Philosophical Foundations of International Criminal Law: Foundational Concepts

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

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

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

CHAO Yi*

4.1. Introduction

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

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

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

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

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

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

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

institutions has been either explicitly established by treaty[6] or presumed in practice.[7] The development of international law in general and international human rights law in particular has rejected the "theoretical insistence of [traditional positivism] that the law of nations applies only to States".[8] In spite of the doctrinal reticence to pronounce the international subjectivity of individuals, they have gained not only criminal responsibility but also rights in international law.[9]

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

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

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

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

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

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

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

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

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

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

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

14 *Ibid*., Article 53.

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

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

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

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

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

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

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

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

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

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

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

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21 *Ibid*.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

As is previously emphasised, ICRI requires international law to have obtained an independent identity. Therefore, 'international' criminal responsibility in a real sense could only exist after positivism gave international law its own identity separate from natural law and domestic law.[35] Starting to gain dominance in the nineteenth century, positivism remains the foundation of international law. Although many new approaches/methods/theories[36] of international law have been put forward to reveal the weakness and insufficiency of positivist international law, none has replaced positivism as the authority on what international law is in the real world. Today, positivism "forms the basis of mainstream thinking in international law in one form or another",[37] and no international lawyer "can do without constantly – and near-exclusively – referring to 'positive law' in order to make a 'legal point'".[38]

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

4.2.1.1. The Pluralisation of Subjects of International Law

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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45 *Ibid*., p. 466.

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

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

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

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

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

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

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

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

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

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

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

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

[53] *Ibid*., pp. 176–77.

[54] *Ibid*., pp. 178–79.

[55] *Ibid*., p. 178.

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

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

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

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

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

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

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

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56 *Ibid*., p. 179.

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

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

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

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

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

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

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

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

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61 *Ibid*., p. 32, para. 33.

62 *Ibid*., para. 34.

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

64 *Ibid*.

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

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

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

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

66 See *supra* Section 4.2.1.1.

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

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

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

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

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

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

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71 *Ibid*., p. 45.

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

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

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

4.2.2. Going Beyond Traditional Positivism

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

For example, as Alexander Orakhelashvili noted:

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

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

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

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

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

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

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

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

79 *Ibid*., p. 39.

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

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

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

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

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

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

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

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

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

> The following acts, or any of them, are crimes coming within the jurisdiction of the Tribunal for which there shall be individual responsibility:
>
> a. Crimes against peace: namely, planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing;
>
> b. War crimes: namely, violations of the laws or customs of war. Such violations shall include, but not be limited to, murder, ill-treatment or deportation to slave labour or for any other purpose of civilian population of or in occupied territory, murder or ill-treatment of prisoners of war or persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns or villages, or devastation not justified by military necessity;
>
> c. Crimes against humanity: namely, murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war; or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated.
>
> Leaders, organisers, instigators and accomplices participating in the formulation or execution of a common plan or conspiracy to commit any of the foregoing crimes are responsible for all acts performed by any persons in execution of such plan.[83]

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

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

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

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

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

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

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

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

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

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

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

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

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

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

89 See *supra* Sections 4.2.1.1 and 4.2.1.2.

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

91 *Ibid*., vol. 22, pp. 465–66.

cle 228 of the Treaty of Versailles and the *ex parte Quirin* case.[92] But neither can sufficiently support the existence of ICRI. Reference to the Treaty of Versailles does not provide much support to finding individual criminal responsibility under *international* law, because the military tribunals envisaged in Articles 228 for "persons accused of having committed acts in violation of the laws and customs of war" are, strictly speaking, tribunals with a *domestic* rather than *international* legal character. According to Article 229, accused individuals would be prosecuted before a domestic tribunal of the State against whose nationals the alleged crimes were committed. This is merely a form of domestic jurisdiction based on the nationality principle. And the 'mixed' military tribunal[93] for individuals who were accused of criminal acts against nationals of more than one State is merely a mechanism to coordinate parallel domestic jurisdictions and, therefore, has nothing to do with *international* criminal responsibility for individuals.

It might be argued, however, that the 'special tribunal' envisaged in Article 227 for William II – if indeed established in reality to prosecute him – would have been an *international* criminal tribunal applying ICRI. But even ignoring the fact that Article 227 had not been enforced, ICRI in Article 227 would still be distinguished from that in the IMT Charter as its legal foundations lay in positive international law because Germany consented to the Treaty of Versailles by signing and ratifying it.[94] But such State consent – keeping in mind that traditional positivism regards State consent as the ultimate normative and legitimising source of international law[95] – of Germany was not attached to the IMT Charter.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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100 *Ibid*., p. 283.

101 *Ibid*., pp. 283–84.

102 See *supra* Section 4.2.1.1.

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

104 *Ibid*., p. 428.

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

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

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

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

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

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

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

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

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

[111] *Ibid*.

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

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

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

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

4.2.2.2. *Jus Cogens* and International Crimes

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

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

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

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

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

[117] *Ibid*.

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

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

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

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

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

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

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

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

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

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

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

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

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

Nonetheless, there has been a strong consensus that prohibition of international crimes – such as genocide, crimes against humanity, war crimes, and aggression as enumerated in the Rome Statute[128] – forms the very core and therefore generally undisputed rules of *jus cogens*.[129] The concept of *jus cogens*, in essence, introduces a system of 'relative normativity'[130] or the 'hierarchy of norms'[131] into the international legal order, claiming some norms are superior to others. Although Article 53 of the VCLT seems to provide a 'test-oriented'[132] approach to identifying peremptory norms, it is the moral values – or in Weil's words the "unimpeachable moral concerns"[133] – behind the norms that distinguish *jus cogens* from other 'ordinary' rules in international law.

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

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

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

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

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

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

[130] Weil, 1983, see *supra* note 63.

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

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

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

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

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

Before the concept of *jus cogens* introduced normative hierarchy into positive international law, every rule of international law is 'equal' in the sense that "whatever their objects or importance, all norms are placed on the same plane, their interrelations ungoverned by any hierarchy, their breach giving rise to an international responsibility subject to one uniform regime".[137] This equal normative status also reflects the positivist perception that all rules have the same normative source, that is State consent. Traditional positivism attempts to minimise if not completely eliminate the relevance of morality and ethics by treating State consent as a factual and scientific element. Only by re-emphasizing the moral values or ethical principles behind legal norms – which can certainly be seen as a revival of natural law thinking[138] – is the distinction between *jus cogens* and *jus dispositivum* able to sustain in the international legal order.

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

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

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

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

[138] See *supra* Section 4.2.2.1.

