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

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

Sergio Dellavalle*


Attempting to discover the contribution that Hegel’s philosophy could make to the further development of international criminal law is not an easy task. Rather, it is like starting an expedition into an arid region where hardly anything exciting is expected to be found. Indeed, Hegel paid little attention, in general, to international law, and his understanding of the international arena is dominated by largely self-reliant individual States, often struggling with each other to defend their own selfish interests. Moreover, criminal law seems to be exclusively related to the inner sphere of the individual State. Nonetheless, if we have the intellectual courage to go beyond first impressions and, venturing into what appears to be unpromising terrain to explore, to have a closer look not so much at Hegel’s concrete proposals, but rather at some of the underlying concepts of his social, political and legal conception, we can find interesting, if not even ground-breaking suggestions.

To this end, it is useful to distinguish between two separate questions on which we should concentrate. The first is Hegel’s general understanding of crime and punishment, and therefore of criminal law. The second is the way in which this understanding could be expanded to possibly include the dimension of a criminal law beyond the individual State.

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This second question surely goes further than Hegel’s explicit intentions, but can be reasonably inferred on the basis of his vision of international law and relations which connects in an unprecedented way institutions, history and destiny of the individual State with the universal order of reason.

The first question – which is addressed in the next section – is focused on Hegel’s view of criminal law. This emerges, with all its originality, if we place it against the backdrop of the interpretation that characterised the paradigms of order that dominated the Modern Ages until Hegel’s time and against which he had to establish his innovative position. More specifically, we must keep in mind that the modern philosophy of criminal law – with Kant as its most exemplary exponent – had an almost undisputed individualistic basis. In other words, it was largely, if not exclusively, focused on the individual as a free and fully responsible moral agent. Based on this foundation, society is an artefact which has been built by individuals for their purposes and can only survive if the balance between its components – precisely the individuals themselves along with their self-referential interests – is strictly maintained or restored as soon as possible if disrupted. In fact, a criminal act is a serious disruption of the balance insofar as an individual is acting for his own benefit and to the unjustified detriment of the other(s). Thus, punishment should be retribution imposed on the individual who, on the basis of a free and conscious act of will, acted to the disadvantage of the other(s), in order to re-establish the balance, whereas the retribution must be comparable to the criminal act.

Hegel’s social philosophy, on the contrary, is not centred around individuals, but on the community, which is assumed to possess an added value compared to the sum of its individual components. Coherently, his theory of crime and punishment interprets the former rather as an offence to the homeostasis of the community – that is, to its capacity to guarantee peaceful and co-operative interactions – so that the punishment actually aims at reconciling the society trapped in an unresolved conflict. Consequently, the form and severity of the punishment can differ greatly from the form and severity of the crime, provided that it can achieve its main goal. From this perspective, Hegel’s philosophy seems to create an idea of justice – and of transitional justice in particular – that departs from its traditional conception, as exercised at the international level in the Nu-
remberg and Tokyo trials, giving some significant conceptual support to the kind of approach that has been established by truth commissions.

The second aspect of Hegel’s philosophy that is interesting in the context of this analysis – as addressed in the third section – is his idea of the relation between individual States and the world order. Once again, the target of Hegel’s criticism was Enlightenment political philosophy. This philosophy relied, in fact, on just two elements: the individuals with their rights, reason and interests, on the one hand, and the societas civilis as the political structure created by the individuals themselves in order to safeguard their entitlements and to make the social interactions well-ordered on the other. Insofar as social order was assumed to be – at least potentially – cosmopolitan, also the societas civilis was supposed to take the form of a worldwide civitas maxima. Although we can detect in Kant’s works a seminal reference to a multi-layered system of public law, he never developed this ground-breaking intuition into a coherent concept. Actually, the fundamental assumption of the individualistic paradigm of social order was, therefore, that individuals are the foundation of order as well as its goal. Moreover, insofar as their interactions unfold worldwide, also the political and legal structure which makes these interactions peaceful and predictable cannot but be a Weltrepublik. This understanding of social order – in particular, the focus on the individuals and the centralisation of order into a unitary supra-State organisation – is also relevant for the theory of criminal law since it paves the way for two decisive developments: first, the introduction of the principle of individual responsibility in public international law, and, secondly, the creation of criminal courts at the international level. This approach found its most radical theoretical expression – one and a half centuries after the end of the golden age of Enlightenment – in Hans Kelsen’s work (discussed in Chapter 16 below), and was transferred into legal praxis, even later, through the establishment of the International Criminal Court (‘ICC’).

At first glance, it seems that we have little to learn from Hegel on this point, due to his restriction of criminal law just within the borders of the single State, as well as to the rather marginal normative quality that he attributed to international law. However, this is not the whole truth. In fact, he recognised a higher level of rationality than that embedded in the single State, namely the rationality of world history. In other words, he developed an idea of rationality that is realisable in the world of politics and history, which includes two layers: the single State, on the one hand, and
the world order on the other. Applying this perspective to the question of criminal justice and of its possible extension into the international realm, we could argue that the main context of criminal justice has still to be essentially the nation-State, and that the more inclusive level comes into play only when the basic instance fails to achieve its goal. More concretely, the ICC should not be seen as an institution of the *civitas maxima*, which substitutes the national judicial authority, but rather as an integration of, and a support to, the latter. Surely, such a suggestion goes a couple of steps further than the explicit contents of Hegel’s philosophy. In particular, the fact that, in his conception, world reason is independent of individual awareness, and thus non-reflexive, is highly problematic. Nevertheless, if we manage to re-interpret world reason in intersubjective terms, then Hegel’s view could become an illuminating conceptual platform to elaborate a new balance between national and international criminal justice.

Therefore, anticipating the main conclusions of the inquiry, on which the final section is focused, it is possible to assert, first, that Hegel introduced a significant transition from the understanding of criminal law as essentially aiming at retribution to an idea of it as primarily contributing to reconciliation. Secondly, he suggested the overcoming of the contraposition between an absolutely self-reliant State and a cosmopolitanism which turned out to be largely forgetful of the specificity of the national identity. In his multi-layered philosophical, political and legal construct, both national identity and the world order of reason have a role to play, although the latter does so in a way which may be rather unconvincing. Nevertheless, the first stone for a highly innovative view of a multilevel world order was laid, so that, if we apply his general vision to the question of criminal law, we can deduce, then, that its international dimension should co-operate with – and not substitute – national institutions, always with the goal of restoring national and international peace and order.

