MAPPING INTERNATIONAL JUSTICE: IMMUNITY OF STATE OFFICIALS AND INDIVIDUAL CRIMINAL RESPONSIBILITY

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ABSTRACT

This project argues that the individual criminal responsibility 'represses' the significance and relevance of the collective complicities in the grave human rights violations, such a repression constituting the discursive and "operational" closure of the international justice regime, insulating it from the competing fragments of international law, while rationalizing and normalizing the 'radical evil' of atrocities, which allows their prosecution in the rational and liberal discourse of rule of law. Hence the international justice becomes a full-fledged international regime: a system of knowledge, norms, principles and expertise, entailing an individualistic and legalistic perspective on the human rights atrocities. Alternative to the prevailing liberal explanations of the current proliferation of the international justice regimes, this work suggests a realist, or power based explanation that refers to the political tensions unformulated and 'repressed' in the international justice regime's operation. The methodology includes discourse analysis, structural study of international legal argumentation and the international relations and international law approach. Two case studies that demonstrate this hypothesis are the *Congo v. Belgium* decision of the ICJ and the Rome Statute of the ICC. It is concluded that the heterogeneity of individual centered assumptions of international justice regimes to the residual state responsibility and other state-centered regimes of international law cannot be resolved through the indeterminate international legal structures, and creates a haven for power maximization tactics of actors. The attentiveness to state presence and clashes of sovereign powers involved in trials for human rights atrocities can square the international justice regimes with the residual international regimes of state responsibility, diplomatic intercourse, or international peace and security.

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INTRODUCTION

What is the international legal significance of the immunity of state officials with regard to the prosecutions of grave human rights violations, such as crimes against humanity and war crimes? Is it a mere legalistic obstacle to the accountability for human rights violations; a remnant of the 'eroding' Westphalian international system that is being employed to effectuate impunity? Do the legal sense and meanings of immunity change with the regimes that interpret and apply it from different perspectives? What is the theoretical relationship between such immunity and political tensions in the international community? These are some of the questions out of which the present inquiry was originally born.

The starting point of the inquiry has to deal with the notion that the grave human rights violations are the irruptions of the 'radical evil', which goes beyond ordinary instrumental rationality applicable to general criminal law rationales and which "explodes" the legal order itself. As these grave human rights violations are precisely the subject matter addressed by the international criminal justice, this notion presents formidable theoretical challenges to the very idea of applying ordinary criminal responsibility (individual responsibility) that the international justice regime purports to do.

In applying the individual responsibility international justice leaves out certain important aspects of the human rights atrocities that have to deal with the wider complicities of states and societies that whether actively or passively contribute to the realization of such

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atrocities. The opening of such operation of international justice is situated in the downgrading and rejecting the concept of collective responsibility as being contrary to human freedom and dignity, thus proceeding from the essentially liberal and noble arguments. International justice then becomes a liberal and individualistic project meant to promote liberal values globally, which is a humanitarian and humanizing mission *par excellence*, as suggested by the promoters of the liberal international law theories (discussed in section 2.3).

This project however elaborates on an account of international justice alternative to the mainstream neo-liberal understandings. Neoliberal, or interest-based theories of regimes emphasize the importance of regimes which are instrumental in the collaboration of states that realize their common interests (while being "absolute gain maximizers"). Such "absolute gain maximizers" following the game-theory rationality strive to avoid political market failures where common interests of states are not realized due to information and transaction costs in the anarchical international system[1].

Realists on the other hand treat power as the central variable for regimes, rather than (absolute) interests, and regard states as coordinating to increase their relative gains. While from the neoliberal perspective regimes promote globalization and the liberal world order, according to the realist approach it is not obvious or agreeable that any particular norms and principles (liberal ones here) should be underpinning the regimes (the issue of whether the regimes represent public goods), whereas the world order in its turn depends on which principles the regimes would operate. Hegemonic powers

[1] ANDREAS HASENCLEVER, PETER MAYER, VOLKER RITTBERGER, THEORIES OF INTERNATIONAL REGIMES 1-7, 27-36 (1997).

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therefore ensure that regimes embrace particular principles and norms and are furthermore concerned with their possibilities to veto the regimes, whereas the balance of powers would determine the substance of particular norms and principles by the regimes and their acceptance by states[2].

It is argued that the latter view of regimes explains some of the 'irregularities' of the liberal explanation, which postulates that the international justice regime pursues common public good of accountability and rule of law. It is suggested instead that the international justice regime is also displaying features that can be attributed to a position of a hegemonic project through which actors engage in maximization of their relative power gains. In doing so a realist account suggests that the legal disagreements overlap to different extents with the political tensions that account for the intensity of such disagreements and influence their outcomes; that the legal argumentative scheme cannot resolve these disagreements and is indeterminate at its core; and that the 'repressed' political tensions nevertheless affect the configuration of the international justice regime and thus 'return'. In elaboration of this hypothesis this work addresses jurisdictional and immunity disputes with regard to the international prosecution of grave human rights violations.

First of all it is suggested here that the rejection of the collective complicities in responsibility distribution as contrary to human dignity is not to be taken for granted. The dichotomy of collective versus individual responsibility is regarded here as misleading, whereas the measures of responsibility would be looked upon as the dialectical unity of 'positive' and 'negative' responsibility aspects; where the 'negative' attribute refers to

[2] *Id* at 83-135.

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the aspect of responsibility that has to do with allocating harm to individuals, whereas the 'positive' aspect is about the public support for such measures, that on the normative level includes the sum of ethical and legal principles and norms according to which and in the name of which the 'negative' aspect is realized. Such an account of collective responsibility that does not ascribe guilt to some supra-(or 'super') individual subjects or Molochs, nor considers it as a sum of individual responsibilities, nor is in any sense reducible to such, but rather refers to the public attitude to the atrocities entrenched in the constitutional and legal order of the state, would not arguably violate human dignity, but to the contrary promote and confirm it (as argued in sections 1.3 and 1.4).

Then we approach the main hypothesis of this work, that the international justice regime discursively 'represses' the significance and relevance of the collective complicities at its foundation (section 2.1), such repression constituting the discursive and "operational" closure of the regime in question, insulating it from the general political environment it operates in, separating it from the competing fragments of international law and at the same time rationalizing and normalizing the 'radical evil' of atrocities[3], which allows their prosecution in the rational and liberal discourse of rule of law. Having done that, the international justice becomes a full-fledged international regime, a set of "principles, norms, rules and decision-making procedures around which actor expectations converge in a given issue-area"[4]; a system of knowledge, norms, principles and expertise, entailing an individualistic and legalistic perspective on international reality; "solipsistic and

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[3] *See* DAVID KENNEDY, THE DARK SIDES OF VIRTUE: REASSESSING INTERNATIONAL HUMANITARIANISM 35 (2004).
[4] Stephen Krasner, *Structural causes and regime consequences: regimes as intervening variables* in, INTERNATIONAL REGIMES 1-23 (Stephen Kransner ed., 1995).

imperialistic", at the same time heterogeneous to the state-centered international legal system.

However, while being repressed in the vocabularies of international criminal justice, the political tensions concerning the distribution of responsibility are redirected into the seemingly marginal legal disagreements (with the substance of political tensions), primarily over the jurisdictional and immunity regimes that map the uneven exercise of individual criminal responsibility, as well as into the disputes concerning the political control of the relevant tribunals, marking the 'return of the repressed'. The 'return of the repressed' tensions refers here to the 'counter'-influence of political tensions repressed in the vocabularies of international criminal justice, that synchronically with the repression, distort and further fragment (and sub-fragments) the boundaries and maps of the international criminal responsibility regime.

The argument of the 'return of the repressed' attends to the realist account of the international justice regime, due to its fundamental assumption that the legal disagreements overlap to different extents with the political tensions (which account for their intensity and influence their outcomes), whereas the legal arguments themselves cannot stop short of becoming parties of such political tensions (section 2.3 discusses this point, drawing on the theory by Morgenthau). Another strand of the realist explanation runs through the very approach to the international legal argumentation that according to the critical literature on international law is indeterminate. Thus chapter three of this work reconstructs hypothetical sets of arguments with regard to immunity from the grave human rights violations and the argumentative structure that they are based on.

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Another important clarification; immunity of state officials internationally for grave human rights violations is understood here as the borderline concept that separates and unites individuals and states, endowing the former with relevance beyond 'private capacity', thus often being the ground for special treatment and impunity. The interpretation or reinterpretation of official immunity (discussed in 2.6.1) therefore marks the achievements and proliferation of international justice, or on the other hand its failures and rejection. For example the immunity would be an obstacle for international justice as far as the positive responsibility is repressed, because otherwise the theories on individual responsibility would contradict themselves (where crimes are deemed as committed in private capacity for immunity reasons, but by definition include the official capacity of perpetrators in the objective element of the crimes, whereas the acts in the official capacity would be covered by immunity). Furthermore the immunity questions would be a borderline in a more direct sense, as they would delimit the personal reach of the different sub-regimes of the international justice, when discussing the effects of the 'return of the repressed' (section 2.5).

Timeliness and relevance of the research

A project on immunity of state officials from international crimes could hardly find a more exciting timeframe, which bears the witness to the trial of Charles Taylor, the first cases in the International Criminal Court and the Cambodian Extraordinary Chambers, and generally the wave of prosecution attempts for human rights violations worldwide. International justice goes through ups and downs, successes and awry achievements; one

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could account of the reluctant *Pinochet (3)* decision in UK[5], the ICJ's prohibition of the prosecution of incumbent foreign ministers by municipal jurisdictions[6] and the "death" of the Belgium's universal jurisdiction law[7], the trend of Bilateral Immunity Agreements and the Security Council deferrals of ICC's jurisdiction, ongoing trials by the Supreme Iraqi Criminal Tribunal.[8]

Several threads of international law literature are relevant to this work, which is at the intersection of two the international criminal law[9] and the international law of

[5] Regina v. Bow Street Metropolitan Stipendiary Magistrate And Others, Ex Parte Pinochet Ugarte, [2000] 1 A.C. 147; Consider e.g. Browne Wilkinson: "I have doubts whether, before the coming into force of the Torture Convention, the existence of the international crime of torture as jus cogens was enough to justify the conclusion that the organisation of state torture could not rank for immunity purposes as performance of an official function", at 204.

[6] Case Concerning the Arrest Warrant of 11 April 2000 (Congo v. Belgium), http://www.icj-cij.org/icjwww/idocket/iCOBE/icobejudgment/icobe_ijudgment_20020214.PDF, (14 February 2002) [hereinafter referred to as the *Arrest Warrant* Case].

[7] Steven R. Ratner, *Belgium's War Crimes Statute: A Postmortem*, 97 AMERICAN JOURNAL OF INTERNATIONAL LAW 888 (2003).

[8] For some accounts of the work of this body *see* Michael P. Scharf, *The Iraqi High Tribunal: A Viable Experiment in International Justice?*, 5 JOURNAL OF INTERNATIONAL CRIMINAL JUSTICE 258-263 (2007); Miranda Sissons and Ari S. Bassin, *Was the Dujail Trial Fair?*, 5 JOURNAL OF INTERNATIONAL CRIMINAL JUSTICE 272-286 (2007); Guénaël Mettraux, *The 2005 Revision of the Statute of the Iraqi Special Tribunal*, 5 JOURNAL OF INTERNATIONAL CRIMINAL JUSTICE 287-293 (2007).

[9] There are several definitions of the International Criminal Law. Consider ANTONIO CASSESE, INTERNATIONAL CRIMINAL LAW 15 (2003) (defining it as "a body of international rules designed both to proscribe international crimes and to impose upon States the obligation to prosecute and punish at least some of those crimes. It also regulates international proceedings for prosecuting and trying persons accused of such crimes"). ICL is also defined as "the convergence of two disciplines: the penal aspects of international law and the international aspects of national criminal law" or *delicti jus gentium*; *see* JORDAN J. PAUST ET AL., INTERNATIONAL CRIMINAL LAW: CASES AND MATERIALS 3 (2000). For a similar definition see also M.C. BASSIOUNI (ed.), INTERNATIONAL CRIMINAL LAW vol. 1, 1 (Ardsley, N.Y.: Transnational Publishers, 1999). There is also one that refers to the Nuremberg definition of international crimes as an "act universally recognized as criminal, which is considered a grave matter of international concern…" (*See* KRIANGRAK KITTICHAISAREE, INTERNATIONAL CRIMINAL LAW 3 (OUP 2001); *See also* CLAIRE DE THAN & EDWIN SHORTS, INTERNATIONAL CRIMINAL LAW AND HUMAN RIGHTS 13 (2003). Broomhall defines ICL as encompassing "increasingly narrow concentric rings of doctrine" with its core as "doctrines y which international law imposes criminal responsibility directly upon individuals, regardless of the state of national law" (BRUCE BROOMHALL, INTERNATIONAL JUSTICE AND THE INTERNATIONAL CRIMINAL COURT: BETWEEN SOVEREIGNTY AND THE RULE OF LAW (2003).

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immunities[10] while researching the perspectives of the immunities law with regard to the emergence of the individual accountability trend[11] in the international law.

The issue of official immunities is often approached from several perspectives, one being discussed by the literature on the international criminal law[12] that frequently regards immunity as mere impunity[13], irrelevant and void because of contradicting to *jus cogens* norms and other peremptory concepts of international law. Thus with respect to the application of *aut dedere aut judicare* to international crimes Bassiouni argues that the lack of centralized power in international system makes non-derogable prohibition of any international crimes meaningful only if the obligation of states to act on municipal level cannot be contracted away either. Therefore he continues that where the rules of international law prohibiting particular crimes are *jus cogens* rules, *aut dedere aut judicare* principle would also be *jus cogens*, as it is essential part of realization of responsibility of offenders[14]. This logic would compel a conclusion that States are in fact prohibited to grant immunity for any international crimes constituting *jus cogens*. However the practice is not so equivocal and in fact courts and national legislatures could

[10] By this I refer to the body of International law governing state and individual immunities. *See* HAZEL FOX QC, THE LAW OF STATE IMMUNITY (2002); EILEEN DENZA, DIPLOMATIC LAW: A COMMENTARY ON THE VIENNA CONVENTION ON DIPLOMATIC RELATIONS (1998); Sir Arthur Watts, *The Legal Position in International Law of Heads of States, Heads of Governments and Foreign Ministers*, (1994-III) *Recueil des cours*, Volume 247; JÜRGEN BRÖHMER, STATE IMMUNITY AND THE VIOLATIONS OF HUMAN RIGHTS (1997); CHARLES LEWIS M.A., STATE AND DIPLOMATIC IMMUNITY (1985); GRANT V. MCCLANAHAN, DIPLOMATIC IMMUNITY: PRINCIPLES, PRACTICES, PROBLEMS, (1989); YITIHA SIMBEYE, IMMUNITY AND INTERNATIONAL CRIMINAL LAW (2004).

[11] *See* e.g. LYAL SUNGA, INDIVIDUAL RESPONSIBILITY IN INTERNATIONAL LAW FOR SERIOUS HUMAN RIGHTS VIOLATIONS (1992); RATNER, S. R., ABRAMS J. S., ACCOUNTABILITY FOR HUMAN RIGHTS ATROCITIES IN INTERNATIONAL LAW : BEYOND THE NUREMBERG LEGACY (2001).

[12] *See e.g.* Paola Gaeta, *Official Capacity and Immunities*, *in* THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT : A COMMENTARY 975, 975-1002 (Antonio Cassese et al. eds., 2002).

[13] *See* Bassiouni, Cassese, Broomhall *supra at note* 9.

[14] M. Cherif BASSIOUNI, CRIMES AGAINST HUMANITY IN INTERNATIONAL LAW, 489-99 (1992); *See also* M. CHERIF BASSIOUNI & EDWARD M. WISE, AUT DEDERE AUT JUDICARE: THE DUTY TO EXTRADITE OR PROSECUTE IN INTERNATIONAL LAW 24-25, 28, 52 (1995).

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be hesitant and even reluctant when it comes to immunities, and ICJ did not hesitate to support immunity even for core crimes.

Yet another relevant perspective is that of the state immunity literature[15], as the immunity of officials is one way or another linked to the state immunity and sovereignty (as argued in section 2.6.1) and the work of Hazel Fox is particularly instructive here[16]. Further input into the literature that should also be kept in mind are the writings on the transitional justice[17] that might either deny the immunities arguing for the necessity of criminal trials[18] of 'radical evil' or massive human rights violations in transitional settings or for some measure of selectivity[19] and even non-prosecutorial measures[20].

Finally most relevant to the present research is the already existing works on different aspects of immunity of state officials. Up to day there is an excellent work by Denza which despite limited to the immunities of diplomatic agents provides useful insights into

[15] *See* J.H.H. WEILER et. al (eds.) INTERNATIONAL CRIMES OF STATE: A CRITICAL ANALYSIS OF THE ILC'S DRAFT ARTICLE 19 ON STATE RESPONSIBILITY (1989); *see also* LEWIS, *supra*; *See also* Bröhmer, supra.
[16] See Hazel Fox QC, THE LAW OF STATE IMMUNITY *supra at* 421-473.
[17] *See* note 198 and the accompanying text; *see also* Jennifer L. Balint, *The Place of Law in Addressing Internal Regime Conflicts*, 59 Law and Contemporary Problems 103 (1996); Cherif Bassiouni, *International Crimes*: Jus Cogens *And* Obligatio Erga Omnes, 59 Law and Contemporary Problems 63 (1996); Cherif Bassiouni, *Searching for Peace and Achieving Justice: the Need for Accountability*, 59 Law and Contemporary Problems 9 (1996); Douglass Cassel, *Lessons from the Americas: Guidelines for International Response to Amnesties for Atrocities*, 59 Law and Contemporary Problems 197 (1996); Neil J. Kritz, *Coming to Terms With Atrocities: A Review Of Accountability Mechanisms for Mass Violations of Human Rights*, 59 Law and Contemporary Problems 127 (1996); Stephan Landsman, *Alternative Responses To Serious Human Rights Abuses: of Prosecution and Truth Commissions*, 59 Law and Contemporary Problems 81 (1996); Madeline H. Morris, *International Guidelines Against Impunity: Facilitating Accountability*, 59 Law and Contemporary Problems 29 (1996); Michael Reisman, *Legal Responses to Genocide and Other Massive Violations of Human Rights*, 59 Law and Contemporary Problems 75 (1996); Naomi Roht-Arriaza, *Combating Impunity: Some Thoughts on the Way Forward*, 59 Law and Contemporary Problems 93 (1996); Michael Scharf, *The Letter Of The Law: The Scope Of The International Legal Obligation To Prosecute Human Rights Crimes*, 59 Law and Contemporary Problems 41 (1996).
[18] Diane F. Orentlicher, *Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime*, 100 Yale L.J. 2537 (1991).
[19] CARLOS NINO, RADICAL EVIL ON TRIAL (1996).

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the doctrines of immunity[21]. There is a valuable work on the immunity of Heads of States and Governments written as a part of Hague lectures in 1994, though before such landmarks as *Congo v Belgium* or *Pinochet*, prominent for its arguments and review of the existing jurisprudence[22]. There is also a number of quite interesting articles in law journals commenting on particular cases or issues within the broader context of the immunity of state officials[23] as well as the recent book by Simbeye that gives a thorough mainstream account on jurisprudence of immunities in international law[24]. The amount of research is likely to grow due to the emergence of new jurisprudence of national courts, hybrid tribunals, ICC and that of the ICJ.

Few words are necessary with regard to the relationship between state responsibility and

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[20] E.g. MARTHA MINOW, BETWEEN VENGEANCE AND FORGIVENESS: FACING HISTORY AFTER GENOCIDE AND MASS VIOLENCE (1998).
[21] DENZA, *supra*.
[22] See Arthur Watts, *supra*.
[23] Dapo Akande, International Law Immunities and the International Criminal Court, 98 *American Journal of International Law*, 407-433 (2004); G. Barker, *The Future of Former Head of State Immunity After* Ex Parte Pinochet, 48 International and Comparative Law Quarterly 937 (1999); Andrea Bianchi, *Immunity versus Human Rights: The Pinochet Case*, 10 European Journal of International Law 237 (1999); M. C. M. Carrasco, J.A. Fernandez, *In re Pinochet. Spanish National Court, Criminal Division (Plenary Session) Case 19/97, November 4, 1998; Case 1/98, November 5, 1998*, 93 American Journal of International law 690 (1999); Antonio Cassese, *When May Senior State Officials be Tried for International Crimes? Some Comments on the Congo v. Belgium Case*, 13 European Journal of International Law 853 (2002) (hereinafter Cassese, *Congo v. Belgium*); Christine M. Chinkin, *In re Pinochet. United Kingdom House of Lords. Regina v. Bow Street Stipendiary Magistrate ex parte Pinochet Ugarte (No. 3). [1999] 2 WLR 827*, 93 American Journal of International Law 703 (1999); Hazel Fox, *The Pinochet Case No.3*, 48 International and Comparative Law Quarterly 687 (1999); Hazel Fox, *The Resolution of the Institute of International Law on the Immunities of Heads of State and Government*, 51 International and Comparative Law Quarterly 119 (2002); Paola Gaeta, Ratione Materiae *Immunities of Former Heads of States and International Crimes: The* Hissene Habre *Case*, 1 Journal of International Criminal Justice 186 (2003); Darryl Robinson, *The Impact of the Human Rights Accountability Movement on the International Law of Immunities*, 40 Canadian Yearbook of International Law 151-194 (2002); Steffen Wirth, *Immunity for Core Crimes? The ICJ's judgement in the Congo v. Belgium Case*, 13 European Journal of International Law 877 (2002) (hereinafter Wirth, *Congo v Belgium*); Salvatore Zappala, *Do heads of State in Office Enjoy Immunity from Jurisdiction for International Crimes? The Ghaddafi case before the French Cour de cassation*, 12 European Journal of International Law 595 (2001) (hereinafter Zappala, *The Ghaddafi case*). B. Stern, *In re Pinochet. French Tribunal de grande instance (Paris)*, 93 American Journal of International Law 696 (1999); Luc Reydams, *In re Pinochet. Belgian Tribunal of First Instance of Brussels (Investigating Magistrate), November 8, 1998*, 93 American Journal of International Law 700 (1999).
[24] *See* Simbeye, *supra*.

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individual responsibility regimes implicated in this work. First of all it is important to note that this project is primarily about the regime of individual responsibility itself, as viewed 'from inside', its separation and discursive self-insulation into a distinct and structurally heterogeneous fragment of international legal fabric.

For the arguments set forth in this work it is therefore sufficient to argue that the individual criminal responsibility forecloses state involvement in its vocabulary. The implication of this approach appears to be that the strict duality and separation of state and individual responsibility regimes is ultimately artificial; provided that they address from different epistemological premises same types of events, these regimes cannot exist in complete isolation. However considering the Occam's Razor this premise does not have to be argued; this work is limited to arguing that the individual responsibility regime in itself denies relevance of state presence and to providing an alternative explanation to this phenomenon.

The closest reference to this point appears in the section 3.2.1 where the state responsibility-*nouveau* effect is discussed, referring to the possibilities of an indirect use of the individual criminal responsibility to circumvent the cumbersome formalities of invoking state responsibility. This reference underscores the political sensitivities of state responsibility that hinder its uniform and widespread acceptance, also partly explaining why individual responsibility proliferates at its expense, while striving to discursively emancipate itself from the references to state presence.

A mirror issue that is not to be confused with the present work is how the state responsibility in its own turn separates itself and interacts with the individual

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responsibility regime. The recent ICJ Judgment in the *Bosnia v. Serbia* case[25] demonstrates some of the problems encountered here, in particular when it comes to the attribution of genocide to Serbia, using criminal law categories in ruling on state responsibility[26] or else ascribing intent to a state[27].

This work differs from the existing literature and contributes to it in several regards; it treats the issue of immunities in the light of the 'new stream' international legal scholarship[28], with the implications that this carries when addressing the structure of legal argumentation in the immunity debates. Furthermore it regards the meaning and conflicting interpretations of immunity as dependent on the application of different regimes of international law. Finally it follows a realist explanation of the immunity and responsibility debates from the perspective of the hegemonic struggle of actors, different from the prevailing neoliberal explanations.

Summary of the research

The first chapter starts by outlining some of the theoretical insights into the notion of the radical evil, as well as the response that the individual criminal responsibility lends to it. It argues that the symbolization of the atrocities into crimes carries the consequences of

[25] *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (Bosnia and Herzegovina v. Serbia and Montenegro); available at <http://www.icj-cij.org/docket/files/91/13685.pdf>.
[26] *See* Antonio Cassese, *On the Use of Criminal Law Notions in Determining State Responsibility for Genocide*, 5 Journal of International Criminal Justice 875-887 (2007)
[27] *See e.g.* Andrew B. Loewenstein, Stephen A. Kostas, *Divergent Approaches to Determining Responsibility for Genocide: The Darfur Commission of Inquiry and the ICJ's Judgment in the Genocide Case*, 5 Journal of International Criminal Justice 839-857(2007).
[28] *See e.g.* DAVID KENNEDY, THE DARK SIDES OF VIRTUE, *supra*; MARTTI KOSKENNIEMI, THE GENTLE CIVILIZER OF NATIONS: THE RISE AND FALL OF INTERNATIONAL LAW 1870-1960 (2002); HILARY CHARLESWORTH & CRISTINE CHINKIN, THE BOUNDARIES OF INTERNATIONAL LAW – A FEMINIST ANALYSIS (2000); ANTONY ANGHIE, IMPERIALISM AND SOVEREIGNTY AND THE MAKING OF INTERNATIONAL LAW (2004); Thomas Skouteris and Outi Korhonen, *Under Rhodes's Eyes: The "Old" and the "New" International Law at Looking Distance*, 11 Leiden Journal of International Law 429 (1998).

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normalizing them and exonerating wider collective complicities associated with them. Furthermore it suggests that both the individual and collective guilt are insufficient to reflect on the responsibility for grave human rights violations, and in particular that the individual criminal responsibility fails to properly account of the wider complicities involved in "administrative massacres". It is argued that a view of responsibility that regards it as a dialectical unity of the 'positive' and 'negative' aspects of it (as inspired by Isaiah Berlin's theory of positive and negative aspects of human rights) is more helpful than the framework of collective vs. individual responsibility. Moreover it shows that the individual criminal responsibility underemphasizes and 'represses' positive responsibility under the rubric of collective guilt as being barbaric or primitive responsibility, contrary to human freedom and dignity. Instead it is suggested that it is possible to conceive of positive responsibility theory compatible, and indeed enhancing human freedom. It concludes with a statement of necessity to improve the response to the human rights atrocities by foregrounding the positive responsibility, embracing it in the normative systems of societies that fall prey to the evil of state and society-sponsored human rights violations.

The second chapter elaborates the main hypothesis of this work that the vocabularies of international criminal justice repress state presence and underemphasize the positive responsibility in human rights atrocities. It starts by examining the "Nuremberg formula" for individual responsibility under international law and suggests that it entails a 'hidden' preference for negative responsibility and relegates the state presence in crimes to the unimportant and secondary role in the commission of human rights atrocities, reducing them to ordinary crimes. These repressions represent the discursive "operative closure" of

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international justice regime that has been on the rise ever since, by separating it from general international law and balancing it against the political tensions associated with prosecutions for such atrocities. The repressions constitute international justice as a distinct fragment of international law, which according to the position of this work is conducive for its employment in the hegemonic struggle (realist explanation). The other side of the argument is that the legal disputes concerning the functioning and the boundaries of the international justice regime entail substances of political tensions, marking the 'return of the repressed' tensions that in its turn further sub-fragments the international justice regime into multiple loosely connected sub-regimes based on spatial(territorial), temporal and personal criteria

Finally it is suggested that the re-interpretation of the diplomatic immunities law undertaken from the premises of structural biases of international justice regime further erases the traces of sovereign presence in the rationales and theories of immunities reducing them to the notion of mere 'impunity' devoid of any value.

Chapter three extends the critical and realist narratives of the second chapter, arguing that the legal structure of the debates on 'immunity versus responsibility' is indeterminate and in itself incapable of providing an answer or solution to these debates. In order to do so it describes the disagreement within the mainstream scholarship on the extent of immunities granted to various state officials in different situations. It reconstructs three differing accounts of the immunity of state officials versus/within international criminal justice (a narrative from international civil society, one of US scholarly perspectives and a 'constitutionalist' account) that flow from different conceptual schemes and influence

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the core of the modern discourse of immunities. The disagreement scale is limited to more or less converging views which agree that "no immunity" approach is inadequate and that there should be exceptions to the rule of immunity, however they all disagree on the extent and situations where immunity should be granted.

Another purpose of the third chapter is to describe the subjective reasons for disagreements and point to their role as the driving forces of the arguments usually provided with regard to the international criminal justice and in particular concerning the question of immunity of state officials; to demonstrate which kinds of arguments can be advanced towards specific maps of immunities within the international legal argumentation sphere. It argues that the disagreements between three narratives cannot be explained away within the traditional conceptual and argumentative schemes of sovereignty/human rights, naturalism/positivism and monism/dualism; such argumentation being reversible and indeterminate, and therefore misleading. These arguments, along the disagreement map of the three narratives, cannot ultimately refute each other, as the international legal argumentative scheme allows making of contradicting and opposing arguments that have equal force they obtain within this given scheme.

Fourth and fifth chapters are the two case studies of international justice, dealing respectively with immunity in the contexts of universal jurisdiction and the International Criminal Court. Fourth chapter is centered on the story of the 'rise and fall' of the Belgian law on universal jurisdiction and the ICJ's decision in the *Congo v Belgium* case regarding this law. It seeks to uncover the references to the substantive clashes of state

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and sovereign powers in the universal jurisdiction in general, and particularly within the Belgian perspective on atrocities in Congo through the prism of its criminal legislation. It aims to demonstrate how the international legal structures are unable to resolve the tensions associated with universal jurisdiction and suggests that ICJ's attempts could be conceived both as circumscribing the Belgian law, but also as purporting to preserve criminal justice and further disentangle it from the substantive conflicts of sovereign powers. In concludes that neither the attempt of the ICJ nor the repressions in the international justice vocabularies were successful and did not do away with the political tensions, while the latter tensions altered the regime and personal reach of the Belgian law in accordance with the repressed or unarticulated in criminal law segments of tensions.

Chapter five is the case study of the immunity and personal jurisdiction in the context of the International Criminal Court. Whereas the Rome Statute of the ICC rejects any immunity on the basis of article 27, there are further provisions in the Statute that are increasingly being used for de-facto immunity, most importantly article 16 that gives the Security Council the power to defer prosecutions and article 98 that refers to the obligations to respect the currently existing international law immunities of the nationals of third states. With regard to the article 16 provision it is argued that the Security Council and ICC have partly overlapping jurisdiction and in a certain sense share the common purpose and reason of contributing to the international peace and security, albeit with different approaches and philosophies, and whereas Security Council under the UN Charter has largely unchecked and broad powers with "primary responsibility" over international peace and security, the ICC self-projects as more modest and purely

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legalistic institution dealing solely with responsibility of individuals. Repressions of state presence and sovereign clashes in crimes and responsibility regime of ICC allow it to deal selectively with the subject matter of potentially divisive political tensions, while at the same time construing the Court as politically detached and independent, neutral to such tensions. At the same time these repressions necessitate deferring to the Security Council which is being constructed in terms of the ICC discourse as a political body, which coupled with limited possibilities for judicial review and limitation or responsibility of the Security Council under international law makes article 16 of the Statute a basis for judicial deference, a sort of political question doctrine. While instrumental in creating necessary vocabulary for apolitical and aseptic treatment of issues concerning international peace and security, repressions of state presence at the same time define the limitations of ICC regime: being the source of its independence and neutrality, at the same time setting boundaries for its regime, they serve as a 'balance wheel' that determines the reach, the strengths and compromises of the ICC and international criminal justice in general.

Concerning the provisions of article 98, and most importantly the issue of the Bilateral Immunity Agreements (BIA's) based on it, it is suggested that the repressions of state presence in international crimes, apart from circumscribing the responsibility and constructing apolitical and tension-substance neutral argumentation scheme for handling clashes of sovereign powers, also create grounds for a similar regime, also seemingly and rhetorically apolitical and not engaging with the substances of sovereign disputes; that of BIAs. Repressions however remain utterly unhelpful in grasping or overcoming this opposition by the BIA regime to the personal jurisdiction reach of the ICC. It is argued

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that the argumentative structure in the part concerning international criminal justice is indeterminate, and can both justify the BIA regime and the ICC's regime of personal jurisdiction, immunity as non-impunity in the case of the former, and non-impunity with possible immunity in the case of the latter. From the perspective of international criminal justice there is no particular reason for special treatment of the jurisdiction over nationals of states not parties to the Rome Statute, as repressions assume that the individual responsibility is not related to states and their political tensions. But this does not mean that individual criminal responsibility is 'perceived' in the same way by the political tensions, substance of which it might entail. In such cases, as tensions do not disappear with repressing them in the vocabularies of international criminal justice, a new regime is being constructed, as the shadow of the ICC regime, using the same argumentation structure, but with different outcomes. And the outcomes are then not determined by the repressions as one could expect, but other way around the reaches of both regimes would be determined by the political tensions that they justify and guard.

As argued in this work the repressions of state presence in the atrocities are the discursive closure of the international criminal justice. They separate and constitute the individual criminal responsibility regime as a regime neutral, apolitical and detached from political tensions. Such repressions are the source of international criminal justice, making it a legal attitude and framework for addressing issues such as genocide, crimes against humanity and war crimes that purports to resolve the tensions associated with them by judicially deciding on the individual guilt involved in them. However these repressions at the same time remain the main limitation, the source of the greatest weaknesses of the international criminal justice. Fragmentation debates reveal arguments about international

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justice as a regime, from it being an expression of plurality of knowledge and expertise within international legal pluralism heterarchically related to general international law and other regimes, to being a part of the emerging constitutionalism of the international law. On the other hand flowing from the international relations theory are the views of the regimes, and international justice regime in particular, as neoliberal institutions enhancing state collaboration to promote liberal institution, or contra to that a realist narrative of international justice promoting neoliberal *Grossraum*.

Methodology

A note on methodology. Modern international legal scholarship appears to present a wide array of methods, such as legal positivism[29], interdisciplinary approaches of international law and international relations[30], critical legal studies[31] and more[32] to choose from. It is however important to keep in mind that over-prioritizing of method over substance runs the risks of running into a

[29] For an account of positivism in international law *see* Roberto Ago, *Positive Law and International Law*, 51 American Journal of International Law 691 (1957); *see also* Bruno Simma & Andreas L. Paulus, *The Responsibility of Individuals for Human Rights Abuses in Internal Conflicts: A Positivist View*, 93 American Journal of International Law 302 (1999).

[30] For an example of the International relations and International law method *see* Kenneth W. Abbott, *International Relations Theory, International Law, and the Regime Governing Atrocities in Internal Conflicts*, 93 American Journal of International Law 361 (1999); For the application of the economic analysis of law *see e.g.* Jeffrey L. Dunoff; Joel P. Trachtman, *The Law and Economics of Humanitarian Law Violations in Internal Conflict*, 93 American Journal of International Law 394 (1999).

[31] Martti Koskenniemi, *Letter to the Editors of the Symposium*, 93 American Journal of International Law 351 (1999); Feminist approaches can also be accounted as critical, *see* Hilary Charlesworth, *Feminist Methods in International Law*, 93 American Journal of International Law 379 (1999).

[32] This 'etc' in fact contains very important methods such as 'International Legal Process' (*see e.g.* Mary Ellen O'Connell, *New International Legal Process*, 93 American Journal of International Law 334 (1999) and New Haven School or Policy-Oriented jurisprudence (*see e.g.* Siegfried Wiessner, Andrew R. Willard, *Policy-Oriented Jurisprudence and Human Rights Abuses in Internal Conflict: Toward a World Public Order of Human Dignity*, 93 American Journal of International Law 316 (1999). *See also* Steven R. Ratner, Anne-Marie Slaughter, *Appraising The Methods Of International Law: A Prospectus For Readers*, 93 American Journal of International Law 291 (1999).

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> "…shopping mall approach to "method", the assumption that styles of legal writings are like brands of detergent that can be put on display alongside one another to be picked up by the customer in accordance with his/her idiosyncratic preferences"[33].

The research envisaged by this project requires multi-pronged inquires and should not indeed strive to fit itself into one of the existing categories. In addressing the questions presented above, it is important to keep in mind the interdisciplinary tools of sociological interpretations of law and law and literature. The methodology of this work therefore combines the inquiry into the formal sources of international law with the examination of the theoretical meanings and implications of the documents. This work also appears to be influenced by the critical legal studies approach in the context of international law scholarship[34] in several interrelated ways.

First of all it uses the discourse analysis in the issues of discovering the under-said and under-emphasized meanings of the texts, such as appears to be the case with the repressions of meanings in the vocabularies of international justice. This becomes most explicit in the sections 2.1 and 2.2 of the thesis that study the repression of the positive responsibility and state presence in the "Nuremberg formula" of international justice to reconstruct its 'erased' parts in order to argue that the repression that occurs at that point is the discursive "operative closure" of international justice to separate it from other regimes of international law and broader environments of international law, as well as international politics.

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[33] Martti Koskenniemi, *Letter*, *supra at* 352.
[34] Nigel Purvis, *Critical Legal Studies in Public International Law*, 32 Harvard International Law Journal 81 (1991).

Furthermore discourse analysis is used in the section 4.2.1 of the chapter dealing with universal jurisdiction, while describing the "surreal" nature of the Belgian universal jurisdiction law's application to the events in DRC, at times pointing to the mainstream argument of this thesis on the repressions of positive responsibility in human rights atrocities as described through international criminal law, and at some moments digressing to discuss the general limitations of the criminal law narratives. It is relevant at this point to re-collect another major critical legal studies work on international law that points out the limited perspective of international humanitarianism in general and the problems it generates[35]. Section 5.3 also employs the discourse analysis in order to show how the same concept (immunity) is being reinterpreted using similar types of arguments and applying same rules of international law, but with different outcomes, depending on the structural bias or ethos of a given regime, in this case international peace and security law and the international justice regime.

Secondly structural study of international legal argumentation as applied to the field of international criminal law is employed. Sections 3.1.2 and 3.2 study the general argumentative structures of international law as applied to the disagreements between three mindsets or accounts on immunities and argue that these argumentative structures are indeterminate. These sections follow the suggestion by Koskenniemi that there are two major types of international legal arguments, descending and ascending, the former type proceeding from "justice, common interests, progress, nature of the world community or other similar ideas", whereas the latter type "takes as given the existence of States and attempts to construct a normative order on the basis of the 'factual' State

[35] DAVID KENNEDY, THE DARK SIDES OF VIRTUE, *supra*.

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behavior, will and interest", first one ending up describing international law as "utopian" and the second one as "apologetic" of state behavior and politics[36].

In this project concerning the "structure of international legal argument" Koskenniemi suggests a powerful analogy with the structural linguistics where the meaning is located within a "network of binary oppositions" that constitute the international legal *langue*, that is, "conditions of what can acceptably be said" or "what it is possible to think or believe in", the international legal "grammar" that delimits the boundaries of acceptable international legal arguments[37]. Kennedy also sets out to describe the international legal theory "from within" to uncover its "recurring rhetorical structure"[38].

It is suggested in line with these theses that as the international legal discourse thinks in opposites and as the opposing ends of dichotomies have to rely on each other to obtain their validity it is possible to make arbitrary arguments within the international legal argumentative scheme and therefore the latter is incapable of providing a determinate answer. The structural study of international legal arguments is also re-appearing in section 4.2.2 (when discussing the topology of argumentation relied on by the ICJ when deciding the *Congo v Belgium* case) and the sections 5.1 (ICC and State Sovereignty) and 5.2 (ICC's jurisdiction) when describing the combination of arguments that constitute the ICC within the international legal discourse.

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[36] MARTTI KOSKENNIEMI, FROM APOLOGY TO UTOPIA: THE STRUCTURE OF INTERNATIONAL LEGAL ARGUMENT 59 (2005).
[37] *Id, at* XVII- XXIV.
[38] DAVID KENNEDY, INTERNATIONAL LEGAL STRUCTURES 7-8 (1987).

Finally the international relations and international law approach is used when discussing the relevance of regimes theories in international relations to the international law regimes such as the international criminal law, and various sub-regimes and their fragmentation. International relations theories provide important insights on the issues of explaining the formation of regimes, their purposes and functioning. Furthermore international relations theories are helpful for the purposes of the third chapter while reconstructing the narratives of multifarious actors or groups of actors with a view on explaining their purposes and interests; in this case either as following their absolute interests, such as promoting liberal values, or else maximizing their relative power gains as in the case of realist assumptions.

Moreover international relations literature is used when discussing legal disputes and their relationship to political tensions, as undertaken in the section 2.3. Here the elements of the realist theories become more explicit, taking into account various parts of the hypothesis in this project, such as the assumptions that legal disputes overlap with political tensions; that the international legal argument being indeterminate does not by itself provide outcomes of disagreements, but rather justifies the outcomes that result from the global political and power-distribution structures; that the interpretation of legal concepts, in this case immunity, is determined with regard to the structural bias and ethos, the mindset of a given regime or the fragment of international legal fabric; the acceptance that the actors use regimes to promote the principles that maximize their relative power, the regime of international relations *inter alia* being prone to usage by actors engaging in hegemonic tactics.

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CHAPTER 1: IDENTITY AND OPPOSITION OF COLLECTIVE AND INDIVIDUAL RESPONSIBILITY

What are the grave human rights violations that the international criminal justice deals with? Are they the irruptions of the radical evil that challenge the very legal order that is imposed on them? Is there a possibility to punish or forgive such deeds, and is there something that could be done to the trauma of the human rights atrocities? Is the idea of the individual criminal responsibility indeed a construct of our liberal consciousness, and what are some of the consequences that this could entail for the guilt distribution in societies and for the international law itself? These are some of the crucial questions that confront any work on the grave human rights violations, whereas neither this work, nor this chapter in particular would provide them a definite answer. Nevertheless it is the impression that these questions challenge the core assumptions of the international criminal justice regime, and therefore any work concerning its features and qualities must be conscious of them.

This chapter starts by outlining some of the theoretical insights into the notion of the radical evil, as well as the response that the individual criminal responsibility lends to it. It is supported here that the given symbolization of the atrocities into crimes carries the consequences of normalizing them and exonerating wider collective complicities often associated with them.

Concerning the collective complicities, the argument that the individual responsibility is a liberal notion as opposed to the more Romantic collective responsibility is being discussed, as well as the 'inherent' problems of collective responsibility with human

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freedom. The views on the criminal guilt that regard it as exclusively individual, will be referred to as the liberal individualism, and the other view that according to Fletcher supports collective guilt that was maintained by certain Romantics as "expressive unity" (following Berlin and Taylor).

It is then argued first that the Romanticism *per se* is not sufficient to sustain the collective responsibility thesis, but rather in its own turn vaguely refers to a more specific theory of subject that could do so; second, that it is possible to conceive of the collective responsibility that does not abandon individual freedom and rationality, but on the contrary enhances them. In order to do so the notions of positive and negative aspects responsibility are introduced that demonstrate the dialectical unity of the opposition of the collective and individual responsibility, and provide a foundation of sensible measures of collective responsibility that enjoy the support of compelling arguments of respect for the human dignity. The chapter closes by a call to consider, make explicit and develop the vocabularies of the positive responsibility dimension of international justice.

1.1 Radical Evil and international criminal justice

Before proceeding to the question of responsibility for grave human rights violations, the state and/or society sponsored human rights violations, including crimes against humanity and genocide as the most abhorrent manifestations of them, it is necessary to reflect briefly on the origins and nature of this radical evil of modern times, as they have been characterized and on the very question of their extirpation and possibility of their punishment. If the crimes dealt with are the eruptions of radical evil into the ordinary

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course of human affairs; if they then, as Kant suggests, exceed instrumental rationality and spring from the propensity to evil rooted in human nature; if then these crimes, according to Arendt, "explode the limits of law" and no punishment is adequate for them, since they can be neither forgiven nor punished; if neither deterrence is then thinkable nor revenge is possible; then the whole idea of criminal prosecution and punishment seems beside the point.

The concept of radical evil has been introduced to the modern discourse by Kant and since has been applied by scholars to the human rights atrocities to describe the impropriety of normal moral assessments of such events, which appear so irrational and unexplainable from ordinary motives[39]. According to Kant radical evil is a propensity (*Hang*) towards adopting morally evil maxims rooted in human nature. Such a propensity is acquirable and is "the subjective ground of the possibility of an inclination", unlike a predisposition (*Anlage*) which is necessarily innate. It is radical because "it corrupts the ground of all maxims; it is, moreover, as a natural propensity, *inextirpable* by human powers, since extirpation could occur only through good maxims, and cannot take place when the ultimate subjective ground of all maxims is postulated as corrupt; yet at the same time it must be possible to *overcome* it, since it is found in man, a being whose actions are free". Such evil does not come from natural inclinations, as all evil originates in free will (*Willkür*).

It must therefore be possible to overcome such a propensity, despite the total corruption of all maxims, as the "the ultimate subjective ground of the adoption of moral maxims" is

[39] *See* HANNAH ARENDT, THE ORIGINS OF TOTALITARIANISM 438-459 (1973); *See also* CARLOS NINO, RADICAL EVIL ON TRIAL vii-viii (1996).

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according to Kant inscrutable and, as Bernstein suggests, must be inscrutable for the free will to be possible[40]. Hence Kant's theory of radical evil postulates that the evil comes from the conscious inversion of the categorical imperative, from which the rest of the evil follows since this corruption of human will[41].

Schelling deepens the thesis by Kant suggesting that the origin of evil is rooted in the Ground of God. He distinguishes Ground (*Grund*) and Existence (*Existenz*) in Being (*Wesen*), whereas God contains both within himself and is a unity of both ground and existence. God however needs humans for self-revelation, and only human beings can separate and reverse what is indivisible in God, ground and existence. Human beings are natural beings with a spiritual dimension, and evil then is the "conscious (spiritual) elevation of the principles of darkness over the principle of light". Thus the principle of evil comes from the ground of God, which is not intrinsically evil, but becomes the basis of evil in humans, when they consciously elevate the dark principle with self-will. Such an act of spiritual exaltation of self-will becomes a dangerous delusion of omnipotence in which human beings try to rival God, transforming "animal egotism" into "spiritualized

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[40] RICHARD BERNSTEIN, RADICAL EVIL: A PHILOSOPHICAL INTERROGATION 27-28, 30-35, 45 (2000).

[41] IMMANUEL KANT, RELIGION WITHIN THE LIMITS OF REASON ALONE 31-32 (1960), (writing that "Consequently man (even the best) is evil only in that he reverses the moral order of the incentives when he adopts them into his maxim. He adopts, indeed, the moral law along with the law of self-love; yet when he becomes aware that they cannot remain on a par with each other but that one must be subordinate to the other as its supreme condition, he makes he incentive of self-love and its inclinations the condition of obedience to the moral law…if a propensity to this does lie in human nature, there is in man a natural propensity to evil; and since this very propensity must in the end be sought in a will which is free, and cant therefore be imputed, it is morally evil. This evil is *radical*, because it corrupts the ground of all maxims; it is, moreover, as a natural propensity, *inextirpable* by human powers, since extirpation could occur only through good maxims, and cannot take place when the ultimate subjective ground of all maxims is postulated as corrupt; yet at the same time it must be possible to *overcome* it, since it is found in man, a being whose actions are free".

will". Hence the principle of darkness can neither be mastered, nor sublated (*aufgehoben*) as Hegel suggests[42].

