[258] and rights of victims; it facilitates the recovery of compensation for victims;[259]

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255 *Ibid.*, pp. 104–05; citing Cesare Beccaria, *Traité des Délits et des Peines*, Guillaumin, Paris, 1856 (first published in 1764), p. 119, and Jean-Paul Marat, *Plan de Législation Criminelle*, Neuchâtel, 1780, p. 33.

256 A.E. Dick Howard, *The Road from Runnymede: Magna Carta and Constitutionalism in America*, The University of Virginia Press, 1968, pp. 387–88.

257 STL Statute, Article 15, see *supra* note 244.

258 *Ibid.*, Article 16.

259 *Ibid.*, Article 25.

and, as well as the three conventional organs of Chambers,[260] Prosecutor[261] and Registry, [262] it innovates by creating a Defence Office[263] responsible for protecting the rights of the defence and providing support and assistance to defence counsel.[264]

Appointed, like the Prosecutor, Registrar and Head of the Defence Office, by the UN Secretary-General, the judges of the STL are required to be "persons of high moral character, impartiality and integrity, with extensive judicial experience […] independent in the performance of their functions and [prohibited from accepting or seeking] instructions from any Government of any other source". [265]

Their functions include both the application of certain provisions of the Lebanese Criminal Code relating to terrorism and murder, [266] the adoption and application of the "highest standards of international procedure" prescribed by the STL Statute "with a view to ensuring a fair and expeditious trial" ,[267] which standards fall within the fundamental change already described[268] that has occurred within public international law.

Reconciliation is to be seen in both the creation, as well as in the application, of international criminal law. The 'fundamental change' in public international law has had many authors. They include those who created the great post-war human rights conventions. As well, squarely recognised by Article 38(1)(d) of the ICJ Statute, are those responsible for "judicial decisions and the teachings of the most highly qualified publicists of the various nations", together with other speakers, writers and decision-makers who have discerned and promoted the need for change.

In the absence of any international legislature, beyond the parties to multilateral treaties and on occasion the Security Council in exercise under Article 24 and Chapter VII of the UN Charter of its power to make or require legislative change, and the coral reef process of developing custom-

260 *Ibid.*, Article 8.

261 *Ibid.*, Article 11.

262 *Ibid.*, Article 12.

263 *Ibid.*, Article 13.

264 Selected from a list drawn up by the independent Head of the Defence Office.

265 STL Statute, Article 9, see *supra* note 244.

266 *Ibid.*, Article 2.

267 *Ibid.*, Article 28.

268 *Belhaj v. Straw*, 2014, see *supra* note 11.

ary international law, both international and domestic judges can find themselves required to consider whether, in order to decide a case, they should make or develop the law.[269]

The challenges include tensions between judiciary and lawmakers – a role that in international law is claimed by States. But the principle of legality prohibits judges from creating and convicting of a novel offence.[270] Subject to that limit and within others that are perhaps incapable of precise expression, international law has been and will continue to be evolved by judges navigating between reluctance to accept the legislative role traditionally belonging to States and yet a determination to avoid injustice. To the criteria already used to evaluate such decisions as required in the ICTY's *Tadić* Interlocutory Appeal (whether the dichotomy between international and civil conflicts should be eroded),[271] should surely be added the overall principle of Reconciliation and *what decision will best promote that value*.

The same is increasingly to be said of the judicial application of law, including international criminal law.

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269 In United Kingdom Supreme Court, *Al-Waheed v. Ministry of Defence*, 17 January 2017, [2017] UKSC 2, [2017] 2 WLR 327, Lord Mance stated:

> 148. […] The role of domestic courts in developing (or […] even establishing) a rule of customary international law should not be undervalued. This subject was not the object of detailed examination before us, and would merit this in any future case where the point was significant. But the intermeshing of domestic and international law issues and law has been increasingly evident in recent years. Just as States answer for domestic courts in international law, so it is possible to regard at least some domestic court decisions as elements of the practice of States, or as ways through which States may express their opinio juris regarding the rules of international law. The underlying thinking is that domestic courts have a certain competence and role in identifying, developing and expressing principles of customary international law.

Lord Mance drew on Hersh Lauterpacht's earlier article, "Decisions of Municipal Courts as a Source of International Law", in *British Yearbook on International Law*, 1929, vol. 10, pp. 65–95, and later writings, especially by Michael Wood. See *supra* note 17.

270 Antonio Cassese (ed.), *The Oxford Companion to International Criminal Justice*, Oxford University Press, 2009, p. 438. As to domestic criminal law, in United Kingdom House of Lords, *R v. Margaret Jones*, Opinions of the Lords of Appeal for Judgment in the Cause, 29 March 2006, [2006] UKHL 16, [2007] 1 AC 136, the House of Lords held that the days had gone by when the courts imported a criminal offence without parliamentary sanction. So, although in the past the common law had imported from international law the criminal offence of piracy, such procedure was no longer possible in the case of alleged breach of international law as to aggression.

271 See Shane Darcy, *Judges, Law and War: The Judicial Development of International Humanitarian Law*, Cambridge University Press, 2014, p. 111.

Domestic judges are seen as providing the legal voice and arm of the State; stating the law and authorising or requiring the operation of its sovereign powers. Legislation is made by the State's legislature, and the law gives much authority, including inherent powers, to the executive. But that is true only to the extent that legislature and executive conform with the law as interpreted by the judges. How they should do so is regulated by legal standards which the judiciary have a major role in setting. There are many criteria, which may differ from the highly principled, to those of Hitler's Roland Freisler.

Historically and, in relation to purely domestic issues, currently, both the appointment and the performance of judges have been assessed according to domestic standards. For them to perform their role, familiarity with local conditions remains essential. Nevertheless, increasingly in domestic contexts, as necessarily with regard to international judging, broader criteria have been developed.[272] The evolution of the Internet and other aspects of the communication revolution has allowed both judges and critics of their performance to compare it with standards elsewhere. There is an ever-increasing capacity for and interest in comparative law and adjudication.[273]

The impossibility of legislating for every contingency[274] charges judges – required to decide all cases even though more than one option is fairly arguable – to select one of them as decisive. In the case, for example, of open-textured language of a written document, such as a constitution or convention, what is the ultimate criterion? It cannot be simply subjective or the law would lose credibility, as turning on the fortuity of which judge happens to be allocated the case. Aharon Barak argues that "the relationship between members of a society, and between society and its members, is complicated and complex to the extent it cannot be described by one the-

[272] Stephen Breyer, *The Court and the World: American Law and the New Global Realities*, Alfred A. Knopf, New York, 2015.

[273] See Martin Scheinin, Helle Krunke and Marina Aksenova (eds.), *Judges as Guardians of Constitutionalism and Human Rights*, Edward Elgar, Cheltenham, 2016, *passim*.

[274] Jeremy Bentham, while celebrated for his advocacy that legislation be codified, observed in his *Theory of Legislation* (Étienne Dumont edition, translated by Charles Milner Atkinson and edited by Humphrey Milford, London, 1914, p. 62): "The legislator, who cannot pass judgment in particular cases, will give directions to the Tribunal in the form of general rules, and leave them with a certain amount of latitude in order that they may adjust their decision to the special circumstances". Roscoe Pound later made the same point: Roscoe Pound, *The Spirit of the Common Law*, Marshall Jones, Boston, 1931, pp. 180–82.

ory".[275] I agree. But one must of course do more than recognise that judges' life experience differs.[276] The decision must accord with the underlying principle. While many subordinate principles have been devised, *the ultimate principle* against which others, and the options before the judge, must be measured, is that of good law's basic immediate purpose – Reconciliation. That task is not an easy one.[277] There may be competing arguments for reconciliation. Which of the values in the Promissory Oaths Act[278] should predominate? And why? Opinions will differ: to do right may unsettle stability in the law and even lead to loss of confidence in unelected judges' usurping a legislative function; to apply an unjust law will by definition work injustice. Which is the lesser evil? Barak speaks of weighing "the social importance of the conflicting principles at the point of conflict". But what criterion is to be used for prioritising unlike values, as "balancing between five kilos and four meters"?[279]

It is to be recalled that so-called 'fundamental rights' – such as those against self-incrimination, to fair trial, and to proportionate sentence – exist not in isolation but in tension with opposing interests. Of ever-increasing prominence is the struggle between the right to privacy in personal communications and that of prosecutors to secure access to them in the public interest.[280]

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275 Aharon Barak, "On Judging", in Scheinin, Krunke and Aksenova, 2016, *supra* note 273, p. 47.

276 *Ibid.*, p. 48.

277 David Jenkins, "Procedural Fairness and Judicial Review of Counter-Terrorism Measures", in *ibid.*, p. 165, fn. 5.

278 See *supra* text between notes 246 and 248.

279 Barak, 2016, p. 40, see *supra* note 275.

280 The Appeals Chamber of the STL was faced with this issue when Defence counsel challenged the access by the Prosecutor without court order to 7.5 years' metadata of all telephone calls made and texts sent in Lebanon: STL, *The Prosecutor v. Ayyash*, Appeals Chamber, Decision on Appeal by Counsel for Mr Oneissi Against the Trial Chamber's Decision on the Legality of the Transfer of Call Data Records, 28 July 2015, STL-11-01/T/AC/AR126.9 (http://www.legal-tools.org/doc/30049c/). The principle of confidentiality of personal information or privacy and their bounds have recently been debated in many jurisdictions; see, for examples, Ronald J. Krotozynski Jr., *Privacy Revisited: A Global Perspective on the Right to Be Left Alone*, Oxford University Press, 2016; as to European law, Isabella Buono and Aaron Taylor, "Mass Surveillance in the CJEU: Forging a European Consensus", in *The Cambridge Law Journal*, 2017, vol. 76, no. 2, p. 250; as to common law States: the United Kingdom (David Anderson, *A Question of Trust: Report of the Investigative Powers Review*, June 2015; United Kingdom Supreme Court, *R (Ingenious Media Holdings plc v. Commissioners for Her Majesty's Revenue and Customs*, Judgment, 19 October 2016, [2016]

The special importance of Reconciliation in international criminal law sentencing – entailing the conflict between "the offence against me (or my family); my liberty at stake" – is seen in its prominence in Section 5.8. above. There will frequently be competing interests. The enormity of what has been done to the victims is likely to be the very reason for the reference to the ICC or the creation of an *ad hoc* international criminal tribunal. Subordinate defendants may argue personal circumstances, such as being personally abused as a child soldier. If crimes on one side are left unpunished, the politics of victors' justice will be seen to have displaced the rule of law with its requirements of proof by fair trial beyond reasonable doubt of a crime conforming with the principle of legality. Both in interpreting the law and in assessing sentence scrupulous care is required of judges to act justly and with a sense of proportion. Failure to do so will discredit both them and international criminal law.[281] The judges must take a long view of the offence, the offenders, and the proportionate exercise of their authority. The result of perceived injustice will be damage to the prospects of future reconciliation.

Indeed, in the case of all serious issues, unless the choice is seen to turn on the ultimate question – where do the overall prospects of Reconciliation best lie? – it will court adverse reaction to both the judge and the law. Nowadays candour is essential to credibility; the judge must not only wrestle with the problem, but explain why the choice has been made.[282] The choice can be challenging. Either way, the judge can be criticised, sometimes exposed to personal risk. But the exercise of judicial independence – expressing not a merely personal opinion but the one which he or she considers best squares with the basic principle of Reconciliation – will create the best result of which that judge is capable, and the one most likely to be ultimately acceptable as right.

Such analysis accords with the argument of other publications, for a unified approach. While less eloquently expressed, it parallels that of Edgar

UKSC 54, [2016] 1 WLR 4164, para. 17); Ireland (Ireland Supreme Court, *Damache v. DPP*, Judgment, 23 February 2012, [2012] IESC 11); as to civil law States: France (Conseil Constitutionnel, Décision no. 2015-713 DC, 23 July 2015); Lebanon (Decree Law no. 127/59, "Post and Telecommunications – Telephone and Telex", 12 June 1959).

281 Cf. United States Supreme Court, *Yamashita v. Styer*, In re Yamashita, 4 February 1946, 327 U.S. 1.

282 Cf. Barak, 2016, p. 31, see *supra* note 275.

Morin and Christiane Taubira in their exchange "Pour une poétique des civilisations":[283]

> Christiane Taubira:
>
> If today we reflect on the shocks of civilisation and the inevitable confrontations, it's because those who run the world do so according to reasoning and planning conforming rather with the will of belligerents rather than of those who prefer discussion. "Civilisation" embraces civility. But our civilizations, armed and equipped to sell weapons, have forgotten that aspect. […] humanity requires transcendence, appreciation it comprises more than flesh and muscles. We must not only sketch our outlines but rethink and think again of our role in the world.
>
> Edgar Morin:
>
> I am above all else a human being, but also a citizen of the Earth. […] Our identity is neither homogeneous nor monopolistic, it is both singular and plural. And that multiplicity must be nourished.

If they have in mind the use of the word 'poetry' – "in a broad sense to mean much more than arranging words into verses […] trac[ing] it to its Greek root in *poiesis* – making or crafting […] Poetry is a way of being"[284] – their discussion comes very close to my theme, of a large, unified and virtuous perspective.

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[283] Nicolas Truong, "Edgar Morin et Christiane Taubira : «Pour une poétique des civilisations»", *Le Monde*, 29 July 2017, p. 26:

> Christiane Taubira:
> Si aujourd'hui nous nous interrogeons sur les chocs de civilisation et les confrontations inévitables, c'est parce que ceux qui dirigent le monde le font selon des logiques et des schémas qui conduisent plus volontiers à des belligérances qu'à des disponibilités au dialogue. Le mot civilisation comprend celui de civilité. Or nos civilisations très armées et très douées pour vendre des armes ont oublié cette dimension. […] l'être humain a besoin de transcendance, de penser qu'il n'est pas que chair et muscles. Nous n'avons pas seulement besoin de tracer des courbes, mais de repenser et de nous repenser dans le monde.
>
> Edgar Morin:
> Je suis avant tout un être humain, mais je suis aussi un citoyen de la Terre, […] L'identité n'est pas monolithique ou monopoliste, elle est une et plurielle. Et il faut nourrir cette multiplicité. […]

[284] Sarah Bakewell, *At the Existentialist Café: Freedom, Being, and Apricot Cocktails*, Vintage, 2017, p. 184. To cite Bakewell's quotation of Heidegger (perhaps derived from Hölderlin

In the end, State and international leaders and their advisors, judges, scholars and other contributors to the making and development of international criminal law must stand back, evaluate and compare the competing public and private interests at stake. Morten Bergsmo proposes that the project of which the three Philosophical Foundations books are the main outcome should (i) be identified by linking the insights of leading philosophers with the best of the current discipline of international criminal law (which is what the first volume, *Philosophical Foundations of International Criminal Law: Correlating Thinkers*, seeks to do); (ii) be mapped and analysed as foundational concepts of international criminal law (which is what the second volume, *Philosophical Foundations of International Criminal Law: Foundational Concepts*, contributes towards); (iii) in the case of Reconciliation, be posited and articulated eloquently and in detail its character as the legal good of international criminal law that has recently taken centre stage; (iv) introduce the notions of 'global international criminal law', 'global international criminal justice' and 'global social contract'; (v) assess the idea of 'unity' as a possible legal good of international criminal law (as several chapters in the present volume analyse); and thereby (vi) help make the discourse become more global and open: embracing the future internationally rather than risk marginalizing international criminal law in international relations.[285]

Within the limits of respecting distinctly local values, I emphatically agree. At each stage of such process the result most likely to do both justice and right to the parties, to their community and to the rule of law, will be that which overall will most accord with the overarching value of Reconciliation and thereby recognise and promote the decency that achieves human dignity.

I conclude with three questions that lie beyond my sphere. May what has been said of judges also warrant consideration in the context of other decision-makers whose conduct may affect people's lives? Is 'prudence et audace' perhaps a formula for politicians whose choices may promote or

whom he cites) is not to endorse generally his strange and tainted philosophy whose Nazi element was radically at odds with the present argument.

[285] See the concise concept note for the project of which this anthology forms part (available, with other project resources, at https://www.cilrap.org/events/170825-26-delhi/), as well as his presentations at the New Delhi conference, in particular Morten Bergsmo, "On Legally Protected Interests in International Criminal Law", CILRAP Film, New Delhi, 26 August 2017 (https://www.cilrap.org/cilrap-film/170826-bergsmo/).

destroy Reconciliation among States and their people? And is it an appropriate guide for all decision-makers as to the creation and application of an international criminal law fit for purpose in today’s conditions?

6

On 'Unity' as an Emerging Legal Interest in International Criminal Law

Salim A. Nakhjavani and Melody Mirzaagha*

6.1. Why Legal Interests Matter

As Judge David Baragwanath makes explicit in the previous chapter of this anthology, judges are responsible for "accurately identifying and applying the relevant moral values of a given law".[1] Their decisions take into consideration not only the letter of the law, but also the substratum of moral values. This is not to say adjudication consists in the application of subjective beliefs about morality and not the law. It is, rather, a realistic and practical acknowledgment that legally-protected interests *matter* in the adjudication of core international crimes cases.[2] As Albin Eser suggests, legal interests must integrate both what 'is' and what 'ought to be'.[3] In other

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1 David Baragwanath, "'Reconciliation' as a Philosophical Foundational Concept in International Criminal Law", Chapter 5 in this volume.

2 See also Morten Bergsmo, "On Legally Protected Interests in International Criminal Law", Indian Law Institute, New Delhi, 26 August 2017 (https://www.cilrap.org/cilrap-film/170826-bergsmo/).

3 Albin Eser, "The Principle of 'Harm' in the Concept of Crime: A Comparative Analysis of the Criminally Protected Legal Interests", in *Duquesne University Legal Review*, 1966, vol. 4, p. 345–417.

words, legal interests must also have normative value, bringing into sharper relief the kinds of values we *ought to uphold*. This approach has the potential to provide a framework through which we consider the legal interests that should be protected under international criminal law.

In continuing to reflect on potential or emerging values of international criminal justice, and before considering specifically 'unity' and what is meant by it in this chapter, a fitting starting point is the practical scholarship of another judge: the late Antonio Cassese. Judge Cassese's work contributes to the consideration of 'unity' in two ways. He sheds light on the substantive issue of what is meant by 'unity' as a foundational value or legal interest. His writing also assists with method because he offers a caution or 'sense check' that is important when international criminal lawyers – like public international lawyers generally – engage in thinking *de lege ferenda*.

6.2. Identifying Emerging Legal Interests Should Be about Reading Reality, Not Magic

In 1986, Cassese was teaching in Florence. The world was divided along stark lines. And international criminal law was in its long hibernation. Cassese published a small volume at the time, *International Law in a Divided World*,[4] at the request of a Chinese student who had looked in vain for a short and accessible text in the field. There Cassese writes:

> However critical and vigilant a student of social institutions may be, sooner or later he falls into the trap of believing his own reconstruction of reality actually reflects it as a coherent and flawless whole and that indeed the object itself is as smooth as a mirror. Reality intrudes continuously, but he glosses over the cracks or simply hides them by theoretical contrivances.[5]

The late Robert Cryer transposes this critique to the discipline of international criminal law when he warns that "to overstate the extent to which there is agreement on foundational values provides fodder for those who remain sceptical of international criminal law as a whole".[6]

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4 Antonio Cassese, *International Law in a Divided World*, Clarendon, Oxford, 1986, p. 5.

5 *Ibid*.

6 See Robert Cryer, "The Doctrinal Foundations of International Criminalization", in Mahmoud Cherif Bassiouni (ed.), *International Criminal Law, Volume 1: Sources, Subjects and Contents*, 3rd edition, Martinus Nijhoff Publishers, Leiden, 2008, p. 113.

Musing on emerging legal norms is a favourite pastime of international lawyers, and in doing so it is necessary to act with wisdom, bearing in mind the cautions of Cassese and Cryer. This is especially important because of the prevalence of the view that 'unity', much more even than 'reconciliation', is what Maurice Cranston called a "hurrah word".[7] At times, it is a word viewed with suspicion as suggesting superficial, syncretic or transitory agreement, with a concomitant marginalisation of difference and even stifling of dissenting voices.

6.3. Explicit References to 'Unity' in Texts Related to International Criminal Law Offer a Spectrum of Conceptions of the Term

The most common use of the term 'unity' in international criminal law – and indeed in public international law – is a narrow one, in reference to the unity of the State. Every student of international law can repeat the mantra 'national unity and territorial integrity', which figures prominently in legal instruments[8] and court decisions[9] – primarily those concerned with the right to self-determination. 'Unity' here is being understood as the mere prevention of secession.

This traditional conception of 'unity' is, to borrow Hannah Arendt's description, a "negative phenomenon" – an absence, not a presence.[10] Arendt took this position to a gritty extreme when she conceived even of her own humanity as the sense of "elemental shame, which many people of various nationalities share with one another today" and "what finally is left of our sense of international solidarity".[11] A commentator on her work

7 Maurice Cranston, *Freedom: A New Analysis*, 2nd edition, Longmans, London, 1954, p. 14.

8 Declaration on the Granting of Independence to Colonial Countries and Peoples, UN Doc. A/Res/1514(XV), 14 December 1960 (http://www.legal-tools.org/doc/5de655/); Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations, UN Doc. A/RES/2625(XXV), 24 October 1970 (http://www.legal-tools.org/doc/5039aa/).

9 International Court of Justice, *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo (Request for Advisory Opinion)*, Advisory Opinion, 22 July 2010, paras. 82, 83 (http://www.legal-tools.org/doc/5ac90f/).

10 Hannah Arendt, *The Origins of Totalitarianism*, World Publishing, New York, 1958, p. 315.

11 Hannah Arendt, *The Jew as Pariah: Jewish Identity and Politics in the Modern Age*, Grove Press, New York, 1978, p. 234.

helps us to access her meaning, "one of the most harrowing and pessimistic chapters of her political thought":[12]

> To be repelled, and feel ashamed by what some who are similarly circumstanced have done to other persons or peoples with whom we share an identity, as well as the earth, is to be burdened by the obligation of a general responsibility for the actions of one's fellow human beings. More specifically, the political significance of the idea of universal solidarity is that it is "the only guarantee that one superior race"[13] will not be successful in dominating humankind. Eichmann, by actively supporting and implementing a policy of Jewish extermination, breached universal solidarity. Therefore, the rest of the human race no longer can be expected to share their common habitat – the earth – with him.[14]

Arendt's conception of "universal solidarity", then, finds its value only in its breach. It is a solidarity grounded in a fear that without it, something worse will come about. And that is how the Rome Statute uses the term, only once – at least explicitly – across 128 articles, in the 'savings clause' for the characterisation of war crimes. Article 8(3) of the Statute distinguishes the threshold of non-international armed conflict from the "responsibility" of governments to "defend the unity and territorial integrity of the State, by all legitimate means".[15] The leading commentaries on the Statute are silent on the meaning of "unity" in this provision. Bothe and Klamberg both emphasise that the savings clause is established "in favour of the power of the State to defend itself against rebellious forces",[16] and "to ensure that acts committed in times of internal disturbances and tensions are not to be prosecuted as war crimes".[17] Their silence is entirely understandable, because the language of Article 8(3) of the Statute is, as

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12 Ken Reshaur, "Concepts of Solidarity in the Political Theory of Hannah Arendt", in *Canadian Journal of Political Science*, 1992, vol. 25, no. 4, pp. 723–36.

13 Arendt, 1958, p. 16, see *supra* note 10.

14 Reshaur, 1992, see *supra* note 12.

15 International Criminal Court ('ICC'), Rome Statute of the International Criminal Court, 17 July 1998, Article 8(3) ('ICC Statute') (http://www.legal-tools.org/doc/7b9af9/).

16 Michael Bothe, "War Crimes", in Antonio Cassese, Paola Gaeta and John R.W.D. Jones (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, Oxford University Press, Oxford, 2002, pp. 423–24.

17 Mark Klamberg, "War Crimes", in Mark Klamberg (ed.), *Commentary on the Law of the International Criminal Court*, Torkel Opsahl Academic EPublisher, Brussels, 2017, p. 117 (http://www.toaep.org/ps-pdf/29-klamberg).

Bothe notes, embedded in Article 3 of Additional Protocol II.[18] Article 3, in turn, rests squarely on the traditional conception of 'unity of the State' in public international law. This is confirmed by the International Committee of the Red Cross Commentary, which provides that defending "national unity" is the "responsibility of governments and is expressly recognised" in the Protocol.[19] For the International Committee of the Red Cross's commentators, Arendt's negative solidarity is in full view:

> Article 3 is a response to the fear that Protocol II might be used as a pretext to violate the sovereignty of States and intervene in their internal or external affairs, i.e., that it might serve as a justification for intervention. Such fear became apparent at the Conference of Government Experts. Some of the experts would even have liked to include a clause in the Preamble to the effect that respect for national sovereignty and for the principle of non-interference in internal affairs was a pre-requisite for applying the Protocol.[20]

There is, of course, a rather different conception of 'unity' advanced in the first recital of the Preamble of the Rome 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 […] [italics added].

Klamberg comments as follows:

> The affirmation in this paragraph is a way to highlight the importance of cultures and the need for various peoples of the world to exercise respect and tolerance for one another. The references to "common bonds" and "shared heritage" *recognize that humankind essentially is one despite differences between societies*. [italics added]

Given the profound character and implications of the claim that humanity is in essence one, it is surprising the first recital has found such little concrete expression in ICC jurisprudence to date. The reason is not likely to be methodological, however – there is every basis for a chamber to

[18] Bothe, 2002, pp. 423–24, see *supra* note 16.

[19] International Committee of the Red Cross, Yves Sandoz, Christophe Swinarski and Bruno Zimmermann (eds.), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, Martinus Nijhoff Publishers, Geneva, 1987, p. 1362, para. 4500.

[20] *Ibid*., p. 1362, para. 4497.

rely on the preamble for interpretative purposes. The Appeals Chamber has confirmed that the "wider aims of the law as may be gathered from its preamble and general tenor of the treaty".[21] A Trial Chamber has gone a little further, in fulsome language:

> The right resolution of the issues presented in this litigation requires keeping in view at all times the objects and purposes of the ICC as indicated in the Rome Statute. The clearest expression of those objects and purposes are to be found in the Statute's preamble. For present purposes, the most material parts of the preamble are set out immediately below. And, in the particular context of this litigation, it is crucial to reflect carefully on each of the messages communicated in the Statute's preamble […]
>
> Some may find it more convenient to see the preamble as hortatory prose that induces feelings of goodness all around and nothing more. The Chamber has a different view. The Rome Statute preamble is a compendious expression, in all solemnness, of the serious and urgent concerns that frame the mandate that the States Parties have given the ICC and from which derives the powers and attributes that are reasonable for the achievement of the Court's purposes.[22]

The South African Supreme Court of Appeal – not a body generally known for "hortatory prose" – had this to say about the significance of the preamble to the Rome Statute in its decision about the obligation on the executive branch to arrest and transfer Mr. Omar Al-Bashir to the ICC:

> The importance of the international struggle to rid the world of these crimes is resoundingly stated in the Preamble […].[23]

"Struggle" is a distinctively meaningful word in South African public discourse. Its subtext is, almost without exception, a call to collective ac-

[21] ICC, Situation in the Democratic Republic of the Congo, Appeals Chamber, Judgement on the Prosecutor's Application for Extraordinary Review of Pre-Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal, 13 July 2006, ICC-01/04-168, para. 33 (http://www.legal-tools.org/doc/a60023/).

[22] ICC, Situation in the Republic of Kenya, *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, Trial Chamber V(a), Decision on Prosecutor's Application for Witness Summonses and resulting Request for State Party Cooperation, 17 April 2014, ICC-01/09-01/11-1274-Corr2, paras. 63, 64 (http://www.legal-tools.org/doc/e28d64/).

[23] Supreme Court of Appeal of South Africa, *The Minister of Justice and Constitutional Development and Others v. Southern African Litigation Centre*, Judgement, 15 March 2016, [2016] ZASCA 17, Case No. 867/15, para. 54.

tion for an important purpose. What these judicial remarks from the ICC and one domestic court show, is that there is little merit in the reductionist argument that reference to the preamble is nugatory because the preamble is too lofty to be of any real use. All that does is strip judges of their legitimacy when they seek, hopefully with rigour and transparency, to identify and be guided by legal interests in their decisions.

In an initial survey of international and regional legal instruments broadly relevant to international criminal law, we also find a more constructive conception of 'unity'. A number of transnational crimes treaties in the spheres of the Council of Europe and the African Union conceive of 'unity' as evoking co-operation to combat transnational threats. The various European treaties – the Convention on Laundering, Search, Seizure and Confiscation of the Proceeds of Crime;[24] the European Convention on the Suppression of Terrorism;[25] the Criminal Law Convention on Corruption;[26] the Convention on the Protection of the Environment through Criminal Law;[27] and the European Convention on the Non-Applicability of Statutory Limitation to Crimes against Humanity and War Crimes[28] – all refer back to the founding Statute of the Council of Europe, which, in its first article, states that:

> The aim of the Council of Europe is to achieve a greater unity between its members for the purpose of safeguarding and realising the ideals and principles which are their common heritage and facilitating their economic and social progress. This aim shall be pursued through the organs of the Council by discussion of questions of common concern and by agreements and common action in economic, social, cultural, scientific, legal and administrative matters and in the maintenance and further realisation of human rights and fundamental freedoms.

[24] Council of Europe ('COE'), Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime, 8 November 1990 (http://www.legal-tools.org/doc/4e2269).

[25] UN, Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, 14 December 1973 (http://www.legal-tools.org/doc/514b57).

[26] COE, Criminal Law Convention on Corruption, 27 January 1999 (http://www.legal-tools.org/doc/e67afc).

[27] COE, Convention on the Protection of the Environment through Criminal Law, 4 November 1998 (http://www.legal-tools.org/doc/769535).

[28] COE, European Convention on the Non-Applicability of Statutory Limitation to Crimes against Humanity and War Crimes, 25 January 1974 (http://www.legal-tools.org/doc/302b1c).

Here, then, the concept of 'unity' is an aspiration or goal, based on three elements: a shared vision premised on a "common heritage", a common purpose, and common action.

Similarly, the Constitutive Act of the African Union[29] provides guiding text in its preamble and Article 3, in the following terms:

> INSPIRED by the noble ideals which guided the founding fathers of our Continental Organization and generations of Pan Africanists in their determination to promote unity, solidarity, cohesion and cooperation among the peoples of Africa and African States; […]
>
> CONSIDERING that since its inception, the Organization of African Unity has played a determining and invaluable role in the liberation of the continent, the affirmation of a common identity and the process of attainment of the unity of our continent and has provided a unique framework for our collective action in Africa and in our relations with the rest of the world; […]
>
> GUIDED by our common vision of a united and strong Africa and by the need to build a partnership between governments and all segments of civil society, in particular women, youth and the private sector, in order to strengthen solidarity and cohesion among our peoples; […]
>
> Article 3. The objectives of the Union shall be to: (a) achieve greater unity and solidarity between the African countries and the peoples of Africa; […]

The preamble of one African regional treaty on transnational crime – the African Union Convention on Preventing and Combating Corruption[30] – interprets the Article 3 prescription as enjoining Member States to "coordinate and intensify their cooperation, unity, cohesion and efforts to achieve a better life for the peoples of Africa". In these legal instruments, unity is given a both geographical and collective scope (the unity "between [...] African countries and the peoples of Africa") and recognised as a process that emerges after emancipation and awareness of a common identity, and one that is connected to "collective action". The term seems to move in the same constellation as "cooperation", "solidarity", "cohesion", and "ef-

[29] African Union ('AU'), Constitutive Act of the African Union, 11 July 2000 (http://www.legal-tools.org/doc/496299).

[30] AU, African Union Convention on Preventing and Combating Corruption, 11 July 2003 (http://www.legal-tools.org/doc/0470b1).

forts to achieve a better life for the people of Africa", but is also kept distinct from these concepts.

The chapter has not touched on the evolving conceptions of 'unity' in general public international law, quite intentionally, leaving this analysis for future work. But it is important to recognise how 'unity' is being positioned as a legally-protected interest in, for instance, the 2016 Secretary General's report, *One Humanity: Shared Responsibility*, for the World Humanitarian Summit:

> [P]eople feel outrage and frustration at the challenges to humanity and the lack of global unity and solidarity to end the suffering and are calling for change.[31]
>
> […]
>
> One humanity: a vision for change
>
> Such change requires a unified vision. In a globalized world, this vision needs to be inclusive and universal and to bring people, communities and countries together, while recognizing and transcending cultural, religious or political differences. It needs to be grounded in mutual benefit, where all stand to gain. At a time when many are expressing doubt in the ability of the international community to live up to the promises of the Charter of the United Nations to end wars or to confront global challenges, we need, more than ever, to reaffirm the values that connect us. Our vision for change must therefore be grounded in the value that unites us: our common humanity.[32]

Similarly, in the Secretary General's 2015 *Report on Coordinating and Strengthening Rules of Law Activities*, he states:

> This common humanity has many different ethnic and national identities, religious beliefs and cultural customs. Yet, it connects in the universal principle that there is inherent dignity and worth in every individual that must be protected, respected and given the opportunity and conditions to flourish […].[33]

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31 One humanity: shared responsibility: Report of the Secretary-General for the World Humanitarian Summit, UN Doc. A/70/709, 2 February 2016, para. 9 (http://www.legal-tools.org/doc/df9245/).

32 *Ibid*., paras. 15, 16.

33 Strengthening and Coordinating United Nations Rule of Law Activities: Report of the Secretary-General, UN Doc. A/65/318, 20 August 2010 (http://www.legal-tools.org/doc/8c2134/).

Cassese also sheds light on the concept of 'unity'. In concluding the final work of his lifetime, *Realizing Utopia* (2012), he reflects on the richness of Durkheim's concept of the *solidarité organique* of society emerging from the *solidarité contractuelle* as a natural result of the division of labour and specialisation of functions.[34] But he finds *solidarité organique* "inapplicable at the international level"[35] because he considered that States' values coalesce only when their national interests align.

Cassese then identifies a quality he calls *solidarity proper* as a yet-unrealised goal on the international level. He defines *solidarity proper* as "strongly shared concerns, moral bonds, feelings, sympathies, actions, resulting in collective action". It is not merely the warmth of fellow-feeling or of international consciousness. It has an expressly moral foundation, shapes the intellect and emotions, and translates concepts into action. We alight on this definition because it comes closest to what we mean by the quality of 'unity' in this chapter: *the capacity to pursue common goals in a purposeful and co-ordinated manner within a common framework*.[36]

We are not aware of any systematic study of the concept of 'unity' in international criminal law. The closest effort known to us is that of Mario Prost (2012), who focuses his study on the unity of international law as a normative system, but draws on examples from international criminal law.[37] He argues that the proliferation of international tribunals was one factor driving the fragmentation of international law, from the 1990s. While some scholars fretted about overlapping and conflicting jurisprudence undermining the coherence of the law, others welcomed a kind of "healthy pluralism".[38] The discourse matured to consider unity and coherence in the law as a legitimate goal – one that required the "ordering of pluralism".[39] Then he makes this wonderful remark:

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[34] Émile Durkheim, *De la division du travail social*, Presses Universitaires de France, Paris, 1967, p. 204.

[35] Antonio Cassese, "Gathering up the main threads", in Antonio Cassese (ed.), *Realizing Utopia: The Future of International Law*, Oxford University Press, Oxford, 2012, p. 650.

[36] Institute for Studies in Global Prosperity, "Conceptualising Oneness", 24 November 2014 (working paper on file with the authors).

[37] Mario Prost, *The Concept of* 'unity' *in Public International Law*, Hart Publishing, Oxford, 2012.

[38] *Ibid*., p. 11.

[39] *Ibid*.

> For all the talk about fragmentation – its sources, its consequences and its remedies – the concept of unity is hardly ever mentioned let alone theorised. This is remarkable, since *fragmentation necessarily presupposes* 'unity', either as something that once was and has since been lost, or as a programmatic objective. Either way, *speaking about fragmentation is meaningless unless we can articulate some notion of* 'unity'. It would be like speaking about shadows without reference to light.[40] [italics added]

Prost suggests that it is not possible to analyse normative fragmentation without a conception of 'unity'. But is there any good reason that his comments would not hold for other forms of fragmentation as well? We are accustomed to speaking, for instance, about social fragmentation as divisions founded on class, race, or religious belief. However, do these discussions not also necessarily presuppose a conception of 'unity'? And what, then would this conception look like?

Earlier reference was made to Cassese's reading of Durkheim and the suggestion that as much as "organic solidarity" on a world level would be laudable, this model remains "inapplicable" in a world where collective action emerges only when national interests coalesce. Our assumption is that the "alignment of national interests" – the work of diplomats – is *not* a legal interest of international criminal law. Rather, space for thought and experimentation must be created in order to identify *other processes by which collective action can emerge* in international criminal law, processes that do not depend on coalescing national interests.

6.4. 'Unity' in Which Society?

Cassese found Durkheim's 'organic solidarity' inapplicable to relations between States. But Durkheim would be interesting to international criminal lawyers for another reason entirely. His work contributes to a better understanding of why, on the one hand, international criminal law is turned to as a world-shaping social force and, on the other hand, assists legal scholars and practitioners to guard against expecting too much from their chosen field. Durkheim premises his theories on the socialisation of human beings from inductive reasoning about the criminal law.[41] Foucault starts from the

[40] *Ibid*., p. 12 (emphasis added).

[41] Émile Durkheim, *The Rules of Sociological Method*, Steven Lukes ed., W.D. Hall trans., The Free Press, 1982 (1895), pp. 97–98.

same premise in *Discipline and Punish*.[42] If social theorists derive all sorts of insight from examining their national criminal justice systems, what does the current state of international criminal justice tell us about the 'society' that we are expecting to show an emerging quality of 'unity'?

At the international level, contradictory, problematic results become visible. At some level, institutions of international criminal justice seem humane, though in small ways. The Trial Chamber of the Extraordinary Chambers in the Courts of Cambodia went to great lengths to accommodate Nuon Chea's every twinge of back or neck pain. To see just how well individuals accused before or convicted by international criminal tribunals are treated, one might think of international criminal law as a benign, civilising force. The UN Minimum Rules for the Treatment of Prisoners are now known, evocatively, as the 'Nelson Mandela Rules'. They are, in large measure, why Kaing Guek Eav (alias 'Duch') served his life sentence in a private compound-within-a-compound outside Phnom Penh, complete with bed, separate bath and toilet, and a small garden, something the average Cambodian prisoner can only dream of today.

The contrast is manifest, though, when we examine humanity's collective capacity to *enforce* international criminal law. Here the image of Al-Bashir flying in and out of South Africa is conspicuous – humanity seems an adolescent bunch, our burgeoning sense of justice stilted by transitory political gain. And – if this can be done without giving into despair – looking to humanity's ability to *prevent* international crimes in the first place – the paralysis on Syria, for instance, and the pointed comment of Carla Del Ponte ("there is no prosecutor and no court")[43] pounding in one's ears like the refrain in Eliot's *The Waste Land* ("but there is no water")[44] – we can understand how a conception of humanity as a slave to its animalistic tendencies emerges in the public discourse. But we recognise, equally, the emergence of an evolutionary understanding of our individual and collective capabilities as a species.

So, the present state of international criminal justice in the world shows humanity doing something marvellous and yet doing it terribly. Al-

[42] Michel Foucault, *Discipline and Punish: The Birth of the Prison*, Alan Sheridan trans., Vintage Books, 1995.

[43] "Syria investigator del Ponte says enough evidence to convict Assad of war crimes: SonntagsZeitung", in *Reuters*, 13 August 2017.

[44] T.S. Eliot, *The Waste Land and other poems*, Faber and Faber, London, 1999, p. 37.

lott calls this phenomenon the "double image" we have of ourselves as a species:

> We are a wonder of nature with the amazing capacities that nature has given to us. And yet we are a permanent disappointment to ourselves. We have an apparently unlimited capacity of self-knowing, self-ordering, and self-improving. We can create beautiful things and infinitely ingenious things, and we can do profoundly good things. And yet we can do every conceivable form of evil. We build and we destroy. Human beings are masters of self-perfecting and self-harming.[45]

6.5. 'Unity' and Social Evolution Are Interdependent Processes: Both Depend on a Species-Consciousness

It seems necessary to make explicit an intrinsic connection between the nascent and evolving degrees of 'unity' being attained at the international level, and the degrees of *social maturation* of the society in which that 'unity' manifests itself. Both are the products of a dynamic interaction of humanity's self-perfecting and self-harming in what Allott calls the "society of all societies" – the world society. In this connection, it is important to confront the unfair expectations we sometimes have of international criminal justice and its institutions. Fundamentally, the criminal law is a very crude instrument for socialising human beings at any level. At the basic level of the family, parents do not have a hope of training children through *only* the application of increasingly harsh sanctions and nothing more. If we expect international criminal justice and its institutions to somehow create Cassese's *solidarity proper* at the international level, we will wait in vain. This is not to suggest that these institutions have no place in harmonising thoughts and opinions, remedying injustice and contributing to the establishment of a more just and prosperous global order. Quite the opposite. Institutions only grow and develop as they gain real experience, and that experience depends on individuals and communities that place their confidence in an evolving system without the false hope or paralysing despair that results from the expectation of an illusory perfection.

In turning again to consider Philip Allott's perspicuous analysis in his monograph *The Health of Nations: Society and Law Beyond the State*, it is

[45] 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, pp. 1–2 (http://www.toaep.org/pbs-pdf/75-allott).

paramount to keep in mind Klamberg's comment about "peoples united by common bonds" in the Preamble conveying the intrinsic oneness of humanity:

> To criminalise a human being is a denial of love […] In love, I am the other, and the other is part of me. The murderer and the torturer, and those who procure murder and torture in the public interest, are me and part of me. That art thou, to borrow the formula of the Upanishads.[46] The true *telos* of the criminal law is not deterrence or retribution, as generally supposed, but exclusion. It is a system of exclusion from the affective bonds of the social family and the human family. The introduction of international criminal jurisdiction into the present state of international society is a crude extrapolation of the most primitive, the least efficient, and the most morally dubious of systems for socialising human beings, namely, the criminal law. International criminal law might follow, but cannot precede, the establishing of the idea of the international rule of law, including international administrative law, to control directly the abuse of power and the anti-social behaviour of governments and public officials. And the establishing of the international rule of law will follow, but cannot precede, the coming-to-consciousness of the idea of human sociality, the species-consciousness of the human species.[47]
>
> There is pathetic irony in the fact that the retrospective application of corrective justice involves a betrayal of those who are the victims of past social evil. Corrective justice, as its name implies, in some sense corrects an evil. To some degree, the perpetrator is absolved. A price is paid. Suffering is compensated. Feeble old men and their seedy subordinates shuffle into the court-room, shrunken figures bearing no physical relationship to the physical scale of the suffering for which they are responsible. The half-theatrical, half-religious rituals of the law are performed. Due process. Verdict and sentence. History has been corrected. The causes and the effects

[46] Chandogya Upanishad 6.8.7, तत्त्वमसि ('*Ta Tvam Asi*'), also variously rendered as 'Thou art that'. As cited in Philip Allott, *The Health of Nations: Society and Law beyond the State*, Cambridge University Press, 2004.

[47] *Ibid*., p. 65.

> of extreme social evil remain, its human price, but our moral outrage is clouded by the charade of judicial retribution.[48]

We have taken on board some caution about overhasty value claims in international criminal law. We have at least partially distilled what is meant by 'unity' in this context and how it relates to the evolution of an international society, and having abandoned our expectation that international criminal law processes themselves create the quality of 'unity' that is being described here. We can now begin to examine how 'unity' may be emerging as a foundational value within international criminal law.

6.6. 'Unity' as a Foundational Value in Sentencing and Reparations Decisions

Thirty years after *International Law in a Divided World*, Ahmad Al Faqi Al Mahdi offered a guilty plea and an apology in Courtroom 1 at the International Criminal Court, after a plea and sentence agreement with the prosecution. Guilty pleas before international tribunals are a rarity. Many here will also know that Al Mahdi – *nom de guerre* Abu Turab – presided over the destruction, in June and July 2012, of parts of the World Heritage Site at Timbuktu in Mali, both as a direct perpetrator and involving forces aligned to Ansar Dine and Al Qaeda in the Islamic Maghreb. He was prosecuted for the war crime of directing an attack against buildings dedicated to religion and historic monuments which were not military objectives, under Article 8(2)(e)(iv) of the Rome Statute. He says he committed the crimes based on his belief that the mausoleums of saints and scholars at Timbuktu were an abomination to Islamic belief and practice because they rose more than one inch above the ground.[49] Interestingly, nowhere does he say his belief was wrong or that it has changed, only that he was acting under orders and that he now understands that even permissible actions must be proportionate to the damage caused to others. He did not say his belief was wrong in itself, only that in retrospect his action failed a proportionality test that ought to have guided his conduct, and that he would never repeat the conduct.[50]

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48 *Ibid*., p. 70.

49 ICC, Situation in the Republic of Mali, *The Prosecutor v. Ahmad Al Faqi Al Mahdi*, Trial Chamber VIII, Trial Hearing, Transcript, 22 August 2016, ICC-01/12-01/15-T-4-Red-ENG, p. 13, lines 14–17 (http://www.legal-tools.org/doc/14e68e/).

50 *Ibid*., p. 13, lines 21–22; p. 14, lines 2–8.

Before reflecting on the terms of his apology[51] and what this case may show about the emerging legal interest of 'unity', it is important to mention that the presiding judge (Judge Pangalangan) characterised Al Mahdi's apology as sincere in the later Order for Reparations.[52] Initially, when looking at the wording of his apology, it is difficult to perceive such sincerity because of the English wording of the translation. According to the transcript of the day, Al Mahdi said, after invoking the Qur'ánic injunction to all believers to "stand up firmly for justice as witnesses to Allah, even as against yourselves or your parents or your next of kin":[53]

> I would like to remember the words of those who said that we need to speak justice even against ourselves. We have to be truth – true to ourselves, even that truthfulness would burn our hands. Ladies and gentlemen, it is with deep regret and with great pain I had to enter a guilty plea and all the charges brought against me are accurate and correct. I am really sorry. I am really remorseful and I regret all the damage that my actions have caused. I regret what I have caused to my family, my community in Timbuktu, what I have caused my home nation, Mali, and I'm really remorseful about what I had caused the international community as a whole.

He continues with a specific apology directed to the inhabitants of Timbuktu, past present and future, in other words, apparently including the ancestors and future generations.