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

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

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

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

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

[141] *Ibid*., Article 19.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

These two Draft Articles, therefore, answer the 'whom' question in a definitive manner. But 'whose' conduct triggers the responsibility? Since abstract entities cannot physically attend conferences or sign treaties, it is often the conduct of individuals in their official capacity that triggers responsibility. Therefore, one answer to the 'whose' question is individuals. But the fact that States and international organisations cannot 'act' in a literal sense does not mean, from a legal perspective, the conduct or behaviour is not *theirs*. It has been clear that it is the "internationally wrongful act of a State/an international organization" that "entails the international responsibility of that State/organization".[149] There is no doubt that international law recognises the conduct of individuals attributable[150] to abstract entities as the conduct of the abstract entities *themselves*,[151] and it is up to international law to prescribe whether given conduct is attributable.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

160 *Ibid*., pp. 81–82.

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

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

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

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

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

It is important to note that:

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

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

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

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

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

> stroyed German economy and made chaos and suffering inevitable.[165]

The punishment of key industrialists in the subsequent trials under Control Council Law No. 10[166] was also illustrative of the recognition of corporate entities in the commission of international crimes. As Telford Taylor said in his opening statement against the principal corporate figures of Flick KG, "[t]he Third Reich dictatorship was based on this unholy trinity of Nazism, militarism, and economic imperialism".[167] Although no corporate entities were prosecuted, the Allies prosecuted key industrialist figures of corporates such as Friedrich Flick (of Flick KG), Carl Krauch (of IG Farben), and Alfried Krupp (of Krupp Holding) that had been involved deeply in and profited greatly from the commission of international crimes. Although prosecutions of these industrialist actors were based on ICRI, it was more than clear that the international criminal responsibility imposed was linked with the identity of these individuals as the directors, managers, and staff in the relevant corporations. It was the activities of the corporations rather than the personal acts of the individuals accused that served as the basis of ICRI. It would be both counterfactual and counterintuitive to deny that the relevant international crimes were committed by corporations as well as individuals.

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

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

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

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

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

167 *Ibid*., vol. 6, p. 32.

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

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

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

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

While Roling focuses on governments as the collective system,[171] there is no reason why system criminality should be exclusively tied to States. The key of system criminality is the close relationship between the commission of crimes and the collective system (regardless of the form or international legal status of that system) when the commission of crime "is caused by the structure of the situation and the system"[172] and "express[es] the tendencies of the existing system".[173] Therefore, system criminality in international law can connect to any "situation where collective entities order or encourage international crimes to be committed, or permit or tolerate the committing of international crimes".[174] Criminality in international criminal law can be found in various forms of collective system such as States, international and regional organisations, organised armed groups, ruling political parties or transnational terrorists groups[175]

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

170 *Ibid*.

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

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

173 *Ibid*., p. 11.

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

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

as long as the commission of international crimes "serves the system, and is caused by the system".[176]

4.3.1.2.1. Collective Criminality in the Conceptualisation of Core Crimes

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

4.3.1.2.2. Collective Criminality in Responsibility Attribution

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

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

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

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

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

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

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

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

On the one hand, international criminal responsibility could be imposed upon purely 'individual' acts. If a person committed war crimes or crimes against humanity against or without the authority of the collective entity,[195] individual responsibility allocated to him would not imply collective criminality. This scenario of 'direct perpetration'[196] pins the commission of international crimes down to the guilty acts and *mens rea* of the individual perpetrator.[197] But under other circumstances, international criminal responsibility for individuals is allocated precisely because of the structure of collective criminality. In most cases, commission of international crimes (especially aggression and genocide) "entails the cooperation of a large number of persons […] [in] a more or less established network".[198] The acts and mind of no one single person are sufficient for the whole crime. Individual guilt is therefore determined by the involvement and participation in the collective criminality. Statutes and case law of international criminal courts and tribunals have developed various doctrines – such as conspiracy,[199] criminal organization,[200] joint criminal enterprise,[201] and commander/superior responsibility[202] – to ascertain individual responsibility from the collective commission of international crimes.

It should be particularly noted that:

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

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

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

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

[198] *Ibid*., p. 953.

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

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

[201] See, for example, ICTY, *Prosecutor v. Duško Tadić*, Appeals Chamber, Judgment, 15 July 1999, IT-94-1-A, paras. 185–234 (http://www.legal-tools.org/doc/8efc3a).

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

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

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

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

> First, there are elements of the [commander/superior responsibility] doctrine that not only have no equivalent in municipal law, but are also inconsistent with fundamental principles that should underlie a regime that imposes criminal liability on persons qua individuals; and
>
> Second, the obligations that are imposed on superiors by contemporary international criminal law, and on States by customary international law concerning certain obligations *erga omnes*, are functionally identical in their scope and content.[207]

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

[204] Sliedregt, 2012, pp. 71–72, see *supra* note 24.

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

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

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

Development of these modes of liability under the concept of ICRI has certainly evoked concerns about the deviation of international criminal responsibility from general principles of criminal responsibility in domestic laws[208] and overreaching application.[209] While these are legitimate concerns, the deviation may well be inevitable and necessary due to the inherently collective nature of international crimes.[210] Although the concept of ICRI is about the responsibility of individuals rather than States or other collective entities, the allocation of ICRI in most cases implies criminality of the abstract entities in international law.

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

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

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

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

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

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

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

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

The following analysis will focus on the collective systems of State in the discussion of ICRCS. This does not mean States are the only collective systems in the commission of international crimes[212] but only results from certain considerations of this author. First, laws and practices of international responsibility have been so far most developed in the realm of State responsibility. Legal regimes of international responsibility to other collective entities (even in the case of international organisations) might still be too embryotic to sustain a realistic discussion of ICRCS. Second, States provide a good point of reference in formulating ICRCS.[213] Certain international crime such as aggression and crime against peace are formulated as State crimes, and the actual commission of most international crimes "often suggests State involvement"[214] and requires a complicated coordinating and operating system tantamount to State structures. Third, there has been a significant overlap between the concept of collective criminality and that of 'State crimes' in the codification and progressive development of international law.[215] The discussion of ICRCS on States can also contribute to the topical debates on 'State criminal responsibility' in international law.

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

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

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

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

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

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

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

4.3.2.2. Other Potential Forms of Collective Criminal Responsibility

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

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

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

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

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

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

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

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

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

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

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

[223] *Ibid*., p. 367.

[224] Sliedregt, 2012, p. 7, see *supra* note 24.