13.2. Crime, Punishment and Reconciliation in Hegel’s Philosophy

To better understand the novelty and originality of Hegel’s approach to criminal law, we must set it against the background of the well-established conceptions which had been developed before his time. To this end, it is useful to connect these conceptions to what I propose to define as the
‘paradigms of social order’.\textsuperscript{1} By the notion of paradigm of social order, I refer to the most essential set of concepts which lie at the basis of the use of the theoretical and practical reason, with reference to a specific field of human knowledge and action within a certain historical context. Put differently, in order to understand the world – or at least a part of it – and to act properly, we always rely on some basic concepts which make up what we can identify as the preconditions of knowledge and action. On this set of most fundamental concepts, then, we build the theories that, at a less general level, allow us to describe the world – sometimes also to try to explain it – and justify our actions. Given these premises, if we connect the most fundamental theories on criminal law to the paradigms of social order, we will have as many fundamental ideas of criminal law as we have paradigms of social order. In fact, this cannot be surprising insofar as the ideas about crime and punishment are generally considered essential for a certain understanding of how a well-ordered society should be organised. Therefore, depending on which fundamental paradigm of order we adopt, we also assume, as a consequence, a quite specific conception of what a crime is and of how we should deal with it in order to restore social order.

If the connection between the ideas of criminal law and the paradigms of order is the first step, the second consists in specifying the contents of the paradigms of order that also determine the conceptions of criminal law. Paradigms of social order comprise concepts which make claims as regards three inescapable aspects of a well-ordered society: first, the extension of a well-ordered society, that is, whether this is necessarily limited in space and population, or can be presumed to be universal, including all human beings; secondly, the ontological basis of a well-ordered society; thirdly, the question whether a well-ordered society must be structured in a hierarchical and unitary form, or can also positively display plurality and diversity, so that the conflict of norms is not seen as a pathology, but as a difference that should be resolved by means of dialogue. Leaving the influence that the first and third aspects of the contents of the paradigms of order may have on the understanding of criminal law to the next section, I concentrate here on the second aspect, namely, on which ontological basis a well-ordered society is assumed to be built.

Before Hegel, two opposite conceptions had been developed with reference to the ontological fundament of a well-ordered society. On the one hand, we have the holistic understanding of society, according to which the whole – or holon – of the community, with its social bond, is not only genetically but also axiologically superior to the sum of its members. In other words, the social community is presumed to have more value than all associates taken together, as well as than each one of them taken singularly. On the other hand, the opposite idea arose that society is nothing more than a construct created by individuals in order to better protect their rights and interests, with the result that it has no inherent value which might supersede the value of the individuals.

In accordance with the holistic paradigm, since the highest worth is assigned to the well-being of the community as a whole – or, more specifically, to its homeostasis – crime is seen primarily as an offence against the holon, and only secondarily against one or more of its members individually. Furthermore, the social whole is regarded as an organic unity, so that the reaction to the crime – that is, the punishment – has essentially the task of recreating the homeostasis and the unity of the society, and not so much of compensating the individual damage. The consequence is that similar crimes might result in quite different kinds of punishment, if this disparity is deemed beneficial for the restoration of social order.

A perfect example of this approach is delivered by Thomas Aquinas. His starting point is the acknowledgement that crime – or, in Thomas’ words, ‘sin’ – is a breach of the unitary principle of social order. As a result, “whoever sins, commits an offence against an order: wherefore he is put down […] by that same order, which repression is punishment”. However, given that “the proper act of justice is nothing else than to render to each one his own”, Thomas specifies that a two-fold order of justice must be taken into account: on the one hand ‘commutative justice’, which “is concerned about the mutual dealings between two persons”; on the other ‘distributive justice’, which represents “the order of what belongs to the community in relation to each single person” and “distributes the goods proportionately”. When it comes to the definition of how a

3 Ibid., sect. II, question 58, art. 11, 1921.
4 Ibid., question 61, art. 1, 1935.
“just proportion” in the distribution of goods of common interests should be understood, Thomas leaves no room for ambiguity:

[I]n distributive justice something is given to a private individual, in so far as what belongs to the whole is due to the part, and in a quantity that is proportionate to the importance of the position of that part in respect of the whole. Consequently in distributive justice a person receives all the more of the common goods, according as he holds a more prominent position in the community.5

Therefore, we can conclude that, since criminal justice is intended, if not to distribute, then surely to defend common goods, it must be ruled by distributive justice, with the consequence that punishment must aim primarily at re-establishing the hierarchical order of society.

Albeit in a less radical way than Thomas Aquinas, Jean Bodin – to cite a second example from a nearer historical and ideological context – also seems to share largely the same view. Indeed, Bodin criticises the commonwealth in which, according to a strict understanding of distributive justice, “all is left to the discretion of the magistrates to distribute pains and penalties according to the importance and status of each individual”.6 Such a political community, Bodin argues, would be “neither stable nor durable” since “no bond of union” could be possible “between the great and the humble, and therefore no harmony between them”.7 As a result, distributive justice should be mitigated by some elements of commutative justice, in order to make the distribution of benefits and penalties more predictable for all members of the République. Bodin gives to this mixed regime the name of ‘harmonic justice’. However, even if social rank is partially – and rather marginally – balanced by considerations of equal treatment, the rationale behind Bodin’s conception does not consist in the principle that every individual should get what she or he deserves as a consequence of her or his actions and on an equal footing with all other individuals, but, again, in the idea that the highest goal of social life is the stability of the community, and not the guarantee of individual rights and interests. Yet, in Bodin’s perspective stability can be best achieved

5 Ibid., question 61, art. 2, 1936.
7 Ibid.
through harmonic justice as a synthesis of distributive and commutative justice, and not through an uncompromising and lastly short-sighted defence of social hierarchy.

The shift came with the paradigmatic revolution from the holistic towards the individualistic understanding of society, which was triggered by the political philosophy of Thomas Hobbes (discussed in Chapters 8 and 9 above, and in the chapter by Christopher B. Mahony in *Philosophical Foundations of International Criminal Law: Foundational Concepts*). In his works, Hobbes put, for the first time, individuals with their inherent endowment of rights, interests and reason at the centre of society. As a corollary, the *societas civilis* is nothing but a construction of human will, with the purpose of safeguarding the fundamental entitlements of the individuals by means of a contract. In fact, Hobbes’s *pactum unionis* was assumed to necessarily re-establish social hierarchy, but this was regarded as the outcome of a free decision taken by those individuals who had chosen to become members of a political community. In other words, while according to Bodin, social hierarchy is a positive matter of fact, which deserves to be preserved, in Hobbes’s view it is created by an agreement between free and equal individuals.