Hegel's take on the question of evil is mostly elaborated in the *Lectures on the Philosophy of Religion*. He sees good and evil as dialectically related, one being impossible without another, the evil being necessary for the emergence of self-consciousness of the mind (*Geist*)[43]. The opposition of good and evil creates the anguish, knowledge of which makes us human. This anguish of humans concerning themselves and located in their innermost beings constitutes:

> "the element of negativity in the affirmative, meaning that within itself the affirmative is self-contradictory and wounded. This anguish is thus one moment of evil. Evil merely on its own account is an abstraction; it *is* only in antithesis to the good, and since it is present in the unity of the subject, the latter is split, and this cleavage is infinite anguish. If the consciousness of the good, the infinite demand of the good, is not likewise present in the subject itself, in its innermost being, then no anguish is present and evil itself is only an empty nothingness, for it *is* only in this antithesis"[44].

Hegel suggests in the Phenomenology of Spirit that the evil besides being thus necessary for self-realization of the Spirit, is also "not imperishable" but "taken back by the Spirit into itself", and that the "wounds of the Spirit heal and leave no scars behind"[45]. The internal cleavage Hegel talks about is the condition for evil, and at the same time

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[42] Bernstein, *supra at* 83-93.
[43] Bernstein, *supra at* 66.
[44] Hegel, *Lectures on the Philosophy of Religion*, cited from Bernstein, *supra.*
[45] GEORG WILHELM FRIEDRICH Hegel, PHENOMENOLOGY OF SPIRIT 407 (para 669), (1977)

necessary for the transition from "natural condition to a fully human one", however already in this cleavage there is a reconciliation and sublation of evil presupposed[46].

However Bernstein argues the sublation of evil does not erase and eliminate it, but rather preserves it[47]. The proposition that the reconciliation "leaves no scars behind" he suggests means that we must justify the existence of evil, including the evil of Auschwitz[48]. He argues that cleavages and ruptures that for Hegel are just moments and stages in realization of the Spirit that are sublated, but are "so extreme, so radical that they resist sublation", making Hegel's thesis unacceptable.

Concerning Jaspers, when it comes to the question of the radical evil, Jaspers would rather side with Kantian framework of the moral autonomy, rather than what Fletcher could call a more 'romantic' position of Goethe[49]. Whereas for Kant the radical evil is essentially a conscious inversion of the categorical imperative, the moral duty based on pure reason and constituting the basis for the moral autonomy and freedom for individuals, Goethe in principle opposed his basing of all freedom in such a duty "directed against nature" and "diverting him inwards"; rather the "man knows himself only in knowing the world, of which he becomes aware only in himself and of himself only in it"[50]. Whereas Jaspers' views on the radical evil diverge from Kant in some aspects, he alludes to Kantian basis of radical evil in individual categorical imperative, in

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[46] Bernstein, *supra* ait 68.
[47] *Id*.
[48] *Id at* 72.
[49] *See* Edward Baumgarten, *The Radical Evil in Jaspers' Philosophy, in* THE PHILOSOPHY OF KARL JASPERS 349-352, 337-369 (Paul Arthur Schlipp ed., 1981).
[50] *Id at* 347

which he sees "mandatory assumption of the one and only possible freedom"[51]. In the 1935 lecture "On the Radical Evil in Kant" he writes that the "Radical Evil lies in a depth of my Reason which first spawns all specific sorts of Evil, but itself cannot once and for all be known with objective certainty"[52].

Views of Karl Jaspers with regard to the radical evil should be considered together with another influential philosopher; Hannah Arendt. With a view on the new and unprecedented forms of evil being practiced in totalitarian regimes, Arendt considered that what was involved in the cases of the extermination camps was not a mere crime, but rather "radical evil"; she expressly disagrees with Jaspers' qualification of Nazi policy as crimes as they "explode the limits of the law" and thus "it may well be essential to hang Goring, but it is totally inadequate" and that the guilt is actually "beyond crime and innocence"[53].

According to Arendt the Nazi deeds constituted the radical evil that has to do with eliminating human spontaneity, unpredictability, plurality and to render humans superfluous[54]. In her work on the *Origins of Totalitarianism* Arendt noted that we cannot in our philosophical tradition conceive of the radical evil and that even Kant, who actually conceptualized this notion, immediately reduced it to the notion of the "perverted free will", the conscious inversion of the categorical imperative[55]. However in aspiring to prove that "everything is possible" totalitarian regimes went well beyond conceivable and

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[51] Cited from *Id at* 349.
[52] Karl Jaspers, On the Radical Evil in Kant (cited from *id at* 351).
[53] LOTTE KOHLER AND HANS SANER, HANNAH ARENDT/KARL JASPERS CORRESPONDENCE 1926-1969 54 (Robert Kimber & Rita Kimber trans., Harcourt Brace Jovanovich 1993).
[54] ARENDT, ORIGINS OF TOTALITARIANISM *supra at* 438.
[55] *Id* at 459.

normal selfish motives that are dealt with in, say, the Ten Commandments or in the criminal law, importantly they were destroying humanity in humans. In Arendt's words they sought to "organize the infinite plurality and differentiation of human beings as if all humanity were just one individual" and the camps were not there just to exterminate people but to eliminate "spontaneity itself as an expression of human behavior and of transforming the human personality into a mere thing"[56].

In the *Human Condition* Arendt expresses certain skepticism about the very possibility of either punishing this radical evil via criminal law or altogether forgiving it as it "transcend[s] the realm of human affairs and the potentialities of human power"[57]. Commenting on the "Origins" Jaspers asked Arendt "Hasn't Jahweh faded out too much", probably pointing to the departure from the Ten Commandments approach to evil in theology and the corresponding account by Kant (but "within the limits of reason alone") that conceives of evil from the perspective of corrupted free will, Arendt reacted that the radical evil has nothing to do with the "humanly understandable, sinful motives" behind the crimes, in other words what the criminal law is capable of punishing, revenging or deterring[58]. What the radical evil is about is the "delusion of omnipotence of an individual man" rather than mere "lust for power", the delusion that renders man superfluous[59]. Thus portraying the radical evil as mere crimes, however gravest, normalizes and brings it into the orbit of the ordinary human affairs.

A further important contribution was the development of the insight that the radical evil

[56] *Id* at 438.
[57] HANNAH ARENDT, THE HUMAN CONDITION 241 (1958).
[58] BERNSTEIN, *supra*.
[59] ARENDT/JASPERS CORRESPONDENCE, *supra* at 165.

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is ultimately "banal". Thus Jaspers wrote to Arendt that the evil should be seen in its "prosaic triviality" or "total banality" without attributing any "satanic greatness" to the Nazi deeds[60], which apparently impressed Arendt when later she reported on the "banality of evil"[61], the view that is sometimes traced back to St Augustine's works (that only good can be radical) on whom Arendt wrote her doctorate[62]. In her account of the Eichmann trial she characterized him as thoughtless and superficial, suggesting that he was "neither perverted nor sadistic" but on the other hand "terribly and terrifyingly normal", puzzling the assumption of law that to commit a crime one has to posses an intent to do wrong[63].

It has been suggested that what Arendt came to identify as the "banality of evil" in fact presupposed her understanding of radical evil associated with superfluousness rather than repudiated it[64]. In a letter to Gershom Scholem she wrote that "evil is never radical" but only "extreme", that evil "possesses neither depth nor any demonic dimension. It is "thought-defying"…That is its "banality". When writing on the Eichmann trial she pointed that he had "no motives at all" in a way clarifying her statement in the *Origins* that evil has no humanly comprehensible motives. In this sense her account of evil could be said to characterize it as banal in the sense of having no depth and being superficial, and at the same time in a sense radical because it strives to eliminate human spontaneity and plurality and make men superfluous[65].

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[60] *Id*, at 62.
[61] BERNSTEIN, *supra at* 215
[62] Generally on influence of Augustine on Arendt see Joanna Vecchiarelli Scott, *A Detour Through Pietism: Hannah Arendt on St Augustine's Philosophy of Freedom*, 20 Polity 394-425 (1988).
[63] HANNAH ARENDT, EICHMANN IN JERUSALEM: A REPORT ON THE BANALITY OF EVIL 373 (1994).
[64] BERNSTEIN, *supra at* 218.
[65] *Id*, *supra at* 218-219.

Apart from whether the evil, such as Auschwitz or Gulag, should be justified as a mere stage necessary for development and self-realization of the Spirit (*Geist*); whether the sublation of evil with the consciousness of the good present in the subject presupposes reconciliation and "leaves no scars"; whether evil is a mere abstraction present in the unity of the good and evil in the consciousness of the subject; the question is whether the traumatic event of the radical evil's irruption into the consciousness could be altogether symbolized.

If the radical evil is "beyond crime and innocence", "thought-defying", "unforgivable and unpunishable", "exploding the limits of law", could there be an adequate signification, a spell of the Symbolic realm that could "bury"[66] the traumatic event at all, regardless of whether the evil is necessary and justified because of its sublation in the Spirit.

Yes is the answer of the international criminal justice project. It seeks to try the radical evil, bring justice to the victims and victim communities, punish and forgive traumatic events through individual criminal responsibility. In doing so however it must be utterly cautious to address the peculiarities of such evil that goes beyond ordinary course of legal affairs; it must make sure that it does not leave out too much, nor promises more than it can deliver.

Arendt's insights touch upon the important shortcomings of the individual criminal responsibility. Firstly it effectuates the normalization of the radical in evil, when atrocities are constructed as crimes, which presupposes their being committed out of

[66] The reference to the Symbolic is inspired by Lacan; *see* JACQUES LACAN, ÉCRITS: A SELECTION 104 (1977). For the "burying of the trauma" *see* SLAVOJ ŽIŽEK, LOOKING AWRY: AN INTRODUCTION TO JACQUES LACAN THROUGH POPULAR CULTURE 23 (1992).

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ordinary and selfish motives. Secondly it disregards that the atrocities were sponsored by societies, often sustained by their formal or informal dominant normative and value systems, exonerating the wider collective complicities, which remove the feeling of responsibility in "desk murderers" like Eichmann through ideological and bureaucratic support.

Indeed Arendt's criticisms of Eichmann trial go beyond the mere legal vacuum in which it was held, and constitute a genuine issue for any criminal responsibility measure. Thus she considered that the question of radical evil would persist and will not be extinguished even in the hypothetical then case of a world court trying individuals on the basis of the existing law; she asks whether "things [would] be different if we had a law against *hostes humani generis* and not only against murderers and similar criminals" because "we have no tools to hand except legal ones with which we have to judge and pass sentence on something that cannot even be adequately represented either in legal terms or in political terms"[67].

Beyond exoneration, individual responsibility makes crimes inadequately perceived and degrades the victims by not acknowledging the entire wrong. Something more than the mere trial of individual crimes is then perhaps necessary to acknowledge the public attitude of the society as a whole towards the crimes committed; perhaps something of this kind was meant by Arendt when she claimed the necessity of "positive political statement of intentions addressed to the victims"[68] on behalf of Germany, some positive political attitude of the state and the law.

[67] *See* CORRESPONDENCE *supra at* 417.
[68] *See id at* 53, 62 (for Jasper's reaction on this).

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1.2 Liberal individualism and expressive unity

Is there a certain discomfort in prosecuting only individuals for the crimes that would have been impossible without state involvement and perhaps improbable without societal support, acquiescence or toleration; in the feeling that ordinary criminal law structures might distort the perception of these crimes, exonerating some, and putting too much guilt on others? On the other hand the collective guilt also seems problematic to our liberal perceptions, while according to Fletcher it is more easily identifiable with the Romantic thought. Is the collective guilt thesis upheld in Romanticism, is it opposed to liberalism and is it opposed to human freedom in general?

Following on Fletcher's suggestion that collective guilt has to do with the Romanticism, whereas individual responsibility is closer to liberal thought, this section starts off by locating the 'liberal individualism', an approach to individual freedom as based on the universal reason and the individual responsibility, and the 'romantic' approach based on the "expressive unity"[69] of individual with his/her roots and nature (rather than confronting it) with the collective responsibility.

According to (atomistic) liberal individualism only individual responsibility can be upheld as enhancing the human freedom, whereas the collective guilt should be rejected as false in its assumption of some moral subject beyond or above an individual, possessing some common character and more importantly will, capable of committing

[69] These term are borrowed from CHARLES TAYLOR, HEGEL AND MODERN SOCIETY 14 (1979).

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crimes and being subject to criminal responsibility; such a character would have falsely done away or diminished the individual freedom and responsibility.

This view draws on Kant's philosophy of morality, which postulates the moral freedom as a matter of following the categorical moral imperative, that men should act as if their maxims, that are self-imposed rules, could at the same time serve as a universal law for all rational beings, maxims which can "have themselves as universal laws of nature as their object". The categorical imperative and self-legislation are based on the intrinsic worth of a human being as an "end in himself", as having a "dignity" rather than a "price"[70]. This imperative is formal and free from any inclinations, the maxim springing from the free will of individuals that prescribe self-imposed rules. Accordingly the only subjects that could be blameworthy, and since could be prosecuted, are those whose evil could be linked to their free will (hence Kant's theory of Radical Evil).

A paradigmatic work of the liberal individualism on the question of guilt for the grave violations of human rights is the classical exposition by Karl Jaspers, who sought to determine who could be held guilty and in what sense. Accordingly he famously distinguished four types of guilt (legal, moral, political and metaphysical) and argued that the legal guilt, the one decided in courts is always only individual, rejecting the existence of any "national character extending to every single member of a nation" and the possibility of making "an individual out of a people"[71]. Thus he asserts it "nonsensical"

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[70] Immanuel Kant, Foundations of the Metaphysics of Morals, *in* KANT: SELECTIONS 277-279 (in Lewis White Beck ed., 1998)
[71] KARL JASPERS, THE QUESTION OF GERMAN GUILT 34-35 (1978).

to "charge a whole people with a crime", as "[t]here is no such thing as a people as a whole" and therefore a people "cannot be a criminal", either be "guilty [or] innocent"[72].

This position is shared by Arendt, who writes that whereas in legal and moral sense there can be no collective responsibility, as such standards "always relate to the person and what the person has done", there is a collective responsibility in strictly political sense, as "we are always held responsible for the sins of our fathers as we reap the rewards of their merits; but we are of course not guilty of their misdeeds, either morally or legally, nor we can ascribe their deeds to our own merits"[73].

Underlying this position was the view of the human as an autonomous and self-determining unit, an ongoing project making existential choices throughout his/her life. To charge a collective would have been making assumptions akin to Nazi ideology, the assumptions of *volks*-homogeneity that were sought to be evaded. For Jaspers' insistence on individual criminal guilt cannot be viewed outside his general philosophical outlook on the nature of individual in general and the Radical Evil in particular. As an existential philosopher he affirms individual moral autonomy and self-determination, man alone being the "presence, nearness, fullness, life"[74]; for Jaspers the truth is "founded in *Existenz* that we can become" through the decision that "makes Existenz real, forms life and changes it in inner action…"[75].

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[72] *Id*
[73] HANNAH ARENDT, RESPONSIBILITY AND JUDGMENT 148-150 (2003)
[74] Karl Jaspers, *On My Philosophy, in* EXISTENTIALISM: FROM DOSTOEVSKY TO SARTRE 141, 131-158 (Walter Kaufmann ed., 1957).
[75] *Id at* 150.

Therefore in addressing the *Question of German Guilt*, despite famously suggesting that in political sense "everybody is co-responsible for the way he is governed"[76], Jaspers argues that in moral and legal senses only individuals could be judged, individual responsibility being an important corollary and mirror of (individual) freedom, and that only by alluding to individual responsibility could this freedom be enhanced and maintained.

The position of 'liberal individualism', as standing for individual guilt, is being pinned against the Romantic notions of expressive unity and collective guilt. Fletcher suggests that there is a "strong methodological and cultural affinity" between collective guilt and Romanticism that he defines referring to Isaiah Berlin as "the expressive self insisting on its own distinctiveness and value" and the "rejection of the Enlightenment ideal of a universal culture based on reason"[77]. This is a very broad definition, and indeed any exercise in giving the Romanticism definition is according to Berlin "a dangerous and a confused subject". Berlin notes that whenever someone tries to pin the Romanticism to some particular conceptions someone would come up with examples ranging from "the writings of Homer, Kalidasa, pre-Muslim Arabian epics, medieval Spanish verse…, Racine and Pope,…Woodsworth and Coleridge"[78]. Fletcher does refer to a variety of sources for Romanticism supporting collective guilt, and important figures here are Hamann, Herder and Rousseau, while others include also Schleiermacher, Schiller, Savigny etc[79].

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[76] JASPERS, QUESTION *supra at* 25.
[77] George P. Fletcher, *The Storrs Lectures: Liberals and Romantics at War: The Problem of Collective Guilt*, 111 Yale L.J. 1499, *at* 1505 (2002).
[78] ISAIAH BERLIN, THE ROOTS OF ROMANTICISM 1 (1999).
[79] Fletcher, *Storrs Lectures supra at* 1505-1506.

Concerning Rousseau it is important to note that his notion of *volonté generale*, the principle that bears affinity to collective guilt, is arguably not a Romantic theory if we accept Fletcher's (or Berlin's) definition. Berlin writes that whereas Rousseau is important for Romanticism, his role is "exaggerated" and that his work on *Social Contract*, where he comes up with the general will theory can hardly be called a Romantic opus, and that Rousseau that wrote *Social Contract* and on whom the Robespierre and Jacobins were drawing is not a Romantic. The *Social Contract* according to Berlin was:

> "a typically classical treatise that speaks of return of man to those original, primary principles which all men have in common; the reign of universal reason, which unites man, as opposed to emotions that divide them"[80].

The core Romantics that are then referred to are German thinkers, such as Schleiermacher, Hamann and Herder, and generally the *Sturm und Drang* movement whose views (following Taylor[81] and again Berlin) we could refer to as expressive unity, for the starting point of individual freedom as rooted in expressive activity and belonging to a culture, rather than the Enlightenment ideal of man as being egoistic and above the nature. Herder is credited for his picture of man as a unity, unfolding from inspiration like a work of art, in communion with nature[82]. There is a certain point where expressive unity conflicts with the Kantian radical freedom, where the latter dirempts from all inclinations of the nature[83].

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[80] *Id at* 7.
[81] Charles Taylor, HEGEL AND MODERN SOCIETY 1 (1979).
[82] *Id at* 1-2.
[83] *Id at* 1- 6.

But the question is whether the Romanticism as expressivism necessarily supports collective responsibility, the hypothesis that people act and commit crimes and wrongs collectively. Expressivism is a necessary qualification here because otherwise we refer to an indefinite number of authors and opuses that might not support the collective responsibility. Indeed one could even argue that Kant himself when showing the limitations of the Enlightenment thought in dealing with the things in themselves was a Romantic, whereas it could be difficult to find in his work any direct support for the collective responsibility thesis. Thus Berlin discussing Kant's thesis on morality points out that the latter despite looking for the universal and objective norms discoverable by reason, nevertheless shifts to the language of subjective reacting to an "inner voice" and "inner demand", like an artist "projecting himself" rather than calculating and therefore suggests that Kant was a proto-romantic, having thus laid the foundation for the thought to develop through the age of Romantics[84].

There is a moment where Romanticism might overlap with something that gives a firmer ground for collective guilt, and that comes in the work of Herder, but this something is again not necessarily Romantic. The concept not mentioned by Fletcher but elaborated by Herder (and probably inspired by Hamann) is the concept of *volk*-nation that bears the national culture and national spirit, a particular theory of subject where an infinite (national) Spirit or Mind is expressed in the finite individuals; a concept that could call for collective responsibility where wrongs could be ascribed to such a national character.

Herder's expressivism starts with the importance of the language that is the medium that unites people, often on ethnic basis. Language is relevant for both Herder and Hamann

[84] ISAIAH BERLIN, FREEDOM AND ITS BETRAYAL: SIX ENEMIES OF HUMAN LIBERTY 60 (2003).

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when discussing the people and national history. For Hamann language is the "mother of reason and revelation, their ά and ω" [85], it expresses a people' history and unity[86] and its manner of thinking[87]. Hamann is considered a mystical philosopher; he argues that history is a "shadow play of secret activities" in which the Providence has a hand[88]. For Herder as well the human is "a creature of language", as well as the "creature of the herd, of society"[89]. He saw the reasons for France's glory in the development and influence on the neighbors of the "*national language*" as "each person who took delight in its writings thereby entered its realm and sympathetically shared in them".[90]

Besides the work on the language however Herder also has more immediately political works that are somewhat neglected with regard to the collective guilt, such as the *Letters for the Advancement of Humanity*[91], where he develops the notions of the organic and historically unfolding *Volk*-nation inhabited by a *Geist*, a spirit or mind. Moreover Herder ascribes to the national *volk* a particular importance, as it is the basis of the state, he writes that "[t]here exists in the state only a single class: the *people* (not the rabble) – to it belongs the king as much as the farmer"[92]. The *Geist* for Herder is expressivist and Romantic; it "cannot be described, drawn, painted – but it can be felt, it expresses itself through thoughts, movements, through striving, force and effect"[93].

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[85] Larry Vaughan, JOHANN GEORG HAMANN: METAPHYSICS OF LANGUAGE AND VISION OF HISTORY 6 (1989)
[86] *Id at* IX
[87] *Id at* 75.
[88] *Id at* 92.
[89] Johann Gottfried von Herder, Treatise on the Origin of Language, *in* JOHANN GOTTFRIED VON HERDER: PHILOSOPHICAL WRITINGS 65-167, *at* 127, 139 (Michael N. Forster trans. and ed., 2002).
[90] Herder, *Letters* [excerpt on patriotism], in PHILOSOPHICAL WRITINGS *supra at* 378.
[91] Herder , *Letters concerning the Progress Of Humanity*, *id at* 361-425.
[92] *Id at* 364 (note the word "people" is translated from "volk").
[93] *Letters*, *id at* 361.

The individuals are seen as expressing this Spirit of their nations and fatherlands that are divided from each other by Nature in multiple senses to defy any universalist aspiration of men:

> Nature has *divided* peoples through language, ethics, customs, often through mountains, seas, rivers and deserts; it, so to speak, did everything in order that they should for a long time *remain* separated from each other and become rooted in themselves. Precisely contrary to the world-unifying plan of that *Nimrod*, the languages got confused (as the old legend says); the peoples divided from each other. The diversity of languages, ethics, inclinations, and ways of life was destined to become a bar against presumptions *linking together* of the peoples, a dam against the foreign inundations – for the steward of the world was concerned that for the security of the whole each people and race preserved *its* impress, *its* character; peoples should live *beside* each other, not mixed up with and on top of each oppressing each other[94].

In the excerpt on patriotism Herder further compares a fatherland to a "ship in the flooding waves of the sea" where everyone "feels himself obliged to aid, to preserve, to save the ship" or otherwise "casts himself overboard" [excerpt on patriotism, 375]. Moreover each fatherland possesses a "*moral tendency*" which "descends from fathers" and links the human species into a chain of continuing members who are to each other brothers, sisters, betrothed, friends, children, parents" [95].

Drawing on expressivism Herder's political theory is not however nationalistic, but cosmopolitan and stands for universal justice based on reason in its Romantic ways; he writes that despite the divisions between nations "[m]y great *peace woman* has only a

[94] *Id at* 384-385.
[95] *Id at* 378-9.

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single name: she is called *universal justice, humanness, active reason*"[96]. Thus Herder insists on preservation for all nations in an equal manner, defining nation culturally, not racially and denounces militaristic states and military conflicts[97] calling the combats between fatherlands the "worst barbarism"[98]. He further adds that the "tendency of human nature contains within it a *universe*, whose inscription is: "No one for himself only, each for all; thus are you all dear to each other and happy"[99].

It is suggested that rather than the broad and diffuse Romanticism, the implications of collective guilt are more readily drawn from a more specific theory of subject, similar to Herder's *Volksgeist*. This theory of subject could arise from the expressive unity, but this is the only place where it overlaps with Romanticism. Romanticism is at once too broad, that is too many writers "there" would not subscribe to the collective guilt, as well as too elusive, in a sense that in its main propositions, if any could be drawn with precision, it does not necessarily allude to the collective guilt. On the other hand the notion of infinite subject expressed in finite individuals, would be the suggestion where the collective guilt and responsibility could be anchored, because the collective responsibility is not a sum of individual responsibilities, but requires first and foremost a collective subject to which it is attributable, in this case a national one as expressed in a state.

Nevertheless the words *Volk* or *Volksgiest* or anything similar do not appear in Fletcher's discourse of Romanticism as supporting collective guilt. Despite haunting the discussion, especially when referring to Herder, they remain in the brackets of the broader and

[96] *Id at* 404.
[97] *See* Michael Foster, *Introduction*, in JOHANN GOTTFRIED VON HERDER: PHILOSOPHICAL WRITINGS *supra at* XXXII.
[98] *Letters, supra at* 378-379

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elusive "Romanticism", from which they look out in their new clothes. The causes for this aversion in some cases could be the perceived connotations of the Nazi ideology looming behind them; the concepts of *Volk, Geist* and added *Fuehrer* being regarded as an infamous vocabulary. Heidegger's invocation of *Geist*, as investigated by Derrida in "Of Spirit", talks about it as of Phoenix, force renewing itself in the *geistige Fuehrung* or pathways[100]. Heidegger writes of the *Volk* as self-determining and fulfilling its spiritual mission guided by the *Fuehrer*, as "[t]he truth of nation is the revelation of Being out of which the nation knows what it wants historically by wanting itself, by wanting to be itself"[101].

Jaspers' message in this regard was clear although not explicit; having 'divided' the guilt he continues that "[t]here is no such thing as a national character extending to every single member of a nation" and that "[t]here is no such thing as a people as a whole"; to say otherwise for Jaspers "presupposes a false substantialization and results in the debasement of the human being as an individual"[102]. Said in the context of post-war Germany these assertions of the wrongfulness of collective judgments as debasing individuals were clearly referring to the Nazi national and racial theories.

1.3 Collective guilt: shortcomings and advantages

The notion of collective responsibility is in all probability one of the most ancient ones and dates back to the emergence of the humanity. The narratives of the Sodom and

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[99] *Id at* 424.
[100] JACQUES DERRIDA, OF SPIRIT: HEIDEGGER AND THE QUESTION 84 (1991).
[101] IAN WARD, LAW, PHILOSOPHY AND NATIONAL SOCIALISM: HEIDEGGER, SCHMITT AND RADBRUCH IN CONTEXT 110-111 (1992).
[102] JASPERS, QUESTION *supra* at 34-35.

Gomorrah, Tower Of Babel and the Noah's Flood are common to all three Abrahamic religions, whereas the narratives of deluge as a divine punishment also appear in a wide variety of traditions, from Mesopotamian to Hindu, Native American and Chinese, instantiating the responsibility of the humanity for its sins. Since the emergence of human communities and individual selves, the notions of the collective freedom and responsibility accompany the understanding of a collective spiritual life greater than individual, as a means to transcend the limitations of the human life, most importantly its finitude. Conceptualizing the collective subject has been necessary to accumulate, reinforce and identify the legacies, meanings, cultural and historical values of the communities of men; because, as Charles Taylor suggests following Aristotle, man being a social and political animal is not self-sufficient outside a polis, and needs a community to become a moral agent and maintain his identity[103].

Rather than a sum of individual responsibilities, collective responsibility is in a certain sense separable as the responsibility of some abstract entity. In Nuremberg the Court underlined the necessity of a more mundane and efficient individual accountability, saying that the "Crimes against international law are committed by men, not by abstract entities"[104], however apart from this individual responsibility the responsibility of the abstract entities also deserves attention rather than neglect, for these abstract entities do not exist beyond men, but rather are in a dialectical relationship where they continuously posit and constitute each other.

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[103] Charles Taylor, Atomism, *in* PHILOSOPHY AND THE HUMAN SCIENCES: PHILOSOPHICAL PAPERS vol. 2, 187-211, *at* 189, 191, 205-210 (1985).
[104] Judgment, p. 41.

Collective responsibility in this sense *cannot be reduced or divided into the sum of individual responsibilities*, and in this case the individual responsibility cannot properly substitute it and vice versa; but they *complement* each other. As Cooper argues, the vocabularies of collective responsibility are relevant and necessary because often the statements ascribing collective responsibility cannot be reduced to the statements on individual responsibility, especially when the former is indivisible; at an example of a tennis club he demonstrates that its failure might not be attributable to any particular individual members, but nevertheless the blame could be ascribed to the club as a whole, where the "*espirit de corps*" was missing and things were artificial[105]. Feinberg suggests that collective responsibility is sometimes a "natural and prudent way of arranging the affairs of an organization" and describes the group as having a "community of interest" among the members[106].

With regard to the international criminal justice collective responsibility receives further implications as the relevant crimes often involve collective action sanctioned by the communities, despite there could be individual members not supporting or even resisting them. Thus Fletcher points out that the four crimes over which the International Criminal Court has jurisdiction (aggression, war crimes, genocide and crimes against humanity) by definition entail collective complicities; that they are "deeds that by their very nature are committed by groups and typically against individuals as members of groups" but for which "only individuals are prosecuted" following our liberal bias[107]. He argues that the interpretation consistent with the spirit of the humanitarian law and the Rome Statute

[105] D. E. Cooper, *Collective Responsibility, in* COLLECTIVE RESPONSIBILITY: FIVE DECADES OF DEBATE IN THEORETICAL AND APPLIED ETHICS 35-47, *at* 35-41 (Larry May and Stacey Hoffman eds., Maryland 1991)
[106] Joel Feinberg, *Collective Responsibility*, in COLLECTIVE RESPONSIBILITY 53-77 *supra at*, 61-62.

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shows that the war crimes are deeds "carried out in the name of the military--in the name, as it were, of the occupying army" and that "the law of war crimes presuppose collective action"[108]. Crimes against humanity on the other part defined as being a "part of a widespread or systematic attack directed against any civilian population" and "pursuant to or in furtherance of a State or organizational policy to commit such attack" are just as the genocide and aggression also "collective in nature"[109].

Indeed to deny that these crimes involve something greater than an individual deviation from social norms, as in the case of ordinary crimes, but represent criminal activity *according* to such norms would trivialize these crimes and deny their gravity. We would be deceiving ourselves with regard to the greater fallacies that turn out to be happening as "normality" when they happen and so abhorrent 'afterwards'. However there are familiar arguments against collective guilt and responsibility on their own, irrespective of whether individual responsibility measures are applied concordantly.

Thus Fletcher refers to some of these problems, which he also calls according to the mentioned Romanticism hypothesis of collective guilt "romantic perversions"[110]. Two main themes here are "The Excess of Transmission by Birth" that leads to "too much guilt" as well as the problem of the "Guiltless Sincerity" or else "Authenticity without guilt" which results in "too little guilt"[111]. The problem of "transmission by birth" consists in the fact that as nations include many innocent people already by definition ("the young and the unborn") and live longer than a single generation does, the guilt

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107 George Fletcher, *The Storrs Lectures supra at* 1514 (2002).
[108] *Id* pp. 1518-1522.
[109] *Id* pp. 1523-1525.
[110] George Fletcher, ROMANTICS AT WAR: GLORY AND GUILT IN THE AGE OF TERRORISM 139 (2002).

would pass like an "original sin" through generations and innocent people, replicating the sentiments leading to anti-Semitism and putting overall too much guilt[112]. The issue of "guiltless sincerity" or "too little guilt" means that once the individual criminals authentically believe and express their own cultures, it becomes difficult to blame them and puts too little guilt on them, whereas the "banality of evil becomes the virtue of being true to one's roots and one's culture"[113].

The common theme of the problems connected to the legal responsibility other than individual is its conflict with individual freedom, and collective responsibility is certainly not an exception. As long as we conceive of the collective responsibility as being 'outside' and 'other' to individual responsibility and allocate responsibility according to principles not corresponding to the exercise of individual's moral duties and individual free will, collective guilt remains an unwelcome externality for individual freedom and distorts it. It disrupts the distribution of freedom and responsibility from individual's perspective, relieving some and blaming others, not according to *their* choices as individuals, but merely according to their being embodied in and expressing some greater nature and greater will, thus violating human dignity. The question is however whether apart from the contradictions there is a possibility to reconcile these themes. Could there be a view of collective responsibility that would be compatible with individual freedom, and if so why would it be compelling to realize it from the perspective of individual dignity and reason, rather than a matter of a mere expressive unity? The next section attempts to bring such a theory into the light.

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[111] Fletcher, *The Storrs Lectures*, *supra at* 1545-50; Fletcher, ROMANTICS AT WAR *supra at* 140-148.
[112] Fletcher, *The Storrs Lectures supra at* 1546
[113] Fletcher, *The Storrs Lectures supra at* 1553

1.4 Positive and negative responsibility

How could a theory reconcile the collective responsibility with rationality and respect for individual dignity? First it is important to see the collective responsibility as exceeding a sum total of individual responsibilities, as a measure necessary for "better" justice requiring "positive" measures of public support, as contrastable with pure "negative" individual responsibility. The analogies of positive and negative responsibility are drawn here from the concepts of freedom as "negative" and "positive", to illustrate the space for responsibility in the public life of the community, the necessity of public support for responsibility. Responsibility could be called "negative", where it does not require the public support, and "positive" where it entails public measures that are principles of rationally ordered in the ethical life of a community. Thus it is possible to conceive of the collective responsibility as of positive responsibility measures that do not ascribe guilt to particular individuals (which is done on the individual responsibility level though) but become entrenched in the normative systems of societies.

Such a theory of positive responsibility could reconcile individual liberty with expressive unity based on the Hegelian notions of ethical life and organic unity. For Hegel the essence of *Geist* (mind or spirit) is Freedom, it is the self-contained existence, not depending on anything external and self-conscious ("knowing itself"), as well as containing potentiality and energy to realize itself[114]; thus the History for Hegel is the development of the Mind's consciousness of the Freedom and its realization[115]. The *Geist*

[114] Georg Wilhelm Friedrich Hegel, THE PHILOSOPHY OF HISTORY 17 (Dover 1956).
[115] *Id at* 63.

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is therefore Freedom in its nature and also the absolute goal of history[116]. The State is important for Hegel, as he regards it to be "the Divine Idea as it exists on Earth" in which "Freedom obtains objectivity, and lives in the enjoyment of this objectivity", whereas the Law is the "objectivity of Spirit; volition in its true form" and therefore only those who obey law are independent and free[117].

To better understand this argument it is necessary to follow that Hegel has important qualifications to Kant's views on freedom. He agrees that freedom consists in following universal reason based on moral duty, but he criticizes Kant that his theory divides man against his nature and puts him in conflict with the desire, that it offers no solution to the conflict between self-interest and moral duty[118]. But he is also distinguished from expressivists like Herder in that he does not reject universal reason as the sole basis of freedom. According to Hegel freedom can be realized only in a rationally organized organic community, where individuals realize their identity in being a part of that community and will not pursue their self interest beyond such a community any more; just as the rationally organized community will not disregard the interests of the members[119]. Individuals are more deeply free when they can choose without pressure of other individuals, their own desires and social circumstances[120].

This fuller realization of freedom is only possible in a State, but by this Hegel does not mean the government, which could make this theory authoritarian, but rather the social

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[116] *Id at* 23.
[117] *Id at* 39.
[118] PETER SINGER, HEGEL 33 (1983).
[119] *Id at* 34- 39; *See also* G.W.F. Hegel, PHILOSOPHY OF RIGHT 160-162 (Clarendon Press 1942).
[120] Singer, s*upra at* 39.

life in general, "the actuality of the ethical Idea"[121]. Hegel asserts that "the state is not something abstract standing over against citizens; but rather they are moments as in organic life"; the relationship of ends and means appears to be misleading and inappropriate. State is not something super-individual, but the community that exists via individuals[122]. Hegel's notion of communal obligations, of the ethical life of the community, or *Sittlichkeit* refers to the moral obligations of the individual towards the community they are parts of, based on the established customary uses and norms, where there is no gap between "Ought" and "Is"[123]. For Hegel morality is complete in a rationally organized community, and individuals can attain the most complete moral existence as members of a community. He writes that the "Society and the State are the very conditions in which Freedom is realized", and the Freedom "does not exist as original and natural….Rather must it be first sought out and won"[124]. The State embodies the rational freedom in an objective form[125], Morality being its "vital principle", the State's laws and arrangements constituting the rights of the individuals comprising it, its history being their deeds.[126]

Hegel's view on the ethical life society provides interesting arguments for the positive responsibility in the international justice. As the State and the Law epitomize for Hegel the Spirit, are its objective embodiment and should be ordered by reason to enhance human freedom, doesn't reason require more than mere condemnation of individuals, but also to define the society's legal attitude towards the evil, its prosecution as morally

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[121] Hegel, PHILOSOPHY OF RIGHT *supra at* 155, Singer *supra* at 42.
[122] Charles Taylor, HEGEL AND MODERN SOCIETY *supra at* 86-87.
[123] *Id at* 83.
[124] HEGEL, PHILOSOPHY OF HISTORY, *supra at* 40-41.
[125] *Id at* 47.

unacceptable and criminal, as well as the recognition of the dignity of the victims and the recognition of the legal responsibility of the society and the individuals comprising its ethical life, or *Sittlichkeit*? Shouldn't a rationally ordered society take this attitude to evil, based on its respect towards individuals and their dignity, and shouldn't individuals seek to introduce this principle into the society ordered by reason?

Sittlichkeit, the ethical life of community, rejects or accepts the past, its evil and errors, and this is the measure that comes close to the collective guilt: the organic community of people recognizing its responsibility according to reason and realizing the recognition of the crimes and respect for the victims in its legal system as its principle. In this view the collective guilt is compatible with individual freedom, indeed indistinguishable from individual responsibility, as it is constituted by the acts of the organic community. And individual responsibility becomes collective, because besides the crimes being collective by definition, the harm allocated to given individuals refers to the ethical and legal principles and norms that it enforces and realizes, constituting state's and society's presence and attitude towards the crimes. Both are present and represent a dialectical unity.

In other words we do not have to accept any notions of super-individual subject or mind in order to conceive responsibility beyond purely negative measures. The notion of the ethical life of a community allows us to see both positive and negative aspects of responsibility as necessary for any measure of responsibility to make sense. Both of these aspects should be present in order to conceive responsibility, whereas it is impossible to argue that any of them is prior or even possible without reliance on another.

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[126] *Id at* 52.

Responsibility has to be negative, as some individuals should be held accountable with regard to their deeds, and at the same time it should represent society's attitude towards the evil perpetrated, in the first instance the evil perpetrated on behalf of that society and sponsored by it. Whereas collective guilt refers to the negative responsibility as it does place the burdens of responsibility on certain individuals, even if the group includes everyone, individual responsibility in its turn has to rely on positive responsibility as well in order not to become a senseless exercise of violence towards select individuals with no reference to the values it guards. The collective responsibility is on the other hand realized through the multiplicity of negative responsibility measures towards a number of individuals, whereas the individual responsibility has to rely on the ethical and legal attitude of the society towards the crimes in question to become legitimate and sensible. Both positive and negative aspects should be present, and any measure of responsibility represents both aspects.

Concepts of positive and negative responsibility surely remain abstract, as there would hardly be any purely negative or positive measure of responsibility, and nothing should suggest that any of them is preferable to another. Once we suggest that both negative and positive aspects of responsibility must be present, the difference between individual and collective responsibility would seem more artificial, in a sense that both are employing similar means and measures but from different angles and with different scopes; both are merely a shorthand for characterizing responsibility distribution in a society.

Official condemnations of the past criminal policies, laws restricting historical revisionism, public apologies and laws providing for the compensations to the victim

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groups are the instances that require positive responsibility becoming a part of the ethical life and embodied in the public sphere of the community by being reflected in its laws. These measures do restrict individual freedom albeit in a different sense, they could for example impose general restrictions on speech or political freedoms, or involve material burdens, however collective responsibility being thus established is actually conducive to human dignity and freedom.

This is where Hegel's insight that freedom is realized in the State, rather than by nature becomes more relevant. For Hegel the proposition that men are free by nature only means that a man is free "in virtue of his destiny", that his freedom is only "an undeveloped power", because savage states are not free, but ruled by "brutal passions" and "deeds of violence" that restrain freedom[127]. Rather the freedom that is supposed to be "sought out and won" requires a creation of society and state that restrict the "brute emotions and rude instincts" (which represent the violations of universal moral duty and freedom being against the categorical imperative) and enhance freedom in the "Rational and Ideal form"[128], that is in accordance with the universal reason and categorical imperative.

Positive responsibility enacted in the public sphere recognizes such a principle that could enhance freedom, as it represents the rational and morally compelling attitude of the individuals to their pasts and present becoming a principle of their ethical life and law of the state, according to the principles that they have themselves accepted in accordance with moral imperative and reason and out of respect for victims' dignity, apart from prudent considerations regarding the recognition and prevention of recurrence of the evil.

[127] *Id at* 40.
[128] *Id at* 41.

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Just as individuals commit collective crimes and accept the criminal policies as principles of their communities, so the measures of positive responsibility are necessary for a better respect of the dignity of victims, beyond individual grace, also for the decency of the members of the larger community, as well as for more adequate vocabularies for responsibility.

Let us return to the "romantic perversions" of the collective guilt and see to what extent they are relevant in dealing with a more abstract positive responsibility measures. The argument of "guiltless sincerity" does not appear convincing any more, for the question is whether the positive responsibility involves the feeling of sincerity of the individuals, where the "yes" answer could only be prompted if we accept the hypothesis that it is always a matter of a Romantic expressivism, which is not the case as argued above. If Romanticism is not directly relevant, and if we talk about the positive responsibility, then the latter does not in principle diminish the guilt of individuals, but reinforces it. In fact the argument of "authentic sincerity", based on the sincere affirmation and expressive unity with the collective values, turns out to be against the situation where the individual responsibility is upheld without reference to the collective, as the individuals are punished for things they do not feel liable about.

As to the "excess of transmission by birth" of the responsibility entrenched in the public sphere, this "excess" argument is based on two coincident concerns, first being whether as a member of community individuals should share its negative and positive legacies, and the second being that the intuition of injustice that most of the times we are not able to choose the nations and communities we are born to, but nevertheless have to carry

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their 'luggage' once we are in. While the first part of the concern could be seen as irrelevant once we argued that the incorporation of positive responsibility could contribute to the enhancement of the freedom in society overall and is necessary for the respect of victim groups (no "excess"), the second part ("transmission by birth") seems to be rather about the imperfect theory according to which the international law divides the planet among the fixed number of peoples with more or less fixed populations and territories, where men are born into the legal systems and regimes established before them. We also run into a greater problem here whether the individuals should be bound by the constitutions and laws, and the restrictions imposed by them that were enacted by the previous generations, at any case this problem is not the focus of this research[129]. Moreover, another questionable assumption of the "excess" argument is that individuals are actually made outside their very societies, the assumption being that of atomistic individualism as Taylor puts it, delegating this problem to the category of those created by the approach to solve it.

A conclusion for the international criminal justice from this approach to responsibility is that any measure of responsibility for the radical evil (state and community sponsored grave human rights violations) would implicitly embody both positive and negative responsibilities, despite the rejection and repression of the positive dimension of the responsibility. As it has been argued here, positive responsibility is both commendable and necessary measure in addressing the radical evil. Moreover, even individual responsibility, despite being framed into the "negative" language, nevertheless does

[129] *But see* a discussion of the "paradox of preferred generations" in *e.g.* Andras Sajo, *Preferred generations: a paradox of restoration constitutions, in* CONSTITUTIONALISM, IDENTITY, DIFFERENCE, AND LEGITIMACY 335-353, 337 (Michel Rosenfeld ed., 1994)

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instantiate both dimensions, as the next chapter argues. At this point it is suggested therefore that the vocabularies of the international criminal justice should take the positive responsibility seriously, rather than repressing and distancing from it out of what Charles Taylor calls atomistic preconceptions on freedom[130].

1.5. Positive responsibility and individual criminal responsibility

Thus beyond punishment of individuals the criminal sanctions, domestic or international, entail positive responsibility that seeks to modify the societies to better respect human dignity through acknowledgements of the wrong and accountability of the perpetrators and thus combating the principles and norms that oppress individuals. While in the context of municipal legal systems this can sometimes be treated as transitional justice transforming the state to better realize human dignity[131], the international law through parallel efforts of state and individual responsibility for human rights violations (as well as rudimentary movements towards corporate, non-governmental and international organizations' responsibility) strives towards the world where human freedom and dignity are realized to a more complete degree, which requires from states, as well as any organizations created for the purpose of enhancing human freedom, to conform their structure and societal ethos to maximize this freedom.

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[130] Charles Taylor, *Atomism*, supra.
[131] Luc Huyse, *Justice after Transition: on the Choices Successor Elites Make in Dealing with the Past*, in TRANSITIONAL JUSTICE: HOW EMERGING DEMOCRACIES RECKON WITH FORMER REGIMES 337-349, 337-339 (Neil Kritz ed., 1995); *See also* Kirchheimer discussing the transitional justice within the framework of ideal types of *état criminel* as opposed to the state that pursues respect for human dignity and rejects degradation of human beings, Otto Kirchheimer, *Trial by Fiat of the Successor Regime*, *in* TRANSITIONAL JUSTICE, *id at* 350-374; *See also* Orentlicher suggesting that the criminal sanctions are necessary to advance and strengthen democracies, Diane Orentlicher, *Settling Accounts: the Duty to Prosecute Human Rights Violations of a Prior Regime*, *in* TRANSITIONAL JUSTICE, *id at* 375-416.

International regime of the individual criminal responsibility is by far considered the most successful and proliferates among the array of methods to deal with these aspirations. The 'positive' aspects of individual responsibility are however overlapping with the 'negative' aspects; as probably any criminal sanction that punishes the individuals for the socially dangerous deeds, thus supporting the principles of state organization and in ideal protecting human dignity by supporting it on state level. From this angle individual criminal responsibility for grave human rights violations should have more explicit positive responsibility message as it handles cases where state and societal actions and failures were involved and seeks to remedy them. We should make explicit and consider the positive responsibility dimension of international justice that normatively supports human dignity and freedom; this shadowy and silenced feature of it that reaches beyond retaliation to individual's corruptness.

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CHAPTER 2: REPRESSED MEANINGS AND INDIVIDUAL RESPONSIBILITY

2.1 The repression of positive responsibility foregrounded

A thesis has just been raised that the individual criminal responsibility entails a positive responsibility dimension as well as its more obvious 'negative' condition. This part of the work will try to uncover this positive responsibility aspect seemingly repressed[132] in the discourse of individual criminal responsibility and will continue to inquire as to the reasons and consequences of such a repression as well as those of the 'return of the repressed'.

The starting statement of the existing international justice regime is the postulate that was made understandably at the very foundation, namely at the Nuremberg trial, that the "Crimes against international law are committed by men, not by abstract entities"[133]. This sentence which has since become a slogan for the individual criminal responsibility is based upon considering the individuals as acting outside communities and thus disregarding the complicities of the latter, whereas states or societies are put as mere 'abstract entities' devoid of substance and irrelevant for the considerations of criminal responsibility. Immediately the negative responsibility is prioritized as the only real responsibility, whereas the positive responsibility that deals with entities that are 'abstract', somehow ephemeral and unreal, elusive and non-present is deemed inferior and complementary. Apart from prioritization of negative responsibility these words

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[132] The metaphor of repressed tensions represented in legal disputes is borrowed from Morgenthau, *infra.*
[133] Trial of the Major War Criminals before the International Military Tribunal Nürnberg, 14 November 1945-1 October 1946, vol. I, page 223 (Nürnberg: 1947).

logically understate that states are some actual individuals abstracted as states, as well as the postulate that individuals deemed outside states are merely another abstraction.