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

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

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

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

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

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

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

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

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

deprived of certain aspects of their sovereignty. Although military occupation of a State (the occupation of Germany after the Second World War as an apt example) and international "surveillance and oversight"[232] may be acceptable as a temporary arrangement at a given time, they are at odds with the fundamental principle of sovereign equality.[233] International law promises State's right to exist[234] and to enjoy full sovereignty.[235] Enforcing ICRCS in forms of 'outlawing' certain States from the international community[236] would undermine this fundamental promise of the international legal order. This dilemma remains a serious obstacle to legitimising forms of international criminal responsibility for States other than ICRI and may well explain why a specific system for punishing States is still lacking under current international law.[237]

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

240 Supreme Court of Canada, *Kazemi Estate v. Islamic Republic of Iran*, 2014 SCC 62, [2014] 3 S.C.R. 176, 10 October 2014 ('*Kazemi*') (http://www.legal-tools.org/doc/ca8a 2e/).

place outside Canada. The key domestic law is the State Immunity Act[241] ('SIA'), and *Kazemi* raised important questions as to the interpretation of key provisions in SIA and its interaction with customary international law about immunity.

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

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

4.4.1.1. The Majority Opinion

According to the majority opinion:

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

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

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

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

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

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

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

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

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

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

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

[245] *Ibid*., para. 32.

[246] *Ibid*., paras. 33(1)–(3). The other two issues summarised in paragraphs 33(4)–(5) are not discussed in this chapter, as they are issues of Canadian constitutional law rather than international law.

[247] *Ibid*., para. 54.

[248] *Ibid*., para. 56.

[249] *Ibid*., para. 73.

[250] *Ibid*., para. 69.

territory directly under the scrutiny of Canada's judiciary – the exact situation sovereign equality seeks to avoid".[251]

As for the third issue, the majority confirmed that "public officials, being necessary instruments of the State, are included in the term 'government' as used in SIA" and therefore "benefit from State immunity when acting in their official capacity".[252] Given the "State-sanctioned or official nature of torture",[253] the alleged acts of torture committed by Mortazavi and Bakhshi are shielded under foreign immunity and therefore cannot be sued in Canadian civil courts.

4.4.1.2. The Dissenting Opinion

The dissenting Justice Abella did not challenge the majority opinion on the first two issues,[254] but disagreed with the majority on the third issue on whether lower-level government officials are entitled to foreign immunity under SIA. Based on the wording of Section 2[255] of SIA in which the definition of 'foreign State' makes no explicit reference to public officials except for the heads of State,[256] Justice Abella found that:

> At the very least, the silence creates an ambiguity as to whether SIA applies to lower-level officials. Resolving that ambiguity is assisted by reference to customary international law.[257]

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[251] *Ibid*., para. 70.

[252] *Ibid*., para. 93.

[253] *Ibid*., para. 95.

[254] The dissenting opinion did not touch upon the exception to immunity under Section 6(a) of SIA and found that SIA "only addresses the circumstances in which Canadian courts are procedurally barred from taking jurisdiction over a foreign state in proceedings outside the criminal context", see *Kazemi*, para. 181, see *supra* note 240.

[255] SIA, Section 2, see *supra* note 241. It provides that:

> In this Act […] foreign state includes: (a)any sovereign or other head of the foreign state or of any political subdivision of the foreign state while acting as such in a public capacity, (b) any government of the foreign State or of any political subdivision of the foreign state, including any of its departments, and any agency of the foreign state, and (c) any political subdivision of the foreign state; *political subdivision* means a province, state or other like political subdivision of a foreign state that is a federal state.

[256] *Kazemi*, para. 184, see *supra* note 240.

[257] *Ibid*., para. 186 (internal reference omitted).

By citing academic commentaries, a Permanent Court of International Justice decision, an Inter-American Court of Human Rights decision, human rights treaties, United Nations General Assembly resolutions, and Commission on Human Rights reports,[258] Justice Abella found that:

> [A]n individual's right to a remedy against a State for violations of his or her human rights is now a recognised principle of international law.[259]

Despite acknowledging that international practice is equivocal about whether "State immunity denies victims of torture access to a civil remedy",[260] she determined the status of customary international law as follows:

> [W]hile it can be said that customary international law permits States to recognise immunity for foreign officials, as evidenced in *Jones v. United Kingdom*, it also does not preclude a State from denying immunity for acts of torture, as exemplified in *Pinochet No. 3* and *Samantar II*.[261]

Based on the reasoning that "customary international law no longer requires that foreign State officials who are alleged to have committed acts of torture be granted immunity *ratione materiae* from the jurisdiction of Canadian courts",[262] Justice Abella opined that SIA should not apply to Mortazavi and Bakhshi to shield individual perpetrators of torture under foreign immunity.[263]

4.4.1.3. The Clash of Philosophy and Rationales

In *Kazemi*, the majority of the Court and the dissenting judge reached the opposite conclusions regarding foreign immunity of individual perpetrators of torture in Canadian civil courts. But their contrary conclusions were based on the consensus about both the international legal characterisation of torture and relevant facts of the case. Both the majority and the dissenting opinions confirmed that torture constitutes a violation of *jus*

[258] *Ibid*., paras. 190–98.
[259] *Ibid*., para. 199.
[260] *Ibid*., para. 200.
[261] *Ibid*., para. 211.
[262] *Ibid*., para. 228.
[263] *Ibid*., para. 231.

cogens in international law[264] and that the alleged acts committed by Mortazavi and Bakhshi were carried out in their official capacity.[265]

Therefore, the opposite positions taken demonstrated a clear clash of legal philosophy and rationales between the majority and the dissenting judge. The clash of philosophy first appeared as to the role of customary international law in statutory interpretation. The statutory language in Section 2 of SIA is admittedly not entirely unequivocal, as it does not explicitly refer to public officials other than the heads of State. This left the Court with some interpretative space. The process of interpretation certainly reveals legal philosophy of the interpreters, although interpreters are always careful to mask their philosophy behind seemly neutral techniques of statutory/treaty interpretation. In *Kazemi*, the majority relied on the techniques of contextual and teleological interpretation to find that "public officials must be included in the meaning of 'government' in section 2 of SIA".[266] In contrast, the dissenting judge also employed the technique of contextualised interpretation – together with a reference to the legislative history – to reach the contrary conclusion.[267] Here the real conflict is not about the interpretative techniques, because they "are not a set of simple precepts that can be applied to produce a scientifically verifiable result"[268] in the first place and legal systems seldom stipulate a clear hierarchy among different interpretative techniques. The real clash points to the result of interpretation and the fundamental perception of 'individual and abstract entity'. According to the majority:

> The reality is that governmental decisions are carried out by a State's servants and agents. States are abstract entities that can only act through individuals.[269]

But the dissenting judge aims to detach individuals from the State by referring to the legislative history that stated that "this proposed Act

[264] *Ibid*., paras. 47 (majority), 172 (dissenting).