The 'international community as a whole' is an idiosyncratic phrase in international criminal law. When it is uttered in English, it jars slightly, as if his lawyer wrote it. As Lucia Allais – a Princeton architectural historian and theorist – observes, the translation here is the International Criminal Court's work, not Al Mahdi's. Al Mahdi actual words were: "*al bashariyyati jamaa fi anha' al alam*". Allais thinks a truer rendering of the original might be an apology "to the whole of humanity around the world",

[51] Al Mahdi reiterated his apology and request for forgiveness in the course of his sentence review proceedings, which the Court described as "no doubt welcome", though not material to a reduction of sentence; see ICC, Situation in the Republic of Mali, *The Prosecutor v. Ahmad Al Faqi Al Mahdi*, Three Judges of the Appeals Chambers Appointed for the Review concerning Reduction of Sentence Decision on the review concerning reduction of sentence of Mr Ahmad Al Faqi Al Mahdi, 25 November 2021, para. 44 and note 81.

[52] ICC, Situation in the Republic of Mali, *The Prosecutor v. Ahmad Al Faqi Al Mahdi*, Trial Chamber VIII, Reparations Order, 17 August 2017, ICC-01/12-01/15-236 (http://www.legal-tools.org/doc/02d1bb/).

[53] *Qur'án*, Surah 4, verse 135.

not as included in the translation, to the "international community as a whole".

Allais offers one critical reading of Al Mahdi's apology in the International Criminal Court's institutional context, what she called "one of the more remarkable allocutions of Al Mahdi's destructive rationale":

> [T]he ICC equally requires [Al Mahdi] to use his own personhood to depict an expanded field of applicability for international law. The same qualities that Al Mahdi offered to the terrorist network are fully exploited by the ICC: he is a person who can "expand" his identity and belonging concentrically. This is particularly evident in the way Al Mahdi structures his guilty plea, in a statement that repeats atonement in a scalar progression from local brotherhood, to national citizenship, to global humanity. When Al Mahdi uses the word "humanity," he evokes a ribbon of persons across the globe.[54]

Al Mahdi's more specialised, localised apology to the people of Timbuktu confirms precisely what Allott says about the true telos of the criminal law being exclusion. Importantly, it is not just an 'African idea', as much as the communitarian and humanist jurisprudence of uBuntu or uMoja is one embodiment of the same idea. Al Mahdi said to his own local community:

> My regret is […] directed particularly to the generations, the ancestors of the holders of the mausoleums that I have destroyed. I would like to seek their pardon, I would like to seek the pardon of the whole people of Timbuktu, I would like to make them a solemn promise that this was the first and the last wrongful act I will ever commit. I seek their forgiveness and I would like them to look at me as a son that has lost his way and consider me part of the social fabric of Timbuktu and must not forget what I have contributed in the past to Timbuktu. It is my hope that in accordance with the noble Islamic principles to be able to forgive me and to accept my regret.

Not surprisingly, the Order for Reparations pays significant attention to the victims of the crime. The judgment repeatedly confirms that those directly affected by Al Mahdi's crimes include individuals directly affected, the community of Timbuktu in Mali, and the international community. The inclusion of the international community as an affected body is supported

[54] Lucia Allais, "Amplified humanity and the architectural criminal", in *Superhumanity*, 5 December 2016, available on e-flux's web site.

by the designation of the destroyed buildings (except for one) as UNESCO heritage sites. The judgment affirms that the international community is one of the "victims" that have "suffered". In addition, the judgment asserts that "destruction of cultural heritage erases part of the heritage of all humankind".

The judgment endorses a statement of one of the expert witnesses, who states that "the international community should not be forgotten [...] as a collective to which harm was done". The expert goes on to say: "it may make sense to prioritise reparation to those groups closer to the heritage in question while making sure to recognise broader connections". It is interesting to note that the reparations were all directed towards the local community as it was felt that reparations "directed at the local population of Timbuktu inherently will effectively address the broader harm suffered by Malians and by the international community as a whole". This reinforces the idea of our interconnectedness and the conviction that suffering of one part of humanity causes the suffering of the whole and conversely, that the healing and development of one part also influences the whole.

One more profound outcome of the Al Mahdi guilty plea, apology and Order for Reparations is a shift in the way international criminal justice views the perpetrator, the victim, and the "international community as a whole". It is a subtle difference of emphasis, but an important one. Rather than a 'stakeholder' model – where each participant in the justice process has different, sometimes competing rights that must be balanced (the individual victim clamouring for attention and redress; the institution for submission; the prosecution for justice, but with what Morten Bergsmo once called a kind of "morally-insulated righteousness"; and the community demanding recognition in spaces ill-suited to expressions of community life) – rather, all these actors' localised interests no longer claim the foreground. As Eser observes, "[o]n no account does the individual victim of a specific harm suffer alone; rather, the public at large, which has an interest in the protection of all recognised rights and interests, is suffering with him".[55] This is due to the recognition of an interconnectedness between these participants as more significant and worthy of legal recognition and protection than each one individually. This is how Philip Allott describes the phenomenon:

[55] Eser, 1966, p. 372; see *supra* note 3.

> The intense socialising of the human being over recent centuries has produced a form of human self-consciousness in which a sense of human individuality is residual. We are a social being as a biological inheritance. We are a societal being (*zoon politikon*) because we cannot survive and flourish alone. We have become a socialised being because the societies to which we belong determine every moment of our lives.[56]

This is one expression of the emergence of 'unity' as a meta-value in international criminal law. If research is conducted and a search for more expressions ensues, surely proportionate to the intensity of our search, we may find others. Here we suggest one more.

6.7. 'Unity' as a Foundational Value in Threshold Decisions on Aggression?

One of the first areas of debate in defining the crime of aggression as it now stands in Article 8*bis* of the Rome Statute was the formulation of its threshold requirement – whether an act of aggression must be qualified as a "flagrant" or (as was eventually adopted) a "*manifest*" violation of the UN Charter. The reason for the link to the UN Charter was clear by late 2005, as the drafting history shows.[57] There can be no aggression when the conduct is consistent with Article 51 as an act of individual or collective self-defence under customary international law. To translate, self-defence here does not mean a defence to a charge of aggression. The absence of conditions of self-defence – that is, the positive requirement of a UN Charter violation, tested objectively and without a requirement of proving a subjective legal assessment by the perpetrator – is an *element of the crime itself*.[58]

A discussion paper from the time – preserved in the ICC Legal Tools Database – presents the question under analysis, and the commentary seems to summarise a tenuous consensus:

> Should there be a qualifier of the aggression, e.g. should it be in "flagrant" or "manifest" violation of the Charter of the United Nations? Do you think that "flagrant" and "manifest" cover different situations?

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56 Allott, 2016, p. 2, para. 17, see *supra* note 46.

57 ICC, *Discussion paper 3: Definition of Aggression in the context of the Statute of the ICC*, 5 January 2011 (http://www.legal-tools.org/doc/7b1a36/).

58 ICC, Elements of Crimes, 11 June 2010 (http://www.legal-tools.org/doc/3c0e2d).

> The requirement for a flagrant and manifest violation purports to provide a threshold relating either to the magnitude or gravity of the action (e.g. exclude border skirmishes) or *possibly (?) to other considerations where there might be a degree of uncertainty (legality of the action)*.[59] [italics added]

Traditionally, we might understand the underlying legal interests protected by the criminalisation of aggression as the territorial integrity of States and the political independence of States. A realist scholar might itch to say more: that it reifies the principle of *effectivité* and make sovereignty, once acquired, even more difficult to dislodge by the use of force, directly or by proxy. But we can appreciate how important the choice of legal interest is here. This is a core international crime that only became legally enforceable by the International Criminal Court on 17 July 2018. And it is an element of the crime of aggression that the act "by its character, gravity and scale, constitutes a manifest violation"[60] of the UN Charter.

Now imagine – not with much difficulty these days – the rise of a radically nationalist State, a fascist State founded on overtly racist beliefs. Or a radically Stalinist State, a new Khmer Rouge. A State that considers itself under immediate and constant threat from an ill-defined 'other' within and outside its borders. A State that sees spies and enemies everywhere, builds up a weapons arsenal, and makes a show of pointing them left and right. And now construct, outside the territorial limits, a coalition of States, depending on an expansive definition of collective self-defence founded on the responsibility to protect which, without the positive vote of a paralysed and moribund UN Security Council, decides to take military action in the form of an armed blockage of the ports of this outlier State. This is a hypothetical that falls *squarely* in the question mark under discussion in 2005. Is this act "by its character" a "manifest" violation of the UN Charter and so an act of aggression? What interpretative value, if any, is offered by the opening words of the UN Charter "*We*, the peoples of the United Nations, determined to save succeeding generations from the scourge of war"?

If the legally-protected interests of the crime of aggression are 'territorial integrity' and 'political independence', one can immediately appreciate how the legal interest will (a) influence how the act here is interpreted as consistent or inconsistent with a still problematic, vague conception of

[59] ICC, 2011, see *supra* note 57. There is actually a question mark in the text after "possibly".

[60] ICC Statute, Article 8*bis*(1), see *supra* note 15.

collective self-defence; and (b) the legal interest will affect the scope of the crime. One could ask, what if 'unity' is a foundational value of aggression? Our thinking shifts. Our analysis shifts. It becomes something like this:

> The adoption, by a State, of an irremediably racist policy coupled with the threat of use of prohibited weapons to pursue that agenda, even if the threat does not materialise internationally, is incompatible with the reality that humanity is essentially one. States have the right, individually and collectively, to defend their peoples through the use of proportionate armed force. This blockade is not a manifest violation of the UN Charter and so cannot amount to an act of aggression.

This speculative illustration is not meant to predict the impact of a recognition of a legal interest of 'unity' in the context of core international crimes, but only to exercise the imagination a little. What is clear from the example, regardless of its predictive value, is that if 'territorial integrity' and 'political independence' are respected as legal interests through the criminalisation of aggression, this will lead merely to an *absence of armed conflict*, not to 'friendly relations', 'international co-operation', or closer and more stable co-operation, stability and solidarity between States.

6.8. What Are Some Implications of Recognising an Emerging Legal Interest of 'Unity' in International Criminal Law?

We end by suggesting some applications of the further recognition of a legal interest or foundational value of 'unity' within international criminal law. It might influence the development of the substantive law – such as in any future Convention on Crimes against Humanity. 'Unity' is a relational or societal qualitative value, that is linked to the quality of the relationship between communities, thus completing 'humanity' which characterises individual conduct. 'Unity' implies an adjustment of social relations which demands more than the mere absence of conflict between States or within States. 'Unity' is, we would suggest, not compatible with a constant state of competition and tension.

Values such as 'unity' – with a substratum of organic oneness and interconnectedness – are deeply rooted in religious scriptures, and in Indian, Chinese and indigenous African philosophy and jurisprudence, as illustrated by several chapters in this anthology. Its recognition in international criminal law holds promise in exactly the same way this volume and the preceding conference on the subject of the intellectual foundations of international criminal law holds promise: by bringing a greater diversity of

voices into a space for discourse, based on a vision that diversity is an inherent source of collective strength, collective intellectual rigour, and the potential for greater collective insight and more sustainable collective action.

7

Forging a Modern African Perspective on 'Unity' as a Collective Legal Interest in International Criminal Law

Kafayat Motilewa Quadri, Vahyala Kwaga and Tosin Osasona*

7.1. Introduction

If a rationale of domestic criminal laws is to protect the peaceful co-existence of human beings in a community, then international criminal law should also protect the same amongst peoples and nations of the world. Rightly so, Kai Ambos contends that international criminal law serves to protect the peaceful co-habitation of people within a State and across State borders from grave human rights violations and massive threats to the peace and security of mankind.[1]

In fact, the achievement of peaceful co-habitation amongst persons and nations should be the ultimate purpose of any law. The framework for the creation of these laws and the mechanisms for their implementation

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1 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.

must keep evolving in order to meet the ever-changing demands and complexities of our world.

In Africa, the notion of law and justice is centred on *social harmony*, and a remarkable theory that is known as 'Ubuntu'.[2] There is great cultural and political diversity among the peoples of Africa, also as regards their notions of crime, morality, duties and responsibilities. The foundations of the African worldview are rooted in unannotated and unprinted metaphysical, religious, superstitious and even voodooist practices.[3] Can it nevertheless be said that the African has a unique and discernible framework that weaves together the concepts of rights and responsibilities (the pillars of any functional criminal justice system)?

According to Ben Nwabueze, save in a few cases, prior to the advent of the 'civilising' European colonialist, the African polity never had a State in the true sense of the term. Therefore, the concept of an individual having a legal claim is inapplicable. The concept of rights is among the colonial bequests of the Europeans.[4] Scholars like Jack Donnelly have stated that human rights were not recognised in traditional African societies.[5] In defence of an original African conception of rights and duties, Ojo has argued:

> While mankind universally opposed injustice, specific interpretations of the concept of human rights has been and continues to be a reaction to particular experiences of injustice. Thus, a truly universal concept of human rights encompasses as

[2] Ubuntu has been described in the following terms:

> It is not, "I think therefore I am." It says rather: "I am human because I belong. I participate, I share." A person with ubuntu is open and available to others, affirming of others, does not feel threatened that others are able and good, for he or she belongs in a greater whole and is diminished when others are humiliated or diminished, when others are tortured or oppressed, or treated as if they were less than who they are.

See Diane Caracciolo, "Introduction: Becoming Human", in Diane Caracciolo and Anne M. Mungai (eds.), *In the Spirit of Ubuntu: Stories of Teaching and Research*, Sense Publishers, Rotterdam, 2009, p. ix.

[3] Okpara Okpara, *Human Rights: Law and Practice in Nigeria: Volume 1*, Chenglo Limited, Enugu, 2005, p. 45.

[4] Ben Nwabueze, *Constitutional Democracy in Africa: Volume 2*, Spectrum, Abuja, 2003, p. 8.

[5] Jack Donnelly, "Human Rights and Human Dignity: An Analytical Critique of Non-Western Conceptions of Human Rights", in *The American Political Science Review*, 1982, vol. 76, no. 2, p. 308.

> many shades of meanings and includes an African perspective […].[6]

This chapter takes the view that if the 'universalist' notion, as per the origins of human rights, is the most preponderant, forceful and convincing, then *a fortiori* it is unquestionable that all societies have a coherent notion of human rights.[7] Keba M'baye, building on the idea of the 'African worldview', argued that the African notion of rights is a unique experience that tackles the peculiarity of the African local needs[8] through its communalistic institutions. It is thus wrong to say that because the black man does not have his own historical versions of the Magna Carta or the Bill of Rights, human rights are alien to him. After all, the Yorubas found an amenable means of deposing repressive rulers and enforcing social justice prior to the tumultuous European events that led to the drawing up of those historical documents.[9]

International criminal law has been described as a body of international rules designed both to proscribe certain categories of conduct (war crimes, crimes against humanity, genocide, torture, aggression and terrorism) and to make the persons who engage in such conduct criminally liable. It consequently either authorises States or imposes upon them an obligation to prosecute and punish such criminal conduct. International criminal law also regulates proceedings before international courts and tribunals for the prosecution of such crimes.[10] In a way, international criminal law constitutes a blend of international law and domestic criminal law. Though there are elements of criminal law in international law, it is not the same totality of such elements as can be found in the discipline of international criminal law.[11] Whereas international criminal law concerns individuals, international law typically concerns inter-State relations. International criminal law is nevertheless a subset of public international law.

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6 Emmanuel Ojo, "Human Rights and Sustainable Democracy in Nigeria (1999 – 2003)", in *The Journal of Social Sciences*, 2006, vol. 13, no. 1, p. 20.

7 Akin Ibidapo-Obe, *Essays on Human Rights Law in Nigeria*, Concept Publications, Lagos, 2005, p. 246.

8 Keba M'baye, "Le Droit du Developpement comme un Droit de I'Homme", in *Revue des Droits de I'Homme*, 1972, vol. 5, pp. 503–34.

9 Samuel Johnson, *The History of the Yorubas*, CSS Limited, Lagos, 2001, pp. 40–78.

10 Antonio Cassese and Paola Gaeta, *Cassese's International Criminal Law*, Oxford University Press, 2013, p. 3.

11 Ilias Bentekas and Susan Nash, *International Criminal Law*, Routledge-Cavendish, Oxford, 2007, p. 1.

International criminal law is a relatively new body of law, and aspects of it may neither be uniform nor universal. For example, procedural law used by the International Criminal Tribunal for the former Yugoslavia ('ICTY') may differ from that of the International Criminal Court ('ICC').[12] Although interpretations vary of the categories of international crimes, most legal texts deal with crimes falling within the jurisdiction of international and hybrid courts, including the ICTY, the International Criminal Tribunal for Rwanda, the Special Court for Sierra Leone, the Extraordinary Chambers in the Courts of Cambodia, and the ICC. These crimes comprise of genocide, crimes against humanity, war crimes and the crime of aggression, not piracy, terrorism, slavery, drug trafficking or other international crimes. International criminal law also addresses procedures and principles relating to modes of liability, defences, evidence, court procedure, sentencing, victim participation, witness protection, mutual legal assistance and co-operation issues.[13]

One of the main difficulties faced by international law, including international criminal law, is the issue of sovereignty of States which,

> if interpreted in an extreme or supreme manner, may lead some practitioners to rely on an outdated absolutist assumption of not sharing power with anyone else —internally and externally—, and could pose many problems ever since it includes the germ of the potential legal justifications that may lead to the denial of global peace and respect of human dignity.[14]

It remains a challenge to determine how international criminal law can properly meet the needs of all stakeholders. The authors of this chapter believe that international criminal law can, with perspectives borrowed from African humanist philosophy (Ubuntu), serve wider interests of enhanced community or 'unity' among large collectives.

In the next three sub-sections (7.1.1. through 7.1.3.), we discuss the chapter's theoretical framework and what legal goods or interests are in this context, including notions of individual and collective legal goods in

[12] See, generally, Gideon Boas, "Comparing the ICTY and the ICC: Some Procedural and Substantive Issues", in *Netherlands International Law Review*, 2000, vol. 47, no. 3, pp. 267–91.

[13] International Criminal Law Services, "Module 2: What is International Criminal Law?", 2018.

[14] Nicolás Carrillo Santarelli, "The Protection of Global Legal Goods", in *Anuario Mexicano de Derecho Internacional*, 2013, vol. 13, pp. 405–50.

international criminal law. Section 7.2. explores the concept of 'unity' and collectiveness in communitarianism from the perspective of international law. The section expands the 'Ubuntu' concept further by elaborating the positions of Menkiti and Mbiti on personhood and community, differentiating the latter from related Western concepts. The section also treats individualism and communalism, showing that both Western and African societies share elements of both. We discuss Singaporean communitarianism as a 'test case' for developing a distinct communal culture, noting its merits and weaknesses. The section rounds off with a consideration of Western and African notions of rights and duties and their relationship with how human rights are understood from a global perspective.

Section 7.3. introduces the concept of 'neo-communitarianism' and argues for its adoption at the international level, as a means of securing the greater good of all peoples. In Section 7.4., we address the concept of 'unity' and make a case for its adoption as a collective legal good within international criminal law. We discuss the potential of international law to have a unifying effect on nations through international criminal law. Based on the United Nations ('UN') Charter, we suggest that express recognition of 'unity' could enhance the African sense of ownership in international criminal law. Finally, in Section 7.5., we present some concluding remarks on a collective legal interest of 'unity'.

7.1.1. Theoretical Framework

Any argument or claim about the nature of 'unity' in this chapter should identify its own conceptual foundation and enumerate features that provide its structure. One of our central arguments is that international criminal law can be a catalyst in the creation of an evolved regime of international norms, emphasising the centrality of peaceful co-existence. This process is influenced by the forces of globalization and the evolution of institutions. Our claim relies on two distinct conceptions from international law and international relations.[15] The argument is fundamentally interdisciplinary, acknowledging that there are meeting points of the two disciplines. In his text on 'International Law Theories: An Inquiry into Different Ways of Thinking', Andrea Bianchi enumerates the meeting point between interna-

[15] For an extensive treatment on international relations by relevant experts, see Scott Burchill, Andrew Linklater, Richard Devetak, Jack Donnelly, Matthew Paterson, Christian Reus-Smit and Jacqui True, *Theories of International Relations*, 3rd edition, Palgrave Macmillan, Basingstoke, New York, 2005.

tional relations and international law. He describes the schools of thought within the former that contain concepts and positions that are relevant to this chapter. He states that:

> First, institutionalism, with its attention to international organisations and regimes, and the rules, principles, norms, and decision-making processes relevant to an area, upon which the expectations of actors converge […]. Secondly, the constructivist strand, which sees international relations as socially constructed and takes a special interest in the production and transformation of norms […]. Finally, liberal theory, which looks at individuals and groups living in society as the fundamental unit of international relations […].[16]

The argument here is that as the forces of globalization tear down the 'walls' of States,[17] global norms of common association need to be buttressed by a common but intangible unifying ideal. This does not presuppose the absence of conflict as we make strides towards that goal, but it does mean that a common sense of humanity will be at least known and possibly accepted by all. The leaning that this chapter takes, as far as international relations is concerned, is a constructivist one articulated by Alexander Wendt (cited in Bianchi): "the constructivist strand which sees international relations as socially constructed and takes a special interest in the production and transformation of norms".[18] We take the view that the changing texture of global political, economic and social structures, perceived by some as an *effect* of globalization,[19] and by others as the inevitable transformation of legal ordering at the macro-social and international level,[20] plays a major role in redefining the scope, purpose and dynamism

[16] See Andrea Bianchi, *International Law Theories: An Inquiry into Different Ways of Thinking*, Oxford University Press, New York, 2016, pp. 113–14.

[17] This contention is well known to the international law and international relations scholarship, as pointed out in Veronica I. Raffo, Chandra Lekha Sriram, Peter J. Spiro and Thomas J. Biersteker, "International Law and International Politics: Old Divides, New Developments", in Veronica I. Raffo *et al.* (eds.), *International Law and International Relations: Bridging Theory and Practice*, Routledge, Abingdon, 2007.

[18] See Alexander Wendt, "Anarchy is What States Make of It: The Social Construction of Power Politics", in *Journal of International Organisation*, 1992, vol. 46, no. 2, p. 396 (cited in Bianchi, 2016, pp. 114–15, see *supra* note 16).

[19] See Christian Brütsch and Dirk Lehmkuhl, "Introduction", in Christian Brütsch and Dirk Lehmkuhl (eds.), *Law and Legalization in Transnational Relations*, Routledge, Oxford, 2007, p. 1.

[20] See, generally, *ibid*.

of the law and international norms. Globalization, in this chapter, is taken to be a social phenomenon, a causal and constitutive element of social and global dynamics. Definitions by sociologists are chosen in this regard, namely:

> Roland Robertson argues that globalization "refers both to the compression of the world and the intensification of consciousness of the world as a whole." […] Martin Albrow defines globalization as the "diffusion of practices, values and technology that have an influence on people's lives worldwide."[21]

This chapter seeks an amalgamation of the perspectives of Robertson and Albrow in constituting globalization as the increasing development of interdependence and mutual awareness among social, political and economic units across the world, and among actors in general.[22] The drive towards interdependence of States as an outcome of the globalization of norms and of globalization *simpliciter*, does not preclude the occurrence of conflict[23] and even strife – as both can happen simultaneously. Yet, it does show that a path to convergence is possible, within the right parameters.

In some respects, the law and globalization are symbiotic, both positively and negatively, perhaps even neutrally. The effect of law on what globalization means has been elucidated by Donald Jackson *et al.* as they ask the following broad questions:

> How are the forces of globalization today, including the global spread of international human rights norms, the rise of universal criminal jurisdiction, and the pressure for the establishment of rule of law and good governance in the developing world, affecting domestic law, courts, and processes? Are the effects the same in all places at all times? To what degree, if

[21] See Mauro F. Guillén, "Is Globalization Civilizing, Destructive or Feeble? A Critique of Five Key Debates in the Social Science Literature", in *Annual Review of Sociology*, 2001, vol. 27, p. 236.

[22] *Ibid*.

[23] See *ibid*., p. 248. Guillén articulates the views of scholars who think that globalization will inevitably cause problems. International relations scholar Yoshikazu Sakamoto and political scientist Robert Cox concur in arguing that globalization generates problems of international governance and reduces the regulatory power of States. For Dani Rodrik, globalization creates social and political tensions within and across nation-states, and political theorist Michael Mosher asks whether there is a successful way of reconciling the excessive nature of markets with the boundary maintaining activities of nation-states.

> any, has the reception of international human rights norms and universal criminal jurisdiction undermined national authority and the concept of the nation-state?[24]

As these questions relate to the notion of *jus gentium*, they envisage the spread of values, preceeding the development of norms that are part and parcel of the evolution of the international legal regime. The notion of *jus gentium* – upon which our conception of 'neo-communitarianism' rests – is elucidated by Gordon E. Sherman who states (referring to Grotius' writings on the subject):

> We have noted at the outset that Grotius sat down to write his masterpiece in a spirit which sought to propound the first principles of a law between nations, as distinct from those of a system of jurisprudence governing courts when dealing with citizens in their private affairs; but he also endeavored to posit such a foundation in the moral consciousness of man. He looks at a system of law governing nations in their mutual intercourse, therefore, in the light of universal concepts drawn from the ancient ideas of an unwritten law of right reason combined with a system striving to develop the sense of equality and fairness in the personal dealings of men.[25]

This kind of thinking is not new. Judge Antônio Augusto Cançado Trindade has already expounded on the development of international law into a regime that increasingly acknowledges the universality and common human values that international law has and ought to have. Foisting a notion of common, global norms on international law presupposes an idea that the norms and values themselves are shared by all of humankind. In the words of Judge Trindade:

> The current process of the necessary *humanization* of International Law stands in reaction to that state of affairs. It bears in mind the universality and unity of the human kind, which inspired, more than four and a half centuries ago, the historical process of formation of the *droit des gens*. In rescuing the universalist vision which marked the origins of the most lucid doctrine of International Law, the aforementioned process of

[24] See Donald Jackson, Michael Tolley and Mary Volcansek, "Introduction", in Donald Jackson, Michael Tolley and Mary Volcansek (eds.), *Globalizing Justice: Critical Perspectives on Transnational Law and the Cross-border Migration of Legal Norms*, State University of New York Press, Albany, 2010, p. 1.

[25] See Gordon E. Sherman, "Jus Gentium and International Law", in *American Journal of International Law*, 1918, vol. 12, no. 1, p. 63.

> humanization contributes to the construction of the new *jus gentium* of the XXIst century, oriented by the general principles of law.[26]

The thinking behind this chapter and the arguments put forth align to some extent with realist notions that international arbitration and judicial decision-making have the ability to influence the development of legal principles and conduct by States and non-State actors.[27] Yet, this chapter borrows its multidisciplinary framing from readings of international relations, including its 'idealism' concept. 'Idealism' is a critical component of our framework. It is, in our view, within and from this form of viewing the world that the notion of 'unity' and communitarianism can exist and diffuse outward. Cynthia Weber describes the foundations of this school of thought in the following terms:

> Idealists believe that there is a basic goodness to people that can be corrupted by bad forms of organization. [...] It is these bad forms of organizations that divide people and lead to misunderstandings among them. If people could only be organized in ways that allow them to really, truly, and honestly communicate with one another, then they could see what they have in common and unite around common standards of goodness, truth, beauty, and justice. Or (somewhat less optimistically) they could at least put into place rules and laws to temper conflict and facilitate cooperation. Either way, good organizations can lead to good changes in people [...]. And good forms of organization are possible not only domestically but internationally because even international social relations

[26] See Antônio Augusto Cançado Trindade, *International Law for Humankind: Towards a New Jus Gentium*, Martinus Nijhoff Publishers, 2010, pp. 291–92.

[27] See Malcolm Langford (ed.), *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law*, Cambridge University Press, Cambridge, 2008, pp. 3–4. When transnational judicial or quasi-judicial authorities pass decisions or agree on conventions that increasingly lead towards a sense of the common good, they are in effect enabling foundations of an order that recognizes the common good, a building block of what we refer to as neo-communitarianism. The notion of neo-communitariansim presupposes the existence of a conception of a (legal) 'good' that all humans can aspire to and judicial authorities lean towards. 'Good' is understood as a higher-order value that humankind can commonly claim to aspire to, as explained by John Finnis in his *Natural Law and Natural Rights*, Oxford University Press, Oxford, 2011, pp. 81–89.

> are marked much more by harmony (when there is pure communication) than by conflict.[28]

Fortunately, the tenets of idealism at the level of international relations can find a willing meld with universalism (as understood by many lawyers). Wendt addressed the conceptual leaning of the use of idealism in international relations, explaining idealism (and idealists *via* the study of international politics) in this way:

> Idealists believe the most fundamental fact about society is the nature and structure of social consciousness (what I later call the distribution of ideas or knowledge). Sometimes this structure is shared among actors in the form of norms, rules, or institutions; sometimes it is not. *Either way, social structure can matter in various ways: by constituting identities and interests, by helping actors find common solutions to problems, by defining expectations for behavior, by constituting threats, and so on*. These possibilities need not deny a role for material forces, but the idealist claim is that material forces are secondary, significant insofar as they are constituted with particular meanings for actors.[29]

Yet, it can be conceded that this meld of the two concepts is a tenuous one since the idea of universalism does not extinguish counter-arguments related to State sovereignty.[30] Some writers, like Adam Bower and Hans Lindhal argue that such positions are indefensible, taking into account international rational choice, the behaviour of States and the reduc-

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[28] See Cynthia Weber, *International Relations Theory: A Critical Introduction*, 2nd edition, Routledge, London, 2005, p. 38.

[29] See Alexander Wendt, *Social Theory of International Politics*, Cambridge University Press, 1999, p. 24 (emphasis added).

[30] M.N.S. Sellers defines universalism as:

> The universalist paradigm of international law assumes that certain rights and values are (or ought to be) shared by all individuals and all peoples. These values include concern for other human beings (sociability) and respect for reason (reasonableness), as applied to the problems of social cooperation. Dellavalle and von Bogdandy identify these as two separate strands of the universalist paradigm: respect for our common humanity on the one hand and the application of our individual reason on the other. This idea of international law as the common law of a naturally sociable humanity implies an "international community" of all human beings. The great challenge to this conception of law is the evident fact that not all human beings actually accept their connection with humanity as a whole.

See M.N.S. Sellers, "Introduction", in M.N.S. Sellers (ed.), *Parochialism, Cosmopolitanism, and the Foundations of International Law*, Cambridge University Press, 2012, p. 6.

tionist notions of universalism in relation to how global legal ordering works.[31] These rebuttals present a challenge, but they are not insurmountable, especially in light of questions regarding the actual reach of international law and the concept of the person. However, we agree with Grotius, when he observed:

> Law arises from the desire to maintain social harmony, and each person and every social group has its own role to play in doing so. We owe a duty of care and obedience to our fellow citizens, but also to our fellow human beings.[32]

The African Charter of Human and People's Rights ('ACHPR' or 'Charter') is an excellent example in this regard.[33] In particular, Article 28 is an articulation of our position on unity and communitarianism. It states that "[e]very individual shall have the duty to respect and consider his fellow beings without discrimination, and to maintain relations aimed at promoting, safeguarding and reinforcing mutual respect and tolerance".[34]

Our understanding is premised on the idea that the recurrent forces of globalization will engender either a fusion or decoupling of interests, but the human being must be ensconced in a system that represents the foundation of a normative order within which she can thrive. What is proposed here may seem reminiscent of Ali Mazrui's call for an abandonment of ethnic consciousness and the embrace of race consciousness.[35] Yet, we do not propose the abandonment of nationalisms to the embrace of a common humanity, but to have them together: unity in diversity, with no superior religion, race, gender or nation. Put differently, our idea and conceptualisation embrace the diversity of the political, legal and the social.[36]

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31 See, generally, Adam Bower, *Norms Without the Great Powers: International Law and Changing Social Standards in World Politics*, Oxford University Press, 2017; Hans Lindhal, *Fault Lines of Globalization: Legal Order and the Politics of A-Legality*, Oxford University Press, 2013.

32 See Sellers, 2012, p. 250, see *supra* note 30.

33 See the African Charter on Human and People's Rights, adopted 27 June 1981, Articles 23(1), 24 and 27–29 (http://www.legal-tools.org/doc/f0db44/).

34 *Ibid*.

35 See, generally, Ali Mazrui, "Africa between Nationalism and Nationhood: A Political Survey", in *Journal of Black Studies*, 1982, vol. 13, no. 1, pp. 23–44.

36 In fact, law at the international level has been proclaimed to be political in very clear terms by scholars of law themselves. William Slomanson, citing the late Louis Henkin, stated:

> First, law is politics […] [T]he distinction between law and politics is only a half-truth. […] Law is made by political actors (not by lawyers), through political procedures, for

7.1.2. What Are Legal Goods or Interests?

The first problem with this question is the dynamics of whether the term 'legal goods' should be referred to as 'legal goods' or 'legal values' or 'legal interests'. Most writers have used the term interchangeably. As opposed to Common Law jurisprudence that is obsessed with the theory of harm, Civil Law methods are more concerned with the theory of legally-protected goods. The theory of legal goods or legally-protected goods was developed by jurists and writers which include Johann Birnbaum, Karl Binding,[37] Rudolf von Ihering, Frantz von Liszt,[38] and more recently Claus Roxin[39] and Morten Bergsmo.[40]

Legal goods are said to be epistemological concepts that link fundamental liberties with legal norms.[41] The idea of legal goods is said to have been taken from criminal law theory where it was used to determine what interests should or should not be protected by criminal norms.[42] Reversing 'interest' with 'good' in Ugnius Trumpulis' definition of legal interest, a legal good can be defined as a legally-protected conscious aspiration of an

> political ends […]. Second […] law is the normative expression of a political system. To appreciate the character of international law and its relation to the international political system, it is helpful to invoke (though with caution) domestic law as an analogue. Domestic (national) law […] is an expression of a domestic political system in a domestic (national) society […].
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> See William Slomanson, *Fundamental Perspectives in International Law*, 6th edition, Wadsworth Cengage Learning, Boston, 2011, p. 3.

37 See Markus Dubber and Tatjana Hörnle, *Criminal Law: A Comparative Approach*, Oxford University Press, 2014, p. 133.

38 See Kai Ambos, *Treatise on International Criminal Law, Volume I: Foundations and General Part*, Oxford University Press, 2013, p. 62 (https://www.legal-tools.org/doc/9a54bb/).

39 See Dubber and Hörnle, 2014, p. 131, see *supra* note 37.

40 See Chapter 1 above, as well as his presentations at the conference 'Philosophical Foundations of International Criminal Law: Its Intellectual Roots, Related Limits and Potential' (New Delhi, 25-26 August 2017) on which this anthology is based ('On the Philosophical Foundations of International Criminal Law Project', New Delhi, 25 August 2017, CILRAP Film (https://www.cilrap.org/cilrap-film/170825-bergsmo/), and 'On Legally Protected Interests in International Criminal Law', New Delhi, 26 August 2017, CILRAP Film (https://www.cilrap.org/cilrap-film/170826-bergsmo/)), and his concept note for the conference (see https://www.cilrap.org/events/170825-26-delhi/).

41 Ambos, 2015, p. 305, see *supra* note 1.

42 Santarelli, 2013, pp. 405–50, see *supra* note 14.

objectively existing interest, which can satisfy a person's need by using legal measures.[43]

Though the legal goods concept is a form of an answer to the rights theory, the former rests on social contract theories just as the rights theory does. For instance, a definition proffers that legal goods refer to the conditions and the aims needed for free development of the individual, for the realisation of his fundamental rights, and for the proper functioning of State institutions that are needed for these purposes.[44] This definition of legal goods links the individual with his rights and also with the proper functioning of the State in order to foster free development in a person. Another definition is that legal goods are conditions or chosen ends, which are useful either to the individual and his free development within the context of an overall social system based on this objective, or to the functioning of this system itself.[45]

Claus Roxin believes that the limits of the legal goods concept lie in the personal freedoms and rights as enshrined in the constitution of a country. He contended that criminal law does not protect all domains of individual interests, but only the legitimate ones which are already protected as fundamental liberties as found in statutory law. Other areas of law then protect other legal goods.[46] Differing from Roxin, Hans-Heinrich Jescheck and Thomas Weigend define legal goods as follows:

> Among "elementary life goods" that "are indispensable for the coexistence of humans in the community and therefore must be protected by the coercive power of the state through public punishment" one finds, for example, human life, bodily integrity, personal freedom of action and movement, property, wealth, traffic safety, the incorruptibility of public officials, the constitutional order, the public peace, the external security of the state, the impunity of foreign state organs and indicia,

43 See, generally, Ugnius Trumpulis, "Individual Interests as a Foundation of Public Interest", in *Socialinių mokslų studijos*, 2010, vol. 2, no. 6, pp. 123–37.

44 Claus Roxin, *Strafrecht: Allgemeiner Teil Band I*, C.H. Beck, Munich, 1997, p. 15; Iwona Seredytaka, *Insider Trading and Criminal Law: Dangerous Liasons*, Springer, Berlin, 2011, p. 87.

45 See Markus Dubber, *The Promise of German Criminal Law: A Science of Crime and Punishment*, 2004, p. 31.

46 Roxin, 1997, p. 15, see *supra* note 44; Seredytaka, 2011, pp. 193–94, see *supra* note 44.

> the security of national, ethnic or cultural minorities against extermination or undignified treatment, international peace.[47]

Globalization and the shrinking of national space have added another dimension to the concept of legal goods: the notion of global legal goods. Global legal goods are those interests, values and goals (legal goods) that should be protected in a global space of legal interaction.[48] These are purposes and values that inspire and are guaranteed by norms of multiple normative systems and levels of governance and that are validated by multiple actors in the international space. These legal norms, whether codified and expressed explicitly or inferred and informal, interact in a normative space that includes actors at the national, transnational and international levels.[49] Global legal goods are protected not in a subsidiary or vertical manner alone; putting in perspective the pattern of interaction between actors in a contemporary globalized world, actors also interact informally and from the fringe, undertaking their responsibilities by filling gaps of public action or reinforcing actions.[50] Civil organisations and non-State actors readily come to mind when one conceives of these actors at the global level.

7.1.3. Individual and Collective Legal Goods in International Criminal Law

This chapter takes the position that legal goods or interests may be divided into two different types which are intertwined with each other. There are the individual legal goods and collective legal goods.[51] Individual legal goods are those goods that have the most impact on an individual if they are not protected. Examples of individual legal goods include life, liberty and so on. Individual legal interests may also be described as interests so essential, such as life and property, that if threatened, they invite the exercise of self-defence by individuals, even where such conduct may be proscribed under law.[52] Collective legal goods usually concern the welfare of a

47 See Dubber, 2004, p. 27, see *supra* note 45.

48 Santarelli, 2013, p. 405, see *supra* note 14.

49 *Ibid*., p. 408.

50 *Ibid*., p. 413.

51 For more on individual and collective legal goods, see Ioanna Anastasopoulou, "Legal Goods in International Criminal Law" in Chapter 4 above.

52 See Giulio Battaglini and Robert Millar, "The Function of Private Defense in the Repression of Crime", in *Journal of the American Institute of Criminal Law and Criminology*, 1911, vol. 2, no. 3, p. 372.

group, such as a family unit or the larger society. Examples of collective legal goods include peace, security and the environment. 'Unity' may be seen as a form of collective legal good because of its nature which connotes the bringing of more than one person together.

Whilst there is a difference between collective legal goods and individual legal goods, they are both usually intertwined in their relation to the rationale behind a particular crime. For instance, crimes against humanity as an offense under Article 7 of the Rome Statute of the ICC ('ICC Statute'),[53] with its widespread or systematic criterion, protects a collective legal interest (probably of peace and security), but also groups and individuals in their individual rights such as human dignity, life and liberty which are individual legal interests. The crimes of genocide (ICC Statute, Article 6) are a negation of the collective legal good of the continued existence of a group which could be classified under the elementary life goods, as propounded by Jescheck and Weigend above.[54] War crimes (ICC Statute, Article 8) may be in different characterisations, collective and individual, depending on the context.

The international criminal law regime is not without challenges to the realisation and inculcation of collective or individual goods, in this sense, as has been pointed out in some detail by Larry May and Zachary Hoskins.[55] They discuss an inverse relationship between State sovereignty and legal goods, as well as how legal goods relate to different paradigms of health, economic prosperity and security.[56] Such challenges represent the evolutionary process whereby legal regimes absorb norms that ensure that the liberties afforded to persons expand.[57] This chapter agrees with earlier sociological views that saw law as concerned with social integration as an end or aim. Supporting this view, Gregory Shaffer points out:

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53 See Rome Statute of the International Criminal Court, 17 July 1998, in force 1 July 2001, Articles 6–8 (http://www.legal-tools.org/doc/7b9af9/).

54 See Dubber and Hörnle, 2014, p. 131, see *supra* note 37.

55 See Larry May and Zachary Hoskins, "Introduction", in Larry May and Zachary Hoskins (eds.), *International Criminal Law and Philosophy*, Cambridge University Press, 2009, p. 2.

56 *Ibid*.

57 See, generally, Santiago Mir Puig, "Legal Goods Protected by the Law and Legal Goods Protected by the Criminal Law as Limits to the State's Power to Criminalize Conduct", in *New Criminal Law Review*, 2008, vol. 11, no. 3, pp. 409–18; John Knox, "Horizontal Human Rights Law", in *American Journal of International Law*, 2008, vol. 102, no. 1, pp. 1–47.

> Globalization pressures transform issues that formerly were national in scope into global ones. With globalization, national decision-making increasingly has externalities on outsiders, and it is increasingly insufficient to attain national goals. International law and institutions thus rise in importance.[58]

The specific forms of influence generated by globalization are subject to deep disagreements around the world, but in terms of building an inclusive legal order, it is difficult to ignore its positive impact.

7.2. 'Unity' and Collectiveness in Communitarianism

'Unity' is all about collectiveness, but it should not diminish individualism as a concept different from itself, as it is different individuals who come together to make a community, a collective. James Baldwin said "All men are brothers. If you cannot take it from there you can't take it at all".[59] Ordinarily, communitarianism is meant to be a social arrangement where the community accepts all persons regardless of their creed, belief, gender or values. All functioning communities are united despite their differences. Its members are expected to be tolerant of each other. Despite the good intentions found in the provisions of the Universal Declaration of Human Rights ('UDHR') and the preamble of many multilateral treaties, these provisions are not exactly binding:

> All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.[60]

This chapter takes the position that it is only persons and governments that understand 'unity' as a collective interest that would "act towards one another in spirit of brotherhood" and also see the whole world as one community.

Though there are covenants that are now enforceable,[61] there is still a wide gap between what international law says and what the governments of

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[58] See Gregory Shaffer, "International Law and Global Public Goods in a Legal Pluralist World", in *European Journal of International Law*, 2012, vol. 23, no. 3, pp. 692–93.

[59] NBC/TV, "An Interview with James Baldwin", available on James Baldwin Project's web site.

[60] United Nations General Assembly, Universal Declaration of Human Rights, 10 December 1948, Article 1 (http://www.legal-tools.org/doc/de5d83/).

[61] United Nations General Assembly, International Covenant on Civil and Political Rights, adopted 19 December 1966 ('ICCPR') (http://www.legal-tools.org/doc/2838f3/); United Na-

the world are willing to do. It would seem that international law and justice are yet to recognise and understand the importance of 'unity' as a good or interest to be expressly protected. Some writers of literature and music are a few decades ahead in comprehending the essence of 'unity' as a core value. Writers such as T.H. White contend that:

> The destiny of man is to unite, not to divide. If you keep on dividing you end up as a collection of monkeys throwing nuts at each other out of separate trees.[62]

"Monkeys throwing nuts at each other" on a human scale can be regarded as a political or ideological difference that can eventually lead to war. For T.H. White, either we are united as human beings or divided; there are no in-betweens. Another writer, Stephen Chbosky also talks about the unity of humanity in terms of an emotional component:

> And all the books you've read have been read by other people and all the songs you've loved have been heard by other people, and that girl that's pretty to you is pretty to other people and that if you looked at these facts when you were happy, you would feel great because you are describing 'unity'.[63]

Gwendolyn Brooks in her poem writes:

> We are each other's harvest; we are each other's business; we are each other's magnitude and bond.[64]

The famous singer-songwriter, John Lennon in the lyrics of his song 'Imagine' lends a voice to a time in the future when we would all see beyond our differences:

> Imagine there are no countries
> It isn't hard to do
> Nothing to kill or die for
> And no religion too
> Imagine all the people
> Living life in peace
> You may say that I'm a dreamer
> But I'm not the only one
> I hope someday you'll join us

tions General Assembly, International Covenant on Economic, Social and Cultural Rights, adopted 16 December 1966 ('ICESCR') (http://www.legal-tools.org/doc/06b87e/).

62 T.H. White, *The Once and Future King*, Collins, Glasgow, 1958.

63 Stephen Chbosky, *The Perks of Being a Wallflower*, Simon & Schuster, New York, 1999.

64 Gwendolyn Brooks, *Family Pictures*, Broadside Lotus Press, Detroit, 1971.

And the world will be as one.[65]

The entire text of the UDHR represents an aspiration for a type and form of existence between persons and nations that recognises the inherent dignity of the human person. The framing of the person is without discrimination to race, sex, status or nationality. These are the building blocks of the imagination and recognition of legal goods at a global level. This chapter shares Santarelli's observation: "Concerning the reinforcement and complementation of protection of legal goods available under legal systems that are part of the global legal core, […] let the following be said: besides inter-State cooperation in the protection of common legal goods—e.g. by means of the *aut dedere aut judicare/punire* principle—, all actors, regardless of which legal systems' protection they represent, can cooperate with each other in the protection of the same legal goods".[66]

There have obviously been many problems in the implementation of the ICCPR and ICESCR, both adopted several years after the UDHR.[67] But the process has shown that the nations of the world have a common goal and purpose, and it would rest on the interactions of non-State actors, States and in some cases individuals to promote the cause of unity and communitarianism among the peoples of the world.

7.2.1. Menkiti and Mbiti on Personhood and Community

The Western idea of personhood and community is a bit different from that of the African notion of these concepts. The general perception offered by most African philosophers is that persons exists as a result of their community and should exist for their community, hence, the movement from community to personhood.[68]

This position, no doubt of general application, can be traced back to foundations such as Yoruba epistemology. The Yoruba conceptions of

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65 John Lennon, "Imagine", in John Lennon (producer), *Imagine*, Ascot Sound Studios, Berkshire, 1971.

66 See Santarelli, 2013, p. 419, see *supra* note 14.

67 See, generally, Chimere Arinze Obodo, "International Human Rights Law Enforcement Challenges in 21st Century Africa", in *Journal of Law, Policy and Globalization*, 2014, vol. 32, pp. 83–88.