However the structure of the cited statement is such as if the individuals abstracted as states are somehow inferior or less important for criminal justice than the individuals abstracted outside states, and the *understated* parts of the message are that the "crimes against international law are committed by men *that we perceive as individuals being outside states, not by men that we perceive as individuals being inside states*" and also "*crimes against international law are committed by abstract entities of atomized individuals, not by abstract entities of states that are comprised of no individuals*" both of which are misleading. In fact, as argued in the previous chapter both positive and negative responsibility aspects are present in the exercise of any responsibility, and the responsibility for grave human rights violations is a vivid illustration rather than an exception here.

If individual responsibility for international crimes is to make sense and in any case to be complete and effective, it has to refer to the principles and rules of the society in which and by the sanction of which the crimes have been perpetrated, the norms condemning the action must be internalized in the societal ethos, normative and value universe, with the crimes properly investigated and with the complicities of the state (perhaps several states, even the international community as a whole) taken into account and positive responsibility being the legitimating vocabulary for such actions. As long as this does not take place, as long as we would perceive the crimes as committed by individuals out of selfish and ordinary motives, without basing the guilt on the condemnation of the societal

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participation in crimes, the individual responsibility would remain incomplete and the dignity of the victims will be degraded by relying not on the legal principles but on the grace and political will of the communities where the crimes were perpetrated.

It is not alleged here that a complete exclusion of positive responsibility has taken place, which is logically impossible as there has to be at least some state support of the prosecution, but that the positive responsibility is made inferior and secondary, unreal so to speak, apparently inessential. It is argued however that the repression of the positive responsibility in the vocabularies of international justice, of which the starting point was the statement made in Nuremberg, apart from being erroneous has had consequences on the development and the acceptance of the international criminal law regimes worldwide in perhaps unintended ways.

Lets attend briefly to the reception of this statement that represses positive responsibility throughout the modern international criminal law. It has been reflected in the Nuremberg "Principles of International Law" compiled by the International Law Commission in 1950[134], and the 1954 "Draft Code of Offences against the Peace and Security of Mankind" that refers to the crimes "for which the responsible individuals shall be punished", whereas the next article enumerating the offenses (from 2.1 to 2.10) states that they can only be committed by the "authorities of a State", noting that only the war crimes (2.11) can be committed by both state authorities and by private individuals. The 1996 version of the Draft Code includes more recent definitions of crimes and entrenches

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[134] *See* Commentary to the Principle I of the 1950 "Principles of International Law recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal, with commentaries" available at <http://untreaty.un.org/ilc/texts/instruments/english/commentaries/7_1_1950.pdf>, accessed April 15, 2006 (referring to the above formulation in the paragraph 99 of the Commentary).

the individual responsibility, while reserving that such responsibility is without prejudice to the state responsibility[135]. The international criminal tribunals for Rwanda and Yugoslavia follow the same path of affirming solely individual responsibility[136], and so does the Rome Statute of the ICC, that claims jurisdiction over "natural persons" and without any prejudice or effect to state responsibility[137].

This clause about non-prejudice to the state responsibility that usually follows the statement as to the actual responsibility of individuals is not without interest. A perfectly sensible clarification from the legal point of view, when considered literally comes almost as a slip of the reference to an "alternative" or "other" version of responsibility where collective and state responsibilities are actualized. It complements the statement on the individual responsibility that represses positive responsibility, deferring the positive responsibility to some other order or regime where it is supposedly realized. This clause opens a reference to what is missing in the present regime and has to be present for its completeness. Positive responsibility uncovered is then that alternative reading that could have been actualized, but is repressed and degraded for some reason. This silent "prejudice" concerning the presence of positive responsibility is not however accidental and this chapter will try to clarify why and how it affects the disagreements over the actual condition of international justice.

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[135] *See* Article 4 of the 1996 Draft Code of Crimes against the Peace and Security of Mankind, Yearbook of the International Law Commission, 1996, vol. II (Part Two).
[136] *See* Article 6 of the *Statute of the International Criminal Tribunal for Rwanda*, available at Statute of the International Criminal Tribunal for Rwanda, *at* <http://www2.ohchr.org/english/law/itr.htm >, accessed April 15, 2006; *See also* Article 7 of the *Statute of the International Criminal Tribunal for the Former Yugoslavia*, U.N. Doc. S/25704 at 36, annex (1993) and S/25704/Add.1 (1993).
[137] *See* Articles 25.1 and 25.4 of the Rome Statute of the International Criminal Court, 2187 U.N.T.S. 90, *entered into force* July 1, 2002.

The repression of positive responsibility in the international justice regime can be demonstrated at the examples of some legal problems or "paradoxes" created by it. It is for that matter necessary to make some clarifications concerning the positive responsibility's place in state responsibility. As mentioned before state and collective responsibilities entail both positive and negative responsibility aspects, however in the sense of responsibility other than sum of individual responsibilities of the members of the collective, which remains the most plausible construction of collective responsibility, it bears stronger affinities to positive responsibility than individual responsibility; in the absence of clear conceptual discrimination between positive and negative responsibility the collective and state responsibility remain the closest approximations and assume more explicit connotations in terms of positive responsibility than individual responsibility does.

Apart from the issue of the role and place of positive responsibility in the state responsibility regime, when it comes to international criminal law the repression and rejection of positive responsibility becomes a key operative moment in making it individual-centered regime heterogeneous to the state-centered accounts of competing regimes (such as state responsibility). The separation, inferiority of collective responsibility becomes a necessary rhetorical tool in legitimizing this construction of international justice. In the light of impossibility to get rid of positive responsibility this however leads us to some strange situations, especially as the grave human rights violations are at the issue.

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For example, as described above and argued by Fletcher, the crimes such as genocide, crimes against humanity and war crimes are often, if not predominantly, state-sponsored or even state-administered crimes. For that simple reason, beyond individual responsibility, any such crime would also implicate state responsibility. This would happen because the international law of state responsibility firmly upholds that the acts contrary to international law and, more specifically, international crimes are in fact attributable to states[138]. The state practice evidenced by the ILC's Draft Articles on State Responsibility further suggests that "[t]here is an internationally wrongful act of a State when conduct consisting of an action or omission: (a) is attributable to the State under international law; and (b) constitutes a breach of an international obligation of the State"[139]. Furthermore, even where the official "exceeds its authority or contravenes instructions", such acts are still considered as acts of the state[140].

Moreover, it is inherent in the legal and theoretical construction of human rights that their violations are not merely deeds of individuals that happen to be state officials, but also have to do with the state involvement; as Henkin wrote "human rights are against the state" and "are asserted against government"[141]. This is precisely what situates the human rights violations in the system of wrongdoings elevating them to the category of most

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[138] *See generally* WEILER ET AL EDS., INTERNATIONAL CRIMES OF STATE *supra*; *See also* Alain Pellet, *Can a State commit a crime? Definitely, yes!*, 10 European Journal of International Law 425, (1999); *See also* the *Rainbow Warrior* incident 26 I.L.M. 1346 (1987), United Nations Secretary General: Ruling on the Rainbow Warrior Affair Between France and New Zealand, July 6, 1986 (for an example of the acceptance that violations of International Law can be regarded as committed in official capacity and attributed to states).

[139] *See* Article 2 of the International Law Commission Draft articles on Responsibility of States for internationally wrongful acts (2001), U.N. GAOR, 56th Sess., Supp. No. 10, U.N. Doc. A/56/10 (2001), corrected by document A/56/49(Vol. I)/Corr.4

[140] *Id* art 7.

[141] LOUIS HENKIN, THE AGE OF RIGHTS 3-5 (1989); *See also* LOUIS HENKIN, THE RIGHTS OF MAN TODAY 1-3 (1979); *But see generally* ANDREW CLAPHAM, HUMAN RIGHTS IN THE PRIVATE SPHERE (1996).

egregious, their relationship to the state subjectivity against which they receive meaning and identity. One could go as far as to argue that in fact the individual himself, if considered "outside" state and society (construction derived from the Nuremberg statement above) is unable to violate a human right and that only states that are bound by human rights can do so; a conduct can only constitute a violation of human rights if it is also attributable to the state[142]. Thus it is important to consider that most of the crimes under the subject matter jurisdiction of e.g. the ICC are either by definition attributable to states, such as the crimes against humanity[143], or could reasonably be argued as such in most cases, such as the genocide, war crimes and the crime of aggression[144].

In more radical justifications of the repressions this 'duality' in the nature of crimes in question is being artificially explained away by the so-called private acts or non-attributability doctrine. It views all human rights violations as private acts, arguing that such crimes cannot be considered a legitimate state function and thus officials who commit them cannot claim that they were acting on behalf of their states. This theory was more popular at the rise of the international criminal law, thus Glueck argues that states under international law are hypothetically incapable of committing international crimes

[142] This is not to prejudice the theory of *drittwirkung* or "third party effect" of human rights, that regards them as "horizontal' or enforceable against individuals, *see e.g.* ANDRÁS SAJÓ & RENÁTA UITZ, THE CONSTITUTION IN PRIVATE RELATIONS: EXPANDING CONSTITUTIONALISM (2005). The point is rather to reemphasize their relationship with the concept of statehood and state sovereignty. *See e.g.* Louis Henkin, *That "S" Word: Sovereignty, and Globalization, and Human Rights, Et Cetera*, 68 Fordham L. Rev. 1 (1999), *esp. at* 7 and 13 (arguing for such language of state sovereignty that would enforce human rights).

[143] Involving a "state or organizational policy" as a part of the "widespread or systematic" attack on the civilian population; *See Prosecutor v. Tadic*, Opinion and Judgement, Case No. IT-94-1-T, 7 May 1997, para 653; *See also Prosecutor v. Akayesu*, Judgment, Case No. ICT-96-4-T, 2 Sept. 1998, para 579; *See also* RODNEY DIXON, *Crimes against humanity, in* COMMENTARY ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT : OBERVERS' NOTES, ARTICLE BY ARTICLE, (Otto Triffterer ed., 1999).

[144] Note that the ICC will only exercise jurisdiction once the definition is adopted. Note however the existing definition in International Law as in the Resolution of the General Assembly. *See generally* Roger S. Clark, *Rethinking Aggression as a Crime and Formulating its Elements; The Final Work-Product of the*

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and therefore state officials committing such crimes should be considered as having acted outside their official functions. He supports his argument by attributing this assumption to Blackstone, who said once, rather naively as one might observe, that a sovereign should not be supposed to willingly ally himself with his agents who commit crimes[145].

This argument seems to reappear in the reasoning of Pinochet[146] and Congo v. Belgium. In the latter case the ICJ stated in the famous dictum that the prosecution by foreign courts is not prevented by immunity in respect of acts committed by a state official (foreign minister in this case) during his term of office, only if they were committed "in a private capacity."[147]. With regard to the prosecutions for international crimes by third states it follows that they are either impossible without the waiver of immunity, or it is assumed that such crimes are always committed in the "private capacity". The latter view was advanced by Judges Higgins, Kooijmans and Beurgenthal in their separate opinion where they pointed that "serious international crimes cannot be regarded as official acts because they are neither normal State functions nor functions that a State alone (in contrast to an individual) can perform"[148].

Whereas some scholars agree with this argument[149], this position has been subject to severe criticisms. Thus Casesse holds the argument that the international crimes are

Preparatory Commission for the International Criminal Court, 15 Leiden Journal of International Law 859 (2002).

[145] Glueck Sheldon, *The Nuremberg Trial and Aggressive war*, 59 Harvard Law Review 396, 427-428 (1946).

[146] Pinochet [3] judgment *supra at* 203 (Lord Browne Wilkinson saying that "I believe there to be strong ground for saying that the implementation of torture as defined by the Torture Convention cannot be a state function").

[147] *See Arrest Warrant* Decision *supra at* p. 61.

[148] *Id*, Joint Separate Opinion of judges Higgins, Kooijmans and Beurgenthal, para 85, *at* <http://www.icj-cij.org/icjwww/idocket/iCOBE/icobejudgment/icobe_ijudgment_20020214_higgins-kooijmans-buergenthal.PDF>.

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committed in the private capacity to be "artificial", persuasively arguing that "[t]his would mean, for example, that the crimes for which Joachim von Ribbentrop (Reich Minister for Foreign Affairs from 1938 to 1945) was sentenced to death, namely crimes against peace, war crimes and crimes against humanity, should be regarded as 'private acts."[150] The main part of the argument concerns the incompatibility of such an approach with the definition of some crimes that by definition involve official capacities[151] and the criticism that considering crimes against international law as "private acts" leads to the non-imputability of these acts to states and ultimately can allow states to escape responsibility, becoming a trouble that is bigger than the one it seeks to remedy[152].

It is argued at this point that the only source of this "paradox" is the repression of positive responsibility in individual criminal justice. This repression strives to deny the complicity of state sponsorship and the legal fiction of the state, which represents society acting collectively, its laws and norms being the ethical order that supported or acquiesced to the crimes in question. As a result the crimes become private acts in order to avoid implications of state responsibility and the differences in legal regimes that follow from it. That is how the immunity of state officials becomes relevant, for this is the borderline, the hymen so to speak where one has to settle whether it is state or individual acted. Immunity would then remain an obstacle as far as the positive responsibility is repressed; otherwise the theories on individual responsibility would contradict themselves, where

[149] *See e.g.* Zappala at 601.
[150] Cassese, *Congo v Belgium*, *supra at* 870.
[151] Steffen Wirth, *Congo v Belium*, *supra* at 890-891 (noting that as, for example, torture according to the definition of the Torture Convention can only be committed while acting in "official capacity", to qualify international crimes as "private acts" would mean that "any act of torture was committed in private capacity and, thus, would, *per defenitionem*, not be subject to the provisions of the Convention Against Torture".

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crimes are deemed as committed in private capacity for immunity reasons, but by definition include criminality in official capacity in the objective element of the crimes, while acts in official capacity are covered by immunity.

2.2 Repression of positive responsibility and the fragmentation of international law

Repressions have been mentioned throughout this chapter and this section intends to clarify what is actually meant by the term repression, what is arguably being repressed in the individual criminal responsibility, what are some of the possible reasons for repressions and how they take place, as well as some of the consequences of such repressions. As referred above the discourse of international justice represses the presence of the positive responsibility, that is the actuality and importance of societal and state support of the prosecutions for radical evil, the relevance of state's inauguration of rules, norms and principles that deal with international crimes and their consequences, while focusing exclusively on individual guilt.

Several interrelated steps effectuate the repressions of positive responsibility; it is being treated within the individual vs. collective guilt and individual vs. state responsibility framework, thus being confused with collective and state responsibility, the latter being assigned inferior and secondary role theoretically and legally. At the theoretical level collective guilt is assumed problematic as being contrary to human dignity, a 'false substantialization [that] results in the debasement of the human being as an individual'; it is contrasted to liberal thinking as 'romantic' and rejected. At the legal level it is being

[152] *See* Marina Spinedi, State Responsibility v. Individual Responsibility for International Crimes: Tertium Non Datur? 13 European Journal of International Law 895 (2002).

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treated as responsibility of 'abstract entities' unlike the real responsibility of individuals. Furthermore not only the references to the positive responsibility measures are omitted, it is outright denied that any such responsibility is assumed or takes place; the individual criminal responsibility fiercely denies any 'prejudice' to state or collective responsibility, even that the crimes are anything but 'private acts' of the officials resulting from their individual corruptness.

Anything beyond this very narrow conception of grave human rights violations/radical evil as being the mere individual ('negative') responsibility is separated and deferred to other areas of international law, such as state responsibility. Separation and deferral to another filed, inferior rank in the hierarchy of the international criminal law measures, 'unreality' of positive responsibility, denial of its necessity and presence constitute what could called a repression of the actuality of positive responsibility in the vocabularies of international criminal law.

What begs the international criminal law for such a repression? Is it a mere unfortunate or fortunate coincidence or are there more pragmatic reasons for it? It has been suggested in the previous chapter that the atomistic preconceptions on the nature of society, liberty and responsibility might have fostered such a repression through denial of positive freedom and responsibility. Beyond any claims of narrow-mindedness it is plausible that a more 'negative' conception of responsibility for state sponsored international crimes constituting human rights violations would have had more chances of becoming universally acceptable; for humanly impossible pure 'negative' responsibility is ideally

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universal, as it carries no consequences for any state and as such entails no reasons for objections on their behalf.

It turns out however that this is not the case and cannot be the case, and which is really important the price to be paid for such an assumption would be total impunity for radical evil. A nonsensical theory of criminal responsibility that guards no values and simply punishes individuals (even not from revenge for corruptness, for that would be some rule to enhance human freedom however primitive it might appear) does not achieve any purpose merely because it has none.

There is however a more profound and immediate role the repression plays with regard to the international justice; it constitutes the latter as a new regime, a novel fragment on the diversifying carpet of the international legal text. It becomes necessary here to mention few words about the issue of fragmentation of international law in general, as it appears to be directly relevant to the problem discussed here.

As noted in the report of the study group of the International Law Commission on the issue of fragmentation, the present of the international law witnesses "the emergence of technically specialized cooperation networks with a global scope" whereas such networks "tend to develop their own rules and rule systems", which results in the "regimes of international law that have their basis in multilateral treaties and acts of international organizations, specialized treaties and customary patterns that are tailored to the needs and interests of each network but rarely take account of the outside world"[153].

[153] *See* paras 481-483 of Report of the Study Group of the International Law Commission, Finalized by Martti Koskenniemi, Fragmentation of International Law: Difficulties Arising from the Diversification and

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In the view of the absence of hierarchies in international law and the "spontaneous, decentralized and unhierarchical nature of international law-making" the fragmentation of international law, marking the "move from a world fragmented into sovereign States to a world fragmented into specialized "regimes" could result in conflicting responses to same issues and present a threat to the coherence of international legal system. Each specialized regime has its own "experts and its ethos, its priorities and preferences, its structural bias" being "institutionally "programmed" to prioritize particular concerns over others", whereas there is "no homogenous, hierarchical meta-system….realistically available to do away with such problems"[154]. However as the report notices such special regimes are both necessary and unavoidable, the world being "irreducibly pluralistic", and suggests that fragmentation has not "seriously undermined legal security, predictability or the equality of legal subjects" and emphasizes the importance of development in "rules, methods and techniques" for handling "collision of norms and regimes", whereas the "relevant hierarchies must only be established ad hoc and with a view to resolving particular problems as they arise"[155].

There has been some discussion among scholars as to the nature of the fragmentation, the threat it poses if any to the international law in general and about the methods of handling it. Within the range of the position identified by Koskenniemi as legal pluralism[156], it has

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Expansion of International Law, A/CN.4/L.682, 13 April 2006, 58th session of the INTERNATIONAL LAW COMMISSION, *available at* <http://untreaty.un.org/ilc/guide/1_9.htm>, accessed March 17, 2006 [Hereinafter ILC Report on Fragmentation].

[154] *Id*, paras 484-490.

[155] *Id*, paras 485, 491-493.

[156] *See* Martti Koskenniemi, *Global Legal Pluralism: Multiple Regimes and Multiple Modes of Thought*, *at* http://www.helsinki.fi/eci/Publications/MKPluralism-Harvard-05d%5B1%5D.pdf (summarizing the position as a situation where "[l]egal globalisation will become globalisation of the functional differentiation that existed in the national society. Transnational regimes would replace territorial ones,

been suggested that fragmentation is "more radical than any single reductionist perspective" and is the result of the "polycentric" globalization tendencies that result in the fragmentation of the global society and law "not along territorial, but along social sectoral lines", "from territorial boundaries to functional boundaries", a "move from constitution to discourse"[157].

Thus Fischer-Lescano and Teubner argue that "[l]egal fragmentation is merely an ephemeral reflection of a more fundamental, multi-dimensional fragmentation of global society itself" and that whereas "fragmentation cannot itself be combated" only "a weak normative compatibility of the fragments might be achieved". Following Luhmann's theory of 'autopoetic law'[158] they suggest that "the underlying cause for post-modern risks is found within the rationality maximization engaged in by different globally active functional systems" creating self-contained "heterogeneous legal orders" that "fortify themselves as auto-constitutional regimes". Agreeing with the "structural bias" suggestion they point that these regimes "intensify their own rationality without regard to other social systems"[159] and "have difficulty in balancing the values embodied in their

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regimes replace States. Far from a unifying the world, this would intensify the clash of legal regimes and modes of thought, some more central that others, each organised through an internal hierarchy. The best hope for anything unifying would come from a system of regime-co-ordination, and inter-systems law that would resemble the private law of conflicts." But then conflicts between regimes can never be settles because "there is no meta-rationality that would allocate to each its respective place or hierarchical position")

[157] Andreas Fischer-Lescano, Gunther Teubner, Regime-Collisions: the Vain Search for Legal Unity in the Fragmentation of Global Law, 25 Mich. J. Int'l L. 999, at 1000-1004 (2004); Andreas L. Paulus, *From Territoriality to Functionality? Towards a Legal Methodology of Globalization*, *at* www.cpogg.org/paper%20amerang/Andreas%20Paulus.pdf., at p. 2.

[158] For a discussion of Luhmann's theory *see* Arthur J. Jacobson, *Autopoietic Law: The New Science of Niklas Luhmann*, 87 Mich. L. Rev. 1647 (1989) at 1648, 1663-1664 (describing it as "(1) a legal system ceaselessly generating (and transforming) legal materials entirely out of legal materials; hence, (2) a legal system continuously setting (and altering) the conditions of its own validity" and tracing the influences of Kelsen's "law of law", H.L.A. Hart's concept of a legal system as a union of primary and secondary rules and Habermas' theory of communicative action).

[159] Fischer-Lescano and Teubner, *supra* at 1006.

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Statute with the values embodied in other institutions"[160]. They are skeptical of a possibility of hierarchical or constitutional solution to the problem of fragmentation under the modern international legal system, once characterized as "primitive"[161], and suggest that the best law can do is to act as a "gentle civilizer of social systems"[162].

On the other hand there are voices that do not consider fragmentation to be a serious threat to international law's coherence and unity[163] and various legal solutions are suggested to deal with it, such as the increased role of the ICJ[164], inclusion of all law as applicable for each of the tribunals, despite their limited jurisdiction[165] or residual application of general state responsibility law and *lex specialis* maxim[166].

Koskenniemi and Leino argue that the issue is "not so much in the emergence of new sub-systems but in the use of general law by new bodies representing interests or views that are not identical with those represented in old ones" and furthermore that it is improper to conceive of fragmentation as something novel and suddenly threatening the unity of international law[167]. They suggest that fragmentation is about politics and

[160] Paulus, *supra* at p. 15.
[161] *See* HANS KELSEN, PURE THEORY OF LAW 323 (1989) writing that international law differs from municipal law and "shows a certain similarity with the law of primitive, i.e., stateless society in that international law (as a general law that binds all states) does not establish special organs for the creation and application of its norms. It is still in a state of far-reaching decentralization".
[162] *See* Fischer-Lescano and Teubner *supra at* 1004-1008, 1015-1018, 1045; See also Paulus, *supra at* 9-15 (for the discussion of the international law as lacking hierarchical structures capable of dealing with fragmentation).
[163] Jonathan I. Charney, *The Impact on the International Legal System of the Growth of International Courts and Tribunals*, 31 International Law and Politics 697, at 699, 706-708 (1999); William W. Burke-White, *International Legal Pluralism*, 25 Michigan Journal of International Law 963, *at* 978 (2004).
[164] *See* Charney, *id*; Georges Abi-Saab, *Fragmentation or Unification: Some Concluding Remarks*, 31 N.Y.U J. Int'l L. & Pol. 919, *at* 926-929 (1999).
[165] Joost Pauwelyn, Bridging *Fragmentation and Unity: International Law as a Universe of Inter-Connected Islands*, 25 Michigan Journal of International Law 903, at 915-916 (2005)
[166] Bruno Simma and Dirk Pulkowski, *Of Planets and the Universe: Self-Contained Regimes in International Law*, 17 EJIL 483 (2006).
[167] Martti Koskenniemi, Päivi Leino, *Fragmentation of International Law? : Postmodern Anxieties*, 15 Leiden Journal of International Law 553, *at* 561, 559 (2002).

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represents "institutional moves to advance human rights or free trade under the guise of legal technique" and engagement "in a *hegemonic* struggle in which each hopes to have its special interests identified with the general interest"[168]. According to Koskenniemi it is not simply that different regimes have different rules, but that they are "solipsistic and imperialistic" (following Kelsen's definition of solipsistic as "capable of seeing nothing else than one's own legal system" and imperialistic because "everything taking place in the world is judged from its perspective"), and that these regimes have "different objective and a different ethos, a different structural bias" that determine their positions regardless of the rules[169].

International justice as a legal system could be conceived as a social system, a system of knowledge, norms, principles and expertise, entailing an individualistic and legalistic perspective on human rights atrocities. It is however independent and autonomous from surrounding politics, sentiments, economic and power redistribution. It is discursively separated by singling out a specific perspective based on individual criminal responsibility. It is also to a certain degree autonomous within surrounding discourses of general international law and other regimes, such as for example the international peace and security. The internal basis of selection of its communication with environment is shaped by repressions. They condition the autonomy of international justice regime and its responses to the environment. They maintain the "consciousness" of international

[168] *Id at* 561-562.
[169] Martti Koskenniemi, *International Law: Between Fragmentation and Constitutionalism*, Canberra, 27 November 2006, available at <http://www.helsinki.fi/eci/Publications/MCanberra-06c.pdf>, accessed March 19, 2007, see pages 2-5. Furthermore on fragmentation see also Martti Koskenniemi, *Formalism, Fragmentation, Freedom. Kantian Themes in Today's International Law, at* http://www.helsinki.fi/eci/Publications/MFrankfurt-Formalism-05h%5B1%5D.pdf; Gerhard Hafner, *Pros and Cons Ensuing from Fragmentation of International Law*, 25 Michigan Journal of International Law

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justice, its recognition and other communication with the evil of atrocities and communicate its response such as the individual criminal responsibility.

The discussion on fragmentation is a useful context for the arguments put forward in the present work. The regime of international criminal justice constitutes according to the classical definition by Krasner a set of "principles, norms, rules and decision-making procedures around which actor expectations converge in a given issue-area"[170]. The ethos and rationale of international justice purport to address issues overlapping with other regimes such as peace, security, diplomatic intercourse and seek to describe human rights atrocities in the vocabulary of individual criminal guilt in a manner and with outcomes different from those competing regimes or general "residual" norms of international law. It is suggested then that the repressions of positive responsibility and state presence are a kind of "operative closure" for the regime of international justice, making it independent from and putting it in touch with its legal and political environment. It is furthermore in accordance with this work that the collisions of this regime with others represent a "hegemonic struggle" of actors and social groups to "take the voice of general law" and to provide "vocabularies and forms of expertise" that would identify their interests with general ones.

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2.3 The role of political tensions and the 'return of the repressed'

As argued in the present work the responsibility for international crimes (that constitute grave human rights violations) involves (repressed) positive responsibility of sometimes

849 (2004); Benedict Kingsbury, *Foreword: Is the Proliferation of International Courts and Tribunals a Systemic Problem?*, 31 International Law and Politics 679 (1999).
[170] Stephen Krasner, *Structural causes and regime consequences supra at* 1.

several states. There is nothing objectionable to the prosecutions of states, especially as the crimes we deal with are particularly abhorrent. However remaining unspoken and repressed, this aspect becomes a haven for political tensions and often politicizes the prosecutions beyond their alleged legal significance, undermining the accountability efforts on the whole. Repression of positive responsibility denies the possibilities of 'backdoor', indirect condemnations of state policies via international justice, that thus becomes vulnerable to international politics while being assured of its self-assured neutrality in the matters of state and positive responsibility.

Once it is claimed that there is always a repressed positive responsibility aspect involved in the individual criminal justice measures, it turns out that the individual criminal responsibility can be indirect state responsibility. Once it contains unsaid, literally erased features that could come close to what is conceived as state responsibility, it can be silently/non-expressly employed to enact positive responsibility where it claims that it does not do so. This would result in a 'backdoor' use of individual responsibility, or more precisely 'backdoor' use of the repressed collective assumptions of individual responsibility as an alternative to state responsibility. According to the criteria that international law sets for the states, which are not abstract entities but rather exist through individuals populating certain territories through definable temporal periods, it is possible to construct criminal sanctions regimes for individuals specifying personal, territorial and temporal jurisdictions, targeting particular states or even governments. Moreover the conditions for such 'backdoor' state responsibility would be much more lenient than required for the triggering of proper state responsibility. Considering the rigid limitations (such as the consent of the states concerned) and high thresholds for establishing state

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responsibility, such an awry use of international justice could become an attractive alternative.

This 'side effect' and potentialities it creates are not discussed much in the international criminal justice discourse; however they cannot help entering a complicated system of international and transnational political tensions as unformulated emotions and drives that adversely affect the effectiveness and proliferation of the accountability worldwide. What is worse is that such a 'backdoor' state responsibility usage of individual criminal responsibility cuts both ways; once being used for the purposes other than the individual justice, such purposes would distort and compromise the international justice in various ways. Thus such a system of international criminal justice 'unconsciously' aligns with the side of the tension that enjoys jurisdictional 'preferences' or somehow exercises control over the immanence of criminal trials.

It is relevant to note here that this project does not argue that individuals should not be prosecuted for what should be deemed as state crimes, neither that the state crimes deserve any special treatment and immunity; neither that it is states that commit the crimes rather than individuals. Instead it simply suggests that the atomistic prejudices on the nature of society and the crimes involved should not foreshadow the fact that the crimes are committed by individuals-as-states rather than individuals-outside-states, especially once we deal with the 'core crimes', that transcend ordinary legal framework and are the irruptions of the so-called radical evil. We ought to conceptualize the positive responsibility aspect of the crimes and responsibility, we ought to bring it to the discourse of the international criminal justice, rather than ignore and repress it. We should

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strengthen the international criminal justice making it less prone to the abuses of political agendas potentially enforceable though it by accounting the repressed variables.

It is precisely the criminal state policies that are addressed via the individual criminal responsibility project, and isn't it the most important aspect of the latter to protect individuals against state policies, in many ways similar to what human rights law does and unlike the ordinary criminal justice, to fulfill an important mission of translating the human rights into the criminal law, employ the law and the ethical substance of the societies to enhance human dignity and freedom in fuller senses? Then why repress this aspect literally in the rhetoric of the international justice, why deny the actuality of condemning state policies and relevance of state and collective responsibilities; that it is the criminal laws and policies of states, corrupted ethical substances of societies that make degradement of human dignity among its principles in some way, that it is this substance of the crimes in question that is actually being condemned?

It is suggested here that while being repressed in the vocabularies of international criminal justice (possibly with a view to make the latter more politically neutral towards the states and thus more widespread and universally acceptable) the political tensions concerning the distribution of positive responsibility are redirected into the legal disagreements (with the substance of political tension), primarily over the jurisdictional and immunity regimes that determine the uneven exercise of individual criminal responsibility as well as into the disputes concerning the political control of the relevant tribunals, marking the return of the repressed. The return of the repressed tensions thus signifies the influence of political tensions repressed in the vocabularies of international

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criminal justice that, synchronically with the repression, distorts and further fragments (sub-fragments) the boundaries and maps of the international criminal responsibility regime.

The jurisdictional and immunity disputes are deemed as particularly relevant because they represent the important questions of who is being prosecuted and by which tribunal, who holds control over the political mechanisms of affecting the course of prosecution, which territory is subject to different regimes (that could also bear a geopolitical significance), what are the temporal borders of the responsibility regimes (that could select among relevant political regimes) and also the issue of subject matter jurisdiction, for while most of the crimes are often the same, some "minor" modifications could choose among specific atrocities committed predominantly by one of the sides to the conflicts and criminalize the essences of ideologies and political methods. These are some of the most relevant legal disagreements, that while being underestimated and in their technical senses being trivial legal issues, nevertheless become sources of political tensions when it comes to international justice.

Once we enter the terrain of the theories of international law and international relations, it appears important to clarify to what extent the regimes, and the international criminal justice regime in particular, are the by-products of power politics and instrumental in hegemonic tactics of actors. In the international relations literature there are two main outlooks on this issue, realist and neoliberal. Neoliberal, or interest-based theories of regimes emphasize the importance of regimes in the collaboration of states that are realizing their common interests ("absolute gain maximizers"), following the game-

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theory rationality and avoiding political market failures where common interests of states are not realized due to information and transaction costs in the anarchical international system[171].

Realists on the other hand treat power as the central variable for regimes, rather than interests, and regard states as coordinating to increase their relative gains. Whereas for neoliberals regimes promote globalization and the liberal world order, according to the realist approach it is not obvious or agreeable that liberal norms and principles should be underpinning the regimes (whether the regimes are public goods), whereas the world order depends on which principles the regimes would operate. Hegemonic powers therefore ensure that regimes embrace particular principles and norms and are concerned with their possibilities to veto regimes, whereas the balance of powers would determine the substance and acceptance of particular norms and principles by the regimes and their acceptance by states[172].

Translated into international law the neoliberal perspective on regimes, and international law in general, as entrenching public goods and embracing liberal values in institutions reflects the liberal international law approach advocated by such scholars as Moravcsik[173], Slaughter[174] and Aceves[175]. Its main principles have been formulated as

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[171] HASENCLEVER ET AL, THEORIES OF INTERNATIONAL REGIMES *supra* at 1-7, 27-36.
[172] *Id at* 83-135; *See also* "knowledge based theories" of regimes which understand states as 'role players' rather than utility-maximizers and emphasizing the role of normative ideas, identities and knowledge in the regime formation from sociological perspectives, *id at* 5-7, and more *at* 136-210.
[173] Andrew Moravcsik, *Taking Preferences Seriously: A Liberal Theory of International Politics*, 51 INT'L ORG. 513 (1997).
[174] Anne-Marie Slaughter, *International Law and International Relations Theory: A Dual Agenda*, 87 AM. J. INT'L L. 205 (1993); *Global Government Networks, Global Information Agencies, And Disaggregated Democracy*, 24 Michigan Journal of International Law 1041 (2004); *Towards an Age of Liberal Nation*, 33 Harv. Int'l L.J. 393 (1992); *International Law in a World of Liberal States*, 6 European Journal of

follows: (1) "[t] he fundamental actors in international politics are individuals and private groups, who are on the average rational and risk-averse and who organize exchange and collective action to promote differentiated interests under constraints imposed by material scarcity, conflicting values, and variations in societal influence." (2), "[s]tates (or other political institutions) represent some subset of domestic society, on the basis of whose interests state officials define state preferences and act purposively in world politics." (3), "[t]he configuration of interdependent state preferences determines state behavior"[176].

The view that the international law should "take in the lessons of liberal internationalism" and embrace certain liberal institutions has been aptly criticized by Marks as 'liberal millenarianism' which accepts that "the *ideology* of liberal democracy represents the final stage of political evolution" (accepting that the "history has a *telos*"; that "history's *telos* is liberalism"; and the "distinctive voice, a 'we' who…have liberal democracy" versus "non-liberal 'they")[177]. She argues that the international law scholars while proposing a norm of emerging democratic governance equate it uncritically with a certain ideological conception of liberalism, whereas international law "should not seek to establish democracy as the *solution* to the question of constitutions" but rather "help in entrenching democracy as the endlessly tantalizing, perpetually unsettling, continuously confounding *riddle* of all constitutions"[178]. Thus Marks provides a useful critique of a theoretical

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International Law 503 (1995); *Law and the Liberal Paradigm in International Relations Theory*, Proc. ASIL 180 (1993).

[175] William J. Aceves, *Liberalism And International Legal Scholarship: The Pinochet Case And The Move Toward A Universal System Of Transnational Law Litigation*, 41 HVILJ 129 (2000).

[176] Moravcsik *supra* at 516-520

[177] Susan Marks, *The End of History? Reflections on Some International Legal Theses*, 8 European Journal of International Law 449 (1997).

[178] SUSAN MARKS, THE RIDDLE OF ALL CONSTITUTIONS: INTERNATIONAL LAW, DEMOCRACY, AND THE CRITIQUE OF IDEOLOGY 30-49, 148-151 (2000).

framework that uses the international relations/international law scholarship to interpret international law as a liberal institution.

This questions the unconditional acceptance of the international legal regimes as purporting to promote common goods and make easier state collaboration in the face of avoiding "political market failure", and drives the attention to the counterpart realist outlook on regimes as entrenching the norms and principles of hegemonic powers and increasing states' relative power gains. In other words should e.g. international criminal justice regime be perceived as mere state cooperation to eliminate the impunity for human rights violations by collaboration and decreasing their information and transaction costs in these matters, or rather as hegemonic tactics of states?

Kosekenniemi's image of fragmentation as a "hegemonic conflict" makes the latter point, where regimes represent "institutional moves to advance human rights or free trade under the guise of legal technique" while engaging "in a *hegemonic* struggle in which each hopes to have its special interests identified with the general interest"; he raises the question of "which institution will be entitled to take the voice of general law? What vocabularies and forms of expertise will rule us in the future?"; whereas fragmentation of international law into regimes is a "competition between different systems and criteria for allocating resources between social groups", it is then about "[w]ho will win and who will lose"[179]. International criminal justice consists of norms, principles, decision-making that reflect its rationale, ethos that are 'solipsistic' and 'universalist', its application to facts articulates political preferences of actors, whereas "criminal law *itself* always

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consolidates some hegemonic narrative, some understanding of the political conflict which is a part of the conflict itself"[180].

Discussing the neoliberal criticisms of state sovereignty and equality as 'formalistic obstacles' to the 'new world order' based on interconnected 'transgovernmental networks'[181] and replacing formalist international law with "a dynamic of a politically oriented law", Koskenniemi suggests that these arguments are dedicated to "smoothening the paths of the hegemon" and compares them to realist arguments of Schmitt and Morgenthau[182]:

> Both Schmitt and Morgenthau attacked formal validity as politically conservative and unable to live up to its ideal of neutrality. Both used the term 'dynamic' to characterize the new law that overrode a *status quo* gone stale. It is this dynamic that I hear in the pursuit of the dual agenda, the dynamic of a neo-liberal *Grossraum*.

It is important for the purposes of this chapter to elaborate on the interrelationship between the repressed legal vocabularies (vis-à-vis potential legal disputes they refer to) and their relevance to the repressed political tensions. Morgenthau suggests that the legal disputes, disagreements formulated in vocabularies of law and capable of being decided by judicial bodies, and political tensions (regarding the distribution of the political powers as reflected in the status-quo "hardened" in law and the endeavors to modify it) might overlap or not. His conceptual distinction of legal and political matters rests on his

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[179] *See* Koskenniemi and Leino *supra at* 561-562; Martti Koskenniemi, *Global Legal Pluralism: Multiple Regimes and Multiple Modes of Thought*, *at* http://www.helsinki.fi/eci/Publications/MKPluralism-Harvard-05d%5B1%5D.pdf, pages 6, 21.

[180] Martti Koskenniemi, *International Law and Hegemony: A Reconfiguration*, 17 Cambridge Review of International Affairs 197 (2004), *at* http://www.helsinki.fi/eci/Publications/MHegemony.pdf, *at* 17 (original emphasis), *see also* pages 2-4,16, 21.

[181] *See* ANNE-MARIE SLAUGHTER, A NEW WORLD ORDER (2004)

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theory of the political issues as those with certain "intensity of association or dissociation of human beings" where the disagreeing parties identify or "feel strong about them"[183] apart from moral and legal implications.

Morgenthau suggests that whereas the law reflects the status quo guarded by courts that thus become sides to the disputes, the controversies regarding its modifications "will generally not even be formulated in legal terms"[184]. Thus he distinguishes unformulated political tensions concerning the distribution of power from the ordinary legal disputes:

> These conflicting desires…are rarely expressed in their own term. What the representatives of nations talk about are moral principles and legal claims. What their talks refers to are conflicts of power. We propose to refer to unformulated conflicts of power as "tensions" and call the conflicts formulated in legal terms disputes.[185]

He continues to discuss various situations where both tensions and disputes are manifested to different degrees, hypothesizing "pure disputes" with "no tensions at all", "disputes with the substance of a tension" where using the iceberg metaphor he talks about disputes that "may be identical with a certain segment of the subject matter of the tension" and finally "disputes representing a tension" that resemble pure disputes, but where the substance of a dispute is not related to the tension, but simply bears a "representative and symbolic function". It is in these cases he argues that the real issue,

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[182] Martti Koskenniemi, *Carl Schmitt, Hans Morgenthau and the Image of Law in International Relations*, *in* The Role of Law in International Politics: Essays in International Relations and International Law, 17-34, at 33-34 (Michael Byers ed., 2001) .

[183] Developed initially by Morgenthau the conception of the political as the "intensity of association" in his doctoral dissertation it was borrowed by Carl Schmitt in his later editions of the "Concept of the Political", *see* Marttii Koskenniemi, THE GENTLE CIVILIZER OF NATIONS *supra at* 436, 442.

[184] HANS MORGENTHAU, POLITICS AMONG NATIONS: THE STRUGGLE FOR POWER AND PEACE 410-412 (1947).

[185] *Id at* 412.

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the political tension, is "for the moral and ideological reasons…incapable of rational formulation in terms of claims and counterclaims" and becomes "repressed"[186].

To summarize the claims put forward so far in this work, the repression of the 'positive' responsibility in the international criminal law seeks to constitute it as a distinct regime, fragment of international law, which depending on the perspective, either serves to advance the global public good (neoliberal view), or as supported here to engage in hegemonic struggle (realist explanation). In accordance with the latter view the legal disputes concerning the functioning and the boundaries of the international justice regime entail substances of political tensions, marking the 'return of the repressed' tensions that in its turn further sub-fragments the international justice regime.

2.4 Trials and politics

Another question that begs the discussion is the one about the relationship between international justice trials with politics, especially with regard to the role of the political tensions. Should trials be regarded as more than mere trials, should they be regarded as politics or as opposed to politics? Objecting to the way the accusation against Eichmann was framed to pursue multiple purposes, Arendt wrote that the only "purpose of a trial is to render justice, and nothing else" and that "even the noblest of ulterior purposes", such as "the making of a record of the Hitler's regime which would withstand the test of history", could "only detract from the law's main business: to weigh the charges brought against the accused, to render judgment, and to mete out due punishment", whereas any attempt to do more of the trial would end "in complete failure", not merely because the

[186] *Id at* 412-415.

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Court would not possess "the tools required for the investigation of general questions" but primarily because "it speaks with an authority whose very weight depends upon its limitation"[187].

This can be contrasted with the view of Shklar, who considered the trial to be a "supreme legalistic act", where legalism itself is an expression of political ideology of that "ethical attitude that holds moral conduct to be a matter of rule-following, and moral relationships to consist of duties and rights determined by rules"[188]. One could be reminded here of Weber's understanding of law and legal rationality as one of the "ideal types" of state legitimacy, state holding the monopoly of violence in a society, legitimating the domination "by virtue of the belief in the validity of legal statute and functional 'competence' based on rationally created *rules*"[189].

According to Shklar the issue is not "Is law political?" but rather "What sort of politics can law maintain and reflect?". She argues that law is a peculiar type of legalistic politics, whereas not all politics are necessarily legalistic[190]. But she nevertheless defends some of the trials that pursue noble purposes, consider that:

> "there is politics and politics. It is the politics of persecution which political trials serve that is the real horror, not the fact that courts are used to give it effect. There are occasions when political trials may actually serve liberal ends, where they promote legalistic values in such a way as to contribute to constitutional politics and to a decent legal system. The Trial of the Major War Criminals by the International Military Tribunal at Nuremberg probably had that effect. To be

[187] HANNAH ARENDT, EICHMANN IN JERUSALEM: A REPORT ON THE BANALITY OF EVIL 253-254 (1994).
[188] Judith Shklar, LEGALISM: LAW, MORALS, AND POLITICAL TRIALS 1 (1986).
[189] Max Weber, *Politics as a Vocation, in* From Max Weber: Essays in Sociology 77-128 (H.H. Gerth & C. Wright Mills eds., 1946).
[190] Shklar *supra at* 144.

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> sure, within a stable constitutional order political trials may be a disgrace, a reversion to the politics of repression, but it is not the trials itself but situation in which it takes place and the ends that it serves which matter. It is the quality of the politics pursued in them that distinguishes one political trial from another"[191].

Hence according to Shklar law and trials are politics, politics of legalism that can be good or bad politics depending on circumstances of a particular occasion. Whereas trials are useful for most of the types of politics, for some more and for some less[192], Nuremberg should for example be regarded as a useful instance.

It has been recently noted that international criminal law has to move back and forth between the "Scylla of impunity" and the "Charybdis of show trials"[193]. International criminal trials have to individualize the guilt to avoid impunity, but can this be done without compromising the principle that the "purpose of a trial is to render justice, and nothing else"? The deterrence possibilities of trials are limited, as the crimes emerge from "radical evil" that according to Kant "exceeds the bounds of instrumental rationality" and "seeks no objective beyond itself" and because the criminal acts "do not evidence criminal intent, and instead come about as aspects of ideological programmes that strive for the good life" and then the deterrence seems of little relevance[194]. Moreover the transitional justice arguments are not persuasive either, because when "trials are conducted by a foreign prosecutor and before foreign judges, no moral community is being affirmed beyond the elusive and self-congratulatory "international community"[195].

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[191] *Id* at 145.
[192] *Id* at 220.
[193] Martti Koskenniemi, *Between impunity and show trials*, 6 Max Planck Yearbook of United Nations Law 1, 19 (2002).
[194] *Id at* 8.
[195] *Id at* 11.

Thus the only purpose remains the truth telling function, but then not to degenerate into a "show trial" it appears that the accused must be silenced[196]. Otherwise the technique of the "trial of rupture" developed as a tactics for such trials would render it a "show trial"; here on a basis of *Differend*, a situation where "regulation of the conflict [between two parties] …. is done in the idiom of one of the parties while the wrong suffered by the other is not signified in that idiom" the defense is built as an attack on the existence of *differend*, on the different "frameworks of interpretation" rather than merely questioning the facts of the case[197]. This however can endanger the trials by moving them into the category of show trials.

Along the lines of what can be said with regard to the trials as politics, and Shklar's point is evidently a strong argument about the law's and legalism's contribution to good or oppressive politics, trials and criminal law itself should not and cannot admit being concerned with anything but individual justice at least not to undermine the politics behind them, as the strength and uniqueness of trials if in anything is precisely conditional on such a limitation, as Arendt suggests. And it might require significant endeavor to overcome the challenge of degeneration into show trials as Koskenniemi argues. It is to be mentioned however that the cornerstone of such self-insulation of trials from politics consists according to this work in repressing too many elements and dimensions of responsibility for human rights atrocities, effectuated most evidently by the repressions of positive responsibility in the vocabularies of international justice, these repressions becoming the self-perceived and auto-constructed balance wheel of the international justice vis-à-vis politics.

[196] *Id at* 25, 35

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This project argues that together with its discursive closure international justice system, while being heterogeneous to state-centered vocabularies of international law, is being employed for relative-power maximization strategies and hegemonic tactics of actors, being associated with political tensions that do not fall within the grasp of discursive consciousness of international justice, precisely because of the structure of repressions. This way it is possible to see the further fragmentation and diversification of international justice regimes based on some criteria (territorial, temporal or personal) to which international justice is *apriori* neutral, whereas these criteria may overlap with certain outcomes of political tensions.