[265] *Ibid*., paras. 94 (majority), 173 (dissenting).

[266] *Ibid*., para. 85.

[267] *Ibid*., para. 184.

[268] Richard Gardiner, *Treaty Interpretation*, 2nd edition, Oxford University Press, Oxford, 2015, p. 7.

[269] *Kazemi*, para. 85, see *supra* note 240.

deals with States, not with individuals".[270] It is the clash of philosophy on the relation between individual and abstract entity – the question that gave birth to ICRI yet still haunts international law to this very day – that resulted in the opposite findings on whether customary international law should inform the interpretation of SIA in *Kazemi*.

The clash of philosophy is also revealed in the contrary understandings of the status of customary international law regarding foreign immunity of individual torturers in domestic civil proceedings. The majority of the Court and the dissenting judge approached this issue with different legal philosophies. Based on evidence of State practice and *opinio juris* that Justice Abella provided in her dissenting opinion, Justice LeBel on behalf of the majority of the Court stated:

> As far as the right to reparation is concerned, I find no evidence in the cases reviewed by my colleague [Justice Abella] demonstrating the existence of a rule of customary international law to the effect that courts have universal civil jurisdiction to hear civil cases alleging acts in violation of *jus cogens*. On the contrary, most of these cases have affirmed State immunity in civil proceedings alleging acts of torture.[271]

The dissenting judge, on the other hand, characterised the status of customary international law as:

> while it can be said that customary international law permits States to recognise immunity for foreign officials, as evidenced in *Jones v. United Kingdom*, it also does not preclude a State from denying immunity for acts of torture, as exemplified in *Pinochet No. 3* and *Samantar II*.[272]

The majority and the dissenting judge employed drastically different philosophies to approach customary international law. The majority approached customary international law with a traditional positivist philosophy, requiring widespread State practice and *opinio juris* to identify

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[270] *Minutes of Proceedings and Evidence of the Standing Committee on Justice and Legal Affairs*, No. 60, 1st session, 32nd parliament, 4 February 1982, at p. 32, cited in *Kazemi*, para. 184, see *supra* note 240.

[271] *Ibid*., para. 101.

[272] *Ibid*., para. 211.

customary rules.[273] The dissenting judge, however, emphasised the evolutionary process of customary international law, arguing that there is a "palpable, albeit slow trend in international jurisprudence"[274] to lift foreign immunity for individual perpetrators of torture.

This clash of philosophy in *Kazemi* strikingly resembles that in the Nuremberg trial regarding the existence of ICRI in customary international law. In both cases, evidence of State practice and *opinio juris* were severely lacking, yet there were judicial efforts to find customary rules despite the status of State practice and *opinio juris*. The ultimate rationale shared by the Nuremberg Tribunal and the dissenting opinion in *Kazemi* is that if there was no law that fits, then new law should be made. In this way, the issue of foreign immunity for torture signifies another critical point in the transformation of international law, and the rationales of both sides need to be scrutinised.

4.4.2. The Dilemma of Fragmentation: *Jus Cogens* Prohibition of Torture v. Customary International Law on Immunity

The legal dilemma of foreign immunity for individual perpetrators of torture presents strong tensions in the transformation of international law. On the one hand, prohibition of torture is deemed as *jus cogens* in international law. Acts of torture violate legal goods that are fundamental to the international community as a whole. On the other hand, foreign immunity has been a time-honoured rule of customary international law based on the equality of States.[275] The conflicts between *jus cogens* prohibition of torture and customary international law on immunity can be seen as a proxy for the deep conflicts between international law's two identities – international law as the law of the international community versus international law as inter-State law.

While the new identity of international law, as the law of the international community, has been increasingly emphasised by international

[273] This traditional positivist approach is reflected in Article 38 of the ICJ Statute which defines customary international law as "evidence of a general practice accepted as law".

[274] *Kazemi*, para. 208, see *supra* note 240.

[275] For an analysis of the relation between State equality and the origin of State immunity in international law, see Ernest K. Bankas, *The State Immunity Controversies in International Law: Private Suits Against Sovereign States in Domestic Courts*, Springer, Berlin, 2005, pp. 1–12.

lawyers in the recent decades, the old identity of international law, as inter-State law, has not been abandoned. Rules and principles based on the old identity of international law, such as State immunity, are not automatically annulled simply because *jus cogens* – legal norms protecting the fundamental interests of the international community as a whole – are involved. As the ICJ has reasoned in *Jurisdictional Immunities of the State*:

> To the extent that it is argued that no rule which is not of the status of *jus cogens* may be applied if to do so would hinder the enforcement of a *jus cogens* rule, even in the absence of a direct conflict, the Court sees no basis for such a proposition. A *jus cogens* rule is one from which no derogation is permitted but the rules which determine the scope and extent of jurisdiction and when that jurisdiction may be exercised do not derogate from those substantive rules which possess *jus cogens* status, nor is there anything inherent in the concept of *jus cogens* which would require their modification or would displace their application.[276]

Given the well-established customary international law on State immunity, it is plausible to reason – as the majority of the Supreme Court of Canada did in *Kazemi* – that the scope of State immunity should extend to public officials for their acts on behalf of the State. As the majority aptly pointed out in *Kazemi*,

> The reality is that governmental decisions are carried out by a State's servants and agents. States are abstract entities that can only act through individuals.[277]

The above dictum conceptualises a unitary identity of individuals and the abstract entity which is drastically different from the perception in the Nuremberg dictum that "crimes against international law are committed by men, not by abstract entities". The unitary identity is apparently more plausible than the Nuremberg perception in cases of torture, because in the international legal order torture is defined as an official act of the State. According to Article 1 of the Convention Against Torture, torture is defined as:

> any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such pur-

[276] *Jurisdictional Immunities of the State*, para. 95, see *supra* note 143.

[277] *Kazemi*, para. 85, see *supra* note 240.

> poses as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, *when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity* (emphasis added).

Although this definition "is without prejudice to any international instrument or national legislation which does or may contain provisions of wider application",[278] it is without a doubt the most widely accepted definition of torture in international law and the most important source of States' international obligation to prevent and punish acts of torture. The involvement of State authority via the hands of "public official[s] or other person[s] acting in an official capacity" is an essential component to the grave "evilness" of torture, because "torture, as the most serious violation of the human right to personal integrity, presupposes a situation of powerlessness of the victim which usually means deprivation of personal liberty".[279] As was eloquently pointed out in the majority opinion of *Kazemi*, "it is the State-sanctioned or official nature of torture that makes it such a despicable crime".[280] Therefore, it makes sense to portray a unitary picture of individual perpetrators and the State in cases of torture: the State tortures through individuals and individual perpetrators act on behalf of the State.