68 See Ifeanyi A. Menkiti, "Person and Community in African Traditional Thought", in Richard A. Wright (ed.), *African Philosophy: An Introduction*, University Press of America, 1984, p. 1.

knowledge, belief and opinion have been understood to be more stringent than those of Anglo-American speech.[69]

African philosophical notions of community and personhood involve more than just a statement of position; they are the foundations of the social system. They define the perception of African thinking on the role and relationship between persons and group.[70] Richard Bell reminds us of the words of the African independence movement's founding fathers. This is key to understanding the African philosophical position, since colonialism represents a critical juncture for an African understanding of self. Bell states that:

> As Senghor said: "we had achieved socialism before the coming of the European." Nkrumah, too, noted that Africa's socialism was "more in tune with the original humanist principles underlying African society." And Nyerere said: "'*Ujamaa',* then…describes our Socialism." "Our socialism" is the recognition of society as an extension of the basic family unit; it was an attitude of mind for Nyerere that reaches back to "tribal days." But, he says, "the family to which we all belong must be extended yet further—beyond the tribe, the community, the nation, or even the continent—to embrace the whole

[69] See Kwasi Wiredu (ed.), *A Companion to African Philosophy*, Blackwell Publishing, Oxford, 2004, p. 7. In the introduction to the volume, Wiredu notes that:

> One of the most remarkable results of the investigation under discussion is the finding that Yoruba discourse lays down more stringent conditions for knowledge (or more strictly, what corresponds to knowledge in the Yoruba language) than is apparent in English or, generally, Anglo-American speech. In English-speaking philosophy, it seems to be generally accepted that somebody may be said to know something, provided that she believes it, and it is true, and the belief is justified in some appropriate way. By the way, the need for not just a justification, but also one of an appropriate type, was pressed upon the attention of contemporary Anglo-American epistemologists by Edmund Gettier, in a three-page article entitled "Is Justified True Belief Knowledge?" (1963). The control that those three pages have exercised on recent epistemology has been, to say the least, tremendous.

For an excellent essay on African epistemology *vis-à-vis* western epistemology, referencing Evans-Pritchard's study of Zande witchcraft, see generally, Kwame Appiah, "African Studies and The Concept of Knowledge", in Bert Hamminga (ed.), *Knowledge Cultures: Comparative Western and African Epistemology*, Rodopi, New York, 2005, pp. 23–56.

[70] It may go without saying that this does in no way imply that there is a general African philosophical position. Rather, we believe that whatever position taken is just one of many equally compelling views. The analogy that we draw is with tapestry: several individual threads can be identified, but they all make up a complete whole.

> society of mankind. This is the only logical conclusion for true Socialism".[71]

John Mbiti contends that the African view of the person can be summed up in this statement: "I am because we are, and since we are, therefore I am".[72] So, a man in this context is defined by reference to his community. African philosophers such as Ifeanyi Menkiti would insist that the Western idea of a person is 'a man for himself alone', but this would seem to be an extreme notion. The Western world may have individualistic tendencies and many of their people may prefer to be by themselves without any affiliation or validation coming from a communal platform, but there are communities in these societies too that may or may not uphold the principles of communal living.

Menkiti and Mbiti believe that the communal world is more important than the life of an individual. Menkiti further contends that the individual is made of what the community provides for him: the language, the culture and the history of the community.[73] While this may be true, it does not however, represent all the individuals in the average African community. It is hard though for individuals who question the validity of communal dominance in their daily existence. Such persons may be stig-

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[71] See Richard Bell, *Understanding African Philosophy: A Cross-cultural Approach to Classical and Contemporary Issues*, Routledge, New York, 2002 p. 37. Bell goes on to compare and contrast the Western notion of humanism as an ideal with that of African humanism:

> African humanism, on the other hand, is rooted in traditional values of mutual respect for one's fellow kinsman and a sense of position and place in the larger order of things: one's *social* order, *natural* order, and the *cosmic* order. African humanism is rooted in *lived dependencies*. Where life's means are relatively minimal and natural resources are scarce, the individual person must depend on his or her larger community. Nkrumah says, "Our philosophy must find its weapons in the environment and living conditions of the African people".

[72] See Menkiti, 1984, p. 1, see *supra* note 68.

[73] *Ibid*., pp. 2–3. In fact, Menkiti holds the following view, as regards the concept of 'community' in Africa. He says that:

> [T]his understanding of human community, and of the approach to its study, is something completely at odds with the African view of community. When Mbiti says that the African says to himself, 'I am because we are', the we referred to here is not an additive 'we' but a thoroughly fused collective 'we'. It is possible to distinguish three senses of human grouping, the first of which I shall call *collectivities* in the truest sense; the second of which might be called *constituted* human groups; and the third of which might be called *random* collections of individuals. The African understanding of human society adopts the usage in description number one above, whereas the Western understanding would fall closer to description number two […].

matised or branded as strange or stubborn. For instance, in the Yoruba culture of the Nigerian people, there is a custom of sharing and selling of traditional attire for weddings and sometimes burial ceremonies.[74] The celebrant or a friend of the celebrant goes around to sell the traditional attire chosen for the ceremony to other family members and friends. It is usually expected of everyone to purchase this traditional attire and if a person decides not to buy the attire as a result of lack of money or just lack of interest, such a person would be branded as anti-social. Other persons may even borrow money to buy the attire to avoid being branded as stingy or anti-social.[75]

Menkiti writes that in Africa it is the community that defines a person as a person as opposed to in Western societies.[76] This may not be entirely accurate, but all societies have their norms and values that affect the individual living in such a community. While some conform to all the dictates of their community, others forge a different path that may be individualistic or part of another community, sharing a different approach of existing which entails a possibly different value system. But it is important to note that all communities have an effect on a person, but some few individuals consciously or unconsciously stand out and this should never be a reason for separatism or exclusion.

The next point buttressed by Menkiti is the institution of incorporation in the African community, which transports a person into their personhood. Menkiti insists that personhood is a status that has to be *achieved*.[77] It is not thrust upon a person, but deserved as a result of "a long process of social and ritual transformation" in order to achieve "excellence";[78] one of such institutions is marriage. In most African communities, if you are not married, especially if you are a woman, you are not really considered to be a person and the stigma that ensues is multifaceted.[79] From social gatherings to professional and work environments, the personhood of the female

74 See, generally, Rose Ogbechie and Friday Osemenshan Anetor, "The Ethics of Aso-Ebi Culture in Nigeria", in *Journal of Culture, Society and Development*, 2015, vol. 8, pp. 27–34.

75 See *ibid*., p. 27.

76 See Menkiti, 1984, p. 2, see *supra* note 68.

77 *Ibid*.

78 *Ibid*.

79 See Lorretta F.C. Ntoimo and Uche Isiugo-Abanihe, "Patriarchy and Singlehood Among Women in Lagos, Nigeria", in *Journal of Family Issues*, 2013, vol. 35, no. 14, pp. 1–29.

is constantly questioned, pitied and in many cases shamed and ridiculed into conformity and submission.[80]

Menkiti also argues that a person is capable of failing at personhood and this is why the community must provide guidance for individuals to survive in their various communities.[81] The older the person, the more acclimatised he is to his community and the more 'important' he is; which is why the Ibo have a proverb that "what an older person can see sitting down, a younger person would not see even while standing up". The problem with this adage is that it never accords any form of relevance to the knowledge or wisdom that a young person may have despite their youth and lack of experience. For it is not true that wisdom comes certainly with age. This kind of mindset does not recognise the geniuses in their communities at their elementary stage because they are expected to *earn* the right to be seen and heard. This is how a lot of opportunities for discoveries, development and advancement are ignored. This is not to say that communities do not provide support systems for growth – they do – but to what extent is support necessary for any human being? It should be enough that the person is human. That should be the ideal communitarian model; a community that accepts all in unity, those that conform and those that do not, for it is in the space of non-conformity that creativity and advancement emerge. Conformity gives order and uniformity, but without non-conformists a community would remain stagnant. That is not to say non-conformists are better than conformists, but both are needed to ensure that a society does not remain staid but grows.

7.2.2. Individualism: The Movement from Personhood to Community

Just as Western philosophers make generalisations on the African concept of communitarianism, African philosophers also make generalisations about the Western idea of individualism and liberalism.[82] A philosophy discourse loses its direction if all it seeks is who is right and who is wrong

[80] See I.E. Nwosu, "Gender Role Perceptions and the Changing Role of Women in Nigeria", in *International Journal of Agriculture and Rural Development*, 2012, vol. 15, no. 3, pp. 1240–46.

[81] See Menkiti, 1984, p. 3, see *supra* note 68.

[82] In this chapter, liberalism and individualism are used interchangeably to mean the same thing.

rather than objectively proffering best practices from different sides. This is important for sustainable development for future generations.

According to M.F.S. van den Berg, liberalism, unlike communitarianism, gives primary value to the existence of persons in their individuality. Such persons have autonomy over themselves, their dignity, unique qualities and dispositions, and the freedom to express all these, while the community and the State give protection to this autonomy and expression of the person.[83] He believes that protecting the rights of a person (of higher importance than community-rights over the person) is to protect him or her from oppression by that community and the State.[84] 'Individualism' is the view that individuals enjoy a kind of ontological or axiological priority to the collectives they constitute.[85] Van den Berg contends:

> Although, I agree that we cannot do without communities, that people are largely interdependent and that the moral self develops within a social context where culture and history play vital roles, I disagree that the self is a mere product of a constitutive collectivity, submerged in the community conceiving of itself primarily as a member of a group and someone who discovers 'self' as constituted by community values.[86]

However, liberalism or individualism like communitarianism has its Achilles' heel in the form of separatism. In the case of individualism, Joseph Tamney contends:

> [I]ndividualism means that the value of the person exceeds that of any group as such. Take the case of a family. According to individualism, the well being of each member of the family is equally important, and the happiness of the members is more important than the status of the family as such; thus divorce can be justified in terms of improving the aggregate well being of the individuals composing the family. Individualism is not egoism. The latter means being selfish, making one's self more important than anyone else. Individualism is

[83] See M.F.S. van den Berg, "On Communitarianism Ethos, Equality and Human Rights in Africa", in *Alternation*, 1999, vol. 6, no. 1, p. 194.

[84] *Ibid*., pp. 193–212.

[85] Irfan Khawaja, "Whose Liberalism? Which Individualism?", in *Reason Papers*, 2000, vol. 25, pp. 73–99.

[86] Van den Berg, 1999, see *supra* note 83.

> not glorification of the self. Rather, it is expressed in a respect for each person including the self.[87]

Whilst Western societies lay claim to individualism or liberalism as opposed to communal living or communitarianism, which in turn is claimed by the African philosophers, both sides in reality experience some part of the other. Western societies, for instance, cannot claim to be free of communal structures such as marriage, peer groups, trade unions, and religious rites and gatherings, and neither can African societies assert that all things African are necessarily all things communitarian. This is the position that Lisa Iyer has taken in the analysis of a classical African literary text by Buchi Emecheta. Iyer contends that all cultures glorify only what is advantageous to their society at specific times and within specific frameworks:

> The prevalent notion that Western culture glorifies individualism is by and large a fallacy, since it encourages only aspects of individualism which perpetuate the dominant belief system, such as economic individualism, while in general taking a hostile stance toward manifestations of individualism which seem to threaten the status quo.[88]

Environmental problems have been linked to individualist behaviour where an individual acts against the collective interest of a group with similar norms and that affects the rest of the group in a negative way "so that recognisably suboptimal outcomes are produced for all if each person acts in accord with their 'private' reasons".[89] The generation of a universalistic notion of law, norms and legal goods would have to discharge the friction between these competing notions of human existence. Though they have their roots in the specific histories and cultures of the peoples that espouse them, the dichotomy stands in the way of an encompassing teleology of human existence that seeks to bridge those gaps. As the preoccupation with phenotypical differences falls from the focus of the eyes of Lady Justice, in her global form, the law should itself recognise the inherent trivial

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87 Joseph Tamney, *The Struggle Over Singapore's Soul: Western Modernization and Asian Culture*, Walter de Gruyter, Berlin, 1996.

88 Lisa H. Iyer, "The Second Sex Three Times Oppressed: Cultural Colonization and Coll(i)(u)sion in Buchi Emecheta's Women", in John Hawley (ed.), *Writing The Nation: Self And Country In The Post-colonial Imagination*, Rodopi, Amsterdam, 1996, pp. 123–38.

89 See Xavier Marquez, "Virtue and the Commons", in Jonathan Boston, Andrew Bradstock and David Eng (eds.), *Public Policy: Why Ethics Matters*, ANU E Press, Canberra, 2010, p. 159.

nature of the differences themselves.[90] Yet, before the law can do that, human beings must direct it to do so and see the benefit of doing so. The quest for unity and communitarianism may be an appropriate vehicle through which this could be done.

7.2.3. Singaporean Communitarianism: The Personhood/ Community Stance That Makes No Movement at All

In the early days of the creation of Singapore, the priority for a sustainable political existence made the government focus more on pragmatic values in order to promote the economic development of the country. This is said to have changed by the late 1980s when the government became concerned with "widespread materialism within the society".[91]

Singaporean communitarianism grew out of the need to distance their society from the West's perceived lack of prudence and care, implying a belief that Western culture breeds an acceptance of unnecessary risk-taking and careless disregard for the flow-on effects of individualistic behaviour characterising Western neo-liberal culture.[92]

LEE Kuan Yew, the founding father of modern Singapore, contended that Singapore is a society with communitarian values where the interests of society take precedence over that of the individual. He believed that if Singapore became a Western-style, individualistic society, the country would go down the drain with the existence and reinforcement of more drugs, crime, single mothers with delinquent children, and a poor economy. This type of communitarianism is said to have assisted in establishing and maintaining national unity, which was the primary role of the Singapore government.[93]

Institutionalising communitarianism in the development of the Singaporean economic fortunes has had some marked effects. Yet, these values are embedded in South Asian culture generally, as has been pointed out:

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90 *Ibid*.

91 Stephan Ortmann, "Singapore: The Politics of Inventing National Identity", in *Journal of Current Southeast Asian Affairs*, 2009, vol. 28, no. 4, pp. 23–46.

92 Faith Benjaathonsirikul, "Singapore: staying the course", in Paul 't Hart and Karen Tindall (eds.), *Framing the Global Economic Downturn: Crisis rhetoric and the politics of recessions*, ANU E Press, Canberra, 2009, pp. 275–76.

93 Daniel Bell, "A Communitarian Critique of Authoritarianism: The Case of Singapore", in *Political Theory*, 1997, vol. 25, no. 1, pp. 6–32; Beng-Huat Chua, *Communitarian Ideology and Democracy in Singapore*, Routledge, London, 1997.

> In Singapore, the family is the core of society and is its single most important unit. Kua and Yang (1991, P25) reports that the traditional Asian value of family ties remains paramount to the average Singaporean. Hence, it is not surprising that it is the group rather than the individual that is emphasized in Singapore society.[94]

That the Singaporean society is communitarian is not in doubt, as has been exemplified by SAM Choon Yin in the following passage:

> The national values of Singapore also appear to go against the individualistic ideology. First raised in 1988, a National Ideology Committee was established [...] to develop Singapore's ideology using the traditional cultures of the Chinese, Malays and Indians. The first ideology 'Nation before community and society above self' exemplified the Singapore values, one that advocates self sacrifice and social harmony. Based on the Confucian principles, the government prescribes to a hierarchical system centered on the society, the government and the family before others. Clearly, being individualistic is not recommended as one value that Singaporeans should adopt.[95]

While this may be true, it should not be taken as conclusive, as Green *et al.* point out in their review of the dimension of culture.[96]

What can be acknowledged, however, is that culture is comprised of components and variables that can be influenced to trigger certain outcomes. We take this to mean that the development of global communitarianism is possible. Perhaps our focus should be on how to operationalise this without becoming paternalistic, as the Singaporean society has been accused of being.[97] This has serious implications for notions of individual personal autonomy *vis-à-vis* communitarianism, because individualism is not synonymous with selfishness but egoism (as used in the strict psychological sense).

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94 See LIU Qiang, "Core Culture Values and Beliefs of Singapore" (on file with the authors).

95 See SAM Choon Yin, "Individualism and Communitarian Ideologies in Singapore" (on file with the authors). See also, generally, Lai Lai Tung and M.A. Quaddus, "Cultural differences explaining the differences in results in GSS: implications for the next decade", in *Decision Support Systems*, 2002, vol. 33, no. 2, pp. 177–99.

96 Eva G.T. Green, Jean-Claude Deschamps and Dario Páez, "Variation of Individualism and Collectivism within and between 20 Countries: A Typological Analysis", in *Journal of Cross-Cultural Psychology*, 2005, vol. 36, no. 3, pp. 321–39.

97 See "Singapore expands its paternalistic policy on race: The president will now be chosen partly on racial criteria", in *The Economist*, 15 December 2016.

7.2.4. The Western and African Divide

There has always been an African/Asian and Western divide on the concept of personhood and subsequently the human rights that accrue; especially relating to the rights that hold more importance for each bloc.

While the African governmental evolution followed a different path, the emergence and dominance of State institutions in Western societies could be seen as having atomised and isolated the individual both from society and the State, hence the need to seek its protection. As such, the overdrawn emphasis on individual rights by Western societies derive from Western history and worldview. While it is the understanding that an individual in Africa lives in the warm cocoon of extended family and societal inter-relationships. It is, therefore, not surprising that the membership of an extended family or community devolves on the individual the concept of rights and duties.

From the perspective of human rights, liberalism or individualism and communitarianism are actually two sides of the same coin. Whilst liberalism or individualism is clamouring for rights of the individual, which essentially are civil and political rights or 'first-generation rights', communitarianism as it is understood clamours for rights and duties while emphasising duties and collective rights. Every human aggregate or community has had some form of social structure layered with roles and status pyramids that are closely attached to their immediate communities.

The global African philosophical worldview is best outlined in the above-mentioned ACHPR. The Charter reflects African peoples' worldoutlook, legal philosophy, collective developmental needs, and peculiar circumstances and autonomy. The emphasis of the Charter is on the protection of national rights, rather than individual rights. In this respect, the rights listed for protection by the Charter include the rights to self-determination, liberation and equality of all peoples; the right to international peace and security; the right to use one's resources; the right to development; the right to satisfactory environment; and the right of national minorities.[98]

Conversely, in Western societies, the idea of rights is shaped by their particular historical experience, which is distinct from the Africans. As such, the pursuit of individual rights is neither natural nor universal from

[98] Elechi Oko, "Human Rights and the African Indigenous System", 10 August 2004 (on file with the authors).

the African historic perspective, but nonetheless its pursuit is now essential for a harmonious world.[99]

In the international law realm, one of the main objectives of the UN is the protection of human rights for all persons regardless of their race, gender and religion.[100] All Member States of the UN are enjoined to protect certain human rights of all persons whether they are their citizens or migrants or refugees fleeing from their own country for reasons not limited to armed conflict, political or economic instability, famine, drought and so on. Though all human rights are said to be inalienable, interdependent and interrelated, they can still be divided into first, second and third generation rights. First-generation rights are also usually called civil and political rights. They are regarded as the rights representing the liberalism or individualist school of thought, including the right to life, human dignity and freedom from discrimination. The second-generation rights are also known as the economic, social and cultural rights. The third generation includes rights such as the rights to self-determination and economic and social development.

Nonetheless, all human rights are to be treated as universal, indivisible, interdependent and interrelated. All human rights must co-exist and apply to all citizens of the world regardless of where they are and come from.

7.3. Neo-Communitarianism

There is a symbiotic relationship between unity and community. As explained in Chapter 1 above, the word 'unity' comes from the Latin word '*unus*' or '*unitas*', which connotes oneness. The word 'community' also has its roots in the Latin language from the term '*communis*' which means common, public, shared by all or many, representing the common sentiment and something universal. When something is having or representing a common sentiment, then it has in it some form of commonality.

Our chapter does not argue for 'sameness' but commonality or uniformity in the sense of togetherness (despite differences). The concept of communitarianism ordinarily should be an embodiment of all persons in community so as not to exclude certain groups. But it would seem that the

[99] *Ibid*.

[100] United Nations Charter, adopted 26 June 1945, Article 1(3) (http://www.legal-tools.org/doc/6b3cd5/).

communitarianism projected by African philosophers tends towards exclusion rather than complete inclusion of all, that is, unity.

This is why this chapter proposes a new and enhanced form of communitarianism by use of the prefix 'neo'. 'Neo-communitarianism' goes beyond the regular form and embraces the differences among members, without viewing those differences as points of discord. It is to be viewed as an umbrella of legal norms that guides the society, and a concept that is above all, since it unites all.

Trumpulis argues for different individual interests coming together to form public interest, and this aggregated individual interest should also include the interest of communities and the interest of the State.[101] In other words, the interests of individuals, the whole society and the State should be in accord with each other. Trumpulis also contends that a compromise should not be found between the interests of all subjects, because an individual, the society and the State are values for each other, their interests depend on and influence the development of every subject.[102] A violation of the interests of one subject automatically causes a violation of the interests of another subject; in this situation neither a consecutive development of all earlier mentioned subjects is possible nor can common welfare be achieved.[103]

One way the interests can be protected is when the obligation of duties makes its entrance. The ACHPR enshrines duties with a communitarian characteristic, that is, by recognising duties towards the community.[104] Most human rights advocates talk about rights with little regard to duties. But duties and rights go hand in hand. Assimilation and acceptance are easier for migrants, for instance, if they partake in the activities that sustain the community; hence the adage, 'when in Rome, do as the Romans'.

In conclusion, unity of the global community reinforces sustainable living. Apart from ignorance and exploitation, a chief root of conflict among human beings is the illusion that we are so different from one another. There is nothing wrong with feeling different as long as it does not lead to discrimination, racism and, in extreme cases, atrocity crimes. The

101 Trumpulis, 2010, pp. 123–37, see *supra* note 43.

102 *Ibid*.

103 *Ibid*.

104 ACHPR, Article 27, see *supra* note 33.

protection of refugees and minority groups based on ethnic, religious, sexual or other identity are key to the unity of all communities.

7.4. 'Unity' as a Collective Legal Good for International Criminal Law

When unity is spoken of, it is not to say there are no different cultures, religions, skin colours, values and gender, but that we are the same in our feelings and emotions of love, pain, anger, frustration, happiness, gentleness and our violent and peaceful nature. It just takes the right trigger and circumstances to determine our continued existence or doom.

International relations between States have been characterised by periods of extreme violence and discord and periods of relative peace and calm. Karl Polanyi was critical of the system that capitalism had produced in the early part of the twentieth century and was suspicious of its effect by its characterisation in the 'free market'. Yet, even he was committed to the breaking of barriers and the establishment of freedom that to him would ensure that society progresses. In his words:

> Every move towards integration in society should thus be accompanied by an increase of freedom; moves towards planning should comprise the strengthening of the rights of the individual in society. His indefeasible rights must be enforceable under the law even against the supreme powers, whether they be personal or anonymous. The true answer to the threat of bureaucracy as a source of abuse of power is to create spheres of arbitrary freedom protected by unbreakable rules. For, however generously devolution of power is practiced, there will be strengthening of power at the center, and, therefore, danger to individual freedom.[105]

The concept of idealism still rings true at the core of our chapter, but we remain conscious of the impediments to its 'truth'.[106] States operate

[105] See Karl Polanyi, *The Great Transformation: The Political and Economic Origins of Our Time*, Beacon Press, Boston, 1944, p. 264.

[106] In particular, Cynthia Weber identifies the prominent theses of idealism, as explained by a contemporary scholar, Charles W. Kegley. She notes that:

> Kegley argues the Idealist worldview can be summed up in the following core principles: 1. Human nature is essentially "good" or altruistic, and people are therefore capable of mutual aid and collaboration. 2. The fundamental human concern for the welfare of others makes progress possible (that is, the Enlightenment's faith in the possibility of improving civilization is reaffirmed). 3. Bad human behavior is the product not of evil people but of evil institutions and structural arrangements that motivate people to act

within spheres of influence in the international system. To push a project for enhanced unity and communitarianism would mean that States could see a reduction in their control over the very subjects they are comprised of (the citizens) and, potentially, of their political relevance. But, progress, as they say, is inevitable and there seems to be a path towards securing the project of unity and communitarianism despite these and other challenges.

The path begins from the notions of international law that have been put forth by prominent jurists H.L.A. Hart and Hans Kelsen in constitutionalism, as the centrepiece of the project. Though the two differed on the ultimate *origins* of a constitution, they did agree that it had an *extra*-legal source. This is where our project finds its own source: from the *will* of the people and States. For just as a nation can possess an 'unwritten constitution', this chapter takes the position that the promotion of unity and communitarianism is a form of *constitution* that is derived from the fundamental will and need of mankind to live in harmony and peace. The corollary to the components of the unwritten British Constitution are the documents that make up the unity of the international system: the UN Charter and the UDHR. This is because:

> [I]f the international legal system is supposed to have developed into a constitution, it must have found some superior unity that goes beyond a system of formal rules. A constitution, in this strong reading, is more than a mere system of deriving substantive rules from state consent, acquiescence, and general principles of law. In a more developed formalist sense, a constitution is a comprehensive order of the whole system that is hierarchically superior to all other legal rules, and it derives its legal source itself, formally speaking, from the ultimate rule of recognition or, substantively speaking, from the ultimate source of legitimacy, which is, in the domestic legal order of democratic states, the people in form of the *pouvoir constituent*.[107]

selfishly and to harm others – including making war. 4. War is not inevitable and its frequency can be reduced by eradicating the anarchical conditions that encourage it. 5. War and injustice are international problems that require collective or multilateral rather than national efforts to eliminate them. 6. International society must reorganize itself institutionally to eliminate the anarchy that makes problems such as war likely.

See Weber, 2005, p. 41, see *supra* note 28.

[107] See Andreas Paulus, "The International Legal System as a Constitution", in Jeffrey Dundoff and Joel Trachtman (eds.), *Ruling the World? Constitutionalism, International Law, and Global Governance*, Cambridge University Press, 2009, p. 75.

Therefore, the comity of nations that has proven elusive, finds expression through this unifying theme that unites all the peoples of the world. "We are each other's harvest; we are each other's business; we are each other's magnitude and bond."[108]

Unity as a legal good would seem to already be present in other legal goods such as reconciliation and humanity, as discussed in Chapters 3 and 5 above. "The Destiny of Man is to unite, not to divide. If you keep on dividing you end up as a collection of monkeys throwing nuts at each other out of separate trees."[109] For instance, reconciliation is the act of making one's views or beliefs compatible with another's, and it represents restoration of friendly relations. So, it is obvious that reconciliation is only possible when the aggrieved party sees the sameness of themselves in the erring party. It is that sameness that unifies people. It is that unity of seeing that all human beings come from the same flesh, blood and bones – "I am you and you are me" – that allows for reconciliation. All of these are what 'unity' represents in this context.

Mass atrocities, like the Nazi Holocaust or South African apartheid, are acts that completely go against the unity of people or the unity of nations. The wounds and grievances from such atrocities lay open for centuries. Many might say that such atrocities were committed only because of lack of humanity in perpetrators. But we would argue that it is also because of the lack of a mindset of unity. The 'sense of humanity' is when a person does something out of his or her human nature, such as being courteous. 'Unity' goes further, connoting something deeper. It is something we do to protect family. We may be different nations, but as inhabitants of earth; who protect earth, who walk on earth, who cherish the wonders on earth, who die and get buried on earth. We are one family. These are the legal goods that international law can strive to protect.

Iwona Seredynska refers to a definition of two types of legal goods by Jescheck and Weigend: simply put, the legal good that is one out of its nature and the one that is made a legal good through its introduction into the legal order.[110] 'Unity' would seem to be that type of legal good that exists in its nature. Jescheck and Weigend define such a legal good as the type that is "indispensable for the coexistence of humans in community and

[108] Brooks, 1971, see *supra* note 64.

[109] White, 1958, see *supra* note 62.

[110] Seredynska, 2011, p. 194, see *supra* note 44.

therefore must be protected".[111] This effortlessly puts 'unity' in the sphere of legal goods because it is impossible for a community or a nation in the world to thrive and for humans to live peacefully without conscious and deliberate co-existence, which is easier with unity in diversity. In this respect, 'unity' is the opposite of separatism, which is a source of crimes against humanity and genocide.[112]

The world is becoming more of a global village where what is done in one country soon affects neighbouring countries. The activities of individuals in one jurisdiction are likely to affect the welfare of individuals in other jurisdictions. In this regard, international law offers the possibility of creating co-ordination mechanisms.

Some claim that the "rise of international law may have roots in the domestic struggle for power. It is one means, among many others, by which elites push back against democratization".[113] This is one way of looking at it. Others may fear that international law will take over the domestic laws of sovereign nations. They emphasise that international law has a democracy deficit, meaning that the international law regime is a framework that is determined by a select few rather than the masses. This may be true especially if such laws benefit only the First World, which is sometimes the case, but international law has a more noble intention. International law was and is still being developed in an effort to deal with conflict among nations, with a view to providing order and reducing disagreements and misunderstandings.

International law has gradually evolved through several means. The first and probably the most important is the source that comes from international agreements and treaties between States. Treaties are the largest source of international law and also serve as the origin of intergovernmental organisations such as the UN. The second type is customary practices that have evolved over time and they often end up becoming law. The third is general legal principles, which are common to a large number of States and as result also became part of international law. The fourth

111 *Ibid*.

112 *Ibid*.

113 John McGinnis and Ilya Somin, "Should International Law Be Part of Our Law?", in *Stanford Law Review*, 2007, vol. 59, no. 5, pp. 1175–247.

source of international law comes from the writings of international legal scholars and jurists from around the world.[114]

The truth is that there is still limited literature on the concept of 'unity' and how it may benefit the world. The best that comes out of the literature on international law and jurisprudence is to infer collectiveness, as can be found in the works of Ian Brownlie. He contended that most people do not trust the importance or relevance of international law, especially because of the self-interests of nations and principles exhibited during negotiations, trade talks, the complexity of contemporary military systems and the reserve of nuclear weapons:

> No doubt we should be critical – and even skeptical – in our approach to particular questions and proposals. The fact remains however that there are things which manifestly need to be done only by collective action.[115]

In other words, we can do more and achieve more as a world if we do things together or, in the least, support one another. The concept of teaching how to fish rather than giving free fish relinquishes the ego of staying relevant and allowing all nations to be truly sovereign and independent of one another whilst retaining the exchange of culture and of fair trade.

It gives hope that it is only a world that is interested in peace and unity that creates bodies such as the UN. 'Unity' would seem to already be a legal good protected by international law, except it is not usually expressly invoked as such. It is when we analyse the mechanics of the world from within the UN that we comprehend the importance of uniting systems and values from different parts of the world, a precondition for the successful existence of the UN.

The UN Charter provides for some of the rationale behind its creation, including to "practice tolerance and live together in peace with one another as good neighbours and to unite our strength to maintain international peace and security".[116] This is what 'unity' would seem to entail: to

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[114] Eros Brahm, "International Law" (on file with the authors); Statute of the International Court of Justice, adopted 26 June 1945, Article 38(1) (http://www.legal-tools.org/doc/fdd2d2/).

[115] James Crawford, *Brownlie's Principles of Public International Law*, 8th edition, Oxford University Press, 2012, p. 18.

[116] Charter of the United Nations, 24 October 1945, Preamble (http://www.legal-tools.org/doc/6b3cd5/).

unite strengths for the well-being of humankind and sustainable existence of all things on earth.

Article 2 of the UN Charter recognizes the importance of the sovereign equality of its members, suggesting that each Member State should be able to flourish without external interference. Some States also create regional organisations (such as the African and European Unions) to foster better regional communities in terms of migration, trade and other foreign relations. The Charter also provides that Member States shall in good faith fulfil all obligations expected of them in order to ensure the rights and benefits that accrue from membership. For rights and duties to go hand in hand is an essential feature of communitarianism, while upholding the sovereignty of each Member State is a like a form of 'individualism' to draw a parallell to our earlier discussion.

7.5. Conclusion

There has been an ongoing contention among African and Asian countries, on one side, and the West (excluding the United States), on the other, regarding the relevance and impartiality of the international criminal law regime as applied by the ICC. Earlier moves by the African Union suggesting that its Member States should withdraw from the ICC Statute is a case in point. The ICC has been accused of arresting only African leaders, while it claims that it is simply pursuing justice for victims of war crimes.[117]

This chapter takes the view that fostering a sense of 'unity' that cuts across lines of race and conceptions of identity would perhaps create an environment where the violence, distrust and hate common to countries in conflict could decrease. What the world needs to protect more than anything else is the value and concept of 'unity'. The benefits of peaceful coexistence are self-evident. The instrumentality of the law should play its role. Its essential function – regulating social interaction and providing order – finds ample expression in the project of 'unity' and neo-communitarianism.

Some may argue that the idea of 'unity' as a legally-protected interest is somewhat lofty in a world of rampant sovereignty and armed conflict. But the harm which such conflicts threaten to cause is the reason why every stone should be turned to equip international law to play its part. This

[117] See Emmanuel Igunza, "African Union backs mass withdrawal from ICC", *BBC News*, 1 February 2017.

was done when legal interests such as ‘life’ or ‘dignity’ were recognised by international law. Crimes that usurp these interests are likely to always exist, but that is not an argument against their inclusion in international criminal law.

With ‘unity’ as a legal good, it becomes apparent that when you hurt one human being, you have hurt an entire community, the whole humankind. Whether we are there or not, we are all affected.

8

Humanity and Unity: Indian Thought and Legal Interests Protected by International Criminal Law

Surabhi Sharma*

This chapter sets forth an argument for the inclusion of a new legal interest, 'unity', to be protected by international criminal law. It is suggested that 'unity' should be one of the underlying considerations in international criminal justice practice to properly pursue the protection of peace, security and well-being of the world.

I arrive at such an argument by drawing on elements of Indian Hindu philosophical thought[1] concerning the notion of 'unity of existence'. 'Unity of existence' is a common thread in Vedantic[2] literature (literature which explains the hymns in the Vedas – Hindu religious texts written in Sanskrit) which states that all living things are a self-projection of a singular source of cosmic energy and exist only due to such a manifestation. The specific

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1 References to Indian Hindu philosophy in this chapter is the reliance on the ancient philosophical traditions of the Indian subcontinent. Indian Hindu philosophy is said to have come with the influx of Indo-Aryans who settled in the Indian subcontinent *circa* 1500 B.C. and is largely comprised of the scriptures of the Vedas and Upanishads. These texts were composed during the Vedic age between 1500–500 B.C. There are two schools of Indian Hindu philosophy: '*āstika*' and '*nāstika*'. The '*āstika*' or orthodox schools of Indian philosophy are so called, not because of theological considerations, but rather because they accept the Vedas as authoritative, while the '*nāstika*' or unorthodox schools of Indian philosophy reject the line of thought proposed by the Vedas. The author has relied on the '*Āstika*' school of Indian Hindu philosophy.

2 Vedantic thought refers to the metaphysical and philosophical theories as laid down in the Upanishads. The Upanishads are ancient Indian texts which were written at the end of the Vedic period, and are therefore also known as 'Vedanta' ('*ant*' – end; literally, end of the Vedas). In my view, the Upanishads are where the core of Indian philosophy is held.

term 'unity' (Latin: '*unitas*' – '*unus*', literally, 'one')[3] is used as opposed to other synonymous terms, such as solidarity, international co-operation and the like, because it is the most accurate encapsulation of the oneness of existence as stated in the '*Āstika*' school of Indian Hindu philosophy.

'Unity' is expressed in diverse ways in the six separate schools of orthodox Indian Hindu philosophy. The arguments canvassed below for the elevation of 'unity' to a legal interest are based on the teachings of the Advaita Vedanta (Sanskrit: अद्वैत वेदान्त, literally 'not two') or the non-dualist school of Indian Hindu philosophy, a subset of the '*Āstika*' school of philosophy. The other schools of Indian Hindu philosophy also advocate such a thought, but the reasoning given within the Advaita Vedanta school is most relevant to the argument in the present chapter.

The chapter progresses by quoting passages from the Upanishads[4] (Vedic Sanskrit texts) and the Bhagavad Gita[5] (a verse which forms part of the epic Mahabharata) that support the notions of 'humanity' and 'unity' as interests or values to be protected by the law. The scope of the chapter has been limited to these specific goods as they are both abstract in their formulation. However, whereas the value of 'humanity', considered a *sacred trust of the civilization*, professes strong foundational, philosophical and statutory basis to render it a legal interest within the discipline of international criminal law, 'unity' is a value that has set no roots in the discipline – an omission this chapter speaks to. Like the international legal good of 'humanity' – a broad concept that overarches the field of international criminal law and is intrinsically tied to it – 'unity' too is proposed as such a value that is strongly attached to the fundamentals of international criminal law and the purpose that the discipline seeks to achieve. The chapter relies

3 *Merriam-Webster's Dictionary*, "Unity", online version. See Chapter 1 of this anthology for a discussion of relevant terminology in Classical Roman thought.

4 There are 108 Upanishads of which 12 are known as the Principal Upanishads. The Upanishads are originally written in Sanskrit. Translations of the Upanishads in this chapter are from Swami Nikhilananda, *The Upanishads*, vols. I–IV, Harper & Brothers Publishers, New York, 1949 (vol. I), 1952 (vol. II), 1956 (vol. III) and 1959 (vol. IV). For a comprehensive overview of Indian philosophy, see S. Radhakrishnan (ed., trans.), *The Principal Upaniṣads*, Gregory, Allen and Unwin Ltd., London, 1968, and Nikhilananda, 1949, 1952, 1956 and 1959, see *supra* note 4.

5 Swami Nikhilananda (ed., trans.), *The Bhagavad Gita Translated from the Sanskrit, with Notes, Comments and Introductions*, Ramakrishna Vivekananda Centre, New York, 1944 ('The Gita'). The Bhagavad Gita or 'the Lord's Song' is the dialogue between Lord Krishna and Prince Arjuna during the battle of Kurukshetra.

on Vedantic literature to illustrate that elements of Indian philosophical thought support the legal protection of 'humanity' and 'unity'.

In Section 8.1., I make some introductory remarks on the concept of legal interests or values – its definition, scope, functions and place in international criminal law – as has been discussed more in depth in earlier chapters. The section states the test for recognition of a value as a legal interest on the basis of which the corresponding test in international criminal law is formulated. Section 8.2. introduces 'humanity', setting out its meaning in the context of international criminal law, the history of its inclusion in the discipline and the significance of 'humanity' today.

Section 8.3. then turns to the recognition of 'humanity' in Advaita philosophy. The theory of karma as conceptualised in Advaita philosophy is analysed towards this end, and parallels between this theory and 'humanity' are drawn. The section concludes that 'humanity' has strong foundations in the Advaita school, which supports the recognition of 'humanity' as a legally protected interest. Next, relevant Vedantic texts are reviewed and the conclusion is reached that elements of Indian philosophy support the elevation of 'unity' as an interest to be protected by law (Section 8.4.).

Section 8.5. explores real-world implications of recognizing 'unity' as a legal interest. It sets out the advantages of such an elevation, chief among them being: (a) the inclusion of 'unity' in the 'Proposed International Convention on the Prevention and Punishment of Crimes Against Humanity ('Proposed Crimes Against Humanity Convention')[6] could provide value guidance for the future development of international criminal law; (b) 'unity' is a value that should be kept at the forefront when formulating international law and policy more generally; and (c) 'unity' should be a central consideration in reparative justice, a lens through which reparation orders are formulated. Finally, Section 8.6. addresses the importance of introducing an Indian philosophy concept in the discipline of international criminal law.

[6] Leila Nadya Sadat (ed.), *Forging a Convention for Crimes Against Humanity*, Cambridge University Press, 2011, p. 359 *et seq.* (the Proposed Crimes Against Humanity Convention has been reproduced as Annex 1 in Morten Bergsmo and SONG Tianying (eds.), *On the Proposed Crimes Against Humanity Convention*, Torkel Opsahl Academic EPublisher, Brussels, 2014, p. 397 (http://www.toaep.org/ps-pdf/18-bergsmo-song)).

8.1. Fundamental Legal Interests

Arguments for elevating 'unity' to the standing of a legally-protected interest would need to respect this notion and its place in international criminal law. The terms 'legal interest', 'legally-protected interest' and 'legal good' used in this chapter are generic terms that refer to an interest, value or good secured or protected by the legal order. The term 'legal good' is used in numerous languages as a general term across legal disciplines, not restricted to criminal law or to one or a few jurisdictions. At first sight, the term seems to borrow from the German concept of '*Rechtsgut*' as discussed by Dr. Ioanna Anastasopoulou in Chapter 4 above. German criminal law has seen the development of a '*Rechtsgutstheorie*' or 'theory of legal goods', a theory of crime which posits that the function of criminal law is to protect 'legal goods' or 'life goods' (*Lebensgüter*).[7] It is emphasized that this chapter does not attempt to import a German criminal law theory into international criminal law. That would risk importing old baggage of doctrinal contention specific to German national law into international criminal law, something this chapter definitively does not seek to do.

Rather, when the chapter uses the term 'legal goods', it uses it as a discourse tool to assist consideration of what international criminal law as a discipline should protect in the future.[8] Such discourse tools can help avoid haphazard development of the law when the crises of war and mass atrocities lead to demands for legal response or action. The discipline of international criminal law has now reached such a level of mature development that further criminalisation should only be undertaken after very careful analysis of which additional values and interests require its protection. Discourse terms such as 'legal goods' and 'legally-protected interests' may therefore guide the discussion on how the law should progress further.

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7 Markus Dirk Dubber, "Theories of Crime and Punishment in German Criminal Law", in *The American Journal of Comparative Law*, 2005, vol. 53, no. 3, pp. 679–707. For the general 'legal goods' notion, see, for example, the Norwegian term '*rettsgode*', defined by Trygve Knudsen and Alf Sommerfelt (eds.), *Norsk Riksmålsordbok*, vol. III, Kunnskapsforlaget, Oslo, 1983, p. 1115: "gode sikret ved den bestående rettsorden; rettslig sikret gode" ("good secured by the existing legal order; legally secured good").

8 Morten Bergsmo, "On Legally Protected Interests in International Criminal Law", lecture presented at the conference Philosophical Foundations of International Criminal Law: Its Intellectual Roots, Related Limits and Potential, New Delhi, 26 August 2017 (https://www.cilrap.org/cilrap-film/170826-bergsmo/).

8.1.1. Traces of the Concept of Legally-Protected Interests in International Criminal Law

International criminal law has emerged out of the gradual incorporation of domestic laws and legal constructs within the framework of the international legal system.[9] There is, therefore, a doctrinal dependence of international criminal law on national criminal law.[10] Although no foundational theory of international criminal law has yet been conceptualised, the discipline seeks to legally protect certain interests. For example, the Preamble to the Rome Statute of the International Criminal Court ('ICC Statute')[11] recognises that "such grave crimes threaten the peace, security and well-being of the world",[12] and "that the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured by taking measures at the national level and by enhancing international cooperation".[13] The wording of the Preamble to the ICC Statute suggests that the mission of international criminal law and its first permanent world court is a two-fold one.[14] On an individual level, it aims to protect fundamental human rights by prosecuting and punishing international crimes violating these rights; on a collective level, it seeks to secure the 'peace, security and well-being of the world' by the effective prosecution of international crimes threatening these values. This, in turn, strongly echoes with the legal good or legal interest notions.

Claus Roxin defined legal goods to be "conditions or chosen ends, useful either to the individual and his free development within the context of an overall social system based on this objective, or to the functioning of this system itself".[15] The same definition is utilised for legal interests or values. An alternative test can be inferred from this definition for the elevation of an interest to the standing of a legally protected interest: it must be

9 Dylan Bushnell, "Re-thinking International Criminal Law: Re-connecting Theory with Practice in the Search for Justice and Peace", in *Australian Year Book of International Law*, 2009, vol. 28, pp. 57–89.

10 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.

11 Rome Statute of the International Criminal Court, 17 July 1998, entry into force 1 July 2001 ('ICC Statute') (http://www.legal-tools.org/doc/7b9af9/).

12 *Ibid*., Preamble, para. 3.

13 *Ibid*., para. 4.

14 Ambos, 2015, p. 319, see *supra* note 10.

15 Roxin as quoted in Dubber, 2005, p. 685, see *supra* note 7.

useful (a) for the free development of the individual, or (b) for the proper functioning of the community.

To formulate a corresponding test in international criminal law for the elevation of a good to the standing of a legally-protected interest, we may draw a parallel to Roxin's definition. Considering the international community to be a social system, the relevant interest should either be useful for the proper functioning of the international community – which, for example, the foundational interests of international peace and security or friendly relations between nations are – or for the free development of the individual. "According to modern understanding, criminal law serves one overall purpose in particular: it is supposed to secure the peaceful living together of human beings in a community."[16]

8.2. 'Humanity' as a Legally-Protected Interest

'Humanity' has had a place in international humanitarian law since the appearance of the word in the Martens Clause. The meaning and scope of the term 'humanity' and its inclusion in international criminal law was the topic of debate for nearly half a century in light of the Westphalian model of sovereignty and the principle of legality, before appearing in the Statutes of the International Criminal Tribunal for the former Yugoslavia ('ICTY') and the International Criminal Tribunal for Rwanda ('ICTR'). Today, treaties and academic writings have defined the scope of 'humanity' and made crimes against humanity a prosecutable offence under the subject-matter jurisdiction of the International Criminal Court ('ICC').

The notion of 'humanity' which first appeared in the Martens Clause[17] in The Hague Convention of 1899 provided that gaps in the laws of war were to be filled by the "laws of humanity". The term reoccurred during World War I at the time of the Armenian mass-killings, which were

[16] Hans-Heinrich Jescheck and Thomas Weigend, *Lehrbuch des Strafrechts: Allgemeiner Teil*, 5th edition, Duncker & Humblot, Berlin, 1996, p. 2; as quoted by Ambos, 2015, p. 304, see *supra* note 10.

[17] The Martens Clause states as follows:

> 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.

See 1899 Hague Convention II – Laws and Customs of War on Land, 29 July 1899, entry into force 4 September 1900 (http://www.legal-tools.org/doc/7879ac/).

described as a "crime against humanity and civilization".[18] At the time, States[19] were opposed to prosecuting crimes against humanity as they were perceived as moral offences, not legal breaches, thus lacking the required justiciability.[20] From the reluctance to penalise violation of 'humanity' as a separate crime, it can be inferred that in this period of history, 'humanity' was yet to be considered an interest to be legally protected. Such conduct was considered worthy of moral condemnation but not legal sanction.

'Crimes against humanity' were much debated at the time of the drafting of the charters of the Nuremberg and Tokyo Tribunals as it was hard to reconcile such an offence with the principle of legality. However, despite the issue of *ex post facto* legislation, the attacks during World War II were of such gravity that it shocked the collective conscience of mankind. Prosecution of crimes against humanity under the Nuremberg and Tokyo charters was therefore made possible by the very heinousness of the crime, reducing the impact of the principles of *nullum crimen sine lege* and *nulla poena sine lege*. The charters set precedents for subsequent tribunals to try political and military officials for crimes against humanity, which led to the emergence of 'humanity' as an interest to be protected by the law.