As far as criminal law is concerned, the individualistic paradigms of order led sometimes to opposite outcomes – at least in such an important issue as the death penalty. In particular, Cesare Beccaria condemned capital punishment resorting to the contractualist argument that no one would agree on giving to others the right to take her or his life. Nor would the State have such an entitlement, since it derives its competences exclusively from the transfer of rights by the citizens. On the contrary, Jean-Jacques Rousseau started from the same contractualist premises to achieve the reverse conclusion, namely that the death penalty is justifiable precisely because everyone has the right to risk her or his life in order to preserve it. Thus, if we admit that the threat of capital punishment can

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Despite these differences, the individualistic understanding of criminal law is generally characterised by a significant internal coherence and conceptual soundness – a coherence and soundness that has been interpreted in the most paradigmatic way by Kant. In his work, we can perfectly detect the two outstanding features of the individualistic conception of criminal law: the idea of the moral freedom and autonomy of the individual, on the one hand; and the constructivist – we could almost say: mechanistic – view of the State on the other. Kant’s centrality of the individual is most famously expressed in the second formulation of his categorical imperative, according to which a person should never be treated “as a means to an end”, but “always […] as an end”.\footnote{Immanuel Kant, “Grundlegung zur Metaphysik der Sitten”, in Immanuel Kant, \textit{Werkausgabe}, Wilhelm Weischedel ed., Suhrkamp Verlag, Frankfurt am Main, 1977 (1785), vol. VII, pp. 9–102, at p. 49 (for the 1956-edition, see www.legal-tools.org/doc/c8e1e/f).} When applied to criminal law, this principle implies that a punishment should not be inflicted on a person in order to deter someone else from committing a crime, and even not to prevent the convicted from doing further harm to the society. As a result, criminal law should not be seen as a cure against the pathologies of society, or as an instrument to recreate social cohesion and harmony, and punishment has the only goal of re-establishing the moral integrity of the subject. Therefore, according to the individualistic paradigm of order – and contrary to the holistic one – the purpose of criminal law is not the preservation of the organic homeostasis of the social community, but the defence of the most essential elements of the individual capacity to act. In Hobbes’s philosophy, this was best guaranteed by the safeguard of life and safety of the individuals;\footnote{Hobbes, \textit{Leviathan}, chap. XVII, see supra note 8; Hobbes, \textit{De Cive}, book II, chaps. XIII, II ff., see supra note 8.} for Locke by the prevention of self-defence;\footnote{John Locke, \textit{Two Treatises of Government}, Awnsham-Churchill, London, 1698 (1690), book II, chap. 7, sect. 90; \textit{ibid.}, chap. 11, sect. 134; \textit{ibid.}, chap. 12, sect. 143; \textit{ibid.}, chap. 13, sect. 150.} for Rousseau by the consolidation of the \textit{volonté générale}\footnote{Rousseau, 1966, see supra note 10, book I, chap. 6, p. 51.} – and for Kant,
in probably the most radical way, by the protection of the moral integrity of every single person.

Furthermore, the individualistic paradigm of order generally assumes that individuals are capable of acting on the basis of free, self-conscious and reasonable decisions. In other words, while in accordance with the holistic understanding of order what the single person does is always, to some extent, depending on her or his role within society, the supporters of the individualistic paradigm assert that individual action is nothing but the result of free choice. Rousseau and Kant went so far as to claim that autonomy is the most fundamental goal which a correct use of practical reason should envisage. With a difference, however: while for Rousseau the autonomy of the individual derives from the autonomy of the political community, for Kant individual autonomy has clear priority. Thus, for Rousseau, crime is primarily an offence against the autonomy of the volonté générale insofar as someone has tried to impose her or his selfish – and therefore, from the perspective of the political community, heteronomic – advantage on the shared interests. Instead, according to Kant – and more specifically, to the first and the third formulations of his categorical imperative – crime is an attack against the capacity of the individual to act in accordance with the universal commands of reason, which is the only guarantee that she or he is not at the mercy of the heteronomy of egoistical driving forces. From this point of view, if we have to preserve the dignity of the individual as an autonomous decision-maker, then we must also assume that every action is the consequence of a free decision. This approach rules out any possibility to concede to the offender some kind of mitigating circumstances due to her or his unfavourable social situation.

Once given that, within the conceptual horizon of the individualistic paradigm of order, criminal law does not aim at restoring the organic uni-

\[17\] Kant, “Grundlegung zur Metaphysik der Sitten”, 1977, p. 67, see *supra* note 11.
ty of society, but at reinstating the moral capacity of the subject to act in a just way – and not in a functional one – both as an individual and as a member of a political community based on a contract between free and equal, then the question arises on what the just measure of punishment should be. It was Kant, once again, who gave the most unequivocal answer.\textsuperscript{18} Since the consideration that should matter is exclusively the damage that the culprit has inflicted on the society – not her or his social status, difficulties that she or he might have had in life, or social pathologies in general – the just punishment cannot be anything but the imposition by the society of the same amount of harm on the convicted criminal. Otherwise, Kant argues, the punishment would be a matter of individual arbitrariness by the judge, therefore a breach of the principle of legal certainty, as one of the most central tenets of justice.\textsuperscript{19}

Leaving aside Kant’s chilling defence of the death penalty, which is justified by resorting to the same strict concept of retribution,\textsuperscript{20} the question of the just measure of punishment brings the second most remarkable element of the individualistic understanding of criminal law to the fore, along with the freedom and autonomy of the individual: that is, the constructivist, if not mechanistic, idea of justice. To understand this aspect, it is necessary to return to the epistemological revolution which came with the transition from the holistic to the individualistic paradigm of order.

According to the holistic understanding, society can be regarded as superior to the sum of its members because it is conceived as an organic body, as a corpus, each component of which has its proper raison d’être only within the whole, while being largely useless outside of it. Therefore, the action undertaken by the public power against one limb of the body – also in the form of criminal punishment – is essentially depending, in its scale, on the functional interaction of the components. On the contrary, the individualistic paradigm conceives of society as made of elements – the individuals themselves – which have inherent value of their own. As a result, the political community is visualised as a machine that puts together those elements for the purpose of obtaining a general benefit. On the other hand, since the components have a social meaning regardless of


\textsuperscript{19} Ibid., p. 454.

\textsuperscript{20} Ibid., p. 455.
their belonging to the assembled machine, they must be preserved in their original, pre-social endowments, while the mechanism of social interaction must aim at maintaining perfect balance between equally essential and potentially independent constituents. Within the horizon of an understanding of politics that consider physics – and in particular mechanics – as its leading science, to each action a contrary reaction must follow, which must have the same intensity in order to uphold the mechanism and its capacity to function. Thus, to a criminal action that threatens to jeopardise the stability of the construction, an equivalent counteraction must follow in form of a punishment according to the most severe principles of retributive justice.

When Hegel began to address the question of the consequences of crime for the destabilisation of the social and political community, as well as of the significance and measure of punishment as the instrument to re-establish order, he had to develop his own position against a paradigmatic background characterised by a dichotomy. On the one hand, there was the idea that criminal law should reinstate social cohesion and hierarchy; on the other, the individualistic view according to which the punishment should aim at recreating the moral integrity of the person on the basis of an inflexible system of retribution. In fact, Hegel started to show interest in the matter quite early, and no doubt can be raised that the target of his criticism was – at least at first sight – the criminal law conception of modern individualism in general, and of Kant in particular. We find the first references to the meaning of crime and punishment in the fragmentary writings – going back to his time in Frankfurt (1796–1800) and never published during his lifetime – which are generally known under the title Der Geist des Christentums und sein Schicksal (The Spirit of Christianity and Its Fate – 1797–1800). Given that crime is interpreted by Hegel, as

usual, as a severe breach of the rules of social order, his originality already emerges clearly when he shifts his attention to the task that should be assigned to punishment and, thus, to criminal law. His criticism is most explicitly directed against the rigid Old Testamentary law of retaliation (*lex talionis*), but, in fact, his closest and most significant target is Kant’s theory of morals and law.