However, there have been legal attempts of detaching individuals from the State in order to lift their foreign immunity for acts of torture. In *Yousuf v. Samantar*[281] before the United States Fourth Circuit, one of the most important and well-cited domestic decision that denied foreign immunity to individual perpetrators of torture in civil suits,[282] it was con-

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[278] CAT, Article 1(2), see *supra* note 23.

[279] Manfred Nowak and Elizabeth McArthur, *The United Nations Convention Against Torture: A Commentary*, Oxford University Press, Oxford, 2008, p. 76.

[280] *Kazemi*, para. 95, see *supra* note 240.

[281] United States Court of Appeals for the Fourth Circuit, *Yousuf v. Samantar*, 2 November 2012, 699 F.3d 763 (4th Cir. 2012) ('*Samantar*').

[282] *Samantar* was also cited and relied upon by Justice Abella in her dissenting opinion of *Kazemi*, see *Kazemi*, paras. 201–202, see *supra* note 240.

cluded that "under international and domestic law, officials from other countries are not entitled to foreign official immunity for *jus cogens* violations, even if the acts were performed in the defendant's official capacity".[283] The reasoning for such a conclusion needs particular attention. According to the Fourth Circuit:

> Unlike private acts that do not come within the scope of foreign official immunity, *jus cogens* violations may well be committed under color of law and, in that sense, constitute acts performed in the course of the foreign official's employment by the Sovereign. However, as a matter of international and domestic law, *jus cogens* violations are, by definition, acts that are not officially authorised by the Sovereign.[284]

The rationale, simply put, is that *jus cogens* violations such as torture cannot be perceived as the acts of, or authorised by, the States because international law has made such acts illegal. As Justice Abella has succinctly summarised in her dissenting opinion of *Kazemi*, the philosophical foundation and rationale behind the decision of *Samantar* are essentially that "[b]ecause *jus cogens* violations are not legitimate State acts, the performance of such an act does not qualify as an 'official act' justifying immunity *ratione materiae*".[285]

The purpose of this argument is to detach the identity of individual perpetrators from the State by characterising the acts in question as 'unofficial' ergo purely private acts in international law. Such an argument is only a present-time variation of the Nuremberg dictum that international crimes are committed by "men, not abstract entities". Therefore, the argument that torture as *jus cogens* violations of international law cannot be an official act of the State[286] suffers equally if not more from the conceptual weakness behind the Nuremberg dictum. As Part II of this chapter has demonstrated, to detach the identity of individual perpetrators of international crimes from States would be to turn a blind eye to the paramount

283 *Samantar*, p. 777, see *supra* note 281.

284 *Ibid*., pp. 775–76.

285 *Kazemi*, para. 201, see *supra* note 240.

286 Variations of this argument have been more frequently employed by domestic courts in dealing with foreign immunity of individual perpetrators of *jus cogens* violations in criminal proceedings, see Weatherall, 2015, pp. 303–306, see *supra* note 121.

role of abstract entities and collective criminalities in the commission of the most heinous violations of international law. Torture is by definition an act of State agents in their official capacity. It would be "manifestly absurd and unreasonable"[287] to interpret torture as an unofficial act irrelevant to the State simply because the issue of immunity is involved. Such an interpretation – as was employed in *Samantar* – is not only wrong but would also "constitute a remedy more harmful than the wrong it was intended to remedy",[288] because it eliminates the possibility of asserting State responsibility for torture by denying torture as the acts of State. As Nina Jørgensen has eloquently put, "[j]ust as individuals are unable to hide their guilt behind the State, the State should not be permitted to hide its guilt behind the punishment of individuals".[289] Therefore, the argument that torture cannot be official acts of the State must be rejected. It is inherently flawed to assert that *jus cogens* violations cannot be official acts of the State, because it presupposes that States do not violate peremptory norms of international law. The reality, however, is that States *do* violate international law. And it is precisely because violations of certain norms severely threaten the international community as a whole that these norms are defined as *jus cogens* in the first place.

The line of arguments in *Samantar* and other like-minded decision-makers have demonstrated a dangerous trend of legal thinking which links the most severe violations of international law exclusively to individuals and denounces the role of collective entities in such violations. This category of 'most severe violations of international law' is usually characterised as 'international crimes' or '*jus cogens* violations'. In international legal theory, 'international crimes' and '*jus cogens* violations' are usually perceived as mutually definitional or highly overlapping concepts. In practice, the two concepts are generally treated as interchangeable.[290]

[287] According to Articles 31 and 32 of VCLT, an interpretation would not be acceptable when it is "manifestly absurd or unreasonable" even if the interpretation results from the application of the general rule of treaty interpretation, see *supra* note 13.

[288] Marina Spinedi, "State Responsibility *v.* Individual Responsibility for International Crimes: *Tertium Non Datur*?", in *European Journal of International Law*, 2002, vol. 13, no. 4, p. 897.

[289] Jørgensen, 2000, p. 155, see *supra* note 216.

[290] Weatherall, 2015, pp. 270-1, see *supra* note 121. "Although it has been suggested that *jus cogens* constitutes a broader legal category than that of international crimes, jurisprudence has not borne out of this position in practice".

Therefore, for the proponents of a universal (criminal and civil) jurisdiction on the violations of peremptory norms of international law, it is convenient to transplant the Nuremberg dictum and argue that *jus cogens* violations of international law are committed by individuals but not abstract entities. Some commentators have even argued that individuals are "the primary subject of peremptory norms in international law" and "the sole bearer of criminal responsibility for violations of *jus cogens*".[291] Such a line of arguments must be rejected for ignoring the roles of collective entities and their collective criminality in the conceptualisation of international crimes and ICRI. As the example of torture has clearly demonstrated, the involvement of abstract entities such as States is usually present and sometimes even required for violations of peremptory norms of international law. Therefore, violations of *jus cogens* in international law can also be legally perceived as the acts of abstract entities (such as States) and incur their responsibility under international law.