The statutes of the ICTY and the ICTR recognise 'crimes against humanity', as does the ICC Statute. The offence has also found its way into municipal legal systems around the world. On 17 July 2014, the United Nations ('UN') International Law Commission voted to move the topic of a new treaty on crimes against humanity to its active agenda and appoint a Special Rapporteur.[21] It is now up to governments in the UN General Assembly to take the matter forward.

What is so heinous in the violation of 'humanity' that it was criminalised *ex post facto* after World War II? A deeper understanding of crimes

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18 It was initially titled "crimes against Christianity", but it was felt that such a term would offend Islamic populations and thus it was amended to "crimes against humanity and civilization".

19 The United States of America, in particular.

20 Beth Van Schaack and Ron Slye, "A Concise History of International Criminal Law", in *Legal Studies Research Papers Series, Santa Clara University School of Law*, September 2007, Working Paper No. 07-42, p. 23.

21 Provisional summary record of the 3227th meeting, UN Doc. A/CN.4/SR.3227, 29 October 2014 (http://www.legal-tools.org/doc/3b7934/); cited in Leila N. Sadat, "Codifying the 'Laws of Humanity' and the 'Dictates of the Public Conscience': Towards a New Global Treaty on Crimes Against Humanity", in Bergsmo and SONG, 2014, p. 17, see *supra* note 6 (https://www.legal-tools.org/doc/fbbb5d/).

against humanity has been succinctly provided by David J. Luban in his article "Theory of Crimes Against Humanity".[22] According to Luban, these crimes are so egregious in their commission that they either shock (a) the value of being human, or (b) the collective mass of humanity or humankind. Crimes against humanity are particularly heinous because they violate the quality of 'humanity'. It is a manifestation of politics gone poisonous, a result of state officials turning against their own citizens.

For 'humanity' to be protected by international criminal law, it must be a concept common to all civilizations and schools of thought. Violations such as the Rwandan genocide, the Srebrenica massacre, and the Holocaust are actions of such magnitude that they collectively make every normal person's stomach turn.[23] Such fundamental violations of 'humanity' necessarily hamper the peaceful progress of society and the free development of the individual. Such mass killings therefore offended the sensibilities of every nation. The protection of 'humanity' is, in other words, an underlying theme in every school of thought and as such reflected in their philosophical systems.

8.3. 'Humanity' in Indian Philosophy

A good-faith reading of Advaita philosophy supports the notion of 'humanity' as an interest to be protected by law. From the perspective of this philosophy, compassion towards other living beings, including protection of 'humanity', is an important soteriological or salvation-related concept. Classical Indian writings dwell at length on the individual conduct one should observe to attain salvation. This encompasses practising compassion and recognizing the oneness of existence as necessary preconditions to be freed from the cycle of life and death. Advaita thought suggests that the world order is governed by the law of karma, a law of morality and theory of rebirth. The law of karma declares non-injury to be the basic moral duty and the mother of all virtues. If one violates this law, it hampers the prospects of a better or higher life. In the Bhagavad Gita, Lord Krishna explains to Prince Arjuna the importance of practising virtues or divine treasures: "The divine treasures are said to be for the purpose of liberation, and the heritage of the demons, for bondage. Grieve not, O Pandava; you are

[22] David J. Luban, "A Theory of Crimes Against Humanity", in *The Yale Journal of International Law*, 2004, vol. 29, no. 1, pp. 85–167.

[23] *Ibid*., p. 101.

born with divine treasures".[24] The Bhagavad Gita states what these 'divine treasures' comprise of:

> The Lord said: Fearlessness, purity of heart, steadfastness in knowledge and yoga; charity, self-control, and sacrifice; study of the scriptures, austerity, and uprightness; *Non-violence*, truth, and *freedom from anger*; renunciation, tranquillity, and aversion to slander; *compassion to beings* and freedom from covetousness; gentleness, modesty, and absence of fickleness; Courage, *forgiveness*, and fortitude; purity, and *freedom from malice and overweening pride* – these belong to him who is born with divine treasures.[25]

The Brhad-āranyaka Upanishad stresses the importance of compassion:

> Then the demons said to him: "Please instruct us, Sir." To them he uttered the same syllable da [and asked]: "Have you understood?"; They replied: "We have. You said to us: 'Be compassionate (*dayadhvam*).'" He said: "Yes, you have understood." That very thing is repeated [even today] by the heavenly voice, in the form of thunder, as "Da," "Da," "Da," which means: "Control yourselves," "Give," and "Have compassion." Therefore, one should learn these three: self-control, giving, and mercy. We should try to be at peace with all, abhor all cruelty and ill will.[26]

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[24] In the original Sanskrit, see The Gita, chap. 16, para. 5, see *supra* note 5:
दैवी संपद्विमोक्षाय निबन्धायासुरी मता ।
मा शुचः संपदं दैवीमभिजातोऽसि पाण्डव ॥१६- ५॥

[25] Italics added. In the original Sanskrit, see *ibid*., chap. 16, paras. 1–3:
श्रीभगवानुवाच
अभयं सत्त्वसंशुद्धिर्ज्ञानयोगव्यवस्थितिः।
दानं दमश्च यज्ञश्च स्वाध्यायस्तप आर्जवम् ॥१६- १॥
अहिंसा सत्यमक्रोधस्त्यागः शान्तिरपैशुनम् ।
दया भूतेष्वलोलुप्त्वं मार्दवं ह्रीरचापलम् ॥१६- २॥
तेजः क्षमा धृतिः शौचमद्रोहो नातिमानिता ।
भवन्ति संपदं दैवीमभिजातस्य भारत ॥१६- ३॥

[26] In the original Sanskrit, see Nikhilananda, 1956, "Brihadāranyaka Upanishad" ('B U'), part V, chap. ii, para. 3, see *supra* note 4:
अथ हैनमसुरा ऊचुर्, ब्रवीतु नो भवानिति ।
तेभ्यो हैतदेवाक्षरमुवाच द इति
व्यज्ञासिष्टा३ इति ।
व्यज्ञासिष्मेति होचुर् दयध्वमिति न आत्थेत्य्
ओमिति होवाच व्यज्ञासिष्टेति ।

Pursuant to this thought, those injuring others have demonic tendencies in them, which must be suppressed by practising compassion or '*dayadham*'.

> Man is of the divine race, but he has in him the element of non-being, which exposes him to evil.[27]
>
> Ostentation, arrogance, and self-conceit; anger, rudeness, and ignorance – these belong to him who is born to the heritage of the demons.[28]
>
> Holding such a view, these lost souls of little understanding and fierce deeds rise as the enemies of the world for its destruction. Giving themselves up to insatiable desires, full of hypocrisy, pride, and arrogance, they hold false views through delusion and act with impure resolve.[29]
>
> These cruel haters, these evil-doers, these vilest of men I hurl always into the wombs of the demons in the cycle of births and deaths.[30]
>
> Having fallen into the wombs of the demons and being deluded from birth to birth, they never attain Me, O son of Kunti but go farther down to the lowest state.[31]

तदेतदेवैषा दैवी वागनुवदति स्तनयित्नुर्
द द द इति दाम्यत दत्त दयध्वमिति ।
तदेतल्लय॰ शिक्षेद् दमं दानं दयामिति ॥ ३ ॥
इति द्वितीयं ब्राह्मणम् ॥

27 Radhakrishnan, 1968, p. 105, see *supra* note 4.

28 In the original Sanskrit, The Gita, chap. 16, para. 4, see *supra* note 5:
दम्भो दर्पोऽभिमानश्च क्रोधः पारुष्यमेव च ।
अज्ञानं चाभिजातस्य पार्थ संपदमासुरीम् ॥१६- ४॥

29 In the original Sanskrit, see *ibid*., chap. 16, paras. 9–10:
एतां दृष्टिमवष्टभ्य नष्टात्मानोऽल्पबुद्धयः ।
प्रभवन्त्युग्रकर्माणः क्षयाय जगतोऽहिताः ॥१६- ९॥
काममाश्रित्य दुष्पूरं दम्भमानमदान्विताः ।
मोहाद्गृहीत्वासद्ग्राहान्प्रवर्तन्तेऽशुचिव्रताः ॥१६- १०॥

30 In the original Sanskrit, see *ibid*., chap. 16, para. 19:
तानहं द्विषतः क्रुरान्संसारेषु नराधमान् ।
क्षिपाम्यजस्रमशुभानासुरीष्वेव योनिषु ॥१६- १९॥

31 In the original Sanskrit, see *ibid*., chap. 16, para. 20:
आसुरीं योनिमापन्ना मूढा जन्मनि जन्मनि ।
मामप्राप्यैव कौन्तेय ततो यान्त्यधमां गतिम् ॥१६- २०॥

> Some *jivas*[32] enter the womb to be embodied as organic beings, and some go into non-organic matter – according to their work and according to their knowledge.[33]

Therefore, if the work of a being is good in its past life, Indian Hindu philosophical thought states that this will directly influence the quality of their next life. Self-knowledge is denied to him, says the Katha Upanishad, "who has not first turned away from wickedness, who is not tranquil and subdued, and whose mind is not at peace".[34] The immortal self will be reborn in a new body due to its meritorious deeds.

This philosophy puts forth the notion that 'demonic' tendencies must be supressed. Such demonic tendencies would effectively comprise any of the acts listed under Articles 6 and 7 of the ICC Statute. Wrongdoing includes murder, torture, extermination, persecution and other prohibited acts as stated in the definition of crimes against humanity and the crime of genocide.

[32] Sanskrit word meaning 'soul'.

[33] In the original Sanskrit, see Nikhilananda, 1949, "Katha Upanishad", part II, chap. ii, para. 7, see *supra* note 4:

> योनिमन्ये प्रपद्यन्ते शरीरत्वाय देहिनः ।
> स्थाणुमन्येऽनुसंयन्ति यथाकर्म यथाश्रुतम् ॥ ७ ॥

[34] In the original Sanskrit, see *ibid*., part I, chap. ii, para. 24:

> नाविरतो दुश्चरितान्नाशान्तो नासमाहितः ।
> नाशान्तमानसो वाऽपि प्रज्ञानेनैनमाप्नुयात् ॥ २४ ॥

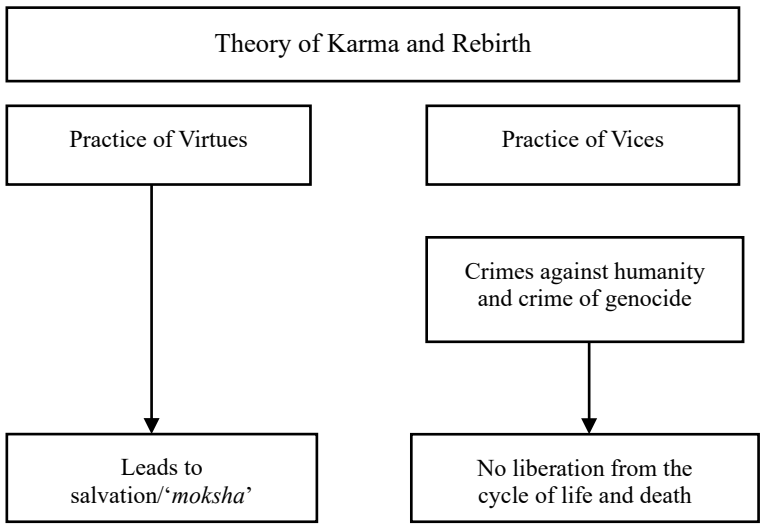

Figure 1: Illustration of the theory of karma and rebirth.

> Three are the gateways of this hell leading to the ruin of the self – lust, wrath, and greed. Therefore, let man renounce these three.[35]
>
> The man who has escaped these three gates of darkness, O son of Kunti, practises what is good for himself and thus attains the Supreme Goal.[36]

The above passages suggest 'humanity' to be an important axiological concept within Advaita philosophy and it safeguards 'humanity' as an interest by stressing on the moral importance of practicing certain virtues.

8.4. 'Unity' as a Value Protected by Indian Philosophy

The notion of 'humanity' from the perspective of Vedantic thought is an indicator of the individual conduct of a human being towards other human beings to attain salvation. Akin to the notion of 'humanity', the value of 'unity' too finds philosophical backing primarily in the Advaita Vedanta school of thought. Whereas the notion of 'humanity' and the law of karma

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[35] In the original Sanskrit, see The Gita, chap. 16, para. 21, see *supra* note 5:
त्रिविधं नरकस्येदं द्वारं नाशनमात्मनः ।
कामः क्रोधस्तथा लोभस्तस्मादेतत्त्रयं त्यजेत् ॥१६- २१॥

[36] In the original Sanskrit, see *ibid*., para. 22:
एतैर्विमुक्तः कौन्तेय तमोद्वारैस्त्रिभिर्नरः ।
आचरत्यात्मनः श्रेयस्ततो याति परां गतिम् ॥१६- २२॥

guide the behaviour of an individual towards other persons in society, the notion of 'unity' in Advaita thought guides the relations between individuals, emphasizing the close relation that human beings share in the world and the reasoning for such a close connection.

The conception of 'unity' finds expression in distinct ways in Indian Hindu philosophy, including the theory of monotheism, unifying of mind, body and spirit through the practice of yoga, and the notion that the cosmic Soul or Brahman is the same as the individual soul or *ātman*. This section of the chapter focusses on the unity of Brahman with *ātman,* thereby formulating an argument for the 'unity of existence', a theory that can be correlated to international criminal law in that 'unity' between nations or 'unity' within a society is an important precondition for fostering peace and security, and thus the non-commission of grave crimes under the subject-matter jurisdiction of the ICC. To this end, this section quotes passages from six Upanishads, namely the Brhad-āranyaka Upanishad, the Katha Upanishad, the Chanadogya Upanishad, the Mundaka Upanishad, the Kena Upanishad and the Isa Upanishad.

8.4.1. '*Aham Brahman Asmi*' – I Am Brahman

'Unity of existence' is the prominent theme of the Advaita Vedanta school of Indian philosophy. The view of the orthodox schools of Indian philosophy[37] is that the 108 Upanishads are consistent in affirming and reaffirming the 'unity of existence' and the non-duality of the ultimate reality or cosmic Soul, 'Brahman'. Brahman is a metaphysical concept in Vedantic thought. Every living entity in the universe arises from, is sustained by and ultimately returns to Brahman. It is the single phenomenon unifying a diverse universe, within which the universe is rooted. Brahman alone, as the innermost essence of things, preserves them. Brahman is derived from the root '*brh*', which means 'to grow' or to burst forth,[38] and is that "from which proceed the origin, the sustenance, and the dissolution" of the universe.[39] The word suggests a fundamental kinship between the spirit of man and the spirit of the universe which it seeks to attain.[40]

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37 As explained above, they are orthodox because they believe the Vedas to be authoritative and not because of their belief in God. The '*nāstika*' or heterodox school of Indian philosophy do not accept the Vedas as authoritative.

38 Radhakrishnan, 1968, p. 52, see *supra* note 4.

39 Nikhilananda, 1949, p. 25, see *supra* note 4.

40 Radhakrishnan, 1968, p. 53, see *supra* note 4.

The Mundaka Upanishad states:

> The heavens are His[41] head; the sun and moon, His eyes; the quarters, His ears; the revealed Vedas, His speech; the wind is His breath; the universe, His heart. From His feet is produced the earth. He is, indeed the inner Self of all beings.[42]

The same notion has been affirmed in the Chanadogya Upanishad:

> The Brahman which has been thus described as immortal, with three feet in heaven, and as the Gayatri is the same as the *ākāśa*[43] which is around us; and the *ākāśa* which is around us is the same as the *ākāśa* which is within us; and the *ākāśa* which is within us is the same as the *ākāśa* which is within the heart. That *ākāśa* which is within the heart is omnipresent and unchanging.[44]

Again, the Katha Upanishad states:

> He is the sun dwelling in the bright heavens. He is the air dwelling in the interspace. He is the fire dwelling on earth. He is the guest dwelling in the house. He dwells in men, in the gods, in truth, in the sky. He is born in the water, on earth, in the sacrifice, on the mountains. He is the True and the Great.[45]

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[41] The common male pronoun has been used in the chapter. However, according to Vedantic thought the Brahman has no gender. It takes on the gender and form of that which it enters.

[42] In the original Sanskrit, see Nikhilananda, 1949, "Mundaka Upanishad", Second Mundaka, chap. i, para. 4, see *supra* note 4:

अग्नीर्मूर्धा चक्षुषी चन्द्रसूर्यौ
दिशः श्रोत्रेवाग् विवृताश्च वेदाः ।
वायुः प्रणोहृदयं विश्वमस्य पद्भ्यां
पृथिवी ह्येष सर्वभूतान्तरात्मा ॥ ४ ॥

[43] '*Ākāśa*' or Akasha is the term for ether in Indian philosophical thought.

[44] In the original Sanskrit, see Nikhilananda, 1959, "Chhāndogya Upanishad", part III, chap. xii, paras. 7–9, see *supra* note 4:

यद्वै तद्ब्रह्मेतीदं वाव तद्योयं बहिर्धा
पुरुषादाकाशो यो वै स बहिर्धा पुरुषादाकाशः ॥ ३.१२.७॥
अयं वाव स योऽयमन्तः पुरुष आकाशो यो वै सोऽन्तः
पुरुष आकाशः ॥ ३.१२.८॥
अयं वाव स योऽयमन्तर्हृदय आकाशस्तदेतत्पूर्णमप्रवर्ति
पूर्णमप्रवर्तिनी᳕श्रियं लभते य एवं वेद ॥ ३.१२.९॥

[45] In the original Sanskrit, see Nikhilananda, 1949, "Katha Upanishad", part II, chap. ii, para. 2, see *supra* note 4:

हँसः शुचिषद्वसुरान्तरिक्षसद्-
होता वेदिषदतिथिर्दुरोणसत् ।
नृषद्वरसदृतसद्व्योमसद्

The Brahman exists in individuals as *ātman*.[46] This unity of Brahman and *ātman* is expressed in different ways such as '*tat tvam asi*'[47] ('That art thou') and '*Aham Brahman Asmi*' ('I am Brahman') which are the fundamental dogma of the Vedanta system. The Upanishads reiterate the oneness of the universal Soul with the individual soul. But, "[t]hat Self[48] hidden in all beings does not shine forth; but It is seen by subtle seers through their one-pointed and subtle intellects".[49]

8.4.2. The Hymn of Creation

According to the hymn of creation, in the beginning, the world and its inhabitants were non-existent and only the Brahman was present. This sole non-being conceived a wish, "May I be" and through the fervour of austerity or '*Tapas*' it multiplied itself into forms and shapes.[50] The Mundaka Upanishad describes the means of creation as follows:

> Brahman expands by means of austerity, and from It primal matter is produced; from matter, Prana; from Prana, mind; from mind, the elements; from the elements, the worlds; thence works, and from the works, their immortal fruits.[51]

But these forms and shapes that the Brahman had multiplied himself into were without understanding and lifeless like a stone. "He thought: I shall enter within, that they may awake. Making Himself like air, He entered within".[52] Therefore, the Brahman creates the forms and animates them by entering them. He does not depend on anything other than himself

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अब्जा गोजा ऋतजा अद्रिजा ऋतं बृहत् ॥ २ ॥

46 Sanskrit word meaning 'soul', see *supra* note 32.

47 'तत्त्वमसि', Nikhilananda, 1959, "Chhāndogya Upanishad", part VI, chap. xiii, para. 7, see *supra* note 4.

48 'Self', with an upper case 'S' refers to Brahman and 'self' with a lower case 's' refers to *ātman* or individual soul.

49 In the original Sanskrit, see Nikhilananda, 1949, "Katha Upanishad", part I, chap. iii, para. 12, see *supra* note 4:

एष सर्वेषु भूतेषु गूढोऽऽत्मा न प्रकाशते ।
दृश्यते त्वग्र्यया बुद्ध्या सूक्ष्मया सूक्ष्मदर्शिभिः ॥ १२ ॥

50 Nikhilananda, 1949, p. 64, see *supra* note 4.

51 In the original Sanskrit, see Nikhilananda, 1949, "Mundaka Upanishad", First Mundaka, chap. I, para. 8, see *supra* note 4:

तपसा चीयतेब्रह्म ततोऽन्नमभिजायते।
अन्नात् प्राणोमनः सत्यं लोकाः कर्मसुचामृतम् ॥ ८ ॥

52 Nikhilananda, 1949, p. 64, see *supra* note 4.

for his manifestation. The power of the Brahman to manifest and actualise himself into forms and shapes and beings is known as '*māyā*' or illusion.

Different metaphors are used to indicate how the universe rises from the central root, how the emanation takes place:

> As the spider sends forth and draws in its thread, as plants grow on earth, as hairs grow on the head and the body of a living man – so does everything in the universe arise from the Imperishable.[53]
>
> And verily this Self is the Ruler of all beings, the King of all beings. Just as all the spokes are fixed in the nave and the felloe of a chariot wheel, so are all beings, all gods, all worlds, all organs, and all these individual creatures fixed in this Self.[54]
>
> This is the truth: As, from a blazing fire, sparks essentially akin to it come forth by the thousand, so also, my good friend, do various beings come forth from the imperishable Brahman and unto Him again return.[55]

8.4.3. The Operation of '*Māyā*'

Pursuant to Vedantic thought, all that exists is Brahman and therefore there is in actuality no relationship between any two living things. When one

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[53] In the original Sanskrit, see Nikhilananda, 1949, "Munduka Upanisad", First Mundaka, chap. i, para. 7, see *supra* note 4:

यथोर्णनाभिः सृजते गृह्णते च
यथा पृथिव्यामोषधयः संभवन्ति ।
यथा सतः पुरुषात् केशलोमानि
तथाऽक्षरात् संभवतीह विश्वम् ॥ ७॥

[54] In the original Sanskrit, see B U, part II, chap. v, para. 15, see *supra* note 26:

स वा अयमात्मा सर्वेषां भूतानामधिपतिः
सर्वेषां भूतानाꣳ राजा ।
तद्यथा रथनाभौ च रथनेमौ चाराः सर्वे समर्पिता
एवमेवास्मिन्नात्मनि सर्वाणि भूतानि सर्वे देवाः सर्वे लोकाः सर्वे
प्राणाः सर्व एत आत्मानः समर्पिताः ॥ १५ ॥

[55] In the original Sanskrit, see Nikhilananda, 1949, "Mundaka Upanishad", Second Mundaka, chap. i, para. 1, see *supra* note 4:

तदेतत् सत्यं
यथा सुदीप्तात् पावकाद्विस्फुलिङ्गाः
सहस्रशः प्रभवन्तेसरूपाः ।
तथाऽक्षराद्विविधाः सोम्य भावाः
प्रजायन्तेतत्र चैवापि यन्ति ॥ १ ॥

sees the Brahman, the differentiated entities in the universe are invisible. The ability to see difference in living organisms is due to the interplay of '*māyā*'.

> When anyone, seeing the manifold universe, establishes a relationship of any kind between it and the non-dual Brahman, the Non-dualists call that notion of relationship *māyā*.[56] *Māyā* or the power of illusion is that which measures out, moulds forms in the formless. The power of *māyā* is sustained by *avidya* or ignorance. We are subject of *avidya* when we look upon the multiplicity of objects and egos as final and fundamental. The individual ego is subject to *avidya* or ignorance when it believes itself to be separate and different from all other egos.[57]

Therefore, Advaita thought suggests every living being to be a manifestation of the Brahman and therefore there is no differentiation between species except in the nature of superficial characteristics, that is, their form, shape, whether they possess an exoskeleton or endoskeleton, belong to the Kingdom Animalia or Plantae, and so on.

8.4.4. The Universe and All Its Inhabitants as a Manifestation of Brahman

Advaita thought believes that the world of names and forms is unreal and only mere modifications of the Brahman. All that is perceived anywhere is Brahman alone and Brahman is the source of all things,[58] is all things, and there exists no multiplicity whatsoever. Everything is reducible to Brahman. The Mundaka Upanishad states:

> By Him are begotten the various *devas*, the *sadhyas*, men, cattle, birds, and also *prana* and *apana*, rice and corn, penance, faith, truth, continence, and law.[59]

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[56] Nikhilananda, 1949, p. 55, see *supra* note 4.

[57] Radhakrishnan, 1968, p. 94, see *supra* note 4.

[58] Nikhilananda, 1949, p. 28, see *supra* note 4.

[59] In the original Sanskrit, see Nikhilananda, 1949, "Mundaka Upanishad", Second Mundaka, chap. i, para. 7, see *supra* note 4:

> तस्माच्च देवा बहुधा सम्प्रसूताः
> साध्या मनुष्याः पशवोवयांसि ।
> प्राणापानौव्रीहियवौतपश्च
> श्रद्ध सत्यं ब्रह्मचर्यं विधिश्च ॥ ७ ॥

> From Him come all the oceans and the mountains; from Him flow rivers of every kind; from Him have come, as well, all plants and favours, by which the inner self subsists surrounded by the elements.[60]

When the non-duality of Brahman is realised, there is no consciousness of subject and object; the distinction between the perceiver and the perceived is annihilated and they become one. Therefore, I, the perceiver, assume that another person – the perceived – is different from me. However, the realization that I, the perceiver, am Brahman and the perceived, too, is Brahman eliminates the difference between the two and establishes in its place the 'unity of existence'. The Katha Upanishad states:

> What is here, the same is there; and what is there, the same is here. He goes from death to death who sees any difference here.[61]
>
> By the mind alone is Brahman to be realised; then one does not see in It any multiplicity whatsoever. He goes from death to death who sees multiplicity in It. This, verily, is That.[62]

The Isa Upanishad states:

> The wise man beholds all beings in the Self, and the Self in all beings; for that reason he does not hate anyone.[63]

Human beings are not fundamentally different from one and another as they are all a manifestation of the Brahman. The Isa Upanishad states:

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60 In the original Sanskrit, see *ibid*., para. 9:
अतः समुद्रा गिरयश्च सर्वेऽस्मात्
स्यन्दन्तेसिन्धवः सर्वरूपाः ।
अतश्च सर्वा ओषधयोरसश्च
येनैष भूतैस्तिष्ठतेह्यन्तरात्मा ॥ ९ ॥

61 In the original Sanskrit, see Nikhilananda, 1949, "Katha Upanishad", part II, chap. i, para. 10, see *supra* note 4:
यदेवेह तदमुत्र यदमुत्र तदन्विह ।
मृत्योः स मृत्युमाप्नोति य इह नानेव पश्यति ॥ १० ॥

62 In the original Sanskrit, see *ibid*., para. 11:
मनसैवेदमाप्तव्यन्नेह नानास्ति किंचन ।
मृत्योः स मृत्युं गच्छति य इह नानेव पश्यति ॥ ११ ॥

63 In the original Sanskrit, see Nikhilananda, 1949, "Isa Upanishad", para. 6, see *supra* note 4:
यस्तु सर्वाणि भूतान्यात्मन्येवानुपश्यति ।
सर्वभूतेषु चात्मान ततो न विजुगुप्सते ॥

> To the seer, all things have verily become the Self: what delusion, what sorrow, can there be for him who beholds that oneness?[64]

The Kena Upanishad states:

> If a man knows Atman here, he then attains the true goal of life. If he does not know It here, a great destruction awaits him. Having realised the Self in every being, the wise relinquish the world and become immortal.[65]

Therefore, Advaita thought seems to suggest that the world of multiplicity is an illusion and every entity and object in the universe is a self-projection of the Brahman. All the possibilities of the world are affirmed in the first being, Brahman. Brahman does not create the world but becomes it. Brahman creates the forms that exist in the world and subsequently occupies it to give it life, morphing itself into the form it occupies. The Katha Upanishad expresses this notion by way of a variety of metaphors:

> As the same non-dual fire, after it has entered the world, becomes different according to whatever it burns, so also the same non-dual Atman, dwelling in all beings, becomes different according to whatever It enters. And It exists also without.[66]

> As the same non-dual air, after it has entered the world, becomes different according to whatever it enters, so also the same non-dual Atman, dwelling in all beings, becomes different according to whatever It enters. And It exists also without.[67]

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64 In the original Sanskrit, see *ibid*., para. 7, see *supra* note 4:
यस्मिन्सर्वानि भूतानन्यात्मैवभुद्विजानतः ।
तत्र को मोहः कः शोक एकत्वमनुपश्यतः ॥

65 In the original Sanskrit, see Nikhilananda, 1949, "Kena Upanishad", chap. ii, para. 5, see *supra* note 4:
इह चेदवेदीदथ सत्यमस्ति न चेदिहावेदीन्महती विनष्टिः ।
भूतेषु भूतेषु विचित्य धीराः प्रेत्यास्माल्लोकादमृता भवन्ति ॥ १३ ॥

66 In the original Sanskrit, see Nikhilananda, 1949, "Katha Upanishad", part II, chap. ii, para. 9, see *supra* note 4:
अग्निर्यथैको भुवनं प्रविष्टो
रूपं रूपं प्रतिरूपो बभूव ।
एकस्तथा सर्वभूतान्तरात्मा
रूपं रूपं प्रतिरूपो बहिश्च ॥ ९ ॥

67 In the original Sanskrit, see *ibid*., para. 10:
वायुर्यथैको भुवनं प्रविष्टो

> There is one Supreme Ruler, the inmost Self of all beings, who makes His one form manifold. Eternal happiness belongs to the wise, who perceive Him within themselves-not to others.[68]

The Brahman, as the ultimate reality is devoid of characteristics and also gender.

> It is not woman, it is not man, nor is it neuter. Whatever body it takes, with that it is joined. By means of thoughts, touching, seeing, and passions, the *jiva* assumes successively, in various places, various forms in accordance with his deeds, just as the body grows when food and drink are poured into it.[69]

Therefore, it is through *Brahman* that the world of the physicist, the biologist, the lawyer, the engineer, the moralist, air, trees, flora, fauna is unified.

Advaita thought stresses that all beings exist in the Self and the Self exists in all beings. Therefore, there is no apartness and the perfect soul cannot look with apathy on the sufferings of other souls, for they are also his own self. "There is no differentiation in Brahman and he goes from death to death who sees it."[70] The teaching of Vedanta demonstrates the ultimate reality of Brahman, '*Sarvam Khalvidam Brahma*' – "All that exists is Brahman".[71]

Therefore, relevant to the above, Advaita Vedanta thought contains four fundamental ideas:

1. The universal Soul (Brahman) exists within individual living things as the individual soul (*ātman*).[72]

रूपं रूपं प्रतिरूपो बभूव ।
एकस्तथा सर्वभूतान्तरात्मा
रूपं रूपं प्रतिरूपो बहिश्च ॥ १० ॥

68 In the original Sanskrit, see *ibid*., para. 12:
एको वशी सर्वभूतान्तरात्मा
एकं रूपं बहुधा यः करोति ।
तमात्मस्थं येऽनुपश्यन्ति धीराः
तेषां सुखं शाश्वतं नेतरेषाम् ॥ १२ ॥

69 Nikhilananda, 1949, p. 88, see *supra* note 4.

70 *Ibid*., p. 39.

71 *Ibid*., p. 54.

72 The word *ātman* is derived from '*an*', 'to breathe'. It is the breath of life.

2. The universal Soul, Brahman, manifests itself into every living thing that exists. Every living thing has grown from the universal Soul, is sustained by it and returns to it upon attaining salvation. "Having realised Atman, which is soundless, intangible, formless, undecaying, and likewise tasteless, eternal, and odourless; having realised That which is without beginning and end, beyond the Great, and unchanging – One is freed from the jaws of death."[73]
3. Realization of the oneness or 'unity' of the Brahman and *ātman* is the path to salvation.
4. He who sees difference between individual living beings and fails to see every living thing as a manifestation of the universal Soul, having taken different forms and shapes, will never attain salvation.

8.4.5. Correlating with the Legal Interest Test

According to Advaita Vedanta thought, the notion of 'unity' in Indian philosophy is essentially this: all living beings are a manifestation of the ultimate reality, Brahman. Beings appear different due to the play of '*māyā*' or illusion and therefore there is no multiplicity. Thus, a person, 43 years of age, of Indian ethnicity living in India is at one level no different from a person, 22 years of age, of Maltese ethnicity living in Turkey – they are the same, as it is the Brahman manifesting itself as two separate people. Taking another example, this time in the context of the Rwandan genocide; from the perspective of Indian thought, there was no difference between the Hutus and Tutsis as it was the Brahman projecting itself as the Hutus and the Tutsis. Therefore, the genocide of the Tutsis at the hands of the majority Hutus was in actuality the Hutus eliminating themselves.

In light of such a theory of 'unity' in Indian classical writings, the above-discussed test for elevating 'unity' to the standing of a legally-protected interest in international criminal law is of significance for the following reasons:

1. Recognizing the 'unity of existence' aids the free development of an individual. Perceiving differences between individuals, which in my opinion, do not exist from the perspective of Advaita philosophy (as

[73] In the original Sanskrit, see Nikhilananda, 1949, "Katha Upanishad", part I, chap. iii, para. 15, see *supra* note 4:

अशब्दमस्पर्शमरूपमव्ययं तथाऽरसन्नित्यमगन्धवच्च यत् ।
अनाद्यनन्तं महतः परं ध्रुवं निचाय्य तन्मृत्युमुखात्प्रमुच्यते ॥ १५ ॥

every living being is a manifestation of the Brahman) – race, ethnicity, historical background – is a recurring source of violent conflict, also in our contemporary world. Therefore, recognition of 'unity' is a necessary precondition to an absence of armed conflict. Armed conflict hampers an individual from enjoying the rights and liberties afforded to him, necessary for his individual development.

2. A disruption of 'unity' may lead to conflict, resulting in a breach of peace, security and the well-being of the world. 'Unity' amongst nation States is essential to protecting these goods and for the functioning of the international society as a whole. Consideration of 'unity' as a legal interest by international law and relations policy makers may be a key driving force in building friendly relations between States.

8.5. Some Tentative Remarks on Advantages of Elevating 'Unity' to a Legally-Protected Interest from an Indian Perspective

Recognition of 'unity' as a legally protected interest could have several advantages. At the level of the state, fostering and preserving 'unity' of people in a post-conflict society is crucial for lasting peace within that society. Mahatma Gandhi said:

> We are all tarred with the same brush; we are all members of the vast human family. […] We have the same virtues and vices. Humanity is not divided into watertight compartments so that we cannot go from one to another.[74]

A feeling of 'unity' can evoke the 'humanity' that must be extended to fellow beings. From the perspective of Vedic Hindu thought, though individuals in these societies may outwardly appear different, they are manifestations of the Brahman in the form of seven billion avatars (and the numerous animal, flora and fauna species that exist). Therefore, when an individual harms another person – by whatever means; murder, torture, sexual slavery, psychological pain – the individual in essence harms Brahman and by extension himself. The Brahman having manifested itself as every living entity produces a sense of similarity and oneness that may not be outwardly apparent (due to the operation of '*māyā*'), but it is the deepest realisation of camaraderie with fellow beings.

[74] Mahatma Gandhi, "India and the World", in *id.*, *Gandhi's India: Unity in Diversity*, National Book Trust, New Delhi, 1968, p. 16.

At the international level, inclusion of 'unity' in international instruments may enhance co-operation between nation States. Thus, the primary advantage in elevating 'unity' to an interest to be protected by law lies in public international law in general. 'Unity' among nation States is foundational to a peaceful world order. It should be a lens through which international law and policy is made. Governments and policy makers should give the value of 'unity' proper legal backing to realise reasonable utilitarian aspirations on behalf of international criminal law. Furtherance of 'unity' between nations should ideally inform the development of further declarations and treaties. Its restoration should be a fundamental consideration for governments when they enter into armed conflict. Governments should recognise that, at the most basic level, there is really no difference between its citizen and the citizens of other nations.

This may seem like an idealistic notion, but the history of war crimes exemplifies the consequences of ignoring this basic starting point of politics and international relations. In his Nobel Peace Prize acceptance speech, "A Just and Lasting Peace", former United States President Barack Obama quoted Martin Luther King Jr.:

> As Dr. King said at this occasion so many years ago, "I refuse to accept despair as the final response to the ambiguities of history. I refuse to accept the idea that the 'isness' of man's present condition makes him morally incapable of reaching up for the eternal 'oughtness' that forever confronts him."
>
> Let us reach for the world that ought to be – that spark of the divine that still stirs within each of our souls.[75]

As stated above, the primary advantage in elevating 'unity' to a legally-recognised interest lies in public international law in general. Consideration for 'unity' between nations could serve as one of the baseline values of international law, and as such become relevant in the interpretation of international law by actors before international jurisdictions, in foreign ministries and in multilateral contexts.

Particularly with regard to the discipline of international criminal law, elevating 'unity' to a collective legal good could, over time, contribute towards several goals. First, it could reinforce existing related values such as maintenance and restoration of international peace and security. 'Unity'

[75] Barack Obama, "A Just and Lasting Peace", Acceptance Speech at the Nobel Prize Ceremony, 10 December 2009 (http://www.legal-tools.org/doc/82a187/).

between nation States is not just the absence of armed conflict, and it is more than state co-operation or friendly relations among States. Territorial integrity and political independence are interests that international criminal law seeks to protect by criminalising the crime of aggression. However, safeguarding these interests will merely lead to a situation where armed conflict does not exist. On the other hand, safeguarding 'unity' among nations entails a deeper social, economic and person-to-person integration, affecting the root causes of armed conflict.

Secondly, inclusion of 'unity' in the Preamble of the Proposed Crimes Against Humanity Convention could give proper effect to language which is already in the first preambular paragraph of the ICC Statute, and become an explicitly recognised baseline value that should be taken into account in the further evolution of the discipline of international criminal law. In the words of the late Judge Hans-Peter Kaul:[76]

> Having both participated in the negotiation of the Statute of the International Criminal Court and applied this Statute as a Judge of the Court, I have witnessed first-hand the importance of fully recognising the significance of every word that is included in such an instrument with a view to honouring the complex agreement reached between law-making States […] Actors who may take part in the process to prepare a general convention on crimes against humanity should keep this in mind. Treaties are not only of cardinal importance when they have entered into force, but also when they are being made.

Protecting 'unity' by way of a convention would raise the importance of this value in the eyes of actors around the world.

8.6. Within the Reparative Justice Framework

8.6.1. Victims and the Reunification of Affected Communities

Within the theoretical framework of reparative justice, reparation orders should seek to further 'unity' within the affected society. The rendering of reparations should be viewed as a responsibility of the international community and an opportunity to increase comity between nations and groups

[76] Judge Hans-Peter Kaul, "Preface", in Bergsmo and SONG, 2014, p. i, see *supra* note 6 (https://www.legal-tools.org/doc/96e4d5/).

rather than as a sanction, since the "primary function of corrective or remedial justice is to rectify the wrong done to the victim".[77]

While reparations and respect for the condition of victims of core international crimes has been an established feature of international human rights and humanitarian law, the ICC Statute has only recently brought victims' rights to the forefront of the international criminal justice discourse. References to victims were non-existent in the Nuremberg and Tokyo charters. The protection of rights of victims (and witnesses) was referred to in the ICTY and ICTR statutes, but there was no provision for reparations as the purpose of sentencing was primarily deterrence and retribution.[78] Certain judgements also recognised the importance of reconciliation, but the work of the above-mentioned tribunals with respect to reparations has been scant.[79]

The ICC Statute consistently underscores the fact that one of the Court's primary purposes is to protect and vindicate the victims of the world's most heinous crimes. This victim-oriented approach secured a place for reparations within the international criminal justice framework. "At its core, International Criminal Law exists for two purposes: to end impunity in order to prosecute the perpetrators of the world's most heinous crimes and to bring some form of justice and solace to their victims."[80] The new international criminal law order thus sought to place victims as central figures in the administration of justice. The ICC Statute observes in its Preamble: "during this century millions of children, women and men have been victims of unimaginable atrocities that deeply shock the conscience of humanity".[81] The ICC has statutory power under Article 75 of the ICC

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77 Dinah L. Shelton and Thordis Ingadottir, *The International Criminal Court Reparations to Victims of Crimes (Article 75 of the Rome Statute) and the Trust Fund (Article 79)*, Centre on International Cooperation, New York University, 1999. For a comprehensive overview of reparative justice, see Christine Evans, *The Right to Reparation in International Law for Victims in Armed Conflict*, Cambridge University Press, 2012.

78 See, for example, ICTY, *Prosecutor v. Tadić*, Trial Chamber, Opinion and Judgement, 7 May 1997, IT-94-1-T (http://www.legal-tools.org/doc/0a90ae/); ICTR, *Prosecutor v. Akayesu*, Trial Chamber, Sentence, 2 October 1998, ICTR-96-4-S (http://www.legal-tools.org/doc/fdbe2a/). See further discussion in Evans, 2012, pp. 89–98, see *supra* note 77.

79 ICTY, *Prosecutor v. Furundžija*, Trial Chamber, Judgement, 10 December 1998, IT-95-17/1-T (http://www.legal-tools.org/doc/e6081b/).

80 Michael Bachrach, "The Protection and Rights of Victims under International Criminal Law", in *The International Lawyer*, 2000, vol. 34, no. 1, pp. 7–20.

81 ICC Statute, Preamble, para. 2, see *supra* note 11.

Statute to award reparations, and Article 79 creates a Trust Fund which is to be managed by States Parties for the benefit of victims and their families.

This step is a reassuring development in international criminal law, but it is suggested that in addition to victims' rights, a key consideration should be the restoration of 'unity' in the affected society so as to place that community not only in the position that it was before (thus fulfilling in some measure the principle of *restitutio in integrum*), but rather in a better one, so that the cause for conflict should not arise again. "It is essential to recognise that the failure to provide justice would risk further cycles of violence, thus undermining one of the purposes for the creation of the Court."[82] The justice that the ICC seeks to achieve must necessarily include *reuniting* the society. Society in such a context includes all present and future stakeholders. Particular importance must be paid to the children of victims – the value of 'unity' ought to be nourished in them to ensure peaceful coexistence in the future.

8.6.2. The Van Boven and Bassiouni Principles

The ICC draws on the 'UN Basic Principles and Guidelines on the Right to a Remedy for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law' of 2005[83] ('Van Boven/Bassiouni Principles') when passing reparation orders. The Principles state the objective of reparations to be five-fold: restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition. Principles 19 to 23 examine each of the objectives of reparation:

1. Restitution, in accordance with the *Factory at Chorzów*[84] case, requires the affected person to be restored to the original situation before the gross violations took place, thereby achieving *restitutio in in-*

[82] Shelton and Ingadottir, 1999, see *supra* note 77.

[83] Basic Principles and Guidelines on the Right to a Remedy for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, UN Doc. A/RES/60/147, 21 March 2006 (http://www.legal-tools.org/doc/bcf508/).

[84] Permanent Court of International Justice, *The Factory at Chorzów (Germany v. Poland)*, Judgment, 26 July 1927, p. 21 (http://www.legal-tools.org/doc/54d3bc/). Affirmed in International Court of Justice, *Armed Activities on the Territory of the Congo (Democratic Republic of Congo v. Uganda)*, Judgment, 19 December 2005, p. 93, para. 259 (http://www.legal-tools.org/doc/8f7fa3/). The *Factory at Chorzów* is the foundational case for reparation. This case originally recognized the categories of reparations to consist of compensation and restitution. Over time, human rights jurisprudence developed the ambit of reparations, and today five species of reparations are recognized.

tegrum. This could take the form of restoration of liberty, enjoyment of human rights, identity, family life and citizenship, return to one's place of residence, restoration of employment, and return of property, among other things.

2. Compensation, in accordance with Principle 20, should be provided for "any economically assessable damage resulting from violations of human rights and humanitarian law".
3. Rehabilitation, a species of reparation, has been defined as "the process of restoring the individual's full health and reputation after the trauma or serious attack on one's physical or mental integrity".[85]
4. Finally, as for satisfaction and guarantees of non-repetition, victims should, *inter alia*, be provided with cessation of continuing violations; full and public disclosure of the truth; an official declaration restoring the dignity, reputation and legal rights of the victim; and measures that would help prevent the recurrence of victimization.

None of these principles focus specifically on promoting 'unity' within the affected society, neither does Article 75 of the ICC Statute which states that: "The Court shall establish principles relating to reparations to, or in respect of, victims, including restitution, compensation and rehabilitation".

8.6.3. Repairing Societies

Disruption of 'unity' can be perceived to be a direct result of armed conflict. The protection of the rights of victims finds adequate representation in the ICC Statute, but references to repairing affected societies as a whole are rare. Pursuant to the conception of 'unity' in accordance with Vedantic thought, the main thrust of reparative justice should be to unify the members of the affected society. In this deeper sense, the focus of international criminal justice should not only be victim-centric, but rather society-oriented. This can primarily be realised through programmes that foster 'unity', for example through educational measures, and making victims aware that the international community is coming to their aid in the form of providing reparations.

[85] Marten Zwanenburg, "The Van Boven/Bassiouni Principles: An Appraisal", in *Netherlands Quarterly of Human Rights*, 2006, vol. 24, no. 4, pp. 641–68 (http://www.legal-tools.org/doc/aa4e6c/).

Furthermore, reparations orders should actively explore the provision of collective reparations for the community. The early trend of reparation orders by the ICC was largely compensatory. The reparation orders in *Prosecutor v. Thomas Lubanga Dyilo*,[86] for instance, requested States Parties to trace, seize and freeze any of Thomas Lubanga Dyilo's assets to enable payment of reparations to affected individuals. In the case of *Prosecutor v. Germain Katanga*,[87] both individual and collective reparations were awarded in the form of compensation. In *Prosecutor v. Ahmad Al Faqi Al Mahdi*, [88] the ICC awarded both individual and collective reparations. Collective reparations were ordered for the rehabilitation of sites and the community of Timbuktu.

Moreover, adequate consideration must be given to reconciliation programmes as this is an important mechanism to nourish 'unity' within a community. Collective reparation orders can be instrumental. It should be explored whether reconciliation could be included as a species of reparation in the context of reparation orders.[89]

In his opening statement at Nuremberg, Robert Jackson stated that the "wrongs which we seek to condemn and punish have been so calculated, so malignant and so devastating, that civilisation cannot tolerate their being ignored, because it cannot survive their being repeated".[90] Since then, the human race has seen several wars tearing nations and communities asunder. The value of reuniting a society from within and promoting 'unity' among States is of the greatest importance to discourage future armed conflicts. The 'unity' consideration in a reparative theory of justice is a long-term measure for the betterment of victims and the war-torn society as a whole. The Indian notion of unity of existence could inform conceptual and norm-setting developments in this area.

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86 ICC, *Prosecutor v. Lubanga*, Trial Chamber, Judgment pursuant to Article 74 of the Statute, 14 March 2012, ICC-01/04-01/06-2842 (http://www.legal-tools.org/doc/677866/).