According to Hegel’s analysis, in both Old Testamentary conception and Kant’s vision, criminal law is a power which arises from outside, against the will of the wrongdoer. It can submit the culprit, but it cannot reconcile her or him with the community. Against this conceptual background, no room for mercy is given. The wrongdoer is punished and subdued, and she or he might also be led back to her or his moral autonomy insofar as her or his criminal attitude is made inoffensive. Nonetheless, the law remains an external force that can compel, but is still unable to really overcome the conflict by transforming it into a stable condition of peace based on a largely shared interpretation of the facts as well as of the best way to rise above them.

Instead, to heal the wound that has been inflicted to society through the criminal act, it is necessary that the culprit recognises that she or he has done wrong and that she or he must make peace with the community so as to have a dignified social life again. In order to explain the difference between the positive law that only punishes and the interior, more deep-going process that can reconcile, Hegel introduced the concept of ‘fate’ (*Schicksal*). While the force of the law externally constrains the freedom of the convicted persons, their ‘fate’ – that is, what happens to them after the crime, and their moral and psychological reaction to these events – makes them aware of the fact that the offence against the rules of the community has alienated them from the social group which is essential to build up the most fundamental nucleus of their identity. Therefore, in a kind of brilliant anticipation of the moral and social dilemma masterfully expressed by Dostoyevsky in *Crime and Punishment*, in Hegel’s

26 Hegel, 1971, p. 306, see *supra* note 23.
early work, it is the culprit her- or himself who acknowledges – like Dostoyevsky’s Raskolnikov – the necessity to submit her- or himself to the social order. The true meaning of justice should not consist in the application of abstract rules, but in aiming at a ‘reconciliation through love’ (Versöhnung durch die Liebe). In fact – Hegel claims – “punishment better nothing, for it is only suffering, a feeling of impotence in face of a lord with whom the criminal has and wants nothing in common”. On the contrary, “it is in the fact that even the enemy is felt as life that there lies the possibility of reconciling fate”. Therefore, “this sensing of life, a sensing which finds itself again, is love, and in love fate is reconciled”.

Nonetheless, the purpose of reconciliation does not remove the necessity of inflicting punishment as a reaction to the crime. Yet, the task that is accomplished by inflicting punishment does not consist in counter-balancing the harm done to the society and to the moral autonomy of the subject, which is based on the categorical imperative, but in supporting the solution of social conflicts.

Since already in Hegel’s early works the reaction to the crime should lead primarily – if not exclusively – to the reconciliation of the political community, it could seem that we are confronted, here, with a backwards-oriented plea for a return to the holistic understanding of criminal law. In fact, this is partially true insofar as Hegel openly turned his back on the conception of criminal law of the enlightenment and, in general, of the individualistic paradigm of order. As a result, he envisaged the reconstruction of a harmonic social community, and not the regaining of moral autonomy by the single subject.

However, claiming that Hegel just wanted a kind of restoration of the old idea of order is too reductive, and ultimately incorrect. Indeed, it is also undisputable that the goal of justice should not consist, in his view, in restoring traditional and old-fashioned hierarchies, but in reconstructing

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30 Hegel, 1971, p. 345, see supra note 23; Knox, 1961, p. 231, see supra note 23. In the English version edited by T.M. Knox, the German “Verbrecher” is rendered by “trespasser”; I prefer to translate it as “criminal” since the German word is the same which is also used in the language of criminal law.


33 Hegel, 1971, p. 306, see supra note 23.


and consolidating an ethical life with a predominant look to the future. In fact, criminal law can only succeed in its most fundamental task if it contributes to the ‘interiorization’ of shared social values, whereas these values must imply what Hegel called, in his later works, a Gesinnung (‘conviction’), namely, a profound and assertive identification with the goals of the social and political community by every single individual.36

This is the very point where the second essential novelty of Hegel’s conception of criminal law comes into play. Indeed, at least in some of his texts, the criminal act is not an offence against a legal order which – in a static vision of society – is deemed to sustain the best possible or, at least, the best achievable form of social life. Rather, according to a dynamic understanding of social evolution, the crime is an inevitable revolt against an abstract system of norms which rises in front of the individuals as an alien power. Surely, this interpretation in not meant to justify the violation of norms. In fact, no doubts can be raised on the fact that Hegel always condemned the criminal act as a dangerous attack on the essential rules of a peaceful social life, and that he was utterly convinced that it had to be punished. Nonetheless, it was also seen as a response to some kind of social pathology, which punishment – and, thus, criminal law – has the task, if correctly understood, of healing and overcoming. In this sense, the criminal act is granted a positive meaning as a necessary step on the way to a better society. Indeed, if we consider that international criminal law has to deal with such abhorrent crimes as, for instance, genocide, it might be quite disturbing to think of them as bearing some kind of constructive function. Nonetheless, leaving aside Hegel’s optimistic teleology, it is also true that crimes – even the most horrifying – may be indicators of a deep-going sickness in which a society is trapped and from which it should be released. In making society healthy again, however, the intervention should always concentrate first on the support for the victims, and only in a second step on the social rehabilitation of the perpetrators.37


The idea that crimes are the result of social pathologies – in particular of a too formal understanding of rules – was already implicit in the Frankfurt writings on The Spirit of Christianity. A couple of years later – namely in the first lecture on the Philosophy of Spirit held by Hegel in 1803–04, thus in the middle of his time in Jena (1800–07) – the breach of rules was directly related to social conflicts and to the role played by them in paving the way to higher and more stable forms of social organisation. No direct reference is made, here, to criminal law. Nonetheless, the reason for the breach is given, here too, by the presence of regulations which are too far from the individual sensibility; yet, they concern, in this text, not religious worship, but the safeguard of property. The outcome, then, is similar as well: far beyond the mere punishment of the trespasser, the true solution of the conflict cannot but be a pacified society grounded on mutual recognition. In the last lecture on the Philosophy of Spirit of the Jena period (1805–06), the strands of thinking that Hegel developed in his earlier works came to an accomplished synthesis. The reference to criminal law reappeared again, even more explicitly than in the Frankfurt writings, but was now inserted – following the pattern of the Philosophy of Spirit – into an ambitious interpretation of social evolution, that was assumed to move on through the emergence of conflicts and their solution. Building a stage on its own, criminal law was located – like the ‘struggle for recognition’ in the lectures of 1803–04, but in the context of a more complex systematic structure and on the basis of a more sophisticated argumentation – between the system of property grounded in contract, and the constitution built on shared values. Hegel did not reject the principle of retribution, but left no doubts, nonetheless, about his conviction that this had to be only a preparatory and largely instrumental step on the way

39 Ibid., pp. 217 ff.
40 Ibid., pp. 223 ff.
42 Ibid., pp. 212 ff.
to a higher goal, namely the foundation of a society in which the interests of the individuals could be identical with the common good.\(^\text{43}\)