2.5 Territorial and spatial sub-fragmentation of the individual criminal responsibility regimes

This section of the chapter argues that the disagreements over and the differences in the spatial and temporal fragments of the international regime of the individual criminal responsibility reflect the tensions that are repressed in the vocabulary of international justice, and at the same time influence this regime in a reciprocal manner ('return of the repressed'). Despite being ignored, the perspectives of individual responsibility for radical evil that view it from the angle of positive responsibility measures, translate themselves into political tensions fragmenting the international justice globally; temporal and spatial jurisdictions are referred together because they both represent the physical parameters according to which states are projected and their sovereignty is considered.

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[197] *Id at* 17-26

The significance of the temporal jurisdiction increases once we account that what the individual criminal responsibility deals with are actual political regimes, existing in space and time, the spirit or mind so to speak realized in temporal periods and within certain territories. This is more significant than if we deal with the crimes as merely individual that on these conditions would appear neutral with respect to the choices of time-ranges of the relevance of the individual criminal responsibility regimes.

This becomes especially relevant when we deal with transitional justice situations[198], when time is often the central criteria to distinguish different regimes where the mind creates its present consciousness by splitting its temporal existence by creating its "past", that is the subject matter of the criminal justice prosecutions, the "present" is formulated as the transitional justice measures themselves and the "future" is the expectation and striving to the just tomorrow where freedom and individual dignity are better respected; the "past" here becomes the criteria for the present and the clue for the future prosperity. It is no surprise that the international criminal justice project is so intimately connected to the transitional justice efforts out of which it was initially born.

However even today, once the permanent international criminal court has been created arguably synthesizing the best of the international justice experiences and coping with the prior inconsistencies, its usage is not universal and even widespread despite its apparent

[198] Teitel defines transitional justice "as the conception of justice associated with periods of political change, characterized by legal responses to confront the wrongdoings of repressive predecessor regimes", *see* Ruti G. Teitel, *Transitional Justice Genealogy*, 16 Harv. Hum. Rts. J. 69, 69. But *see also* Posner and Vermeule who claim that "theorists of transitional justice commonly err by treating regime transitions as a self-contained subject" whereas the "legal and political transitions lie on a continuum, of which regime transitions are merely an endpoint" and that "[i]f transitional justice is continuous with ordinary justice, then there is no reason to treat transitional justice measures as presumptively suspect on either moral or institutional grounds, unless we are to treat the justice systems of consolidated liberal democracies as

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advantages in the expertise, economic expediencies (of referring to an existing tribunal instead of a costly set up of a different solution), neutrality and the political safeguards from extra-legal influences. To the opposite, in politically important and sensitive situations different structures with similar functions are often preferred to be created. Morgenthau's insight that the tribunals can unconsciously be the guardians of a particular position or status-quo's and become subjects to the disputes, not the disputes concerning individual's guilt but the legal disputes with a substance of political tensions, can show that the complete disregard of these aspects on behalf of international justice that occurs because of the repression in its vocabularies explains this situation.

Let us refer to an example that could support this argument. Instead of referring the case of prosecuting international crimes in Iraq to the ICC the Iraqi Governing Counsel created instead in 2003 the Iraqi Special Tribunal (Now Supreme Iraqi Criminal Tribunal; hereinafter SICT)[199]. Apart from the variety of considerations that could have prompted this decision, let's focus on the difference in the temporal jurisdiction frames between the two courts, as the drastic differences in this particular aspect cannot be arbitrary. The International Criminal Court can only prosecute crimes committed after the entry into the force of the Rome Statute on 1 July 2002 and with respect to the state party that ratified the Statute later only the crimes committed after the entry into force of the Statute for that particular state unless a special declaration is made by the state[200]. The temporal jurisdiction ends only with the denouncing of the treaty and, moreover, the withdrawal is

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suspect as well", Eric A. Posner and Adrian Vermeule, *Transitional Justice as Ordinary Justice*, 117 Harv. L. Rev. 761, 762-764 (2004).

[199] The translation of the recently amended "Law of the Supreme Iraqi Criminal Tribunal" is available at <http://www.ictj.org/static/MENA/Iraq/iraq.statute.engtrans.pdf>; for the review of the recent changes to *see* Mettraux, *supra*.

only effective at least one year after the corresponding notification[201]. That would mean that if on the 10.12.2003 the Governing Counsel would have instead ratified the Rome Statute, the international justice regime on its territory would cover the period at most from July of 2002 till one year after it would have decided to stop it.

Different from this the period of temporal jurisdiction of the Supreme Tribunal starts on July 17 1968, when the Baath party came to power in Iraq with the key role played by Saddam Hussein, and ends on May 1 of 2003[202], the date when according to the White House the "mission" in Iraq was "accomplished"[203] and any effective control of Saddam's administration was correspondingly over. Besides the persecutions of Kurds, Shi'ites, Marsh Arabs and disloyal Sunnis, the tribunal can also prosecute the war crimes committed beyond Iraq over the Iran-Iraq war and occupation of Kuwait and the Gulf War of 1990-1[204]. This period does not however include the consideration of any events that took place before the Baath's coup d'état as well as committed during the administration of the occupation powers and afterwards. In the possible scenarios of e.g. American soldiers committing war crimes or crimes against humanity in Iraq, such as the infamous abuses in the Abu Ghraib[205] the available legal options will be limited to the

[200] Rome Statute, *supra*, articles 11, 12.3.
[201] Rome Statute, article 127.
[202] *See* Article 1 of the "Law of the Supreme Iraqi Criminal Tribunal", *supra.*
[203] Dana Bash, *White House pressed on 'mission accomplished' sign: Navy suggested it, White House made it, both sides say*, CNN (October 29, 2003), *at* http://www.cnn.com/2003/ALLPOLITICS/10/28/mission.accomplished/.
[204] *See* Asli Ü. Bâli, *Justice under Occupation: Rule of Law and the Ethics of Nation-Building in Iraq*, 30 Yale J. Int'l L. 431, 458 (2005); *see also* Ilias Bantekas, The *Iraqi Special Tribunal for Crimes Against Humanity*, 54 International & Comparative Law Quarterly 237, 241-242 (2005).
[205] Such as the reported "sodomizing a detainee with a chemical light; pouring phosphoric liquid on detainees; beatings; threats of rape and electrocution; stripping detainees naked; and forcing them to masturbate and simulate other sex acts in public", "a hooded prisoner, arms outstretched, standing on a box, with wires attached to his genitals and other parts of his body;" "leering American soldiers are seen pointing and giving a thumbs-up as a young Iraqi, naked except for a sandbag over his head, is made to masturbate;" "a pile of naked, hooded detainees being watched by two grinning American soldiers…" or

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trials by the courts martial while complete immunity is retained from Iraqi law and legal process[206].

Two differences in the temporal jurisdiction of both solutions (ICC and the SICT) are the periods between July 1968 and July 2002 and the one from May 1 of 2003 onwards. In the first of these periods ICC would not be able to prosecute any crimes, and in the second the SICT would not be able to do so. Apparently the adoption of the SICT's current temporal solution was not arbitrary but had reasons to prefer *both* differences: the necessity to prosecute retroactively crimes before the entry into force of the SICT Statute and the necessity to not prosecute any crimes committed on the territory of Iraq after the fall of the Saddam regime despite the possible continuation of hostilities. Whereas different reasons could be adduced as to why the ICC solution was not acceptable this part only argues that the choice of temporal jurisdiction that is politically neutral from the perspective of the criminal responsibility of the individuals becomes in fact so important that forms a part of the decision to create a different regime using political influences and additional capitals.

It so happens that once we account how the criminal responsibility of individuals for the international crimes is not exclusively negative, but also positive to the extents that through individual responsibility regimes and states are implicated, the importance of the temporal and spatial jurisdictions does not appear politically irrelevant at all. Space and time are the criteria of the states and their political regimes, and criminalizing its

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allegations that prisoners were "ridden like animals, fondled by female soldiers, forced to curse their religion and required to retrieve their food from toilets", *see* Ryan J. Liebl, *Rule of Law in Postwar Iraq: from Saddam Hussein to the American Soldiers Involved in the Abu Ghraib Prison Scandal, What Law Governs Whose Actions?,* 28 Hamline L. Rev. 91, at 105-106.

substances as manifested in individuals while picking times and spaces aims to achieve purposes beyond pure negative responsibility. A criminal justice theory that does not consider this aspect uncritically aligns with the given space and time choices and becomes a party to the disputes guarding a certain status-quo.

Concerning the territorial jurisdiction, the regime of the individual criminal responsibility is not homogenous and universal worldwide, and many powerful states are not parties to the ICC Statute, such as US, Russia, China, India etc. Through different territories the modalities of the regime vary significantly, so that if one makes a world map of the individual criminal responsibility regime's fragments, it is possible to see that the attempts to establish and modify them coincided through history with some major geopolitical conflicts, such as those at Balkans (Former Yugoslavia, Kosovo), Middle East (Iraqi Special Tribunal), Eastern Europe through NATO enlargement, Japan and Germany after the WWII. The question is then whether the establishment of the individual criminal responsibility regimes through international law or retroactive legislation is the measure of negative responsibility alone or whether it is an attempt to establish a backdoor responsibility of states and regimes, becoming a party to a political tension. If we recall that citizens and society/state according to Hegel are in organic unity, none of them means or ends, that state is nothing but individuals acting as state, then the prosecution of such individuals for crimes that include in their objective elements the conduct under the color of law thus becomes an indirect state responsibility. It then follows that the choice of territorial jurisdictions and differences in regimes of

[206] Liebl, ibid at 107-108.

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criminal responsibility that fragment the text of the international justice could be politically motivated/abused.

One could summarize that the choices of time and space for the individual criminal responsibility are not arbitrary but often hide political tensions that are not translated into the language of international law via the traditional state responsibility mechanisms, because of the repressed vocabularies of international justice. It is logical then that these repressions on the one side expand the scope of international justice by "freeing" it from or relaxing it to the legal sensitivities of state responsibility, but at the same time translating such sensitivities into the domain of political tensions completely. International justice then becomes a measure of extra-legal (diplomatic or political) pressure on the one hand, whereas the latter affects the nature of justice done (as unconsciously it becomes a party to the tension) creating a reciprocal inter-relationship.

2.6 Personal jurisdiction and immunity

This section of the chapter explains why the issues of personal jurisdiction and immunity of state officials are relevant and important to the repression of state's presence in individual criminal responsibility. It has been argued above that although deferred to other areas of international law, presented as 'unreal' abstract entity and thus repressed, the state in fact maintains its presence through individuals, as without reference to it the whole project of international justice lacks sense and purpose. It is in personal jurisdiction and immunity from international crimes where the hymen, the borderline of two constructs of international law (provided that the international law is ultimately legal

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construct, the concepts of state and individual strictly within the discourse of international law can be perceived as such) becomes visible.

The issue of immunity of state officials is the watershed where individuals become states and vice versa for the purposes of international law. It will be argued here that all modern theories of immunity of state officials from criminal jurisdiction rely on the presence of the state as their essential rationale and furthermore that this vocabulary of state presence is repressed. The reinterpretation of immunity theories that seeks to disentangle immunity from state presence purports to untie the international criminal law prosecutions from the obstacles of state sovereignty, making immunity pure impunity and relegating immunity claims to the position of ascending arguments, while presenting prosecutions for human rights violations as the international rule of law and descending arguments. How effective this achievement might turn out to be is further discussed in the section 4.2.2 of this work where it is demonstrated how these intentions could turn awry.

2.6.1 Theories of official immunities

Several theories or justifications of immunity are usually presented, and while drafting the preamble to the Vienna Convention on Diplomatic Relations[207] the International Law Commission has commented that the immunity of diplomatic agents has been historically influenced by three explanations: extraterritoriality, sovereign representation and functional necessity[208]. The earliest of them is the **extraterritoriality** theory according to which ambassadors and heads of states are not to be considered on the territory of the state where they are, but rather on the territory of the representing state.

[207] Vienna Convention On Diplomatic Relations, Apr. 18, 1961, U.N.T.S. Nos. 7310-7312, vol. 500, 95-239.

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Grotius suggests that ambassadors are to be considered to be outside the State where they reside[209]. This theory has been operative in the XVIII and even XIX century; thus Hurst notes that it has been defended in the 1765 case of the French ambassador to Britain, in which the British court has stopped the criminal case considering that the mentioned ambassador should be deemed as being in France. On the same ground the civil action was dismissed in Britain against the Guatemalan representative Martin in 1859[210]. According to Lauterpacht "[e]xterritoriality…is a fiction only, for diplomatic envoys are in reality not without, but within, the territories of the receiving states"[211].

This theory was rejected already in 1953 in the *Tietz et al. v. People's Republic of Bulgaria*, where it was held to be "an older doctrine of international law which has not found any modern-day acceptance" and an "artificial legal fiction which does not appear to be accepted as sound law anywhere in the world today"[212]. The British Court departed from this theory in *Radwan v Radwan (1)*[213]. The United States Court of Appeals held in *McKeel v Islamic Republic of Iran* that the "United States embassy remains the territory of the receiving state, and does not constitute territory of the United States" and that

[208] *Yearbook of the International Law Commission*, 1958 Vol. II pp. 94-5.
[209] Denza, *supra at* 113.
[210] Cecil Hurst, *Les immunités diplomatiques*, Collected Courses of the Hague Academy of International Law, Vol. 12 (1926-II), p. 164.
[211] LASSA OPPENHEIM, INTERNATIONAL LAW: A TREATISE vol. 1, 792 (H. Lauterpacht, 8th ed., 1955).
[212] *See* Tietz et al. v. People's Republic of Bulgaria, 28 ILR 369 at 379, Supreme Restitution Court for Berlin established by Allies; cited from Denza *supra at* 114).
[213] The case involved the recognition by English courts of *Talaq* divorce (according to the Egyptian Law) between an English woman and an Egyptian, obtained at the Consulate General of the United Arab Republic in London. The preliminary issue was therefore "whether the premises of the Consulate General were within or outside the British Isles for the purpose of recognition of the divorce under the Recognition of Divorces and Legal Separations Act 1971". The Court held that diplomatic premises cannot be considered a part of the territory of the sending state and that the divorce in fact was not obtained "in a country outside the British Isles" thus departing from the extraterritoriality theory, Radwan v Radwan (1), [1973] Fam. 24; [1972] 3 W.L.R. 735; [1972] 3 All E.R. 967.

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"United States embassies are not within the territorial jurisdiction of the United States"[214].

Finally when drafting the Preamble to the 1961 Vienna Convention on Diplomatic Relations the International Law Commission refused to justify the immunity of diplomatic agents under the extraterritoriality rationale. Sir Fitzmaurice noted that the "theory of extraterritoriality would not bear close examination" and the Commission included in the Commentary that it was guided by the other theories[215], discussed below. As to the Conference where the Convention was adopted, the delegates omitted this theory, which according to Denza "may have finally discredited it"[216]. This 'older' rationale for immunities is notable for considering state presence very literally and physically, defined through the notion of territory that is a primary attribute of modern states.

The theory of **sovereign representation** apparently derives the immunity for some state officials from state immunity by identifying them or their actions with those of the respective states and in accordance with the principle that all states are sovereign and equal[217]. Accordingly, as *par in parem non habet iurisdictionem*, "no state may exercise jurisdiction over other state without its consent."[218]

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[214] McKeel v Islamic Republic of Iran, 722 F.2d 582.
[215] Denza, *supra at* 10-11.
[216] *Id at* 12
[217] Charter of the United Nations, 59 Stat. 1031; T.S. No. 993, Art. 2.(1), *at* <http://www.un.org/aboutun/charter/>; *See also* Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations, UNGA Res. 2625 (XXV), UN GAOR, 25th Sess., Supp. No. 28, at 121, UN Doc. A/8028 (1971), adopted by consensus on October 24, 1970
[218] PETER MALANZUCK, AKEHURST'S MODERN INTRODUCTION TO INTERNATIONAL LAW 118 (1997).

Thus Montesquieu suggests that the ambassadors "are the voice of the prince who sends them, and this voice ought to be free" and that "they speak for a man entirely independent"[219]. Vattel also had some support for this theory, and whereas his language supporting 'functions theory' is more frequently referred to, he also writes that:

> "if an ambassador may be indicted for ordinary offences, be criminally prosecuted, taken into custody, punished — if he may be sued in civil cases — the consequence will often be, that he will neither possess the power, the leisure, nor the freedom of mind which his master's affairs require. *And how shall he be able to support the dignity of representation in such a state of subjection?*"[220]

Vattel continues that "[t]he respect which is due to sovereigns should redound to their representatives, and especially their ambassadors as representing their master's person in the first degree"[221]. This theory is also reflected in the US jurisprudence on immunities starting with the *The Schooner Exchange v. McFaddon* case[222]

The question is whether this theory is still theoretically valid and acceptable to explain the law of immunities. The Preambles to the Vienna Convention on Diplomatic

[219] Yes, Montesquieu, celebrated for the support of the functions theory however did not rely on the latter as the sole ground and also suggested the representative rationale of the diplomatic immunity, *see* CHARLES DE SECONDAT BARON DE MONTESQUIEU, THE SPIRIT OF LAWS Book XXVI, Chapter 21 (Thomas Nugent trans., G. Bell & Sons, Ltd. 1914), *available at* http://www.constitution.org/cm/sol.htm.

[220] Emmerich de Vattel, The Law Of Nations or Principles of the Law of Nature Applied to the Conduct and Affairs of Nations and Sovereigns, Book IV, Chapter VII, § 92 (T. & J.W. Johnson & Co. Joseph Chitty and Edward D. Ingraham ed. 1883), *available at* http://www.constitution.org/vattel/vattel.htm (emphasis added).

[221] Vattel, *id at* § 80

[222] 11 U.S. 116 (Mem), 7 Cranch 116, 1812 WL 1310 (U.S.Pa.), 3 L.Ed. 287 (C.J. Marshall stating that "a sovereign committing the interests of his nation with a foreign power, to the care of a person whom he has selected for that purpose, cannot intend to subject his minister in any degree to that power; and therefore, a consent to receive him, implies a consent that he shall possess those privileges which his principal intended he should retain- privileges which are essential to the dignity of his sovereign, and to the duties he is bound to perform").

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Relations, the Vienna Convention on Consular Relations and of the Convention on Special Missions include the passage that states are "[r]ealizing that the purpose of such privileges and immunities is not to benefit individuals but to ensure the efficient performance of the functions of …missions *as representing States*" (emphasis added)[223]. In the Commentary to the Articles of the Diplomatic Relations Convention the ILC mentions that in the process of drafting it was "also bearing in mind the representative character of the head of the mission and of the mission itself"[224]. At the Conference in Vienna the Soviet delegate managed to incorporate an oral amendment that the functional theory is not the sole justification of immunities and that the character of the diplomatic missions as representing their sovereign states should also be kept in mind[225].

This theory of immunity provides a 'personal' presence of the state, that is to say the state is present in individuals that act as officials representing the state in foreign affairs either by virtue of their office or through special mandates. Once the sovereignty was inseparable from the figure of absolute monarchs as in the times when heads of states were considered as personified states and were called 'sovereigns'. The age of absolutism being over, the state is mostly present and spoken from the mouths of elected officials and foreign affairs bureaucracy that have taken the place of such 'sovereigns'. The state is no longer present in one individual, but in many of them to different degrees, or even all of them in the utopian case of the most successful representative popular democracy, where everyone is effectively "co-responsible for the way he is governed".

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[223] Vienna Convention on Diplomatic Relations *supra*; Vienna Convention on Consular Relations, Apr. 24, 1963, U.N.T.S., vol. 596, p. 261; Convention on Special Missions, Dec. 8, 1969, U.N.T.S., vol. 1400, p. 231.
[224] *Yearbook of the International Law Commission*, 1958 Vol. II pp. 94-95.
[225] Denza *supra* at 12

Yet the most preferred theory today is the one expressed in the formula *ne impedatur legatio*, or so the called **functional approach** that justifies immunities by the reference to their necessity for the effective performance of official functions by state officials. Thus it is deemed necessary in case of diplomatic and consular envoys, as well as heads of states and governments on special missions. The rationale of the immunity here is to preserve the friendly relations between states on which depends the maintenance of international peace and security.

The idea was first (probably) expressed by the Roman lawyers Paul and Julian, who argued that the immunity of the foreign representative, be it ambassador or consul, rests on the necessity to secure him the possibility to perform his duties without obstacles. It was later developed and supported by Montesquieu who argued that the law of nations requires ambassadors not "to depend either on the sovereign to whom they are sent, or on his tribunals" for the reason that:

> 'no obstacle should hinder the execution of their office: they may frequently offend, because they speak for a man entirely independent; they might be wrongfully accused, if they were liable to be punished for crimes: if they could be arrested for debts, these might be forged. Thus a prince, who has naturally a bold and enterprising spirit, would speak by the mouth of a man who had everything to fear'[226].

Vattel also believed that ambassadors and other "public ministers" representing foreign states are the "*necessary* instruments for the maintenance of that general *society*, of that *mutual correspondence* between nations" and that for an ambassador:

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> "It is a matter of no small importance that he have no snares to apprehend — that he be not liable to be diverted from his *functions by any chicanery* — that he have nothing to hope, nothing to fear, from the sovereign to whom he is sent. In order, therefore, to the success of his ministry, he must be independent of the sovereign authority and of the jurisdiction of the country, both in civil and criminal matters" [227].

The Preamble to the Vienna Convention on Diplomatic Relations proclaims that the immunity is given "to ensure the efficient performance of the functions of diplomatic missions". This language is also repeated in several other conventions[228] and makes the 'functions theory' the main and increasingly the sole justification. On the debate in the International Law Commission while drafting the Articles for the Convention sir Fitzmaurice argued that this theory is the correct one and it should underlie any claim for individual immunity[229].

The 'functions theory' was invoked as a ground for the customary rule of immunity of foreign ministers in office in the *Congo v. Belgium* where the International Court of Justice stated that the immunities are given to foreign ministers for the "the effective performance of their functions on behalf of their respective States" and in examining whether the nature of the functions of the foreign ministers was such as to preclude the jurisdiction of foreign states as hindering their performance continued that "His or her acts may bind the State represented" and that under the Vienna Convention on the Law of Treaties the Foreign Minister "simply by virtue of that office, has full powers to act on

[226] Montesquieu, *supra.*
[227] Vattel, *supra*, at § 92.
[228] *Supra* note 223

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behalf of the State"[230]. It is also noteworthy that under the Vienna Convention on the Law of Treaties heads of diplomatic missions, the "representatives accredited by States to an international conference or to an international organization or one of its organs" and also heads of states and governments can also bind their states by the virtue of their office[231].

Despite the emphasis is made in this theory on the functions of officials, this theory also cannot avoid referring to the presence of states for the purposes of granting immunity to officials. Immunity is given to officials so that they could exercise their functions; and whereas all officials have to exercise their functions, only those who can bind their states and whose position makes their functions important and relevant to the maintenance of international peace and friendly relations between states are to be immune from criminal jurisdiction. The state is present again, this time in the shape of functions, rather than territory or persons.

Whether one argues that immunity is justified by one of these theories or through several of them or that the different kinds of immunities are to various extents justified by the different theories, it is relevant for our purposes that the law of individual immunities cannot endure without the presence of states either *directly* as in the sovereign representation theory, or through their connection to state as *territory* (when being on territory of the representing state) or state as *functions* (while performing functions of the representing state).

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[229] Denza *supra* at 10-11.
[230] Arrest Warrant Case, *supra at* 53-54.
[231] *See* article 7 of the Vienna Convention on the Law of Treaties, May 23, 1969, U.N.T.S. vol. 1155, p. 331.

We could however observe that the presence of the state that is amply demonstrated by the immunity theories is being repressed through their reinterpretation and misrecognition as unreal, abstract and irrelevant, and moreover the acts constituting crimes are argued to be 'private' thus denying any state and societal complicity in them. The important side of the crimes is being intentionally and persistently underemphasized despite any illogical conclusions this results in, including the formal impossibility to commit the crimes that should entail state involvement.

These considerations on the presence of state in international crimes, in particular the consideration of the immunity as a kind of a hymen that serves to distinguish whether individual's or state's, private or public is dealt with, puts the arbitrary choice of citizenship and nationality criteria for prosecution suspect of political considerations behind those choices, as compelling such a nationality sensitive prosecution arrangement necessarily involves public attitude towards the criminal activities attributable to states, while indirectly exonerating states other than those whose nationals and officials will be subject to prosecution. Apart from making some individuals immune, from the positive responsibility perspective some additional overtones prevail that some states are made more responsible than others by establishing such a nationality-smart jurisdiction or immunity arrangement.

It is worth emphasizing that when higher state officials are concerned the arguments that they are prosecuted in their official capacity and for their actions as representing states should gain more force without any effect of relieving personal or negative responsibility. This is because apart from state complicity, crimes are also attributable to individuals

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directly, and also because state/collective and individual responsibility despite being triggered by the same acts represent two different, although overlapping realms of responsibility. Every individual is fully responsible for his or her own deeds and to the extent that she/he represented the state the latter is responsible as well. Thus prosecuting such officials is not a mere prosecution of, but also positive responsibility of the state internally and internationally. When however repressed in the international justice discourse, this part of the responsibility determination is deferred to another field of international law that is not synchronically realized or, worse, passes completely to the realm of political process and its tensions that are manifested extensively throughout the disagreements over jurisdiction and immunities which therefore become unusually contentious.

Let us refer briefly (more detailed discussion is provided in the fourth and fifth chapters of this work) to some examples of how the return of the repressed tensions affected the disagreements over the personal jurisdiction and immunity altering the process of individual criminal responsibility, whereas the next chapter elaborates on these and other disagreements and their subjective premises. Once the question of whose nationals can be held responsible became a major political issue that resulted in the amendment 'killing' the Belgian war crimes law that used to establish universal jurisdiction for the international crimes within its subject-matter jurisdiction. After an unprecedented pressure Belgium amended its law so that only its residents and nationals can be prosecuted now. Despite being repressed the state presence in the individual criminal responsibility has subtly retained its actuality and re-shaped the Belgian law. This issue is also relevant to the story of the Bilateral Immunity Agreements sought by the United

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States under the article 98.2 of the Rome Statute to exempt its nationals from the jurisdiction of the ICC. With the mere hypothetical possibility of prosecution of its nationals, officials and the military personnel situated in the territories of ICC state parties the US government persistently objected to such an application of the Statute to them and pressured a number of governments of the state parties to conclude bilateral agreements to avoid this happening.

So far this work has been concerned with the seemingly objective distortion in the vocabularies of the international criminal justice, namely the repressions of state presence, that contribute to the fragmentation of the international justice discourse and potentially aggravate scholarly and political disagreements over the exercises of the responsibility for grave human rights violations worldwide. The following chapter will add to these the differences in subjective assessments of the reality of individual criminal responsibility and discuss several influential narratives on international justice that to the certain extent determine approaches to it and coupled with the repressions constitute the deep structure of the argumentative scheme concerning the individual criminal responsibility.

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CHAPTER 3: THE DISCOURSE ON IMMUNITIES: THE STRUCTURE OF SCHOLARLY DISAGREEMENT

3.1 Three exemplary narratives

The purpose of this chapter is to demonstrate the indeterminacy of the legal argumentative scheme concerning the international justice versus immunity debate. In order to do so it starts with elaborating on the disagreement within the mainstream scholarship on the extent of the immunities granted to various state officials in different situations and outlines three (of infinitely various) differing accounts of the immunity that flow from different conceptual schemes but nevertheless influence the core of the modern discourse of immunities. These narratives, despite producing different maps of immunities are frequently employing similar types of arguments, charged with 'ascending' or 'descending' rhetoric[232]. It is suggested that the legal argumentation itself cannot explain or resolve the aforementioned disagreements on immunities.

This disagreement scheme is limited to three more or less converging views in a sense that all of them agree that "no immunity" approach is inadequate, that is all of them agree that there should be exceptions to the rule of immunity, however they all disagree on the extent and situations where immunity should be granted. The point of the chapter is also to demonstrate and describe the subjective reasons for disagreement and point to their role as the driving forces of the arguments usually provided with regard to the international criminal justice and in particular concerning the question of immunity of state officials from international crimes.

[232] *See* Koskenniemi, From Apology to Utopia *supra* at 59-69.

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Three narratives described are not intended to simplify or in any way to label the works of scholars or attribute them to some political agenda, but rather to demonstrate which kinds of arguments can be advanced towards specific maps of immunities within the international legal argumentation sphere, their normative vocabularies of the international law concepts, institutions and constructs.

3.1.1 A Unites States Perspective on the immunities in the international justice

The purpose of referring to the United States is to reconstruct typical arguments of a specific sort, namely those centering on political control and distrust that underlie a more or less consistent approach to international immunities, without getting too moot and hypothetical. The narrative can be summarized as basically maintaining that the international criminal tribunals established under the Security Council power under the Chapter VII are satisfactory in rejecting immunity for the crimes in question, the ICC in its current jurisdictional and internal structure is problematic and that the trials under the universal jurisdiction are only viable where there is a political veto mechanism involved, whereas any attempt to change this structural and institutional setting is a mere power redistribution.

Before setting down to elaborate the narrative, it might be relevant to mention how this approach came about; it is believed to be the child of a more general stance taken by the US legal and constitutional episteme towards justice and international relations. Rather than a doctrinal idiosyncrasy, this approach is a result of pragmatic self-calculations intended to maximize the performance and utility optimization for the viability of the US

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international politics and hegemony that would take serious changes of priorities to be abandoned.

One of the most distinctive features of the American approach to international legal reality is the discrimination between internal and external affairs; justice of the judiciary branch of power and the constitution remain products for 'domestic' use. In the landmark *US v. Curtiss-Wright* opinion the Supreme Court held that whereas these "two classes of powers are different, both in respect of their origin and their nature" the notion of the constitutionally limited government "is categorically true only in respect of our internal affairs", this being justified by avoiding "embarrassment" the Executive's having a "better opportunity of knowing the conditions" and keeping the "secrecy"[233], that can also be translated as basically untying the external sovereignty from any constitutional constraints, for the external world could be deemed as something still in a kind of the Hobbesian "state of nature"[234]. This can also be regarded as the culmination of the more general concept, well known to the students of the US Constitutional Law, namely the famous political question doctrine[235], according to which courts should defer in important determinations to the executive; namely they will follow the executive in pronouncing on sovereign immunity, recognition and territorial issues[236]. As to the proper immunity of

[233] *See* U.S. v. Curtiss-Wright, 299 U.S. 304.
[234] For such analogy *see* Gerhard Hafner, *An Attempt to Explain the Position of the USA towards the ICC*, 3 Jounral of International Criminal Justice 323, *at* 326 (arguing that whereas the Europeans follow the "Lockean approach", the US position is a kind of "Hobbesian" approach to international relations).
[235] Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803); Baker v. Carr, 369 U.S. 186 (1962); *see also* Louis Henkin, *Is There a 'Political Question' Doctrine?*, 85 Yale L.J. 597 (1976). For the discussion of merits of judicial abstention in foreign affairs see Jonathan I. Charney, *Judicial Defrence in Foreign Relations, in* FOREIGN AFFAIRS AND THE U.S. CONSTITUTION 96-106 (Louis Henkin et. al. eds., 1990); For the argument that deference might obscure the constitutional arrangement for dealing with foreign affairs see Michael J. Glennon, *Foreign Affairs and the Political Question Doctrine*, ibid at 107-114.
[236] Restatement (Third) of Foreign Relations Law § 1 (1987), Reporter's note 4, citing Ex parte Republic of Peru, 318 U.S. 578, 63 S.Ct. 793, 87 L.Ed. 1014 (1943); Republic of Mexico v. Hoffman, 324 U.S. 30, 65

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state officials, the diplomatic status of a person – be it a diplomatic agent, special mission representative or a head of state or government – the immunity is actually confirmed only when it is recognized by the Department of State. Moreover, even if the person is not entitled to immunity, courts upon the "suggestion" by the executive might confer one[237].

That the role of the political branches is pivotal in the immunity determination was starkly demonstrated in the *U.S. v. Noriega* case, when the United States District Court S.D. Florida held that Manuel Noriega, who had been the effective head of state in Panama since the August of 1983, and who was captured after the successful Operation Just Cause and indicted for drug offences, racketeering and money laundering, was not entitled to diplomatic immunity, because *inter alia* he was not recognized as such by the United States, whereas "recognition of foreign governments and their leaders is a discretionary foreign policy decision committed to the Executive Branch and thus conclusive upon the courts"[238].

Concerning the international criminal justice proper, within the scholarly discourse on the issue of official immunities one can clearly identify a position, to which this paper will refer as the "US position", which is reflective of the attitude taken by the United States towards the international criminal justice system, and most characteristically reflected in the stance towards the International Criminal Court's jurisdictional structure[239] and to the

S.Ct. 530, 89 L.Ed. 729 (1945);Williams v. Suffolk Ins. Co., 38 U.S. (13 Pet.) 415, 420, 10 L.Ed. 226 (1839); Jones v. United States, 137 U.S. 202, 212, 11 S.Ct. 80, 34 L.Ed. 691 (1890).

[237] Restatement (Third) of Foreign Relations Law § 464 (1987), Reporters' Notes 1, 12-14.

[238] U.S. v. Noriega, 746 F.Supp. 1506, 1519, affirmed in 117 F.3d 1206 (11th Cir.1997).

[239] For the arguments of this approach see Madeline Morris, *High Crimes and Misconceptions: The ICC and Non-Party States*, 64-WTR Law & Contemp. Probs. 13 (2001); Madeline Morris, *The United States and the International Criminal Court*, 64-WTR Law & Contemp. Probs. 1 (2001); David J. Scheffer, *The United States and the International Criminal Court*, 93 Am. J. Int'l L. 12 (1999); David J. Scheffer, *Staying the Course with the International Criminal Court*, 35 Cornell Int'l L.J. 47 (2002); David J. Scheffer, *Should*

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exercise of the universal jurisdiction principle[240]. Thus one cannot be mistaken in striking similarities in the rationales underlying the positions towards these principles and their connectedness to the international agenda of the United States.

Among the various arguments considering the ICC problematique are those concerning the military concerns[241] and the constitutional problems[242] that could rise in connection to the Rome Statute ratification. However this chapter deals exclusively with the arguments

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the United States Join the International Criminal Court?, 9 U.C. Davis J. Int'l L. & Pol'y 45 (2003); David J. Scheffer, *Article 98(2) of the Rome Statute: America's Original Intent*, 3 Journal of International Criminal Justice 333-353 (2005); Lee A. Casey, David B. Rivkin, Jr., *The Limits of Legitimacy: The Rome Statute's Unlawful Application to Non-State Parties*, 44 Va. J. Int'l L. 63 (2003); John R. Bolton, *The United States and the International Criminal Court*, Remarks to the Federalist Society (2002), *at* http://www.state.gov/t/us/rm/15158.htm; John R. Bolton, *American Justice and the International Criminal Court*, Remarks at the American Enterprise Institute (2003), *at* http://www.state.gov/t/us/rm/25818.htm; Cara Levy Rodriguez, *Slaying The Monster: Why The United States Should Not Support The Rome Treaty*, 14 Am. U. Int'l L. Rev. 805 (1999); William K. Lietzau, *International Criminal Law after Rome: Concerns from a U.S. Military Perspective*; 64-WTR Law & Contemp. Probs. 119 (2001); Remigius Chibueze, *United States Objection To The International Criminal Court: A Paradox Of "Operation Enduring Freedom"*, 9 Ann. Surv. Int'l & Comp. L. 19 (2003); David A. Nill, *National Sovereignty: Must It Be Sacrificed To The International Criminal Court?*, 14 BYU J. Pub. L. 119 (1999); Ruth Wedgwood, Harold K. Jacobson, Monroe Leigh, *The United States And The Statute Of Rome*, 95 Am. J. Int'l L. 124 (2001); Ruth Wedgwood, *The Irresolution Of Rome*, 64-WTR Law & Contemp. Probs. 193 (2001); James Podgers, *War Crimes Court Under Fire*, 84-SEP A.B.A. J. 64; Paul D. Marquardt, *Law without Borders: the Constitutionality of an International Criminal Court*, 33 Colum. J. Transnat'l L. 73 (1998). There are also pieces supporting of the ICC and criticizing the US position also useful for the description of the relevant arguments, John Seguin, *Denouncing the International Criminal Court: an Examination of U.S. Objections to the Rome Statute*, 18 B.U. Int'l L.J. 85 (2000). Michael P. Scharf, *The ICC's Jurisdiction over the Nationals of Non-Party States: a Critique of the U.S. Position*, 64-WTR Law & Contemp. Probs. 67 (2001); Michael P. Scharf, *Application of Treaty-Based Universal Jurisdiction to Nationals of Non-Party States*, 35 New England Law Review 363 (2001). For the discussion of the US arguments from the European perspective see *inter alia* Dapo Akande, *The Jurisdiction of the International Criminal Court over Nationals of Non-Parties: Legal Basis and Limits*, 1 J. Int'l Crim. Just. 618 (2003); Gerhard Hafner, *An Attempt to Explain the Position of the USA towards the ICC*, 3 Jounral of International Criminal Justice 323 (2005); Giovanni Conso, *The Basic Reasons for US Hostility to the ICC in Light of the Negotiating History of the Rome Statute*, 3 Journal of International Criminal Justice 314 (2005); Daryl Mundis, *The United States of America and International Justice Has Lady Liberty Lost her Way?*, 2 Journal of International Criminal Justice 2 (2004); Paul Stephan, *US Constitutionalism and International Law: What the Multilateralist Move Leaves Out*, 2 Journal of International Criminal Justice 11 (2004); Patricia M. Wald, *Is the United States' Opposition to the ICC Intractable?*, 2 Journal of International Criminal Justice 19 (2004).

[240] For various arguments against particular versions of the universal jurisdiction *see* Madeline Morris, *Universal Jurisdiction in a Divided World: Conference Remarks*, 35 New Eng. L. Rev. 337 (2001); Henry Kissinger, *The Pitfalls of Universal Jurisdiction: Risking Judicial Tyranny* Foreign Affairs *at* http://www.globalpolicy.org/intljustice/general/2001/07kiss.htm; George Fletcher, *Against Universal Jurisdiction*, 1 Journal of International Criminal Justice 580 (2003).

[241] Lietzau, *supra.*

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on the international law, because the area of interest is the international law discourse, rather than the prospects of US joining the Rome Statute.

The principal thrust of the argument proceeds from the provisions in the Rome Statute that provide for the jurisdiction of the Court, acting *proprio motu* or upon the referral of a state party, in cases where the alleged crimes were committed by the nationals of non-party states on the territory of a state party to the statute[243]. In other words the jurisdictional structure allows the Court to proceed without the control of the Security Council or the consent and ratification of the state whose nationals are involved. This has also been characterized as the "principal" American objection[244].

Why this situation (and the same rationale is relevant with regard to the so-called "new universal jurisdiction"[245]) would appear so annoying as to become a precondition to the whole effort of creating a regular criminal accountability system? It can be observed at this point that in line with the arguments made in previous chapters of this work the international criminal responsibility discourse does entail state presence, despite repressing relevant references in its vocabularies. However this aversion of references to state presence in international crimes, that becomes particularly striking in cases of predominantly state-sponsored and administered crimes, aiming to avoid political tensions associated with such references, cannot get rid of the latter tensions. To the

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[242] E.g. Marquardt, *supra*.
[243] *See* Rome Statute *supra*, articles 12-15; *see also* article 16 (for the deferral power of the Security Council).
[244] Wedgwood, Jacobson and Leigh *supra at* 126; *See also* Scheffer, *The United States and the International Criminal Court supra*, *at* 18 (putting it as a treaty law issue); *See also* Morris, *High Crimes*, *supra* (pointing that the treaty law is a mere surface problem); *See also* Chibueze *supra at* 31-36; *See also* Casey and Rivkin *supra at* 64; *See also* Rodriguez *supra at* 818.
[245] *See* Eugene Kontorovich, *The Piracy Analogy: Modern Universal Jurisdiction's Hollow Foundation*, 45 Harv. Int'l L.J. 183 (2004) (distinguishing new and old universal jurisdictions).

contrary their intensity escapes the grip of the international legal consciousness and they mould the boundaries of the international justice regimes. Political tensions would not stop short of making international justice a form of subtle and hidden but nevertheless effective pronouncement on state responsibility. Such a "smuggling out" of the state responsibility references cannot be left unattended by states involved, as when it comes to the determinations on the state responsibility, any state's submission to them must be properly consented to and ratified through a treaty or else a norm of customary international law.

Several arguments are thus advanced to argue that there is a customary international law norm regarding such a delegation of the authority on the state responsibility including delegated territorial or universal jurisdiction. Such theories would claim that whereas states themselves are entitled as a matter of territorial or universal jurisdiction to claim such authority, they remain free to enforce it collectively or via an international body. The principal response to this is that actually states never had the right to pronounce on acts involving state responsibility of other states, or at least the states affected would always have the right to legitimate non-recognition and denial of such a pronouncement.

The acts prosecuted within territorial jurisdiction could be labeled as 'illegal' only within such a jurisdiction; to be 'illegal' under international law, there has to be an international pronouncement, which as a rule involves the consent of the affected state. Accordingly the delegated jurisdiction explanation is not plausible and can be easily explained away[246]. Alternatively there is a "global treaties" argument, *jus cogens* or *erga omnes*

[246]For the arguments concerning illegality of such moves see Wedgwood et al. *supra at* 126-129; Casey and Rivkin *supra* at 75-88; For more detailed arguments consider Morris (*High Crimes*, *supra*) who criticizes

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legal norms argument and the instant custom theories, that also fail to provide legitimacy to ICC's jurisdiction over nationals of non-partisan states[247].

Apart from illegality, this narrative would also argue that it is actually improper to submit questions involving state responsibility and interstate relations to the adjudication in the criminal law vocabulary. Strong normative implications of the criminal procedure, language and the framework of criminal law assumptions could put the functioning of interstate reality into unacceptable and undesirable situations, occupying the field of

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the delegated universal jurisdiction arguing that not all crimes within subject matter jurisdiction are the universal jurisdiction crimes, such as the child soldier conscription or some of the violations of the Second Additional Protocol and also distinguishing the rule of the universal jurisdiction as against the rule of possibility of delegation of the universal jurisdiction. In order to do so she develops a consequences theory which suggests that the consequences are fundamentally different when the universal jurisdiction is delegated to an international tribunal, because in the latter cases there is more political impact, as the case transcends the situation of "disagreement among equals", and because an international tribunal has more power to create authoritative international law (at 28-30). Furthermore she submits that there is no customary law as to the rule of delegated universal jurisdiction, because the content of the custom was different. According to her *opinio juris* was never about delegated universal jurisdiction: ICTY and ICTR were created under the Security Council Chapter VII power whereas the Nuremberg and Tokyo tribunals were acts of occupying powers acting as sovereigns and exercising their power. She concludes that "this absence of precedent precludes the possibility that delegability has been affirmatively entailed within the customary law of universal jurisdiction as it has developed through state practice and *opinio juris*" (*at* 35-43).
Concerning the delegated territorial jurisdiction Morris argues that there has not been practice where defendant was a national of non-party to the convention and the state of nationality did not consent to it, whereas the Nuremberg, Far East, ICTY and ICTR are based on the consent of the state of nationality (criminals "whose offenses have no particular geographic location", at 43-44). She proposes the "legitimate interest" theory of territorial jurisdiction, that "critical linkage between territorial jurisdiction and the legitimate prosecutorial interests of the territorial state would be broken if territorial jurisdiction were delegated to a state on whose territory the crime did not occur", at the example that US can object to the transfer of the territorial jurisdiction over a US national by France to the Libya (*at* 45-46). Moreover Morris reinterprets the "Lotus" principle of jurisdiction saying that "the customary international law of criminal jurisdiction is based on a perceptible, if somewhat ill-defined, set of principles regarding the legitimate prosecutorial interests of states" whereas the 'Lotus principle' is not the general umbrella rule, but rather an opposite of the four established principles of criminal jurisdiction. She argues it is not that "any new basis for jurisdiction, however extravagant or nonsensical, is legitimate simply because it has not been previously claimed and has, therefore, not previously been rejected" but to the contrary, each time a state claims one of the four traditional nexuses to legitimate the jurisdiction (*at* 47-51).

[247] *Id*, concerning the argument of global treaties that "serve the common interest of humanity" Morris writes that it is questionable that those treaties exist and besides this notion is inapplicable to the Rome Statute. As to the argument of *jus cogens* norms and *erga omnes* obligations, they do not require that the mechanism for the enforcement should necessarily look like the Rome Statute procedure as provided in the art. 12. Finally she also rejects the customary law basis as no extensive and uniform practice exists and the "instant custom" theory is irrelevant as the situation it is far from any straightforward consensus (*at* 52-60).

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compromise and leaving no space for political advantages of other mechanisms and rendering compromise solutions impossible.

The non-compromisable outcome, the "winner-takes-all" bias, the irreversibility and the assertability of the rightness of a decision are among some reasons for states sometimes to avoid resolutions of their disputes via individual criminal guilt determinations[248]. On the other hand, there could also be arguments that an individual can become a victim of the political prosecutions where the extent or even presence of individual guilt could become a matter of political importance, aggrandizing the political dimensions of individual case (that would be contrary to the principle of human dignity) and making prosecutions political (however improbable in the case of the ICC).

Along these lines this narrative could provide similar criticisms, which are also applicable to another institution of the international criminal law vitally relevant to the immunities – universal jurisdiction[249]. Political control is required[250] to handle two major concerns on universal jurisdiction: political or sham prosecutions[251] and the increasing

[248] Morris, *High Crimes*, *at* 17-18

[249] In the meaning of the modern concept of universal jurisdiction for crimes against international law, or "new universal jurisdiction", *see* Kontorovich *supra*.

[250]For the comparison of the problem with the ICC from the political control perspective *see* Lincoln P. Bloomfield, Jr., Assistant Secretary for Political-Military Affairs, *The U.S. Government and the International Criminal Court*, Remarks to the Parliamentarians for Global Action, Consultative Assembly of Parliamentarians for the International Criminal Court and the Rule of Law, United Nations, New York (2003), *at* http://www.state.gov/t/pm/rls/rm/24137.htm (saying that "[u]nlike other war crimes tribunals, such as for Rwanda and the former Yugoslavia, the ICC does not operate under the functional supervision of the U.N. Security Council" and that [w]hen Belgium's judicial authorities asserted universal competence and sought to prosecute leading American political and military figures for war crimes as a reflection of a fairly unique political perspective on the 1991 Gulf War, the policymaking branch of the Belgian government was able to weigh the nation's equities – such as the desirability of maintaining NATO's headquarters in its capital – and take legitimate legislative action to amend the judicial powers exercised by that country" whereas the "ICC can point to no equivalent oversight mechanism"); *See also* Morris, *Universal Jurisdiction*, *supra at* 338.

[251] Morris *id* at 352-59.

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role of the judiciary that runs the risks of "judicial tyranny"[252]. If we look closer, both of these positions are pushing forward the same types of arguments as against the ICC's jurisdiction over non-partisan states.

Thus the argument against political trials is not simply that they involve political issues; it would make little sense to argue this because ultimately any trial and legal issue has at least some political dimension. Rather the meaning of the political trial in the negative normative sense is that such a trial, in a manner described with regard to the ICC, could try to smuggle political points (involving state responsibility) through the individual criminal prosecutions, at the same time making the accused or tried person a scapegoat and depriving him of basic dignity (to be treated as the end rather than means)[253]. Two points here are interrelated in that the universal jurisdiction trials should not be misusing the "duality" of the crimes in question, i.e. their 'unique' ability to invoke both individual and state responsibility, because of the undue international relations consequences, or from the reverse perspective to encroach upon the position of the individual accused.