With regard to foreign immunity of the individual perpetrators of torture, there is clearly a 'conflict', that is, "a situation where two rules or principles suggest different ways of dealing with a problem".[292] One approach suggests that immunity be lifted based on the significant interests of the international community protected by *jus cogens*, whereas the other approach relies on State immunity to uphold the immunity of acts perpetrated on behalf of the State. There is no middle ground between these two positions. As *Samantar* and like-minded jurisprudence have demonstrated, attempts to reconcile these two irreconcilable positions would inevitably lead to the absurd interpretation that torture is not an official act of State.

Therefore, international law is fragmented as regards foreign immunity of individual perpetrators of torture. The fragmentation leads to a *non liquet* in international law since it cannot be convincingly asserted that international law commands either the grant or the lift of immunity under such circumstances. This means whatever domestic courts decide to do – granting or lifting foreign immunity of individual torturers in domestic suits – is their own choice rather than, despite what they usually claim, the command of international law. The status of fragmentation is even more highlighted when domestic courts of the same State consciously

[291] *Ibid*., p. 266.

[292] Fragmentation of International Law, para. 25, see *supra* note 120.

choose to lift foreign immunity of the individual perpetrators of torture in criminal yet not civil proceedings. For example, in *Pinochet*,[293] the United Kingdom House of Lords confirmed that immunity does not apply for acts of torture in criminal proceedings because "*jus cogens* violations could not be considered 'official acts' under international law".[294] However, in the civil proceedings of *Jones*,[295] the House of Lords drew the opposite conclusion to uphold immunity *ratione materiae* of the alleged acts of torture. In *Jones* Lord Bingham stated that "it is […] clear that a civil action against individual torturers based on acts of official torture does indirectly implead the State since their acts are attributable to it".[296]

There is no basis in international law for domestic courts to distinguish civil and criminal cases and treat the issue of foreign immunity for torture differently. As the ILC Special Rapporteur Roman Anatolevich Kolodkin noted in his Second report on immunity of State officials from foreign criminal jurisdiction:

> […] as to whether it can in principle be said that the consequences for immunity of prohibiting grave international crimes by *jus cogens* norms may be different depending on what kind of jurisdiction is being exercised – civil or criminal[,] [n]either practice nor logic appear to show that such consequences would differ.[297]

It is the choice of domestic decision-makers to decide if foreign immunity is to be upheld. An artificial distinction between civil and criminal proceedings cannot sustain as a convincing international law argument, because "[i]f a peremptory norm prevails over immunity, then immunity from which jurisdiction – civil or criminal – is of no account. And vice versa".[298] It is clear that States are making different and often incon-

293 UK House of Lords, *Regina v. Bow Street Metropolitan Stipendiary Magistrate and Others, Ex parte Pinochet Ugarte (No. 3)*, 24 March 1999, [2000] 1 AC 147 (http://www.legal-tools.org/doc/c57811/).

294 Weatherall, 2015, p. 303, see *supra* note 121.

295 UK House of Lords, *Jones v. Ministry of the Interior of Saudi Arabia and others*, 14 June 2006, [2006] UKHL 26 (http://www.legal-tools.org/doc/dd4908/).

296 *Ibid*., para. 31.

297 Second report on immunity of State officials from foreign criminal jurisdiction, UN Doc. A/CN.4/631, 10 June 2010, p. 41, para. 66 (http://www.legal-tools.org/doc/f43326/).

298 *Ibid*., footnote 159.

sistent choices between the old and new identity of international law.[299] The status of fragmentation is the reality of today's international legal order and is here to stay as long as inter-State structures remain in the world system. As for foreign immunity of individual torturers, it is the choice of domestic decision-makers rather than the implausible perception that torture is committed by "men, not abstract entities" that leads to the lift of immunity.

4.4.3. Stuck in the Transformation: The Tension between States and the 'International Community as a Whole'

The transformation of international law seems to promise a linear process: international law transforms from inter-State law to the law of the international community, and at the end 'international community as a whole' shall replace sovereign States as the basic structure of the world system. However, such a linear perception must be rejected. If the 'international community as a whole' in its complete form only exists after sovereign States cease to exist, then the 'international community' would lose its 'international' character. If structures of the "State system"[300] no longer exist, 'international' law would lose its inter-State foundations and become a body of 'global domestic law'. Therefore, the continuing existence of international law requires itself to remain stuck in the transformation in which States and the 'international community as a whole' coexist and interact with one another. This is also how the 'international community as a whole' is conceptualised in contemporary international law.

The definition of *jus cogens* in international law might be the most important point of reference about the interaction between States and the 'international community as a whole'. According to Article 53 of the VCLT:

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[299] Another example of inconsistent choices that is analogous with the civil-criminal distinction is the distinction between immunity *ratione personae* and immunity *ratione materiae*. In *Samantar*, for example, the Fourth Circuit determined that "American courts have generally […] conclud[ed] that *jus cogens* violations are not legitimate official acts and therefore do not merit foreign official immunity but still recognizing that head-of-state immunity, based on status, is of an absolute nature and applies even against *jus cogens* claims", *Samantar*, p. 776, see *supra* note 281.

[300] Henkin, 1995, pp. 7–25, see *supra* note 49.

> a peremptory norm of general international law (*jus cogens*) is a norm accepted and recognised by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.

This definition links the 'international community as a whole' with States by prescribing the acceptance and recognition of the 'international community *of States* as a whole' as the key normative criterion for identifying *jus cogens*. The 'of States' qualification stresses the central role of sovereign States in conceptualising the 'international community as a whole' and reinforces "the traditional tenets of international law, especially the primary role of States in the production of international rules, including rules of *jus cogens*".[301] But on the other hand, the concept of 'international community as a whole' should not equalise the sum of all sovereign States, because doing so would render the idea of 'international community as a whole' redundant. As the Chairman of the Drafting Committee of VCLT clarified on 21 May 1968,

> by inserting the words "as a whole" […] the Drafting Committee had wished to stress that there was no question of requiring a rule to be accepted and recognised as peremptory by all States. It would be enough if a very large majority did so; that would mean that, if one State in isolation refused to accept the peremptory character of a rule, or if that State was supported by a very small number of States, the acceptance and recognition of the peremptory character of the rule by the international community as a whole would not be affected.[302]

This explanation seems to introduce a quantitative criterion: 'international community as a whole' needs to include 'a very large majority' of States. There has also been suggestion of a qualitative criterion that the 'international community as a whole' needs to include "not only by some particular group of States, even if it constitutes a majority, but by all the

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[301] Ragazzi, 2002, p. 55, see *supra* note 132.