Hegel did not regard crime as the result of social tensions and pathologies in all texts in which he addressed the question of criminal law. The difference depends largely on how he respectively interpreted and described the distinct forms of the ‘spirit’ (\textit{Geist}) – namely, the expressions of the self-realisation of the individual in relation to its conscience, to other individuals, as well as to the social world – and their relations to each other. In some works – in particular, those from the early stages of his philosophy – he did it with an almost evolutionary approach. In other words, the shapes taken by the \textit{Geist} are dynamically presented as the result of social conflicts, or – as Hegel preferred to say – of “struggles for recognition”.\(^\text{44}\) This applies in particular to all works referred to above; to be more precise, it applies at least partially to \textit{The Spirit of Christianity},\(^\text{45}\) and fully to the later \textit{Philosophies of Spirit} of 1803–1804\(^\text{46}\) and 1805–1806.\(^\text{47}\) In these writings, crime and punishment are conceived of as painful, but inevitable stages on the way to a properly integrated society. In other works, on the contrary, Hegel fixed the forms of the ‘spirit’ within a rather static system, in which each one of its manifestations contributes to the organic whole, and the transition from the lower expression of the \textit{Geist} to the higher one is determined – according to what we assume to be the typical idealistic method – by the conceptual insufficiency of the former, rather than by social processes. This approach was anticipated – at least as regards the static understanding of the social order, far less with reference to the concept of \textit{Geist}, which Hegel had not properly developed yet – in the \textit{System of Ethical Life (System der Sittlichkeit)} of 1802–03,\(^\text{48}\)

\(^{43}\) \textit{Ibid.}, pp. 215 ff.


\(^{45}\) Hegel, 1971, see \textit{supra} note 23; Knox, 1961, see \textit{supra} note 23.

\(^{46}\) Hegel, 1986, see \textit{supra} note 38; Harris and Knox, 1979, see \textit{supra} note 38.

\(^{47}\) Hegel, 1987, see \textit{supra} note 41; Rauch, 1983, see \textit{supra} note 41.

and was brought to completion, then, in the works of his Berlin period (1818–31). Here, the criminal act loses its former function as a detector of social pathologies and conflicts to be healed through social processes of reconciliation, but criminal law in general, and punishment in particular, maintain their role as instruments in the service of the construction of an ethical life based on shared values. More specifically, in the System of Ethical Life, punishment is presented as a preliminary stage of the ‘Free Government’ (freie Regierung) insofar as it has the task of overcoming the challenge against the very idea of a society grounded on the common good.  

The most complete presentation of criminal law in Hegel’s work, however, is to be found in the Elements of the Philosophy of Right (Grundlinien der Philosophie des Rechts) – officially printed in 1821, but released in 1820. Yet, completeness does not correspond necessarily with innovativeness. In fact, in the Philosophy of Right of his Berlin period, Hegel was primarily interested in construing a coherent system of political and legal philosophy in which every element of the two disciplines could find its proper place as part of a holistic understanding of truth and knowledge. Hegel was convinced that this could happen on the basis of the subjectivistic categories of his Logics, which he had developed during his Nuremberg period. The subjectivistic logics allowed, according to Hegel’s intention, a sufficient dialectic between the categories of law and politics, but within a framework which was determined from the outset. In other words, each element was regarded, now, as a component of the self-development of the holistic subject, and not – as in the earlier texts – as a step in the context of a social evolution with open-ended results. The outcome was that intersubjective interaction turned into monological subjectivism, and that the elements of law and politics were frozen into a rather rigid structure. Therefore, we can find in the Berlin Rechtsphilosophie only a vestige of the most ground-breaking innovations that Hegel brought into the debate for the first time in the earlier texts.

The presentation of criminal law in the Rechtsphilosophie of 1821 is divided into two parts: the first one is inserted into the section on the

49 Ibid., p. 497.
50 Hegel, 1971, vol. 7: Grundlinien der Philosophie des Rechts, see supra note 36.
‘Abstract Right’ (Abstraktes Recht) and contains the analysis of the formal concepts of criminal law; the second belongs to the section on the ‘Administration of Justice’ (Rechtspflege), in which, in general, the abstract system of the legal categories acquires living concreteness through statutes and adjudication. Although marginalised if compared with the earlier texts, at least two of the innovative elements of Hegel’s former interpretation of criminal law are still present in the Rechtsphilosophie of 1821. In particular, each of the parts into which the analysis is divided contains one of them. First, the ‘Abstract Right’ is concluded with the paragraphs on criminal law since – according to Hegel – the laws on crime and punishment are, of all components of the legal system with the only exception of constitutional law, those that best express the superiority of the common good over the individual interests. Moreover, the fact that the reinstated conscience of the criminal finds its completion, beyond criminal law, in the realm of morality, is a further proof of Hegel’s conviction that reconciliation – and not retaliation – must be the aim. Secondly, in the section on the ‘Administration of Justice’ Hegel took up his former idea that the measure of the punishment must depend on general social interests, so that, if society is sufficiently “strong and sure of itself”, this might justify a “mitigation of […] punishment”.

Having reconstructed Hegel’s understanding of criminal law, it is now possible to address the question on which suggestions it could give to the contemporary efforts to construe a system of international criminal law. Before doing that, let us recollect briefly the most important components of his conception. First, contrary to the theory of retribution which characterised the understanding of criminal law according to the individualistic paradigm of order, Hegel expressed throughout his whole philosophical work the conviction that punishment should be primarily – if not exclusively – applied with the purpose to restore social cohesion. Secondly, however – against the organic vision of social order of the holistic paradigm – social cohesion did not coincide, in his vision, with the reinstatement of traditional hierarchies, but rather meant the construction of a peaceful and healthy social life, which had to be based not on passive

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53 Ibid., §§ 209 ff., pp. 360 ff.
54 Ibid., § 104, p. 198.
55 Ibid., § 218, p. 372.
obedience, but on shared values. Thirdly, and lastly, in some of his early works Hegel explicitly asserted that crime might be the consequence of social pathologies. Put differently, we could also say that Hegel’s theory of criminal law, by and large, does not aim at retribution, but at reconciliation through the overcoming of the social conflicts that led to the criminal action. If we transpose this theory, now, into the present discussion, we can surprisingly detect that it shows significant similarities with some of the most innovative approaches of transitional justice.

By the concept of transitional justice, we understand the extraordinary measures – which include criminal law, but are not limited to this – that a society emerging from a period of conflict and repression takes in order to address the large-scale violation of human rights that occurred during that time and cannot be dealt with by the procedures of ordinary justice. In its early stage, which is to be located at the end of World War II, transitional justice was characterised by the tendency to sort out some of the most prominent exponents of the regime which perpetrated the violations of human rights, in order to put them to trial, while victims were granted little involvement – or none at all – in the procedure, and a blank guarantee of innocence was given to the rest of the populace. In the most optimistic interpretation, “society as a whole was given the chance to atone for its sins by witnessing the cathartic act of blaming its representatives”.