Similarly, the argument against judicial tyranny is in essence the same as the argument against propriety of the criminal law in addressing questions that entail "pitfalls in the interstate relations realm"[254]. Thus the narrative reaches new results using the same types of arguments and the same "Hobbesian" logic and attitude towards applying justice in external affairs. Furthermore, one cannot be mistaken to notice the affinity of the 'judicial tyranny' argument with the dualist theories of international law; the arguments of the

[252] Kissinger, *supra.*
[253] For the argument against universal jurisdiction on the basis of the problems of the side of the accused person *see* George Fletcher, *Against Universal Jurisdiction*, *supra*.
[254] Morris, *Universal Jurisdiction*, *supra* at 352.

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internal separation of powers, the impropriety of judicial intervention into foreign affairs and the distinction between domestic and international legal orders fit comfortably into the current perspective. Therefore, the narrative might go, to prevent these evils only such a system of universal jurisdiction could have legitimacy that would entail a system of political control over prosecutions, say via a mechanism of veto power by the "relevant national executive organs"[255].

If we account of these variables that the narrative takes into account, it is easy to visualize the cost-benefit analysis of the universal jurisdiction trials; once it is trite that the whole economics of prosecutions works until the marginal benefit of the prosecutions exceeds its marginal cost, thus prosecutions under such analysis arguably happen until the equilibrium "x" point, where the cost of each next prosecution is higher than its benefit; arguably criminal trials in domestic jurisdictions take place at all because there are a lot of instances where the benefit is higher than the cost, suppose the curves could look like this:

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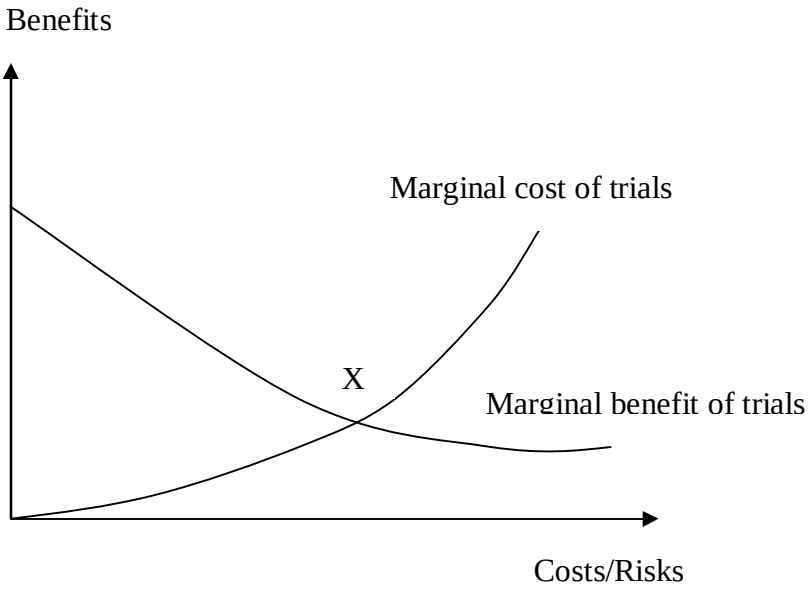
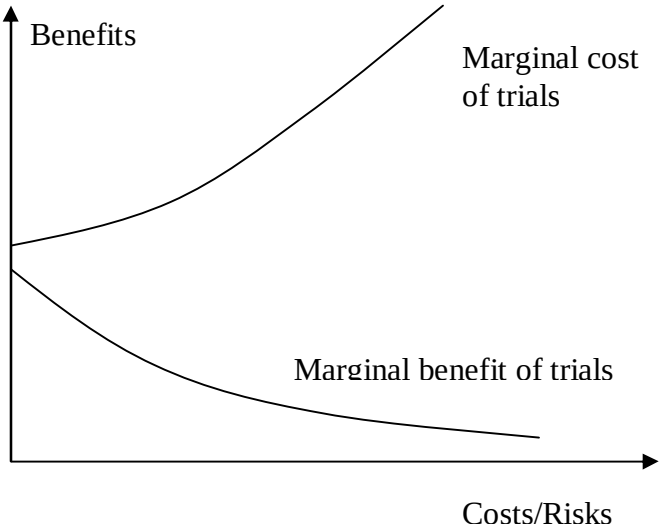
[255] Morris, *id* at 338.



In the case of the trials under universal jurisdiction things are a bit different. The benefits of trials are probably relatively high, especially if we account that the crimes in question are often very grave and of concern to large numbers of people. The marginal benefit at the beginning might be even higher because in the first place the most responsible officials will be tried for the gravest crimes. At the same time the risks and thus the costs of such trials in the interstate system also increase. Our current narrative hypothesizes that without the inclusion of the suggested variables of political control above, the costs in the existing system of universal jurisdiction would be so high that the equilibrium might never happen and thus the trials would never make sense, suppose a model resembling this:



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The point is that in the social sciences it is notoriously difficult to index the risks and benefits, and universal jurisdiction trials are not an exemption in this sense. One can hardly calculate and know how the curves would go and that there would never be equilibrium point. However it is as difficult to argue to the contrary as well for the similar reasons, which renders the cost/benefit analysis unhelpful for our case.

Considering another prong in the international justice, the international criminal tribunals for the Former Yugoslavia and Rwanda, this narrative would support the irrelevance of official immunity, along the same type of reasoning. Thus it could be argued that these tribunals are rightful in doing what the ICC is not entitled to, because they are not mere treaty mechanisms, but rather the expressions of the supranational power of the international community legitimated via United Nations Security Council, acting under its Chapter VII authority to restore international peace and security, whereas states cannot create such a power among several of them towards third states, as they cannot pass to each other the power they do not possess themselves.

The narrative described here provides reasons for a particular map of immunities, reasons that are acceptable and valid within the existing framework of international law, and the provision of which aims to insist on a specific distribution of powers in the international relations. It is important to mind again that the issue at question is the waterline of the international justice v. immunity approach to the human rights violations worldwide. In addressing this question it appears significant that the international criminal justice has, as probably any legal regime, certain political messages, consolidating a "hegemonic narrative, some understanding of the political conflict which is a part of the conflict

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itself"[256].

The particular approach to the immunities map this narrative takes is perfectly explainable; a state with the possibility of veto and essentially shared monopoly over international justice would not be happy to emancipate itself from it, as this would mean a change in the power structures around the globe that is not in its favor. Thus Morris for example says that the present formulation of the ICC jurisdiction provisions are in fact an attempt to "effectuate a change in interstate power relations by moving an important category of interstate disputes out of the diplomatic realm and into that of compulsory adjudication", that is, increasing the power of the ICC and adjudicatory mechanisms and institutions "without regard to the resultant redistribution of power among particular states"[257].

The particular states are obviously the Security Council permanent members who otherwise have an explicit monopoly and veto of using international justice; at the end of the day this is one of the fundamental differences of 'ad hocist' ICTY or ICTR approach from the permanent ICC, the monopoly to apply "indirect" state responsibility against the will of the state concerned. A similar theory could be used in regard of the Nuremberg and Tokyo trials. If we acknowledge what does not demand a particularly deep inquiry into the realm of the international relations theory, namely that the UN structure and particularly the Security Council veto arrangement for the monopoly on use of force is in fact the reflection and institutionalization of post World War II power relations structure and games-of-the-rule setting of the great chessboard, it becomes clear that the occupying

[256] *See* Martti Koskenniemi, *International Law and Hegemony: A Reconfiguration*, supra.
[257] Morris, *High Crimes*, *supra at* 25-26.

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powers in Nuremberg above all exercised the similar power and authority as in Rwanda and Former Yugoslavia, the difference being primarily formalistic, namely that the decision to bring Nazi criminals to trial was not then institutionally and legally legitimated via United Nations mechanisms.

This concern over potential power redistribution becomes even more explicit while criticizing the "evenhandedness approach" of ICTY in prosecuting Croats to dispel anti-Serb bias suspicion of ICTY. The point of concern here is that there were voices in support of ICTY investigating NATO military activities as to the presence of the war crime elements, the approach that in the ICC context is unacceptable for "particular states" because "it could become even more likely that the actions of non-"rouge" states would become the subject of ICC prosecutions", the concern that can be voiced in the context of NATO actions in the Former Yugoslavia as the protest against possible condemnation of US actions as war crimes[258]. Another aspect of the same concern is the possibility of abuse in case of the emergence of bipolar (or n-polar) world where sixty parties requirement would not reasonably reduce the potential for the "abusive" use of the ICC[259].

The "benefits" of the politically controlled or directed international justice can also be demonstrated at the instance of what might be called the Banković anomaly. The case concerns the application to the European Court of Human Rights of the relatives of the victims of the NATO bombings of the *Radio Televizije Srbije* on the 23 April 1999[260].

[258] *Id* at 34-35
[259] *Id* at 46-47
[260] *See* Grand Chamber Admissibility Decision in Banković et al v. Belgium et al, Application no. 52207/99 (12/12/2001) paras 9-11.

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The events found to be outside the ECHR's *espace juridique* and the case to be inadmissible[261]. The case however at least formally is perfectly within the ICTY jurisdiction that covers incidents "committed in the territory of the former Yugoslavia since 1991"[262]. The case however could not be voiced in that context, and the victims remained in a kind of a "black hole" of the international law.

In this regard the Rome Statute does provide a potential for an appropriate measure of "safeguard", namely the deferral power of the Security Council under the article 16 of the Rome Statute, however the burden of action is reversed *against* the permanent members, which can prove important in cases of political divides. Nevertheless the account of reasoning provided here inclines to the usage of the article 16 deferrals to provide the blank exemptions for the officials of the state concerned, to retain a part of the status-quo.

This narrative is to a large extent reflected in the official stance of the United States towards the International Criminal Court expressed in the US Department of State's Fact Sheet, that objects *inter alia* to the jurisdiction of the ICC over nationals of non-partisan states because then ICC "would have jurisdiction for enumerated crimes alleged against U.S. nationals…even though the U.S. is not a party" and also to the discretionary powers of the Prosecutor that "can proceed with an investigation on his or her own initiative with the agreement of two judges of a three-judge panel" without being "responsible to an elected body or to the UN Security Council" and therefore "lack[ing] fundamental checks and balances", in other words the veto control by the 'particular states'[263]. As clearly

[261] Paras 80-82 and 84-5.
[262] Statute of the International Criminal Tribunal for the Former Yugoslavia *supra*, Article 1.
[263] US Department of State, Bureau of Political-Military Affairs, *Fact Sheet on the International Criminal Court* (2002), *at* http://www.state.gov/t/pm/rls/fs/2002/23426.htm; See also Marc Grossman, Under

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stated by Clinton concerning the ICC participation:

> In signing, however, we are not abandoning our concerns about significant flaws in the treaty. In particular, we are concerned that when the court comes into existence, it will not only exercise authority over personnel of states that have ratified the treaty, but also claim jurisdiction over personnel of states that have not. . . Given these concerns, I will not, and do not recommend that my successor submit the Treaty to the Senate for advice and consent until our fundamental concerns are satisfied.[264]

Apart from the renewing urges through the Security Council deferral powers[265] and the practice of the Bilateral Immunity Agreements[266], this attitude has culminated in the promulgation of the American Service-Members' Protection Act that holds the Rome Statute to be contrary to the US interests where it "purports to establish an arrangement whereby United States armed forces operating overseas could be conceivably prosecuted by the international court even if the United States has not agreed to be bound by the treaty" whereas this "could inhibit the ability of the United States to use its military to meet alliance obligations and participate in multinational operations, including humanitarian interventions to save civilian lives"[267].

Secretary for Political Affairs, *Remarks to the Center for Strategic and International Studies on American Foreign Policy and the International Criminal Court* (2002), *at* http://www.state.gov/p/9949.htm.

[264]Madeleine Morris, *The United States and the International Criminal Court*, *supra*.

[265] James Cunningham, Deputy U.S. Representative to the United Nations, *Statement on the Renewal of Resolution 1422 in the Security Council* (2003), *at* http://www.state.gov/p/io/rls/rm/2003/21546.htm.

[266] Sean D. Murphy, *US Bilateral Agreements Related to ICC*, 97 American Journal of International Law 200, (2003).

[267]*See* the American Service-Members' Protection Act, 22 USCA § 7421- 7433; This has been found contrary to the interests of the United States because "[m]embers of the Armed Forces of the United States should be free from the risk of prosecution by the International Criminal Court, especially when they are stationed or deployed around the world to protect the vital national interests of the United States" and furthermore because "the President and other senior elected and appointed officials of the United States Government may be prosecuted by the International Criminal Court. Particularly if the Preparatory Commission agrees on a definition of the Crime of Aggression" and besides "senior United States officials may be at risk of criminal prosecution for national security decisions", 22 USCA § 7421, Sec. 2002 (Findings).

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The purpose of this part of the chapter was to show how the arguments can be made with the acceptable limits of the international legal argument in favor of a particular immunities map in the international criminal justice system. Such a map provides that there should be immunity provided for the official acts, including international crimes, unless the state concerned consented to the contrary or there is a determination by the Security Council under the Chapter VII supranational authority. As to the universal jurisdiction, there should be a fair amount of political control over its exercise. The reasons for such a position could include the possibilities of the political use of the international justice, emanating from a certain dualism of the crimes involved and the resistance to a re-distribution of the power relating to such a use, which could turn out to be powerful. The purpose was not to argue that the position is in any way anti-humanist, but rather to show that essentially good faith and valid arguments can be provided against the certain accountability structuring that are acceptable and valid within the international legal framework and constitute an inalienable part of the international legal discourse on immunities. The next two sections will outline alternative accounts that are at least partly contradictory to this one but equally valid and acceptable.

3.1.2 A narrative from the international civil society

This part of the chapter tries to isolate and single out yet another narrative about the international law of immunities, this time that of the international civil society, that represents a variety of networks of transnational and domestic organization that struggle for the effective realization of human rights worldwide. Whereas the international civil society entails an extremely broad spectrum of organizations and networks with different

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interests and agendas, including terrorist organizations and human rights or feminist groups, this chapter focuses on specific segment of that society, namely the international human rights organizations that strive to ensure the global respect for what is known as universal civil and political rights, primarily those enshrined in the Universal Declaration of Human Rights[268].

Transnational human rights networks have become according to some international relations theories new influential actors in the world politics. Already Keohane and Nye suggested that states no more have monopoly over world politics and stressed the importance of non-governmental, primarily transnational actors, defining the latter as communicating and acting directly with foreign entities and governments while "bypass[ing] their own government", emerging as new "autonomous actors" that have their own "private foreign policies" not necessarily coinciding with those of the states[269]. Moreover it has been argued that transnational advocacy networks, transnational coalitions and campaigns, transnational social movements, linked across the state boundaries are becoming through the effective information exchanges, transnational tactics and mobilization powerful new agents in international politics that are "transforming global norms and practices"[270]. Human rights networks become vital

[268] *See e.g.* the position of the Amnesty International that according to its self-statement is to achieve the "world in which every person enjoys all of the human rights enshrined in the Universal Declaration of Human Rights and other international human rights standards", *at* http://web.amnesty.org/web/web.nsf/print/6503A34021A857C480256D89005738AD; *See also* the Human Rights Watch "dedicated to protecting the human rights of people around the world" and determined to "investigate and expose human rights violations and hold abusers accountable", *at* http://hrw.org/about/; *See also* Human Rights First that is a "human rights advocacy organization" aiming to "create a secure and humane world – advancing justice, human dignity, and respect for the rule of law", *at* http://www.humanrightsfirst.org/about_us/about_us.htm.

[269] ROBERT O. KEOHANE AND JOSEPH S. NYE, JR, TRANSNATIONAL RELATIONS AND WORLD POLITICS x-xiii, xxi-xxii, (1971).

[270] SANJEEV KHAGRAM, JAMES V. RIKER and KATHRYN SIKKINK eds, RESTRUCTURING WORLD POLITICS: TRANSNATIONAL SOCIAL MOVEMENTS, NETWORKS AND NORMS 4-8 (2002).

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proxies in disseminating and "diffusion" of human rights norms often sidestepping state cohesion and monopoly[271].

Disseminating idealist and noble human rights goals, campaigning through media, lobbying at the negotiations of international instruments, participating at various levels in the work of the intergovernmental organizations, intervening in judicial proceedings via *amicus curiae* and armed by the universalistic attitude, these networks certainly have generated their own narratives of the international criminal justice. These narratives are frequently dissenting from states and could be not nearly as significant for the purposes of producing international "hard" law compared to those of the states; for the simple matter that the paradigm of the international law we currently inhabit does not consider these types of actors as legitimate subjects for those purposes. However their influence is not to be underestimated, whereas the narratives they generate definitely contribute to the plurality of the fragmented international legal meaning and identity, pushing certain types of arguments, the discussion of which appears important for the disclosure of the structure of the debate on the immunities law.

The position discussed here is primarily characterized by the perception of international justice as enforcing human rights worldwide by punishing the most egregious and mass scale violations via individual responsibility under international law. The idea of individual responsibility is sound with that of human rights, both accent on the relevance of individual autonomy and dignity and both were generated in similar historical

[271] THOMAS RISSE, STEPHEN C. ROPP, and KATHRYN SIKKINK. eds., THE POWER OF HUMAN RIGHTS: INTERNATIONAL NORMS AND DOMESTIC CHANGE 5 (1999) (Also discussing the "boomerang" influence when "domestic groups in a repressive state bypass their state and directly search out international allies to

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circumstances, namely largely as the reaction to the massive human rights violations in the course of the Second World War; in fact it is argued in the following chapters that two concepts have much more common genesis than this.

Being universalistic, the idea of global human rights is therefore often hostile to such a notion of state sovereignty that is the expression of the acceptability of the pluralism in values, which are not always based on the idea human rights. Sovereignty, as a version of exception to the global rule of law which enforces human rights, is therefore perceived as the antithesis of human rights or rule of law, as the synonym of the arbitrariness or the political.

Human rights networks therefore view immunity as a sheer impunity and try to combat it in an each and every instance, arguing within the international legal discourse for the most robust versions of the denial of the official immunity. Furthermore they would often argue to expand the scope of the "core crimes" to include the violations of as many of the violations of civil and political rights as possible. Finally it is characteristic to put the arguments in the direction of taking the international justice away or at least distancing it from the states, more precisely, the states' political control that is expressed in the views on the proper functioning of the accountability mechanisms, such as the universal jurisdiction or the ICC.

The human rights networks usually take that to establish a system of the international criminal justice that would put an end to the impunity for the human rights violations, the essential agenda for the nearest future should include the ratification and implementation

bring pressure on their states from outside" (*at* 18) in a five phase spiral model of human rights change(*at*

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of the ICC statute, the use of the universal jurisdiction on the municipal level and the cooperation with the international criminal tribunals established under the Security Council authority[272].

Whereas the previous narrative argues that the ICC should be prevented from prosecuting non-state-party nationals, arguing that this would in effect adjudicate on official acts of states, there is a number of human rights organizations that start from the radically different premises and not only believe that the ICC jurisdictional structure as it exists now is a great achievement, but also argue that the US attempts, consistent with the above outlined position, to secure immunity for their nationals and officials worldwide are contrary to the International Law[273]. Thus in a number of documents, fact sheets and letters the leading human rights organizations have consistently opposed the bilateral immunity agreements concluded and sought by the United States government with the parties to the Rome Statute as well as the Security Council resolution prohibiting prosecutions under Article 16 of the Rome Statute[274].

17-35).

[272] Amnesty International, *Establishing a system of International Justice to End Impunity*, *at* http://web.amnesty.org/pages/jus-index-eng; for the Human Rights First *see* "*Human Rights First and International Justice*" (aiming to "ensure that strong and effective International Justice Mechanisms, including the International Criminal Court, are established" and that "national courts are able to fulfill their obligations both to hold perpetrators to account themselves and to cooperate with the ICC") *at* http://www.humanrightsfirst.org/international_justice/what_we_do.htm, and their position towards the universal jurisdiction and the ICTY and ICTR in the "wider context", *at* http://www.humanrightsfirst.org/international_justice/w_context/w_context.htm; For the Human Rights Watch's support of the same institutions *see* the its statement that "Human Rights Watch works closely with the International Criminal Tribunals for Rwanda and the former Yugoslavia" that it "advocate[s] world-wide for the establishment of the International Criminal Court, a permanent, global tribunal that will judge those accused of genocide, war crimes, or crimes against humanity when national governments can or will not do so and "extending the "Pinochet precedent"-the principle that, under international law, human rights criminals can be tried in national courts anywhere", *at* http://hrw.org/justice/about.htm.

[273] *See* e.g. The "Coalition for the International Criminal Court", uniting more than 2,000 NGO's "advocating for a fair, effective and independent International Criminal Court", *at* http://www.iccnow.org/.

[274] *See* Amnesty International, *US Threats to the International Criminal Court*, *at* http://web.amnesty.org/pages/icc-US_threats-eng; *See also* See Human Rights Watch, *The United States and the International Criminal Court*, *at* http://hrw.org/campaigns/icc/us.htm; For the Human Rights First

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Regarding the Bilateral Immunity Agreements (BIA's) practice the narrative suggests that their purpose is merely to secure impunity for crimes against humanity and other horrendous crimes which contradicts the good faith interpretation of the Rome Statute, whereas Article 98.2 was only meant to leave intact the SOFA's and any interpretation that allows BIA defeats the object and purpose of the Statute and should not therefore be accepted as valid. Article 98.2 provides that if a state party to the statute is requested by the Court for surrender, such a state may refuse surrender if that contradicts its "obligations under international agreements"[275]. Thus whereas to the preceding account a bilateral agreement exempting one's nationals from the Court's jurisdiction would appear certainly legitimate, from the perspective of the 'no-impunity' rationale this interpretation certainly appears questionable.

According to the present narrative the "object and purpose" of the ICC treaty are to put and end to impunity and its underlying philosophy is that no one is above the law and immune from the crimes. Furthermore it is argued that article 27, intent of the drafters and the *travaux preparatoires* confirm this rationale and therefore any exceptions to this must be construed narrowly, otherwise state parties to the Rome Statute would simply violate their obligations under the international law of treaties[276]. Moreover, in line with

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arguing that the US concerns are flawed *see The United States and the International Criminal Court*, *at* http://www.humanrightsfirst.org/international_justice/icc/us_role/us_role.htm; *See also* Human Rights First, *U.S. Should Not Stand in the Way of Justice in Darfur* (2005), *at* http://www.humanrightsfirst.org/media/2005_alerts/ij_0329_icc.htm; *See also* Human Rights First letters to Bolivia, Ecuador and Peru on the Bilateral Immunity Agreements, *at* http://www.humanrightsfirst.org/international_justice/icc/icc.htm.

[275] Rome Statute, *supra* art. 98.2.

[276] *See* Amnesty International, *International Criminal Court: US efforts to obtain impunity for genocide, crimes against humanity and war crimes*, IOR 40/025/2002 (2002), *at* http://web.amnesty.org/library/index/engIOR400252002?Open&of=eng-385 (where Amnesty "is deeply concerned by the current worldwide campaign by one state, the United States of America (USA), to

the principle suggested above that the international justice is to be taken away from the states' political control, it is up to the ICC to determine the legal effects of the BIA's rather than in the power of the individual state parties[277].

In arguing that the existing BIA's are in a contradiction with the terms of the Rome Treaty the narrative employs various arguments, namely that the United States are in the lack of clear jurisdictional and subject matter legislation and unable themselves to investigate and prosecute all of the crimes enumerated in the ICC Statute; because BIA's contain the clause that criminal proceedings are to be started only "where appropriate" leaving the matter to discretionary (political) decision-making; because their purpose, unlike that of SOFA's is to exempt from responsibility rather than to allocate it; because they contain no legal obligation for the second state party to them to investigate and, if there is sufficient admissible evidence, prosecute (leaving no horizontal complementarity). Besides, the BIA cover with immunity much wider range of persons than the standard SOFA's (Persons covered by the standard US impunity agreement are

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persuade states to enter into impunity agreements which seek to prevent US nationals accused of genocide, crimes against humanity or war crimes from being surrendered to the International Criminal Court. These impunity agreements do not require the USA or the other state concerned to investigate and, if there is sufficient admissible evidence, to prosecute the US national accused by the International Criminal Court of such horrendous crimes"); *See also* Human Rights Watch, *United States Efforts to Undermine the International Criminal Court: Article 98(2) Agreements* (2002), *at* http://www.amicc.org/docs/HRW_Art98.pdf (arguing that "any country that has signed but not yet ratified the Rome Statute may not sign an agreement providing immunity from ICC prosecution with a country that has repudiated or has Rome Statute; to do so would violate the "object and purpose" of the Rome Statute); Human Rights First, *In the Matter of the Statute of the International Criminal Court and in the Matter of Bilateral Agreements Sought by the United States under Article 98(2) of the Statute, Joint Opinion by James Crawford, Philippe Sands and Ralph Wilde* (2003), *at* http://www.humanrightsfirst.org/international_justice/Art98_061403.pdf (arguing that "[i]t is inconsistent with the object and purpose of the ICC Statute for a State party to enter into or to apply a bilateral nonsurrender agreement if purpose or effect of doing so would be to provide impunity to a person credibly suspected of having committed a crime within the jurisdiction of the ICC" and that "[s]imilar considerations would apply to a signatory to the ICC Statute, to the extent that a bilateral non-surrender agreement might tend to frustrate the object and purpose of the Statute, contrary to Article 18 of the Vienna Convention on the Law of Treaties; *see more* in Chapter 5 below).

[277] Human Rights First, *id*; Amnesty International, *id*.

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"current or former Government officials, employees including contractors, or military personnel or nationals of one Party") or say the relevant Security Council Resolution 1422 (discussed below)[278].

This narrative would naturally recommend the states parties to the Rome Statute not to sign and ratify the BIA's and for other states to "enter into agreements with the International Criminal Court pursuant to Article 87 (5) to provide assistance to the Court by surrendering accused persons found in any territory subject to their jurisdiction" contrary to the US position on jurisdiction of ICC and moreover, interestingly, to comply with the ICC requests to surrender persons covered by such immunity *contrary* to the BIA so that ICC could have a chance to effectively pronounce on the validity of such agreements[279].

[278] The persons covered by the US impunity agreements are not limited to "current or former officials from a contributing State not a Party to the Rome Statute over acts and omissions relating to a United Nations established or authorized operation", as in Security Council Resolution 1422, but they also include employees, including civilian contractors regardless of nationality and regardless whether the person was a national of a state party or a state signatory to the Rome Statute. In addition, the persons covered by the US impunity agreement are not limited to persons with some connection to a UN established or authorized operation, as in this Resolution. Another reasons brought by Amnesty involve that if a state signs a US impunity agreement, it will have to renegotiate all or almost all current extradition agreements with other states since most bilateral extradition agreements have re-extradition clauses. *See* Amnesty International, *International Criminal Court: US efforts to obtain impunity*…(supra). Human Rights watch suggests that "an express clause should be inserted that commits the United States to investigate and, where appropriate, prosecute its nationals accused of committing ICC crimes" so that "to ensure that the United States is capable of prosecuting all ICC Treaty crimes" and moreover that the "ICC's fundamental role of overseeing national pledges of prosecution must be preserved", Human Rights Watch, *Letter urging continued resistance to U.S. impunity agreements* (2002), *at* http://www.hrw.org/press/2002/10/eu-icc1021ltr.htm.

[279] Amnesty *id*, suggesting that any state "that has entered into a US impunity agreement should comply with any request by the International Criminal Court to arrest and to surrender US nationals (or associated nationals) pending a determination by the International Criminal Court of the legality of the agreement". *See also* Human Rights First / Crawford et. al. *Joint Opinion* supra (arguing that "in accordance with Article 119 of the ICC Statute, the compatibility of a bilateral non-surrender agreement with the Statute would be a matter to be addressed by the International Criminal Court (in the context of a request for transfer), or by the Assembly of States Parties. It might also fall within the jurisdiction of the International Court of Justice").

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The main thrust of the argument against the Bilateral Immunity Agreements provided by this narrative is therefore that they violate the international law of treaties regime, as they defeat the "object and purpose" of the Rome Statute and that the wrong constituencies decide on their validity, namely nation states instead of the ICC itself. Whereas from this narrative's perspective the arguments are perfectly valid, as the ICC indeed aims to decide on the guilt of individuals and to prevent the impunity, it does not convincingly, or at all, address the arguments that have caused the movement to such agreements from the previous account's angle.

Essentially similar in structure is the response to the use of the Security Council for the same purposes (impunity in the vocabulary of this account). Thus according to the Article 16 of the Rome Statute Security Council can via a resolution passed under the Chapter VII powers stop any investigation or prosecution[280]. The United States following considerations similar to those described in the previous account have sought to provide immunity for their nationals participating in the UN operations around the world. However the current account is unhappy with the Resolutions 1422/1487 and 1497, providing for the immunity from the ICC claiming their invalidity under the international law[281].

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[280] For the discussion of the validity and legal effect of these resolutions see Neha Jain, *A Separate Law for Peacekeepers: The Clash between the Security Council and the International Criminal Court*, 16 EJIL 239 (2005).

[281] Human Rights Watch, *Closing the Door to Impunity: Human Rights Watch Recommendations for Renewing Resolution 1422*, *at* http://www.hrw.org/campaigns/icc/; *see also* Amnesty International, *International Criminal Court: The unlawful attempt by the Security Council to give US citizens permanent impunity from international justice*, IOR 40/006/2003 (2003), *at* http://web.amnesty.org/aidoc/aidoc_pdf.nsf/Index/IOR400062003ENGLISH/$File/IOR4000603.pdf; *see also* Human Rights First, *U.S. Obtains Permanent Immunity from ICC Prosecution: Resolution 1497* (2003), *at http://www.humanrightsfirst.org/media/2003_alerts/0804.htm.*

The main arguments against such resolutions are that the Security Council has exceeded its authority under the Charter, that it has in effect amended the Rome Statute and that it is the ICC that should have the final word in interpreting the consistency of the resolution with the Article 16. Resorting to textual and structural interpretation of the Rome Statute, this account suggests that the Resolutions also violate Article 27 by "bestowing blanket impunity" and the real meaning of Article 16 that means case by case determinations.

Thus it is suggested by this account that to act under the UN Charter authority the Security Council must first make a determination as to the existence of a threat to peace and generally its actions are subject to limitations imposed by international law; Amnesty e.g. argues that the *jus cogens* provisions are applicable to its actions[282]. Apart from this it is argued that the Council has altered the meaning of the Rome Statute and violated the international law of treaties, because it "would require states parties to the Rome Statute to violate their obligations under that treaty….by refusing to surrender persons accused". Furthermore it is suggested that ICC is the organ that should make the determinations on the legality of these resolutions[283].

It is interesting that the both narratives often invoke the same arguments. One example is the law of treaties, where they would reach the different conclusions using different types of argument. Thus the previous narrative would employ an "ascending" argument that the treaties are not binding unless consented to by states, and therefore the ICC's jurisdiction over the nationals of non-partisan states is invalid. On the other hand the current account

[282] Amnesty, *id.*
[283] Amnesty, Human Rights Watch, Human Right First *id*; see also Coalition for the International Criminal Court, *Open Letter On The Occasion Of The Security Council Public Meeting On Renewal Of Resolution 1422* (2003), *at* http://www.iccnow.org/documents/otherissues/1422/CICC1422Stmt12June03FINAL.pdf.

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would also rightfully resort to a "descending" argumentation that the treaties are to be followed, arguing around the same treaty, the Rome Statute, that its obligations are violated when the Security Council modifies its content and when the states have to breach them by not surrendering such nationals according to the treaty provisions .

Furthermore, when it comes to the question of the legality of the BIA's or the Security Council resolutions, it is pushed into the "who decides" framework. From the perspective of the no-impunity account, the States should not control via Security Council or BIA's the accountability of individuals, which should be left to the ICC that is an independent institution. On the other hand the previous account has done a good deal of argument on political control, and its concerns are not sufficiently satisfied, as it could be argued that if the purpose of the Security Council deferral power was to give the permanent members some control over prosecutions, why then ICC should control how it is being controlled.

Another important context for the official immunity is the universal jurisdiction doctrine and the activity of municipal courts in enforcing individual responsibility. A number of human rights organizations combating impunity worldwide have expressed their attitude towards such prosecutions via various artifacts ranging from press-releases and reactions to jurisprudential developments to more comprehensive studies on the matter[284]. Most eloquent, well argued and meticulous study has been produced by the Amnesty

[284] *See* Human Rights First, *Human Rights First Praises Pinochet Court Decision, but Disputes Immunity for Officials in Office* (1998), *at* http://www.humanrightsfirst.org/media/2001_1996/pino1198-2.htm; Amnesty International, *14 Principles for the Effective Exercise of Universal Jurisdiction*, AI Index: IOR 53/01/99 (1999), *at* http://web.amnesty.org/library/index/engior530011999; Human Rights Watch, *Belgium: Questions And Answers On The "Anti-Atrocity" Law* (2003), *at* www.hrw.org/campaigns/icc/belgium-qna.pdf; Human Rights Watch, *Belgium: Universal Jurisdiction Law Repealed* (2003), *at* http://www.hrw.org/press/2003/08/belgium080103.htm; Human Rights Watch, *The Pinochet Precedent: How Victims Can Pursue Human Rights Criminals Abroad*, *at* http://www.hrw.org/campaigns/chile98/precedent.htm.

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International[285]; the study that has influenced other similar narratives and is frequently referred to[286].

The "international civil society" narrative would naturally maintain a peculiar folklore of the universal jurisdiction that would depict it as a part of the global fight against impunity for the violations of human rights by states. In doing so it would strive to extend the range of the violations for which there is alleged universal jurisdiction to include as many as possible, apply a theory with descending types of arguments concerning the validity of universal jurisdiction claims and would stand for a mechanism that tries to take the universal jurisdiction away from states as political entities; different in a principled manner from the previous tale that does not separate them but rather views them as two sides of the same coin, the coin of international domination translatable into different languages.

As if to confirm this hypothesis the range of crimes covered by the universal jurisdiction in the legal memorandum of Amnesty International far exceeds most of what would be acceptable from the US perspective or the constitutionalist position (below) on the matter. In addition to the widely accepted crimes of genocide, crimes against humanity and war crimes, Amnesty seeks to cover also extrajudicial executions, torture and forced "disappearances"; a move to promote more of the human rights as expressed in the Universal Declaration.

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[285] *See* Amnesty International, *Universal Jurisdiction - the duty of states to enact and enforce legislation*, AI Index: IOR 53/003/2001 (2001), *at* http://web.amnesty.org/pages/legal_memorandum.
[286] *See e.g.* Human Rights Watch, *Belgium: Questions And Answers*, supra; The Public Committee Against Torture in Israel, *at* http://www.stoptorture.org.il/eng/account.asp?menu=9&submenu=2&item=15; International Campaign for Justice for the Victims of Sabra & Shatila, *at* http://www.indictsharon.net/amnestyuj.pdf; Redress, *Universal Jurisdiction in The European Union: Country Studies*, *at* http://www.redress.org/conferences/country%20studies.pdf.

Besides the range of crimes, this memorandum the decentralized enforcement of international law as being the main rationale of the universal jurisdiction. Thus according to the memorandum "courts in these cases are primarily acting as agents of the entire international community to enforce international law, even when the crimes are also defined in national law, rather than acting to enforce their own national law"[287]. This language and the decentralized enforcement theory are patently "descending arguments" as they proceed from the notions of the international legal order binding on states and ultimately legitimated by the peremptory norms of international law, such as the *jus cogens* law and the obligations *erga omnes*, that are opposable to the state's immanent consent and are sometimes unchangeable, as is the case with the peremptory concepts.

Furthermore, the mechanism of universal jurisdiction is consistent with the logic of the narrative; one of the underlying principles of Amnesty's vision of universal jurisdiction is enshrined in Principle 7 and is that the decisions and control over universal jurisdiction processes should remain within the independent judiciary, with no political control or interference. This stands in sharp contrast to the position outlined in the previous account, where the political control over such decisions was considered the main recommendation for the development of universal jurisdiction as the condition of its viability under the global cost/benefit analysis. Amnesty suggests that such an argument "has no relevance to the exercise of universal jurisdiction over conduct amounting to crimes under international law and crimes of international concern when the forum state is acting on behalf of all states in the international community."[288] The memorandum replies

[287] Amnesty International, *Universal Jurisdiction* memorandum *supra*, Chapter 1, pages 3-4.
[288] *Id* at 29-41

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explicitly to the argument of Morris that such political control "is antithetical to justice and contrary to the obligations of states to ensure an independent judicial system". Consider that:

> "To the extent that there are diplomatic tensions between particular countries, the appropriate response is not to eliminate universal jurisdiction, but to ensure that all states have effective legislation permitting its exercise and to ensure that independent prosecutors and investigating judges take decisions on the basis of the normal legal criteria for deciding whether to investigate or prosecute cases based on territorial jurisdiction…"[289]

The mechanism suggested here is therefore also along the descending argument's logic: the universal jurisdiction needs to be taken away from the states as political entities. Moreover, there should be no political control over prosecutions and a government of the rule of law and the separation of powers should take care that the judicial bodies independent from the political branches exercise the fight against impunity in a decentralized manner. Again the assumption is that one branch of the limited (and most probably liberal) government can be used against the others to enforce the concepts of the international legal order possibly against the state's foreign policy interests.

Apart from this mechanism, the general approach to the exercise of universal jurisdiction mirrors the no-immunity/impunity rationale; in particular Amnesty is coherent in rejecting any immunity for all officials in any capacity according to the general idea that

[289] *Id at* 34.

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nobody should be above the law and in pointing to the irrelevance of statutes of limitations, past crimes, superior orders, duress and other similar defenses[290].

Finally concerning the current International Criminal Tribunals established under the Security Council authority under Chapter VII of the UN Charter, this account supports them as they are a kind of forum for individual responsibility and precedents for the exercise of a supra-state power of international norms and institutions, sources of major development of humanitarian and international criminal law jurisprudence and thus instances of a *par excellence* descending kind of argument realized. Multiple human rights networks supported the tribunals and instructed governments on their cooperation duties with these bodies[291].

This passage on the narratives of the international civil society intended to explicate a certain position on the issues of individual immunity and responsibility arguably generated by the non-state agents of transnational intercourse, and to suggest how the particular types of arguments and legal vocabulary are conducive to their position and the increase of their impact according to their shared values and beliefs in universal human rights in our case. Dissenting from the official narratives of states, transcending the latter's' boundaries, unifying ideologies, myths and normative orders, these agents are

[290] *See* Amnesty International, *14 Principles*, *supra*.
[291] Human Rights Watch, *Action urged regarding non-cooperation with ICTR and ICTY: Letter to Security Council Members* (2002), *at* http://hrw.org/press/2002/10/noncooperation-ltr.htm (urging the Security Council to take measures with regard to the non-compliance practice); Amnesty International, *International Criminal Tribunals: Handbook for government cooperation* (1996), AI Index: IOR 40/07/96, *at* http://web.amnesty.org/library/index/engior400071996 (arguing that there is a duty of all UN member states of fully cooperating with the Tribunals in terms of evidence, investigations, surrendering and transferring of suspects and providing other necessary practical assistance. Furthermore there is a duty to enact legislation consistent with the relevant SC resolution and where not necessary to make a declaration to that effect, *at* 62.); Human Rights First, *Crisis in Kosovo: Immediate Access for Tribunal Investigators* (1999), *at* http://www.humanrightsfirst.org/media/2001_1996/kosovostatement0199.htm.

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contributing to the enrichment of the international law's identity and align with the arguments in international law that strive to submit states to the external normative commands, often employing "descending" arguments for those purposes.

3.1.3 European constitutionalism: global juridical order, hierarchy of values and the "radical evil"

The third fragment of the international legal meaning of the immunity v. accountability debate is derived here from the European constitutionalist ideas and tradition. What is meant by this is basically a map of the international law as a coherent and global legal system that entails an internal hierarchy of legal norms and normative values. This hierarchy ideally places human dignity on its top and contrasts, identifies itself, against a perceived concept of the "radical evil", which is the part and parcel of the same construct, its "other"-demonic, irrational and incomprehensible. The construction of the crimes against humanity as the "radical evil" is one of hallmarks of the current narrative. The "dark side" of the state, the possibility of state-administered crimes, is among the costs to be paid for this monolithic, coherent, "disenchanted"[292], and hierarchical system.

A corresponding vision is *mutatis mutandis* projected upon the international reality and constructs the vision of the international law as a legal system with the hierarchy of legal norms and values. Kelsen, besides being prominent for his influential positivist account, is also credited for postulating the picture of the global legal order, ultimately legitimated

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[292] The thesis of disenchanted society is taken from Max Weber, *Science as a Vocation, in* FROM MAX WEBER: ESSAYS IN SOCIOLOGY 147-148 (H.H. Gerth & C. Wright Mills eds., 1988).

by the *Grundnorm*, a 'monist' theory of the interrelationship between international and national legal orders based on the primacy of the international law[293].

Kelsen argued that the borders delimiting the international and national legal orders are blurring and that there is an increasing centralization in international law, which is according to him directed towards the "organizational unity of a universal legal community" and "the emergence of a world state"[294]. Besides this tendency, he noted that international law is juridical in nature[295] and comprehensive in that it possesses unlimited spatial and temporal validity; as no norm can claim to exclude its validity anywhere in space or time, suggesting that international law can be even retroactive in effect[296]. For Kelsen both national and international legal orders form parts of the "universal legal order", whereas the *Grundnorm* of the international law provides legitimation for both national and international orders[297]. Unity, "juridical-ness", internal hierarchy and comprehensiveness are thus the main features of such a universal legal order.

This vision is among others probably inspired by the Kantian philosophical ideas of the "perpetual peace" that can be achieved through the world law. According to Kant "the peoples of the earth have…entered in varying degrees into a universal community, and it has developed to the point where a violation of rights in *one* part of the world is felt *everywhere*". Kant suggested that there is a kind of a natural propensity towards "producing concord among men" that is guaranteed "by no less authority than the great

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[293] Kelsen, PURE THEORY OF LAW *supra at* 214-217; 328-339.
[294] *Id*, at 328
[295] Hans Kelsen, THE LEGAL PROCESS AND INTERNATIONAL ORDER 11 (1935).
[296] Hans Kelsen, PRINCIPLES OF INTERNATIONAL LAW 178-179 (1967).
[297] *Id*, especially at 553-4, 561-2, 569, 573-581 and 587.

artist Nature herself"[298], arguing for a cosmopolitan ideal that is built on the global rights of the "world citizen[s]"[299].

The vision of the philosopher could be argued to legitimate the global constitutionalist arrangements with monolithic in nature, all-comprehensive in the reach and internally organized structures. Based on these theoretical and philosophical premises some scholars advance a thesis on the "constitutionalization" of the European or the international legal fabric in general.

In lines with the constitutionalization theses Petersmann suggests that the UN system should constitutionalize into a federation of states, as Kant suggested, and with the cornerstone value of protection of human rights and dignity, right as the categorical imperative prescribes. The new federation would entail a unified judicial system with compulsory adjudication and a system of appellate review, with the International Court of Justice as the main judicial body of the universe, overarching and bridging the WTO and EC laws, as well as any other legal issue, whereas the "[n]ational and international constitutionalism must build on the same principles and mutually reinforce each other"[300]. This position reflects to some extent the beliefs entailed in the German constitutional jurisprudence that views the law in an integral unity, with the internal

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[298] *See* Immanuel Kant, *Perpetual Peace: A Philosophical Sketch*, *in* KANT: POLITICAL WRITINGS 107-108 (H. Keiss & H.B. Nisbet eds., 1992).
[299] *See* Jürgen Habermas, *Kant's Idea of Perpetual Peace, with the Benefit of Tow Hundred Years' Hindsight*, *in* PERPETUAL PEACE: ESSAYS ON KANT'S COSMOPOLITAN IDEAL 113 (Bohman & Lutz-Bachmann eds., 1997)
[300] Ernst-Ulrich Petersmann, *How To Constitutionalize International Law And Foreign Policy For The Benefit Of Civil Society*?, 20 Mich. J. Int'l L. 1, 20-24 (1999); Ernst-Ulrich Petersmann, *Constitutionalism and international adjudication: how to constitutionalize the U.N. dispute settlement system*?, 31 N.Y.U. J. Int'l L. & Pol. 753 (1999).

hierarchy of values with the focus on individual human rights according to the Kantian moral philosophy of human dignity and individual autonomy[301].

With comparable overtones, de Búrca and Gerstenberg argue for the 'de-nationalized constitutionalism' as the future of international law while questioning the premises of dualist arguments (such as the fear of judicial tyranny and democratic deficit) based on the example of the European Union[302]. Similarly, de Wet suggests that there is an international constitutional order emerging with "international community, an international value system and rudimentary structures for its enforcement"[303].

Finally it is important to account for the particular role of the concept of radical evil in this narrative. The problem of radical evil and responsibility are overall important for the discourse of international justice and for the idea of individual responsibility, thus bearing upon most of the accounts. However there is perhaps no second secular perspective that is influenced by this concept so directly and drastically. As briefly mentioned, the dark side or cost of a global, hierarchical, all-permeating constitutional order that would symbolize the universal peace for humankind, is the possibility of its betraying human dignity and committing crimes against it. Together with such a notion of

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[301] *See* German Basic Law that provides in the first article that "human dignity shall be inviolable"(*See* Basic Law for the Federal Republic of Germany (Grundgesetz), *at* http://www.iuscomp.org/gla/statutes/GG.htm). In the Lüth decision (1958) the German Constitutional Court has held that the Basic Law "establishes an objective order of values and this order strongly reinforces the effective power of basic rights. This value system…centers upon dignity of human personality developing freely within the social community". *See* DONALD P. KOMMERS, THE CONSTITUTIONAL JURISPRUDENCE OF THE FEDERAL REPUBLIC OF GERMANY 368-375, 370 (1989).
[302] Gráinne de Búrca, Oliver Gerstenberg, *Denationalization of Constitutional Law*, 47 Harv. Int'l L.J. 243 (2006).
[303] Erika de Wet, *The International Constitutional Order*, 55 International & Comparative Law Quarterly 51 (2006).

radical evil, the theories of the single, cosmopolitan and internally organized international law constitute a more or less coherent and consistent structure.

Radical evil is therefore a necessary part of the "constitutive other", the ultimate evil that is opposed to the ultimate good, projected as being outside the oeuvre, but nevertheless constituting the part of its identity, and the idea of translating grave human rights violations as radical evil and punishing it in criminal tribunals is a recognizable feature of the current narrative. Thus contrary to Arendt's suggestion that the radical evil turns out to be both unforgivable and unpunishable, that such deeds "transcend the realm of human affairs and the potentialities of human power, both of which they radically destroy wherever they make their appearance"[304], Nino suggested that "radical evil" in the form of massive human rights violations could be "put on trial" and moreover argued that retroactive justice measures should be applied to it[305].

Having summarized some of the basic features of this narrative, let us turn to the vision and the discussions of international law of immunities it could suggest. It is possible to argue that a narrative of immunities would insist on the relevance of distinguishing the crimes into two broad categories: those representing radical evil and the others. Thus the notion of the 'core crimes', basically crimes against humanity, genocide and war crimes, is deemed important for the validity of the immunity claims. This is because the hierarchy of values approach of the narrative provides the reference for balancing the gravity of the crimes with the immunity claims. Besides, the account will seriously

[304] Arendt, THE HUMAN CONDITION, *supra* at 241.
[305] Nino, RADICAL EVIL ON TRIAL *supra at* vii-viii (applying the notion of radical evil to the massive human rights violations "so widespread, persistent, and organized that normal moral assessment seems inappropriate").