[302] Official Records of the United Nations Conference on the Law of Treaties, First Session (Summary records of the plenary meetings and of the meetings of the Committee of the Whole), 80th meeting of the Committee of the Whole, UN Doc. A/CONF.39/C.1/SR.80, 21 May 1968, p. 472, para. 12.

essential components of the international community"[303] such as "western and eastern States, developed and developing countries, and States of different continents".[304]

The essence of *jus cogens* is to create international norms binding on all the actors and participants in the international legal order in order to protect certain fundamentally important interests of the 'international community as a whole'. Therefore, the identification of peremptory norms must go beyond traditional positivism to require the consent of all the States. But at the same time, traditional foundations of international law based on State consent is respected, as the consent of a (both qualitative and quantitative) majority of States is required to identify the existence of *jus cogens*.

Here the question arises as to which and how many States are qualified to represent the 'international community as a whole' – or in Prosper Weil's words "who or what is this community"[305] – in the making and enforcement of international law. Because there is no answer to this question, there is a real danger that the concept of the 'international community as a whole' might be exploited as a self-serving rhetoric to mask hegemony and abuse of power in international relations. As Weil has warned as early as 1978:

> since a State's membership in this club of "essential components" [of the international community] is not made conspicuous by any particular distinguishing marks – be they geographical, ideological, economic, or whatever – what must happen in the end is that a number of States (not necessarily in the majority) will usurp an exclusive right of membership and bar entry to the others, who will find themselves not only blackballed but forced to accept the supernormativity of rules they were perhaps not even prepared to recognise as ordinary norms.[306]

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[303] Yearbook of the International Law Commission 1976, vol. 2, part II, UN Doc. A/CN.4/SER.A/1976/Add.1 (Part 2), p. 119, para. 61 (emphasis added) (http://www.legal-tools.org/doc/75f3bc/).

[304] Robert Ago, *Droit des traités à la lumière de la Convention de Vienne*, in *Recueil des Cours*, 1971, vol. 134, p. 323.

[305] Weil, 1983, p. 426, see *supra* note 63.

[306] *Ibid*., p. 427.

The paradox of *jus cogens* lies in the conflicts between its mandate to create universal rules beyond strict positivism and the traditional philosophical foundation of international law that State consent is the ultimate source of international law's normativity. When the principal sources of international law, treaty and custom, still reflect the philosophy of traditional positivism and its requirement of State consent, it would be hard to logically explain where a peremptory norm comes from if some States have not consented to it. It would be especially hard to justify – without every State's consent – how a treaty provision can stipulate the mechanism of *jus cogens* to prescribe universally non-derogatory binding norms without violating the general principle that "[a] treaty does not create either obligations or rights for a third State without its consent".[307] Therefore, although the concept of *jus cogens* seems to escape the hold of traditional positivism by its definition and links with the 'international community as a whole', its existence depends heavily on the traditional positivist philosophical foundations of international law. As Martti Koskeniemmi elegantly put:

> Initially, *jus cogens* seems to be descending, non-consensualist. It seems to bind States irrespective of their consent. But a law which would make no reference to what States have consented to would seem to collapse into a natural morality. It would appear as an indemonstrable utopia – a matter of subjective, political opinion. Hence the reference to recognition by ''the international community of States''. To that extent, *jus cogens* becomes ascending, consensualist. Moreover, every State's subjective consent seems necessary as [Article 53 of VCLT] speaks of the community as a whole and not just some representative part of it. Indeed, any other position would seem to violate sovereign equality.[308]

In order to make this conceptual fallacy behind *jus cogens* appear less blatant, the identification of peremptory norms has shifted from a

[307] VCLT, Article 34, see *supra* note 13. Alfred Verdross stressed that "[a]t first glance all treaties encroaching upon the rights of third States seem to be contrary to *jus cogens*. In fact such treaties are illegal if the third States do not give their consent". Verdross, 1966, p. 60, see *supra* note 120.

[308] Koskenniemi, 2005, pp. 323–24, see *supra* note 109 (internal citation omitted).

test-based process to a value-based approach.[309] Instead of asking what norms have indeed been accepted by all the States as non-derogatory, the identification of *jus cogens* becomes a search for moral values and ethical principles. Instead of taking on the difficult task of "find[ing] the practice and *opinio juris* that has given any particular content to [*jus cogens*]",[310] international lawyers look elsewhere for "fundamental values"[311] or "fundamental ethical principles"[312] to justify their identification of peremptory norms.

Such a value-based approach cannot solve the conceptual problems behind *jus cogens*, and instead only complicates it. The first problem is that there are many values that can be deemed as fundamental to the international legal order. According to different writers, these fundamental values may include, but are not necessarily limited to, State sovereignty (and its corollaries such as State equality, non-intervention, territorial integrity and so on),[313] non-use of force in international relations,[314] international peace and security,[315] humanity,[316] human rights,[317] and human dignity.[318] In international practice, as Ragazzi has observed:

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309 Such a swift to value-based approach is also reflected in the ICJ's identification of obligations *erga omnes* in international law, see Ragazzi, 2002, pp. 43–73, see *supra* note 132.

310 Henkin, 1995, p. 39, see *supra* note 49.

311 *Ibid*.

312 Lepard, 2010, p. 244, see *supra* note 135.

313 Henkin characterised these concepts as a part of "constitutional international law" whose "constitutional" normative character is derived directly from the international system itself. Henkin, 1995, pp. 31–32, see *supra* note 49. See also Declaration on Principles of International Law, 1970, see *supra* note 233.

314 See Cassese, 2005, p. 202, see *supra* note 3; Oscar Schachter, *International Law in Theory and Practice*, Martinus Nijhoff Publishers, 1991, p. 343; Henkin, 1995, pp. 38–39, see *supra* note 49; Ian Brownlie, *Principles of Public International Law*, 7th edition, Oxford University Press, Oxford, 2008, pp. 510–11.

315 See Verdross, 1966, p. 60, see *supra* note 120; Mahmoud Cherif Bassiouni, "International Crimes: *Jus Cogens* and *Obligatio Erga Omnes*", in *Law and Contemporary Problems*, 1996, vol. 59, no. 4, pp. 69–70.

316 *Ibid*; International Court of Justice, *Corfu Channel (United Kingdom of Great Britain and Northern Ireland v. Albania)*, Judgment, 9 April 1949, p. 22 (http://www.legal-tools.org/doc/861864/).

317 See Ragazzi, 2002, p. 48, see *supra* note 132.

318 Myres S. McDougal, *International Law, Power, and Policy: A Contemporary Conception*, in *Recueil des Cours*, 1953, vol. 82, pp. 165–91.