This was the model that was strictly applied in the Nuremberg and Tokyo trials – namely, in the first experiments of transitional justice – and later, to a large extent, also as regards the ad hoc international tribunals for Rwanda and the former Yugoslavia. Having recognized the deficits that affected these experiences, a different pattern has emerged which, going through the intermediary step of the hybrid courts of Sierra Leone, was implemented in particular by the truth commissions of South Africa.

Three elements typify the South African truth commissions if compared to the former models of transitional justice. First, reconciliation is given priority over retribution. Secondly, more attention is focused on the victims and their destiny. Thirdly, society as a whole is involved, whereby not only the most active perpetrators of human rights violations have to stand trial, but also their backstage supporters must acknowledge their breach of the most essential rules of societal life in front of the victims in order to be reintegrated into the community. Mercy is central, thus, but

56 Girelli, 2017, p. 393, see supra note 37.
under the condition of a credible recognition of one’s own guilt. Therefore, according to an innovative understanding of transitional justice, criminal law is not only about the rehabilitation of the culprit – which has become, in the meantime, a well-established principle of criminal justice – but also, and above all, about the healing process of a “wounded society”. With some understandable adjustments, this is, quite precisely, what Hegel suggested more than two hundred years ago, in particular in his early writings. Surely, it would be a huge stretch to claim that Hegel had the newest developments of transitional justice in mind, but it is not an exaggeration to assert that the most forward-looking understanding of criminal law can find in his work an intriguing and thought-inspiring – although quite unexpected – philosophical support.

13.3. A Hegelian Understanding of International Criminal Law

Inevitably, the conception of transitional justice has a relevant impact on the international implementation of criminal law. In fact, international criminal law comes into play when a nation proves to be unable to guarantee the implementation of justice. This happens, almost always, under circumstances in which a national society has gone through devastating historical experiences such as dictatorships with large and severe violations of fundamental human rights, or genocide. At this point, international criminal law overlaps with transitional justice, since it must step in where the structures of the national administration of justice cannot adequately perform their task. This is the reason why international criminal law should always pay the highest attention to the theoretical and practical developments of transitional justice.

However, to develop appropriately, international criminal law does not need only a sound concept of justice – which might be suitably influenced by the most innovative understanding of transitional justice – but must also conceive of justice as something which can, and should, be implemented at the international level no less than within the borders of the State. The presupposition for justice to be conceived this way, yet, is that we are provided with a universalistic conception of order. This brings us back to those conceptual patterns that have been defined, at the beginning of the former section, as the paradigms of social order, in particular to their second essential characteristic – beside the claim regarding the onto-

57 Ibid., pp. 195 ff.
logical basis of the well-ordered society – namely the assertion concerning the possible extension of order.

At the time Hegel began to address the question of the possible extension of order, a dichotomy of two opposing paradigms had dominated the scene of the theories on international law and relations for a long time. On the one hand, we have the idea that order can only be achieved within a limited and homogeneous community. This particularistic assumption rules out from the outset the possibility that criminal law could be implemented beyond the legal boundaries of the State. On the other hand, a conception was developed according to which order can include, in principle, the whole humankind. The consequences were, first, that the perspective of a world constitutionalism became palpable, and, second, that criminal courts can also be established at the international level. To reach these conclusions, however, a long time in the history of ideas was needed.

Indeed, the most ancient ideas that gave expression to universalism – the Buddhist dharma in Eastern thinking and Stoic philosophy in the West – despite their role as ground-breakers, had little impact, if any, on law and politics (maybe with the only exceptions of Ashoka in the East and Mark Aurel in the West). An important step forwards was made when the universalistic approach of the Stoic philosophy was taken up by Christianity which later became the leading force of the Western world, not only in spiritual but also political and legal matters. Yet, due to the still missing institutional structure which could guarantee the realisation of the universal order, the Western political and legal philosophy of the early Modern Ages had to ground its universalistic conception of order on the abstract commands of natural law and reason. In other words, all authors


who shaped the modern understanding of *jus gentium*, from Vitoria\(^{60}\) to Suárez,\(^{61}\) and from Grotius\(^{62}\) to Pufendorf\(^{63}\) – all of them deeply influenced by the Christian concept of natural reason, the former two in its Catholic version, the latter two in its Protestant setting – supported the idea that a universal order of reason is possible. Nonetheless, this order was not intended to be based on anything else than on what natural reason demands from every rational being, with the result that it was actually devoid of whatsoever form of supra-State legal framework.

The author who paved the way to a new stage of the development of the universalistic idea was, again, Immanuel Kant. In his vision, cosmopolitanism was not only a command of reason but also, as *jus cosmopoliticum*, a part of his tripartite system of public law, beside constitutional law (*jus civitatis*) and international law (*jus gentium*).\(^{64}\) Therefore, Kant’s framework for universalism had – for the first time in the history of ideas – an explicitly *legal* character. Although his intuition marked a fundamental milestone on the way to the philosophical foundation of international adjudication, and thus also of international criminal law, the final goal was nonetheless far from achieved. In fact, the contents of the *jus cosmopoliticum* in Kant’s perspective were rather slim, making no reference to criminal law. Moreover, he failed to present a coherent proposal on how the cosmopolitan order could be supported by adequate institutional structures.\(^{65}\) These shortcomings were removed – largely in Kant’s spirit, but with a more radical approach – by Hans Kelsen roughly one and a half century later.

Essentially, Kelsen introduced two major clarifications, and two novelties. The first clarification focussed on the synthesis between individualism and universalism. Indeed, it was Kant who first conceived a

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\(^{64}\) Kant, “Zum ewigen Frieden: Ein philosophischer Entwurf”, 1977, p. 203, see *supra* note 16.

paradigm of order that we can call *universalistic individualism*, according to which the individuals are at the centre of the order of theoretical and practical reason, while this order is cosmopolitan. Yet, it was Kelsen who made this idea more concrete by transposing the centrality of the individuals from the philosophical to the legal level,\(^66\) and by locating international law – charged with the unequivocal task of safeguarding individual rights – at the apex of the legal system.\(^67\) A further clarification brings the third – and last – feature of the paradigms of order to the fore. Indeed, beside the claims on extension and ontological basis of order, a third element characterises every paradigm of order, namely an assumption as regards the unitary – or non-unitary – character of order. In the case of the unitary conceptions, order can only exist if it is structured in the form of a coherent hierarchy of institutions and norms, in which vertical relations prevail, whereas horizontal ones are largely ignored or avoided. From this standpoint, it is ruled out that two or more institutions – as well as two or more norms – can claim to possess the same degree of authority and normativity, while belonging nonetheless to different, yet commensurable institutional and legal systems. On the contrary, non-unitary or post-unitary conceptions of order admit the possibility of conflicts between institutions and norms which cannot be addressed by resorting to hierarchy, so that dialogical forms of conflict solving must take place. Undoubtedly, the explicit assertion of the existence of legal pluralism as a possible enrichment of society – and not as a pathology – dates back to just a few decades ago.\(^68\) Nevertheless, while Kant left the door open to some kind of balance between constitutional and international law, without imposing a clear-cut hierarchy between the two regimes, Kelsen’s construction is unequivocally pyramidal, with international law at the top\(^69\) and State law as nothing more than the enforcer, within a specific territory, of what international law requires or allows.\(^70\)