87 ICC, *Prosecutor v. Germain Katanga*, Trial Chamber, Order for Reparations pursuant to Article 75 of the Statute, 24 March 2017, ICC-01/04-01/07-3728-tENG (http://www.legal-tools.org/doc/63d36d/).

88 ICC, *Prosecutor v. Ahmad Al Faqi Al Mahdi*, Trial Chamber, Reparation Orders, 17 August 2017, ICC-01/12-01/15-236 (http://www.legal-tools.org/doc/02d1bb/).

89 I refer to Chapter 5 by David Baragwanath, "'Reconciliation' as a Philosophical Foundational Concept in International Criminal Law".

90 David J. Luban, Julie R. O'Sullivan and David P. Stewart, *International and Transnational Criminal Law*, Aspen Publishers, New York, 2010, p. 77.

8.7. The Significance of International Criminal Law Recognizing Foundational Indian Notions

As we have seen above, the notions of 'humanity' and 'unity' enjoy a central position in Advaita thought, as fundamental, ancient values. There should, however, be specific reasons for such categories to be recognised by a legal order. This is required by public international law in general and the specific discipline of international criminal law.

Public international law covers relations between States in all their myriad forms, from war to satellites, and regulates the operations of the many international institutions.[91] These laws may be universally or specifically binding. However, it is undisputed that by its very nature and name, international law not only affects the Western world but also Oriental States, African nations and the Indian subcontinent, among others. Peaceful coexistence in the community of States requires adherence to international law. Furthermore, a large portion of humanity lives in India. A population of approximately 1.3 billion is affected by the Indian government's sense of ownership of international law.

Historically, the foundations of international law lie in the development of Western culture and politics, and the growth of the Westphalian model of sovereignty. As such, it is widely seen as being Western-centric in its approach. This fact has become increasingly articulated in scholarship of so-called Third World perspectives.

Be that as it may. This chapter assumes that the dawn of the twenty-first century requires that the continued development of the law of nations be influenced not only by Western culture but also Eastern thought. In the case of India, it is a fact that philosophical and religious thought has been a major influencer of Indian laws. Almost all personal laws[92] within the country express religious traditions and practices that have been concretised into legal norms. A large number of criminal and civil laws also find their basis in Indian thought[93] and the theories of statecraft as written by

[91] Malcolm N. Shaw, *International Law*, 6th edition, Cambridge University Press, 2008, p. 2.

[92] The laws of marriage, divorce, adoption and guardianship are influenced by religious laws. For example, there is no uniform law for marriage in India and marriage among Hindus is regulated by Hindu law, marriage among Muslims is by Islamic law and marriage between Christians by Christian law.

[93] Indian legal thought can also find basis in the *Manusmriti*, an ancient text of Hinduism written *circa* second century B.C. which expanded on topics such as rights, duties, conduct and liberties.

ancient philosophers such as Chanakya.[94] More recently, Justice S.A. Bobde of the Supreme Court of India, in his opinion in the judgement in *Justice K.S. Puttaswamy (Retd.) and Another v. Union of India and Others*,[95] upheld the right to privacy as a fundamental right under the Constitution of India and traced it to ancient Indian Hindu texts including the Grihya Sutras, the Ramayana and the Arthashastra.

A truly global international law would require the inclusion of Indian thought in its legal framework. Indian philosophy does not only include within its ambit Hindu philosophy, expressed under the '*āstika*' school, but it also includes Buddhist, Jain and Sikh philosophy as expressed in the '*nāstika*' schools. It has also had a significant influence on Islamic Sufi thought as evidenced by the teachings of the Persian sage Abu Yazid al-Bistami whose philosophy of oneness with God or Brahman reflects deeply of Vedantic thought. '*Tat tvam asi*' or 'That art Thou' was Abu Yazid's most well-known utterance which is essentially a summary of the Upanishads in three words.[96] Accommodating foundational Indian notions in the further development of international criminal law would thus, ensure a wider non-Western imprint on and ownership in the discipline. The political significance of such a development would be beyond reasonable dispute.

[94] Chanakya (also known as Kautilya) was an Indian philosopher who lived in the fourth century B.C. He was the royal advisor in the court of the first Mauryan king Chandragupta. He is credited with writing the celebrated statecraft treatise *Arthashastra* which discusses monetary and fiscal policies, welfare, war strategies and more.

[95] Supreme Court of India, *Justice K.S. Puttaswamy (Retd.) and Another v. Union of India and Others*, Judgment, 24 August 2017, Writ Petition (Civil) No. 494 of 2012, para. 259 (http://www.legal-tools.org/doc/fa041f/).

[96] See the classic R.C. Zaehner, *Hindu and Muslim Mysticism*, School of Oriental and African Studies, London, 1960, republished by One World Publications, Oxford, 1994.

9

Unity and Disunity in International Criminal Justice

Rod Rastan*

9.1. Introduction

The concept of 'unity' can be thought of at several levels. At its most basic level, the law embodies an existential drive for self-organising unity.[1] Concepts such as 'unity', 'coherence', 'integration' and 'order' have, as such, been discussed in juxtaposition to the central theme of the long-standing discourse on the fragmentation of international law.[2] The unity of interna-

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1 See, for example, Mireille Delmas-Marty, *Trois défis pour un droit mondial*, Seuil, 1998, pp. 95, 104: "Le droit a horreur du multiple. Sa vocation c'est l'ordre unifié et hiérarchisé, unifié parce que hiérarchisé" ("The law shuns multiplicity. Its vocation is to a unified and hierarchical order, one that is unified precisely because it is hierarchical"); translated to English in Martti Koskenniemi and Päivi Leino, "Fragmentation of International Law? Postmodern Anxieties", in *Leiden Journal of International Law*, 2002, vol. 15, no. 3, pp. 556–57.

2 This well-known debate has looked at the proliferation and diversification of different branches of international law into increasingly specialised fields with their own supervisory structures, as well as efforts to identify principles, techniques and methods to give order to such pluralism; Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law: Report of the Study Group of the International Law Commission, UN Doc. A/CN.4/L.682, 13 April 2006, para. 8 (http://www.legal-tools.org/doc/dda184/); Report of the International Law Commission: Fifty-eighth session (1 May-9 June and 3 July-11 August 2006), UN Doc. A/61/10, 11 August 2006, para. 251(1) (http://www.legal-tools.org/doc/50b1e6/); Report of the International Law Commission: Sixty-eighth session (2 May-10 June and 4 July-12 August 2016), UN Doc. A/71/10, 12 August 2016, para. 84, recalling its earlier conclusions on fragmentation with regard to "the unity and coherence of international law, which is a single legal system and is not divided into separate branches, each with its own approach to sources" (http://www.legal-tools.org/doc/fcd5db/). See, generally, Mario Prost, *The Concept of Unity in Public International Law*, Hart Publishing, 2012, pp. 10–12; Philippa Webb, *International Judicial Integration and Fragmentation*, Oxford University Press, 2013; Elies van Sliedregt and Sergey Vasiliev, "Pluralism: A New Framework for International Criminal Justice", in Elies van Sliedregt

tional law in this context has focussed either on the constitutive rules and principles that regulate the creation and identification of other rules of international law, such as the rules on sources, foundational principles such as sovereign equality, *pacta sunt servanda*, or peremptory norms; or on the idea of a single core document, such as the UN Charter, setting out the constitutional order for the international community.[3] The important insights that have been gained from this debate have therefore primarily studied the implications of 'unity' in terms of the internal coherence of international law.

The concept of 'unity' can also be thought of at the level of process, to describe mutualistic modes of social organisation that are not contest-orientated, drawing insights from such diverse fields as feminism, systems theory, ecology and environmentalism, communication theory and alternative dispute resolution.[4] Such an approach, for example, might consider that the adversarialism of criminal trials, which prizes contests of advocacy and client interest, or the narrow lens of individual criminal liability which can obscure or distort our perception of wider societal contexts, render the criminal process ill-equipped to advance objectives like restoration and reconciliation, such that it fails to organise the structures of society in ways that advance unity.[5]

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and Sergey Vasiliev (eds.), *Pluralism in International Criminal Law*, Oxford University Press, 2014, pp. 3–38; Mads Tønnesson Andenæs and Eirik Bjørge (eds.), *A Farewell to Fragmentation: Reassertion and Convergence in International Law*, Cambridge University Press, 2015; Salim A. Nakhjavani and Melody Mirzaagha, "On 'Unity' as an Emerging Legal Interest in International Criminal Law", in Morten Bergsmo, Emiliano J. Buis and SONG Tianying (eds.), *Philosophical Foundations of International Criminal Law: Legally-Protected Interests*, Torkel Opsahl Academic EPublisher, Brussels, 2022, Chapter 6.

3 Wouter G. Werner, "The never-ending closure: constitutionalism and international law", in Nicholas Tsagourias (ed.), *Transnational Constitutionalism: International and European Perspectives*, Cambridge University Press, 2007, pp. 350–52; Bardo Fassbender, "The United Nations Charter as Constitution of the International Community", in *Columbia Journal of Transnational Law*, 1998, vol. 36, no. 3, pp. 529–619; Christian Tomuschat, "Obligations arising for states without or against their will", in The Hague Academy of International Law, *Recueil des Cours*, 1993, vol. 241, pp. 195–374; Erika De Wet, "The International Constitutional Order", in *International and Comparative Law Quarterly*, 2006, vol. 55, no. 1, pp. 51–53; Christopher Greenwood, "Unity and diversity in international law", in Tønnesson Andenæs and Bjørge (eds.), 2015, *supra* note 2, pp. 37–55.

4 See Michael Karlberg, *Beyond the Culture of Contest: From Adversarialism to Mutualism in an Age of Interdependence*, George Ronald, Oxford, 2004.

5 *Ibid*., pp. 47–50. See, for example, Durkheim's well-known distinction between restitutive, as opposed to retributive, law as a means to restore social relations, characteristic of a civili-

The discussion in this chapter takes a different approach. Building on the discussion on foundational concepts and legally-protected interests developed in earlier chapters in the present volume and, in part, the second volume in the *Philosophical Foundations of International Criminal Law* series, it sets out to explore notions of 'unity'/'disunity', not in terms of the law itself or of legal processes, but in terms of core concepts and values that appear to underpin international criminal justice. In this context, the chapter does not attempt to use the notion of legal good or protected legal interests in the usage developed along the lines of the *Rechtsgut*-concept.[6] Bearing in mind the editors' encouragement to avoid watertight distinctions and rigid constraints, but rather to open up and stimulate thinking, the chapter seeks to explore notions of 'unity' more broadly insofar as they appear relevant for explaining a number of the underlying rationales for the existence and operation of international criminal justice and, specifically, of the International Criminal Court ('ICC' or 'Court'). And while this volume focusses primarily on *values*, the chapter also touches upon the related pillar of *concepts* by treating 'unity' not only in terms of a core value underpinning or protected by international criminal justice, but also as a concept and a socio-political condition. The hope is that such an approach can help broaden our understanding of the notion of 'unity' in international criminal law ('ICL') discourse.

Specifically, the three themes around which the chapter is organised inquire into: (i) why the ICC was created; (ii) what social function it serves; and (iii) how it can be effective. In doing so, the chapter touches on a number of prevalent discourses, such as on the concept of humanity as a single body politic, on global order and the idea of a universal society, and on questions of State compliance. It examines both where 'unity' anchors international criminal justice and where other notions operate in ways that appear, formally, at odds with 'unity'. The chapter thereby rehearses a

sation based on organic, as opposed to mechanistic, solidarity; Émile Durkheim, *The Division of Labor in Society*, Steven Lukes ed., W.D. Halls trans., Free Press, 2014 (1893), pp. 89–96. See also David Baragwanath, Chapter 5 above.

6 See, for example, Kai Ambos, "The Overall Function of International Criminal Law: Striking the Right Balance between the *Rechtsgut* and the Harm Principles – A Second Contribution Towards a Consistent Theory of ICL", in *Criminal Law and Philosophy*, 2015, vol. 9, no. 2, pp. 301–29. On *Rechtsgüter*, see Chapter 4 above by Ioanna Anastasopoulou ('Legal Goods in International Criminal Law').

number of themes that apply to international law more generally,[7] but which are given particular focus by international criminal law in the light of its heightened institutionalised context: for if a recurrently identified weakness of international law is its polycentric, non-institutional framework,[8] international criminal law casts these debates in different (albeit not fundamentally altered) relief.

9.2. Foundational Concepts and Fundamental Values

If we want to understand how and why international criminal justice functions the way it does, we can learn much from broader debates about society. These debates are relevant because law and legal institutions are social phenomena, helping to shape society, but also shaped by it.

All of the themes discussed in this chapter rely on different ideas about the Court. Focussing on the core concepts and values underpinning international criminal justice can help bring clarity on why a permanent atrocity crimes court has been created, what function it is supposed (and not supposed) to serve, and how it interacts with other social actors in order to achieve its intended outcomes. This can in turn clarify the prerequisites necessary for those outcomes to occur. By contrast, uncertainty or contestation over why the Court exists and what purpose it serves will tend to stifle its operability and negatively influence the overall cogency, coherence and enforcement of international criminal justice.

Foundational concepts and fundamental values provide the bedrock upon which social systems and structures can be built: they help explain our underlying assumptions of who we are and our relationship with society. They are at once explanatory, aspirational and transformative. Reflection on these underlying assumptions might validate existing beliefs, theo-

[7] See, for example, James Crawford, *Chance, Order, Change: The Course of International Law*, Martinus Nijhoff Publishers, 2014; Martti Koskenniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870-1960*, Cambridge University Press, 2001; Martti Koskenniemi, "International law in the world of ideas", in James Crawford and Martti Koskenniemi (eds.), *The Cambridge Companion to International Law*, Cambridge University Press, 2012, pp. 47–63; Andrea Bianchi, *International Law Theories: An Inquiry into Different Ways of Thinking*, Oxford University Press, 2016.

[8] Crawford, 2014, pp. 86–114, see *supra* note 7. As discussed below, this difference is only of degree since the overall design of the Rome Statute embodies polycentrism both in its priority for the assertion of national criminal jurisdiction and in the co-operation and enforcement apparatus necessary to give effect to the ICC's exercise of jurisdiction. See Rome Statute of the International Criminal Court, 17 July 1998, ('ICC Statute') (http://www.legal-tools.org/doc/7b9af9/).

ries and rules, and the modes by which they are expressed, whether by means of language, culture, social relations or power structures. Or it might help expose implicit biases or anachronistic dogma that have been internalised and which might, on critical examination, prove to be incongruous with the demands and needs of contemporary society. In this context, law not only seeks to reflect prevailing practices, but is also a normative enterprise that seeks to enunciate certain transformative goals for individual and collective modes of existence: to conceptualise a different reality that may be both desirable and possible.[9]

Law can serve this function because the way things are in the society around us is neither inevitable nor impermeable. As social theorists have long taught us, what we perceive to be reality can be distinguished between physical phenomena that are not dependent on a human observer – such as mountains, oceans and deserts – and socially constructed facts or phenomena – such as territorial boundaries, language, culture, beliefs and institutions – which are all the product of human invention. Social reality shapes our understanding of the world around us; and because it is a product of the human mind, social reality can be altered.[10]

The importance of this distinction can easily be underappreciated, as we have often tended to confuse what is permanent, unchanging and naturally occurring with what we have created through human agreement and are therefore capable of changing. For the philosopher John Searle, the entire structure of social reality is often taken for granted by individuals, who are brought up in a culture that conveys social facts in the same way it presents rocks and trees.[11] Scholars in anthropology and sociology, exploring the subtle and complex dialectical relationship between human nature and culture – for example, as part of the debate over the primacy of structure or agency in shaping human behaviour – have similarly helped unravel the process whereby practices become so internalised that they appear natural and inevitable, and therefore impervious to change.[12] For instance, although the institution of slavery was justified for generations by racial theories that were used to hierarchically structure the relations among peoples,

[9] See also Section 9.6. below on the limitations of the law.

[10] John R. Searle, *The Construction of Social Reality*, Free Press, 1995, pp. 3–5, distinguishing between 'brute' facts and 'institutional' facts.

[11] *Ibid*., pp. 12–13.

[12] See, generally, Sherry B. Ortner, *Anthropology and Social Theory: Culture, Power, and the Acting Subject*, Duke University Press, 2006, pp. 1–18.

one of the ways the abolitionist movement succeeded in galvanising public opinion was by demonstrating the cultural contingency of the concepts and values underpinning slavery.[13]

At the same time, behavioural change is not governed by legislative change alone. Thus, while the abolition of slave trade – with related legislative change and its enforcement on the high seas – signalled the absorption of this normative shift at the formal level of the rapport among nations,[14] the persistence of racism within society, where cultural practices and norms reside, shows that the internalisation of new paradigms and related behavioural adjustments at the individual and institutional levels can be far harder to achieve.

The idea that the world is more complex than it seems – that it needs to be 'unmasked' – has of course longstanding pedigree as a form of social critique,[15] even if its implications have often been lost in practice. As obvi-

[13] Karlberg, 2004, p. 4, see *supra* note 4. See also Marc Howard Ross, *The Culture of Conflict: Interpretations and Interests in Comparative Perspective*, Yale University Press, 1993, (discussed in Karlberg, 2004, pp. 6–7), distinguishing between the 'socio-structural' dimensions of culture, which focus social change on reform of the objective structures of social organisation (that is, tackling underlying structural conflicts through legal reform, reorganising of institutional arrangements and relations) compared to 'psycho-cultural' dimensions, focussed on the subjective structures of the mind, which might lead to an emphasis on awareness raising, rethinking of values or identities or reforming attitudes and beliefs; Paul Ingram and Brian S. Silverman, "The Cultural Contingency of Structure: Evidence from Entry to the Slave Trade In and Around the Abolition Movement", in *American Journal of Sociology*, 2016, vol. 122, no. 3, pp. 755–97.

[14] On shift from widespread acceptance to general condemnation under national and international law, see Seymour Drescher and Paul Finkelman, "Slavery", in Bardo Fassbender and Anne Peters (eds.), *The Oxford Handbook of the History of International Law*, Oxford University Press, 2012, pp. 890–916. On the contemporary persistence of racial inequality and racial attitudes in the United States decades after the repeal of segregation and disenfranchisement laws, see Eduardo Bonilla-Silva, *Racism without Racists: Color-Blind Racism and the Persistence of Racial Inequality in America*, 5th edition, Rowman & Littlefield, 2018.

[15] Koskenniemi calls this a "trope of modernity" (Martti Koskenniemi, "International Law as Therapy: Reading The Health of Nations", in *European Journal of International Law*, 2005, vol. 16, no. 2, p. 330, citing Peter Sloterdijk, *Critique of Cynical Reason*, University of Minnesota Press, 1988), although its ancestry is of course much older; see, for example, the Hindu concept of '*māyā*' or illusion as discussed in Surabhi Sharma, "Humanity and Unity: Indian Thought and Legal Interests Protected by International Criminal Law", in Chapter 8 above. On the more instrumental use of stock phrases such as "tearing off the mask, of lifting the veil, and of making us see through the disguise" to deflect and obscure engagement on the merits of a particular argument or attempt at social change, see Albert Hirschman,

ous as the case of slavery may appear to us now, the same is true of other socially constructed realities that shape our world today and which we may easily take for granted. Deeper analysis of underlying concepts and values might lead to a theory being debunked, as in the case of racial theories, or it might lead to an assessment of whether our theory of a particular social phenomenon has been extended beyond its original context into new domains without interrogating its continued applicability or relevance.[16] In this context, the assumed objectivity, neutrality and universality of our social discourses, such as concerning international law itself, might be interrogated.[17] Moreover, because the relationship between the individual and

The Rhetoric of Reaction: Perversity, Futility, Jeopardy, Harvard University Press, 1991, pp. 79-80, describing this as a "tired metaphor".

16 See, for example, Thomas Kuhn, *Structure of Scientific Revolutions*, University of Chicago Press, 1962, pp. 66–91, on how a dominant theory or paradigm over time may accumulate anomalies which become increasingly difficult to resolve, weakening the paradigm itself and leading, after a period of crisis or failure of the theory, to a paradigm shift, in which underlying assumptions are re-examined and a new paradigm established. Similarly, David Bohm distinguishes between an approach to theories which treats them as a form of *insight*, that is, a way of looking at the world, and which is therefore relative, and as a form of *knowledge* of how the world is, and which is absolute. He argues that when a particular theory which is relevant for a certain range of phenomena, such a Newtonian dynamic, is extended into new domains, such as quantum mechanics, it ceases to work or leads at best to increasingly unclear results. Such underlying relativity of the theories themselves is not problematic unless we mistake our theories for reality itself: otherwise, this would mean that Newton's theories were true until around the turn of the twentieth century and then somehow suddenly became false, or that relativity and quantum theory suddenly became the truth. According to Bohm, failure to understand that our theories are ever-changing forms of insight limits our vision, "since it leads us to approach nature, society, and the individual in terms of more or less fixed and limited forms of thought, and thus, apparently, to keep on confirming the limitations of these forms of thought in experience"; David Bohm, *Wholeness and the Implicate Order*, Routledge, 1980, pp. 3–4. The debate over the usefulness of the domestic analogy of criminal law at the international level is an example of this type of discourse; see, for example, Immi Tallgren, "The Sensibility and Sense of International Criminal Law", in *European Journal of International Law*, 2002, vol. 13, no. 3, pp. 565–67; Mark A. Drumbl, *Atrocity, Punishment, and International Law*, Cambridge University Press, 2007, pp. 8, 24, 123–24; Mark Osiel, "The Banality of Good: Aligning Incentives against Mass Atrocity", in *Columbia Law Review*, 2005, vol. 105, no. 6, p. 1753; Darryl Robinson, "The Identity Crisis of International Criminal Law", in *Leiden Journal of International Law*, 2008, vol. 21, no. 4, pp. 925–63.

17 See, for example, a focus on gender as an analytical tool to critique narratives of the normality and objectivity of international law in Catharine MacKinnon, "Feminism, Marxism, Method, and the State: Toward Feminist Jurisprudence", in *Signs*, 1983, vol. 8, no. 4, pp. 636, 644–45, and Anne Orford, "Contesting Globalization: A Feminist Perspective on the Future of Human Rights", in *Transnational Law and Contemporary Problems*, 1998, vol. 8, p. 195. On the centrality of colonialism in the constitution of international law and its basic

society is reciprocal, the structures of social reality also act upon our thought and demarcate the parameters within which we think, thereby potentially limiting our perspective of what is possible and reinforcing prevalent social structures.[18]

The idea that we can change social reality by changing how we think about the world underlies Allott's conviction in the central role of thought and of philosophy in the creation of a more just society.[19]At the same time,

doctrines, see Antony Anghie, "Finding the peripheries: sovereignty and colonialism in nineteenth-century international law", in *Harvard International Law Journal*, 1999, vol. 40, no. 1, pp. 1–71; Antony Anghie, *Imperialism, Sovereignty and the Making of International Law*, Cambridge University Press, 2005; Bhupinder Singh Chimni, "Third World Approaches to International Law: A Manifesto", *International Community Law Review*, vol. 8, no. 1, 2006, 3-27. See also Morten Bergsmo, Wolfgang Kaleck and Kyaw Yin Hlaing (eds.), *Colonial Wrongs and Access to International Law*, Torkel Opsahl Academic EPublisher, Brussels, 2020 (http://www.toaep.org/ps-pdf/40-bergsmo-kaleck-kyaw).

18 For Foucault, law is one of the manifold forms of domination exercised within society to constrain and supress individuals in order to maintain and enhance political power, thereby restraining the possibility for social change: "The system of right, the domain of the law, are permanent agents of these relations of domination, these polymorphous techniques of subjugation", see Michel Foucault, "Two Lectures", in Michael Kelly (ed.), *Critique and Power: Recasting the Foucault/Habermas Debate*, MIT Press, 1994, p. 34. Foucault states that law inculcates a relationship of domination marked by rituals and meticulous procedures that impose rights and obligations, while at the same time those "[r]ules are empty in themselves … are impersonal and can be bent to any purpose."; Michel Foucault, "Nietzsche, Genealogy, History", in Donald F. Bouchard (ed.), *Language, Counter-Memory, Practice: Selected Essays and Interviews*, Cornel University Press, 1977, pp. 150-151. Cornell argues that the contingency of notions of 'justice' and its irreducibility to the pre-given norms of any established legal system (following Derrida), represents also its 'openness' to adaptive interpretation rather than closure, and calls for greater judicial responsibility to seize law's transformative potential; see Drucilla Cornell, *The Philosophy of the Limit*, New York and London, 1992, p.166. Cf. Anthony Giddens, *New Rules of Sociological Method*, Stanford University Press, 1993, pp. 128–29, on the duality of structure which sees structure and agency as intrinsically related, such that the structure of society can both constrain and enable action: "social structures are both constituted by human agency, and yet are the very medium of this constitution".

19 Philip Allott, *The Health of Nations: Society and Law beyond the State*, Cambridge University Press, 2002, p. 421: "[…] our social ideals and our social possibilities are trapped and stifled within the mental structures which divide and disable the human world, structure which human consciousness has made and which human consciousness can remake"; and Philip Allott, *Eutopia: New Philosophy and New Law for a Troubled World*, Edward Elgar Publishing, 2016, pp. 3–6. See also Jürgen Habermas, *The Divided West*, Ciaran Cronin ed. and trans., Wiley, 2006, p. 117: "Whereas the role of political science is to describe the state of international relations and that of jurisprudence is to give account of the concept, validity, and content of international law, philosophy can try to clarify certain basic conceptual features of the development of law in the light of both existing constellations and valid norms".

if ideas map out the possibilities of what could be, we are concomitantly challenged by the tension between normative ideals and their concrete realisation.[20]

One of the challenges this gives rise to is the reliability of our perceptions of reality, both individually and collective. If our knowledge of the world around us is inter-subjective, this can tend towards nihilism: that is, if reality is relative to one's experience, the notions of truth, ethics and morality all become subjective, nullifying thereby the very possibility of arriving at a collective ethos for any collective enterprise.[21] But if incredulity towards meta-narratives might represent the post-modern condition,[22] one of the basic thrusts of deconstructionist analysis, as it has inspired critical legal theorists for example, is on the need for vigilance in interrogating the value-laden nature of the binary terms we use to frame our discourses in order to expose their inherent instability and self-subverting character.[23] While this might give pause for reflection and critical interrogation of our

[20] Martti Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument*, Cambridge University Press, 2006 (1989), pp. 17–23. For Allott, "the power of the ideal […] [itself] generates a powerful attractive force inclining us to seek to actualise it"; 2002, p. 83, see *supra* note 19; "Societies live within the theories they make. A society generates a theory-filled reality which shapes its willed action which, in turn, shapes its actual everyday living". See also Philip Allott, *Eunomia New Order for a New World*, Oxford University Press, 1990, p. 38. See also Sections 9.4.–9.5. below on contrasting ILC discussions on the desirability and possibility of establishing a permanent international criminal court.

[21] Alasdair MacIntyre critiques this as the moral crisis arising from the doctrine of 'emotivism', namely "that all evaluative judgments and more specifically all moral judgments are nothing but expressions of preference, expressions of attitude or feeling, insofar as they are moral or evaluative in character"; *After Virtue: A Study in Moral Theory*, Bloomsbury, 2014, p. 13. See, in this context, Searle's distinction between ontological subjectivity and epistemological objectivity, meaning that although social reality may not have an existence outside of human agreement, what we know about social reality is not just a matter of personal opinion, but is objectively ascertainable; Searle, 1995, pp. 12–13, see *supra* note 10. On the problem of obtaining a more objective understanding of reality more generally, see Thomas Nagel, *The View from Nowhere*, Oxford University Press, 1986, p. 4: "Objectivity is a method of understanding. It is beliefs and attitudes that are objective in the primary sense. Only derivatively do we call objective the truths that can be arrived at in this way".

[22] Jean-François Lyotard, *La Condition Postmoderne: Rapport sur le Savoir*, Les Éditions de Minuit, Paris, 1979, translated to English in Jean-François Lyotard, *The Postmodern Condition: A Report on Knowledge*, Geoff Bennington and Brian Massumi trans., University of Minnesota Press, 1984, pp. xxiv, 81-82. t

[23] Christopher Norris, *Deconstruction: Theory and Practice*, 3rd edition, Routledge, 2002, p. 165. Relevant binary terms in this context might include 'good' and 'evil', 'sovereignty' and 'community', and 'unity' and 'fragmentation'.

underlying assumptions, it need not negate the possibility of arriving at any value judgements.[24] And yet, even if shared assumptions or values underpinning human society can be identified and relied upon to advance social justice, we might still disagree on the form in which such action is pursued.

The modest purpose of this short chapter is not to survey the variegated expressions of such analyses in accounts of international law by philosophers, legal theorists or political scientists.[25] The point here is merely to recall that the project of international criminal justice, like international law more generally, is a normative enterprise and that how we think about international law has an impact on social reality, just as social reality impacts international law: meaning that the foundational concepts and fundamental values that underpin the discipline directly influence its outcome.[26]

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[24] See, for example, Jacques Derrida, "Force of Law: The 'Mystical Foundation of Authority'", in *Cardozo Law Review*, 1990, vol. 11, nos. 5–6, pp. 953 *et seq.*, while challenging abstract universalist notions of 'law', 'justice', 'values' and 'norms', observes: "what is currently called deconstruction would not correspond (though certain people have an interest in spreading this confusion) to a quasi-nihilistic abdication before the ethico-politico-juridical question of justice and before the opposition between just and unjust", going on to stress that this requires an assumption of responsibility for recognising the consequences of contingency, which includes the potential for transformation, and thus assuming responsibility for our actions and judgments. See also Koskenniemi, 2006, pp. 501–12, see *supra* note 20, on the problem of indeterminacy arising from the reversibility of any legal concept, by which it may be projected with a meaning that links it to any mutually opposing set of principles, such that there is no automatic, objective meaning can be attributed to such terms; but which is nonetheless assuaged by a certain 'structural bias' that steers legal institutions applying international law away from nihilism, pp. 606–07.

[25] For helpful reviews, see, for example, Bianchi, 2016, see *supra* note 7; Jutta Brunnée and Stephen J. Toope, "Constructivism and International Law", in Jeffery Dunoff and Mark Pollack (eds.), *Interdisciplinary Perspectives on International Law and International Relations: The State of the Art*, Cambridge University Press, 2012, pp. 119–45.

[26] See, similarly, Morten Bergsmo, Emiliano J. Buis and Nora Helene Bergsmo, "Setting a Discourse Space: Correlational Analysis, Foundational Concepts, and Legally Protected Interests in International Criminal Law", in Morten Bergsmo and Emiliano J. Buis (eds.), *Philosophical Foundations of International Criminal Law: Correlating Thinkers*, Torkel Opsahl Academic EPublisher, Brussels, 2018 (http://www.toaep.org/ps-pdf/34-bergsmo-buis), p. 11: "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". As Goldstein and Keohane summarise the contrary view: "To many economists, and to political scientists captivated by their modes of thinking, ideas are unimportant and epiphenomenal either because agents correctly anticipate the results of their actions or because some selective process ensures that only agents who behave as if they were rational succeed […] The extreme version of this argument is that ideas are just hooks: competing elites seize on popular ideas to propagate and to legitimize their interests, but the ideas themselves do

The chapter takes as its reference point the ICC, since even if the Court may not represent the sum of our experience with international criminal justice, nor necessarily its ultimate destination, it operates today in many ways as its centrepiece. In particular, the chapter seeks to explore how the ICC Statute correlates concepts related to 'unity' to the effective discharge of the Court's mandate, namely: as a rationale for its establishment; in framing the social function it serves; and as a principle for its enforcement. This interplay is explored below through the threefold interrelationship created between the role of the *individual* in international criminal justice, the function of *social institutions* and the responsibility of the *international community* at large.

9.3. 'Unity' as Rationale for the Creation of the International Criminal Court

Why create the ICC? The opening lines of the Preamble to the Rome Statute read:

> *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[.]

Who are the "peoples" referred to in the ICC Preamble? We can read the term as it has developed within the context of self-determination or third-generation group rights, or in its use as legitimation, such as in the UN Charter, adopted by governments acting in the name of their citizens. But the use of the term "all peoples" in the Preamble appears to be more universal, linked in the paragraph that follows to not only the "children, women and men" who "have been victims of unimaginable atrocities", but to all humanity, whose conscience is deeply shocked.

What does it mean to express, in the words of the Preamble, consciousness of the common bonds that unite all peoples? Notwithstanding the collaborative dynamic that underlay the efforts of civil society actors and delegates in Rome, the negotiators that ultimately signed up to these

not play a causal role"; Judith Goldstein and Robert O. Keohane, "Ideas and Foreign Policy: An Analytical Framework", in Judith Goldstein and Robert O. Keohane (eds.), *Ideas and Foreign Policy: Beliefs, Institutions, and Political Change*, Cornell University Press, Ithaca, 1993, p. 4.

lines[27] were not sentimental utopians, but State representatives drawn from ministries of foreign affairs, justice and defence, under cabinet supervision. The consciousness they expressed, moreover, was not in celebratory affirmation of an apolitical cross-cultural fraternity such as the Olympic movement, but against the backdrop of the most horrendous manifestations of political violence and human cruelty. In this context, to express concern that "this delicate mosaic may be shattered at any time" is to recognize the fragility of human existence and the destructive capacity of human beings to destroy human society. What, then, are we to make of these statements?

We can gloss over these lines as merely hortatory and affirmative of basic values long championed in the founding instruments of international humanitarian law, such as in the Martens Clause, or as reflected in the Preamble of the UN Charter or the constitutional principles set out in the Charter's second article. The ICC Preamble might be admitted to constitute part of the context within which the treaty is to be interpreted,[28] but said to convey rather obvious and somewhat meaningless statements relative to the Statute's overall operation, constituting no more than some sort of vague or pious hope. We might confess that humanity appears to be incapable of achieving this vision, because conflict characterises our modes of interaction and social organisation to such an extent that we may have come to accept such behaviour as intractable.

Notwithstanding the difficulty of discerning the drafters' intent, the Court that is now established and is in operation has the task of interpreting and applying the Statute and must decide what meaning, if any, is to be drawn from these passages. This is particularly so since a preamble can serve to highlight several core elements that motivate and justify an instrument.[29] Set in this context, the opening lines of a preamble can be read

[27] Through a quirk of the drafting history the Preamble was not actually included in the final text but had to be separately adopted by the plenary – which, if anything, adds to its validity as an expression of State intentions; Otto Triffterer, Morten Bergsmo and Kai Ambos, "Preamble", in Otto Triffterer and Kai Ambos (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, 3rd edition, C.H. Beck, 2016, p. 5, at mn. 6.

[28] Vienna Convention on the Law of Treaties, 23 May 1969, Article 31 (http://www.legal-tools.org/doc/6bfcd4/). See also Triffterer, Bergsmo and Ambos, 2016, pp. 4–5, at mns. 4–5, see *supra* note 27.

[29] International Law Commission, Third report on crimes against humanity, by Sean D. Murphy, Special Rapporteur, UN Doc. A/CN.4/704, 23 January 2017, para. 298, in connection to the purpose of a preamble to the draft articles (http://www.legal-tools.org/doc/45aef6/).

as normative statements.[30] For example, the ICC Preamble might be said to challenge certain prevalent assumptions surrounding mass atrocities, embedded in ideas about human nature and social relations. This might include the view that violence, conflict and division are inherent to the human condition, because humans as a species are incorrigibly selfish and aggressive, predisposed to war and spoliation; that group identity can only be given meaningful expression by designation of the 'other' and exclusion; that personal and national welfare are best served by self-interest, requiring the advancement of one's own advantage over others; or that the lives of some matter more than others.[31] Such assumptions would tend to suggest that efforts to constrain large scale violence are destined to be pointless and inconsequential affairs in the larger scheme of things.

By contrast, to affirm the essential oneness of humanity appears to suggest something different. To say that all peoples are "united by common bonds" suggests that they together constitute a 'whole', a single and indivisible unit, which is the body of humanity itself.[32] And to state that our

30 Triffterer, Bergsmo and Ambos, 2016, at mn. 4, see *supra* note 27.

31 For the classical realist articulation of these types of assumptions, see, for example, Hans J. Morgenthau, and Kenneth W. Thompson, *Politics Among Nations: The Struggle for Power and Peace*, Knopf, New York, 1985, pp. 31–33: "The tendency to dominate […] is an element of all human associations, from the family through fraternal and professional associations and local political organizations, to the state", continuing "the whole political life of a nation […] is a continuous struggle for power". Cf. Payam Akhavan, *In Search of a Better World: A Human Rights Odyssey*, House of Anansi Press, 2017, pp. 151–153: "The conception of mass murder as rooted in human nature is often a convenient absolution from our shared responsibility to confront injustice […] Familiarity with the anatomy of genocide may well suggest that often the great evils of our time are predictable […] There is nothing random or spontaneous about radical evil; it is a conspiracy of prodigious proportions. Rarely does it just creep up on us without warning. The real question is not whether we can stop genocide; it is whether we have the will to intervene".

32 See, for example, Kristen Monroe, *The Heart of Altruism: Perceptions of a Common Humanity*, Princeton University Press, 1996, p. 206, whose empirical research concludes that the prevalent self-interest paradigm appears unable to account for case studies of individuals who display "a particular perspective in which all mankind is connected through a common humanity, in which each individual is linked to all others and to a world in which all living beings are entitled to a certain humane treatment merely by virtue of being alive […] it is a very simple but deeply felt recognition that we all share certain characteristics and are entitled to certain rights, merely by virtue of our common humanity". See also Karlberg's discussion on recognition of humanity's increasing global interdependence, in Michael Karlberg, "Reframing Public Discourses for Peace and Justice", in Karina Korostelina (ed.), *Forming a Culture of Peace*, Palgrave Macmillan, New York, 2012, pp. 24-32. In this context, the idea of organic unity between the individual and the collective has sometimes been reflected in the image of the human body, given the complex biological integration of its di-

"cultures [are] pieced together in a shared heritage" suggests that it is the diverse expressions of human experience that link together to form our common identity. Whereas the term "heritage", associated with 'inheritance', normally denotes features that belong to the culture of a particular society which have been passed down from previous generations, the imagery used here suggests that our common inheritance is humanity itself.[33]

Another way to look at the affirmation of the unity of all peoples might be in terms of the notion of 'trusteeship': the idea that each individual is a trust of the whole. Even if limited in the context of the Statute to "universally valid proscription[s] of specific evil",[34] this would suggest that the welfare of each is the concern and responsibility of all, because of our common bonds of humanity.[35] Equally, upon the fate of each is dependent the welfare of the whole, since we are all impacted by these crimes, implicit in the phrase that such atrocity crimes "deeply shock the conscience of

verse cells to enable, or through maladaptation inhibit, the health and functioning of the entire human frame.

33 See, similarly, Triffterer, Bergsmo and Ambos, 2016, at mn. 7, see *supra* note 27, characterising this as an expression of "unity in diversity". Compare the more contested application of the notion of 'common heritage of mankind' in relation joint or collective management or communal ownership of the spatial areas such as outer space, the deep seabed, Antarctica or the subsoil beyond national jurisdiction; see Kemal Baslar, *The Concept of the Common Heritage of Mankind in International Law*, Martinus Nijhoff Publishers, 1998, pp. 1–7.

34 David Wiggins, *Ethics: Twelve Lectures on the Philosophy of Morality*, Harvard University Press, 2009, p. 355, with reference to core proscriptions of international crimes as representing "ideas or notions that human societies find they really can share", contrasting this category with attempts at the international level to formulate "a mass of general judgments or to attempt general prescriptions about millennial goals for the world (which will be interpreted over and over again to reflect the preoccupation of states that are powerful, but unpractised in self-examination, and are caught between the benevolent impulses of their citizens and the insatiable demands of an economy that they dare not contemplate trying to set in a different direction)"; although as discussed below in Section 9.6., the implications of 'unity' even in relation to this limited category has failed to generate the necessary consensus to effect routine compliance.

35 See Karlberg, 2004, pp. 133–34, see *supra* note 4, on trusteeship as the moral foundation for human rights. See similarly the concept of 'human security' set out in 1982, Olaf Palme Commission: *Common Security: A Programme for Disarmament: Report of the Independent Commission on Disarmament and Security Issues*, Pan Books, 1982; or the concept of 'sovereignty as responsibility' in International Commission on Intervention and State Sovereignty, *The Responsibility to Protect: Report of the International Commission on Intervention and State Sovereignty*, International Development Research Centre, 2001, para. 2.14. For a discussion of historical precursors, see Luke Glanville, "The antecedents of 'sovereignty as responsibility'", in *European Journal of International Relations*, 2011, vol. 17, no. 2, pp. 233–55. See also Surabhi Sharma in Chapter 8 above.

humanity", or in the emblematic proscription of certain acts, due to their scale and organised brutality, as crimes committed against humanity as a whole.[36] Trusteeship in this context gives practical expression to the responsibility implicit in the general principle of respect for human dignity.[37] As noted by the *ad hoc* Tribunals, "respect for human dignity is the basic underpinning and indeed the very *raison d'être* of international humanitarian law and human rights law; indeed in modern times it has become of such paramount importance as to permeate the whole body of international law".[38] Set out as the lead statement in the ICC Preamble, arguably this consciousness, with its implications for trusteeship and human dignity, ultimately serves as the rationale for creating an international criminal court

[36] Israeli Supreme Court, *Attorney-General of the Government of Israel v. Eichmann*, Judgment, 29 May 1962, 36 ILR 277, para. 12 (http://www.legal-tools.org/doc/f204ef/). David J. Luban, "A Theory of Crimes Against Humanity", in *Yale Journal of International Law*, 2004, vol. 29, no. 1, pp. 86–91, offers two interpretations of 'humanity', linked to 'humankind' or membership of the human race, compared to an interpretation linked to the quality of 'humaneness' or the quality of being human, the latter drawing from Hanna Arendt's argument that what makes crimes against humanity an offense against humanness is their assault on human diversity, namely the "characteristic of the 'human status' without which the very words 'mankind' or 'humanity' would be devoid of meaning"; *ibid*., p. 114; Hanna Arendt, *Eichmann in Jerusalem: A Report on the Banality of Evil*, revised and enlarged edition, Viking Press, New York, 1965, pp. 268–69. See also Martti Koskenniemi, "Constitutionalism as Mindset: Reflections on Kantian Themes About International Law and Globalization", *Theoretical Inquiries in Law*, 2007, vol. 8, no. 1, p. 35; Susan R. Lamb, Chapter 3 above; Nakhjavani and Mirzaagha, Chapter 6 above; Kafayat Motilewa Quadri, Vahyala Kwaga and Tosin Osasona, "Forging a Modern African Perspective on 'Unity' as a Collective Legal Interest in International Criminal Law", Chapter 7 of this volume.

[37] See Oscar Schachter, "Human Dignity as a Normative Concept", in *American Journal of International Law*, 1983, vol. 77, no. 4, pp. 848–54; 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, pp. 304–14, tracing the implications of human dignity, predicated on Kant's conception, as a rationale for international criminal justice.

[38] ICTY, *Prosecutor v. Furundžija*, Trial Chamber, Judgment, 10 December 1998, IT-95-17/1-T, para. 183 ("*Furundžija* Trial Judgment") (http://www.legal-tools.org/doc/e6081b/); ICTR, *Prosecutor v. Muhimana*, Trial Chamber, Judgment and Sentence, 28 April 2005, ICTR-95-1B-T, para. 539 (http://www.legal-tools.org/doc/87fe83/). See also ICTY, *Prosecutor v. Tadić*, Appeals Chamber, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, IT-94-1-A, para. 59 (http://www.legal-tools.org/doc/866e17/). See also Akhavan, 2017, pp. 274–78, see *supra* note 31, on human dignity as a reflection of our self-definition about human nature. For discussion on the centrality of human dignity in rooting legitimate global prescriptive authority in international criminal law, see Margaret DeGuzman, *Shocking the Conscience of Humanity: Gravity and the Legitimacy of International Criminal Law*, Oxford University Press, 2020, pp. 87 *et seq*.

of potentially global and compulsory jurisdiction.[39] The unreserved acceptance of the oneness of humanity becomes the starting point for international justice.

Put differently, if we did not care about what happens to other people in other parts of the world, or they did not care about us, there would be no point to create a criminal jurisdiction that would fight impunity for atrocity crimes around the world – we would only be interested in our own welfare and create, at most, *ad hoc* mechanisms as the need and political will arose to address our more limited concerns and interests, which might be based on entirely different rationales. A universal mechanism is only justified if we believe the commission of atrocities, in any part of the world, is of concern to us all.[40]

There is of course the perennial danger that appeals to 'unity' might disguise the workings of hegemony. As has often been noted, projects of world community, which seek to speak in the name of humanity, can easily mask the advancement of particular power interests. As modern history shows, universalist rhetoric has often been a tool of imperialist expansion to justify the worst forms of international violence.[41] Moreover, even if the

[39] Potentially 'global' due to universal treaty adherence or referral of situations by the Security Council, and 'compulsory' due to the absence of additional state consent (opt-in) requirements for the exercise of jurisdiction pursuant to Article 12 or 13(b) of the ICC Statute.

[40] See similarly Luban, 2004, p. 88, see *supra* note 36: "'crimes against humanity' suggests that the defining feature of these offenses is the *party in interest*. In law, some wrongs – chiefly civil wrongs, like torts – are thought to affect only the victims and their dependents. Other wrongs, inflicted on equally determinate victims, violate important community norms as well, and the community will seek to vindicate those norms independently of the victim […] Viewed along these lines, the term 'crimes against humanity' signifies that all humanity is the interested party and that humanity's interest may differ from the interests of the victims". Beth Van Schaack describes the application of crimes against humanity by the post-war tribunals as revolutionary, insofar as these crimes embodied "the beginnings of a universal moral code addressing the way in which states may treat their citizens", in "*Crimen Sine Lege*: Judicial Lawmaking at the Intersection of Law & Morals", 97 *Georgetown L. J.* 119 (2008), p. 133. See also Triffterer, Bergsmo and Ambos, 2016, at mn. 8, see *supra* note 27, observing justice in this context is meted out "not only in the name of individuals or groups of victims, but also on behalf of humanity as such". Cf. Antony Duff, "Authority and Responsibility in International Criminal Law", in Samantha Besson and John Tasioulas (eds.), *The Philosophy of International Law*, Oxford University Press, 2010, pp. 597–602, critiquing the Statute's preambular aspiration to be mete out justice on behalf of humanity.