> [t]he ICJ, and some of its members in their individual opinions, have referred to *jus cogens* in the context of areas of the law as varied as the rights of passage through a territory, the protection of fundamental human rights, humanitarian law, the law of the sea, self-determination, and the prohibition of the unlawful use of force.[319]

Under this value-based (rather than consent-based) approach to *jus cogens*, the identification of peremptory norms becomes dangerously subjective and uncertain. As Birgit Schlütter reminded us:

> [t]hough international law is not a neutral law, absent any value judgments or value-based norms and principles, value judgments alone do not provide the hard and fast and, above all, revisable basis for the formation of legal norms.[320]

The existence of *jus cogens* depends on the acceptance and recognition of the 'international community as a whole', and States will always attempt to identify peremptory norms on behalf of the international community by claiming values that fit their interests to be fundamental. It is not unimaginable that in the conflict between two States, both States can claim certain fundamental values and accuse the other of violating *jus cogens*. In scenarios like this, the 'international community as a whole' ends up being "reduced to a convenient term of art"[321] that are doomed to be exploited in subjective, self-serving, and opportunist manners.

The value-based approach to *jus cogens* has a second problem: although States can hardly object to certain norms being pronounced as *jus cogens* because of the "unimpeachable moral concerns"[322] behind these norms, their commitment to the enforcement of peremptory norms is not necessarily prioritised over other legal and political considerations.

Prohibition of torture is an apt example. On the one hand, it is hardly possible for States to oppose to identifying torture – one of the most heinous and severe violation of human dignity – as violation of *jus cogens* in international law. But on the other hand, as *Kazemi* and the majority of

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319 Ragazzi, 2002, p. 46, see *supra* note 132.

320 Birgit Schlütter, *Developments in Customary International Law: Theory and the Practice of the International Court of Justice and the International Ad Hoc Tribunals for Rwanda and Yugoslavia*, Martinus Nijhoff Publishers, 2010, p. 58.

321 Weil, 1983, p. 430, see *supra* note 63.

322 *Ibid*., p. 424.

international practice at the present time show,[323] domestic decision-makers do not feel that the enforcement of *jus cogens* in the sense of providing a civil remedy to victims of torture must be prioritised over the consideration of State immunity. As the majority opinion of *Kazemi* made clear, the Court's decision to "give[] priority to a foreign State's immunity over civil redress for citizens who have been tortured abroad" does not indicate that "Canada has abandoned its commitment to the universal prohibition of torture".[324] While "Canada does not condone torture, nor are Canadian officials permitted to carry out acts of torture",[325] the policy choice of prioritising foreign immunity is "an indication of what principles Parliament has chosen to promote given Canada's role and that of its government in the international community".[326]

In deciding whether the immunity is granted to violations of *jus cogens* in which the interests of the 'international community as a whole' is at stake, it is also reasonable and legitimate for a State to take into account consequences of its decision to inter-State relations. The consequences to inter-State relations are carefully evaluated even when domestic courts decide to lift the immunity. For example, Lord Phillips who favoured lifting of immunity in the civil proceedings of *Jones* reasoned that:

> If civil proceedings are brought against individuals for acts of torture in circumstances where the State is immune from suit *ratione personae*, there can be no suggestion that the State is vicariously liable. It is the personal responsibility of the individuals, not that of the State, which is in issue. The State is not indirectly impleaded by the proceedings.[327]

Once again, the 'international community as a whole' does not have the authority to triumph the traditional State-oriented foundations of international law. At the present time, it is still primarily the States and their

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[323] See European Court of Human Rights, *Jones and Others v. The United Kingdom*, Judgment, 14 January 2014, applications nos. 34356/06 and 40528/06, para. 34 (http://www.legal-tools.org/doc/7307f8/).

[324] *Kazemi*, para. 46, see *supra* note 240.

[325] *Ibid*., para. 53.

[326] *Ibid*., para. 46.

[327] UK Supreme Court of Judicature, Court of Appeal, *Jones v. Ministry of the Interior of Saudi Arabia and Lieutenant Colonel Abdul Aziz*, Judgment, 28 October 2004, [2004] EWCA Civ 1394, para. 128 (http://www.legal-tools.org/doc/6de5e5/).

own decisions that are shaping the concept of the 'international community as a whole', and "[t]he question of if and to what extent national law should be trumped by a peremptory norm of international law would depend on a careful weighing of all the interests affected".[328] At the end of the day, it is States that call the shots.

4.5. Concluding Remarks

The international legal order has witnessed an ongoing transformation: States cease to be the exclusive subjects in international law, and the dependence of international law's legitimacy on State consent has loosened to some extent. Since the Nuremberg trials, the concept of international criminal responsibility for individuals has played a significant part in this foundational transformation by propelling the pluralisation of subjects in the international legal order. Moreover, it helped develop legal mechanisms to punish the most severe violations of international law, and materialise the philosophical dimension of international law as the law of the international community as a whole.

As international criminal responsibility for individuals has firmly established as a principle of international criminal law in particular and public international law in general, it is high time that its philosophical foundations and practical implications be carefully evaluated.

The dictum that "crimes against international law are committed by men, not by abstract entities", which once provided a legitimising foundation of international criminal responsibility for individuals in the "decisive and rare legislative moment"[329] in the Nuremberg trial, is problematic and has led to some unconvincing and undesirable interpretation of international law. The most important legacy of the Nuremberg trial is establishing that international law can impose responsibility directly on the individual perpetrators of international crimes by introducing international criminal responsibility for individuals to the international legal order. But it would be both wrong and unwise to exclude the involvement of abstract

[328] Erika de Wet, "The Prohibition of Torture as an International Norm of *Jus Cogens* and Its Implications for National and Customary Law", in *European Journal of International Law*, 2004, vol. 15, no. 1, p. 121.

[329] Mettraux, 2011, p. 7, see *supra* note 84.

entities and collective criminality from the commission of international crimes.

The element of collective criminality is inherent in the concept of international criminal responsibility for individuals. In most cases, international crimes are committed by abstract entities like States as much as (if not more) by the individual perpetrators. Both the conceptualisation of international crimes and the modes of liability reflect the inseparable intertwinement between individual guilt and collective criminality and acknowledge the essential and pervasive role of abstract entities in the commission of international crimes. While individual criminal responsibility should remain a foundational principle of international criminal law, international criminal responsibility for collective system should be developed in the international legal order.

While international law has been increasingly emphasised as the law of the international community, its traditional identity of inter-State law remains important. The set of concepts and mechanisms that stress the community dimension of the international legal order – *jus cogens*, international crimes, and international criminal responsibility for individuals – should not mislead us into believing that the transformation of international law would or should end with the 'international community as a whole' or individuals replacing sovereign States as the only structural and philosophical foundation of the international legal order.

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