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\(^70\) Kelsen, 1949, pp. 351 ff., see *supra* note 66.
Kelsen’s first novelty, then, if compared to Kant, has been the claim that universalistic order has to be conceived not only as having, beside the political components, also a legal character, but as being essentially a legal system.\(^{71}\) In other words, legal norms are more than only one pillar to support the construction of universal order: they are rather, if not the only one, at least and by far its most fundamental feature. The second novelty, finally, affects directly criminal law, in particular in its international implementation. Being Kelsen’s cosmopolitan system of the civitas maxima centred on the individuals, law-based, unitary and hierarchical, the consequence cannot but be that international criminal law is destined to play a central role. In fact, the supremacy of the legal dimension – more specifically, of public law – ensures that criminal law is granted a prominent position in guaranteeing social stability. Furthermore, being the individuals at the core of social order, international criminal law should target primarily individual responsibility\(^ {72}\) while addressing State responsibility only insofar as the system is underdeveloped and no better alternative is available.\(^ {73}\) It is important to keep in mind, at this point, that the same centrality of the individuals, which characterised Kelsen’s approach, also informed deeply the spirit that led to the establishment of the ICC roughly sixty years after the first formulation of the individualistic principle in international criminal law.\(^ {74}\) Lastly, since Kelsen’s legal system is conceived as necessarily unitary and hierarchical, criminal justice at the international level can claim undisputed priority – or even exclusivity – over its national counterpart.

Having outlined the dichotomy of paradigms that had shaped the panorama of the theories of international law and relations for many centuries – and not least at the juncture of the eighteenth and nineteenth centuries – it is possible, now, to turn to Hegel again, addressing the question on which of the two dichotomous paradigms found support in his work. And, if his conception of international law and relations did not belong properly to any of them, we have then to verify whether it is correct to assert that he laid down some relevant anticipations for a new paradigm of

\(^{71}\) Kelsen, 1944, see supra note 67.

\(^{72}\) Ibid., pp. 71 ff.

\(^{73}\) Kelsen, 1949, p. 96, see supra note 66.

In fact, answering these questions is far from easy for at least two reasons. First, Hegel paid little attention, in general, to the topic, inserting it in his writings only late and, in all likelihood, more because of his wish not to leave any significant aspect of human knowledge and action out of his system, than as a result of a profound and true interest. Secondly, even in the works of his Heidelberg (1816-1818) and Berlin periods, which contain a systematic outline of Hegel’s understanding of international law and relations, the room dedicated to the subject is comparatively small, comprising – in its most detailed presentation in the Rechtsphilosophie of 1821 – only twenty, rather short paragraphs, from § 321 to § 340 included. Despite these limitations, however, we are provided with enough elements to determine Hegel’s position as regards both previous paradigms. In particular, while his rejection of natural-law-based universalism essentially relies on indirect remarks, his criticism of Kant’s cosmopolitanism could hardly be more explicit.

Hegel’s refusal of universalism seems to suggest the conclusion that he endorsed the opposing paradigm. Such a deduction, however, would be hasty and, on the basis of a more accurate analysis, quite incorrect. In fact, Hegel’s theory of international law and relations is characterised by some relevant features which could hardly be tracked down in the work of a
true exponent of particularism. For instance, his concept of the ‘people’ (Volk) is free from any nationalist subtext, and his defence of war rather aimed at justifying social and political dynamism than at defending any kind of ruthless self-affirmation of the nation. Yet, the most important element that distinguishes Hegel’s understanding of international law and relations from the particularistic view is his concept of reason. Indeed, according to the particularistic paradigm of order, rationality is the idiosyncratic product of an individual community, with its specific cultural tradition. Many rationalities exist, therefore, each of them incommensurable with any other, whereas the perspective of a universalistic reason would be nothing more than a chimaera.

Yet, this is surely not Hegel’s vision. In his philosophy, in fact, the identity of the individual social and political community is unmistakeably recognised, which is grounded on its unique idea of common values, namely on its distinctive use of practical reason. Nonetheless, a higher form of reason is situated above all these particularistic rationalities, overcoming their limited range and contents. The higher sort of rationality, which is in essence universalistic, is implemented through the course of world history and, even more so, through the realisations of the ‘absolute spirit’ (absoluter Geist), that is, through art, religion and philosophy. Surely, in Hegel’s conception, universalistic rationality has nothing to do with legal or political institutions, and even less with any kind of conscious involvement by the individuals. Rather, it is a “cunning of reason”,


80 Ibid., § 340, p. 503.


As a result, we can maintain that, if Hegel was no exponent of universalism, he was surely not a supporter of particularism either. We could even go so far as to claim, with good reasons and without exaggeration, that he was paving the way for a new paradigm of order. Indeed, the two paradigms of particularism and universalism are trapped in a dichotomy which has the effect of constraining both into a one-sided conceptual framework. More concretely, on the one hand particularism highlights the indispensable role played by the identity of the individual social and political community, with its distinctive culture and legitimacy – based, in the most favourable cases, on democratic and inclusive procedures – but at the cost of rejecting even the mere possibility of a feasible world order. On the other hand, universalism focusses on the chances for a stable order for the whole humanity, but downgrades the single community to nothing more than an agency of the international community.

Hegel was the first author who tried to overcome the dichotomy by developing a multi-layered and flexible system – as a germinal and quite partial anticipation of contemporary pluralism – in which both elements, namely world order and the identity of the individual social and political community, are included. This could happen because he took a significant distance, for the first time, from the traditional understanding of order as a unitary structure. His system, in fact, does not have the shape of a simple pyramid; rather, it comprises many layers and contexts, the interactions of which cannot be reduced to hierarchy. As a result, the realm of the single social and political community may be superior to world order in terms of participative legitimacy, but inferior as regards inclusiveness.

Hegel’s innovative conception has been a huge step forward in the history of political ideas. Moreover, as regards the topic of this contribution, it can be a great inspiration for international criminal law, in particular for its most advanced approaches. In fact, international criminal law was initially conceived of as an institution of the international community...
and, therefore, of world order, aiming at safeguarding the most essential fundamentals of a worldwide interaction between fellow humans. On that basis, those individuals had to be put to trial before an international court, who, as members of the worldwide community of humankind, had severely offended the essential rights of other members of that same community. Little attention was paid, instead, to the reinstatement of a healthy civil life within the societies in which the crimes had been perpetrated. This was the idea that informed the experiences of the Nuremberg and Tokyo Tribunals as well as, to a large extent, also those of the ad hoc tribunals for Rwanda and the former Yugoslavia. Later, it was recognised that international criminal law, to be effective, must do more than just impose the right punishment on the perpetrators of crimes against the most fundamental values of humankind. Three factors, in particular, should be adequately taken into account: the location of the tribunal, which should preferably be in the country in which the crimes have been committed; the condition of the victims, to which more attention should be paid; and the involvement in the trial also of those who supported the perpetrators without committing the crimes first-hand. All these elements are meant to contribute to the reconstruction of a healthy social life within the wounded community.