[41] See, for example, Carl Schmitt, *Der Begriff des Politischen*, Duncker & Humblot, Berlin, 1932, translated to English in Carl Schmitt, *The Conception of the Political*, George Schwab trans., Rutgers University Press, 1976, p. 54: "To confiscate the word humanity, to invoke and monopolise such a term probably has certain incalculable effects, such as denying the

invocation of 'humanity' might represent a more innocent 'oceanic feeling' of universal fraternity felt by "well-placed professional travelling across cosmopolitan spaces, into institutional projects", it is also true that its invocation arguably cannot escape the particularity of the authority claim made in its name.[42] Bartelson frames this familiar paradox as the perennial risk

enemy the quality of being human and declaring him to be an outlaw of humanity; and war can thereby be driven to the most extreme inhumanity"; Edward Hallett Carr, in Michael Cox (ed.), *The Twenty Years' Crisis, 1919-1939: An Introduction to the Study of International Relations*, Palgrave, 2001 (1939): The "intellectual theories and ethical standards of utopianism, far from being the expression of absolute and *a priori* principles, are historically conditioned, being both products of circumstance and interests and weapons framed for the furtherance of interests. 'Ethical notions', as Mr. Bertrand Russell has remarked, 'are very seldom a cause, but almost always an effect, a means of claiming universal legislative authority for our own preference, not, as we fondly imagine the actual ground of those preferences' […] [T]he utopian, when he preaches the doctrine of the harmony of interests, is innocently and unconsciously adopting Walewski's maxim, and clothing his own interest in the guise of the universal interest for the purpose of imposing it on the rest of the world"; with Carr earlier noting, at p. 69: "Bismarck records the remark made to him by Walewski, the French Foreign Minister, in 1857, that it was the business of a diplomat to cloak the interests of his country in the language of universal justice". See also Prosper Weil, "Towards Relative Normativity in International Law?", in *American Journal of International Law*, 1983, vol. 77, no. 3, p. 441: "There is a danger of the implantation in international society of a legislative power enabling certain states – the most powerful or numerous – to promulgate norms that will be imposed on the others […]. Those privileged to partake of that legislative power are in a position to make sure that their own hierarchy of values prevails and to arrogate the right of requiring others to observe it. In this way the concepts of 'legal conscience' and 'international community' may become code words, lending themselves to all kinds of manipulation, under whose cloak certain states may strive to implant an ideological system of law that would be a negation of the inherent pluralism of international society."; Foucault, 1994, see *supra* note 18, p. 22, warning against the "tyranny of globalizing discourses" based on universal claims of totalising explanations, since appeals to ideals such as peace, freedom or justice merely mask the workings of the self-legitimizing extant powers relations.

42 Martti Koskenniemi, "Projects of World Community", in Antonio Cassese (ed.), *Realizing Utopia: The Future of International Law*, Oxford University Press, 2012, pp. 9–10; David Kennedy, "International Human Rights Movement: Part of the Problem?", in *Harvard Human Rights Journal*, 2002, vol. 15, pp. 101–26 ('Kennedy, 2002a'); David Kennedy, "The international human rights regime: still part of the problem?", in Rob Dickinson, Elena Katselli, Colin Murray and Ole W. Pedersen (eds.), *Examining Critical Perspectives on Human Rights*, Cambridge University Press, 2012, pp. 25–27, 31 ('Kennedy, 2002b'). See also Carlo Focarelli, *International law as Social Construct: The Struggle for Global Justice*, Oxford University Press, 2012, pp. 380–81, on definitions of 'humanity', and pp. 456–61, on the competing value claims made in the name of humanity. The inescapabilty of our own perspective and an emphasis on contingency are of course key themes in modern thought; Friedrich Nietzsche, in Rolf-Peter Horstmann and Judith Norman (eds.), *Beyond Good and Evil: Prelude to a Philosophy of the Future*, Cambridge University Press, 2002 (1886), pp. 5

that "every effort to impose a given set of values on the existing plurality of communities in the name of a common humanity is likely to be met with resistance on the grounds of its own very particularity".[43] As Koskenniemi notes, the "effort to imagine a law that would be applicable everywhere is as old as legal thinking itself",[44] but appeals in the name of humanity typically fail because of the different, often contested, ideas of what the world community should be like and how we should be governed: the ambivalence of our ideas about world community reflected in our oscillation between a desire for world 'unity' and our historical experience of the havoc often wreaked by advocates of such 'unity', which suggests that "diversification, separation and distinctness are often at least as important as unity and community, and often more intensely felt".[45]

In the absence of universal adherence, the potential for 'unity' is also only partially fulfilled by the Rome Statute: the treaty being anchored to a host of other notions that appear, at least formally, at odds with 'unity'. The very Preamble attests to such fragmentary self-conceptions, struggling to constrain the competing concepts of 'community' and 'autonomy' without falling into hegemony on the one hand, or legitimating State-centrism on the other.[46] The Statute is, first and foremost, a treaty, adhered to through a process of State consent; and even when the Court operates outside of its treaty-based jurisdiction, it does so on the basis of another treaty, the UN

et seq.; Friedrich Nietzsche, Keith Ansell-Pearson ed., Carol Diethe trans, *On the Genealogy of Morality*, Cambridge University Press, 2006 (1887), p. 87.

43 Jens Bartelson, *Visions of World Community*, Cambridge University Press, 2009, pp. 1-3. See more generally Nagel, see *supra* note 21.

44 Martti Koskenniemi, *To the Uttermost Parts of the Earth: Legal Imagination and International Power 1300–1870*, Cambridge University Press, 2021, p. 949.

45 Koskenniemi, 2012, p. 11, see *supra* note 42. See nonetheless Koskenniemi's discussion on a 'culture of formalism' as a technique or practice to enable a discourse on universal values in "search for something beyond particular interests and identity politics, or the irreducibility of differences", in Koskenniemi, 2001, pp. 494–509, see *supra* note 7. See also David Kennedy, "One, Two, Three, Many Legal Orders: Legal Pluralism and the Cosmopolitan Dream", in *New York University. Review of Law & Social Change*, 2007, vol. 31, no. 3, pp. 641–59.

46 Borrowing Koskenniemi's alternative descriptions of social life among States in terms of 'community' and 'autonomy', when characterising international legal projects, such as the UN Charter; 2006, p. 476, see *supra* note 20. Tallgren contrasts these tendencies in the contradictory expectations attending the rationale of international law, with its horizontal framework of sovereign equality and voluntarily accepted rules, and the criminal law, with its normative projection of common values and utilitarian societal goals such as prevention, restoration and rehabilitation; Tallgren, 2002, p. 562, see *supra* note 16.

Charter. Chambers of the Court constantly re-affirm their own competence by recourse to State consent and basic rules of treaty interpretation. And while the Statute might be said to impose certain limits on sovereignty, these operate along the familiar lines that have been accepted in public international law more generally, based on the consent of the relevant State to be so bound (as an ICC State Party, as a State declaring its *ad hoc* acceptance of the Court's exercise of jurisdiction, or as a UN Member State required to accept and carry out a decision of the Security Council adopted under Chapter VII of the UN Charter).[47] This includes provisions such as the Court's authority to apply the Statute equally to all persons without distinction based on official capacity or to exercise its jurisdiction irrespective of immunities or special procedural rules that may attach to the official capacity of any person;[48] its power to require co-operation from, and to extend application of the Court's legal framework with respect to, a non-Party State that is the subject of a Security Council Chapter VII resolution;[49] its

[47] See, for example, Permanent Court of International Justice ('PCIJ'), *S.S. Wimbledon (U.K. v. Japan)*, Judgment, 17 August 1923, 1923 PCIJ (ser. A) No. 1 (Aug. 17), para. 35 (http://www.legal-tools.org/doc/ab625e/), describing treaty making, including "restriction upon the exercise of the sovereign rights of the State" as an attribute of sovereignty; ICJ, *Monetary Gold Removed from Rome in 1943 (Italy v. France et al.*), Judgment, 15 June 1954, pp. 17–19 (http://www.legal-tools.org/doc/a23855/), recalling States are not subject to compulsory adjudication without their consent. See also Luigi Condorelli and Antonio Cassese, "Is Leviathan Still Holding Sway over International Dealings?", in Antonio Cassese (ed.), *Realizing Utopia: The Future of International Law*, Oxford University Press, 2012, p. 14: "The overall logic of the phenomenon [the sovereign choice of States to accept limits to their sovereignty] does not […] appear to be that of expropriation of state competencies, but rather of assignment, transfer, or delegation".

[48] Article 27, ICC Statute, see *supra* note 8. See for example, ICC, Situation in Darfur, Sudan, *Prosecutor v. Al Bashir*, Appeals Chamber, Judgment in the Jordan Referral re Al-Bashir Appeal, 6 May 2019, ICC-02/05-01/09-397, paras. 133–49 ('*Bashir* Jordan Appeal') (http://www.legal-tools.org/doc/53c62c/); ICC, Situation in Darfur, Sudan, *Prosecutor v. Al Bashir*, Pre-Trial Chamber, Decision under article 87(7) of the Rome Statute on the non-compliance by South Africa with the request by the Court for the arrest and surrender of Omar Al-Bashir, 6 July 2017, ICC-02/05-01/09-302, para. 89 ('*Bashir* South Africa Decision') (http://www.legal-tools.org/doc/68ffc1/), finding the extension of the applicability of an international treaty to a State which has not voluntarily accepted it to be in line with the UN Charter and the Security Council's powers thereunder.

[49] Articles 13, 86, 87, ICC Statute, see *supra* note 8; *Bashir* Jordan Appeal, paras. 135–42, see *supra* note 48; ICC, Situation in Libya, *Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, Pre-Trial Chamber, Decision on the postponement of the execution of the request for surrender of Saif Al-Islam Gaddafi pursuant to Article 95 of the Rome Statute, 1 June 2012, ICC-01/11-01/11-163, paras. 28–30 (http://www.legal-tools.org/doc/ae7c48/); ICC, Situation in Darfur, Sudan, *Prosecutor v. Omar Hassan Ahmad Al Bashir*, Pre-Trial

authority to assert criminal jurisdiction over the national of a non-Party States alleged to have committed crimes in the territory of a State Party;[50] as well as its ability to render determinations on forum allocation in complementarity decisions that are binding on relevant States;[51] its power to compel the attendance of witness for testimony;[52] and the power of a public

Chamber, Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir, 4 March 2009, ICC-02/05-01/09-3, para. 248 (http://www.legal-tools.org/doc/e26cf4/); ICC, Situation in Libya, *Prosecutor v. Saif Al-Islam Gaddafi*, Pre-Trial Chamber, Decision on the non-compliance by Libya with requests for co-operation by the Court and referring the matter to the United Nations Security Council, 10 December 2014, ICC-01/11-01/11-577, paras. 20–22 (http://www.legal-tools.org/doc/8e689f/); ICC, Situation in Darfur, Sudan, *Prosecutor v. Banda and Jerbo*, Trial Chamber, Decision on "Defence Application pursuant to Articles 57(3)(b) & 64(6)(a) of the Statute for an order for the preparation and transmission of a co-operation request to the Government of the Republic of the Sudan", 1 July 2011, ICC-02/05-03/09-169, paras. 14–15 (http://www.legal-tools.org/doc/891c96/).

50 See, for example, discussion on the Court's jurisdictional competence over the nationals of non-Party States in ICC, Situation in the Islamic Republic of Afghanistan, Public redacted version of "Request for authorisation of an investigation pursuant to article 15", 20 November 2017, ICC-02/17-7-Red, paras. 44–46 (http://www.legal-tools.org/doc/db23eb/). See also discussion of subjective territoriality, regarding the alleged deportation of Rohingya from Myanmar to Bangladesh, in ICC, Prosecution's Request for a Ruling on Jurisdiction under Article 19(3) of the Statute, 9 April 2018, ICC-RoC46(3)-01/18-1, paras. 28–50 (http://www.legal-tools.org/doc/4af756/), interpreting the scope of Article 12(2)(a) of the ICC Statute by reference widely recognised permissive rules in matters of prescriptive jurisdiction and routine treaty practice with respect to the assertion of domestic criminal jurisdiction over international crimes.

51 Article 17, ICC Statute, see *supra* note 8; ICC, Situation in Uganda, *Prosecutor v. Kony et al.*, Pre-Trial Chamber II, Decision on the admissibility of the case under Art. 19(1) of the Statute, 10 March 2009, ICC-02/04-01/05-377, para. 45 (http://www.legal-tools.org/doc/44f5b3/). The same logic extends to other States who are required to accept the decisions of the Court, such as a State which has lodged a declaration under article 12(3) of the Statute or a UN Member State that is obliged by the Security Council to accept the Court's exercise of jurisdiction pursuant to Article 13(b) by virtue of a resolution adopted under Chapter VII of the UN Charter. On application of the complementarity regime to a situation referred by the UN Security Council, see, for example, ICC, Situation in Libya, *Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, Pre-Trial Chamber, Decision on the postponement of the execution of the request for surrender of Saif Al-Islam Gaddafi pursuant to Article 95 of the Rome Statute, 1 June 2012, ICC-01/11-01/11-163, para. 28 and accompanying citations (http://www.legal-tools.org/doc/ae7c48/).

52 Article 93(1)(b), ICC Statute, see *supra* note 8; ICC, Situation in the Republic of Kenya, *Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, Appeals Chamber, Judgment on the appeals of William Samoei Ruto and Mr Joshua Arap Sang against the decision of Trial Chamber V (A) of 17 April 2014 entitled "Decision on Prosecutor's Application for Witness Summonses and resulting Request for State Party Co-operation", 9 October 2014, ICC-01/09-01/11-1598 (http://www.legal-tools.org/doc/e5eb09/).

prosecutor, elected by the Assembly of States Parties, to independently trigger the initiation of investigations on the territory or by the nationals of States Parties without a State or Security Council referral[53] or to directly carry out certain investigative measures on the territory of States Parties without requiring their prior consent.[54] In the Court's analysis, all of these powers are justified on the basis of State consent, its focus being rather on explaining precisely how such consent has been freely expressed. And in other areas, while the Court may make appeals to broader community values when making judicial determinations of non-compliance, it is wholly dependent on the autonomy of other actors, in their individual and collective capacities, to enforce its decisions.[55]

By contrast, the ICC has more rarely asserted jurisdictional competence by recourse to broader community interests, such as by reference to the *ius puniendi* of the international community when identifying relevant rules of customary international law,[56] or through the assertion of an objective legal personality.[57] This may be due in part to its more tightly regulat-

53 Article 15, ICC Statute, see *supra* note 8.

54 Articles 57(3)(d) and 99(4), ICC Statute, see *supra* note 8.

55 See Section 9.5. below.

56 *Bashir* Jordan Appeal, paras. 115, 123, see *supra* note 48; ICC, Situation in Darfur, Sudan, *Prosecutor v. Al Bashir*, Appeals Chamber, Joint Concurring Opinion of Judges Eboe-Osuji, Morrison, Hofmański and Bossa, 6 May 2019, ICC-02/05-01/09-397-Anx1, paras. 201, 409, 422, 432 (http://www.legal-tools.org/doc/fd824a/); ICC, Situation in Darfur, Sudan, *Prosecutor v. Al Bashir*, Pre-Trial Chamber, Corrigendum to the Decision Pursuant to Article 87(7) of the Rome Statute on the Failure by the Republic of Malawi to Comply with the Co-operation Requests Issued by the Court with Respect to the Arrest and Surrender of Omar Hassan Ahmad Al Bashir, 15 December 2011, ICC-02/05-01/09-139-Corr (http://www.legal-tools.org/doc/8c9d80/); ICC, Situation in Darfur, Sudan, *Prosecutor v. Al Bashir*, Pre-Trial Chamber, Decision pursuant to article 87(7) of the Rome Statute on the refusal of the Republic of Chad to comply with the co-operation requests issued by the Court with respect to the arrest and surrender of Omar Hassan Ahmad Al Bashir, 13 December 2011, ICC-02/05-01/09-140-tENG (http://www.legal-tools.org/doc/e2c576/). See, generally, Claus Kreß, "The International Criminal Court and Immunities under International Law for States Not Party to the Court's Statute", in Morten Bergsmo and LING Yan (eds.), *State Sovereignty and International Criminal Law*, Torkel Opsahl Academic EPublisher, Beijing, 2012, pp. 246 *et seq.* (http://www.toaep.org/ps-pdf/15-bergsmo-ling); Ambos, 2013, pp. 293–315, see *supra* note 37; Claus Kreß, *Preliminary Observations on the ICC Appeals Chamber's Judgment of 6 May 2019 in the Jordan Referral re Al-Bashir Appeal*, Torkel Opsahl Academic EPublisher, Brussels, 2019, pp. 1–38 (http://www.toaep.org/ops-pdf/8-kress).

57 ICC, Pre-Trial Chamber, Decision on the "Prosecution's Request for a Ruling on Jurisdiction under Article 19(3) of the Statute", 6 September 2018, ICC-RoC46(3)-01/18-37, paras. 37–48 ('Myanmar/Bangladesh Decision') (http://www.legal-tools.org/doc/73aeb4/), follow-

ed legislative scheme which has prevented the kind of dynamic interpretation undertaken by the *ad hoc* Tribunals towards the sphere of their subject-matter jurisdiction, the specific elements of crimes or to modes of liability through teleological appeals to mandated goals.[58] In general, however, the case law of international criminal courts and tribunals has shown limited tolerance for violations of State consent in pursuance of shared community values, this being largely considered in proportionality assessments concerning the exercise of jurisdiction against allegations of illegal conduct in the collection of evidence or in the delivery of suspects.

On violations of domestic law in the apprehension of suspects, for example, the ICTY Appeals Chamber weighed a number of factors against exclusive national sovereignty considerations, including, among others, the "legitimate expectation [of the international community] that those accused of these crimes will be brought to justice swiftly".[59] In admitting evidence

ing the approach of the ICJ in *Reparation for Injuries Suffered in the Service of the United Nations*, Advisory Opinion, 11 April 1949 (http://www.legal-tools.org/doc/f263d7/).

58 See, for example, ICTY, *Prosecutor v. Tadić*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, paras. 96–97, see *supra* note 38, in interpreting its subject-matter jurisdiction with respect to situations of non-international armed conflict under the residual clause contained in Article 3 of its Statute, contrasting a "clearly sovereignty-oriented and […] traditional configuration of the international community, based on the co-existence of sovereign States more inclined to look after their own interests than community concerns or humanitarian demands" with the "the impetuous development and propagation in the international community of human rights doctrines, particularly after the adoption of the Universal Declaration of Human Rights in 1948, [which] has brought about significant changes in international law, notably in the approach to problems besetting the world community", observing "[a] State-sovereignty-oriented approach has been gradually supplanted by a human-being-oriented approach". As Beth Van Schaack describes, the more malleable application of the *nullum crimen sine lege* principle pre-dating the ICC Statute and its Elements of Crimes has resulted in international and domestic criminal courts developing and modernizing the law born of the World War II era by means of a "a full-scale refashioning of ICL through jurisprudence […] updating and expanding historical treaties and customary prohibitions, upsetting arrangements carefully negotiated between states, rejecting political compromises made by states during multilateral drafting conferences, and adding content to vaguely worded provisions that were conceived more as retrospective condemnations of past horrors than as detailed codes for prospective penal enforcement", see *supra* note 40, pp. 123-124.

59 ICTY, *Prosecutor v. Nikolić*, Appeals Chamber, Decision on Interlocutory Appeal Concerning Legality of Arrest, 5 June 2003, IT-94-2-AR73, para. 25 (http://www.legal-tools.org/doc/61711b/); further observing at para. 26: "In the opinion of the Appeal Chamber, the damage caused to international justice by not apprehending fugitives accused of serious violations of international humanitarian law is comparatively higher than the injury, if any, caused to the sovereignty of a State by limited intrusion in its territory, particularly when the intrusion oc-

collected unlawfully, similarly, it has emphasised the need to "balance the fundamental rights of the accused with the essential interests of the international community in the prosecution of persons charged with serious violations of international humanitarian law".[60] Accordingly, and in an approach

curs in default of the State's co-operation". For other factors drawn from national and regional human rights practice, see, for example, ICTY, *Prosecutor v. Mrkšić et al.*, Trial Chamber, Decision on the Motion for Release by the Accused Slavko Dokmanović, 22 October 1997, IT-95-13a-PT, para. 57 (http://www.legal-tools.org/doc/a13331/); ICTY, *Prosecutor v. Simić et al.*, Trial Chamber, Decision Stating Reasons for Trial Chamber's Order of 4 March 1999 on Defence Motion for Evidentiary Hearing on the Arrest of the Accused Todorović, 25 March 1999, IT-95-9 (http://www.legal-tools.org/doc/eb750d/); ICTR, *Prosecutor v. Barayagwiza*, Appeals Chamber, Decision, 3 November 1999, ICTR-97-19-AR72 (http://www.legal-tools.org/doc/ee7411/); ICTR, *Prosecutor v. Ngirumpatse*, Trial Chamber, Decision on the Defence Motion challenging the Lawfulness of the Arrest and Detention and seeking Return or Inspection of Seized Items, 10 December 1999, ICTR-97-44-I, para. 56 (http://www.legal-tools.org/doc/4cec3f/); ICTR, *Prosecutor v. Kajelijeli*, Trial Chamber, Decision on the Defence Motion concerning the Arbitrary Arrest and Illegal Detention of the Accused and on the Defence Notice of Urgent Motion to Expand and Supplement the Record of 8 December 1999 Hearing, 8 May 2000, ICTR-98-44-I, para. 34 (http://www.legal-tools.org/doc/ccb6d1/); ICTR, *Prosecutor v. Nzirorera*, Trial Chamber, Decision on the Defence Motion challenging the Legality of the Arrest and Detention of the Accused and requesting the Return of Personal Items Seized, 7 September 2000, ICTR-98-44-T, para. 27 (http://www.legal-tools.org/doc/c00858/). See also ICC, Situation in the Democratic Republic of the Congo, *Prosecutor v. Lubanga*, 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, paras. 30, 39 (http://www.legal-tools.org/doc/1505f7/).

60 ICTY, *Prosecutor v. Brđanin*, Trial Chamber, Decision on the Defence "Objection To Intercept Evidence", 3 October 2003, IT-99-36-T, paras. 61–62 ('*Brđanin* Decision on Intercept Evidence') (http://www.legal-tools.org/doc/7efabf/), citing the approach of the ICTY Appeals Chamber in *Prosecutor v. Nikolić*, Decision on Interlocutory Appeal Concerning Legality of Arrest, see *supra* note 59. See also ICTY, *Prosecutor v. Karadžić*, Trial Chamber, Decision on the Accused's Motion to Exclude Intercepted Conversations, 30 September 2010, IT-95-5/18-T, para. 7 (http://www.legal-tools.org/doc/b6b12b/); ICTY, *Prosecutor v. Haraqija and Morina*, Trial Chamber, Decision on Morina and Haraqija Second Request for a Declaration of Inadmissibility and Exclusion of Evidence, 27 November 2008, IT-04-84-R77.4, para. 12 ('Decision on Morina and Haraqija Request') (http://www.legal-tools.org/doc/83862d/); ICTY, *Prosecutor v. Blagojević and Jokić*, Trial Chamber, Decision on the Admission into Evidence of Intercept-Related Materials, 18 December 2003, IT-02-60-T, para. 15 (http://www.legal-tools.org/doc/646db6/); ICTY, *Prosecutor v. Brđanin and Talić*, Trial Chamber, Order on the Standards Governing the Admission of Evidence, 15 February 2002, IT-99-36-T, para. 11 (http://www.legal-tools.org/doc/005043/); ICTY, *Prosecutor v. Kordić and Čerkez*, Trial Chamber, Transcript, 2 February 2000, IT-95-14/2-T, at p. 13694 (http://www.legal-tools.org/doc/298d4d/); ICTY, *Prosecutor v. Delalić et al.*, Trial Chamber, Decision on the Motion of the Prosecution for the Admissibility of Evidence, 19 January 1998, IT-96-21-T, para. 16 (http://www.legal-tools.org/doc/51dec6/).

followed by the ICC, the fact that evidence was obtained in breach of national law, even constituting a breach of State sovereignty, has not, in and of itself, led to the exclusion of evidence absent a qualitative assessment.[61] Moreover, pragmatic realities may render recourse to ordinary domestic procedures unfeasible in the execution of its mandate in circumstances where the authorities themselves are under investigation.[62]

In sum, the notion of the oneness of humanity and an international criminal court's mandate to act on behalf of the international community appears to provide a key rationale for why the ICC was created. Indeed, just as the Nuremberg, Tokyo and later *ad hoc* Tribunals would not have come to pass without reliance, in part, on the idea of a collective humanity, the ICC can be thought of as the cumulative effect of that concept of 'unity' having been put into practice by its predecessors. International criminal justice is also not constrained by the Rome Statute and the progressive development of the law, whether by treaty or custom, may continue to evolve in response to the ever-pressing implications of 'unity'.[63] At the same time, while the idea of 'unity' has appeared in certain discretionary assessments, it perforce has had more limited impact on the operation of the jurisdic-

[61] *Ibid*., para. 55; Decision on Morina and Haraqija Request, para. 15, see *supra* note 60; ICTY, *Prosecutor v. Naletilić and Martinović*, Appeals Judgement, 3 May 2006, IT-98-34-A, para. 238 (http://www.legal-tools.org/doc/94b2f8/); ICTY, *Prosecutor v. Delalić et al.*, Trial Chamber, Decision on The Tendering of Prosecution Exhibits 104 - 108, 9 February 1998, IT-96-21-T, para. 20 (http://www.legal-tools.org/doc/a26c99/). See also *Brđanin* Decision on Intercept Evidence, paras. 56 and 61, see *supra* note 58; ICC, Situation in the Democratic Republic of the Congo, *Prosecutor v. Lubanga*, Pre-Trial Chamber, Decision on the Confirmation of the Charges, 29 January 2007, ICC-01/04-01/06-803-tEN, paras. 61, 84 (http://www.legal-tools.org/doc/b7ac4f/); ICC, Situation in the Central African Republic, *Prosecutor v. Bemba et al.*, Appeals Chamber, Judgment on the appeals of Mr Jean-Pierre Bemba Gombo, Mr Aimé Kilolo Musamba, Mr Jean-Jacques Mangenda Kabongo, Mr Fidèle Babala Wandu and Mr Narcisse Arido against the decision of Trial Chamber VII entitled "Judgment pursuant to Article74 of the Statute", 8 March 2018, ICC-01/05-01/13-2275-Red, para. 280 *et seq.* (http://www.legal-tools.org/doc/56cfc0/).

[62] *Brđanin* Decision on Intercept Evidence, para. 56, see *supra* note 60: "The Trial Chamber acknowledges that there are instances when it is not realistic or practical to request permission to conduct covert interceptions. Therefore, even if obtained without legal authority, or in contravention to existing law, this Trial Chamber acknowledges the principle that there may be exceptional circumstances where it is impossible to obtain legal approval of covert surveillance, for example, when the surveillance is targeted at the body from which permission is to be given", and at para. 61: "in situations of armed conflict, intelligence which may be the result of illegal activity may prove to be essential in uncovering the truth; all the more so when this information is not available from other sources".

[63] Article 10, ICC Statute, see *supra* note 8.

tional regime.[64] For example, it cannot override the parameters of the Court's competence by providing it jurisdiction to act on the basis of public conscience, moral outrage or a norm's peremptory character.[65] Thus, even if the ICC's consciousness is directed towards the oneness of humanity and universality, as a judicial institution inculcating the rule of law, it cannot but eschew *ultra vires* action that is beyond the powers conferred upon it. Instead, what appeals to the concept of 'unity' can do in this context is to demonstrate the moral incongruity of such limitations (set against the rationale of the oneness of humanity) and galvanise public opinion in order to mobilise States to voluntarily adhere to the Statute or for the Security Council to refer situations otherwise outside its jurisdictional scope.[66] In-

[64] See Leena Grover, *Interpreting Crimes in the Rome Statute of the International Criminal Court*, Cambridge University Press, 2014, pp. 199–202, arguing in view of general rules of treaty interpretation that "'object and purpose' and the idea of effective interpretation are to be read down to exclude considerations of collective goals such as ending impunity or securing peace and world order". Cf. Kreß, 2019, pp. 20–25, see *supra* note 56.

[65] As the ICJ has emphasised, "the *erga omnes* character of a norm and the rule of consent to jurisdiction are two different things" (ICJ, *East Timor (Portugal v. Australia)*, Judgment, 30 June 1995, para. 29 (http://www.legal-tools.org/doc/c7cf7e/)); "the mere fact that rights and obligations *erga omnes* or peremptory norms of general international law (*jus cogens*) are at issue in a dispute cannot in itself constitute an exception to the principle that its jurisdiction always depends on the consent of the parties" (ICJ, *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v. Rwanda)*, Judgment, 3 February 2006, para. 125 (http://www.legal-tools.org/doc/1d7775/)); "[a] *jus cogens* rule is one from which no derogation is permitted but the rules which determine the scope and extent of jurisdiction and when that jurisdiction may be exercised do not derogate from those substantive rules which possess *jus cogens* status, nor is there anything inherent in the concept of *jus cogens* which would require their modification or would displace their application" (ICJ, *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)*, Judgment, 3 February 2012, para. 95 (http://www.legal-tools.org/doc/674187/)). See, similarly, European Court of Human Rights ('ECtHR'), *Al-Adsani v. United Kingdom*, Judgment, 21 November 2001, Application No. 35763/97, paras. 61 and 66 (http://www.legal-tools.org/doc/9c81a2/); Myanmar/Bangladesh Decision, para. 49, see *supra* note 57; Joint Concurring Opinion of Judges Eboe-Osuji, Morrison, Hofmański and Bossa, para. 213, see *supra* note 56.

[66] On incongruity, see, similarly, Christian Tomuschat, "Crimes Against the Peace and Security of Mankind and the Recalcitrant Third State", in Yoram Dinstein and Mala Tabory (eds.), *War Crimes in International Law*, Martinus Nijhoff Publishers, 1996, p. 42, noting the inherent contradiction arising from the *pacta tertiis* rule whereby, "by committing the applicability of an international penal code to the discretion of every individual State, the international community grants any potential wrongdoer, *de jure* and not only *de facto*, the privilege of evading the law that is meant to protect the common interest of humanity". Cf. Thomas Nagel, "The Problem of Global Justice", in 33(2) *Philosophy and Public Affairs* (2005), pp. 113-147, arguing that the most likely path toward some version of global justice is through the creation of global structures of power that are initially tolerable to the inter-

deed, the existence of a permanent standing international criminal court with potential universal vocation appears to have increased the routineness with which demands for accountability are made, whether by victims associations, civil society organisations, States and international organisations.[67] Even if such appeals remain only inconsistently met, this represents a significant change in public discourse.[68]

9.4. 'Unity' as a Rationale for the Jurisdiction *Ratione Materiae* of the ICC and Its Role in Restoring and Maintaining Social Order

What social function does the ICC serve? Even more explicit as a rationale, one of the main expressed purposes for the international community to create an international criminal jurisdiction of potential global reach was the affirmation, after World War II, that failure to hold persons accountable for massive crimes not only shocked the conscience of humanity, but was directly linked with the question of international peace and security. When the UN General Assembly, three weeks after the International Military Tribunal at Nuremberg rendered its judgment on 1 October 1946, called "as a matter of primary importance" for the formation and codification of principles recognised in the charter of the Nuremberg Tribunal and in the judgment of the Tribunal, it was not merely rhetorical that it called such a general code "offences against the peace and security of mankind".[69] The UN

ests of the most powerful current nation states, but will over time be subjected to pressures to make their exercise more just and legitimate.

67 As former IRMCT President Theodor Meron has remarked, as the result of work by international criminal courts such as the ICTY and ICTR, "there is an ever-increasing expectation in communities around the world that where atrocities are committed in violation of international law, accountability shall follow. This is a profound change from just a quarter of a century ago", while acknowledging that international criminal justice is "still very much in its infancy, and it is in a highly vulnerable stage of development at present […] facing something of a period of contraction […] after a remarkable period of expansion"; IRMCT, "President Meron speaks at Security Council open debate on international law and the rule of law", 18 May 2018; United Nations Security Council 8262nd Meeting Record, UN Doc. S/PV.8262, 17 May 2018.

68 See below notes 160-164 and accompanying text.

69 Affirmation of the Principles of International Law Recognized by the Charter of the Nürnberg Tribunal, UN Doc. A/RES/95(I), 11 December 1946 (http://www.legal-tools.org/doc/bb7761/); Formulation of the principles recognized in the Charter of the Nürnberg Tribunal and in the judgment of the Tribunal, UN Doc. A/RES/177(II), 21 November 1947 (http://www.legal-tools.org/doc/57a28a/). See also Draft Code of Offences Against the Peace and Security of Mankind – Report by J. Spiropoulos, Special Rapporteur, UN Doc. A/CN.4/25, 26 April 1950, paras. 35-36 (http://www.legal-tools.org/doc/3d7c4d/); Report of the Interna-

Secretary-General, in his Supplementary Report on the Work of the Organization of 24 October 1946, similarly declared that in the "interests of peace, and in order to protect mankind against future wars, it will be of decisive significance to have the principles which were employed in the Nuremburg trials […] made a permanent part of the body of international law as quickly as possible".[70] It would not have been lost on the author of these sentiments that a similar rationale had informed discussions around accountability after World War I.[71]Consistent with the idea that it is the function of law to protect society, international justice was seen as a function of global order for the preservation of global society.[72] It bears emphasising that this statement does not carry within it any value judgment on the character of the global order: it is neutral to the question whether the current system (or the international system as it existed at the end of World War II) is in fact stable, just or necessary. It does not answer, thus, the broader question whether, in part, it is those very structures of international society (unequal distribution of power, economic hegemony, exploitative trading

tional Law Commission covering its second session, 5 June - 29 July 1950, UN Doc. A/1316, 29 July 1950, para. 149 (http://www.legal-tools.org/doc/be570a/).

70 Secretary-General's Oral Supplementary Report to the General Assembly, UN Doc. A/65/Add.1, 24 October 1946 (http://www.legal-tools.org/doc/ecea1b/).

71 See, for example, Reply of the Allied and Associated Powers to the Observations of the German Delegation on the Conditions of Peace, London, His Majesty's Stationery Office, 16 June 1919, p. 30 (Part VII/II, Penalties, relative to articles 227-230 of the Treaty of Versailles) (available in *HathiTrust Digital Library*):

> The Allied and Associated Powers […] regard the punishment of those responsible for bringing these calamities on the human race as essential on the score of justice.
>
> They think it not less necessary as a deterrent to others who, at some later date, may be tempted to follow their example. The present Treaty is intended to mark a departure from the traditions and practices of earlier settlements which have been singularly inadequate in preventing the renewal of war. The Allied and Associated Powers indeed consider that the trial and punishment of those proved most responsible for the crimes and inhuman acts committed in connection with a war or aggression, is inseparable from the establishment of that reign of law among nations which it was the agreed object of the peace to set up.

72 See, similarly, Hersch Lauterpacht, *The Development of International Law by the International Court*, Grotius Publications, Cambridge, 1982 (1958), pp. 3–4, stating "the primary purpose of the International Court (referring to the PCIJ and ICJ) […] lies in its function as one of the instruments for securing peace in so far as this aim can be achieved by law", while cautioning that the "degree of achievement of this end by an international, as indeed by any other, court is dependent upon the state of political integration of the society whose law it administers".

practices, democratic deficits, discriminatory ideology, technological barriers, and so on) that precipitate instability in the system.[73]

From early on, the International Law Commission ('ILC') similarly considered the desirability and possibility of establishing an international criminal jurisdiction in terms of the broad community interest in preserving international peace and security. Thus, the report of Special Rapporteur Alfaro stated:

> The community of States is entitled to prevent crimes against the peace and security of mankind and crimes against the dictates of the human conscience, including therein the hideous crime of genocide. If the rule of law is to govern the community of States and protect it against violations of the international public order, it can only be satisfactorily established by the promulgation of an international penal code and by the permanent functioning of an international criminal jurisdiction.
>
> The community of States realizes that another war will mean the destruction of civilization. It has not only a right but also a duty to make sure that civilization – both material and moral – is not destroyed. The community of States has the same right every community of individuals has to protect its existence from crime and provide for its own security through the organization of a permanent system of penal justice.[74]

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[73] See, for example, Gerry Simpson, *Great Powers and Outlaw States: Unequal Sovereigns in the International Legal Order*, Cambridge University Press, 2009, pp. 56–61, discussing the inequalities tolerated by international law. On the impact of economic inequality, see generally Thomas Pogge, "Recognized and Violated by International Law: The Human Rights of the Global Poor", in *Leiden Journal of International Law*, 2005, vol. 18, no. 4, pp. 717–45, discussing the implications of Article 28 of the UDHR: "international law […] establishes and maintains institutional structures that greatly contribute to violations of these human rights: fundamental components of international law systematically obstruct the aspirations of poor populations for democratic self-government, civil rights, and minimal economic sufficiency. And central international organizations, such as the WTO, the IMF, and the World Bank, are designed so that they systematically contribute to the persistence of severe poverty". See also Frédéric Mégret, "What Sort of Global Justice is 'International Criminal Justice'?", in *Journal of International Criminal Justice*, 2015, vol. 13, no. 1, pp. 80–81 and 96, on the ambivalence of ICL to questions of economic justice and climate change that are otherwise so prominent in the work of global justice scholars.

[74] Report on the Question of International Criminal Jurisdiction by Ricardo J. Alfaro, Special Rapporteur, UN Doc. A/CN.4/15 and Corr.1, 3 March 1950, paras. 136–37 ('Alfaro Report') (http://www.legal-tools.org/doc/352f0d/); Report of the International Law Commission covering its second session, 5 June - 29 July 1950, 1950, para. 135, see *supra* note 69.

As to the meaning of "offences against the peace and security of mankind", the ILC's then Special Rapporteur Spiropoulos on the Draft Code suggested that it was "intended to refer to acts which, if committed or tolerated by a State, would constitute violations of international law and involve international responsibility. The main characteristic of the offences in question is their highly *political* nature. They are offences which, on account of their specific character, normally would affect the international relations in a way dangerous for the *maintenance of peace*".[75] This category was distinguished from other crimes involving international elements, such as piracy, trafficking in persons and goods, slavery, counterfeiting currency and protection of submarine cables.[76]

A similar differentiation reappeared in debates within the Ad Hoc Committee for the creation of the ICC in 1995, in response to the question of whether the Court's jurisdiction would be "limited to the most serious crimes that might threaten international peace and security" or would address the broader category of other treaty-based crimes.[77] This distinction was also retained in the Preamble of the Rome Statute, which refers to "the most serious crimes of concern to the international community as a whole", whose impact "threaten[s] the peace, security and well-being of the world".[78] The proscription of genocide, crimes against humanity, war crimes and aggression have been identified by international criminal courts as representing peremptory norms of international law.[79] And as the ILC has observed in the context of its draft articles on State responsibility, the

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75 Draft Code of Offences Against the Peace and Security of Mankind, 1950, para. 35, see *supra* note 69 (emphasis in the original); Report of the International Law Commission covering its second session, 5 June - 29 July 1950, 1950, para. 149, see *supra* note 69.

76 *Ibid*.

77 Report of the Ad Hoc Committee on the Establishment of an International Criminal Court, UN Doc. A/50/22, 6 September 1995, para. 120, discussing in the context of the power of the UNSC to refer situations (http://www.legal-tools.org/doc/b50da8/).

78 Preamble, ICC Statute, paras. 3 and 4; the phrase "the most serious crimes of international concern" is recalled in Articles 1 and 5 of the Statute, see *supra* note 8. The same rational appears reflected in the authority of the Security Council, acting under Chapter VII of the UN Charter, to both refer situations to the Court and request a deferral under Article 13(b) and 16, as a consequence of the perceived impact (positive or negative) of the ICC's activities on international peace and security.

79 *Furundžija* Trial Judgment, para. 154, see *supra* note 38; ICTY, *Prosecutor v. Kupreškić et al.*, Trial Chamber, Judgement, 14 January 2000, IT-95-16-T, para. 520 ("*Kupreškić* Trial Judgment") (http://www.legal-tools.org/en/doc/5c6a53/); *Bashir* Jordan Appeal, para. 123, see *supra* note 48.

obligations arising from peremptory norms "prohibit what has come to be seen as intolerable because of the threat it presents to the survival of States and their peoples and the most basic human values".[80]

These phrases appear intended to reflect the idea that these forms of conduct "threaten human existence so fundamentally" that they necessitate criminalisation,[81] to protect both national and international orders.[82] These are "international crimes which offend against the public order of the international community".[83] The propounded purpose of the law's application, thus, is to penalise behaviour though the international community's own norms, to protect its own legal values and interests.[84] And one of the ways such a system is intended contribute to "the peace, security and well-being of the world" is through deterrence and the reconstitution of the rule of law.[85] Such rationale has often been repeated by international criminal courts and tribunals.[86]

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80 Report of the International Law Commission on the work of its fifty-third session, 23 April - 1 June and 2 July - 10 August 2001, UN Doc. A/56/10, p. 112 (https://www.legal-tools.org/doc/d197cb/).

81 Tallgren, 2002, p. 565, see *supra* note 16, in discussing possible justifications for ICL.

82 Triffterer, Bergsmo and Ambos, 2016, at mn. 9, see *supra* note 27; see also at mn. 11 discussing the wider implications of the protected value of 'the peace, security and well-being of the world' to denote more than the negative definition of peace as the absence of war.

83 Arthur Watts, "The legal position in international law of heads of states, heads of governments and foreign ministers", in The Hague Academy of International Law, *Recueil des Cours*, 1994, vol. 247, pp. 82-84. See also Luban, 2004, pp. 87–88, see *supra* note 36, arguing that crimes against humanity pose a universal threat that all humankind shares an interest in repressing, because they assault one aspect of being human – our character as political animals – and our existential need to live socially in groups with other human beings.

84 Otto Triffterer, "Preliminary Remarks: The Permanent International Criminal Court – Ideal and Reality", in Otto Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article*, 2nd edition, C.H. Beck, 2008, p. 22, mn. 17; see also mn. 20 *et seq*. See *Kupreškić* Trial Judgement, para. 519, see *supra* note 79: "norms of international humanitarian law [...] lay down obligations towards the international community as a whole, with the consequence that each and every member of the international community has a 'legal interest' in their observance and consequently a legal entitlement to demand respect for such obligations", Joint Concurring Opinion of Judges Eboe-Osuji, Morrison, Hofmański and Bossa, paras. 54, 201-204, see *supra* note 56; Kreß, 2019, pp. 12-20, see *supra* note 56.

85 Preamble, ICC Statute, para. 5, see *supra* note 8. See also Alfaro Report, para. 121, see *supra* note 74, observing: "The cynic and the skeptic will surely remark that wars are not stopped by means of international tribunals and penal codes. Perhaps that is true, up to a certain point. In the municipal organization it may be observed also that there are murderers and thieves despite the fact that there are criminal courts and penal codes, but only God knows how many murders and robberies are not committed precisely because there are

For the ICC, the link between individual criminal accountability and the peace and security mandate of the UN Security Council through the referral (and deferral) mechanism was seen early on as one of the primary purposes for creating a permanent institution for the most serious crimes of international concern.[87] The crime of aggression, a crime against the peace and security of humanity, involving a finding of a manifest violation of the UN Charter, quintessentially operates under the rationale of the maintenance and preservation of social order.[88]

Moreover, to the extent that the pursuit of global order through justice was exercised solely under the authority of the victorious powers in the 1940s and Security Council in the 1990s, the Rome Statute diffuses this

judges and penalties". See also Tomuschat, 1996, p. 42, see *supra* note 66: "Penal law is one of the remedies suitable to ensure effective compliance with the law, and should be at the disposal of the international community for the purpose of deterrence and retribution".

86 See, for example, ICTY, *Prosecutor v. Tadić*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, para. 72, see *supra* note 38: "In adopting resolution 827, the Security Council established the International Tribunal with the stated purpose of bringing to justice persons responsible for serious violations of international humanitarian law in the former Yugoslavia, thereby deterring future violations and contributing to the re-establishment of peace and security in the region"; ICTY, *Prosecutor v. Delalić et al.*, Trial Chamber, Judgment, 16 November 1998, No. IT-96-21-T, para. 405 (https://www.legal-tools.org/doc/d09556/), referring to the "objective of maintaining a balance between the preservation of justice and fairness towards the accused and taking into account the preservation of world order"; *Nikolić*, Decision on Interlocutory Appeal Concerning Legality of Arrest, para. 25, see *supra* note 59: "Universally condemned offences are a matter of concern to the international community as a whole. There is a legitimate expectation that those accused of these crimes will be brought to justice swiftly. Accountability for these crimes is a necessary condition for the achievement of international justice, which plays a critical role in the reconciliation and rebuilding based on the rule of law of countries and societies torn apart by international and internecine conflicts"; Joint Concurring Opinion of Judges Eboe-Osuji, Morrison, Hofmański and Bossa, para. 54, see *supra* note 56: "The ICC exercises its jurisdiction in no other circumstance than on behalf of the international community– represented under the Rome Statute or the UN Charter as the case may be–for the purpose of the maintenance of international peace and security according to the rule of international law.".

87 Report of the International Law Commission on its work on its forty-sixth session, 2 May-22 July 1994, UN Doc. A/49/10, 2 September 1994, paras. 65–66 and commentary on "Action by the Security Council", draft Article 23, p. 84 (http://www.legal-tools.org/doc/f73459/); Report of the Ad Hoc Committee on the Establishment of an International Criminal Court, paras. 120–26, see *supra* note 77.

88 Article 8*bis*, ICC Statute, see *supra* note 8.

function, given the possibility for State Party referrals and *proprio motu* action under the rationale of upholding shared community interests.[89]

This approach is consistent with the designation of such crimes of exception gravity as posing a threat to peaceful co-existence as such.[90] In line with the dicta of the International Court of Justice in *Barcelona Traction*[91] and the approach of the ILC in Article 48 of its Draft Articles on State Responsibility,[92] all States have a legal interest in invoking responsibility and ensuring compliance with the obligations arising from the universal proscription of such crimes.[93]

At the institutional level then, among the goals criminal courts are intended to perform are certain community values related to the restoration and maintenance of social order. In the case of the ICC, by addressing the most serious crimes of international concern, the Court is intended to contribute towards general deterrence; and by holding specific individuals to account, the judicial process aims to avert the collective attribution of blame to entire groups, thereby fostering capacities towards reconcilia-

89 On community interests, see, generally, Bruno Simma, "From Bilateralism to Community Interests in International Law", in The Hague Academy of International Law, *Recueil des cours*, 1994, vol. 250, p. 217.

90 Preamble, ICC Statute, para. 3, see *supra* note 8.

91 ICJ, *Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain) (New Application: 1962)*, Second Phase, Judgment, 5 February 1970, paras. 33–34 (http://www.legal-tools.org/doc/75e8c5/).