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approach the strict discrimination between the so called *ratione materiae* and *ratione personae* types of immunities; for the same reason of the different values that underlie them, that could be evaluated and prioritized on the hierarchy scale[306].

Thus the language of this account is pervaded by references to the "core crimes", crimes of qualitatively different nature, the difference being relevant for the prosecutorial potential. The international criminal law has been a reaction to, and bears the imprint of the World War II experience of war crimes and the Holocaust; the radical evilness of the state-administered, routinely performed and endorsed by the society crimes thus becomes a hallmark for this narrative. The "core crimes" ought to have received a special treatment when being subjected to the hierarchy of values analysis, as their being not simply evil, but radically evil becomes particularly relevant in the balancing exercises. The relevance of the concept(ion) of the 'radical evil' in this account is therefore emphasized by its connection to the hierarchy of values approach.

A further feature of this account is the postulate that the official immunity serves two important values: the ability of the state to carry out its functions on international arena and thus the values of international peace and security on the one hand and the protection of the "state dignity" on the other. Thus a distinction could be constructed between the two types of immunity: one granted to the highest state officials while in office (*ratione*

[306] For such accounts *see* Bianchi, *supra*; Cassese, INTERNATIONAL CRIMINAL LAW *supra*; Cassese, *Congo v. Belgium*, *supra*; Paola Gaeta, *Official Capacity and Immunities*, *supra*; Paola Gaeta, *Ratione Materiae Immunities of Former Heads of State and International Crimes*, *supra*; Zappalà, *The Ghaddafi Case supra*; Salvatore Zappalà, *The Reaction of the US to the Entry into Force of the ICC Statute: Comments on UN SC Resolution 1422 (2002) and Article 98 Agreements*, 1 Journal of International Criminal Justice 114-134; Steffen Wirth, *Immunities, Related Problems, And Article 98 of the Rome Statute*, 12 Criminal Law Forum 429-458 (hereinafter Wirth, *Immunities*); Steffen Wirth, *Immunity for core crimes? The ICJ's judgement in the Congo v. Belgium case*, 13 European Journal of International Law 877 (hereinafter Wirth, *Congo v Belgium*).

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personae) and the one granted to all officials but only in respect of the acts committed in the official capacity (*ratione materiae*). Whereas the former is deemed to be granted only to the highest state officials for a limited time period and to be absolutely inviolable, the latter is given to all state officials and does not expire, but is of very limited nature[307].

In not taking this distinction for granted, we should account that whereas there has been a debate over the different theories underlying for example the Vienna Convention on Diplomatic Relations, there is no explicit reference to the two distinct types of immunities that could be differentiated according to their rationales. Rather different theories could be argued to constitute the archeology of the immunities arguments to different extents (see also section 2.6.1). According to Denza the Convention merely distinguishes the personal inviolability from immunity[308]. Moreover the ICJ in Congo v Belgium only went as far as to distinguish the immunity as a procedural bar from individual criminal responsibility as a substantive issue, noting that immunity does not prevent individual criminal responsibility, albeit in different contexts and in the passages that are far from constituting a convincing basis for the inference of such radical differences[309].

When balancing the different values pertaining to the two types of immunities from the two types of crimes in various jurisdictions (municipal or international) various results are produced. Thus in the situations with the municipal prosecutions for "core crimes", it

[307] *See* Wirth, *Immunities, supra at* 430-433; s*ee also* Wirth, *Congo v Belgium supra at* 882-883; Cassese, INTERNATIONAL CRIMINAL LAW 265-266 *supra*; Cassese, *Congo v. Belgium*, supra at 862; Gaeta, *Official Capacity and Immunities supra* at 975; Bianchi, *supra at* 248-249 (discussing the relevance of the *ratione materiae* immunity); Zappalà, *The Ghaddafi case*, *supra at* 598.
[308] DENZA, *supra*.
[309] Arrest Warrant case, *supra*; *See also* Paola Gaeta, *Ratione Materiae Immunities*, *supra at* 195 (arguing that this is a mere "uncertainty" caused by the ICJ judgment that is necessary to "dispel as soon possible").

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could be argued within this narrative that there is no possibility to prosecute the holders of the *ratione personae* immunity, because the latter is based on the cornerstone value of the postwar international community; the maintenance of the international peace and security that could be tampered by such prosecutions[310].

However in the case of the *ratione materiae* immunity holders, in the same situation, the prosecutions should be possible. Actually what is arguable under these conditions, is that there is a rule in that removes such immunity in cases of the "core crimes" allegations, because it protects essentially state's dignity ("prevents a foreign state from judging another state's conduct") and on the other hand the human rights values, especially when the human dignity at stake is subjected to the "radical" humiliation by the "core crimes", eventually overcome it according to the "hierarchy of values of the international community"[311].

Furthermore, in the case of prosecutions by the International Criminal Tribunals established under the Security Council Chapter VII authority, there is no immunity offered at any instance, because the authority of the latter is supranational and therefore escapes any further requirements of conformity. A more principled approach of this account would be to suggest that the exercise of the authority is still subject to the judicial scrutiny, but at the level superior to that of the state, if such would be available. However the point remains that the value balancing here is different: the presumption of the

[310] *See* Cassese, INTERNATIONAL CRIMINAL LAW 271-73, *supra*; Gaeta, *Official Capacity*, *supra at* 983-89 (although arguing for a balanced approach rather than carte blanche immunity); Wirth, *Congo v Belgium*, *supra at* 883 and 888 (saying that "it remains doubtful whether these precedents [to the contrary] are in accordance with the hierarchy of values recognized by modern international law"); Zappalà, *The Ghaddafi case*, *supra* at 606-607 (suggesting the possible developments in the erosion of this principle).

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maintenance of the international peace and security is shifted in favor of the prosecution and against the immunity[312].

When it comes to the ICC, the narrative makes it important to distinguish two classes of issues; those arising under Article 27 and Article 98.1. Article 27 notes that any kind of official capacity defense, naturally involving immunity, would not be relevant[313]. Taken together with the provision on the jurisdiction on the nationals of non-partisan states, this could mean the triumph of the narrative in the Rome Statute, however there is one "but" in the form of Article 98.1 that eventually holds that in cases where the nationals of non-partisan states are requested for prosecutions, the state requested cannot be made to violate the international law of immunities[314].

The position would thus ultimately boil down to saying that when the national of a state party is involved, the immunity will be stripped, which is uncontroversial because by any standard this provision would be at least a mere treaty-based immunity waiver. And concerning the nationals of states not parties to the statute the situation retains the analysis applicable to the legality of the prosecutions under the universal jurisdiction[315].

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[311] *See* Cassese, INTERNATIONAL CRIMINAL LAW 981-83, *supra*; Gaeta, *Official Capacity*, *supra at* 267-271; Zappalà, *The Ghaddafi case*, *supra at* 601-605; Wirth, *Congo v Belgium*, *supra at* 888; Wirth, *Immunities*, *supra at* 448-449.
[312] *See e.g.* Gaeta, *Official Capacity*, *supra at* 989; Wirth, *Immunities*, *at* 442.
[313] Rome Statute, *supra at* art. 27
[314] *Id*, art. 98.1. Note that there has also been a controversy over whether the "third state" mentioned in the language of the Statute refers only to the non-parties or to any third state (including the state parties). This controversy appears irrelevant for the purposes of this chapter because even the narrowest reading (that it applies with regard to the states parties) would be sufficient.
[315] *See* Wirth, *Immunities at* 457; *See also* Gaeta, *Official Capacity and Immunities*, *at* 995-6 (distinguishing horizontal and vertical immunity under the Rome Statute); *See also* Cassese, *Congo v. Belgium*, *supra at* 865-866 (pointing to the rightness of distinguishing the situation of the international tribunals and the ICC from the applicable customary law situation).

3.2 The structure of scholarly disagreement

While the previous section tried to reconstruct and describe several out of many possible accounts of the international law of immunities, this one undertakes to uncover the argumentative scheme, the structure of the argument along which the disagreements could be presented, argued, legitimated and finally validated. Several core structural dichotomies or binary oppositions become relevant as suggested below. It is moreover argued in this chapter that the scheme is indeterminate and allows contradicting arguments to be made and to produce arbitrary results.

Despite different value systems, histories and identities, the narratives described in the previous section share something that allows to put them together alongside each other; they share similar vocabulary and language of the international law that they use to translate their claims and positions serving the power, influence or income, power in the wider sense of this word. The indeterminacy of the argumentative scheme expands the possibility of this usage of international law and therefore needs exposure to a critical assessment.

Traditionally there are several archetypical types of arguments that are routinely used to describe and explain the immunities discourse, the assumptions on which it is permissible to develop arguments. Those include the sovereignty v. human rights and the rule of law, monism v. dualism and of course the natural law v. positive law types of arguments. According to Koskenniemi the accounts on the immunities described in the previous section would rather be kinds of *parole* that refer back to these underlying

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assumptions/debates about the nature of international law that constitute its *langue* or deep-structure[316].

In his project concerning the "structure of international legal argument" Koskenniemi suggests a powerful analogy with structural linguistics where the meaning is located within a "network of binary oppositions" that constitute the international legal *langue*, that is, "conditions of what can acceptably be said" or "what it is possible to think or believe in", the international legal "grammar" that delimits the boundaries of acceptable international legal arguments[317]. Kennedy also sets out to describe the international legal theory "from within" to uncover its "recurring rhetorical structure"[318]. It will be suggested in line with these theses that as the international legal discourse thinks in opposites and as the opposing ends of dichotomies have to rely on each other to obtain their validity it is possible to make arbitrary arguments within the international legal argumentative scheme and therefore the latter is incapable of providing a determinate answer.

Whereas the arguments of the narratives in the previous section obtain their legal validity, meaning and relevance within the mentioned conceptual schemes that are the 'deep structure' of the debate, such as of sovereignty/human rights, monism/dualism etc., these dichotomies are in fact incapable of resolving the disagreements which makes them misleading. In the rest of this section it is attempted to follow this 'deep-structure' of the international criminal law argumentation to argue that this structure fails to adequately account for the dynamics of the immunities in the international law.

[316] Koskenniemi, FROM APOLOGY TO UTOPIA, *supra at* 7-8.
[317] *Id,* 10-11.

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3.2.1 Sovereignty v. human rights and the rule of law

One of the principal dichotomies where the argument often locates itself is the contraposition of the principle of state sovereignty as against the human rights. Thus the arguments in favor of immunity are often assumed as originating from the state sovereignty, which is regarded as a political, extra-legal and arbitrary notion, whereas the arguments in favor of the denial of immunity for international crimes as those rooted in the prevalence of the human rights and the rule of law in the international reality. The sovereignty is thus taken to mean an institutionalized exception in the wide, almost Schmittean sense of this word, as the opposite and the antithesis of the rule of law and human rights. Thus such a metaphor would suggest a picture of humanizing and pacifying the evils of the international power relations empowered by the unrestricted sovereignty via an individual accountability for the grave violations of the human rights that constitute international crimes.

On the other hand the human rights and the international rule of law arguments, the "descending" patterns of argument, could be confronted with the ascending arguments about the sovereignty being violated by the encroachments upon state sanctioned activities. Turning to the narratives constructed in the previous section, one could see that the arguments from the "US perspective" about the "deficiencies" of the Rome Statute and the universal jurisdiction could be regarded along these lines as ascending arguments, where immunity should shield and protect the integrity of state actions. Thus the argument there goes that by holding US nationals accountable for the state-sponsored

[318] KENNEDY, INTERNATIONAL LEGAL STRUCTURES, *supra at* 7-8.

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crimes without the US ratification of those actions violates the sovereign equality of states. The pronouncement on the crimes that include the state participation and official capacity as an objective element of the crimes involved can trigger state responsibility and cannot be meaningfully separated from it. One could argue even that the individual responsibility for crimes committed in official capacity is a state responsibility-*nouveau*, criminal punishment of the state that is no more personified in one sovereign, but dispersed throughout a range of officials acting as states.

As we could see the attempts to divorce the crimes from the official capacity and push them into the private one remain unconvincing and render the achievements of individual responsibility to appear like pyrrhic victories by repressing state presence and circumscribing the human rights atrocities into the category of ordinary crimes. However acknowledging the state presence elements makes the argument of the denial of immunity as sovereignty rather narrow-minded, ignoring the state-responsibility dimension of the individual responsibility in the cases of relevant crimes.

The narrative of the international civil society, or actually of a segment of it, can also be argued to engage in this argumentation, however on the diametrically opposite side, regarding the sovereignty immunity as a mere impunity that should not stand on the way of the worldwide enforcement of the international human rights, that are translatable as the individual responsibility vs. immunity/impunity argumentation. The international rule of the human rights law should overcome here the sovereignty as the political and irrational variable, sovereignty as a kind of decisionism that is not within the legal sphere.

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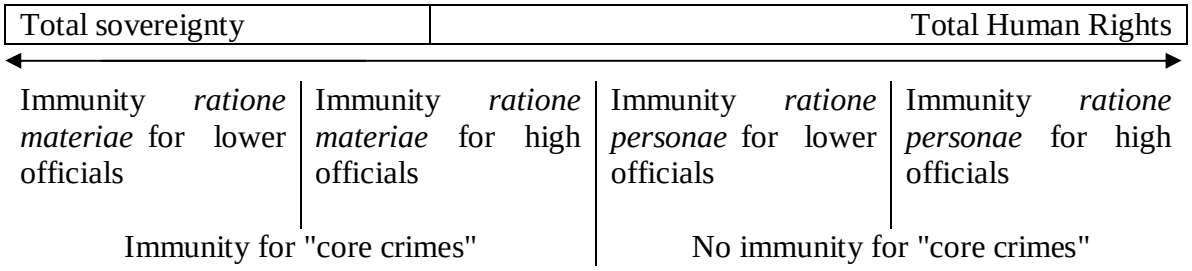
A more sophisticated proposal is advanced by the constitutionalist narrative in this regard. It also regards prosecutions as the transgressions of the sovereignty and moreover distinguishes between the more serious violations of sovereignty, such as prosecution of incumbent state officials, and less serious ones that merely protect state dignity. The violations are treated as more and less serious according to the perceived hierarchy of values of the international legal order. Furthermore, this account also maintains the distinction between more and less "serious" human rights violations, according to the evolving notions of the "radical" and ordinary evil.

One could imagine a continuum that pictures the position of this narrative along the sovereignty v. human rights disagreement scheme, the continuum with the opposing ends of human rights and state sovereignty within which the discourse could be situated approximately in this way:



However it could be shown that these arguments are in fact "reversible"[319], in a sense that both descending and ascending arguments can be made within the sovereignty vs. human rights argumentation scheme, making the latter a rather misleading metaphor for thinking on the issue. According to Koskenniemi's thesis, the meanings of these legal concepts are not intrinsic but rather provided by the "conceptual scheme" in which they appear and in

[319] KOSKENNIEMI, FROM APOLOGY TO UTOPIA, *supra at* 503-512.

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fact they "themselves contain both principles within them" because we might well "reverse these initial associations".[320]

Thus we do also conceive of sovereignty not as an extra-legal and arbitrary obstacle to the rule of law and human rights constructed by such "rudiments" of international law as states, but also as of an ultimate expression of the human right to self-determination, the right of societies and peoples to build and maintain the system of normative values and meanings, where human autonomy is best enhanced according to the varying moral and metaphysical agendas. The sovereignty is there, as Henkin puts it, as the legal expression of the right to self-determination of peoples that are assumed to have their own vision of 'The Good', to which they are entitled to strive via the concept of the state, the right that justifies sovereignty in order to achieve and implement that vision[321]. State sovereignty is also a part of the international legal order that ideally at least institutionalizes the pluralisms of the normative orders via states as proxies to the realization of the collective context of those normative orders where human autonomy and dignity can be most effectively enforced. The right to state sovereignty is thus nowadays ultimately justified through the reliance on human rights.

On the other hand, human rights as legal constructs assume the existence of states; being the legal claims of individual upon the society[322] that cannot meaningfully exist and be protected outside the state system; the language loses its relevance and meaning without reference to sovereign states against whom and by whom they are enforced and claimed. The human rights discourse follows a kind of formula where 'individual makes legal

[320] Id at 505.
[321] LOUIS HENKIN, INTERNATIONAL LAW: POLITICS AND VALUES 104 (1995).

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claims against the sovereign state, using one hand of the government to constrain and normativize another' and on the international scale assuming that the individual has the right under international law to do so. If we remove states from this formula, the latter will not function, and the human rights law will have to qualitatively transform its agenda constructing new agents of enforcement for a different world structure and order.

The same holds true with regard to the international criminal justice; it is widely believed to be based on the radical departure that is constituted by the Nuremberg paradigm of International Law that challenges and transforms state sovereignty based international system. We should not disregard however how close and intimate is the relationship between state sovereignty and international justice. The latter is always enforced by states and states shape international criminal law as a dimension of statehood that checks against shadow situations where states betray liberty and individual dignity that they are supposed to enhance. There is a dialectical and proportional relationship where states enforce international criminal law and the latter is the guardian against states; without one there is no other; we can have strong international justice only with strong state sovereignty and vice versa.

Thus this dichotomical opposition of human rights and state sovereignty is not as simple and determinate as it might appear. We can think of the immunity either as protective of the statehood expressing freedom and the right to self-determination or as of impunity; we can picture the international justice as the enforcement of human rights or as an interference with other state's exercise of its self-determination. This line of the international legal argument also turns out to be reversible, that is capable of being

[322] HENKIN, THE AGE OF RIGHTS *supra*, *at* 2.

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projected with a meaning along both ascending and descending argumentative patterns[323] and the fact of their being presented and advanced by different states remaining the only meaningful difference between them[324].

Let's think of an example of the reversed arguments along this scheme; thus the account named a "US perspective" could easily construct a human rights and a rule-of-law argument in favor of its position. Suppose the argument goes that the individual responsibility is very often a 'state responsibility-*nouveau*' and that any violations of the law of state responsibility, in particularly creation of a 'backdoor' state responsibility mechanism that purports to be legitimate without state consent, go against the international rule of law and violate the principles of non-intervention and sovereign equality of states, that ultimately protect the human right to self-determination. This is how one can get to a human rights and the rule of law argument for a "US perspective". What is an arbitrary exception for the one side can be translated as a human rights protection on the other, and vice versa.

In a similar fashion the perspective of the international civil society narrated above construes its arguments against particular arrangements of immunity assuming that the ideal of human rights is antithetical to the notion of sovereignty. Once sovereignty does not necessarily mean an arbitrary exception to the rule of law protective of human rights, the argument would not stand. However even if by sovereignty one means nothing but a Schmittean type of decisionism and "exception"-ism (as contrastable to the Kelsenian

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[323] Koskenniemi, FROM APOLOGY TO UTOPIA, *supra* at 504
[324] *Id at* 509, 512.

sovereignty as a legal and normative order)[325], it is still possible to point that this narrative also employs this kind of argument itself when referring to the sovereignty/power redistribution argument as follows.

As a new type of actor influencing the international relations the international human rights networks could be argued to translate into the language of human rights their claims and aspirations to depreciate the legal powers of states, while themselves remaining unaccountable and, in this sense, undemocratic institutions. In the previous section we have seen the arguments from this account suggesting that the power to take decisions in the international realm should be taken as much as possible away from the political branches of the governments, when denying veto powers of such political branches over universal jurisdiction trials, or insisting that the decisions of the validity of the BIA's and the Security Council resolutions under the Article 16 of the Rome Statute should be taken away from the states' discretion into the realm of supranational and supra-state decision making. Frequent resorts to the "who-decides" types of arguments, often within the same discourse as the "US perspective" (of e.g. the law of treaties as is the case with the Rome Statute interpretation) could signal instead about the elements of the Schmittean type of sovereignty arguments being 'unconsciously' present in the narrative.

The paradox of human rights as immunity and of "no-immunity" as sovereignty-type claim can also turn the construction of the same argument from the perspective of the European constitutionalist narrative upside down. Once immunity can no longer be contrasted to the human rights and where accountability might go against human rights,

[325] *Id at* 226- 233.

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the arguments based on the hierarchy of values that identify immunity as sovereignty lose any validity.

Once it is possible to project both immunity and its denial with the meaning of being protective of human rights and the rule of law, and at the same time with the meaning of the sovereignty in the different senses of that word, it becomes useless to rely on the sovereignty versus human rights kind of argumentation in resolving contradictions and disagreements on the divisive issues of immunities law. Whereas human rights and sovereignty are probably the main normative arguments, they are not the only ones used, and the next schemes provide further examples of the types of arguments that could be used in the international legal discourse.

3.2.2 Positive v. natural law

Another important argumentative structure of the international law concerns the nature of its sources. Positivists argue that the norms of the international law are created by the sovereign states according to their consent and consensus via treaties and customs and ultimately represent the behavior of states, that all legal rules must be traced back to the State or otherwise excluded; strictest positivists do not hesitate to deny the existence of International Law. Notably positivism refuses to accept propositions that there is any "natural" law that can be derived in some a-priori manner from some rational principles[326]. Thus in the *Lotus* case positivism arguably prevailed where the Court has

[326] Roberto Ago, *Positivism*, in ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW, Vol. III 1072-1079 (Max Planck Institute for Comparative Public Law and International Law ed.,1997); *See also* PETER MALANCZUK, AKEHURST'S MODERN INTRODUCTION TO INTERNATIONAL LAW 16, (1997); *See also* Grigory Tunkin, THEORY OF INTERNATIONAL LAW (1974) (explaining the theory of Concordance of the wills of States)

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held that the international law "emanate[s] from their [states'] own free will as expressed in conventions or by usages"[327]. Contrary to this natural law approaches assume that the legal norms derive from the objectively existing legal order that is beyond and above the states. Such natural law is inherited by people that should "discover" it in a rational way and which therefore is "unchangeable" by human legislators[328].

This debate can have normativizing implications in the context of the immunity debates as well. Historically natural law was invoked to challenge the claims of immunity and related sovereignty-based defenses in Nuremberg and other situations where positive law, generated by the states whose actions were challenged, was suggesting the contrary and thus was considered inappropriate. There is a tendency to bind the individual responsibility to the natural law accounts. It stems from the intuition that the positivism can be regarded as protective of states and their interests, whereas the idea of the inalienable and inherent rights of the individual, as well as the corresponding duties not to violate them, gravitates towards supra-state, external to state consent values, and can transcend them.

It is not at all surprising in this regard that very often the arguments that there is no immunity for human rights violations are connected to and logically inferred from the *jus cogens* norms of the international law[329], that are sometimes regarded as concepts problematic to the positivist assumptions; these and other peremptory concepts, such as

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[327] *See* The Case of the S.S. "Lotus" (France v. Turkey), Judgment No. 9, P.C.I.J. Series A No. 10, 1927, *also at* http://www.worldcourts.com/pcij/eng/decisions/1927.09.07_lotus/.
[328] Jose Puente Egido, *Natural Law*, in ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW, Vol. III 515-520 (Max Planck Institute for Comparative Public Law and International Law ed.,1997).
[329] BASSIOUNI & WISE, AUT DEDERE AUT JUDICARE *supra at* 3, 22-28, 52; Bassiouni, CRIMES AGAINST HUMANITY *supra at* 489-99.

the *erga omnes* obligations, are legal norms that are non-derogable and exceed the legal ability of states to modify and alter their contents, which is difficult to reconcile with the view that the law is essentially a product that emanates from the free will of the states, as *Lotus* held.

The accounts of the positivism and natural law inspire and inform the legal positions of various actors, and are reflected in the narratives they generated. Thus the argument of the 'US narrative' against the jurisdiction of the ICC over the nationals of the non-partisan states, starting from the premises of its illegality also suggests that it cannot be binding, no matter its content and subject matter, without being properly ratified by the states concerned. In this sense the argument is not only against "backdoor" state responsibility, but also that the Rome Statute's being concerned with the human rights, inalienable and inherent (and the universal jurisdiction in this regard as well) is irrelevant and the state concerned should ratify the external jurisdiction over its acts. On the contrary the human rights narrative could suggest that the individual responsibility, as enforcing the inalienable and universal human rights, *ought to* be valid and acceptable without and beyond the consent of the states and governments.

It is however misleading to expect that the natural vs. positive law controversy is capable of explaining or providing a determinate answer to the questions. These doctrines perpetually rely and reinforce each other, but neither can be put forward without ultimate reliance on the other.

Thus naturalism needs to refer to the positivism to demonstrate some objectiveness of its claims and escape the accusations of arbitrariness. On the other hand the positivism has

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to turn to naturalism to answer "why does behavior, will or interest create binding obligations"[330]; Kennedy shows that the reliance on a 'pure' consent as the source of obligation, or the so-called 'hard' sources rhetoric, when pushed to the logical end begs the question of what makes an obligation binding if an agent no more consents to it, and the answer would usually invoke a *pacta sunt servanda* kind of principle, an argumentation of a "soft" or persuasive style[331].

Furthermore both pro- and contra- immunity arguments can be presented in both positivist and naturalist language; actually any of such claims would normally involve both kinds of rhetoric. To be sure, no-immunity claims, apart from relying on natural law, also have to refer to the positivist evaluation of state practice and consensus to confirm their validity. At the same time the immunity of state officials, besides being reflected in the international treaties and customs, is also grounded in the "soft" rhetoric of the state sovereignty as the 'ought to' of the international society of peoples.

Thus the "US perspective" not only claims that the doctrines and rules of international law permitting the jurisdiction of third states in the cases involving the state responsibility-*nouveau* have no basis under the existing treaty or customary international law, as indicative of state consent, but also refers to the principles of sovereign equality of states, principles of the international treaty law that treaties are not binding on third states and that allowing sham trials would violate human dignity. Moreover when discussing the argument about the 'global treaties' that "serve the common interest of

[330] KOSKENNIEMI, FROM APOLOGY TO UTOPIA, *supra at* 308.
[331] KENNEDY, INTERNATIONAL LEGAL STRUCTURES *supra at* 29-34 (describing the argumentative structure of the sources doctrine as a combination of the "hard" or consent based, and "soft" or authoritative styles, whereas positivism and naturalism are seen as "corrupting" these pure models).

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humanity", it was suggested that they are best achieved "by the U.S. remaining free in its peacemaking and humanitarian activities"[332], in other words an inherently "soft" and authoritative rhetoric (however disputable the actual authority of such claim might appear to others).

On the other hand the narrative of the international civil society also brings arguments in the positivist discourse, such as the reliance on the treaty law and the interpretation techniques in the case of the Rome Statute or references to the state practice and *opinio juris* that deny immunity at the universal jurisdiction trials, such as the impressive research conducted by the Amnesty. This is done in order to argue that obligations to fight the impunity for human rights violations are not only deriving from the inalienability and universality of the human rights, a 'soft' or authoritative rhetoric, but also because there is international custom created under by the state practice and recognition that produces binding obligations upon member states of the international community.

Even more explicit are these styles employed in the 'constitutionalist' narrative. It does employ authoritative rhetoric maybe even more than both of the previous ones, suggesting an elaborate "hierarchy of values" and explicitly proposing a vision of the 'radical evil', furthermore balancing the different claims to immunity according to the values that underlie them. However this narrative also relies on the jurisprudence, when necessary criticizing as "erroneous" or "superficial" the law that does not fit neatly into its rigid constructs, e.g. suggesting that the ICJ was wrong in not distinguishing *ratione materiae* and *ratione personae* immunities. Nevertheless there is a "hard" argument when

[332] Morris, *High Crimes and Misconceptions supra at* 52-53

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the law as described is argued to be representative of the international treaty and customary law.

Being in themselves indeterminate and incomplete, the naturalism and positivism cannot adequately account of the immunity v. individual responsibility disagreements. Arguments provided by the narratives employ both "hard" and "soft" argumentation rhetoric, that are while not being identical to the natural or positive law arguments, constitute the deep-structure of the sources discourse. Both natural law and positive law arguments could be made pro and contra immunity, thus it becomes impossible to base the claims on the prevalence of one of the views of what is considered to be the "ancient" debate on the sources.

3.2.3 Monism v. dualism

Yet another argumentative structure is the monism vs. dualism theoretical controversy concerning the interrelationship between municipal and international law. Whereas dualists suggest that both international and municipal legal systems have separate subject matters and do not have supremacy over or affect the validity of each other, monists would consider that international law is supreme even within the municipal sphere[333]; as Kelsen argues the basic norm of the international law provides legitimation for both national and international orders[334].

The descriptions of the pro-immunity accounts, such as the "US Perspective" involve the dualist assumptions of the municipal and international law interaction: the 'Hobessian'

[333] *See* IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 31-32 (2003).
[334] KELSEN, PRINCIPLES OF INTERNATIONAL LAW, supra.

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attitude towards international relations, the statement that the "two classes of powers are different" and the deferential attitude of courts to cases involving acts of foreign governments all point in this direction, and so do the arguments of 'judicial tyranny' and of the necessity of political control (again deference). Immunity could be translated here as non-intervention by courts into the realm of different types of affairs, where domestic judicial solutions and standards are no more adequate. Why would courts be so deferential if the questions involved are inseparable from the domestic legal issues, in fact both being parts of the "universal legal order".

On the other hand monism that treats states with "dislike" and "disrespect"[335], and strongly influences the "constitutionalist" narrative could be argued to be more skeptical of immunities and favorable to the individual responsibility. Unlike the dualist accounts, that could altogether refrain from the discussion of 'political questions', monist narratives would rather treat them as a matter of balancing within the hierarchy of values of the global juridical order.

However this kind of argumentation would not stand critique either. In fact both monist and dualist arguments are also indeterminate and have to rely on each other to be convincing, have to combine ascending and descending patterns. At a deeper level the descending rhetoric is that international law validates and prevails over municipal legal systems, whereas the ascending argument is that on the contrary states are the source of the international law's validity. These are somehow "pure" modes and different theories combine them to the various extents. However the dialectics of the international vs. municipal legal orders entail constant and perpetual mutual reference to each of these

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orders: states create international order that recognizes and constructs states. Municipal orders derive validity from the international, and the latter from the plurality of states.

A monist conception has to refer to the plurality of states that are its constitutive power. Informed by constitutionalist narratives for the world community, monism suggests that it is international law that validates municipal, however the former does not obtain its power and legitimacy from vacuum, but rather from states: otherwise it risks becoming a utopian claim at best, and a mere disguise for political ambitions of some states in a worse case.

On the other hand, dualism is forced to refer to a descending kind of rhetoric; if the argument goes that the international and national orders have different subject matters, the next step is always to determine whether a disputed matter lies within domestic or international jurisdiction, and in arguing so the dualist narrative will inevitably refer to some international rules and principles that would govern this division of jurisdictions, otherwise the argument would be unacceptable and untranslatable into any international legal vocabulary. The dualist rhetoric will have to rely on a monist type of claims.

It is therefore possible to reconstruct arguments that would lead to the dismissal of the monism/dualism scheme as an appropriate argumentative structure. Monism could well support immunity; 'monist' international law could be imagined as a kind of super-federal or consociationalist entity with immunity as an important element of the decentralized enforcement mechanism. Dualism could produce a no-immunity account

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[335] BROWNLIE, *supra*.

easily by allocating individual responsibility matters into the domain of international law, leaving municipal law to be a separate and intact domain.

From the foregoing one may suggest that the disagreement described in the beginning cannot be explained away within the conceptual schemes of sovereignty/human rights, naturalism/positivism and monism/dualism, this argumentation is reversible and indeterminate, and therefore misleading. All arguments along the disagreement map of the three narratives provided above cannot ultimately refute each other, as the international legal argumentative scheme allows the making of contradicting and opposing arguments that have equal force they obtain within such a scheme.

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CHAPTER 4: UNIVERSAL JURISDICTION AND THE "*ARREST WARRANT*" CASE

The hypothesis was set forward in previous chapters, that in applying individual responsibility international justice leaves out certain important aspects of the human rights atrocities that have to deal with the wider complicities of states and societies that whether actively or passively contribute to the realization of such atrocities; that the rejection of the collective complicities as contrary to human dignity is not to be taken for granted, whereas the measures of responsibility could be regarded as the dialectical unity of 'positive' and 'negative' responsibility; that the international justice regime discursively 'represses' the significance and relevance of the collective complicities from the outset, such repression constituting the discursive and "operational" closure of the international justice regime, rationalizing and normalizing the 'radical evil' of atrocities, which allows their prosecution and constituting the international justice as an international regime, heterogeneous to the state-centered international legal system. Furthermore it was argued that the 'repressed' political tensions concerning the distribution of responsibility are redirected into legal disagreements (with the substance of political tensions), primarily over the jurisdictional and immunity issues, marking the 'return of the repressed', while the latter argument has to deal with the realist explanation of the international justice regime, due to its assumption that the legal disagreements overlap to different extents with the political tensions that account for their intensity and determine their outcomes, that the legal regimes themselves cannot stop short of becoming parties of such political tensions and that the international legal argumentation concerning the immunity and international justice is in itself indeterminate.

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This chapter examines the landmark *Arrest Warrant* case and the situation with the modern universal jurisdiction concept to demonstrate this thesis and that the existing disagreement structures cannot convincingly resolve the repressed tensions. It starts with a brief overview of the universal jurisdiction theories and arguments concerning the immunity from universal jurisdiction, then proposes a case study of the Belgian law on universal jurisdiction's perspective and that of the International Court of Justice as expressed in the *Arrest Warrant* decision, to analyze the discourse for references, overt and *sous rature*, to the traces of 'repressed' state presence as well as the actual repression and the return of the repressed tensions.

4.1 Discourse of Universal Jurisdiction

When acting under universal jurisdiction a state can prosecute regardless of the place of the commission of crime, nationality of the offender or the victim, and even if the act was not prejudicial to its own security and interests. Universal jurisdiction is however often limited to the most grave human rights violations and some other international crimes[336]. Princeton principles define universal jurisdiction as criminal and based "solely on the nature of the crime."[337]

It has been noted in literature[338] that historically universal jurisdiction comprises two rationales. The older one is related to the crimes of slavery and piracy, when at the 1815 Vienna Congress it was decided to allow prosecutions of these crimes on basis of

[336] M. Cherif Bassiouni, *Universal Jurisdiction for International Crimes: Historical Perspectives*, 42 Virginia Journal of Int. Law 81, 82 (2001).
[337] PRINCETON PROJECT ON UNIVERSAL JURISDICTION, THE PRINCETON PRINCIPLES ON UNIVERSAL JURISDICTION 38 (Program in Law and Public Affairs, Princeton University 2001).

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universal jurisdiction. The main justification of such development was that whereas most of these crimes were committed in the areas that were beyond territorial jurisdiction of any particular state, such as high seas, it would have been impossible to otherwise deal with these crimes. Thus it was not the gravity, but rather specificity of the crime that justified application of this doctrine.

The modern rationale of universal jurisdiction doctrine is rooted in peremptory concepts of international law, and assumes that some crimes are directed against the whole international community and can thus be qualified as *delicta jurit gentium* (offenses against international law)[339] and the perpetrators of such crimes being considered "common enemies of mankind"[340]. Hence as the international community lacks centralized authority and as any state has legitimate interest in prevention and punishment of such crimes, any state can assert its jurisdiction over the case. A state in such cases is assumed to be acting on behalf and as an instrument of international community[341]. Although the exact list of crimes in respect of which exists universal jurisdiction remains unclear the Princeton Principles include here the genocide, crimes against humanity, war crimes, torture, crimes against peace, slavery and piracy[342]. Bassiouni adds to this list apartheid, hijacking, hostage taking and some other crimes for which international conventions provide universal jurisdiction in some form[343].

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[338] SUNGA, INDIVIDUAL RESPONSIBILITY *supra at*102.
[339] *See* Attorney General of Israel v. Eichmann, 36 I.L.R. 18 (1961, District court decision,) para 12, affirmed in 36 I.L.R. 277 (1962, Israeli Supreme Ct.), *also at* http://www.nizkor.org/hweb/people/e/eichmann-adolf/transcripts/ (holding that universal jurisdiction can be established in respect of the crimes against the International Law itself ("delicta juris gentium"), which are the crimes that "offended the whole of mankind and shocked the conscience of nations").
[340] *See* Kenneth C. Randall, *Universal Jurisdiction Under International Law,* 66 Texas L.R. 785 (1988).
[341] *Id*.
[342] Princeton principles *supra*.
[343] M. CHERIF BASSIOUNI, INTERNATIONAL CRIMINAL LAW, vol.1 (CRIMES) xviii, (1986).

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Universal jurisdiction in different forms and extents is provided for in the international treaty law, with respect to crimes such as piracy[344], slavery[345], war crimes[346], apartheid[347], torture[348] and some other crimes[349]. Whereas the genocide convention does not provide for universal jurisdiction, merely declaring the genocide to be a crime under international law and providing that persons accused with genocide "shall be tried by a competent tribunal of the State in the territory of which the act was committed, or by such international penal tribunal as may have jurisdiction"[350], scholars and jurisprudence confirm that the exercise of universal jurisdiction over genocide has become a part of customary international law[351].

It is also worth mentioning that the International Law Commission in the Draft Code of Crimes against the Peace and Security of Mankind provides for the establishment of universal jurisdiction over the genocide, crimes against humanity, crimes against United

[344] United Nations Convention on the Law of the Sea, Oct. 7, 1982, art. 150, U.N. Doc. A/CONF.62/122.
[345] *See* Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others, Mar. 21, 1950, art. 11, 96 U.N.T.S. 271
[346] Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, art. 50, 6 U.S.T. 3114, 75 U.N.T.S. 31; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, art. 51, 6 U.S.T. 3217, 75 U.N.T.S. 85; Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, art. 130, 6 U.S.T. 3316, 75 U.N.T.S. 135; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, art 147, 6 U.S.T. 3516, 75 U.N.T.S. 287; Protocol I Additional to the Geneva Conventions of Aug. 12, 1949, Dec. 12, 1977, art. 85, U.N. Doc. A/32/144, Annex I.
[347] International Convention on the Suppression and Punishment of the Crime of Apartheid, 30 Nov. 1973, art. IV (b), 1015 U.N.T.S. 243, *also at* http://www.unhchr.ch/html/menu3/b/11.htm.
[348] Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 10 Dec. 1984, art.5, 1465 U.N.T.S. 85, *also at* www.unhchr.ch/html/menu3/b/h_cat39.htm.
[349] Bassiouni, *Universal Jurisdiction*, supra.
[350] *See* Convention on the Prevention and Punishment of the Crime of Genocide, 9 Dec. 1948, art. 1 & 6, 78 U.N.T.S. 277.
[351] Theodor Meron, *International Criminalization of Internal Atrocities*, 89 Am. J. Int'l L. 554, 569 (1995); *See also* RATNER & ABRAMS, ACCOUNTABILITY FOR HUMAN RIGHTS ATROCITIES *supra at*164. *See also* Attorney General of Israel v. Eichmann, *supra at* p. 22 (refusing to follow the provision of the article 6 of the convention, claiming that it has not acquired customary status and remains a mere treaty provision). *See also Prosecutor v Ntuyahaga*, Case No. ICTR-98-40-T, 18 March 1999 (encouraging all states to exercise

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Nations and associated personnel and over the war crimes[352]. Furthermore the *aut dedere aut judicare*, that is a rule that "requires a state which has hold of someone who has committed a crime of international concern either to extradite the offender to another state which is prepared to try him or else to take steps to have him prosecuted before its own court"[353] that approximates universal jurisdiction is some senses is nowadays included into a large number of treaties, dealing with grave human rights violations and other international crimes.

Reydams distinguishes three types of universal jurisdiction, namely the "co-operative general universality" that applies to a wide range of crimes forbidden in most legal systems and is basically the "secondary or subsidiary jurisdiction of the *custodial State* over *all serious offenses* if the extradition of the suspect is impracticable", the "co-operative limited universality" that is the jurisdiction "of the *custodial State over international offenses only*" that is based on bilateral cooperation between States and does not endorse rights of the third states (finally expressed in the *aut dedere aut judicare* regime) and finally the "unilateral limited universality" which is the "primary right of *any State* to try *international offences* without regard to the offender's whereabouts"[354].

With respect to the last version of universal jurisdiction that basically was described by Randall, one cannot fail to notice its relationship with the peremptory concepts of international law; the proximity of the notions of the "common enemy of mankind" and

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universal jurisdiction over "genocide, crimes against humanity and other grave violations of international humanitarian law").

[352] Draft Code of Crimes against the Peace and Security of Mankind (1996), Art. 8., *supra.*

[353] Bassiouni & Wise, AUT DEDERE AUT JUDICARE *supra at* 3.

[354] Luc Reydams, UNIVERSAL JURISDICTION: INTERNATIONAL AND MUNICIPAL LEGAL PERSPECTIVES 28-42 (2003) (original emphasis).

the "offenses against international law" to the *jus cogens* norms and *erga omnes* obligations. If in cases of traditional jurisdiction the link between individual and the state necessary to establish jurisdiction is the legitimate interest of the state as such, the case is completely different with the universal jurisdiction. The main point of the universal jurisdiction is however that the interest of the state is that of a member of the international community is involved to punish crimes which otherwise are not necessarily of its concern. This interest is deemed legitimate because it is assumed that there is a certain scope of values common to all nations on which states have agreed that they are non-derogable and that their violation shall not be tolerated. Thus for example in the *Furundzija* case the ICTY held that one of the consequence of the *jus cogens* status of the prohibition of torture was that "every State is entitled to investigate, prosecute and punish or extradite individuals accused of torture, who are present in a territory under its jurisdiction"[355]

The modern theory of universal jurisdiction, besides the cooperation in criminal affairs between states, is the decentralized enforcement of the international criminal law by states. It involves one or many states acting as international community. If some states support and sponsor criminal policies of genocide or crimes against humanity, betraying their functions of protecting and enhancing human dignity and freedom, how would international law react? The ultimate enforcers of international law (by virtue of their monopoly on enforcement of international law) are states, and state sovereignty is the primary mechanism for international law. States create international law that posits states. Thus international justice, as a part of international law, is a face of state sovereignty as

[355] Prosecutor v. Anto Furundzija, Paras 153-156, IT-95-17/1-T (Dec. 10, 1998), *at*

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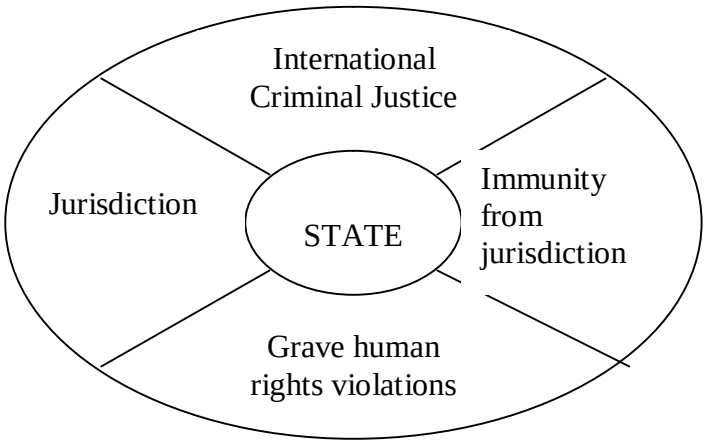
well; different from the other face that is the criminal state and criminal state policies. Once the international law is to condemn crimes such as crimes against humanity committed by some states, other states should enforce the prosecution and condemnation.

The question is however whether the wider complicities of the state(s) are exonerated and avoided when dealing with the crimes within the modern discourse of universal jurisdiction, whether the state presence is to be denied as irrelevant and ephemeral and individuals prosecuted in their individual capacities only. Consider a theory that just as international justice signifies state presence, so do the state's jurisdiction (including universal), immunity from jurisdiction and the grave human rights violations. All these instances are faces of state sovereignty in international law, and all should be accounted when discussing the immunity from universal jurisdiction. If we could imagine a simple mandala of state sovereignty in this regard it would perhaps look like this.



At least two important consequences that would follow from repressing state presence in trials for grave human rights violations are that the victims' dignity is degraded by diminishing the magnitude of the offense suffered and that the political tensions

http://www.un.org/icty/furundzija/trialc2/judgement/index.htm.

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concerning state presence are externalized from legal considerations. In short there is no shortcut to combating grave human rights violations; we ought to expand the vocabularies of international criminal justice to cognize state presence and complicities, otherwise international justice faces self-denial by paradoxical consequences of prosecution attempts in futile pursuit of avoiding state sovereignty language.

4.2 Belgian law on universal jurisdiction

This part of the chapter will be considering the approach of the Belgian universal jurisdiction law to the atrocities committed in the Great Lakes region of Africa, particularly the instance of the failed prosecution attempt of then incumbent Foreign Minister of the Democratic Republic of Congo (DRC) Yerodia that culminated in the ICJ litigation.

The UN Secretariat has been involved with the conflicts in Great Lakes since 1994 and the atrocities that were taking place in their course[356], and in 1997 the Special Rapporteur of the Commission on Human Rights warned of genocide that might be taking place in eastern Congo[357]. A team was established by the Secretary General to investigate the alleged atrocities in 8 June 1997, but had to withdraw "because of the total lack of cooperation from the Government of the Democratic Republic of the Congo"[358], filing a

[356] William Schabas, GENOCIDE IN INTERNATIONAL LAW: THE CRIMES OF CRIMES 477 (2000).
[357] 'Report on the Situation of Human Rights in the Democratic Republic of the Congo (Former Zaire), Submitted by the Special Rapporteur, Mr. Roberto Garreton, in Accordance with Commission Resolution1997/58', UN Doc. E/CN.4/1998/65; 'Report on the Situation of Human Rights in the Democratic Republic of the Congo, Submitted by the Special Rapporteur, Mr. Roberto Garreton, in Accordance with Commission Resolution1998/61', UN Doc. E/CN.4/1998/31 (cited from Schabas, *id at* 473).
[358] Report on the situation of human rights in the Democratic Republic of the Congo, submitted by the Special Rapporteur pursuant to Economic and Social Council decision 1998/260 of 30 July 1998, 10

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report according to which "serious violations of human rights or international humanitarian law" have taken place in DRC and that some of the killings constituted crimes against humanity, pointing to the causes such as "a vicious cycle of violations of human rights and revenge, fuelled by impunity"[359].

The Security Council took notice of the report and condemned the massacres some of which "may constitute genocide", invited the international community to assist DRC in establishing "a judicial institution staffed by competent, independent and properly paid people who will apply internationally recognized rules of procedure" as well as to "support programmes for the rehabilitation of victims of the war and human rights violations, and programmes to reduce ethnic tensions and promote respect for essential dignity and equal rights for all persons" but fell short of establishing another tribunal as in the cases of Former Yugoslavia or Rwanda[360], the stance of the Security Council strongly criticized by the Amnesty International[361].

International law now could not have had a better agent for enforcing international justice than the decentralized mechanism of universal jurisdiction exercised by the plurality of states. While speaking universal jurisdiction the Belgian approach discussed here characteristically translates the situation with atrocities in DRC as the matter of ordinary criminal law charged with more far-reaching jurisdiction provisions than usual.

September 1998, A/53/365, *at* http://www.unhchr.ch/huridocda/huridoca.nsf/0811fcbd0b9f6bd58025667300306dea/704a278146ea2faa802566b2005911ea.