We have in the debate, therefore, two contrasting approaches: the one considers international criminal law as a component of a cosmopolitan idea of order; the other focuses, instead, on the rebuilding of peaceful interactions within the parochial horizon of the individual community. The first is based on the fundamental assumptions of the universalistic paradigm of order, whereas the second rather relies on its particularistic counterpart. The tension between the two approaches has been interpreted as the contradiction of justice versus peace.\textsuperscript{83} However, as justice need not necessarily be in contrast with peace, international criminal law similarly need not have inevitably to disregard parochial peace and the specific identity of the nation. In other words, international criminal law should preferably \textit{co-operate} with national institutions in order to support domestic criminal law procedures in the perspective of stabilising peace-building processes aiming at restoring healthy social interactions in affected countries. In contrast, home institutions and procedures should be

substituted by international criminal law only when they prove unable or unwilling to carry out their tasks. The shift from substitution to cooperation surely needs a corresponding interpretation of the existent legal instruments as well as, possibly, the establishment of institutions and procedures in line with this purpose.

Yet, institutional and procedural arrangements cannot do all the work alone: a sound conceptual framework is no less decisive. So long as universalism and particularism are regarded as a dichotomy, though, no sound conceptual solution can be found. To properly address the theoretical dimension of the question, a framework is required which integrates the universalistic aspiration of a worldwide rational order that includes the whole humankind, with the particularistic attention to the conditions for the preservation – or for the reinstatement – of the fragile identity of the individual social and political community. In the last decades some interesting and quite innovative attempts have been made in this direction. However, if we look back at the history of ideas to search for the inspiration – generally hidden and mostly unknown – of these attempts, we will discover, maybe surprisingly, that no other philosopher is better suited to the task than Hegel.

13.4. Towards a Multi-Layered Idea of International Criminal Law

International criminal law was established to reaffirm the personal responsibility of those who had committed severe crimes against the most fundamental tenets of a civilised and peaceful interaction between fellow humans. If led back to the conceptual framework of the theory of the paradigms of order, international criminal law was – at least at its begin-

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ning – individualistic, universalistic and unitary. It was *individualistic* because it took on and strengthened the newly established principle of individual responsibility at the international level. Moreover, as a consequence of the unconditioned recognition of personal responsibility, punishment was conceived essentially as a retribution aiming at reinstating moral autonomy, while, on the contrary, little or no emphasis was given to the rehabilitation of the convicted wrongdoer or to the peace-building processes of the affected society. International criminal law was *universalistic*, then, because it was understood as an institution of the cosmopolitan community, rather intended to replace the intervention by the involved nation States than to co-operate with them. Finally, it was *unitary* insofar as no complementarity with the criminal law institutions and procedures of the individual States was envisaged.

After criticism was raised against the shortcomings of the first iterations of international criminal law, the awareness arose that two major corrections had to be made: the first concerning the relationship between international and national criminal justice; the second with reference to the goal that should be pursued by criminal law, in general, and by punishment in particular. As regards the first point, the idea that international justice should supplant its national counterpart made progressively room for the conviction that complementarity would better suit the task. The ICC Statute partially reflects this change of mind by expressly “[e]mphasizing” that the ICC “shall be complementary to national criminal jurisdictions”. More concretely, the ICC shall have no jurisdiction, firstly, when “the case is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution” or, secondly, when “the case has been investigated by a State which has jurisdiction over it and the State has decided not to prosecute the person concerned, unless the decision resulted from the unwillingness or inability of the State genuinely to prosecute”. Surely, the recognition of complementarity is only the first step to full-fledged co-operation. For this purpose, in particular, a well-functioning praxis of institutional and jurisdictional dialogue be-

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85 ICC Statute, “Preamble”, 1998, see *supra* note 74.
tween the international and the national levels should be established, beside and beyond the wording of the Rome Statute.

With reference to the second point, namely to the reinterpretation of the function of punishment, international criminal law – and the ICC in the first place – has progressively increased its responsiveness to demands of contribution to peace-building processes emerging from the involved communities.  

Institutions and policies, as well as legal instruments and their interpretations, must be grounded on a robust conceptual and epistemological fundament, if we want them to be convincing, coherent, sound and long-lasting. Otherwise, they run the risk of being nothing more than forms of short-term expediency. In particular, as regards the two recent corrections of international criminal law – namely the better connection between the international and the national level, and an understanding of criminal law as a contribution to restore peace in the affected communities – three most relevant theoretical innovations have to be introduced if compared with the conceptual pattern that deeply influenced for long time the way how the function of criminal law was interpreted, including the first experiences of international criminal law.

First, the strict individualistic approach of criminal law should be abandoned in favour of a position in which the reinstatement of the moral autonomy of the individual and their possible rehabilitation is associated and co-ordinated with the restoration of peaceful social interactions. Otherwise, this process should not simply lead to a return to the old-fashioned holistic view of the defence of the status quo. As a result, a new paradigm of order has to be envisaged in which social order and individual autonomy are on the same footing. Secondly, the dichotomy between universalism and particularism must be overcome, with a view to establishing a better balance between the cosmopolitan and the parochial dimension, so that both national identity and the common values of humankind can receive appropriate recognition. Thirdly, social and legal order should be acknowledged in its essential plurality, and no attempt should be made to bring diversity back to the restrictive corset of a forced unity.

Summing up, the conceptual underground of a forward-looking international criminal law must be a paradigm of social order which over-

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comes the traditional features (and dichotomies) of the old paradigms. As regards its ontological foundation, it should not be individualistic or holistic any longer, but, at the same time, individualistic and holistic. Similarly, with reference to the extension of order, it should dismiss the dichotomy between universalism and parochialism by being at once universalistic and parochial. Finally, it should leave behind the usual identification of order with unity and hierarchy, and explicitly claim a post-unitary understanding of the well-ordered society. Hegel laid down the cornerstone for such a ground-breaking change of perspective. Therefore, re-discovering his work from this unusual standpoint can be a source of inspiration for all those who are committed to improving the theoretical background as well as the impact of international criminal law.
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**Philosophical Foundations of International Criminal Law: Correlating Thinkers**

Morten Bergsmo and Emiliano J. Buis (editors)

This first volume in the series ‘Philosophical Foundations of International Criminal Law’ correlates the writings of leading philosophers with international criminal law. The chapters discuss thinkers such as Plato, Cicero, Ulpian, Aquinas, Grotius, Hobbes, Locke, Vattel, Kant, Bentham, Hegel, Durkheim, Gandhi, Kelsen, Wittgenstein, Lemkin, Arendt and Foucault. The book does not develop or promote a particular philosophy or theory of international criminal law. Rather, it sees philosophy of international criminal law as a discourse space, which includes a) correlational or historical, b) conceptual or analytical, and c) interest- or value-based approaches. The sister-volumes *Philosophical Foundations of International Criminal Law: Foundational Concepts* and *Philosophical Foundations of International Criminal Law: Legally Protected Interests* seek to address b) and c).