92 ILC, *Draft Articles on Responsibility of States for Internationally Wrongful Acts*, November 2001, Supplement No. 10 (A/56/10), chp.IV.E.1, pp. 33, 110-112, 116 and 126-128 (http://www.legal-tools.org/doc/10e324). Under Article 48 of the Draft Articles, entitlement to invoke the responsibility of another State arises where the obligation breached "is owed to a group of States including that State, and is established for the protection of a collective interest of the group" or "is owed to the international community as a whole".

93 See ICJ, *Advisory Opinion Concerning Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, 28 May 1951, p. 12 (http://www.legal-tools.org/doc/52868f/): "In such a convention the contracting States do not have any interests of their own; they merely have, one and all, a common interest, namely, the accomplishment of those high purposes which are the *raison d'être* of the convention. Consequently, in a convention of this type one cannot speak of individual advantages or disadvantages to States, or of the maintenance of a perfect contractual balance between rights and duties. The high ideals which inspired the Convention provide, by virtue of the common will of the parties, the foundation and measure of all its provisions". See, similarly, *Furundžija* Trial Judgment, para. 151, see *supra* note 38; *Kupreškić* Trial Judgment, para. 519, see *supra* note 79; *Bashir* Jordan Appeal, para. 123, see *supra* note 48.

tion.[94] Even if the application of such norms cannot be expected by itself to bring about social order, its re-imposition and restoration, particularly after the chaos and upheaval unleashed by periods of destructive mayhem, can serve important psychological effects: in bringing about a recovery of normalcy and in the restoration of social values directed at the vilification, and not glorification, of violence. Traumatic experiences, particularly where shared across large segments of society, can destabilise peoples' basic beliefs about the world (as a reasonably predictable and safe place) and damage their worldview. The reestablishment of the ordered schemata of society in this context can function as a cornerstone for recovery from trauma.[95]

Conversely, it may be questioned whether the foisting of such weighty societal objectives on an international court is in fact appropriate or feasible.[96] The mantra of deterrence through threat of criminal prosecution might serve as substitute, rather than supplement, for intervention, serving to assuage the shame of political inertia to stop the carnage.[97] The

[94] See discussion in Payam Akhavan, "Beyond Impunity: Can International Criminal Justice Prevent Future Atrocities?", in *American Journal of International Law*, 2001, vol. 95, no. 1, pp. 7–31; Diane Orentlicher, *Some Kind of Justice: The ICTY's Impact in Bosnia and Serbia*, Oxford University Press, 2018, pp. 103-107. Cf. Mégret, 2015, p. 90, see *supra* note 73: "the choice of indictees is always seen as […] reflecting some distributive allocation of blame between different national or sub-national groups"; Mirjan Damaška, "Reflections on Fairness in International Criminal Justice", in *Journal of International Criminal Justice*, 2012, vol. 10, no. 3, pp. 619–20: "pure individual responsibility is often intimately intertwined with its collective counterpart […] judgments of international criminal courts can effectively adjudicate the responsibility of a state".

[95] Dinka Corkalo Biruški, Dean Ajduković and Ajana Löw Stanić, "When the world collapses: Changed worldview and social reconstruction in a traumatized community", in *European Journal of Psychotraumatology*, 2014, vol. 5, p. 5.

[96] See Mirjan Damaška, "What is the Point of International Criminal Justice?", in *Chicago-Kent Law Review*, 2008, vol. 83, no. 1, p. 331, observing "objectives related to peace and security – such as stopping an ongoing conflict – that are far removed from the normal concerns of national criminal justice". See also George P. Fletcher and Jens David Ohlin, "The ICC – Two Courts in One?", in *Journal of International Criminal Justice*, 2006, vol. 4, no. 3, pp. 428–33, questioning the conceptual operational linkage between the political role of the UN Security Council and the criminal justice functions of the ICC. More generally on the debate whether the worthiness of the ICL project is based more on faith than on facts, see Carsten Stahn, "Between 'Faith' and 'Facts': By What Standards Should We Assess International Criminal Justice?", in *Leiden Journal of International Law*, 2012, vol. 25, no. 2, pp. 251–82.

[97] See, similarly, Sarah M.H. Nouwen, "Justifying Justice", in Crawford and Koskenniemi (eds.), 2012, p. 343, see *supra* note 7: "For the Security Council, international criminal tribunals are instruments of therapeutic governance, providing an acceptable compromise be-

impact of international courts on ongoing crimes, in this context, might represent little more than subtle psychological dissuasion – through the distant (and uncertain) prospect of future apprehension – rather than the more concrete risks of swift arrest, severe punishment, and the disruption of criminal activities. More generally, it might be held that the criminal law process, when applied to the indescribably complex social malaise that underlies mass societal violence, itself masks social reality, by privatising responsibility through the lens of individual guilt while avoiding larger background questions concerning overall systemic inequalities and absolving collective agency.[98] Or such avowedly consequentialist goals to restore social order might expose the criminal process for its ambivalence towards the risk that it might descend into a show trial, staged to advance certain historical, political and pedagogic objectives.[99] Or international law might be admitted to serve a functional role in facilitating the pursuit of State interests, but may be said to be marginal to larger questions of global order where national interest is directly affected or to moments of great political crisis.[100]

If we accept that maintaining and restoring social order does represent one of the primary *intended* purposes for creating the Court, the inability of the ICC to exercise its jurisdiction with respect to all such crimes committed anywhere throughout the world, due to the limitations of its treaty-based jurisdiction or its resulting reliance on UN Security Council

tween despicable apathy and authorisation of military interventions that UN members are unwilling or unable to carry out: if not peace, then justice".

98 Tallgren, 2002, p. 594, see *supra* note 16; Osiel, 2005, p. 1812, see *supra* note 16; Drumbl, 2007, pp. 39–41 and 197–204, see *supra* note 16; Kennedy, 2002a, pp. 109–10, see *supra* note 42; Kennedy, 2002b, p. 25, see *supra* note 42.

99 Arendt, 1965, see *supra* note 36; Martti Koskenniemi, "Beyond Impunity and Show Trials", in *Max Plank Yearbook of United Nations Law*, 2002, vol. 6, pp. 1–35.

100 Morgenthau, Thompson, 1985, pp. 112-113, see *supra* note 31: "The great majority of the rules of international law are generally observed by all nations without actual compulsion, for it is generally in the interest of all nations concerned to honor their obligations under international law […] The problem of enforcement becomes acute, however, in that minority of important and generally spectacular cases […] in which compliance with international law and its enforcement have a direct bearing upon the relative power of the nations concerned. In those cases […] considerations of power rather than of law determine compliance and enforcement". See also Gerry Simpson, "International law in diplomatic history", in Crawford and Koskenniemi, 2012, pp. 25–26 and 43–44, see *supra* note 7, framing the relationship of international law to the practice of international diplomacy around a set of images, including one that scrutinises the idea of international law as a body of principles that might appear virtuous yet marginal.

referrals, would also tend to suggest that international peace and security may be negatively impacted by the absence of accountability. Such inconsistency has the further potential to undermine the legitimacy of international criminal courts and to support arguments based on perceived or actual selectivity, instrumentalisation, and structural bias – tending towards disunity, whether directed at the ICC itself or other enabling actors.[101] As Drumbl observes, "the expressive value of law and punishment is weakened by selectivity and indeterminacy in the operationalization of law and punishment, as well as the political contingency of the entire enterprise".[102]

These questions arise routinely at the 'situation' level (*where* and in respect of *when* an investigation is opened) and at the 'case' stage (*who* is investigated or prosecuted for *what*). But if we are looking to identify the overall social function the ICC is designed to serve, linked to the concept of 'unity' as a rationale for social order is the scope of the Court's jurisdiction and the potential this has, relative to its comprehensiveness, to either uphold certain universally protected values, or to lead instead to fragmentary and incoherent responses that tend to undermine the relevance of international criminal justice to global order.

9.5. 'Unity' as an Organising Principle for Enforcement

How can an international criminal court be effective? The last theme of the chapter questions how the ICC, bereft of policing powers, is supposed to function. At the community level, the imprimatur of 'unity' is evident in the framework required for the enforcement of the Court's warrants and orders. As is well known, under Part 9 of the ICC Statute, the entire apparatus of co-operation necessary to give effect to coercive measures is delegated back to States, who undertake to act on the Court's behalf. Without the concerted co-operation from States for such essential processes as the arrest of alleged perpetrators, the preservation of evidence, the execution of confiscatory orders, the protection of vulnerable witnesses, or the enforce-

[101] See, for example, UN Secretary-General, "Honouring Geneva Conventions, Secretary-General Says Debate 'No Longer between Peace and Justice but between Peace and What Kind of Justice'", 26 September 2009, SG/SM/12494-L/T/4417-HR/5002, stating: "there remain serious challenges in pursuing accountability. Some situations which, by any objective analysis, would have warranted some form of action by the Security Council, have faced serious obstacles or languished entirely. This has eroded the Council's credibility. There is a need to address this problem, and to bring some consistency to the effort".

[102] Mark A. Drumbl, "Collective Violence and Individual Punishment: The Criminality of Mass Atrocity", in *Northwestern University Law Review*, 2005, vol. 99, no. 2, p. 593.

ment of sentences, the entire judiciary machinery of the ICC will grind to a halt. So vital is this responsibility to the Court's functions and powers that failure to perform it carries the risk of a judicial ruling of non-compliance and an invocation of that State's international responsibility.

However, this accountability scheme can only work if the international community, represented in the first instance by the Assembly of States Parties or the UN Security Council, acts to give effect to the rulings of the Court. Much like the preventative principle expressed under the threat of united reprisal action under collective security arrangements, the system is predicated on the successful operation of a covenant of undertakings between the individual State and the collective. In this way, under a scheme of shared responsibilities, States are intended to "guarantee lasting respect for and the enforcement of international justice".[103]

Practice, nonetheless, indicates that States do not always uphold the decisions of the Court: co-operation, irrespective of its overall trend, is not automatic, consistent, nor predictable.[104] This has been particularly so in cases involving incumbent senior government officials or powerful non-State actors. In a number of such cases, suspects have been allowed to evade capture,[105] while physical and testimonial evidence has been lost, interfered with or destroyed.[106] Even if States co-operate on some request

[103] Preamble, ICC Statute, para. 11, see *supra* note 8. 'Unity' as a principle for enforcement of international criminal justice can also be thought of in view of the overarching 'system-wide' goal of the Statute: to establish a complementary relationship between national authorities, who retain their primary responsibilities, and the ICC, in order to combat these crimes. This relationship is reciprocal, since without national authorities, the ICC will be unable to act; but also conversely, without the catalytic presence of the ICC, it is less likely that national authorities will act. As such, the ICC Statute acts as both a criminal procedural code for the institution itself and a compliance-inducing mechanism for States more generally.

[104] See, generally, Rod Rastan, "Can the ICC function without State compliance?", in Margaret M. deGuzman and Valerie Oosterveld (eds.), *The Elgar Companion to the International Criminal Court*, Edward Elgar, 2020, pp. 147-179.

[105] See, for example, *Bashir* South Africa Decision, see *supra* note 48; Decision on the non-compliance by Libya with requests for co-operation by the Court and referring the matter to the United Nations Security Council, 2014, see *supra* note 49.

[106] See, for example, ICC, Situation in the Central African Republic, *Prosecutor v. Bemba et al*., Trial Chamber, Judgment pursuant to Article 74 of the Statute, 19 October 2016, ICC-01/05-01/13-1989-Red (http://www.legal-tools.org/doc/fe0ce4/); ICC, Situation in the Republic of Kenya, *Prosecutor v. Ruto and Sang*, Trial Chamber, Decision on Prosecution Request for Admission of Prior Recorded Testimony, 19 August 2015, ICC-01/09-01/11-1938-Corr-Red2, para. 60 (http://www.legal-tools.org/doc/d18042/); ICC, Situation in the Republic of Kenya, *Prosecutor v. Ruto and Sang*, Trial Chamber, Decision on Defence Applications for

but not others, such irregularity can critically undermine the effectiveness of the Court's work and the viability of its cases.[107] To date, despite numerous notification of non-compliance to the ASP and UN Security Council where a State's failure to co-operate has prevented the Court from exercising its functions and powers, no remedial action has been taken by the collective community of States.[108] Clearly, without unified and collective remedies invoking State responsibility, the collective design will fail.[109] As Damaška observes, "international criminal courts […] lack inherent enforcement powers but must process crimes of unusual complexity, and still aspire to realize goals more ambitious than their powerful national counterparts. The predictable consequence of this state of affairs is the likelihood of discrepancies between promise and achievement".[110]

The disparity between norms and their enforcement in practice is a recurrent theme in international law.[111] In the absence of an international enforcement agent, the decisions of international courts must be implemented indirectly by States, who serve as the proximate source of compliance. States may comply on a voluntary basis or may otherwise be induced or coerced to do so by third States. But because decisions on these choices

Judgments of Acquittal, Reasons of Judge Fremr, 5 April 2016, ICC-01/09-01/11-2027-Red-Corr, paras. 147–48 (http://www.legal-tools.org/doc/6baecd/); Reasons of Judge Eboe-Osuji, paras. 2 and 8; Dissenting Opinion of Judge Herrera Carbuccia, ICC-01/09-01/11-2027-AnxI, para. 30 (http://www.legal-tools.org/doc/2bc8b5/).

107 ICC, Situation in the Republic of Kenya, *Prosecutor v. Kenyatta*, Trial Chamber, Decision on the Prosecution's revised co-operation request, 29 July 2014, ICC-01/09-02/11-937, para. 47 (http://www.legal-tools.org/doc/9e7a87/); ICC, Situation in the Republic of Kenya, *Prosecutor v. Kenyatta*, Trial Chamber, Second decision on Prosecution's application for a finding of non-compliance under Article 87(7) of the Statute, 19 September 2016, ICC-01/09-02/11-1037, paras. 16–22 (http://www.legal-tools.org/doc/2f2e43/).

108 For discussion, see Göran Sluiter, "Enforcing Cooperation: Did the Drafters Approach it the Wrong Way?", in *Journal of International Criminal Justice*, 2018, vol. 16, no. 2, pp. 383–402.

109 See Rastan, 2020, pp. 156-157 and 172-175, see *supra* note 104.

110 Mirjan Damaška, "The International Criminal Court Between Aspiration and Achievement", in *UCLA Journal of International Law and Foreign Affairs*, 2009, vol. 14, p. 19.

111 As Berman notes: "It seems to many that the problem is not to discover what the law is, or how to apply it to the particular case, or even whether the existing rule is "satisfactory" or not, but rather how to secure or compel compliance with the law at all. It may be that we have now passed from a great phase of law-making to a period where the focus is not on new substantive law but on how to make existing law effective"; Frank Berman, "Preface", Hazel Fox and Michael A. Meyer (eds.), *Armed Conflict and the New Law Volume II: Effecting Compliance*, British Institute of International and Comparative Law, London, 1993, p. xii.

are guided by numerous policy considerations, amongst which legality is but one element, the notion of impartial and routine observance of international law has encountered deep resistance.[112]

The inability of any system to effect regular compliance with its rules raises questions of fundamental importance for judicial institutions. If a court cannot guarantee the enforcement of its decisions, the nature and relevance of the law it applies is brought into doubt.[113] In the field of the law of armed conflict, this mismatch between norms and enforcement has been exacerbated historically by the absence of robust compliance demands on convention members. Traditional formulations governing the conduct of hostilities under Hague and Geneva laws, for example, were drafted under the premise of auto-enforcement via the national laws of signatories. This subjected international regulation to the modalities, interpretation, reservations and effective discretion of each State. Moreover, relevant rules were often formulated in such generalised terms (such as 'proportionality' or 'reasonableness') that in practice they allowed wide scope for interpretation by those same entities whose operations they aimed to control.[114] Indeed, the exclusion of a serious external sanctioning mechanism was arguably a prerequisite for the adoption of these instruments. Thus, although agreements such as the 1949 Geneva Conventions enjoy almost universal

[112] Bruce Broomhall, *International Justice and the International Criminal Court: Between Sovereignty and the Rule of Law*, Oxford University Press, 2003, p. 60; Rod Rastan, "The Responsibility to Enforce: Connecting Justice with Unity", in Carsten Stahn and Göran Sluiter (eds.), *The Emerging Practice of the International Criminal Court*, Martinus Nijhoff Publishers, 2008, pp. 165-169.

[113] For well-known iterations of this theme, see Thomas Hobbes, *Leviathan*, Basil Blackwell, Oxford, 1960 (1651), pp. 112–13 and 172–76; John Austin, *The Province of Jurisprudence Determined*, John Murry, London, 1832, p. 201; Hans Kelsen, *Principles of Public International Law* (1952), pp. 417–18; H.L.A. Hart, *The Concept of Law*, 2nd edition, Oxford University Press, 1994, p. 214; George F. Kennan, *American Diplomacy 1900-1950*, University of Chicago Press, 1985, pp. 95–103. Cf. Ambos, 2013, pp. 300–04, see *supra* note 37, positing the validity of (international legal) norms based on the material (normative or moral) foundation of their claim of being obligatory, more than on their enforceability by State-like apparatus.

[114] Koskenniemi, 2012, p. 49, see *supra* note 7; André Nollkaemper, "Inside or Out: Two Types of International Legal Pluralism", in Jan Klabbers and Touko Piiparinen (eds.), *Normative Pluralism and International Law: Exploring Global Governance*, Cambridge University Press, 2013, pp. 109-115; Richard Collins and Alexandra Bohm, "International Law as Professional Practice: Crafting the Autonomy of International Law", in Jean d'Aspremont, Tarcisio Gazzini, André Nollkaemper and Wouter Werner (eds.), *International Law as a Profession*, 2017, pp. 71-78.

adherence, the record bears out a culture of impunity where investigations and prosecutions, with rare and selective exceptions, simply have not occurred.[115]

Negotiating a Statute for a permanent international criminal court with the authority to effectively hold national authorities accountable for their failings was supposed to alter these assumptions by shifting the paradigm from self-scrutiny to supranational accountability. However, while the Court may render binding decisions and invoke an obligation to cooperate where it has jurisdiction, the failure of relevant States to enforce its decisions or to give them proper effect (for example, by remedial action consequent to a notification of non-compliance) undermines the cogency of the system and risks a return to a modified variant of traditional self-regulation.

In the present context, it might be said that the normative assumptions underpinning the ICC Statute have not been matched by the required maturity in attendant compliance mechanisms. Instead, a gap has formed between the norms of internationally criminal conduct and their enforcement apparatus. Or it may be said that the ICC sits as an island of substantive 'unity' within an ocean of decentralized enforcement structures.[116] This lacuna creates both normative and structural ambiguities: the Court is supranational in authority, yet subnational in its operability since it relies on State co-operation. Thus, as described above, the implementation of international justice remains dependant on the irregular system of national support (including through international organisations) for all its essential enforcement processes. Compliance can of course be influenced by a variety of agents including transnational actors, governmental authorities, national legislative bodies, administrative compliance procedures, and issue linkages.[117]Clearly, such processes, if properly aligned, can have significant ca-

[115] See, generally, Timothy L.H. McCormack and Gerry J. Simpson (eds.), *The Laws of War Crimes: National and International Approaches*, Kluwer Law International, 1997.

[116] The author would like to thank Claus Kreß for this expression.

[117] See, generally, Jana von Stein, "The Engines of Compliance", in Jeffery Dunoff and Mark Pollack (eds.), *Interdisciplinary Perspectives on International Law and International Relations: The State of the Art*, Cambridge University Press, 2012, pp. 477–501. See also Maja Groff and Sylvia Karlsson-Vinkhuyzen, "The Rule of Law and Accountability: Exploring Trajectories for Democratizing Governance of Global Public Goods and Global Commons", in Samuel Cogolati and Jan Wouters (eds.), *The Commons and a New Global Governance*, Edward Elgar Publishing, 2018, recalling, in the context of the rule of law and the domestication of international norms generally, the relevance of democratic governance principles

pacity to inform and alter behaviour of national decision-making bodies.[118] However, it cannot be said that the compliance regime established by the Rome Statute has fundamentally altered existing frameworks; it instead refers itself back to them.

The problem of State compliance is, fundamentally, a problem of 'unity'. The assumption of such a responsibility requires unity of thought as to the norm that is to be protected.[119] In this instance, international consensus appears to have coalesced around the most basic norms of humanity governing the prevention and repression of atrocities crimes. As explored in Sections 9.3. and 9.4. above, awareness of this fundamental 'unity' might suggest that among the broad community interests protected by the Rome Statute are humanity's essential oneness and upholding global social order. To give effect to those values, however, unity of action is also required. This means that States must so align their national interest with the collective interests of humanity that they would stand ready to take action to uphold shared community values. Conversely, a prevalence of disunity will result in irregularity, unpredictability and the disordering of the overall scheme.[120] In particular, where a recalcitrant State is able to avoid its obligations to ensure compliance with shared community interests, by exploiting divisions within the international community or by bypassing measures aimed at bringing pressure to bear, the collective response will be fatally undermined.

Understood in this way, 'unity' becomes not just a core principle for the enforcement of the Court's mandate, but arguably the organising principle upon which the entire machinery of international co-operation and enforcement depends – for without unified collective support in ensuring

which posit that citizens should have a reasonable expectation that laws duly adopted or promulgated are enforced and carry with them the promise of effective access to justice.

118 In the context of the ICC, see, for example, efforts by non-State actors, working through domestic judicial and legislative processes, to seek national enforcement of ICC warrants or to challenge the constitutionality of domestic executive action; on the *Bashir* case, South Africa Supreme Court of Appeal, *Minister of justice and Constitutional Development and Others v. Southern African Litigation Centre and Others*, Judgment, 15 March 2016, [2016] ZASCA 17 (http://www.legal-tools.org/doc/d4b22b/); Republic of Kenya Court of Appeal, *Attorney General and Others v. Kenya Section of the International Commission of Jurists*, Judgment, 16 February 2018, (2018) JELR 105981 (CA) (http://www.legal-tools.org/doc/vwgz31/).

119 Rastan, 2008, p. 171, see *supra* note 112.

120 Kiser Barnes, paper delivered at the Conference on Law, De Poort, the Netherlands, 14–17 December 2006, cited *ibid.*

compliance, the Court cannot fulfil its mandate. Conversely, disunity among States towards the enforcement of international criminal justice will tend to undermine the cogency of the entire project. So central is this theme that it formed the sole reason why Emil Sandström, the ILC's other Rapporteur in 1950, in answer to the same question first posed by the UN General Assembly in 1948 concerning "the desirability and possibility of establishing an international criminal jurisdiction", argued in the negative (contrary to Alfaro), citing the lack of an adequate and stable enforcement apparatus:

> If, at last, we consider the possibilities of bringing the accused before the Court, provided that it be competent, and of executing the judgements, it must be admitted that there exists no international organization whatsoever for this purpose. In the event of a State refusing to appear before the Court, or to bring before it persons being in its territory, or to execute a judgement, there are no means, in the actual organization of the international community, to have this done […] No organization does exist to enforce an appearance before the Court or the execution of its judgements, and it seems difficult to establish such an organization. The jurisdiction therefore is likely to be limited and brought into action in a haphazard way. There are great risks that culprits will not always be brought before the Court. On the whole this will give the impression that the jurisdiction is being exercised in an arbitrary way. Its deterring effect will thus be very doubtful, if any.[121]

The poignancy of Sandström's prognosis rings loudly in our ears 70 years later. It may be a damning but fair assessment to say that the prevention and effective repression of genocide, crimes against humanity, war crimes and aggression, while universally acclaimed at the level of principle,[122] has not yet reached an acceptable level of priority to warrant signifi-

[121] Report on the Question of International Criminal Jurisdiction by Emil Sandström, Special Rapporteur, UN Doc. A/CN.4/20, 30 March 1950, para. 34 (http://www.legal-tools.org/doc/63c610/). See also Tomuschat, 1996, p. 63, see *supra* note 66 (referring to the draft ILC Code of Crimes): "A Code of Crimes against the Peace and Security of Mankind in the form of a treaty which is supported by some groups of States and resisted by others would constitute a contradiction in and of itself. Such a Code can neither be adopted nor enforced by majority decisions. It needs endorsement by the international community as a whole.".

[122] See, for example, Statement by the President of the Security Council, UN Doc. S/PRST/2004/34, 6 October 2004 (http://www.legal-tools.org/doc/7626d6/); Security Council Resolution 1674 (2006), UN Doc. S/RES/1674 (2006), 28 April 2006 (http://www.legal-tools.org/doc/4bf3cc/).

cant policy re-alignment in political, military and economic spheres. And although issue-linkage between peace and justice has in rare moments of collective unanimity successfully informed compliance-inducing efforts in certain specific contexts,[123] as a general rule the willingness of the international community to seek the enforcement of judicial decisions has tended to fall back on the discrete decisions of individual States to transform such principles into practical policy priorities. As such, it may still be accurate to say that support for the Court will remain both unpredictable and subject to competing priorities, depending on the convergence of a number of policy considerations for each State.[124] By contrast, if the non-compliance procedure is to genuinely influence State behaviour, the support for justice must be matched by concerted, consistent and unified action by the international community in assuming its responsibility to enforce.[125] Understood in this sense, 'unity' arguably more than any other principle becomes the pivot, the organising principle, for "guaranteeing lasting respect for and the enforcement of international justice".[126]

9.6. Disunity

It might seem odd to engage in a discussion on 'unity' in relation to international criminal adjudication. As the practice, rather than the mere idea, of international criminal justice shows, the work of such institutions can be deeply divisive. Wide-ranging debates over their legitimacy,[127] their politi-

[123] See, for example, Rastan, 2008, pp. 165–69, see *supra* note 112, discussing policy linkages between ICTY co-operation by States of the former Yugoslavia and their participation in the European Union's Stabilisation and Association Process and NATO's Partnership for Peace programme, or for the lifting of economic sanctions and the rendering of multilateral and bilateral assistance, by the World Bank or the United States to induce or coerce compliance by States of the former Yugoslavia.

[124] *Ibid*., p. 169.

[125] *Ibid*., pp. 181–82.

[126] Preamble, ICC Statute, para. 11, see *supra* note 8.

[127] Erik Voeten, "Public Opinion and the Legitimacy of International Courts", in *Theoretical Inquiries in Law*, 2013, vol. 14, no. 2, pp. 411–36; Yvonne M. Dutton, "Bridging the Legitimacy Divide: The International Criminal Court's Domestic Perception Challenge", in *Columbia Journal of Transnational Law*, 2017, vol. 56, no. 1, pp. 71–122; Sergey Vasiliev, "The Crises and Critiques of International Criminal Justice", in Kevin Jon Heller, Jens Ohlin, Sarah Nouwen, Frederic Mégret and Darryl Robinson (eds.), *The Oxford Handbook of International Criminal Law*, Oxford University Press, 2020, pp. 626-651; DeGuzman, 2020, see *supra* note 38.

cisation,[128] their selectivity;[129] on their impact on prevention,[130] on peace and security,[131] on domestic proceedings or on alternative conceptions of justice;[132] their costs;[133] internal contestation over their adjudicative function;[134] and a seemingly endless series of controversies,[135] attest to the discordant debate engendered by the work of such courts and tribunals.

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[128] Koskenniemi, 2002, see *supra* note 99; Kennedy, 2002a, see *supra* note 42; Sarah M.H. Nouwen and Wouter G. Werner, "Doing Justice to the Political: The International Criminal Court in Uganda and Sudan", in *European Journal of International Law*, 2011, vol. 22, no. 4, pp. 1161–1164; Nouwen, 2012, pp. 327–51, see *supra* note 97.

[129] Allison Marston Danner, "Enhancing the Legitimacy and Accountability of Prosecutorial Discretion at the International Criminal Court", in *American Journal of International Law*, 2003, vol. 97, no. 3, pp. 510–52; William A. Schabas, "Victor's Justice: Selecting 'Situations' at the International Criminal Court", in *John Marshall Law Review*, 2010, vol. 43, no. 3, pp. 535–52; Asad Kiyani, "Third World Approaches to International Criminal Law", in *AJIL Unbound*, 2015, vol. 109, pp. 255-259.

[130] Tallgren, 2002, see *supra* note 16; David S. Koller, "The Faith of the International Criminal Lawyer", in *New York University Journal of International Law and Politics*, 2008, vol. 40, no. 4, pp. 1027–29; Hyeran Jo and Beth A. Simmons, "Can the International Criminal Court Deter Atrocity?", in *International Organization*, 2016, vol. 70, no. 3, pp. 443–75; Linda Carter and Jennifer Schense (eds.), *Two Steps Forward, One Step Back: The Deterrent Effect of International Criminal Tribunals*, Torkel Opsahl Academic EPublisher, Brussels, 2017 (http://www.toaep.org/nas-pdf/1-carter-schense).

[131] Payam Akhavan, "Are International Criminal Tribunals a Disincentive to Peace?: Reconciling Judicial Romanticism with Political Realism", in *Human Rights Quarterly*, 2009, vol. 31, no. 3, pp. 624–54; Kathryn Sikkink and Hun Joon Kim, "The Justice Cascade: The Origins and Effectiveness of Prosecutions of Human Rights Violations", in *Annual Review of Law and Social Science*, 2013, vol. 9, pp. 269–85; Leslie Vinjamuri, "The International Criminal Court and the Politics of Peace and Justice", in Carsten Stahn (ed.), *The Law and Practice of the International Criminal Court*, Oxford University Press, 2015, pp. 13–29.

[132] Sarah M.H. Nouwen and Wouter G. Werner, "Monopolizing Global Justice: International Criminal Law as Challenge to Human Diversity", in *Journal of International Criminal Justice*, 2015, vol. 13, no. 1, pp. 157–76; Carsten Stahn, "Justice Civilisatrice?", in Christian De Vos, Sara Kendall and Carsten Stahn (eds.), *Contested Justice: The Politics and Practice of International Criminal Court Interventions*, Cambridge University Press, 2015, pp. 46-84; Kevin Jon Heller, "Radical Complementarity", in *Journal of International Criminal Justice*, 2016, vol. 14, no. 3, p. 637; Phil Clark, *Distant Justice: The Impact of the International Criminal Court on African Politics*, Cambridge University Press, 2018.

[133] David Wippman, "The Costs of International Justice", in *American Journal of International Law*, 2006, vol. 100, no. 4, pp. 861–80; Stuart Ford, "What Investigative Resources Does the International Criminal Court Need to Succeed?: A Gravity-Based Approach", in *Washington University Global Studies Law Review*, 2017, vol. 16, no. 1, pp. 1–70.

[134] ICC, Situation in the Central African Republic, *Prosecutor v. Jean-Pierre Bemba Gombo*, Appeals Chamber, Judgment on the appeal of Mr Jean-Pierre Bemba Gombo against Trial Chamber III's "Judgment pursuant to Article 74 of the Statute", 8 June 2018, ICC-01/05-01/08-3636-Red (http://www.legal-tools.org/doc/40d35b/); Dissenting Opinion of Judge

This diversity of opinion and free-flowing debate, indicative of inclusive critical discourse, is of course a precondition for a concept of 'unity' that opposes hegemony and uniformity, and is instead based on the demands of a just (and therefore unprejudiced) inquiry. It also reflects the nascent and exceptional nature of the law's application in this arena, leading to highly inconsistent results relative to the scale of the overall phenomena of atrocity crimes. And it mirrors the deeply volatile contexts in which such courts are called to operate, either during or directly after the most traumatic periods of social upheaval. But our inability to agree on why the ICC was created, what social function it serves, and how it can be effective has an impact on the effectiveness of the regime. As described above, the inconsistent or disorderly application of legal norms to stem the worst excesses of violent human agency can weaken the law's legitimacy and its functions.[136]

What does this mean for the three themes of this chapter (examining the rationales for the creation, purpose and operation of the ICC)? At the *individual level*, rejection of the concept of humanity's oneness and the duty that attends the idea of trusteeship diminishes our empathy for or obligation towards others, who are separated from us by abstractions of territory or nationality and the random effects of proximity; at worst, it tends towards cynicism and apathy ("these things happen, over there, they have nothing to do with us").[137] *Institutionally*, the absence of accountability, engendering a culture of impunity, can precipitate renewed cycles of violence, reinforcing patterns of behaviour that legitimatise violence as a means to power. And at the level of the *international community*, disagreement over whether international criminal courts contribute to a rules-based order, or inhibit it, stultifies the enforcement of judicial decisions.

Sanji Mmasenono Monageng and Judge Piotr Hofmański, ICC-01/05-01/08-3636-Anx1-Red (http://www.legal-tools.org/doc/dc2518/); Separate Opinion of Judge Van den Wyngaert and Judge Morrison, ICC-01/05-01/08-3636-Anx2 (http://www.legal-tools.org/doc/c13ef4/); Concurring Separate Opinion of Judge Eboe-Osuji, ICC-01/05-01/08-3636-Anx3 (http://www.legal-tools.org/doc/b31f6b/).

135 Darryl Robinson, "Inescapable Dyads: Why the International Criminal Court Cannot Win", in *Leiden Journal of International Law*, 2015, vol. 28, no. 2, pp. 323–47.

136 See above Section 9.4. See also Kreß, 2019, pp. 20-25, see *supra* note 56, calling for a coherent theory of international criminal justice.

137 On the centrality of empathy to the task of pursuing justice, see Akhavan, 2017, pp. 191–92 and 197, see *supra* note 31. See also Richard Rorty, *Contingency, Irony, and Solidarity*, Cambridge University Press, 1989, pp. 189-198.

Interest-based theories of State behaviour might describe this as an inevitable result of the amoral condition of international society, necessitating non-engagement and non-confrontation; of balancing off perceived evils against one another and by negating the possibility for value judgements, removing the moral imperative to act or intervene. Veteran Bosnian war journalist Ed Vulliamy, writing in the year the Rome Statute was adopted, aptly describes this neutrality as a form of appeasement:

> 'Appeasement' is a pejorative and historically tendentious term but it seems a good enough word to describe three years of diplomat-to-diplomat barter between the leaders of the democratic West and Radovan Karadžić – now a fugitive wanted for war crimes – beneath the chandeliers of London, Geneva and New York; or the matey soldier-to-soldier dinners of lamb and suckling pig shared by successive United Nations generals with their opposite number, General Mladić – likewise fugitive and wanted – whose death squads perpetrated the Srebrenica massacre, on his personal orders and in his presence. After so much handshaking and negotiation while these two men were very publicly engaged in their foul pogrom, it is curious to see the international establishment baying for their capture, now that it is too late and their work is done.[138]

Part of the reason why international criminal justice is not seen to work in the way criminal law is supposed to function at the domestic level is due to fundamental disagreements over concepts, such as our conception of international society and the values it seeks to uphold. If we hold to the logic of the inter-State system, efforts in the field of international criminal law will forever be spasmodic and uncertain, and Sandström's scepticism will continue to ring true. International criminal justice will offer viability in routine cases with minimal political volatility, but will be unable to function effectively or will be severely hampered when confronting the interest of powerful actors, who can either leverage the international system to create disunity or seek to undermine the legitimacy of the legal norm itself or the institution that seeks to assert it. And when so much is disagreed upon,

[138] Ed Vulliamy, "Bosnia: The Crime of Appeasement", in *International Affairs*, 1998, vol. 74, no. 1, p. 75.

the pursuit of justice itself may be seen as a disruptive force, a harbinger of disunity in world affairs.[139]

Even where the rationale of humanity's underlying oneness is given expression, differences may persist over who is represented by humanity or how to prioritise competing values in humanity's name.[140] War crimes prosecutions, in particular, occupy a crowded and complex space alongside parallel humanitarian, security and political interests, whose disparate objectives may lend themselves to instrumentalisation precisely to prevent issue-linkage, leading to poorly integrated results lacking overall coherence.[141]

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[139] See, for example, Stephen D. Krasner, "Realist Views of International Law", in *Proceedings of the ASIL Annual Meeting*, 2002, vol. 96, commenting on p. 268: "realists of all types agree that the traditional view of international law held by many lawyers not only ignores or obfuscates power and interests but can be destabilizing and counterproductive. It is naive to expect that a stable international order can be erected on normative principles embodied in international law. Well-intentioned efforts to institutionalize structures like the ICC can increase disorder and violence". See also Brad Roth, *Sovereign Equality and Moral Disagreement: Premises of a Pluralist International Legal Order*, Oxford University Press, 2011, observing on p. 284: "There is an inherent tension between the spirit of international criminal justice, which cannot abide impunity, and the present international law of peace and security, which effectively demands that impunity be abided in the absence of an extraordinary political consensus […] The post-World War II order, as constructively amended in the era of decolonization, established the priority of peace and respectful cooperation among judicially equal states; the ethos was one of ideological pluralism and forbearance, qualified only by a Security Council mechanism requiring an extraordinary cross-cutting consensus. That the system leaves unredressed all but the most extraordinary injustices occurring within state boundaries is not an aberrant consequence; the system, mindful that great-power predation has typically flown the flag of righteousness, prioritizes the impeding of impositions"; Allott, 2002, pp. 62–69, see *supra* note 19.

[140] Koskenniemi, 2012, p. 59, see *supra* note 7: "To engage in it [international law] is not to be part of some world-wide effort to construct a harmonious system of rules but to take part in controversies about how to prioritise matters of international concern […] International law does not contain a ready-made blueprint for a better world that could only be 'applied' so as to bring about peace and justice. Instead, it contains arguments and positions, precedents and principles that may be employed to express contrasting interests or values in a relatively organised way"; David Kennedy, *A World of Struggle: How Power, Law, and Expertise Shape Global Political Economy*, Princeton University Press, 2018, p. 269: "International law is a set of arguments and counter-arguments, rhetorical performances and counter-performances, deployed by people pursuing projects of various kinds"; Focarelli, 2012, pp. 456–61, see *supra* note 42.

[141] See, similarly, Yuval Shany, *Assessing the Effectiveness of International Courts*, Oxford University Press, 2014, pp. 20–22, on the problem of goal ambiguity, observing: "fact patterns that lead to the creation of international courts (for example, wars or complex econom-

Arguably, our inability to have a coherent view on the role of international criminal justice on the global scene reflects our fragmented approach towards the world around us, partly fed by the highly specialised and technical tendencies of the discipline. This can contribute towards paralysis in world undertakings. Hans Kelsen, writing in 1928 during the inter-war period, described the:

> contradictions of an international legal theory which in an almost tragic conflict aspires to the height of a universal legal community erected above the individual states but, at the same time, remains a captive of the sphere of power of the sovereign state.[142]

A generation later his student, Hersch Lauterpacht, observed:

> The disunity of the modern world is a fact; but so, in a truer sense, is its unity. This essential and manifold solidarity, coupled with the necessity of securing the rule of law and the elimination of war, constitutes a harmony of interests which has a basis more real and tangible than the illusions of the sentimentalists or the hypocrisy of those satisfied with the existing *status quo*.[143]

More recently, in commenting on the impasse confronting the contemporary European discourse around integration, Jürgen Habermas has contrasted a perspective of national autonomy rooted in the nineteenth century with the requirements of international constitutionalism (the regulation of political power through a hierarchically structured legal order), observing:

> The enduring *political* fragmentation in the world […] is in contradiction with the *systemic* integration of a multicultural

ic relationships), may involve a large number of constituencies and are thus less amenable to political consensus regarding specific goal formulations among the goal-setters".

142 Hans Kelsen, *Das Problem der Souveränität und die Theorie des Völkerrechts: Beitrag zu einer Reinen Rechtslehre*, 2nd edition, Mohr, Tübingen, 1928, p. 320, cited with English translation in Bardo Fassbender, "The Meaning of International Constitutional Law", in Nicholas Tsagourias (ed.), *Transnational Constitutionalism: International and European Perspectives*, Cambridge University Press, 2007, p. 307. See similarly, Hans Kelsen, "Les rapports de système entre le droit interne et le droit international public", in The Hague Academy of International Law, *Recueil des Cours*, 1926, vol. 14, pp. 325–26.

143 Hersch Lauterpacht, "The Reality of the Law of Nations", in Hersch Lauterpacht (ed.), *International Law Being the Collected Papers of Hersch Lauterpacht: Volume 2: The Law of Peace, Part 1: International Law in General*, Cambridge University Press, 2009, p. 26.

> world society and is blocking progress in the process of legally civilizing violence between states and societies.[144]

Theoretical physicist David Bohm argues that part of the reason for our fragmentary self-world view comes from our functional tendency to divide-up complex problems into manageable proportions. The problem arises when we confuse how we think about things as explanatory of how things objectively are in the world.[145] This can lead to a perception that the real world is itself broken up into fragmentary, disparate and irreconcilable parts – and this distorted perception can in turn foster confusion and interfere with our clarity of thought about reality itself:

> [F]ragmentation is continually being brought about by the almost universal habit of taking the content of our thought for 'a description of the world as it is'. Or we could say that, in this habit, our thought is regarded as in direct correspondence with objective reality. Since our thought is pervaded with differences and distinctions, it follows that such a habit leads us to look on these as real divisions, so that the world is then seen and experienced as actually broken up into fragments […]. This confusion is of crucial significance, since it leads us to approach nature, society, and the individual in terms of more or less fixed and limited forms of thought, and thus, apparent-

[144] Jürgen Habermas, "The Crisis of the European Union in the Light of a Constitutionalization of International Law", in *European Journal of International Law*, 2012, vol. 23, no. 2, p. 337. On international constitutionalism, see, generally, Erika De Wet, 2006, see *supra* note 3; Anne Peters, "Compensatory Constitutionalism: The Function and Potential of Fundamental International Norms and Structures", in *Leiden Journal of International Law*, 2006, vol. 19, no. 3, pp. 579–610; Fassbender, 2007, see *supra* note 142; Wouters, 2007, pp. 329–67, see *supra* note 3. See also Collins and Bohm 2017, p. 77, see *supra* note 114, observing that the structure of the international system and its various transnational regimes, and the tug and pull of autonomy and dependence of international institutions from their member states, currently prevents any one actor from assuming overall authority such as could bring coherence and co-ordination to disparate institutional practices.

[145] Bohm, 1980, p. 3, see *supra* note 16: "In essence, the process of division is a way of *thinking about things* that is convenient and useful mainly in the domain of practical, technical and functional activities (e.g., to divide up an area of land into different fields where various crops are to be grown). However, when this mode of thought is applied more broadly to man's notion of himself and the whole world in which he lives (that is, to his self-world view), then man ceases to regard the resulting divisions as merely useful or convenient and begins to see and experience himself and his world as actually constituted of separately existent fragments".

> ly, to keep on confirming the limitations of these forms of thought in experience.[146]

A fragmented conception of social existence set against universal proclamations of 'unity' in countless international instruments suggests humanity is struggling with contradictory identities. It yearns for a world that is just, but appears to uncritically accept its unattainability, as attested by the common experience of humanity. International law itself reflects these conflicting tendencies. Evidently, values associated with 'unity' cannot be simply superimposed onto structures of thought premised on very different patterns of interaction.[147] Just as with ideas unpinning older forms of social organisation, it may be that the demands of the contemporary world call for revisiting our baseline assumptions, the ways we organise our thinking, and the ways we act them out. Scholars in other fields refer to this as the process of examining those interpretive frameworks "that shape our perceptions, interpretation and representations of reality; mentally organize our experience; and provide normative guides for our actions".[148] And if the goal is to alter social reality, arguably this can only meaningfully be realised through cultural change, brought about by genuine and broad based participation in the formation and shaping of our contemporary discourses involving the generality of humankind.[149]

In this context, Allott argues that the challenge is not to merely reorganise the co-existence of states, but of "placing the idea of a universal human society at the apex of the self-understanding of the human spe-

[146] *Ibid*, pp. 5-8, continuing at pp. 8-9: "[…] some might say: 'Fragmentation of cities, religions, political systems, conflict in the form of wars, general violence, fratricide, etc., are the reality. Wholeness is only an ideal, toward which we should perhaps strive.' But this is not what is being said here. Rather, what should be said is that wholeness is what is real, and that fragmentation is the response of this whole to man's action, guided by illusory perception, which is shaped by fragmentary thought. In other words, it is just because reality is whole that man, with his fragmentary approach, will inevitably be answered with a correspondingly fragmentary response". See also Surabhi Sharma, Chapter 8 of this volume, Section 8.4.3. Cf. Nakhjavani and Mirzaagha, see *supra* note 2, on the equally problematic opposing tendency to gloss over the complexities of social reality.

[147] See *supra* note 73 and accompanying text.

[148] Karlberg (2012), see *supra* note 32, pp. 17-18, referring to the works of Gregory Bateson, *Steps to an Ecology of Mind*, Chandler Publishing, San Francisco, 1972, and Erving Goffman, *Frame Analysis: An Essay on the Organization of Experience*, Harvard, 1974.

[149] See *supra* notes 13-14 and accompanying text concerning public discourse around slavery. Compare the manifold evolving, multidimensional contemporary discourses on climate change, the pandemic, the impact of war and conflict, or the effects of deep-seated economic and social injustices.

cies".[150] This he argues requires altering our self-perception, since a distorted perception of social reality as ineluctable leads to fatalism about our capacity to bring about social change, resulting not only in social paralysis, but an abdication of responsibility:

> False fatalism is defeatism. It has deep negative effects on the whole of human self-consciousness. It is *disempowering*. It suggests that we are not able to cause the forces of self-perfecting to overcome the forces of self-harming. It may even suggest that our conscious efforts are as likely to make things worse as to make them better. It is *discouraging*, justifying our surrender in the face of the actual state of the human world, even though we know perfectly well that the actual state was not, and is not, the only possible state of the human world. It is *self-deceiving*, claiming that there is something called human nature, and human nature has always been as it is, and is not likely to be any different in the future. It is *stupefying*, undervaluing and undermining the great capacities of the human mind to imagine and to realise the possible, constantly defying the brutal reality of the actual.[151]

Roberto Unger has similarly written of the illusions of 'false necessity' which arise from mistaking present society for 'possible humanity', and from the acceptance of the ideas and attitudes that make the established order seem natural, necessary or authoritative.[152] Failure to recognise the debilitating effects of this 'hallucination' results in what he characterises as

[150] Allott, 2016, p. 313, see *supra* note 19. Compare Kant's fifth proposition: "The greatest problem for the human species, the solution of which nature compels him to seek, is that of attaining a civil society which can administer justice universally", *Idea for a Universal History with a Cosmopolitan Aim*, in Immanuel Kant, *Political Writings*, Hans Reiss ed., Cambridge University Press, 1991, p. 45. See also Bartelson, 2009, see *supra* note 43, p. 3: "we appear to be stuck with an inescapable tension between particularistic and universalistic accounts of human association"; going on to observe (p. 9): "redefining the concept of community so that it becomes possible to make coherent sense of the idea of world community necessitates a wholesale change in the way we understand political identity. We need a theory of identity that makes it possible to regard the universal and the particular as mutually implicating rather than fundamentally opposed – a theory of identity that also makes it possible to regard human beings and the communities that they inhabit as embedded in a more comprehensive human community than that commonly exemplified by the nation".