[359] *See* Letter from the Secretary-General addressed to the President of the Security Council (29 June 1998), *at* http://www.unhchr.ch/Huridocda/Huridoca.nsf/(Symbol)/S.1998.581.En.

[360] UN Security Council, Press Release SC/6545 (13 July 1998), *Security Council Condemns Massacres, Humanitarian Law Violations In Zaire/Democratic Republic of Congo, at* http://www.un.org/News/Press/docs/1998/19980713.sc6545.html.

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The prioritization of individual vs. collective, of negative vs. positive aspects of responsibility allows to speak of the atrocities as of some individuals violating criminal law, doing something they are ordinarily prohibited to do, while unspeaking their 'banality' and 'radical'ness', obviously condensing them to particular villains, rather than recognizing the wider collective and state complicities that could be involved in their organization and perpetuation; disregarding that these atrocities are the darkest manifestation of the state sovereignty yet, rather than mere individual transgressions or immorality. However to the 'unthinkable' and 'unspeakable', radical and banal, state conceived and individually and collectively performed, the Belgian law could only speak with a certain surrealism as it might appear the liberal individualist notion of individual criminal responsibility.

4.2.1 Surrealism of the individual responsibility perspective

Pursuant to its obligations under the Geneva Conventions of 1949 and Additional Protocols to them of 1977, Belgium passed the Act of 16 June 1993 that dealt with grave breaches of these conventions and on 10 February of 1999 passed the "Act concerning the punishment of grave breaches of international humanitarian law" amending the law of 1993[362].

The subject matter reach of the Belgian law includes the crime of genocide, defined according to the genocide convention; crimes against humanity that are construed "[i]n accordance with the Statute of the International Criminal Court" and "committed as part

[361] Amnesty International, *UN Security Council shamefully abandons victims in Democratic Republic of Congo* (1998), AFR 62/25/98 *at* http://web.amnesty.org/library/Index/ENGAFR620251998

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of the widespread or systematic attack directed against any civilian population"(including deportation, torture, persecution etc.); and the grave breaches to the Geneva Conventions and Additional Protocols to them[363].

Article 7 of the Act that had most frequently come into focus established the universal jurisdiction of Belgian courts with regard to the crimes in question, providing for jurisdiction over crimes committed by Belgian nationals abroad and generally "irrespective of where such breaches have been committed", whereas in the latter case the "filing of complaint by the foreigner or his family or official notice by the authority of the country in which the breach was committed" was required[364].

Atrocities at question are seen by the Belgian law through the prism of solely criminal responsibility of individuals, nothing else is mentioned explicitly in the law concerning the crimes; once states could prosecute in certain circumstances a number of crimes committed abroad or by foreign nationals, such as plane hijackings[365] or drug offences[366], why should then anything prevent a state from prosecuting certain crimes worldwide, especially once they are criminalized through international law.

It is perhaps a part of the problem that there is something more to these crimes than ordinary crimes, something not directly present in but hinted at in the Belgian law; apart

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[362] 38 I.L.M. 918 (1999); for a review of the development of this legislation piece *see* Ratner, *Belgium's War Crimes Statute*, *supra*.
[363] Act Concerning the Punishment of Grave Breaches of International Humanitarian Law, *id at* art. 1-3.
[364] *Id*, Art. 7.
[365] See e.g. Hague Convention for the Suppression of Unlawful Seizure of Aircraft, 14 Oct., 1971, Art. 7, U.N.T.S. 1232; Montreal Convention for the suppression of unlawful acts against the safety of civil aviation, 23 Sept., 1971, Art 7, U.N.T.S. No. 14118, *at* http://www.unodc.org/unodc/terrorism_convention_civil_aviation.html.
[366]See e.g. Single Convention on Narcotic Drugs, 30 Mar.1961, 520 UNTS 204; 14 ILM 302; Convention on Psychotropic Substances, 21 Feb., 1971, Art. 22(a.iv), 1019 U.N.T.S. 175.

from the scope of jurisdictional reach there is a problem in the very approach of the international criminal justice, that is the separation of the individual responsibility from collective, prioritizing individual and rejecting the collective, that originates from the liberal paradigm for individual liberty which denies positive responsibility, omitting and downplaying references to state presence within the atrocities and the responsibility for them. Belgian law was not an exception to this approach in any sense, speaking to the atrocities in the criminal law parlance; as of the crimes committed by individuals rather than 'abstract entities'.

However there are traces of the state presence and of the possibilities of collective complicities in the atrocities that nevertheless remain in the brackets of the given law, while not explicitly mentioned and recognized. Although not emphasized and not directly indicated, such traces are visible at least in two groups of instances in the law. Thus the subject matter of crimes is so that it assumes the existence of state policies, most obviously in the case of the crimes against humanity, which are understood by the Belgian law in accordance with the ICC Statute which includes the "state or organizational policy" as a part of the "widespread or systematic" attack on the civilian population into the definition of such crimes[367], or else in such war crimes as deportation or say "unjustifiable delay in the repatriation of prisoners of war or civilians" and apartheid[368]. Aforementioned crimes including genocide require some larger scale unusual to be performed by ordinary criminals, often involving collective complicities and criminal exercise of state power, or worse partial and full internalization of the principles degrading human dignity within the normative systems of the communities and

[367] Rodney Dixon, *Crimes against humanity*, *supra.*.

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states. Hence the crime definitions in the Belgian law do not assume state participation directly, but are commonly understood to be performed with state support and/or consent, whereas some of them are plainly impossible without such support/consent.

Further references to sovereign power acting criminally are contained in the responsibility regime provisions. The Belgian law in line with general principles of international criminal justice provides in a separate article 5, visibly unrelated to the nature of the crimes in question, but nevertheless pointing to their special character, that defenses typically connected to the exercise of sovereign power are not admissible. Thus in connection with these crimes the "political, military or national interest or necessity", "reprisals", orders by governments, and the consequences of the "official capacity of a person" are said to be invalid[369], which suggests that situations where these defenses could be relevant are more than a common instance and thus require special mentioning.

Through the Belgian law the international justice demonstrated its main inadequacy, the refusal to recognize the atrocities as the evil archetype of state sovereignty that becomes from time to time so inhuman and abhorrent in its daily reality of misery, in its routine mistreatment of itself and its population that it becomes almost surreal to reduce its evil into ordinary illegal acts of individuals. As David Kennedy puts it the modern human rights law "by criminalizing harm and condensing its origin to particular violators, can serve as denial, apology, legitimation, normalization, and routinization of the very harms it seeks to condemn"[370]. Thus to the "vicious cycle of violations of human rights and revenge, fuelled by impunity", to the collapse of humanity that became radical in

[368] Belgian Act, *supra* art 1.
[369] *Id*, art. 5.

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eliminating human "spontaneity" and "plurality", that became banal in its everyday and ordinary denial of human dignity, the international justice, in the voice of the Belgian universal jurisdiction law armed by its vocabularies and theories, could only react by prosecuting certain individuals, like pirates or say drug traffickers.

Hence Belgium, as the 'sword' of the international community, the state sovereignty acting as international justice issued an international arrest warrant (and circulated it via Interpol) for Abdulaye Yerodia Ndombasi accusing him "of having made various speeches inciting racial hatred during the month of August 1998"[371]. The warrant made references to the "particularly virulent remarks" by Yerodia that "had the effect of inciting the population to attack Tutsi residents of Kinshasa" resulting in "several hundred deaths, the internment of Tutsis, summary executions, arbitrary arrests and unfair trials"[372]. The speeches of Yerodia could be enough to incriminate him incitement to genocide or crimes against humanity, but beyond that the context in which they were made is unspoken in the warrant vocabulary, the situation of moral collapse where such speeches could lead to the aforementioned atrocities is reduced to his personal responsibility. Positive dimension of responsibility that addresses the principles and norms of the ethical life of the community that constituted the context of his speeches, and were just as part of the crimes as those speeches, are underemphasized and exonerated in the warrant, by the very thinking that merely cognizes of individual violations rather than concerns itself with the re-evaluation and internalization of the principles and norms representing the rational and morally compelling attitude of

[370] KENNEDY, THE DARK SIDES OF VIRTUE *supra at* 35.
[371] Arrest Warrant Case, *supra at* para 15.
[372] *Id*, para 67.

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individuals to their presents and pasts, becoming a principle of ethical life and law of the state in accordance with moral imperative and out of respect for victims' dignity and that of the all members of the community.

4.2.2 *Arrest Warrant* decision

In response to the arrest warrant on 17 October 2000 Congo (DRC) filed complaint with Belgium in ICJ, whose jurisdiction was recognized and accepted by parties. Congo submitted inter alia that "by issuing and internationally circulating the arrest warrant against Mr. Yerodia Belgium committed a violation in regard to the DRC of the rule of customary international law concerning the absolute inviolability and immunity from criminal process of incumbent foreign ministers"[373]. Besides several objections to the jurisdiction of the Court, Belgium argued that the Pinochet[374] and Qadaffi[375] cases as well as the practice of International Criminal Tribunals, present the evidence of the customary international law rule providing that "immunities accorded to incumbent Ministers for Foreign Affairs can in no case protect them where they are suspected of having committed war crimes or crimes against humanity"[376]. The Court however "has been unable to deduce from this practice that there exists under customary international law any form of exception to the rule according immunity from criminal jurisdiction and

[373] *Id*, para 11.

[374] Ex Parte Pinochet [3], *supra*; For the Spanish proceedings *see* Spanish National Criminal Court (Audencia Nacional), Pinochet case (Order of 5 November 1998), 119 ILR 331 144 (holding that Spain "by virtue of the principle of universal jurisdiction" was competent to request the extradition of the Senator), *see also* Antoni Pigrau Sole, *The Pinochet case in Spain*, 6 ILSA J. Int. and Comp. L. 653, 676 (2000); Brussels Court of First Instance: In re Pinochet (Order of 6 November 1998, 119 ILR 345) also adopted this position; *but see* Luxembourg Court of Appeal (Chambre du Conseil), Pinochet case, 11 February 1999, 119 ILR 360, 364 (2002) (holding that there is no customary rule establishing universal jurisdiction for crimes against humanity).

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inviolability to incumbent Ministers for Foreign Affairs, where they are suspected of having committed war crimes or crimes against humanity."

The Court however provided for four occasions on which official enjoying personal immunity can be prosecuted:

1. Prosecution by the State which granted the immunity
2. Prosecution by foreign states after the immunity has been waived by the State which granted it
3. Prosecution of such person after he leaves the office for acts "committed prior or subsequent to his or her period of office, as well as in respect of acts committed during that period of office in a private capacity"
4. Prosecution by a competent international body[377].

In order to reach these conclusions the Court uses elaborate reasoning that rests on a peculiar topology of arguments. In paragraphs 59-60 the Court bursts out an associative framework with a number of distinctions/associations that constitute its perspective: jurisdiction rules are distinguished from those governing immunity[378]; individual responsibility is distinguished from (non-)immunity; and exoneration from (non) prosecution as substance is related to procedure:

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[375] Cour de Cassation, Qadaffi Case, Arrêt No. 1414, 13 March 2001, *at* courdecassation.fr/agenda/arrest/arrest/00-87215.htm; For analysis of this decision *see* Zappalà, *The Ghaddafi case*, *supra*.
[376] Congo v. Belgium, *supra at* para 56.
[377] *Id*, para 61
[378] *Id*, para 59 (holding that "the rules governing the jurisdiction of national courts must be carefully distinguished from those governing jurisdictional immunities: jurisdiction does not imply absence of immunity, while absence of immunity does not imply jurisdiction").

> Immunity from criminal jurisdiction and individual criminal responsibility are quite separate concepts. While jurisdictional immunity is procedural in nature, criminal responsibility is a question of substantive law. Jurisdictional immunity may well bar prosecution for a certain period or for certain offences; it cannot exonerate the person to whom it applies from all criminal responsibility. [379]

It is argued here that the instant case involved the clash of sovereign powers of DRC and Belgium, manifested in the clash of different normative and substantive attributes of sovereignty (sovereignty as international justice and sovereignty as atrocities). ICJ however addressed the issue avoiding any direct presentation of this clash, while differentiating and hierarchizing the sources of international law and assuming normative and substantive limits on sovereign authority of states, and disguising this by the relative authority of various types of norms (jurisdiction and immunity rules).

The rest of this section tries to demonstrate how the rhetoric of ICJ first translates the sovereign power of Belgium into the language of municipal natural rights of states: the ascending rhetoric of exercising state authority as in a "pure fact" approach to sovereignty (or Schmittean understanding of sovereignty, as Koskenniemi describes it); and second how the DRC's claim to sovereignty at issue is translated into the language of positive international law of immunities according to the purely descending language of international community whose diplomatic activity and intercourse are protected for the purposes of peace and security.

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[379] *Id*, para 60 (emphasis added).

It is interesting to note the repression of state presence occurring twice, first in the understanding of the "crimes" involved and second in the perception of the official immunity claims; in the latter instance the underemphasizing of the direct involvement of DRC's sovereignty was instrumental in disentangling the DRC's sovereign power and authority from the characterization of immunity claims, that thus became descending. Whereas immunity necessarily refers to state sovereignty and presence (as discussed in chapter two), ICJ's decision distances it and tries to erase from its name the claims to sovereign authority and thus the ascending rhetoric; while legitimating them in the language of descending arguments, from the vantage point of international community and its interest in the free and uninhibited diplomatic intercourse.

The first relevant issue for the purposes of this chapter is then how the prosecution of Mr. Yerodia is intruding upon the sovereignty of DRC, or what is the sovereign conflict involved in the case if any. It appears that on the one hand the case involves a clash between Belgian sovereignty, as represented through its jurisdiction to try offenses that springs from the latter, and on the other hand the sovereignty of DRC represented in its presence (that resulted in the immunity of its Foreign Minister). That the stake of DRC transcends an ordinary case involving the mere linkage between the individual and the state is confirmed by the subject matter of the dispute, as such cases arguments do not go further than diplomatic protection claims. However, as suggested in the chapter two of this work, it is in personal jurisdiction and immunity from international crimes where the borderline between states and individuals becomes tangible, whereas through immunity of state officials the international law maintains state presence (despite repressed in the international justice vocabulary) in real persons. Despite repressions and erasure of state

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sovereignty's presence and the descending presentation of DRC's claim, it becomes apparent in scrutinizing the motives and language of the Court decision that through the immunity of Yerodia the normative limits on DRC's sovereignty were involved in the dispute.

Thus when discussing the rationales of upholding immunity the Court brings in the functional theory of immunities, as discussed above, ultimately suggesting that immunity is necessary because "simply by virtue of [their] office" the given officials' acts "may bind the State represented". As already mentioned, despite avoiding the language of state presence, the immunity does assume and refer to state presence, state being defined as functions. The values protected are the international peace and security, that is a descending argument as Koskenniemi would define it, whereas the international peace and security are defined through state involvement and consent, peace and security could only be endangered because the officials may bind the states; the ascending pattern is therefore present here well.

Furthermore the language of DRC's claims also reveals the same type of basis; DRC claimed that Belgium acting under universal jurisdiction violated the "principle that a State may not exercise its authority on the territory of another State" as well as the "principle of sovereign equality"[380]. Congo, although following the descending argumentation, essentially presents the issue as the violation of its sovereignty. Further traces of DRC's sovereignty involved in the immunity of Yerodia are visible throughout the text, most notably in the exceptions to the immunity rule proposed by ICJ; e.g. the fact that state granting immunity might prosecute its officials or waive the immunity

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shows that the immunity essentially belongs to the state and is an emanation of state sovereignty. The distinction made between private and official capacity also points in the same direction because the official capacity signifies relevance of state presence, just as the difference drawn by the Court between the prosecutions by international as opposed to municipal tribunals again tells us about the ascending dimensions of the immunity arguments. Thus there is a clash of sovereignty's of Belgium and DRC, as expressed in the personal jurisdiction reach of Belgian law and the immunity of the DRC in the acts and in certain situation in the persons of its officials.

It is also important to mind the connection and difference between immunity and jurisdiction. This is relevant because the opposition between them has been relied upon by ICJ to differentiate claims of DRC and Belgium in the first place. In some sense immunity is similar to jurisdiction, as both represent the extent of the state power under international law; jurisdiction being the "government's general power to exercise authority over all persons and things within its territory"[381] represents the "extent to each state's right to regulate conduct or the consequences of events"[382]. States can prosecute someone only after establishing their jurisdiction in his/her respect, and this restriction emanates from such fundamental principles of international law as sovereign equality of states and the duty not to interfere in matters within the domestic jurisdiction of other states[383]. International law mostly deals with the "jurisdiction to apply"[384] laws that

[380] *Id*, paras. 17, 12.
[381] Jurisdiction, BLACK'S LAW DICTIONARY 855 (Bryan A. Garner ed., West Group 7th ed. 1999).
[382] SIR ROBERT JENNINGS & SIR ARTHUR WATTS, OPPENHEIM'S INTERNATIONAL LAW § 1, 456 (Longman Peace Edition, 9th ed. 1992).
[383] *See* Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States, *supra.*
[384] Louis Henkin, *International law : politics, values and functions : general course on public international law*, 216 (1989-IV) Recueil des cours 9 (1989-IV), *at* 277.

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includes "prescriptive" or substantive jurisdiction and "enforcement" or procedural jurisdiction[385], whereas prescriptive jurisdiction is the jurisdiction of a State to make its law binding upon a person, whereas enforcement jurisdiction presumes its authority to lawfully enforce such law in respect of that person[386]. As the PCIJ held in the Lotus case the procedural jurisdiction is strictly limited to territory[387], whereas the substantive jurisdiction is "only limited in certain cases by prohibitive rules; as regards other cases, every State remains free to adopt the principles which it regards as best and most suitable"[388]. The prescriptive or substantive jurisdiction is usually defined through four traditional principles, including territorial, nationality[389], passive nationality[390] and protective[391] principles and also as appears through the universality principle.

Immunity in the same ways represents the power of the (other) state to "to exercise authority over all persons and things within its territory" or "extent to each state's right to regulate conduct or the consequences of events"; it covers the states themselves[392], legal entities that are their subdivisions[393], their acts[394] and officials, without whom states

[385] MALCOLM SHAW, International Law 393, (3rd ed. 1991).
[386] Henkin, *International Law: politics, values and functions*, *supra*; SHAW, *id.*
[387] S.S. "Lotus" case *supra at* pp. 18-19 (holding that "[a] State…may not exercise its power in any form in the territory of another State. In this sense jurisdiction is certainly territorial; it cannot be exercised by a State outside its territory except by virtue of a permissive rule derived from international custom or from a convention").
[388] *Id*. However this view that states can establish their jurisdiction unless in conflict with a prohibitive rule of international law was later departed in the *Anglo-Norwegian Fisheries* case, *see* SHAW, *supra at* 403.
[389] JENNINGS & WATTS, OPPENHEIM'S INTERNATIONAL LAW *supra at* 459-460, 462.
[390] MALANZUCK, *supra at* 111 (1997); *see also* Restatement (Third) of Foreign Relations Law § 402, Comment g, (providing that this principle "has been increasingly accepted when applied to terrorist and other organized attacks on a state's nationals by reason of their nationality, or to assassinations of a state's ambassadors, or government officials").
[391] SHAW, *supra at*111-112, 416.
[392] *See e.g.* International Law Commission, Draft Articles on Jurisdictional Immunities of States and Their Property, 30 ILM 1554 (1991), art. 5, *at* untreaty.un.org/ilc/texts/instruments/english/draft%20articles/4_1_1991.pdf; *see also* Foreign Sovereign Immunities Act, 28 U.S.C.A. § 1604 (West 1994) (that "a foreign state shall be immune from the jurisdiction of the courts of the United States and of the States").
[393] *See e.g.* Krajina v Tass Agency, (1949) 2 All Eng. Rep. 274 (C.A.).

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would indeed be inanimate or unreal. Thus immunity has essentially same features as jurisdiction, in that it belongs to the states, can only be waived by states, protects the states (their self-determination and freedom from non-interference into domestic affairs) and also enforces the international legal regime by delimiting the substantive realms of state powers.

While discussing the international legal argumentation Koskenniemi suggests that the jurisdiction vs. immunity opposition is indeterminate, and that both concepts are reversible as arguments, whereas both of them contain the opposing principle within themselves[395]. He shows that the international "legal arguments do not produce substantive outcomes but seek to justify them" and that an official act becomes just as well a matter of "sovereignty" or "immunity" depending on perspective, and the rhetoric might just be "community"(descending) or "autonomy"(ascending) to justify either sovereign immunity or jurisdiction[396].

In Congo v Belgium ICJ however refuses to follow this relationship and claims that "jurisdiction does not imply absence of immunity, while absence of immunity does not imply jurisdiction" and therefore "rules governing the jurisdiction of national courts must be carefully distinguished from those governing jurisdictional immunities"[397]. This separation predates the contrasting of the arguments of DRC and Belgium and ascribing

[394] But mind the situation with so called private acts (*iure gestionis*) that are not immune under the restrictive immunity approach, see ILC Draft Articles on Jurisdictional Immunities *supra at* part III; *see also* SHAW, *supra at* 436.
[395] KOSKENNIEMI, FROM APOLOGY TO UTOPIA *supra at* 505.
[396] Id, at 570 (original emphasis). He accordingly suggests that in the *Sabbatino* case (Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398 (1964) the US Supreme Court sought to protect both "autonomy" and "community" as a matter of establishing balance between two conflicting sovereignties, at 486-8.
[397] Arrest Warrant case, *supra at* para 59.

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to them different values and positions in the hierarchy of norms, values and arguments that follows in order to avoid the direct clash of sovereignties.

The relationship between the jurisdiction and sovereign immunity discourse versus conflicts of sovereign powers as well as the relevance of the substance/procedure distinction employed by ICJ are well illustrated by David Kennedy, according to whom the international law of jurisdiction, while "establish[ing] and delimit[ing] a field for sovereign powers" and setting up the "international regime of boundaries" strives to institute its "independence from substance – and upon its service to the substantive normative order"[398]. Thus claiming to be procedural in nature it seeks to become an international legal regime that does not intrude on sovereign autonomy, remaining a kind of a "hypostatic map thrown over a variety of domestically oriented sovereign behaviors"[399]. So does the immunity discourse as one of the jurisdiction discourses that "delimits situations in which the territorial jurisdiction of one sovereignty gives way to the authority of another" while doing so "without overt reference to norms of substance". While resolving conflicts "between two aspects of the sovereignty of the territorial state" the immunity discourse however always has to rely on either a "substantive vision of the relative authority of the two sovereigns or a hierarchy of legal sources"[400].

This reliance however is disguised via a variety of argumentative tactics. Kennedy argues that the jurisdiction discourses deny the substantive merits of their own norms in order to "avoid the appearance of intruding on sovereign authority while preventing sovereign

[398] KENNEDY, INTERNATIONAL LEGAL STRUCTURES *supra at* 151.
[399] *Id at* 152-3.
[400] *Id at* 154.

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conflict"[401]. In other words jurisdiction discourses while inevitably limiting sovereign powers in substance or constructing hierarchies of legal norms, disguise that through rhetorical exercises to avoid sovereign conflict, while pretending to be purely procedural and stranded from sovereigns[402].

Thus in the Congo v Belgium decision the Court in the majority opinion does rely on a hierarchy of legal sources, by framing the claim of Belgium as the municipal right to exercise universal jurisdiction, which it does not even discuss[403], an ascending claim of that emphasizes sovereign authority, thus being a part of the natural rights of the sovereigns[404], whereas the claims of DRC are taken as positive international law of immunities that derive from sovereign equality and thus rather descending rhetoric is employed[405]. And in the given circumstances where the two were conflicting the immunity rules were held to prevail[406].

It is difficult not to notice how the descending and ascending argumentations of immunity and jurisdiction are easily reversible. International law of jurisdiction is not

[401] *Id at* 152.
[402] *Id at* 153.
[403] Arrest Warrant case, *supra at* para 45.
[404] For the natural rights of the states rhetoric behind jurisdiction that emphasizes the ascending or autonomy and authority argumentation behind jurisdiction mind again the *SS Lotus* decision of PCIJ where it was held that as "[i]nternational law governs relations between independent States" and as "rules of law binding upon States therefore emanate from their own free will" and as the "restrictions upon the independence of States cannot be presumed" a state would have jurisdiction unless there is a rule of International Law with which it comes into conflict. Whereas the jurisdiction to enforce was limited to territory, with regard to the jurisdiction to prescribe states enjoy a "wide discretion" in respect of "extending the application of their laws and the jurisdiction of their courts to persons, property and acts outside their territory", which is "only limited in certain cases by prohibitive rules; as regards other cases, every State remains free to adopt the principles which it regards as best and most suitable". Such discretion, according to the Court, rests in the sovereignty of States. *See* The Case of the S.S. "Lotus, *supra at* 18-20.
[405] Note the acceptance of DRC's rhetoric and formulation of the issue into the ICJ's narrative and construing it as whether "there exists under customary international law any form of exception to the rule according immunity from criminal jurisdiction" (Congo v Belgium, para 58), that is the DRC claim to sovereignty is translated into the descending rhetoric of the public international law immunity rules protecting in the long run the international community through peace and security.

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only supported by the ascending argumentation of states' sovereign rights; and immunity is not simply the descending rhetoric of the protection of the international community. On the reversed side of this argumentation are the jurisdiction rules that are the enforcement of the international community through delimiting the reach of states' authorities, enforcement and realization of the international public law, including international justice and rule of law (with a Kelsenian "pure law" understanding of sovereignty, that is an integral part of the descending argumentation). Furthermore the direction of the immunity claims are also easily capable of being reversed and presented as being protective of state authority and sovereignty; as natural municipal rights of states. It could be redundant to remind here how the repressions of state presence in the immunity of state officials allow making it indirect that the immunity of Yerodia is about the sovereignty of DRC.

Furthermore the differentiation and polarization of the immunity/jurisdiction discourse into separate fragments, rhetorically necessary for ascribing them different values on the argumentative structure and logically preceding the relative hierarchy of jurisdiction and immunity norms did not go without criticisms either. In their joint separate opinion judges Higgins, Kooijmans and Buergenthal question the stand of the Court that there is a such "free-standing topic of international law" as immunity, whereas the latter "depends, conceptually, upon a preexisting jurisdiction"; they suggest that the Court should have initiated the inquiry with addressing the issue of whether Belgian courts had the jurisdiction in the first place, rather than precluding it by *ultra petita* rule[407].

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[406] *Id at* 59.
[407] Arrest Warrant case, Joint Separate Opinion of Judges Higgins, Kooijmans and Buergenthal, paras 2-5.

Moreover the substance v procedure rhetoric of the Court that is used to limit the substantive power of states, of which the power to exercise individual responsibility under universal jurisdiction, while suggesting that the latter power is a "question of substantive law" whereas the immunity rules are merely "procedural"[408] was also criticized. The Court suggests that the Belgian authority and sovereignty, represented in the substantive individual responsibility power, are not limited by the procedural immunity rules (that represent DRC's sovereignty) that "may well bar prosecution" but "cannot exonerate the person"[409]. While perfectly in line with Kennedy's suggestion that the international law would self-posit as procedural "hypostatic map" independent from substantive determinations, the statement of the Court that "immunity does not necessarily lead to impunity" was dissented from by judge Van den Wyngaert, who disagrees suggesting that "where national authorities are not willing or able to investigate or prosecute" as happened in the case with Yerodia the "crime goes unpunished"[410].

It has been argued that whereas the Arrest Warrant case involved the conflict between sovereign powers of DRC and Belgium, the ICJ sought to avoid direct presentation of this conflict and to maintain the independence of the jurisdiction discourse from substantive claims. In order to do so it distinguished immunity from jurisdiction rules, described Belgian claims as municipal natural right to jurisdiction, and DRC's claim as positive international law of immunity protective of international community. Furthermore the Court described immunity and jurisdiction as procedural with the purpose to distance the claims from the substantive sovereign powers. Moreover the role

[408] *Id*, para 60.
[409] *Id*.
[410] Arrest Warrant case, Dissenting opinion of Judge Van den Wyngaert, page 19.

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of the repressions of state presence in international justice vocabularies is a crucial element in disassociating the DRC's sovereignty from the immunity claims and the atrocities from DRC's sovereignty.

The separation of jurisdiction and immunity from substantive claims (the usage of substance v procedure distinction), the hierarchy of sources (municipal national rights v positive international law), the combination of ascending and descending associations, substantive limitation on sovereign powers of states (of universal jurisdiction) and repressions of state presence in official immunity and atrocities were also the strategies that allowed ICJ to "avoid" pronouncing on limits of universal jurisdiction regimes. Thus ICJ has succeeded in maintaining the vision of the "hypostatic map thrown over a variety of domestically oriented sovereign behaviors" that is procedural and independent of substance, "defining the ambit of sovereign powers without elaborating on normative limits to sovereign authority". Such an approach results according to Kennedy in an "apparently overarching regime of law which seems neutral with respect to particular exercises of sovereign power"[411].

Thus the repression backfired to the international justice. Originally meant to untie the prosecutions of grave human rights violations from the state and collective complicities and presences (to escape the restrictive framework of interstate international regimes), as well as being the cornerstone of the 'decentralized enforcement' of international justice in disguising the substantive authority of the prosecuting state as the enforcement of international law, it turned out to work in unintended way. Thus in the present case the repression of state presence disentangled the crimes from the sovereignty of DRC and

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allowed presenting the immunity for them as purely descending, procedural restriction emanating from positive international law. At the same time the prosecution attempt under the universal jurisdiction were treated as ascending claims of the prosecuting state, based on its residual municipal authority and sovereignty, totally disregarding the 'decentralized enforcement' narrative.

The *Arrest Warrant* case therefore demonstrates the ease of reversibility of initial associations of accountability as descending and the immunity as ascending rhetoric. The international legal argumentation scheme turns out to be indeterminate and utterly unhelpful in anchoring the international justice in descending rhetoric and allowing it to maximize its advantages with regard to the state centered regimes of international law. The clash of sovereign powers of DRC and Belgium in this case, repressed in the vocabularies of international justice (of which universal jurisdiction is a part), was redirected into the legal disagreements (with a significant substance of political tensions as it turns out) over the jurisdictional and immunity questions. Neither the ICJ's decision uncovers the clash of sovereign powers, but rather disguises it through a variety of argumentative tactics. As argued in this work the international legal argumentation concerning the immunity and international justice is in itself indeterminate; and whereas the legal disagreement over the immunity of Yerodia overlapped with the political tensions associated with prosecuting 'core crimes' (tensions that are repressed in international justice vocabularies), the tension irresolvable through international justice and tensions that influences the outcome of the legal disagreement.

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[411] KENNEDY, INTERNATIONAL LEGAL STRUCTURES *supra at* 165.

4.3 Return of the repressed tensions

Conflicts of sovereign powers, repressed in the vocabularies of the Belgian law on universal jurisdiction and skillfully disguised by ICJ could not have been avoided altogether. Beyond the prosecution of Yerodia, the Belgian law was invoked in the attempts to prosecute a wide array of individuals, either incumbent high officials in their respective states at the time, or former officials for the acts committed in their official capacities, including Ariel Sharon, Yasir Arafat, Fidel Castro, Saddam Hussein, Hashemi Rafsanjani, George H.W. Bush, Dick Cheney and Colin Powell[412]. By adopting the language of international justice that repressed and deferred the relevance of sovereign conflicts Belgian law was pushing Belgium to a number of clashes of sovereign powers with various states, while denying this. Series of diplomatic and political pressures ensued on Belgium, including Israel's withdrawal of its ambassador to Belgium and US Secretary of Defense Donald Rumsfeld announcing that US would refuse to support the new NATO building in Belgium and bar its officials to travel there[413].

Thus after a number of amendments Belgian Law was reduced to the following scheme since August 2003: Belgian courts only have personal jurisdiction either if the defendant (nationality principle) or the victim (passive nationality principle) is a citizen or resident of Belgium. Moreover all officials entitled to immunity under international customary and treaty law, as well as persons on official visits to Belgium or to international organizations based there are immune from proceedings[414].

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[412] Steven Ratner, *Belgium War Crimes Statute, supra at* 890.
[413] *Id at* 890-891.
[414] *Id at* 891.

While the tensions associated with personal jurisdiction discussed in chapter two were not addressed in the Belgian universal jurisdiction regime, they did not disappear but modified the personal reach of regime in order to accommodate them to an 'adequate' degree. Whereas previously the act disregarded the possibility of indirect usage for legal prosecutions of events comprising wide complicities of states and governments and Belgium could persuade itself that the crimes against humanity could be safely and "aseptically" treated via criminal law, by creating a personal jurisdiction regime with universal reach and subject-matter jurisdiction involving crimes with state complicities, and whereas ICJ could avoid the presentation of the conflict by placing the claims in hypostatic heavens of procedural jurisdiction/immunity discourses, such a possibility was immediately employed. Political tensions associated with such usage however modified the reach of the regime to exclude foreign officials and even foreign nationals that have no apparent link to Belgium but this time without much discussion within legal discourses, by merely circumscribing the personal reach of the given international jurisdiction regime.

One could perhaps concur with Ratner here that whereas the Belgian law was not successful, it can be regarded as a "laboratory" for the universal jurisdiction that should not be abandoned altogether[415] but has a potential to rebirth and renewal in the future attempts to decentralized enforcement of international justice.

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[415] *Id at* 889 and 897.

CHAPTER 5: INTERNATIONAL CRIMINAL COURT: REPRESSIONS AS THE BALANCE WHEEL OF INTERNATIONAL JUSTICE

The creation of the permanent International Criminal Court (ICC) is perhaps one of the most significant events in the history of the individual criminal responsibility efforts. Characterized variously from being a 'monster'[416] to a "major breakthrough in the effective enforcement of international criminal law"[417], it cannot in any case fail the attention of a work that deals with the issue of official immunity and international justice in general. ICC describes itself as a treaty-based permanent and independent court of last resort that tries persons for the gravest crimes of international concern[418]. When it comes to the issue of immunity the ICC effectively creates two regimes of immunity internationally; first one of the multilateral and reciprocal treaty-based waiver that applies to member-states of the Rome Statute (under article 27) and the second one that applies to the officials of third states under the article 98 of the Statute. While expressly rejecting the relevance of the official capacity for the purposes of prosecuting officials of member states within the Rome Statute regime, ICC at the same time maintains that it cannot require member states to violate the international law with respect to the immunity of the officials of third states, whether under multilateral international treaties and custom or bilateral agreements.

Whereas there is an ongoing debate on how far these regimes reach or should reach, partly elaborated for the purposes of third chapter, this chapter suggests that this favoring

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[416] Rodriguez, *Slaying The Monster*, *supra*.
[417] Antonio Cassese, *From Nuremberg to Rome: International Military Tribunals to the International Criminal Court*, in THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY, vol.1, 3-19, 3 (A. Cassese et al. eds., 2002) (hereinafter Cassese et al., COMMENTARY)
[418] *See* the website of the ICC, *at* http:www.icc-cpi.int/about.html.

of the immunity of officials of third states by the ICC is necessitated by its general line of separating individual responsibility from state presence and sovereignty with a view to maintain a certain balance. It strives to assert its own independence and separation from politics to appear neutral to sovereign authorities while resolving disputes involving clashes of sovereign powers. This has a dual purpose of being more appealing to states on the one hand and preserving the independence and neutrality of the Court to state sovereignty and in general on the other. It is further argued that the current equilibrium fixed by the Court in this matter is a result of the repression of state presence and sovereignty in the crimes it deals with, the repression that thus becomes the balance-wheel of the whole individual criminal responsibility project.

This chapter will start by identifying the clashes of sovereign powers and the aspects of sovereign powers involved in the prosecutions under individual criminal responsibility regime of the ICC. It further argues that while the international legal structures allow to present arguments in favor and against immunity in any of the situations, including the immunity of officials of third states, the arguments employed in the Rome Statute describe and justify the outcome produced by the political tensions (including the repressed ones) around the prosecutions, irrelevant of those arguments. Moreover where these tensions are neglected, they nevertheless push the immunity and jurisdiction regimes of the Rome Statute to the unexpressed outcomes, and even might curtail or ignore the ICC as an institution where it runs fundamentally at odds with them.

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5.1 ICC and State Sovereignty

International law is created by sovereign states, and sovereign states becomes such only under international law. ICC, based on a complex combination of arguments about sovereignty and human rights and being a part of international legal construct is also in a dialectical relationship with state sovereignty. On the one hand it restricts sovereignty by outlawing certain state behavior concerning state sponsored grave human rights violations, and on the other hand it represents sovereignty as it is based on an international treaty between sovereign states and states are its sole enforcement mechanism.

ICC *prima facie* deals with clashes of different aspects of sovereign power of one state or several states. This is because the prosecutions by ICC represent exercises of sovereign power of states, and also might tend to become preconditions to state sovereignty and its legitimacy, while at the same time they clash with atrocities that are also exercises of state power, although in its evil embodiment. Prosecutions by ICC do represent sovereign powers of states, as they are based on an international treaty (Rome Statute) governed by international law of treaties, including the Vienna Convention on the law of treaties. Both the foundation of ICC in treaty law and the increasing persuasive force of the argument that the outlawing of state sponsored grave human violations constitutes *jus cogens* and is a precondition to state sovereignty (rather than the reductionist argument that they are beyond state sovereignty and are private acts discussed above) stemming from the international community as a whole are important for the rhetoric available to ICC prosecutions. Through them ICC combines ascending arguments on its authority derived from the consent and authority of member states expressed in positive international law

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of treaties, and descending arguments originating from community and natural international law type of argumentation.

States parties to the Rome Statute on the other hand have severely restricted the ascending argumentation of state sovereignty and authority with regard to ICC's jurisdiction over them by ratifying the Statute. At the same time the descending rhetoric is not available for them either (with notable exception of the Security Council usage discussed below), as there is no international legal argument providing for an inherent municipal right of states to commit grave human rights violations, or more accurately there is an increasing consensus that natural right to sovereignty of states is limited by such prohibition. Things are different however with regards to the states that are not parties to the Rome Statute, as in that case the possibility of ascending arguments against the authority of the ICC is far from being exhausted.

5.2 ICC Jurisdiction

According to the Rome Statute the ICC is a permanent court with an international legal personality and the power to try individuals, with the seat at The Hague and in a legal relationship with the United Nations[419]. The *ratione materiae* jurisdiction of the court

[419] Rome Statute, supra, art. 1-4; *See also* Adriaan Bos, *Seat of the Court*, in Cassese et al., COMMENTARY 189-202; Francesca Martines, *Legal Status and Powers of the Court*, *id at* 203-219; *See also* Draft Relationship Agreement between the United Nations and the International Criminal Court, Art. 2-3, PCNICC/2000/WGICC-UN/L.1, *at* http://www.icc-cpi.int/library/asp/ICC-ASP-3-Res1_English.pdf. Note that ICC was not created as a "part" of the UN, neither as a completely free standing multilateral treaty, but rather with a "structural link with the United Nations" that was perceived in preparatory process to constitute "an essential condition of the universality and moral authority of the new institution" and its "international character", *see* Antonio Marchesi, *Relationship of the Court with the United Nations*, *in* COMMENTARY ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: OBSERVERS' NOTES, ARTICLE BY ARTICLE 65-71, 67-68 (Otto Triffterer ed., 1999) [hereinafter Triffterer ed., COMMENTARY]; *See also* Luigi Condorelli, Santiago Villapando, *Relationship of the Court with the United Nations*, in Cassese et al. eds, COMMENTARY 219-235. Note that the Article 19 of the Relationship agreement according to which in case the Court would seek to prosecute a person entitled to UN privileges and

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covers genocide, crimes against humanity, war crimes and aggression[420]. The temporal jurisdiction of the Court is prospective, that is it only has jurisdiction over crimes committed after the entry of the Statute into force (July 1, 2002) and with respect to the parties that join later since the entry into force of the Statute for that state party, unless the latter makes a declaration for the *ad hoc* acceptance of the Court's jurisdiction[421]. Apart from the situations when the case was referred to the Court by the UN Security Council or by *ad hoc* declaration of the state not party to the Rome Statute, it has jurisdiction only over crimes committed on the territories of states parties and crimes committed by the nationals of states parties[422].

Another sensitive issue related to the case and situation solving capacity of the ICC is that of the "trigger mechanisms". According to the statute the case might be referred to the Court by any of the states parties to it, by the Security Council acting under the authority of Chapter VII of the UN Charter, that is in accordance with a determination that a breach of peace, threat to it or an act of aggression have occurred and finally by the

immunities "the United Nations undertakes to cooperate fully with the Court and to take all necessary measures to allow the Court to exercise its jurisdiction, in particular by waiving any such privileges and immunities".

[420] Rome Statute, *supra*, Art. 5. Jurisdiction over aggression can be exercised only after the states parties agree on a definition in a procedure according to articles 121 and 123 of the Statute; *See also* International Criminal Court, Elements of Crimes, U.N. Doc. PCNICC/2000/1/Add.2 (2000), *at* http://www.icc-cpi.int/legaltools/. For the subject matter jurisdiction see Antonio Cassese, *Genocide*, *in* Cassese et al. eds, COMMENTARY 335-353; Antonio Cassese, *Crimes Against Humanity*, *id at* 353-379; Michael Bothe, *War Crimes*, *id at* 379-427; Giorgio Gaja, *The Long Journey Towards Repressing Aggression*, *id at* 427-443.

[421] Rome Statute, Art. 11, 12.3. For more *see* Sharon A. Williams, *Jurisdiction* ratione temporis, *in* Triffterer ed, COMMENTARY 323-328; *See also* Stephane Bourgon, *Jurisdiction ratione temporis*, *in* Cassese et al eds., COMMENTARY 543-559; Sharon A. Williams, *Preconditions to the exercise of jurisdiction*, *in* Triffterer ed., COMMENTARY 329-342, 341; For personal jurisdiction of the Court see Micaela Frulli, *Jurisdiction* ratione personae, in Cassese et al eds., COMMENTARY 527-543. For territorial jurisdiction *see* Stephane Bourgon, *Jurisdiction* ratione loci, *id* at 559-571.

[422] Article 12 of the Rome Statute; See also Hans-Peter Kaul, *Preconditions to the Exercise of Jurisdiction*, in Cassese, COMMENTARY *supra at* 583-618.

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Prosecutor acting independently[423]. It should be noted that when the case is referred by the Security Council the Court can proceed regardless of whether the crime was committed on a territory of the state party or by its national[424]. Concerning the Prosecutor acting *proprio motu* there are some limitations and safeguards set on his powers, namely he/she upon receiving the relevant information and concluding that there is a "reasonable basis" to proceed submits a request to authorize an investigation to the Pre-Trial Chamber[425].

Concerning the provisions on immunity before the ICC, the Rome Statute excludes any in article 27 providing that:

> 1. This Statute shall apply equally to all persons without any distinction based on official capacity. In particular, official capacity as a Head of State or Government, a member of a Government or parliament, an elected representative or a government official shall in no case exempt a person from criminal responsibility under this Statute, nor shall it, in and of itself, constitute a ground for reduction of sentence.

[423] Rome Statute, Art. 13-15; *See also* Sharon A. Williams, *Exercise of jurisdiction*, *in* Triffterer ed., COMMENTARY 343-353; Antonio Marchesi, *Referral of a situation by a State Party*, *in* Triffterer ed., COMMENTARY 353-359; Monten Bergsmo, Jelena Pejic, *Prosecutor*, *in* Triffterer ed., COMMENTARY 359-373; Philippe Kirsch QC, Darryl Robinson, *Referral by State Parties*, *in* Cassese et al eds., COMMENTARY 619-627; Luigi Condorelli, Santiago Villalpando, *Referral and Deferral by the Security Council*, *id at* 627-657; Philippe Kirsch, Darryl Robinson, *Initiation of Proceedings by the Prosecutor*, *id at* 657-667.

[424] Williams, *Exercise of jurisdiction*, *supra at* 350.

[425] Rome Statute, Art. 18; *See also* Daniel D. Ntanda Nsereko, *Preliminary rulings regarding admissibility*, in Triffterer ed., COMMENTARY 395-405. Moreover in deciding whether to initiate an investigation the Prosecutor should consider apart from the admissibility criteria under article 17 (that implements the complementarity principle) and the a "reasonable basis to believe that a crime within the jurisdiction of the Court has been or is being committed" also whether there are "substantial reasons to believe that an investigation would not serve the interests of justice". If the decision is made solely under this last ground however Prosecutor must notify the Pre-Trial Chamber that can review this decision. See article 53 of the Statute; *See also* Monten Bergsmo, Pieter Kruger, *Initiation of an investigation*, *in* Triffterer ed., COMMENTARY 701-714, *at* 709-710.

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> 2. Immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person.

Thus the position undertaken by the ICC is that there is no immunity whatsoever attached to any persons and officials accused of the crimes within its subject matter jurisdiction. There are however other provisions in the Statute, notably article 16 on the deferrals by the UN Security Council and article 98 on the "cooperation with respect to waiver of immunity and consent to surrender", more closely attended to in the further sections of this chapter, that while not providing immunity directly, are used to effectuate such in indirect matter, by limiting the ICC regime itself.

Whereas there are many arguments on different interpretations of these provisions, on immunity obligations of the surrendering states to third states and the deferrals by the Security Council, as to their reach and precise meaning, as well as the effect on the existing international law of immunity from international crimes, this chapter tries to demonstrate at the examples of their usage how the regime of jurisdiction and immunity of the Rome Statute, by using repressions of state and sovereign presences in atrocities, and by using a mix of rhetorical strategies deals with sovereign clashes between states (including their usages of Security Council mechanism) and accommodates political tensions concerning them. This usage of repressions is necessary in order to disentangle the ICC regime from political tensions to achieve appearance of independence from them while dealing with them.

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The following section therefore argues that with regard to the case within its jurisdiction ICC regime represses and underemphasizes as indirect and occasional state presence and policies as well as their complicities. By this it manages to disguise 'resolving' and addressing clashes of sovereign powers and their manifestations in the involvement of state through its policies and officials in atrocities and in their prosecutions without explicitly engaging in their substances. This results with a combination of descending and ascending arguments in the complete removal and disregard of immunities. As already mentioned Rome Statute's regime is based both on the ascending rhetoric of state consent and authority (via international treaty) and descending argumentation of limitations of state sovereignty with regard to international crimes constituting grave human rights violations.

However this exercise would be impossible without prior disentanglement of the ICC regime and its jurisdiction structures from the political tensions of sovereign powers involved in prosecutions, disentanglement that allows its independence from them and legitimizes the Court as neutral towards such tensions. This is achieved by repressions of state presences in crimes within the subject matter jurisdiction of the Court, as well as in the vocabularies of its responsibility regime. That this is achieved at the price of distorting and circumscribing the responsibility for atrocities, including neglect for positive responsibility and exonerations of wider complicities beyond individual acts, remains one of the major shortcomings of this approach as well as the source of its greatest strength.

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5.3 ICC regime and the repressions of state presence: the art of discussing without mentioning

Rome Statute represses the state presence in the atrocities and rather depicts the matter as a mere prosecution of individuals for their "crimes". As already mentioned this is done to achieve separation from political tensions and independence from clashes of sovereign powers. Thus while implicitly recognizing that ICC directly engages with and limits sovereignty of states, it at the same time describes itself as dealing exclusively with individual responsibility. It formulates the atrocities as ordinary, although grave crimes, and suggests that it "bears no prejudice to the international law of state responsibility.

It has been argued in chapter two that the modern discourse of international justice, ICC being an important part of it, represses references to state presence and sovereignty in definitions of crimes and in conceptualizing responsibility for them. While removing emphasis on positive responsibility for collective aspects of atrocities it neglects both the state involvement and complicities of the societies in the commission of crimes, including the roles of the systems of norms and principles that internalized and justified or tolerated the atrocities.

However despite formulation of atrocities as individual crimes, the traces of state and societal complicities in them nevertheless remain throughout the definitions of crimes and the language of responsibility regime and complement the non-explicit but present aspects of them. Thus the elements of the crime of genocide include besides individual acts the requirement of their taking place "in the context of manifest pattern of similar conduct" against the exterminated group or either themselves were the conduct that could

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effect the destruction amounting to genocide[426]. "Manifest pattern of similar conduct" here is a shortcut referring to the wider engagement in the effectuation of genocide, not only beyond individual's actions, but also structurally independent from them.

The relevance of state participation is most evident in definitions of crimes against humanity that are defined as a "widespread or systematic attack" committed "pursuant to or in furtherance of a State or organizational policy", whereas such a policy "requires State or organization actively promote or encourage such an attack". Moreover this plan or policy of widespread or systematic attack is again independent from the actions of the individual perpetrator who does not have to have "knowledge of all characteristics of the attack or the precise details of the plan or policy of the State or organization".

Finally some of the crimes not only merely involve state policy, but the latter is the single most important characteristic of the crimes. Thus the crime of persecution involves the perpetrator depriving "contrary to international law, one or more persons of fundamental rights"[427], whereas the definition of fundamental rights traditionally refers to states rather than individuals as violators. Furthermore the crime of forced disappearance that is constituted by arrests, detentions or abductions[428] predominantly implicates the actions of state or organizational authorities and their facilities. Most obviously the crimes of apartheid refers to the conduct in an "institutionalized regime of systematic oppression and domination by one racial group over any other racial group or groups"[429] where the "institutionalized regime" is apparently beyond the individual acts of racial

[426] Elements of Crimes, Art. 6 (a-e; last sections), *supra.*
[427] Elements of Crimes, Art. 7.
[428] Elements of Crimes, Art. 7.
[429] Elements of Crimes, Art. 7.

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discrimination. War crimes in their turn require the "awareness of the factual circumstances that established the existence of an armed conflict", that is the armed conflict must be present and be considered as the context for such crimes, whereas armed conflicts are eventually not procured by individuals on their own either, as Fletcher noted.

The responsibility regime of the Rome Statute also contains traces of state involvement in the crimes. On its face it maintains that individuals "shall be individually responsible"[430] and that such responsibility does not affect that of the states. However it cannot ignore that the crimes are quite specific and different from other ordinary crimes in one important aspect that they are committed collectively and with state support; actually amounting to states themselves committing those crimes, as if the notion of state should ever make sense it should not disappear to avoid the responsibility for human rights violations. Therefore Rome Statute provides specifically that no official capacity, including that of a "Head of a State or Government, a member of a Government or parliament, an elected representative or a governmental official" shall relieve responsibility. Moreover military commanders and other superiors are also responsible, whereas "superior orders and prescription by law" shall not relieve the responsibility either[431]. These provisions underline that the state participation in crimes, despite not mentioned directly, but only as a possible context for crimes or unavailable defense for perpetrators, is precisely not absent but very much a lively and relevant issue.

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[430] Rome Statute, Art. 25(2).
[431] Rome Statute, Art. 33 (albeit with an exception).

As elaborated in chapter two of this work the repressions of state presence and sovereignty in international justice originate from the formula or assumption that characterizes states as ephemeral entities that have nothing to do with crimes and atrocities. This separation of crimes from states becomes the starting point for the emergence of an independent institution of international justice within international law that addresses individuals beyond or outside the states; a novel construction for international law at the time. This separation has evolved into the permanent institution of ICC that does engage with clashes of sovereign powers (or their aspects) but disguises this throughout the rhetoric of repressions. These repressions then become the balance-wheel of international justice, because were they to disappear so would have the entire construct of individual responsibility under international that would be indistinguishable from state responsibility and other aspects of international public law such as peaceful settlement of disputes among states. Thus prosecutions apart from determining individual guilt also refer to unexpressed and unspoken tensions concerning the involvements of states in crimes that are treated as secondary and accidental to determinations of individual responsibility and (un)formulated to make ICC appear as if it was beyond or separated and therefore neutral to them.

The rationale of repressions in ICC is then to separate it from the sovereign powers whose clashes it is to resolve. However as already mentioned international law does not produce, but justifies the outcomes of political tensions. Therefore ICC despite rhetorically denying its involvement and making of normative decisions on limits of state sovereignty cannot apply the same logic with respect to the states that are not parties to Rome Statute and do not wish to become subject to its determinations of their sovereign

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powers and inevitably creates a second regime for the atrocities involving sovereign presence of third states. Hence the tensions repressed in the rhetoric of international justice nevertheless continue to mould the boundaries of its regime and efforts to ignore or deny this would result in the rejection of ICC and its regime by states who do not wish for various reasons of altering their power positions in world relations and will result in shrinking or blocking of this regime with regard to particular situations and disputes.

5.4 Disputes concerning international peace and security or individual crimes? From the Security Council to ICC

Another notable limit on the ICC regime is defined through its relationship to the Security Council. What do both of the have in common? Both Security Council and ICC deal with situations concerning the international peace and security; whereas the role of Security Council is rather explicit and provided for in the UN Charter, ICC's jurisdiction also covers crimes that concern international peace and security, crimes that are often committed in the context of armed conflicts, and in the case of the deferred jurisdiction over the crime of aggression it overlaps explicitly.

There are however several notable differences. Where Security Council acts according to the arrangement where each permanent member can veto an action, in ICC the impact of the permanent members is provided for through different arrangement known as "Singapore compromise"(below). Yet another major difference is that ICC deals with international peace and security indirectly, while its primary mission is individual criminal responsibility, or deciding on guilt of and justice for individuals. In other words its vocabulary of international peace is rather narrowly construed. On the other hand any

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straightforward connection or implication of state presence in crimes is underemphasized and repressed, as described in previous chapters with regard to international criminal law in general. This repression gives the ICC several important advantages, as well as limitations as described here.

First of all the repressions of state and sovereign presence in crimes legitimate creation of judicial body to determine individual guilt, while being remote from political considerations and thus justify the existence of ICC with overlapping subject matter jurisdiction aside the Security Council. They allow ICC to disguise dealing with the same substance of political tensions, parallel to the Security Council. They are thus the source of ICC's legitimacy and independence from Security Council.

Therefore one way to look at the issue here could be that we deal with the fragmentation of international law that addresses important political tensions of concern to international community; in different regimes, different vocabularies and different institutions. Coupled with different mechanisms of action and intensity of political tensions this could result in the competing use of these fragments, the mutual interrelationship of which is not clearly defined or delimited, which could result in embarrassment and disguised struggle between powers preferring the employment of one of the mechanisms (or their given combination) according to their interests.

Let's briefly allude to the relationship between ICC and Security Council as defined in the Rome Statute. It is usually described as "three-pronged" relationship, where the

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Security Council can refer cases to the ICC, defer them and enforce its judgments[432]. The suggestion that prior to prosecutions Security Council first should determine that there has been aggression committed, a solution for the overlapping jurisdiction of the two over the matter, was rejected and instead the issue was postponed, so that the Court will only exercise jurisdiction over aggression once an amendment to the Rome Statute defining the crimes will be made[433]. Security Council can under article 13(b) refer "situations" to the ICC's Prosecutor, while "acting under Chapter VII of the Charter of the United Nations".

Most important provision for the purposes of this section is the article 16 which provides that:

> No investigation or prosecution may be commenced or proceeded with under this Statute for a period of 12 months after the Security Council, in a resolution adopted under Chapter VII of the Charter of the United Nations, has requested the Court to that effect; that request may be renewed by the Council under the same conditions.

This article is the outcome of the so-called "Singapore compromise" according to which Security Council has the power of "negative veto", where at least nine affirmative votes are required to stop proceeding, and even all five permanent members together could veto prosecution or investigation. This can be contrasted to proposed "positive veto" arrangement where ICC would have been prevented if a situation was being considered by the Security Council, unless the latter would have decided otherwise; a situation

[432] Monten Bergsmo, Jelena Pejic, *Deferral of investigation or prosecution, in* Triffterer ed., COMMENTARY 373-383, 373; Condorelli & Villalpando, *Referral and Deferral by the Security Council, supra*; Lionel Yee, *The International Criminal Court and the Security Council: Articles 13(b) and 16, in* THE INTERNATIONAL CRIMINAL COURT: THE MAKING OF THE ROME STATUTE: ISSUES, NEGOTIATIONS, RESULTS 143-153 (Roy S. Lee ed.,1999).

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tantamount to veto by every permanent member of the Security Council over the docket of the ICC[434]. This could again be compared to the situation with the ad hoc tribunals, such as ICTY and ICTR where each permanent member can veto creation of a tribunal.

It is important to briefly mention here that the power of the Security Council to create international criminal tribunals, has been practiced as evinced at the examples of ICTY and ICTR, and confirmed by the ICTY in the *Tadic* decision[435]. It is also relevant that under the UN Charter the Security Council has "primary responsibility for the maintenance of international peace and security" (24.1) and under Chapter VII enjoys wide powers in general to that end, whereas decisions in this regard are "made by an affirmative vote of nine members including the concurring votes of the permanent members" (article 27.3). Finally under the article 103 the obligations under the UN Charter prevail over obligations under any other international agreements, so that members of the UN would not be able through international treaties modify the provisions of the Charter for themselves[436].

Since the entry into force of the Rome Statute the Security Council had used its deferral powers several times employing similar language and referring to the article 16 of the Rome Statute[437]. A number of criticisms and international legal issues has been raised

[433] Lionel Yee, *id at* 144-145.
[434] *Id at* 149-150.
[435] Prosecutor v. Dusko Tadic, IT-94-1-AR72, 35 I.L.M. 32 (1996), paras 14-16.
[436] UN Charter, *supra*, Art. 24(1), 27(3), 103.
[437] Security Council Resolution 1422 (2002), *at* http://www.un.org/Docs/scres/2002/sc2002.htm (that blocks investigations and prosecutions for 12 months starting July 1 2002 that involve "current or former officials or personnel from a contributing State not a Party to the Rome Statute over acts or omissions relating to a United Nations established or authorized operation"); Security Council Resolution 1487 (2003), *at* http://www.un.org/Docs/sc/unsc_resolutions03.html (that extends the same bar for another 12 months); Security Council Resolution 1497 (2003), *at* http://www.un.org/Docs/sc/unsc_resolutions03.html (that with regard to the situation in Liberia "current or former officials or personnel from a contributing State, which

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with regard to the legality of the exercise of this power by the Security Council, suggesting *inter alia* that the Security Council acted *ultra vires*, violating the norms of international law in general (because e.g. these resolutions altered the meaning of the Rome Treaty and thus amended them[438], because they violated principle of equality by privileging some peacekeepers over others[439], or that they were against *jus cogens* norms of international law that prohibit international crimes[440] or international law norms that reject impunity for them[441] etc), violating the UN Charter in particular (when not specifying the actual threat to international peace and security while acting under Chapter VII, exceeding limitations set by the Charter, such as the requirement to act in accordance with the purposes of the UN)[442] and suggesting that they were not sound policy in general (Security Council being too vague or limiting the ICC's prosecutorial discretion[443]) and even discussing whether permanent members of the Security Council that are also parties to the Rome Statute violated their obligations under the latter while voting for these resolutions[444]. Furthermore there is a debate as to whether ICC has power to decide on the validity and legal effect of these resolutions in accordance with the *kompetenz-*

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is not a party to the Rome Statute of the International Criminal Court, shall be subject to the exclusive jurisdiction of that contributing State").

[438] Neha Jain, *A Separate Law for Peacekeepers*, *supra at* 243.

[439] Carsten Stahn, *The Ambiguities of Security Council Resolution 1422 (2002)*, 14 European Journal of International Law 85, 102 (2003).

[440] Mohamed El Zeidy, *The United States Dropped the Atomic Bomb of Article 16 of the ICC Statute: Security Council Power* of Deferrals and Resolution 1422, 35 Vanderbilt Journal of Transnational Law. 1503, 1537 (2002).

[441] Zappalà, *The Reaction of the US to the Entry Into Force of the ICC* Statute, *supra at* 117-118.

[442] Neha Jain, *id at* 243, 250, 251; Luigi Condorelli, Annalisa Ciampi, *Comments on the Security Council Referral of the Situation in Darfur to the ICC*, 3 J. Int'l Crim. Just. 590, 596-597 (2005).

[443] Stahn, *supra.*

[444] *Id at* 97-100.

kompetenz principle[445] and whether it can decline Security Council's requests effectively reviewing the latter's action[446].

The current discourse of ICC and Security Council relationship can therefore be described, at least on behalf of ICC supporting narratives, as a critique of Security Council's exercise of its power, characterization of that power as political, versus rule of law and judicial approach of ICC. The arguments of ICC supporters is based on the preference for legal approach of individual responsibility to the international peace and security, limitation of Security Council's unfettered power in this regard, stimulated and informed by a specific liberal individualist episteme described in chapter one, and realized through repressions of state presence in international crimes as argued in chapter two of this work. The issues of whether ICC has power of judicial review over Security Council's deferral resolutions, whether it can decline the "requests" of the latter, whether it should find provisions and norms to that force in the ICC statute or elsewhere according to the *kompetenz-kompetenz* principle point in this direction as well, whereas it is suggested here that rhetorical legitimacy for such issues and their construction stems from mentioned repressions that contribute to the delineation and re-construction of the

[445] "Kompetenz-Kompetenz", the right of an international tribunal to decide on its own jurisdiction, is a recognized principle in international law; *see e.g.* Nottebohm case (*Liechtenstein v. Guatemala*), 1953 I.C.J. 111, at 119. *See also* Statute of the International Court of Justice, annex to the Charter of the United Nations, 3 Bevans 1179; 59 Stat. 1031; T.S. No. 993, *at* http://www.icj-cij.org/icjwww/ibasicdocuments/ibasictext/ibasicstatute.htm, Art. 36(6); See also *Prosecutor v Tadic*, *supra at* 18.

[446] William A. Schabas, AN INTRODUCTION TO THE INTERNATIONAL CRIMINAL COURT 66 (2001); Salvatore Zappalà, *The Reaction of the US to the Entry Into Force of the ICC Statute*, *supra at* 120. But see Ademola Abass, *The Competence of the Security Council to Terminate the Jurisdiction of the International Criminal Court*, 40 Texas International Law Journal 263, 291-292 (2005) (arguing that whereas "[n]either the Statute of the Court nor its Rules of Procedure and Evidence contain provisions to that effect. Besides, it is well known that despite doctrinal propositions to the effect that the ICJ can review Security Council powers, this aspiration has not translated into reality" and that "it is difficult to argue that by terminating ICC jurisdiction, the Security Council did not act in accordance with Chapter VII, unless critics can show that

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international peace and security issues in the vocabulary of international justice, particularly through ICC.

At the same time this judicialization and individualization of situations concerning international peace and security fosters the necessity to frequently defer to the decisions of the Security Council, which is by the same rhetoric of repressions that achieve the detachment from political tensions is being ascribed familiar features of political or executive body (versus judicial nature of ICC's functions), that virtually gives Security Council carte blanche in creating exceptions to the ICC regime and providing immunity to certain officials with little or almost absent possibility of review (given the effective impossibility under the current international law to exercise any type of judicial review over the actions and reasoning of the Security Council), transforming the article 16 deferral powers of the Security Council into a type of "political question" doctrine on international/inter-institutional level.

Let us attend to the argumentation of the Security Council with regard to the International Criminal Court exemplified in the Resolution 1422. Whereas the Rome Statute in its preamble recognizes that crimes it is meant to prosecute "threaten the peace, security and well-being of the world" and also refers to the complementarity principle[447], the same arguments also figure in the rhetoric of the Security Council. Thus the resolution being passed under the Chapter VII authority mentions the interests of international peace and security three times while "[e]mphasizing the importance to international peace and security of United Nations operations", "[d]etermining" those operations to be "deployed

the Council acted in bad faith or that if left unchecked, the massive powers entrusted to the ICC to try nationals of nonparties are incapable of disturbing international peace and security".)

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to maintain or restore international peace and security" and that "it is in the interests of international peace and security to facilitate Member States' ability to contribute to operations established or authorized by the United Nations Security Council"[448], affirming its descending rhetoric of contributing to international community and acting on its behalf. At the same time it also refers to the position of the ICC, but this time indicating its ascending features of being based on the authority of states when emphasizing that "not all States are parties to the Rome Statute" while those who are "have chosen to accept its jurisdiction in accordance with the Statute", and finally alluding to the complementarity principle[449] that is meant here to describe ICC as part of national efforts, as being supplementary to them.

To summarize main points of this section; whereas Security Council and ICC have partly overlapping jurisdiction and share the common purpose and reason of contributing to international peace and security, albeit with different approaches and philosophies, and whereas Security Council under the UN Charter has largely unchecked and broad powers with "primary responsibility" over international peace and security, the ICC self-projects as more modest and purely legalistic, dealing solely with responsibility of individuals. Repressions of state presence and sovereign clashes in crimes and responsibility regime of ICC allow it to deal selectively with the subject matter of potentially divisive political tensions, while at the same time rendering the Court politically detached and independent, neutral to such tensions. At the same time these repressions necessitate deferring to the Security Council which is being constructed in terms of ICC discourse as

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[447] Rome Statute, Preamble, *supra*.
[448] SCl Resolution 1422, *supra*.
[449] *Id*.

political body, which coupled with limited possibilities for judicial review and limitation or responsibility of the Security Council under international law makes article 16 of the Statute a basis for judicial deference, a sort of political question doctrine.

It is also worth pointing out that in accordance with the theses put forward in chapter two, both of the mechanisms of ICC and Security Council as well are legal regimes that refer to political tensions and divisions of powers, guarding and justifying their outcomes. Whereas ICC is more legalistic and rhetorically detached from them, as the result of the mentioned repressions, the tensions associated with it and repressed in its vocabularies did not disappear altogether, but resulted in the limitation of the reach of the ICC regime under article 16, creating immunity for certain officials; the repressed tensions therefore return, modifying the ICC regime accordingly. While they were instrumental in creating necessary vocabulary for apolitical and aseptic treatment of issues concerning international peace and security, they at the same time define the limitations of ICC regime: being the source of its independence and neutrality, at the same time setting boundaries for its regime, they serve as a 'balance wheel' that determines the reach, the strengths and compromises of the ICC and international criminal justice in general.

5.5 Shadows of the ICC's regime of immunity and personal jurisdiction: article 98 and Bilateral Non-Surrender (Immunity) Agreements

Despite providing in article 27 that no immunity whatsoever is available to any person before the Court, the Rome Statute also contains provisions intended to avoid frustration of existing international obligations of states with regard to immunities of officials of states not parties to the Statute (but that might nevertheless fall under its personal

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jurisdiction reach). The hotly debated article 98 identifies in the first part its attitude to the immunities of nationals of third states normally existing under international law, such as those of high ranking incumbent officials, as confirmed in the *Congo v Belgium* decision of the ICJ, or otherwise those pertaining to the former officials, about which there is a recently revived discussion since the *Pinochet* decision of the House of Lords. Thus article 98(1) provides that:

> The Court may not proceed with a request for surrender or assistance which would require the requested State to act inconsistently with its obligations under international law with respect to the State or diplomatic immunity of a person or property of a third State, unless the Court can first obtain the cooperation of that third State for the waiver of the immunity.

Furthermore the second part of the article accounts of international agreements providing immunities, such as SOFA's or others not included within the customary international law of immunities:

> The Court may not proceed with a request for surrender which would require the requested State to act inconsistently with its obligations under international agreements pursuant to which the consent of a sending State is required to surrender a person of that State to the Court, unless the Court can first obtain the cooperation of the sending State for the giving of consent for the surrender.

It should also be noted that article 98 despite being indirectly relevant for the immunity before the Court, does not technically provide for one, merely stipulating conditions under which the Court may not proceed in requesting the surrender of a given person[450]. Apart from the situation with immunities under article 98(1), traditionally accorded to

[450] See Kimberly Prost, Angelika Schlunck, *Cooperation with respect to waiver of immunity and consent to surrender, in* Triffterer ed., COMMENTARY 1131-1133, 1132.

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certain officials under diplomatic and consular law or international law of special missions and customary international law, the situation comparable to the debates when municipal authorities prosecute foreign officials, the scope and validity of the agreements purporting to enforce 98(2) has become controversial.

The US government that is under the American Servicemen Protection Act prevented from participating and contributing to peacekeeping operations unless the Congress is certified by the President that ICC cannot proceed with regard to its service-members[451], has entered into a large number of agreements[452] with both states parties to the Statute, mere signatories to it and states not parties to the Statute. These agreements provide for non-surrender to the ICC of the US nationals usually on a reciprocal basis. A typical agreement[453] provides:

> A. Reaffirming the importance of bringing to justice those who commit genocide, crimes against humanity and war crimes,
> B. Recalling that the Rome Statute of the International Criminal Court done at Rome on July 17, 1998 by the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court is intended to complement and not supplant national criminal jurisdiction,
> C. Considering that the Government of the United States of America has expressed its intention to investigate and to prosecute where appropriate acts within the jurisdiction of the International Criminal Court alleged to have been committed by its officials, employees, military personnel, or other nationals,
> D. Bearing in mind Article 98 of the Rome Statute,

[451] Sean D. Murphy, *Contemporary Practice of the United States*, 97 American Journal of International Law 200, 201 (2003).
[452] As of 11 December 2006 the Coalition for the International Criminal Court reports 102 agreements, *see* CICC, *Status of US Bilateral Immunity Agreements*, *at* http://www.iccnow.org/documents/CICCFS_BIAstatus_current.pdf.
[453] This sample for a Bilateral Immunity Agreement is taken from Crawford et. al, *Joint Opinion*, *supra*, at p. 4-5; *See also* Murphy, *Contemporary Practice*, *supra at* 201-202 for the almost identical sample based on the agreement with East Timor.

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E. Hereby agree as follows:

1. For purposes of this agreement, "persons" are current or former Government officials, employees (including contractors), or military personnel or nationals of one Party.

2. Persons of one Party present in the territory of the other shall not, absent the expressed consent of the first Party,

(a) be surrendered or transferred by any means to the International Criminal Court for any purpose, or

(b) be surrendered or transferred by any means to any other entity or third country or expelled to a third country, for the purpose of surrender to or transfer to the International Criminal Court.

3. When the United States extradites, surrenders, or otherwise transfers a person of the other Party to a third country, the United States will not agree to the surrender or transfer of that person to the International Criminal Court by the third country, absent the expressed consent of the Government of X.

4. When the Government of X extradites, surrenders, or otherwise transfers a person of the United States of America to a third country, the Government of X will not agree to the surrender or transfer of that person to the International Criminal Court by a third country, absent the expressed consent of the Government of the United States.

5. This Agreement shall enter into force upon an exchange of notes confirming that each Party has completed the necessary domestic legal requirements to bring the Agreement into force. It will remain in force until one year after the date on which one Party notifies the other of its intent to terminate this Agreement. The provisions of this Agreement shall continue to apply with respect to any act occurring, or any allegation arising, before the effective date of termination.

The agreements with states not parties to the Statute characteristically include an additional provision that:

6. Each Party agrees, subject to its international legal obligations, not to knowingly facilitate, consent to, or cooperate with efforts by any third party or country to effect the extradition, surrender, or transfer of a person of the other Party to the International Criminal Court.

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The practice of such agreements became a subject for controversy and criticism among scholars and governments alike, including the European Union[454] and the Parliamentary Assembly of the Council of Europe[455]. The scholarly positions criticizing the practice of bilateral immunity agreements, most prominently expressed in the *Joint Opinion* by Crawford, Sands and Wilde[456], rely on a number of arguments.

Crawford *et al* argue that article 98(2) covers but a narrower set of agreements, rather than any agreement providing immunity to all nationals of states not parties to the Statute. First of all this category includes SOFA's and agreements for criminal cooperation that provide for the "transfer of a person to another State, with the proviso that the person in question would be returned to the State of origin (and not a third state or entity), after the purpose for the original transfer had been achieved"[457]. Furthermore the agreements can only cover immunity of individuals "sent" by the third states, and not just any nationals, which is limited to persons that "enjoy a certain status and are performing a particular activity" such as "a government minister or an ambassador or a soldier, who is in the territory of the requested state with the consent of that state to

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[454] See European Parliament Resolution P5_TA-PROV(2002)0449 (2002), *at* http://www.globalsolutions.org/programs/law_justice/icc/bias/europarl.pdf; Elizabeth Becker, *European Union Urges Aspirants to rebuff U.S. on World Court*, New York Times, Aug. 14, 2002, at A12.

[455] *See* Murphy, Contemporary Practice *supra at* 202 (for Parliamentary Assembly of Council of Europe resolution "greatly concerned by the efforts of some States to undermine the integrity of the ICC Treaty and especially to conclude bilateral [non-surrender] agreement" and considering such agreements "not admissible under the international law governing treaties" and do not comply with the Treaty that "applies equally to all persons without any distinction based on official capacity").

[456] Crawford et al, supra; *See also* Harmen van der Wilt, *Bilateral Agreements between the United States and States Parties to the Rome Statute: Are They Compatible with the Object and Purpose of the Statute?*, 18 Leiden Journal of International Law 93 (2005).

[457] Crawford et al, *id at* para 40.

engage in official business of the sending state"[458]; requirement that suggests nexus between a non-party State and the individual that is beyond mere nationality.

Another suggestion put forward by Crawford *et al* is that unless the non-surrender agreements provide that the "sending state" shall subject the person covered by such an agreement to an effective investigation and prosecution (where necessary) the states parties to the Rome Statute are prevented from entering such agreements, as they would deprive the Statute of its object and purpose by allowing impunity, contrary to the international law of treaties[459]. The argument that the Rome Statute's object and purpose is to eliminate impunity is being discovered in the Preamble of the Statute[460] as well as in the provision that with regard to the complementarity requirement sets conditions for the admissibility of cases before the ICC[461]. Moreover signatories that have not ratified the Statute are also under the obligation not to defeat the object and purpose of the Rome Statute by entering into such agreements according to the article 18 of the Vienna Convention on the Law of Treaties[462].

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[458] *Id at* 43.

[459] *Id at* 24. See also *Case Concerning Military and Paramilitary Activities (Nicaragua v Unites States)*, 1986 ICJ Reports 14, at 138 (paras. 275-6).

[460] Crawford et al, *at* para 27; See also Rome Statute, Preamble, Paras 4-6 ("*Affirming* that the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured by taking measures at the national level and by enhancing international cooperation, *Determined* to put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes, *Recalling* that it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes).

[461] Crawford et al, *at* para 29. The relevant provisions in the article 17 of the Statute suggest that the case may be found inadmissible when *inter alia* 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 "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".

[462] Crawford et al, *at* paras 53-55. Article 18 of the Vienna Convention provides that "A State is obliged to refrain from acts which would defeat the object and purpose of a treaty when: (a) it has signed the treaty or has exchanged instruments constituting the treaty subject to ratification, acceptance or approval, until it shall have made its intention clear not to become a party to the treaty; or (b) it has expressed its consent to

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Therefore they argue that 98(2) forbids States parties to enter into agreements that defeat such "object and purpose" of the Rome Statute or provide for the immunity of persons that cannot be treated as being "sent" by the third state[463]. These conditions however do not apply to the agreements concluded prior to the Rome Statute that are valid according to the Article 30(4) of the Vienna Convention[464]. Of course the significance on this latter 'limitation on the limitation' of the bilateral immunity agreements is practically not that important, considering that the targeted agreements are post Rome Statute event, and moreover renewals of such prior agreements might also be prevented[465].

As to the issue of the determination of the compliance of such agreements with the article 98(2), Crawford, Sands and Wilde envision several possibilities. One is that the Court itself might resolve the issue under the article 97 consultation provision[466]. Alternatively the Court might refer the dispute to the Assembly of States Parties which could either resolve the matter itself through a resolution or otherwise suggest further means of dispute resolution, including referral to the ICJ for an advisory opinion, that neither the Assembly of States Parties, nor ICC are still not authorized to do[467].

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be bound by the treaty, pending the entry into force of the treaty and provided that such entry into force is not unduly delayed". *See* Vienna Convention on the Law of Treaties, *supra*.

[463] Crawford et al, *at* para 52.

[464] *Id at* 47; *See also* Vienna Convention on the Law of Treaties, Art. 30(4), *supra* holding that "[w]hen the parties to the later treaty do not include all the parties to the earlier one: (a) as between States Parties to both treaties the same rule applies as in paragraph 3 (then "the earlier treaty applies only to the extent that its provisions are compatible with those of the later treaty"); (b) as between a State party to both treaties and a State party to only one of the treaties, the treaty to which both States are parties governs their mutual rights and obligations.

[465] Crawford et al, *at* para 47.

[466] *Id*, para 58. According to the Art. 97 of the Rome Statute states parties "shall consult with the Court without a delay" if they identify "problems which may impede or prevent the execution of the request", including "[t]he fact that execution of the request in its current form would require the requested State to breach a pre-existing treaty obligation undertaken with respect to another State".

[467] Crawford et al, *at* paras 60-61. According to the Art. 119(2) of the Rome Statute "[a]ny other dispute between two or more States Parties relating to the interpretation or application of this Statute which is not

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On the other hand , beyond the disputations on whether the ICC can have jurisdiction over nationals of non-party states at all, there are more moderate proposals suggesting that the existing BIA are valid, albeit might need improvements to make them less vulnerable to criticisms. Thus Dietz suggests with regard to the law of treaties argumentation that whereas signatories and states parties to the Rome Statute merely have an obligation not to "defeat the object and purpose of a treaty", which is a standard lower than actually defeating the treaty[468], whereas both 98(2) and the complementarity principle of the Rome Statute "limit the reach of the ICC and limit the scope of preventing impunity"[469].

He continues that even arguing that the 98(2) requires complete prevention of impunity, US agreements are still valid, because they do refer to the importance of accountability and the intention to investigate and prosecute persons where necessary[470]. Furthermore he argues that the "sending state" clause does not necessarily require that persons are in the "requested state" on official business because the article 98(2) refers to the requested state party as the "requested" rather than "receiving" state, and the article 98(2) is the only place in the Statute where "sending" State is mentioned. Moreover he suggests that the at the negotiation process US when including 98(2) intended them to cover "any

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settled through negotiations within three months of their commencement shall be referred to the Assembly of States Parties. The Assembly may itself seek to settle the dispute or may make recommendations on further means of settlement of the dispute, including referral to the International Court of Justice in conformity with the Statute of that Court"

[468] Jeffrey S. Dietz, *Protecting the Protectors: can the United States successfully exempt U.S. persons from the International Criminal Court with U.S. article 98 Agreements?*, 27 Houston Journal of International Law 137, 155 (2004).

[469] *Id*, at 158.

[470] *Id*, at 159.

American"[471]. He concludes that the "sending state" clause "merely indicates where the ICC must turn to seek consent for surrender of an accused"[472].

Dietz comes out with suggesting ways to improve the agreements by first expanding the jurisdiction of the US Courts to improve their ability to prosecute all US nationals for crimes in the Rome Statute[473]; secondly by changing the agreements from mere obligation of not transferring the accused to the ICC to their extradition to US together with emphasizing the intent to investigate and prosecute[474]; and finally by concluding unilateral rather than bilateral agreements, because the likelihood of former type of agreements' being found contrary to the obligations under the Statute decreases, as the US is anyway not party to the Statute and does not intend to join it, whereas such agreements would provide for the immunity of US nationals only[475]. He concludes that the 98(2) Agreements are valid and concluded with good faith understanding of the Rome Statute, despite there are ways of making them more effective and covering wider scope of individuals[476].

While opposing and seeking to define the boundaries and limits of the reach of the ICC's regime of personal jurisdiction and immunity, the regime of BIA's is in many aspects similar to the former, becoming its shadow supplemented by its argumentation structure.

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[471] *Id*, at 169-173. But see Scheffer, *Article 98(2) of the Rome Statute*, *supra at* 333 (arguing that "in contributing to the drafting of that provision of the Statute, the US delegation did not seek to protect the entire body of US nationals, such as the many US nationals who are engaged outside the United States as humanitarian aid workers, as journalists, as staff of the UN or intergovernmental relief agencies, as representatives of NGOs, as expatriate employees of private companies, or as tourists").
[472] Dietz, *supra*, *at* 175.
[473] *Id at* 176-177.
[474] *Id at* 177-178. This according to Dietz would enable State Parties to both the Rome Statute and a Bilateral Agreement to rely on the Article 90 of the Statute (that concerns handling the competing requests for extradition). Then the Article 98(2) will only become important when the US would have no intention to prosecute the person, considering the accusations "frivolous"; *at* 152-153.

BIAs' argumentation and rhetoric rely on the same constructs, such as separation of substance vs. procedure in the jurisdiction and immunity discourse, the repression of state presence in the individual responsibility (that separates and identifies the individual criminal responsibility narratives from political tensions), legalism and individualism in the approach to atrocities. Its arguments mirror their protagonist; are in way already contained in, come together with the latter. Furthermore, as this project supports, whereas the international legal structures are indeterminate, justifying the outcomes of political tensions rather than determining them, they provide arguments and legal validity for both positions. The disagreement with ICC that is not necessarily expressed within the limits of its perspective instead constructed another regime, that of BIAs, relying on the same types of legal arguments, but with different outcomes, such a regime becoming a shadow of the ICC's regime and marking the return of the repressed tensions.

First of all it is worth mentioning that both opponents and supporters of the BIA regime rely on the interpretations of the Rome Statute within the discourse of the law of treaties. One the one hand it is argued that the good faith interpretation of the Statute prevents conclusion of such agreements on behalf of states parties and signatories, as that defies its "object and purpose". On the other hand the BIA's are also claiming the good faith understanding of the Statute, based on the Article 98[477] that is taken to limit the non-impunity as the "object and purpose", and moreover try to settle within and conform to other provisions of the Statute to appear genuinely within this modest interpretation of the Statute. Thus for example the clauses in paragraphs 3 and 4 of the typical agreement

[475] *Id at* 148, 178-9.
[476] *Id*, *at* 179-180.
[477] *See* paragraph "D" of the typical agreement reproduced above.

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(above) that prevent the surrender "absent the expressed consent of the Government" of the sending state also mirror the same exception clause of the article 98 that requires the cooperation of the sending state in waiving the immunity. Apart from that the regime demonstrates the potential to mould itself in fitting the task of being within this modest understanding of the Statute increasingly better, as exemplified in the suggestions to improve the BIA's as recited above.

Being more direct to the point; theoretically the BIA argumentation relies closely on the distinction between immunity and impunity, jurisdiction and responsibility (as procedure versus substance) in the international criminal law as also accepted by the ICJ in the *Congo v Belgium* judgment, the distinction reflecting the repression of state presence in the individual criminal responsibility, creating and constituting the modern discourse of international justice.

In this spirit the BIAs emphasize the complementarity principle, however this time not to avoid impunity, as suggested by the friendly reading of the Statute by Crawford, Sands and Wilde, but to limit the ICC regime. Thus the complementarity principle in the paragraph "B" of the typical agreement is followed by the distinction between immunity and impunity being underscored in paragraph "C", that together with the importance of bringing to justice those responsible for international crimes (in paragraph "A")[478] means that immunity in BIA's is not necessarily impunity. Complementarity is then used in a strange way to avoid ICC's deciding on impunity, rather than to demonstrate Rome Statute's object and purpose as suggested by Crawford. Thus according to the BIA's non-

[478] And with the alternative of strengthening this statement to the expression of the intent to investigate and prosecute where necessary, as Dietz suggests.

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impunity is avoided, where immunity does not substantively mean impunity, and where complementarity is not used to provide impunity. This is to say that neither the complementarity nor the non-impunity can determine the validity of the BIA regime by themselves and can be projected with both support of the BIA's and their rejection.

As argued in this work the repressions of state presence in the atrocities is the "balance wheel" of the international criminal justice. They separate and constitute the individual criminal responsibility regime as neutral, apolitical and detached from political tensions. Such repressions are the source of international criminal justice, making it a legal attitude and framework for addressing issues such as genocide, crimes against humanity and war crimes that purports to resolve the tensions associated with them by judicially deciding on the individual guilt involved in them. However these repressions are at the same time the source of the greatest weakness of the international criminal justice. Beyond circumscribing the responsibility, from constructing apolitical and tension-substance neutral argumentation scheme for handling clashes of sovereign powers, they create grounds for a similar regime, also seemingly and rhetorically apolitical and not engaging with substance of sovereign disputes; a regime such as that of BIAs. Repressions here are however utterly unhelpful in grasping or overcoming this opposition by the BIA regime on legal grounds, as the latter is based on them as well.

Thus the international legal argumentative structure in the part concerning international criminal justice is indeterminate, and can both justify the BIA regime and the ICC regime of personal jurisdiction, immunity as non-impunity of the former, and non-impunity with possible immunity of the latter. From the perspective of international criminal justice

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there is no particular reason for special treatment of the jurisdiction over nationals of states not parties to the Rome Statute, as repressions assume individual responsibility is not related to states and their political tensions. But this does not mean that individual criminal responsibility is perceived the same way by the political tensions, substance of which it might entail. In such cases, as tensions do not disappear with repressing them in the vocabularies of international criminal justice, a new regime is being constructed, as the shadow of the ICC regime, using the same argumentation structure, but with different outcomes. And the outcomes are then not determined by the repressions as one could expect, but other way around the reaches of both regimes would be determined by the political tensions that they justify and guard.

The bilateral agreements story is therefore a manifestation of how the 'repressed' political tensions concerning the distribution of responsibility are redirected into legal disagreements that cannot be solved convincingly by the international legal argumentative scheme which appears to be indeterminate. Thus the legal regimes, those of ICC and the bilateral immunity agreements here, cannot themselves fall short of becoming parties of political disagreements involved in the usage of the regimes for relative power maximization strategies, according to the realist explanation of regimes for international law purposes.

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CONCLUSION

This thesis sought to argue that the regime of international criminal justice that has emerged since the Nuremberg trials is based on the repression of positive aspect of responsibility for the human rights atrocities, that becomes its operative and discursive closure from politics and general international law, as well as other regimes of international law, such as diplomatic intercourses law or state responsibility law. Furthermore a realist explanation was employed to explicate the dynamics of fragmentation and sub-fragmentation of international justice regimes in the power-based hegemonic tactics of the actors involved.

The discursive boundaries of international justice were argued to be based on the reduction of the radical evil to the international crimes, while denying and underemphasizing the state presence in crimes from both the international law and domestic perspectives. From the viewpoint of international the repressions serve as the internal basis for selecting and communicating information by the episteme of international criminal justice; its internal bias and ethos in dealing with facts and norms characterized differently by other regimes of international law, in particular the concept of immunity/impunity. The heterogeneity of international justice vocabularies to the mainstream state-centered narratives of international law allows normative reinterpretation of concepts and facts such as immunity in legal disputes that contain substances of political tensions. The realist explanation affords an interesting view of the perspectives of the international justice regimes as engaged in hegemonic tactics of various actors.

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Furthermore it was argued that the outcomes of legal disputes discussed in case studies were not determinable either by facts themselves nor the usage of the norms of international law, but often *apriori* through the application of a given regime and the *differend* contained in the idioms and structural biases of a given regime, application of which depends on the outcomes of political tensions, rather than determines them.

The discussion on fragmentation was necessary to contextualize the regime of international criminal justice in its relationship with other regimes, as well as to bring to light arguments and explanations prevalent in modern international law concerning the nature of fragmentation, its dynamics, threats and advantages it comprises, as well as explanations of the nature of regimes from the international relations perspective, mainly realist and neoliberal ones. Whereas the neoliberal explanations of the international justice regimes seem to be ubiquitous in the literature, this project alternatively suggested a realist explanation. Furthermore the surfacing of fragmentation was conducive to elaborating the role of the repressions of positive responsibility and state presence as the 'operative closure' of the international justice regime.

First chapter's arguments emancipated the rational and liberal in the collective components of responsibility that are being downgraded perhaps due to atomistic liberalist biases concerning responsibility for atrocities, to explicate the collective guilt's positive aspects as enhancing human dignity and liberty. Moreover the arguments against positive responsibility as 'collective guilt' as being based on romanticism as opposed to liberalism (provided that they are necessarily conflicting), rationality and human freedom were reconsidered as simplistic and not necessarily accurate. Furthermore the first

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chapter calls for a more robust constitutional and international law vocabularies for positive responsibility for human rights atrocities as a part of a normative, moral and legal, attitude within societies to the victim communities that would generally provide for a more decent and rational arrangement, especially in cases of transition.

Second chapter investigates the structure of the operative closure of international justice, that centers on the depicting radical evil of human rights atrocities as individual crimes, omitting and under-referencing the collective aspects of such deeds, rationalizing them as ordinary criminal acts and ripping them off the state and societal complicities. Furthermore the international criminal justice normatively reinterprets immunity rationales of the diplomatic relations law as non-justice impunity without intrinsic value of state presence. It also discusses the relationship between legal disputes and political tensions concerning legal interactions that could be relevant to power-redistribution tactics of actors involved in the employment of the international justice regime in various circumstances. It outlines the basis for interactions between various international justice regimes, as well as the their relations with regimes of state responsibility and such regimes as international peace and security, that are more engaged in politicized aspects of international life. It suggests that the repressions constituting the discursive boundaries of international justice are inattentive and anomic to the bordering and overlapping regimes of international law, which creates a margin for their heterogeneous employment alongside such regimes and alongside different sub-regimes of international justice.

More peculiar conclusions could be drawn from the third chapter, that outlines the perceptions of international justice and its outcomes from several reconstructed

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perspectives and their arguments. The reconstruction of narratives is followed by the discussion of the argumentative schemes of international law that constitute the *langue*, the deep-structure of the debates along which these narratives build up their arguments. It suggests that the traditional argumentative schemes, such as for example 'sovereignty versus human rights', are rather indeterminate and inconclusive, as they are vulnerable to being employed in both ascending and descending argumentative tactics and projected with different meanings and values.

Chapter four touches upon several parameters of the modern universal jurisdiction. In discussing the merits of the Belgian regime on universal jurisdiction it seeks to demonstrate the intrinsic limits of the current individual justice vocabularies as they are applied to human rights atrocities, suggesting the surreal reduction and singling out of facts it applies to, normalizing and trivializing the situation in Congo that triggered its application. The core of the chapter is dedicated to the discussion of the *Congo v Belgium* decision of the International Court of Justice, which is one of those cases when the Court had to deal with collision of the different regimes of international, that of international justice and the diplomatic intercourse law. The situation was marked by the absence of hierarchical principles and norms within general international law that could resolve the contradicting assumptions and ethos's of both regimes. The case underscores the anomy of international justice regime, that is lack of recognition and coordination with overlapping state-centered regimes of international law. Yet the Court had to face the substantive collision of sovereign powers involved in the dispute, and having to avoid the *differend* where the outcome would have been determined by the idiom and vocabularies of one of the regimes, in which the parties were pleading their arguments.

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As the result the *Congo v Belgium* decision demonstrates the avoidance of the judgment on the substantive merits of the clash of sovereign powers, disguised by relying on the procedure v. substance distinction of immunity and impunity, responsibility and jurisdiction. Major conclusion of the discussion of the case is the indeterminacy of the international legal argumentation where neither the facts nor the application of international law arguments were relevant, but the normative terms of the regime on which the conflict of sovereignties would be addressed. Thus the ICJ's decision was rather cautious and deferential, avoiding any explicit hierarchy between regimes, although implicitly admitting the priority of the immunity in a given case.

The chapter on ICC was centered on the discussion of the complex of arguments that constitute the Rome Statute regime, with a view to its interaction with the peace and security regime through delimitation of powers with the Security Council in article 16 of the statute. Whereas the subject matter of the Rome Statute regime overlaps with that of Security Council, the terms on which they address it are fundamentally at odds with each other. It can be suggested that the assumptions of state presence in the crimes can improve the sensitivity of the international justice regimes to the state responsibility and international peace and security regimes, becoming a roadmap for adapting to and recognizing SC resolutions, rather than making the article 16 a kind of political question doctrine for the ICC.

Furthermore the fifth chapters engages in the discussion of the bilateral immunity agreements under article 98(2) and argues that by themselves the legal terms and arguments of the Rome Statute are incapable of avoiding the tensions associated with its

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application or blocking them trough discursive repressions. Repressed tensions create "shadow" regimes, such as that of BIA, mirroring the repressions that constitute the operative closure of international justice.

The foremost conclusion for the domestic approaches to dealing with the human rights atrocities is the need for the vocabularies of positive responsibility as a principled ground for trials and other measures of truth and reconciliation that should be based on the normative constitutional principles that affirm and internalize the attitude towards past atrocities within the ethical life of the society, granted that the atrocities were taking place with the support or acquiescence of the majority of society, in its name and on its behalf, apart from trials of the responsible individual, affirming them and without allocating any personal guilt to the individual members of the majority that did not contribute to the atrocities. Such measures as public apologies, truth investigations, prohibitions of historical revisionism that purport to restrict public freedoms to account for the involvement of state's sovereignty in the commission of atrocities and contribute the decency of society by affirming the dignity of the victim communities and shaming the majority communities[479].

One might conclude that once the complicities of legal system, normative values and belief systems of the communities and of government are systematically downplayed by the exclusive individual responsibility approach of the criminal law trials, whereas such complicities are at the same time the source of the major legal difficulties concerning such trials, routinely including such defenses as *nullum crimen sine lege*, defense of prior

[479] *See* Andras Sajo, *Affordable Shame*, *in* THE PARADOXES OF UNINTENDED CONSEQUENCES 163, 173, 177-182 (Lord Dahrendorf, et al. eds., 2000).

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legality and superior orders. Moreover the truth telling function of the trials would rely on the principled attitude of the legal system and normative attitude of the society in general, rather than becoming the source of discomforting activism of courts that risk of running into show trials. The tactics of 'rupture trials' referred to in the introduction, when the defendant based on *differend* challenges the idioms and assumptions, the historical narrative provided in the court's account and pushing the trial into the category of show trials would also become useless at least.

The complicities of societies in human rights atrocities should not be underemphasized, but rather be brought to light and accounted, and a general attitude within society to them properly articulated. This would further provide a sense of deeper justice for criminal trials of individuals, dismissing the romanticizing of the individual's guilt and the sentiment of "guiltless sincerity" in the virtue of being truthful to one's roots, instead reinforcing the guilt by reference to the positive responsibility measures.

The realist hypothesis concerning the emergence and application of international justice regimes further suggests that the heterogeneity of individual centered assumptions of such regimes to the residual state responsibility and other state-centered regimes of international law cannot be resolved through the existing indeterminate international legal structures, and creates a haven for power maximization tactics of actors. Whereas such tactics cannot be done away completely through the vocabularies of legal disputes, due to their intensity, the attentiveness to state presence and clashes of sovereign powers involved in trials for human rights atrocities can square the international justice regimes

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with the existing regimes of state responsibility, diplomatic intercourse and international peace and security.

The recognition and internalization of state presence could mitigate the anomy of individual responsibility regimes within the international law framework, and provide a meta-language for coordination with such regimes and lead to more cohesive and evenhanded outcomes for application of multifarious regimes to same facts. Given that the existing approach to the conflict of the international justice regimes with other regimes would not be directly addressed within the international legal structures, as indicated by the *Congo v Belgium* decision of the ICJ, the recognition of state presence in atrocities would signify the movement of the international justice regimes towards self-definition within such structures.

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