[151] Allott, 2016, p. 4, see *supra* note 19. See also Allot's discussion of 'physic atrophy', *ibid.*, p. 309.

[152] Roberto Unger, *False necessity: Anti-necessitarian social theory in the service of radical democracy*, Verso, London, 2001, p. xx.

"the central difficulty in our understanding of ourselves and of society", which is to map out the scope of transformative possibilities:

> So long as we lack a credible view of discontinuous structural change – of how we can and do remake the institutional and discursive orders we inhabit – we find ourselves driven back to a surrogate standard of realism in the evaluation of proposals for the reform of society. A proposal will seem realistic if it remains close to what exists, and utopian if it is distant from what exists. As a result, every proposal will be made to appear either trivial or utopian. This false rhetorical dilemma is the consequence of our lack of a believable account of how, piece by piece and step by step, we can and do reorganize society. […] The solution is to wage the campaign against false necessity through many forms of thought […] to combat the domestication of criticism and disrupt the alliance between skepticism and resignation, and to show how particular strategems of intellectual subversion can fit together into a different way of thinking.[153]

As discussed above, constructing a social reality in which the inherent oneness of humanity is consciously pursued is challenged foremost by certain habits of thought, including an unwavering belief in the incorrigible selfishness of human beings and in the impermeability of institutional and relational arrangements. This can lead to cynicism, despondency and despair over our ability to do anything about what we see as wrong in the world. This suggests that as important as being clear about the many injustices in the world is recognising the psychological barriers that guarantee their persistence – and which might, in turn, limit our ability to have a clear-sighted sense of what may be possible and the agency that we can exercise.

Arguably, it is this disconnect between our ideas about the world and the values and interests that international law is designed to serve that causes our fragmentary world system. This does not necessarily mean that actors in the inter-State system, when they fail to uphold a cherished legal norm, do not subscribe to the inherent dignity of every human being. The

[153] *Ibid*., pp. xx and xxii. See also the notion of 'false consciousness', as developed by Engels, Gramsci, Marcuse and others, based on the internalisation or active acceptance of a dominant ideology or on resignation to the unchanging inevitability of the social order; for discussion, see Steven Lukes, *Power: A Radical View*, 3rd edition, Macmillan, 2021, pp. 129-156.

issues risk being trivialised when norm defectors are portrayed as villains. Even accounting for the obvious influence of political opportunism, what is also at play is competition over norm allegiance: recalling the theme of fragmentation in a different context, other values, such as pragmatic (national) self-interest or principles of sovereign equality, non-intervention and friendly relations, are given precedence; or there is a contestation over normative hierarchies and the scope for their resolution.[154] Phrased differently, we might say that there is rupture in the conceptual frameworks we use to understand and interpret social relations and social phenomena. For example, as shown by events such as recurrent refugee-migrant crises throughout the world, while on a human level sympathy or even indignation might be felt universally for the plight of others, there is disagreement on how this sentiment of common bonds should be translated into action, and by whom.[155] In the case of international criminal justice, it is this lack

[154] In the context of the Bashir warrants, for example, the issue was formulated by South Africa and Jordan as a conflict between the customary international law norm of sovereign equality, which remains applicable towards a non-Party State such as the Sudan and whose observation would require the Court not to proceed with its co-operation request pursuant to Article 98 of the Statute, as contrasted with those treaty obligations voluntarily consented to by States Parties, including acceptance to be bound by the terms of Article 27 of the Statute and the extent to which this might modify the application of Article 98 inter-parties; ICC, Situation in Darfur, Sudan, *Prosecutor v. Al Bashir*, Submission from the Government of the Republic of South Africa for the purposes of proceedings under Article 87(7) of the Rome Statute, 17 March 2017, ICC-02/05-01/09-290, paras. 54–74 (http://www.legal-tools.org/doc/2854f0/); ICC, Situation in Darfur, Sudan, *Prosecutor v. Al Bashir*, The Hashemite Kingdom of Jordan's appeal against the "Decision under article 87(7) of the Rome Statute on the non-compliance by Jordan with the request by the Court for the arrest and surrender [of] Omar Al-Bashir", 12 March 2018, ICC-02/05-01/09-326, para. 20 (http://www.legal-tools.org/doc/826788/).

[155] As Seyla Benhabib observes, "[o]ur fate, as late-modern individuals, is to live caught in the permanent tug of war between the vision of the universal and the attachments of the particular"; *The Rights of Others: Aliens, Residents and Citizens*, Cambridge University Press, 2004, p. 16. On norm contestation, see, generally, Andreas Fischer-Lescano and Gunther Teubner, "Regime-Collisions: The Vain Search for Legal Unity in the Fragmentation of Global Law", in *Michigan Journal of International Law*, 2004, vol. 25, no. 4, pp. 1004-1009 (on the plurality of "society-wide institutionalized rationalities" engendered by different transnational legal regimes which each "claim a global validity for themselves"); David Kennedy, 2007, p. 657, see *supra* note 45: "There is no one 'international community.' The phrase refers to the particular elite who are the audience for the global media. We must recognize the idea that they share a 'consensus' view of global political or ethical matters – or that their views condense the attitudes of humanity – as a fantasy. It may often be a desirable fantasy, and we may often want to encourage it, but it is a fantasy. And it can be a dangerous fantasy. It can encourage us to think there is, in fact, an 'international community' ready to back up pronouncements made in its name"; Martti Koskenniemi, "The Fate of Public Inter-

of unity in thought and action in world undertakings that instils doubt as to *why a permanent international criminal court was created*, *what social function it serves*, and *whether it can be effective*.

In this context, a measure of perspective may also be warranted relative to the ICC's lofty goals. As Adam Roberts reminds us, we should be careful that international courts and tribunals are not drowned under the weight of exaggerated expectations, given that they "are only likely to have a minor impact on vast problems, and are not necessarily the most important mechanism even for the limited objective of securing implementation of the laws of war".[156] And if international criminal justice is part of a

national Law: Between Technique and Politics", in *Modern Law Review*, 2007, vol. 70, no. 1, p. 19, on the lack of consensus on what values or norms should be accorded priority over others and who should decide; Prost, 2012, p. 188, see *supra* note 2, on the difficulties on conceiving of an axiological 'super-determination' of certain norms by others, noting even "*jus cogens* is made up of universal humanitarian values (human rights, prohibition of torture and slavery, war crimes) *as well as* individual state values (non-intervention, sovereign immunities, prohibition of the use of force), and these axiological orders or 'layers' often clash or contradict each other"; Jan Klabbers, "Law, Ethics and Global Governance: Accountability in Perspective", in *New Zealand Journal of Public and International Law*, 2013, vol. 11, no. 2, p. 316: "in the fragmented global order […] which rule is to be applied is also a matter of how an issue is framed: many issues can be approached from radically different angels, leading to the possible application of radically different rules"; MacIntyre, 2014, pp. 9-13, see *supra* note 21, on the interminability of much contemporary moral debate arising from the "conceptual incommensurability" of rival arguments based on their radically differing premises and normative assumptions. On reframing contemporary social discourses in an effort to move beyond modes of thought that perpetuate social conflict and injustice, see Karlberg (2012), see *supra* note 32, rejecting two dominant interpretive frames prevalent in the discourses of society – the 'social command' frame (conceptualized as a legacy of patriarchal or authoritarian social relations) and the 'social contest' frame (where society is understood as a competitive arena in which self-maximizing individuals or groups pursue divergent interests in a world characterized by scarce resources and opportunities) – and instead proposing a 'social body' frame, based on the logic of interdependence, where the well-being of every individual or group depends upon the well-being of the entire social body. As Karlberg observes, at p. 24: "collective well-being cannot be achieved through oppressive power hierarchies. Nor can it be achieved by structuring virtually every social institution as a contest of power. Rather, collective well-being can only be achieved by maximizing the possibilities for every individual to realize their creative potential to contribute to the common good within empowering institutional structures that foster and canalize human capacities in this way".

[156] Adam Roberts, "The Laws of War: Problems of Implementation in Contemporary Conflicts", in *Duke Journal of Comparative & International Law*, 1995, vol. 6, no. 1, p. 73. See also Damaška, 2008, p. 365, see *supra* note 96, in discussing the overabundance of goals that are claimed by and overburden international courts, cautions against "[d]isillusionment stemming from unfulfilled expectations", observing "[a]n overly ambitious, or otherwise inappropriate, selection of goals generates disparities between declaration and achievement, and

wider normative enterprise to transform our modes of thinking and action for want of a better world, to overcome our unease at our coinciding perceptions of moral indignation and moral incoherence, we must also recall, as the editors of this volume caution, the limitations of the law.[157] A compartmentalised preoccupation with legal rules and processes will likely fail to tap into the mainsprings of human motivation that are more appropriately served by philosophy, morality and belief.[158] As Allott observes, "a legal system cannot be better than the social consciousness that it enacts".[159]

uncertainty about their relative importance produces disorientation"; Payam Akhavan, "The Rise, and Fall, and Rise, of International Criminal Justice", in *Journal of International Criminal Justice*, 2013, vol. 11, no. 3, p. 529, on the "projection of exaggerated normative fantasies on to this seeming panacea".

157 Morten Bergsmo and Emiliano J. Buis, "Editors' Preface", in Morten Bergsmo, Emiliano J. Buis and SONG Tianying (eds.), *Philosophical Foundations of International Criminal Law: Legally-Protected Interests*. See also Koskenniemi, 2007, p. 30, see *supra* note 155, on the invocation of international law in the public imagination "as a kind of secular faith […] as a placeholder for the vocabularies of justice and goodness, solidarity, responsibility and faith", observing that "the tradition of international law has often acted as a carrier of what is perhaps best described as the regulative idea of universal community, independent of particular interests or desires".

158 See, for example, Allott, 2016, pp. 248-253 and similarly at p. 267, see *supra* note 19, identifying four constitutive forces that historically have had the power to bind society: *religion*, *philosophy*, *ideology* and *human psychology*; acknowledging their potential to be used and abused by holders of public power, but insisting on the necessity for fostering their inherent benefits while minimising their formidable costs. See also David Kennedy, "The Mystery of Global Governance", in *Ohio Northern University Law Review*, 2008, vol. 34, no. 3, p. 851: "our efforts to comprehend global governance have focused far too much on the authority of agents we can see to act within structures we understand. We have paid too little attention to the myriad ways power flows through the capillaries of social life, perhaps particularly at the global level […] many are flows of belief, modes of knowledge, of affiliation and disaffiliation, the social movement of wills to power, the desire to submit, the experience of triumph and victimization, pride and shame". See also Unger, p. xxv, see *supra* note 148, on the need for both "practical and spiritual action to reproduce, refine, reform or replace the institutional arrangements and enacted beliefs that shape the routines of a society"; going on (pp. 572 *et seq*.) to discuss the need for "a social vision" and "the ideal of personality and the psychologic dynamic that correspond to this collective ideal and help inspire and justify it".

159 Allott, 2002, p. 313, see *supra* note 19, further remarking: "If the role of philosophy in human self-surpassing and self-perfecting is not restored […] then the development of the international legal system is condemned to be an impoverished product of an impoverished human consciousness". See also *ibid*., at p. 83: "From the spiritual mind, energised by the idea of the ideal, come our most passionate moral feelings – of anger (for example, in the face of injustice or oppression), of hope (for example, for freedom and self-fulfilment), of joy (for example, in the face of the good and the beautiful) – feelings capable of inspiring limitless self-surpassing and self-sacrifice"; and at pp. 312–14: "Politics in the most socially

While such motivational consciousness cannot cause international criminal courts to stray outside the logic of their legal frameworks, it can play an important role at the level of public discourse, where our ideas about criminal justice are formed, by considering what it means, for example, to "guarantee lasting respect for and enforcement of international justice".[160] And if the patterned way we think and talk about international justice, our views and assumptions, influence social practices – even as social practices shape our discourses – this might remind us of the relationship between how we think about social phenomena and how we act.[161] To the extent this dialectical process shapes, and can reshape, our perceptions, attitudes and behaviours, it brings into focus the relevance of ideas and of attitudinal changes in steering the exercise of public power towards imple-

developed national systems has recently degenerated into an impoverished debate within narrow dialectical limits, focused particularly on the manipulation of mass-opinion […] Corrupted social consciousness fills the private minds of human beings everywhere with low values generated as systematic by-products of social systems which will soon be, if they are not already, beyond the redeeming power of higher values […] The meaning and measure of human progress are difficult to establish. A fair general judgement might be that material progress has not been matched by spiritual progress […] [we must find] within ourselves another capacity, the capacity to form the idea of the ideal – the ideal of a better human future which we can choose to make the actual". Recalling the tradition of 'Bildung' developed by the German Lutheran Pietist movement that went on to influence late eighteenth- and nineteenth-century German philosophy, the 'constitutional mindset' and 'constitutional vocabulary' Koskenniemi describes is similarly framed in terms of a programme of moral, spiritual and political regeneration: "The Pietist search for self-improvement, *Bildung*, and spiritual perfection prepares a constitutionalist mindset from which to judge the world in a manner that aims for universality, impartiality, and all the virtues of the 'inner morality of law': honesty, fairness, concern for others, the prohibition of deceit, injury, and coercion"; going on to observe: "The virtue of constitutionalism in the international world follows from a similar universalizing focus, allowing extreme inequality in the world to be not only shown but also condemned. This inequality may be explained by historical causes and described in economic or sociological terms. But something like a constitutional vocabulary is needed to articulate it as a scandal insofar as it violates the equal dignity and autonomy of human beings"; Koskenniemi, 2007, p. 33, see *supra* note 36. See also Kelsen, 1926, pp. 325–26, see *supra* note 142, on the need for a revolution in social consciousness to surpass the contradictions inherent in the fluctuating demands of an individualistic conception of state sovereignty and a universalist conception of humanity and a universal legal order.

160 Preamble, ICC Statute. See, for example, Stahn, 2012, pp. 279–80, see *supra* note 96, on the 'expressive function' of international criminal courts, observing that "their strength and virtue may lie in their ability to 'send messages', shape debates and discourse, and influence the generation and perception of norms"; Carsten Stahn, *Justice as Message: Expressivist Foundations of International Criminal Justice*, Oxford University Press, 2020, p. 11.

161 See, for example, Karlberg (2012), see *supra* note 32.

mentation of cherished norms.[162] At the same time, without internalisation, behavioural change is unlikely to follow. As observed by 'Abdu'l-Bahá 'Abbás in his 1875 treatise on the impact of modernity on Iran (in discussing the efficacy of wide-ranging institutional and rule of law reforms): "any agency whatever, though it be the instrument of mankind's greatest good, is capable of misuse. Its proper use or abuse depends on the varying degrees of enlightenment, capacity, faith, honesty, devotion and high-mindedness of the leaders of public opinion".[163] This suggests that the gap between norms and practice may be as much dependent on the values underpinning individual, institutional and community relations as it is on laws.[164] And at the level of ideation, in challenging the cynicism that arises from disillusionment over whether it is really possible to change the situation in the world or whether any of us can make a difference, the correlation of the concepts of 'unity' and 'justice' might cause us to reflect upon, and assume responsibility for envisaging, what the implications of the oneness of humanity might mean for how we organise the structures of society.

[162] MacIntyre, 2014, pp. 211- 236, see *supra* note 21; Klabbers, 2013, see *supra* note 155; Allott, 1990, p. 48, see *supra* note 20, on the centrality of the values in our consciousness to transform ideas into action, in the sense that values provide "a ground for choosing between possibilities". See also Groff and Karlsson-Vinkhuyzen, 2018, see *supra* note 117.

[163] 'Abdu'l-Bahá 'Abbás, *The Secret of Divine Civilization*, Marzieh Gail (trans.), Bahá'í Publishing Trust, 1990 (1875), p. 16. See also pp. 64–66, calling for a global collective security arrangement based on the conclusion of an all-embracing international pact, based on clear territorial delimitation, the codification of principles governing inter-state relations, the identification of international agreements and obligations, and maintenance of mechanisms for arms control.

[164] See, for example, Morten Bergsmo and Viviane E. Dittrich, "Integrity as Safeguard Against the Vicissitudes of International Justice Institutions", in Morten Bergsmo and Viviane E. Dittrich (eds.), *Integrity in International Justice*, Torkel Opsahl Academic EPublisher, Brussels, 2020, pp. 38-43, discussing the need for an "individual will to integrity" to embed a culture of integrity (http://www.toaep.org/nas-pdf/5-dittrich-heinze).

INDEX

A

Abdu'l-Bahá 'Abbás
  The Secret of Divine Civilization, 368
Abu Yazid al-Bistami, 312
Advaita Vedanta, 284, 302
  humanity, 285, 290
  karma, 285, 290
African Charter of Human and People's Rights, 273
  Article 28, 257, 275
African independence movement, 265
African Union, 231
  Constitutive Act, 232
  ICC, relations with, 281
African Union Convention on Preventing and Combating Corruption, 232
Al Hussein, Zeid Ra'ad, 166
Al Mahdi, Ahmad Al Faqi, 239
Albrow, Martin, 253
Alfaro, Ricardo J., 340, 353
Allais, Lucia, 240
Allott, Philip, 54, 237, 242, 320, 361, 366
  The Health of Nations, Society and Law Beyond the State, 237
Ambos, Kai, 23, 27, 43, 88, 90, 135, 247
Anastasopoulou, Ioanna N., 27, 41, 117, 286
Anderson, Benedict R.O., 53
Annan, Kofi
  Interventions, A Life in War and Peace, 199
Antarctic Treaty, 185
Arendt, Hannah, 229
  Eichmann in Jerusalem, A Report on the Banality of Evil, 91
  The Jew as Pariah, Jewish Identity and Politics in the Modern Age, 227
  The Origins of Totalitarianism, 149
Aristotle, 40
  Nicomachean Ethics, 39
Arnaudeau, Eugène, 61
Asian-African Legal Consultative Organization, ii
Asser Institute, 194
Ataturk, Mustapha Kemal, 158
ātman, 295
Australia
  High Court, *Mabo v. Queensland (No. 2)*, 161

B

Baldwin, James, 262
Baragwanath, David, 41, 139, 225
Barak, Aharon, 218
Bartelson, Jens, 329
Bassiouni, M. Cherif, 308
Bauman, Richard, 49
Bell, Richard, 265
Bellot, Hugh, 76
Bentham, Jeremy, 176, 218
Benvenisti, Eyal, 28, 52
Bergsmo, Morten, ii, 1, 43, 134, 140, 222, 242, 258, 368
Bhagavad Gita, 284, 290
Bianchi, Andrea
  International Law Theories An Inquiry into Different Ways of Thinking, 251
Biehl, Amy, 182
Biehl, Linda, 183
Biehl, Peter, 183
Binding, Karl, 118, 258
Bingham, Tom, 161
Birnbaum, Franz, 118
Birnbaum, Johann, 11, 258
Bluntschli, Jean-Gaspard, 61
Bobde, Sharad A., 312
Bohm, David
  Wholeness and the Implicate Order, 360
Boister, Neil, 206
Bothe, Michael, 228
Bower, Adam, 256
Brecke, Peter
  War and Reconciliation, Reason and Emotion in Conflict Resolution, 170
Brooks, Gwendolyn, 263
Brownlie, Ian, 280
Buis, Emiliano J., ii, 1

C

Cançado Trindade, Antônio, 53
Cançado Trindade, Antônio A., 197, 254
Canivet, Guy, 213
Cannizzaro, Enzo, 53
Cassese, Antonio, 128, 193, 226, 237
  International Law in a Divided World, 226
  Realizing Utopia, 234
Centre for International Law Research and Policy, ii, 1, 140
Chbosky, Stephen, 263
Cicero, 39
civil law, 258
Clark, Janine Natalia
  International Trials and Reconciliation, Assessing the Impact of the International Criminal Tribunal for the Former Yugoslavia, 162
Clemenceau, George, 77
common law, 81, 186, 212, 258
communitarianism, 269, 277
  African Charter of Human and People's Rights, 273, 275
  neo-communitarianism, 275
  Singapore, 271
concordia, 37, 38
constructivism, 321
Control Council Law No. 10, 102
Convention (X) for the Adaptation to Maritime Warfare of the Principles of the Geneva Convention, 62
Convention Against Torture, 165
Convention for the Adaptation to Maritime Warfare of the Principles of the Geneva Convention, 63
Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 60, 62, 63
  Additional Protocol I, 65
  Additional Protocol II, 65
Convention on Certain Conventional Weapons
  Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices, 66
Convention on Cluster Munitions, 66
Convention on Laundering, Search, Seizure and Confiscation of the Proceeds of Crime, 231
Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction, 66
Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction, 66
Convention on the Protection of Cultural Property, 66
  Second Protocol, 66
Convention on the Protection of the Environment through Criminal Law, 231
Convention on the Rights of the Child, 75
Convention relative to the Treatment of Prisoners of War, 62, 63, 71
Convention respecting the Laws and Customs of War on Land, 63
Cooke, Robin, 161
Corstens, Geert, 141
cosmopolitanism, 33, 35, 36, 47
Council of Europe, 231
  Statute, 231
Covenant of the League of Nations
  Preamble, 17
Cranston, Maurice, 227
crimes against humanity
  definition, 98, 103, 104, 108, 111
  definition (humanity), 89, 94, 96, 115
  ECCC, 111, 113
  gravity, 92
  ICC, 109
  ICTR, 103, 113
  ICTY, 103, 107, 108, 113
  IMT (Nuremberg), 86, 90, 91, 113
  inhumanity, 91
  origins, 86, 90, 98, 99, 101, 102
  punishment, 91
  SCSL, 111, 113
  State, relation with, 22, 97, 104, 110, 114
  universality. *See* international criminal law, universality
  widespread or systematic attack, 104
Criminal Law Convention on Corruption, 231
Cryer, Robert, 226
Cynicism, 33

D

Damaška, Mirjan, 349
de Greiff, Pablo, 164, 184
de Lapradelle, Albert, 77
de Vattel, Emer, 53
de Vattel, Emmerich, 214

de Waal, Frans, 172
Del Ponte, Carla, 236
Diogenes, 33
Dittrich, Viviane E., 368
Dolenc, Pavel, 189
Donnelly, Jack, 248
Draft Articles on State Responsibility (ILC), 341, 344
Draft Code of Offences Against the Peace and Security of Mankind, 341
Drumbl, Mark A., 347
Duff, R.A.
Philosophical Foundations of Criminal Law, 143
Dumas, Jacques, 77
Durkheim, Émile, 234

E

ECCC Law
Article 5, 111
Eliot, Thomas S.
The Waste Land, 236
Emecheta, Buchi, 270
Eser, Albin, 242
European Convention on the Non-Applicability of Statutory Limitation to Crimes against Humanity and War Crimes, 231
European Convention on the Suppression of Terrorism, 231
European Union
Brexit, 170
Extraordinary Chambers in the Courts of Cambodia, 236
establishment, 75, 192
jurisdiction, 250
Prosecutor v. Kaing, 192
Prosecutor v. Kaing Guek Eav, 111

F

Feichtner, Isabel, 8
Foucault, Paul-Michel, 214
Discipline and Punish, 235
fragmentation, 31, 235, 360
Frankfurter Schule, 123
Freisler, Roland, 218

G

Gandhi, Mahatma, 142, 304
Garner, James, 78
Garrard, Eve, 95
genocide. *See* also under legal interests (international criminal law)
crimes against humanity, vis à vis, 90, 104, 113
origins, 97
Geras, Norman, 89, 95
Germany
Bundesverfassungsgericht (Constitutional Court), 126
globalization, 33, 50, 252, 257, 260, 262
Goldstone, Richard J., 211
Green, Stuart
Philosophical Foundations of Criminal Law, 143
Greenwood, Christopher, 145
Grotius, 254, 257
De jure belli ac pacis, 186
The Introduction to Dutch Jurisprudence, 155
Grotius Centre for International Legal Studies, ii
Guru Gobind Singh, 159, 162

H

Habermas, Jürgen, 7, 29, 359
harmony (he, 和), 37
Harris, Donald
The Concept of Possession in English Law, 176
Hart, H.L.A., 176, 277
Hiéramente, Mayeul, 27
Hitler, Adolf, 174
Hobbes, Thoas
The Elements of Law, 153
Holocaust, 97
Homer
The Iliad, 151
homonoia, 38
Honoré, Tony, 162
Hörnle, Tatjana
Theories of Criminalization, 11
Hoskins, Zachary, 261
humanitas, 21, 49

I

ICC Statute
Preamble, 16, 37, 45, 82, 95, 109, 129, 229, 287, 307, 323, 324, 325, 341
Article 6, 261, 293
Article 7, 109, 110, 113, 114, 261, 293
Article 8, 74, 75, 228, 239, 261
Article 8 *bis*, 19, 20, 243
Article 13, 331
Article 27, 331
Article 75, 308, 309
Article 79, 308
Article 86, 331
Article 87, 331
Part 9, 347
travaux préparatoires, 196
ICJ Statute
Article 38, 216
Article 38(1), 58
ICTR, 59
ICTR Statute
Article 3, 103
Article 4, 73, 75
ICTY, 59
ICTY Statute
Article 2, 72
Article 3, 72, 74
Article 5, 103
IMT (Nuremberg) Charter
Article 6, 71, 72, 85, 96, 98, 112
India, 311
Constitution, 141
Supreme Court, 140, 150
Supreme Court, *Dev Sharan v. State of Uttar Pradesh*, 150
Supreme Court, *Justice K.S. Puttaswamy (Retd.) and Another v. Union of India and Others*, 312
Supreme Court, *Kesavananda Bharati v. State of Kerala*, 160
Indian Society of International Law, ii
individualism, 269, 272, 274, 362
Integrity in International Justice, 368
International Committee of the Red Cross, 60, 229
Amnesties and International Humanitarian Law, Purpose and Scope, 173
International Convention for the Prevention and Punishment of Terrorism, 208
International Convention for the Suppression of the Financing of Terrorism, 165
International Court of Justice
Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo, 145
Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia), 197
Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain) (New Application 1962), 344
Belgium v. Senegal, 165
Democratic Republic of the Congo v. Uganda, 17
Ukraine v. Russian Federation, 165
International Criminal Court
African States, relations with, 281
Al Bashir case, 80
Assembly of States Parties, 333, 349
co-operation, 347, 348, 351
deterrence, 344
establishment, 2, 323, 341
jurisdiction, 176, 332, 337, 341
legal interests, 323, *See* also legal interests (international criminal law)
Legal Tools Database, 243
Prosecutor v. Al Mahdi, 204, 239, 242, 310
Prosecutor v. Katanga, 200, 310
Prosecutor v. Lubanga, 205, 310
Prosecutor v. Ruto and Sang, 230
referral (State Party), 343
referrals (UN Security Council), 346
reparative justice, 307, 310
Situation in Kenya, 109
Situation in the DRC, 230
States Parties, 16
Trust Fund for Victims, 205, 308
United Nations, relations with, 243, 330, 349
victims, role of, 307
international criminal law, 249
amnesty, 173, 180, 181, 192
collective crimes, 133
cost, 354
criminalization, 10, 13, 25, 37, 41, 48
critical discourse, 2
dignity, 21, 23
enforcement, 2, 41, 43, 58, 62, 66, 316, 349, 354
environment, 2, 9, 48, 130, 138, 206, 209, 211
fair trial rights, 220
guilty pleas, 242
human solidarity. *See* also solidarity

impact, 262, 354
integrity, 2, 216, 368
ius puniendi (international community), 7, 333
legitimacy, 6, 12, 354
mitigating circumstances, 241
national jurisdictions, 2, 12, 24, 58, 59, 78, 86, 132, 218, 287, 350, 354
Nuremberg Principles, 72
politicization, 354
power dynamics, 328
proportionality, 214
public international law, relation with, 249
quality control, 2, 49
reconciliation, 49, 139, 146, 159, 163, 164, 174, 185, 206, 209, 212, 220
reparative justice, 242, 306, 308
sovereignty, 6, 45, 97, 244, 250, 256, 288, 334, *See* also crimes against humanity, State, relation with
States, relation with, 6, 50, 137
terrorism, 165, 206, 208, 211
transitional justice, 164, 184, 191, 211, *See* also reconciliation
universality, 7, 10, 48, 79, 104, 110, 114, 249, 254, 257, 270, 328, 337
victims, role of, 242, 307
von Hagenbach trial, 14
International Criminal Tribunal for Rwanda
establishment, 72
jurisdiction, 250
Prosecutor v. Kayishema, 190
Prosecutor v. Ndindabahizi, 203
Prosecutor v. Ntagerura et al., 190
Prosecutor v. Rugambarara, 189
International Criminal Tribunal for the former Yugoslavia
establishment, 72, 187
jurisdiction, 250
Outreach Programme, 177
Prosecutor v. Blagojević and Jokić, 203
Prosecutor v. Brđanin, 187, 335
Prosecutor v. Erdemović, 188
Prosecutor v. Karadžić, 187
Prosecutor v. Milošević, 187
Prosecutor v. Nikolić, 203, 334
Prosecutor v. Tadić, 108, 217
reconciliation, 163
Tadić case, 73, 75
International Military Tribunal (Nuremberg), 58
Charter, 65, 71
establishment, 3, 187, 338
fair trial, 289
Nuremberg Principles, 103
International Military Tribunal (Tokyo), 58
fair trial, 289
International Nuremberg Principles Academy, ii, 174
international relations
constructivism, 252, *See* also constructivism
idealism, 255, 256
international law, relations with, 222, 252, 305, 341, 357
unity. *See* unity
Iyer, Lisa, 270

J

Jackson, Donald, 253
Jackson, Robert, 187, 310
Jenkins, Simon, 167
Jescheck, Hans-Heinrich, 259, 261
Jessup, Philip C., 52
jus gentium, 254
Justinian
Digest of Roman Law, 160, 195

K

Kaing Guek Eav, 236
Kant, Immanuel, 171
On Perpetual Peace, 171
Kaul, Hans-Peter, 306
Kavran, Olga, 194
Kelsen, Hans, 139, 277, 359
Khan, Daniel Erasmus
The Charter of the United Nations, A Commentary, 209
Khanna, Hans, 160
King, Martin Luther Jr., 305
Letter from a Birmingham Jail, 175
Klamberg, Mark, 228, 229, 238
Köhler, Michael, 134
Koskenniemi, Martti, 330
Kreß, Claus, 351
The Ukraine War and the Prohibition of the Use of Force in International Law, Occasional Paper Series No. 14 (2022), 18
Krishna Varma, Shymaju, 142
Kwaga, Vahyala, 42, 247

L

Lamb, Susan R., 24, 26, 85
Larnaude, Fernand, 77
Lauterpacht, Hersch, 80, 86, 97, 359
  The Law of Nations and the Punishment of War Crimes, 78
League of Nations, 208
  establishment, 17
LEE Kuan Yew, 271
legal goods. *See* legal interests
legal interests (categories)
  abstract, 123
  collective, 5, 6, 10, 12, 21, 24, 46, 121, 124, 127, 129, 135, 138, 260, 266, 276
  communal. *See infra* collective
  global, 260, 264, 275
  group, 79, 83, 96, 97, 105
  ideal. *See infra* abstract
  individual, 79, 83, 96, 121, 130, 135, 260
  meta-, 140
legal interests (international criminal law)
  aggression, crime of, 2, 18, 19, 150, 306, *See* also *infra* territorial integrity
  civilian population, protection of, 112
  crimes against humanity, 2, 23, 90, 98, 114, 134, 138, 150, 261, 290, *See* also humanity and crimes against humanity
  criminalization. *See* under international criminal law
  definition, 119, 258, 259
  dignity, 21, 23, 127, 135, 136, 141, 147, 150, 173, 180, 261, 327, 336, *See* also *infra* humanity
  diversity, 279
  endangerment, 119
  existence (group), 150
  genocide, 2, 23, 86, 90, 97, 114, 130, 134, 135, 138, 150, 261, 303
  harm principles (theory), 17, 88, 117
  human existence, 342, *See* also international community, international peace and security
  human solidarity, 138, *See* also humanity, solidarity
  humanity, 5, 7, 21, 22, 23, 44, 79, 80, 83, 87, 88, 89, 93, 95, 96, 99, 100, 109, 110, 114, 127, 130, 150, 278, 284, 288, 290, 336, 352, 356
  IMT (Nuremberg), 71
  international community, i, 7, 9, 50, 80, 82, 93, 97, 127, 129, 131, 134, 240, 278, 288, 348, *See* also *infra* humanity
  international peace and security, 5, 9, 17, 18, 30, 32, 55, 82, 115, 127, 128, 131, 211, 287, 338, 342
  moral values, *vis à vis*, 1, 2, 7, 49, 119, 146, 148, 225, 337
  physical integrity, 127, 135, 150
  political independence, 150, 244
  Rechtsgut (theory), 4, 11, 27, 117, 123, 125, 134, 138, 286, 315
  State interests, 29, 81, 83, 127, 129, 131, 134, 222, 227, 255, 263, 277, 346
  territorial integrity, 227, 229, 244
  unity, 5, 29, 30, 32, 37, 40, 45, 55, 135, 225, 251, 261, 262, 263, 274, 276, 283, 284, 303, 305, 310, 314, 352, *See* also *infra* human solidarity, and solidarity, *See* also unity
  war crimes, 2, 23, 57, 134, 138, 150, 261, *See* also war crimes
legal positivism, 1, 6, 60
Legal Tools Database. *See* under International Criminal Court
Lemkin, Raphael, 86
  Axis Rule in Occupied Europe, 97
Lennon, John, 263
liberalism, 269, 274
Lieber Code, 60
  Article 47, 77
Lindhal, Adam, 256
Lokur, Madan B., 141
Long, William J.
  War and Reconciliation, Reason and Emotion in Conflict Resolution, 170
Luban, David J., 22, 23, 27, 89, 98
  Theory of Crimes Against Humanity, 290

M

M'baye, Keba, 249
Mahabharata, 284
Mandela, Nelson, 181, 208, 236
Martens Clause, 79, 100, 288, 324
Mason, Anthony, 161
May, Larry, 261
māyā, 298
Mazrui, Ali, 257
Mbiti, John, 251, 266
Menkiti, Ifeanyi, 251, 264, 266, 267
Mirzaagha, Melody, 42, 225

Modi, Narendra, 142
Molière
  Le Bourgeois Gentilhomme, 139
Morin, Edgar, 221
Motilewa Quadri, Kafayat, 42, 247
Moynier, Gustave, 60
Murray, Earl, 161

N

Nakhjavani, Salim A., 42, 225
National Law University, Delhi, ii
New Zealand
  Court of Appeal, *New Zealand Maori Council v. Attorney-General*, 161
Nigeria, 267
Nish, Ian, 214
Nolte, Georg, 28, 46, 52
  The Charter of the United Nations, A Commentary, 209
Norway, ii
nulla poena sine lege, 289
nullum crimen sine lege, 289
Nussbaum, Martha, 34
Nwabueze, Ben, 248
Nyerere, Julius, 265

O

O.P. Jindal Global University, ii
Oppenheim, Lassa
  International Law, A Treatise. War and Neutrality, 76
Osasona, Tosin, 42, 247
Outer Space Treaty
  Article IX, 185

P

pacta sunt servanda, 314
Pangalangan, Raul, 240
Paris Agreement, 209
Paulus, Andreas
  The Charter of the United Nations, A Commentary, 209
Peace of Westphalia, 141
Peking University International Law Institute, ii
Permanent Court of International Justice
  The Factory at Chorzów (Germany v. Poland), 308
philantropía, 21
Phillips, Nicholas, 161
Philosophical Foundations of International Criminal Law series, i, 54, 315
Philosophical Foundations of International Criminal Law: Correlating Thinkers, i, 4, 222
Philosophical Foundations of International Criminal Law: Foundational Concepts, i, 4, 222
Pico della Mirandola
  On the Dignity of Man, 21
Polanyi, Karl, 276
principle of legality, 288, 289
Prodigal Son, Parable, 167
proportionality, 350
Proposed Crimes Against Humanity Convention, 306
Proposed International Convention on the Prevention and Punishment of Crimes Against Humanity, 285
Prost, Mario
  The Concept of 'unity' *in Public International Law*, 234

R

Rastan, Rod, 42, 313
Ratner, Steven R., 27
Ratzinger, Joseph (Pope Benedict XVI)
  The Unity of the Nations Vision of the Church Fathers, 34
Rechtsgut (theory). *See infra* legal interests (international criminal law), See legal goods (international criminal law)
reconciliation
  Bible, 153
  definition, 151, 160, *See* also international criminal law, reconciliation
  etymology, 151
  ICC, 201, 204
  ICJ, 197
  ICTR, 177, 188, 201
  ICTY, 163, 177, 187, 201
  IRMCT, 204
  Qur'án, 153
  RSCSL, 204
  SCSL, 190, 201
  South Africa, 212, *See* also South Africa
  STL, 194, 195
  transitional justice, 184

Truth and Reconciliation Commission (South Africa), 179
truth, *vis à vis*, 166, 200
war, *vis à vis*, 169
redistributive justice, 9
Renault, Louis, 80
De l'application du droit pénal aux faits de guerre, 77
Roberts, Adam, 365
Robertson, Geoffrey, 90, 94, 95, 163
Robertson, Roland, 253
Rolin-Jaequemyns, Gustave, 61
romanitas (vis à vis humanitas), 21
Roxin, Claus, 119, 258, 259, 287
rule of law, 148, 178, 210, 212, 213, 220

S

Sachs, Albie
The Strange Alchemy of Life and Law, 161
SAM Choon Yin, 272
Samoa
Court of Appeal, *Attorney General v. Matalavea*, 156
Criminal Procedure Act 1972, 156
Sandström, Emil
Report on the Question of International Criminal Jurisdiction (ILC), 353
Schmitt, Carl, 328
Schwarzenberger, Georg, 59
SCSL Statute
Article 2, 111
Article 3, 75
Searle, John
The Construction of Social Reality, 317
self-determination, 274
Senghor, Léopold Sédar, 265
Seredynska, Iwona, 278
Shaffer, Gregory, 261
Sharma, Surabhi, 42, 283
Sherman, Gordon E., 254
Sierra Leone
Truth and Reconciliation Commission, 192
Simma, Bruno
From Bilateralism to Community Interest in International Law, 7
The Charter of the United Nations, A Commentary, 209
Simpson, Gerry, 53
Singapore, 271
National Ideology Committee, 272
Slaughter, Anne-Marie, 50
slavery
racial theories, 317
social reality, 317, 363
solidarity, 39, 232, 257, *See* also legal interests (international criminal law)
contractual (Durkheim), 234
global (Anastasopoulou), 137
international criminal law, 28, 137
negative (Arendt), 229
organic (Durkheim), 234, 235
proper (Cassese), 234, 237
universal (Arendt), 228
SONG, Tianying, ii, 1, 23, 25, 57
South Africa
Al-Bashir case (ICC), 236
Amy Biehl case (Truth and Reconciliation Commission), 183
apartheid, 179, 182
Institute of Justice and Reconciliation, 181
Interim Constitution, 157
Promotion of National Unity and Reconciliation Act, 179
Supreme Court of Appeal, *The Minister of Justice and Constitutional Development and Others v. Southern African Litigation Centre*, 230
Truth and Reconciliation Commission, 179, 180
sovereign equality, 15, 281, 314, 364
Special Court for Sierra Leone
establishment, 191
jurisdiction, 250
Prosecutor v. Fofana et al., 191
Prosecutor v. Norman et al., 191
Prosecutor v. Sesay et al., 191
UNSC Resolution 1315(2000), 191
Special Tribunal for Lebanon
establishment, 193
Interlocutory Decision of 16 February 2011, 208
jurisdiction, 176
Lebanon, relations with, 195
outreach, 194
Prosecutor v. Ayyash et al., 194
Rules of Procedure and Evidence, 194
Spiropoulos, Jean, 341
Stahn, Carsten, 173
Stjernø, Steinar, 29
STL Statute
Article 2, 216
Article 8, 215
Article 9, 216

Article 11, 216
Article 12, 216
Article 13, 216
Article 16, 215
Article 25, 215
Article 28, 216
Stoicism, 33, 35, 39, 162

T

Taubira, Christiane, 221
Terence
Heauton Timoroumenos, 21
terrorism, 208, *See* also under international criminal law
the Netherlands
Hoge Raad (Supreme Court), 141
Third World Approaches to International Law, 311
Thorburn, Malcolm
Criminal Law as Public Law, 144
Tolley, Michael, 253
Torkel Opsahl Academic EPublisher, i
Treaty of Maastricht
Preamble, 170
Treaty of Versailles, 69
Article 227, 15
Triffterer, Otto, 43, 134
Trumpulis, Ugnius, 258, 275
Tutu, Desmond, 180, 181

U

Ubuntu, 157, 241, 248, 250
Ulpian, 162
Digest of Roman Law (Justinian), 160
UN Charter
Preamble, 15, 17, 18, 280
Article 1, 15, 17, 30, 146
Article 2, 18, 20, 281
Article 4, 243
Article 24, 207, 216
Article 39, 207
Article 41, 207
Article 42, 207
Article 51, 243
Article 96, 211
Chapter VII, 130, 165, 176, 207, 216
Unger, Roberto, 362
United Kingdom
Brexit, 170
Court of Appeal of England and Wales, *Belhaj v. Straw*, 142, 186
High Court of Justice, *R (Abdulwaheed Shannan Al Rabbat) v. Blair*, 176
House of Lords, *A(FC) v. Secretary of State for the Home Department*, 161
Promissory Oaths Act, 212, 219
United Nations
Agenda for Sustainable Development (2030), 172
Basic Principles and Guidelines on the Right to a Remedy for Victims of Gross Violations of International Human Rights Law and Serious Viola-tions of International Humanitarian Law, 308
Educational, Scientific and Cultural Organization, 130, 242
establishment, 17
General Assembly, 192, 338, 353
High Commissioner for Human Rights, 166, 171
International Law Commission, 44, 72, 85, 103, 289, 340, 353
Minimum Rules for the Treatment of Prisoners, 236
peacebuilding, 172
Peacebuilding in the Aftermath of Conflict (Secretary-General), 172
SC Resolution 2341(2017), 208
Secretary-General, 172, 178, 192
Secretary-General, *One Humanity Shared Responsibility*, 233
Secretary-General, *Report on Coordinating and Strengthening Rules of Law Activities*, 233
Secretary-General, *Supplementary Report on the Work of the Organization*, 338
Security Council, 20, 45, 165, 208, 210, 331
War Crimes Commission, 70, 96, 101, 102
United States
Marshall Plan, 174
Supreme Court, *Brown v. Board of Education of Topeka*, 161
unity. *See* also under legal interests (international criminal law), *See* legal interests (international criminal law), *See* also legal interests (international criminal law):unity
Advaita Vedanta, 294, 302, 303, 311
Council of Europe, 232
eymology, 284
fragmentation. *See* fragmentation

ICC Statute, 330
international community, 364
International Criminal Court, 351, 352
international criminal law, 285, *See* also legal interests (international criminal law):unity
international relations, 305
law, relations with, 314, *See* also legal interests (international criminal law)
Proposed Crimes Against Humanity Convention, 306
unity of existence (Advaita Vedanta), 283, 295
Universal Declaration of Human Rights, 264
Article 1, 262
University of Cologne
Institute for International Peace and Security Law, ii
University of Delhi
Campus Law Centre, ii
University of Nottingham, ii
Upanishads, 284
Brhad-āranyaka, 291, 295
Chanadogya, 295, 296
Isa, 295, 300
Katha, 295, 296, 300, 301
Kena, 295, 301
Mundaka, 295, 296, 297, 299

V

van Boven, Theo, 308
van den Berg, M.F.S., 269
Vara, Shailesh, 142
Vedas, 283
Verdross, Alfred
Kriegsverbrechen und Kriegsverbrecher, 77
Vernon, Richard, 92, 94
Vetlesen, Arne Johan, 29
Voigt, Christina, 53
Volcansek, Mary, 253
Völkerstrafrechtspolitik, 48
von Hagenbach, Peter, 14
von Ihering, Rudolf, 258
von Liszt, Franz, 118, 258
Vulliamy, Ed, 357

W

war crimes
definition, 57, 67, 71, 72, 76, 78, 79, 82
grave breaches (Geneva Conventions), 64, 72, 75
gravity, 82
human rights, relation with, 79, 83
ICC, 59, 74, 82
ICTR, 73
ICTY, 73
legal interests, 64, 358
Lieber Code, 76
'Oxford Manual', 61
punishment, 60, 67, 78, 81
Warren, Earl, 161
Waseda University Law School, ii
Weber, Cynthia, 255
Weigend, Thomas, 259, 261
Wendt, Alexander, 252, 256
White, T.H., 263
Wilson, Woodrow, 15
Winter, Renate, 191
Wolfrum, Rüdiger, 45, 52
World War I, 288
accountability processes, 64, 67, 339
Commission on Responsibility, 58, 63, 68, 79, 100
Kaiser Wilhelm II, prosecution, 14
Preliminary Peace Conference, 67, 100
World War II, 3, 146

Y

Yoruba, 264, 267

Z

Zola, Émile, 149

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Philosophical Foundations of International Criminal Law: Legally-Protected Interests

Morten Bergsmo, Emiliano J. Buis and SONG Tianying (editors)

This book discusses notions such as 'community interest', 'legally-protected interest' and 'legal good' in the context of international criminal law. The authors assess main interests or values currently protected by international criminal law (including 'humanity' and 'international peace and security'), their characteristics and inter-relations. Chapters then zoom in on supplementary values or interests that should receive further recognition by international criminal law, among them 'reconciliation', 'solidarity' and 'unity of humankind'. A growing sense of environmental and security threats to our survival invites us to afford the value of 'unity of humankind' a greater measure of affirmation also through international criminal law.

The anthology offers nine chapters by thirteen authors from diverse backgrounds, including China, India, Latin America, the Middle East, Nigeria and Western European and Other States Group, in alphabetical order: Ioanna N. Anastasopoulou, David Baragwanath, Morten Bergsmo, Emiliano J. Buis, Vahyala Kwaga, Susan R. Lamb, Melody Mirzaagha, Salim A. Nakhjavani, Tosin Osasona, Kafayat Motilewa Quadri, Rod Rastan, Surabhi Sharma and SONG Tianying. The questions they discuss go beyond the growing polarisation between rival 'great powers' and have some capacity to unite actors in a common, forward-looking endeavour. The editors argue that new international criminal law-making should be genuinely representative of humankind.

This is the third volume in the series *Philosophical Foundations of International Criminal Law* published by TOAEP. The three volumes combined contribute 37 chapters organized in three thematic anthologies: *Correlating Thinkers* (2018), *Foundational Concepts* (2019), and now *Legally-Protected Interests* (2022).

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